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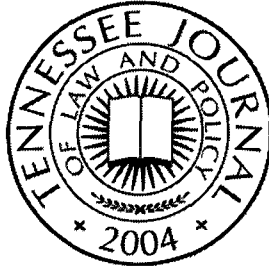
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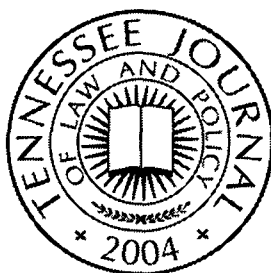
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**Foreword and Acknowledgments:  
About the STUDY SPACE Project**

*Colin Crawford*

**Study Space: Evaluations of Human Habitats and Habits in the 21<sup>st</sup> Century**, is an intensive series of workshops, held at diverse locations around the world, the goal of which is to acquire a deeper understanding of the legal, policy and human challenges posed by the global growth of megacities. **Study Space** intends, at various times and in different places, to provide a vehicle for progressive scholars and graduate students from varied backgrounds and disciplines to study, learn and seek to understand experientially this trend in all of its implications – for identity and self-determination, for participatory democracy, for equality and social justice, for human health, for the environment, for livable cities and for manageable land use.

To that end, **Study Space I: Entering the 21st Century: Challenges and Opportunities of Panama's Explosive Urban Growth**, was held in La Ciudad de Panamá, Panamá, from December 9-15, 2007. Its primary sponsors were the Center for the Comparative Study of Metropolitan Growth, Georgia State University College of Law (CMG), and Latina & Latino Critical Legal Theory, Inc. (LatCrit). In addition, this first **Study Space** was blessed with the co-sponsorship of the Rosenstiel School of Marine & Atmospheric Science, University of Miami. **Study Space I** could not have happened without the benefit of the conceptual and organizational work of Dr. Daniel Suman, a member of the Rosenstiel faculty. Dr. Suman's deep and broad knowledge of Panamá, its people, culture and environment helped inform every aspect of **Study Space I** and for his tireless work to make the week a success, he deserves hearty thanks. In addition, it would be remiss not to thank Dean

Steven J. Kaminshine and the Georgia State University College of Law for the institutional and financial support that helped launch **Study Space I** and the entire **Study Space** project.

It is anticipated that the co-sponsorship model will continue to characterize the **Study Space** project. **Study Space II: Property, the Environment, and Cultural Diversity** in Colombia, was held in Bogotá, Colombia, from March 9-15, 2008, under the joint sponsorship of the CMG and Lat-Crit, along with the Faculty of Law at the Universidad de los Andes; those proceedings will be published in an edition of Inter-American Law Review at the University of Miami. **Study Space III** is planned for Denver, Colorado, USA, in December 2008, with the joint sponsorship of its Sturm College of Law; **Study Space IV** is scheduled for Medellin, Colombia, in March 2009, in collaboration with the law and other faculties at the Universidad EAFIT in that city. Through this cooperative, cross-national, and cross-institutional model, the **Study Space** project seeks to build a body of comparative law and related disciplinary scholarship addressing –in the broadest sense –the consequences of global urbanization and related social, economic, and environmental change. **Study Space** is, moreover, by no means, a closed project. It is one that aims constantly to reach out and create new institutional partners and cross-national working relations to address its central themes. On behalf of those previously and currently involved in the collaborative **Study Space** project, let me conclude by saying that we look Forward to your comments, criticisms, and future participation.







FOREWORD

**INTERRUPTIONS AND INTERSECTIONS: JOURNEYS TO THE  
CENTER OF THE AMERICAS**

*Francisco Valdes\**

**Introduction**

In December, 2007, a diverse group of scholars and students from various regions and institutions inaugurated a new project in knowledge production, the Study Space Seminar Series.<sup>1</sup> Devoted to critical perspectives in comparative and international studies, the Study Space Seminar Series follows a decade-long history of collaboration among legal scholars and friends associated with critical outsider jurisprudence. As outlined below, this new project

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\* Professor, University of Miami School of Law, and Co-Director, Center for Hispanic and Caribbean Legal Studies. I begin by thanking Dr. Daniel Suman for spearheading the development of this inaugural Study Space program and Professor Colin Crawford for spearheading the organization of the Study Space Seminar Series as an ongoing project. I thank also the many local hosts and participants, who made the study schedule spectacularly fruitful and the contingent of diverse scholars noted below who participated in the program, and whose essays capture its essence. I likewise thank the LatCrit community of scholars around the world, whose imaginative labors make possible this type of collaborative experiment in knowledge production. I am also grateful for assistance from the Center for the Comparative Study of Metropolitan Growth at the Georgia State University College of Law, which helped make my participation possible. I thank also the editors of the TENNESSEE JOURNAL OF LAW AND POLICY and especially Stevie Phillips and Ashley Musselman, for the work and support that not only help us to disseminate this knowledge, but that also improve our efforts with their talents. Finally, I thank Richard Cornier for his consistent assistance in all aspects of this work. All errors rest with me.

<sup>1</sup> The participants in the Study Space I program include Elvia Arriola, Colin Crawford, Jorge Esquirol, Sheila Foster, Carmen Gonzalez, Ruth Gordon, Ileana Porras, Eric Rogers, Daniel Suman, Robert Westley, Tiffany Williams, and myself.

both reflects and expands the rich record in democratic knowledge-production undertaken by “OutCrit” scholars of various stripes in previous years.<sup>2</sup>

The Study Space Series was designed to create opportunities for scholars and students interested in critical and comparative studies to share in a programmatic experience designed both to exchange and to produce knowledge. More particularly, the Study Space Series was designed to bring together scholars from the Global South with those from the Global North in a one-week immersion program focused on the study of a particular geographical location. The week-long program schedule was structured to expose the participants to localized insights in venues that permitted an exchange of impressions, views, and insights. In addition, the program schedule included daily readings and reflection periods to generate rich, substantive discussion each evening. Through this process of exposure, reflection, and exchange, the Study Space experience allowed all participants to learn from each other even as we were learning from and about our local environment.<sup>3</sup> This synergis-

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<sup>2</sup> Critical outsider jurisprudence, or “OutCrit” theorizing, is one way of describing the commonalities shared by varied genres of contemporary legal discourses that are defined both by outsider positionality and a critical stance. Among these are feminist legal theory, critical race theory, critical race feminism, queer legal theory, and LatCrit theory. These overlapping and intersecting genres share a common lineage with critical legal studies and realism. See generally Francisco Valdes, *Outsider Scholars, Legal Theory and OutCrit Perspectivity: Postsubordination Vision as Jurisprudential Method*, 49 DEPAUL L. REV. 831 (2000).

<sup>3</sup> The Study Space Seminar Series was conceived as an immersion-style workshop combining varied approaches to the study of law and society. The concept calls for a relatively small group of scholars and students to embed themselves in a particular locale and to examine local conditions through interaction with the environment and local actors with specific areas of knowledge or expertise. These interactions are preceded and followed by readings tailored to the program schedule. In addition, the participants engage in intensive discussion of daily experiences, events, and readings. The aim each day is to build and

tic process aims to produce new insights and new trajectories in critical studies of law, policy, and society, as reflected in the symposium essays presented below.

As with other collaborative efforts of this sort, the community of scholars spearheading the Study Space Seminar Series aims to make this process of knowledge exchange and knowledge production socially relevant from an antisubordination perspective.<sup>4</sup> Thus, we hope that the expanded opportunities for intellectual interaction created through the Study Space Seminar Series will facilitate enduring relationships and networks committed to the promotion of social justice action. Of course, the translation of theory into action can take many forms and many turns; our aim, in creating the Study Space Seminar Series, therefore was to provide a collective platform for individual scholars to do their social justice work in diverse yet programmatic terms. In this way, the Study Space Series provides another illustration of academic activism<sup>5</sup> as we, in the “LatCrit” community, understand it.<sup>6</sup>

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expand on the learning and reflection of previous days, such that each participant gradually develops a viewpoint on a particular aspect of the program. After the schedule concludes, participants compose short essays like the ones presented in this symposium. These efforts, we hope, will inform the participants’ teaching and scholarship in manifold ways, and the essays, we hope, will become a resource both for scholars and teachers in the areas of critical and comparative studies. For more information on the Study Space concept and project, visit [www.latcrit.org](http://www.latcrit.org).

<sup>4</sup> See Jerome M. Culp, Jr., Angela P. Harris & Francisco Valdes, *Subject Unrest*, 55 STAN. L. REV. 2435 (2002) (on antidiscrimination and antisubordination).

<sup>5</sup> For an elaboration of academic activism as a LatCritical concept, see Margaret E. Montoya & Francisco Valdes, *Afterword—Latinas/os and Latina/o Legal Studies: A Critical and Self-Critical Review of LatCrit Theory and Legal Models of Knowledge Production*, FLA. INT’L U.L. REV. (forthcoming 2008).

<sup>6</sup> See generally Francisco Valdes, *Latina/o Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities*, 9 LA RAZA L.J. 1 (1996) (discussing the

As the symposium essays reflect, the inaugural Study Space program focused on Panama City, Panama. We chose this location because it symbolizes and represents the epicenter of the Americas in many different ways. Geography, history, and commerce place Panama City squarely at the center of the micro and macro processes leading to the construction of what we today know as the Americas. Panama City is a relatively small location through which much of the world (still) travels. Today, Panama City embodies the myriad vectors and valences resulting from the human and natural forces that converge precisely there. It is a place defined by interventions and interruptions—interventions mainly from Europe and the North, which repeatedly interrupt the aspirations, struggles, and accomplishments of local communities. As the symposium authors note in their essays, Panama is both symbol and site of hemispheric, if not global, convergences and contestations; today, it reflects and projects the cumulative record of humanity on these lands during the past half millennium, and beyond.<sup>7</sup> No better place existed for the inauguration of the Study Space Seminar Series.

The eight essays presented below capture the observations and insights of most of the contingent that helped to

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colloquium at which the “LatCrit” subject position was conceived); Francisco Valdes, *Poised at the Cusp: LatCrit Theory, Outsider Jurisprudence and Latina/o Self-Empowerment*, 2 HARV. LATINO L. REV. 1 (1997) (discussing the First Annual LatCrit Conference, held in 1996, and the circumstances leading up to it). For current and historical information on LatCrit projects and publications, visit Latina and Latino Critical Legal Theory, Inc., [www.latcrit.org](http://www.latcrit.org).

<sup>7</sup> For example, “In 1519, the Spaniards founded Panama City, the first permanent European settlement on the Pacific coast, locating it at the lowest and narrowest point of the landmass that separated the Atlantic from the Pacific. From its inception the city’s fate had been intimately linked to its function in facilitating international trade.” Ileana Porras, *Panama City Reflections: Growing the City in the Time of Sustainable Development*, 4 TENN. J.L. & POL’Y 360-61 (2008).

inaugurate this new project.<sup>8</sup> These essays not only reflect our approach to knowledge exchange and production as noted above, but also set out several substantive themes drawn from the program and readings in Panama that build upon many of the lines of critical inquiry previously pursued in OutCrit legal studies. Outlining these broad substantive themes, how they are represented in these papers, and how they contribute to the ongoing development of OutCrit legal studies, provide the purpose and framework for this Foreword.

The Foreword is divided into two main parts, each devoted to a trio of thoughts or themes that recur in the essays, and both of which follow a prefatory note on LatCrit theory, community, and praxis. In Part I of this Foreword, the focus is on the recurring salience of history, the relevance of history, and the exacerbation of historical legacies by corporate globalization. The discussion of these three inter-related points in Part I, as reflected in the symposium essays, set the stage for the three insights or lessons spelled out in Part II of this Foreword. In Part II, attention shifts to the persistent yet multifaceted linkage of “class” to other categories of identity, to the complex role of law (or its absence) in the construction of social and material realities, and to the promise and limits of knowledge-production in the struggle toward complete de-colonization. The trio of lessons extrapolated from the symposium essays in Part II of this Foreword in effect confirm, deepen, and expand the ongoing work of LatCrit and other OutCrit scholars toward a post-subordination society.<sup>9</sup> We thus begin with a LatCritical preface to help contextualize the Study Space Seminar Series and the symposium essays that help to inaugurate it.

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<sup>8</sup> Additional essays from the Study Space I program participants will be published in another upcoming symposium.

<sup>9</sup> For a discussion of postsubordination vision as jurisprudential method, *see* Valdes, *supra* note 2.

## **Situating the Study Space: A LatCritical Preface**

As the introduction notes, the Study Space Seminar Series is a project conceived and organized by a diverse group of legal scholars. Based in different universities across the hemisphere, the Study Space Seminar Series is a joint project specifically of the LatCrit community and the Center for the Comparative Study of Metropolitan Growth at the Georgia State University College of Law, where the project is principally based.<sup>10</sup> The Study Space Seminar Series therefore is one of the “critical partnerships” organized by LatCrit-identified scholars in collaboration with other institutions of legal education in the United States and beyond. This brief preface thus aims to situate the Study Space Seminar Series within the context of LatCrit theory, community and praxis, as undertaken specifically in the form of various critical partnerships, to conduct joint projects of academic activism.

Based principally within the academy of the United States and other academic institutions around the world, the far-flung LatCrit community of multiply diverse scholars has devoted much of its time and energy to the production of knowledge in the form of traditional texts published in scholarly journals.<sup>11</sup> However, we have understood and approached this traditional work in both traditional and nontraditional ways. We have understood the core mission

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<sup>10</sup> For more information on the Center and its work, visit <http://law.gsu.edu/metrogrowth/>.

<sup>11</sup> Twenty-some LatCrit symposia have been published, both in mainstream academic journals, as well as in specialty journals devoted to difference and social justice. A list of these publications, as well as information on LatCrit theory, including the full text of most of the LatCrit symposia based on our Annual Conferences or other academic events (such as the International and Comparative Colloquia and the South-North Exchanges) can be obtained at the LatCrit website, available at <http://www.latcrit.org>.

of knowledge-production in ways that recognize yet transcend traditional paradigms of academic work. To capture this difference, we sometimes describe our approach as “academic activism” to underscore the joinder of critical theory and antistatutory action in all that we do.<sup>12</sup>

While elaborated fully in other texts, the basic LatCrit approach to knowledge-production and academic activism aims consciously to unite the work of theory with the work of community-building through collaborative or coalitional group efforts.<sup>13</sup> This general description applies to the varied projects in the “Portfolio of Projects” that constitutes the kinds of “collective personal praxis” that LatCrit scholarship has carefully cultivated during the past dozen or so years.<sup>14</sup> However, the blending of theory, community and praxis in the context of any particular project, event or publication can take many different forms. Indeed, this flexible, imaginative, and nimble approach to innovation in diverse situations has become a hallmark of LatCrit projects, as the Study Space itself so richly illustrates.<sup>15</sup>

This earnest and proactive embrace of innovation has incrementally lead LatCrit scholars toward our own particular version of democratic knowledge production.<sup>16</sup> To us, as explained more fully in other LatCritical texts, democratic models of knowledge-production tend to be generally open to participation across diverse categories of

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<sup>12</sup> See Montoya & Valdes, *supra* note 5 (elaborating the concept of academic activism).

<sup>13</sup> E.g., Berta Hernández-Truyol, Angela P. Harris & Francisco Valdes, *Beyond the First Decade: A Forward-Looking History of LatCrit Theory, Community and Praxis*, 17 LA RAZA L.J. 167 (2006).

<sup>14</sup> *Id.* at 194-96 (on LatCrit theory and personal collective praxis); see also [www.latcrit.org](http://www.latcrit.org) (describing the projects in the LatCrit portfolio).

<sup>15</sup> See *supra* note 5 and *infra* notes, 70-73 and accompanying text (on knowledge production models and their combination).

<sup>16</sup> Montoya & Valdes, *supra* note 5 (on the LatCrit version of the democratic model).

discipline, perspective, geography, or professional status. In addition, democratic projects focus on the development of “safe zones” constituted through various academic projects or programs that span the entire year and thereby enable numerous opportunities for myriad interactions among individual scholars in the pursuit of their respective scholarly agendas.<sup>17</sup> Finally, democratic models tend to emphasize both community-building and institution-building to create the conditions for knowledge-production unlimited by the constraints of mainstream institutional politics within legal academia.<sup>18</sup> These characteristics lead democratic experiments toward interdisciplinary and inter-generational paths of development that combine theory and action in varied ways.<sup>19</sup>

In the LatCrit context, as noted above, these various ways of combining theory and action are grounded in the antistatist principle and its promotion through academic activism. Our adherence to the principle of antistatist trains our attention on analyses and solutions that spring from the “shifting bottoms” of diverse socio-legal situations across the globe.<sup>20</sup> In other words, the grounding of “academic activism” in LatCrit theory, community and praxis means that our work is informed and guided first and foremost by the insights to be drawn from the bottoms and the margins of society, rather than the

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<sup>17</sup> *Id.* (elaborating the relationship of safe “space” and safe “zone” in the context of different knowledge-production models).

<sup>18</sup> *Id.*; see also Hernandez et al, *supra* note 13, at 196-99 (on LatCrit community and institution-building efforts).

<sup>19</sup> See generally *supra* note 5 and *infra* notes, 70-73 and accompanying text (on strategic combinations of different aspects of knowledge production models to maximize the impact of scholarship as a form of academic activism).

<sup>20</sup> See Athena D. Mutua, *Shifting Bottoms and Rotating Centers: Reflections on LatCrit III and the Black/White Paradigm*, 53 U. MIAMI L. REV. 1177 (1998-99).



privileged bromides of “enlightened” elites.<sup>21</sup> With this emphasis on academic activism LatCrit scholars do not question the centrality of knowledge-production in the totality of our labors. Instead, this emphasis provides an insistent reminder to each and all of us that knowledge-production can be conceived and practiced in and through many different ways and means. And, of course, different ways and means serve different ends or purposes;<sup>22</sup> hence, our normative grounding in antisubordination values and our methodological grounding in democratic knowledge-production.

The important point in these prefatory notes regarding academic activism and knowledge-production as Lat-Critical practice is that our work as “academics” must transcend traditionalist paradigms in both method and substance if our work is to have antisubordination bite. We must not only re-imagine and re-conceive the project of knowledge production; we must also practice knowledge-production in innovative ways that enable persons and groups to challenge systems of subordination in diverse yet specific contexts. In other words, the fundamental substantive purpose of our knowledge-production work as academics must be to enable the self-determination of individuals and communities on egalitarian terms.

In method, the scope of our work as academics consequently must include efforts, projects, and work products not limited by or tailored to the elegant articles of mainstream academic journals. Academic activism should thus embrace a multidimensional set of practices against social injustice, both in the politics of knowledge-production as well as in the social and material construction of society at

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<sup>21</sup> See generally Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

<sup>22</sup> See Jean Stefancic, *The Law Review Symposium Issue: Community of Meaning or Re-Inscription of Hierarchy?*, 63 U. COLO. L. REV. 651 (1992) (offering a good overview of basic possibilities).

large. This approach and grounding entails an appreciation for both the necessity and difficulty of collective action.<sup>23</sup> If nothing else, collaboration must be understood as a pragmatic imperative of antistatization work: as the Civil Right and Labor Movements of the past century have demonstrated, collective action is necessary to challenge entrenched elites successfully. This insight is no less true when applied to academic elites in control of the institutions and processes that produce the knowledge through which individuals and societies understand their personal and collective realities.

However, OutCrit jurisprudential experience teaches that a key challenge in the initiation and maintenance of a robust antistatization agenda is to root collective action in shared substantive principles, and in their principled, egalitarian practice.<sup>24</sup> Only when participants in collective action believe that collective principles are the object of their actions will a sense of collectivity endure and grow. In the long run, only principled transparency can provide the solidarity to overcome adversity. Without a shared and transparent commitment to a normative grounding, collective action will tend to be fleeting and minimally effective. The lessons of jurisprudential experience thus counsel community-building and democracy in the construction and development of scholarly formations and discourses dedicated to legal reformation as a vehicle toward social justice transformation.<sup>25</sup>

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<sup>23</sup> Coalitional collaboration is also a hallmark theme and practice among LatCrit scholars. See, e.g., Hernandez et al, *supra* note 13 at 193-99 (on coalition-building as LatCrit praxis).

<sup>24</sup> See, e.g., Francisco Valdes, *Theorizing "OutCrit" Theories: Coalitional Method and Comparative Jurisprudential Experience—RaceCrits, QueerCrits and LatCrits*, 53 U. MIAMI L. REV. 1265 (1998-99) (outlining varying outsider approaches to theory-making, and detailing LatCrit practices as a synthesis).

<sup>25</sup> *Id.*; see also *supra* note 11 and sources cited therein (on LatCrit experience in this area).

Oftentimes, the first impulse toward collective social justice action is to seek the likeminded within our “home” institutions or local communities. These connections are no doubt helpful, even indispensable. But alone, local connections do not suffice. If we stop there—or focus only on those immediate connections—we will remain forever defined, encased, and delimited by those pools of possibility. Our efforts and horizons will be shaped by local vagaries and institutional politics. Because local politics oftentimes reduce us to a “society of one” (or two) within our home institutions, we must reach out if we are to realize the benefits of collective action as part of our work.<sup>26</sup>

Thus, to ensure the integrity of knowledge-production in the service of self-determination, academic activists interested in collective action oftentimes must focus first on the creation of alternative and autonomous formations, organizations, or associations that avoid replication of traditionalist imperatives and dysfunctions.<sup>27</sup> We must, in short, create alternative support mechanisms for the incubation and sustenance of academic activism in tandem with critical theory. For me, and for many of the other scholars spearheading this innovative project, the LatCrit community has become this “home space” for principled and liberational academic activism.<sup>28</sup> This LatCrit

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<sup>26</sup> See Rachel Moran, *Commentary: The Implications of Being a Society of One*, 20 U.S.F. L. REV. 503 (1985-86) (elaborating the “society of one” concept).

<sup>27</sup> LatCrit scholars began this process about a dozen years ago. See, e.g., Francisco Valdes, *Under Construction: LatCrit Consciousness, Community, and Theory*, 85 CAL. L. REV. 1087 (1997) and Francisco Valdes, *Poised at the Cusp: LatCrit Theory, Outsider Jurisprudence and Latina/o Self-Empowerment*, 2 HARV. LATINO L. REV. 1 (1997).

<sup>28</sup> Lawrence *supra* note 9; see Charles R. Lawrence III, *Foreword: Who Are We? And Why Are We Here? Doing Critical Race Theory in Hard Times*, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes, Jerome McCristal Culp & Angela P. Harris, eds., 2002) xi, xvii (explicating the safe space context).

community is not the only possible home space for academic activists today, but I am grateful to the scholars behind the Study Space Seminar Series and similar projects for helping to expand the horizon of critical possibility. With these prefatory remarks as background, we can now turn to the program and papers that inaugurated this latest exemplar of academic activism in the service of antisubordination knowledge production.

### **I. Past, Present, and Future: Engineering the Structure of Social Inequality**

A basic tenet of OutCrit jurisprudence is that context matters and, therefore, history matters.<sup>29</sup> History, in other words, provides the context for critical analysis of social realities as presently structured. This avoidance of ahistorical study is very much manifest in the symposium papers presented here: most authors weave into their essays historical sketches to set the stage for a comprehensible critique of present-day legacies.

In my view, this uniformity is remarkable. I find it remarkable because this high level of consistency is not a result of programming on the part of the Study Space organizers. Instead, this educated coincidence flows organically from the individual choices that each scholar made in mapping out the text she or he had in mind. Thus, each author, with her or his set of compositional choices, illustrates and confirms the fundamental tenet of critical studies in favor of historicizing all analyses. These choices point to the first substantive theme recurring in the symposium essays.

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<sup>29</sup> Consequently, law school courses devoted to social justice studies typically begin with, or feature, a historical component that similarly helps to contextualize the specific areas of study and discussion. See, e.g., Francisco Valdes, *Outsider Jurisprudence, Critical Pedagogy and Social Justice Activism: Marking the Stirrings of Critical Legal Education*, 10 ASIAN L.J. 65 (2003).

### A. The Salience of History: Colonialism and Imperialism as Context

In the instance of Panama City, the history that the symposium authors sketch pivots on the processes of Spanish colonialism and (mostly) North American imperialism dating back to the 1500's.<sup>30</sup> This enormous historical expanse is thick with nuance, complexity, and contradiction—a thickness that continues to define specific and prevalent conceptions of the “Latina/o” today.<sup>31</sup> The combined works of these eight authors similarly teach that we cannot fully understand this modern-day location without first comprehending the histories of colonialism and imperialism that incrementally lead up to the present moment.

Perhaps the essay by Osvaldo Jordan, focusing on the status of land taken from indigenous communities during colonial and imperial periods, provides the most extensive discussion of history as context.<sup>32</sup> His focus trains critical attention on the uses of indigenous lands, sometimes in violation of legal instruments or political compromises, in ways that further damage indigenous communities to expand wealth or comfort for the successors-in-interest to colonial and imperial legacies. In this essay, Professor Jordan makes plain that the current structure of land allocation cannot be addressed, much less redressed, without a careful exposition of its colonial and imperial underpinnings. This essay pointedly demonstrates the salience of history in contemporary law and society.

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<sup>30</sup> For a historical overview, *see generally*, Francisco Valdes, *Race, Ethnicity and Hispanismo in Triangular Perspective: The “Essential Latina/o” and LatCrit Theory*, 48 UCLA L. REV. 305 (2000-01).

<sup>31</sup> These histories inevitably produce resilient legacies for the construction of Latina/o identities and communities today. *See id.*

<sup>32</sup> Osvaldo Jordan, *“I Entered During the Day and Came Out During the Night”: Power, Environment and Indigenous People in a Globalizing Panama*, 4 TENN. J.L. & POL’Y 467 (2008).

In addition, the essay by Professors Carmen Gonzalez, focusing on the current expansion of the Canal facilities,<sup>33</sup> and the essays by Professors Jorge Esquirol,<sup>34</sup> Ileana Porras,<sup>35</sup> and Daniel Suman,<sup>36</sup> all of which focus on various aspects of housing and the re-development of properties, also provide historical background to analyze local present-day circumstances. Each of them explains how today's difficulties stem from historical decisions and actions taken during colonial and imperial regimes, and how the viability of potential policy solutions are defined by the possibilities for reform that those legacies have since established. Although each of these authors focuses on a different or particular subset of local histories in order to set the stage for their focused analysis of a specific topic, the composite conclusion derived from their common methodology is that history serves as an indispensable key to a critical comprehension of the present. These authors, each in her or his own way, illustrate and demonstrate the salience of history to antisubordination analysis and critical theory.

The brief historical snapshots presented in these papers indicate a long and multifaceted process of contestation, manipulation, exploitation, interruption, and interference. While not the exclusive focus of any paper in this symposium, this historical record nonetheless helps to provide a context for comprehension of modern-day realities. Without this background in mind, the present might seem random, but that would be mistaken, as the papers so

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<sup>33</sup> Carmen Gonzalez, *Environmental Impact Assessment in Post-Colonial Societies: Reflections on the Proposed Expansion of the Panama Canal*, 4 TENN. J. L. & POL'Y 303 (2008).

<sup>34</sup> Porras, *supra* note 7 at 357.

<sup>35</sup> Colin Crawford, *Saving Biodiversity at the Crossroads of the Americas*, 4 TENN. J. L. & POL'Y 199 (2008).

<sup>36</sup> Daniel Suman, *Tamales & Bollos – Patrimonio de la Humanidad / World Heritage: Challenges Faced by Restoration Efforts in Panama City's San Felipe Historic District*, 4 TENN. J. L. & POL'Y 403 (2008).

clearly demonstrate. Thus, the relevance of the past to the present, as elaborated in the essays, points to the second recurring substantive theme outlined here.

### **B. The Present Relevance of History: Still Living the Past**

As mentioned above, the authors in this symposium present their historical sketches not merely as an exercise in learning about the past, but as a step in the process of learning about the present. Thus, the authors use their historical sketches as a point of departure for their analyses of more specific and concrete contemporary realities in and around Panama City. Whether their focus turns to the allocation of land, the structuring of formal democracy, the non-regulation of “development” or the preservation of cultural and environmental assets from erosion or erasure, the authors all show us that today’s landscape is the cumulative result of the historical processes they have sketched for us.

In repeatedly demonstrating the present relevance of history, the symposium authors provide us a salutary reminder of a basic and crucial insight: it took centuries for the forces of oppression to engineer the structure of present-day inequalities,<sup>37</sup> and it should come as little (if any) surprise to learn that the project of dismantling these structures of subordination presents a similarly intergenerational struggle. This realization implies a scale and depth of struggle that cries out for collaborative and coalitional exertions rather than only individual, atomized actions.<sup>38</sup> This reminder effectively reinforces the basic lesson that underscores the need for individual yet concerted acts of will if the journey toward a postsubordination

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<sup>37</sup> See Valdes, *supra* note 30 (on colonial and imperial histories).

<sup>38</sup> The point to emphasize is the need for both personal and collective actions, or “personal collective praxis.” See *supra* note 13 and accompanying text (on personal collective praxis as a LatCritical norm).

society is ever to end happily. These papers show that individuals must take the initiative to resist the momentum of an entrenched status quo, but that to succeed, motivated individuals must connect and combine to create and mutually sustain successful social justice interventions.

As noted above, the authors represented in this symposium each felt a substantive need to provide historical context to elaborate their analysis of a particular aspect or topic relating to contemporary Panamanian society. History, then, is the point of departure for critical analysis of present-day realities. Professor Gonzalez has perhaps phrased this point most aptly: "Even after the colonial power departed, the institutional and ideological vestiges of colonialism were not easily eradicated."<sup>39</sup> Similarly, Professor Jordan roots his analysis of land and identity on "the persistence of colonial relations between indigenous peoples and the descendants of the colonizers."<sup>40</sup> Focusing on North American imperialism, Professor Porras notes the "legacy of the U.S. controlled canal zone"<sup>41</sup> while Professor Colin Crawford focuses on the continuing impact of the lands "reverted" to Panamanian control upon the departure of U.S. forces from precisely that zone.<sup>42</sup> As a set, these essays underscore the substantive, analytical need to historicize contemporary law and society in order to understand—and reform—it.

In each of these examples, the symposium author shows us that contemporary inequalities are the proximate if not direct consequence of historical injustices. They show us, in effect, the social constructedness, and therefore contingency, of modern day societies. They show us the power of entrenchment, and the adversity facing individuals who seek to challenge the injustice of that power today.

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<sup>39</sup> Gonzalez, *supra* note 33 at 304.

<sup>40</sup> Jordan, *supra* note 32 at 468.

<sup>41</sup> Porras, *supra* note 7 at 357.

<sup>42</sup> Crawford, *supra* note 35 at 199.



They show us that individuals who band together with others to undertake principled ant subordination action face daunting odds, yet sometimes succeed in denting the structures of subordination. In this way, they show us a microcosm of social justice work not only in Panama but also across the globe.

### **C. Corporate Globalization: Exacerbating Historical Legacies of Subordination**

As an exercise in comparative scholarship, these symposium essays also suggest that the salience of history, and the relevance of history in present-day societies, are not phenomena isolated to Panama alone. Rather, they reflect larger historical patterns of domination and subordination, similarly carried out during the eras of colonialism and imperialism in varied regions of the hemisphere and globe, that shape much of the past several centuries in human affairs. In this way, the local focus of this Study Space program also serves to illuminate the larger processes, and effects, of corporate globalization today.

More specifically, the symposium essays effectively illustrate how historical legacies established by colonial and imperial enterprise help to structure the operations and imperatives of corporate globalization. These papers show how the “winners” under colonial and imperial regimes are best situated to remain “winners” in the corporate-oriented organization of globalization as we know it today. These papers also pointedly show how corporate globalization mirrors the dynamics of colonialism and imperialism. To some, these observations may lead to the suspicion that globalization is, in many ways, a structural extension of colonial and imperial power dynamics in both local and in global terms.

As with the prior two points and linkages, the relationship of corporate-style globalization to the legacies of colonial and imperial histories is made, sometimes explic-

itly and sometimes implicitly, in the symposium essays. An apt example of explicit linkage is provided in the essay by Eric J.D. Rogers, whose analysis focuses on the impact of housing issues specifically for the middle class in Panama City.<sup>43</sup> Viewing the various factors that serve as catalysts for the “unprecedented growth in all sectors” of that economy, and especially in the trafficking of property, Rogers notes that, “much of this housing development is aimed at “baby boomer” retirees and second home buyers from the US, Canada and Europe.”<sup>44</sup> Similarly, he notes, “foreign investors see a great deal of potential in Panama City as both a hub of shipping and industry, as well as a retirement mecca for North Americans and Europeans.”<sup>45</sup> The local, in other words, is driven by the global.

Professor Porras similarly notes that this influx of capital, persons, and development is “playing havoc with all sense of urban scale,” which she notes brings into question whether or not sustainable development can be a coherent policy concept in this economically globalized local context.<sup>46</sup> Conversely, Professor Porras reminds us expressly that sustainable development requires us to analyze “our new understanding of the interrelationship between economic activity, environmental impact and issues of intra- and inter-generational equity.”<sup>47</sup> These explicit and specific examples thus illustrate a point that travels through the symposium essays as a whole: the powerful forces of corporate globalization today not only affect localities everywhere, but also do so in ways that materially and structurally reinforce the legacies of colonial and imperial rule. The essays show how colonial and imperial baselines

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<sup>43</sup> Eric J. D. Rogers, *Out with the Old in with the New: Housing Issues for the Middle-Class in Panama City, Panama*, 4 TENN. J.L. & POL’Y 507 (2008).

<sup>44</sup> *Id.* at 513.

<sup>45</sup> *Id.* at 514.

<sup>46</sup> Porras, *supra* note 7 at 360.

<sup>47</sup> *Id.* at 392.

effectively create the structural platforms from which variously-positioned persons or communities can (and cannot) participate in the promised benefits of globalization processes. Thus, history is not only salient, and not only relevant to the present, but it also serves as a point of staging for the skewed politics of corporate globalization that continue to reinforce unjust legacies.

As these illustrative examples show, corporate globalization—like colonialism and imperialism before it—is a complex and powerful process of contestation and exploitation. It is a human phenomenon structured to generate “winners” and, therefore, “losers.” The structure of this stratification is the structure of society, both yesterday and today. The resulting architecture is always local, and yet always representative of larger patterns. These patterns lead to critical substantive insights reflected also in the symposium essays, and outlined below in Part II of this Foreword.

## **II. Identity, Law and Knowledge: Pivots of Power and Action**

As outlined in Part I of this Foreword, the symposium essays reflect three recurrent and inter-related themes drawn from the Study Space in Panama during December, 2007. These three themes focus on the salience of history, the present relevance of history, and the continuation of historical legacies through the dynamics of corporate globalization. These three themes in turn suggest three lessons or conclusions: the strong relationship between “class” and other forms of identity, the complex yet central role of law (or its absence) in the construction of social and material realities, and the promise and limits of knowledge-production in the quest toward a de-colonized reality. These three lessons or conclusions, as sketched below, both

confirm and build on the body of literature that OutCrit scholars have produced in recent years.<sup>48</sup>

### A. Beyond the Dichotomy: The Interconnection of “Class” to (Other) Social Identities

In the United States, class-based identities are oftentimes viewed as somehow oppositional to identities based on other social constructions, such as race, gender, ethnicity or sexual orientation.<sup>49</sup> In comparative South-North studies, class-based identities are oftentimes emphasized as markedly disconnected from other social identities, such as those based on race, or ethnicity.<sup>50</sup> As an exercise in experiential and immersion study, this Study Space program brought into sharp view the limitations inherent in both of these propositions. The symposium essays corroborate that class, in fact, is oftentimes co-constitutive of other social identities, and vice versa.<sup>51</sup> The lesson, in other words, is

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<sup>48</sup> See, e.g., *supra* note 11 and sources cited therein (listing the LatCrit symposia of the past decade or so).

<sup>49</sup> See, e.g., Hernandez et al, *supra* note 13 at 193-99 (on the mutually-reinforcing relationship of class and other axes of sociolegal identity as understood by LatCrit theorists); see also Elizabeth M. Iglesias & Francisco Valdes, *LatCrit at Five: Institutionalizing a Postsubordination Future*, 78 DENV. U. L. REV. 1249, 1270-73 (2000-01) (making the same point).

<sup>50</sup> See generally, Tanya Hernandez, *An Exploration of the Efficacy of Class-Based Approaches to Racial Justice: The Cuban Context*, 33 U.C. DAVIS L. REV. 1135 (1999-2000) (focusing on Cuba to explore, and debunk, the popular claim that color and class are not systemically correlated in the Caribbean and southern or central American societies).

<sup>51</sup> Building on early concepts like intersectionality and antiessentialism, various OutCrit-identified scholars have developed this point during the past decade or so, steadily mapping the mutually-constructed nature of “different” identity categories. See, e.g., E. Christi Cunningham, *The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases*, 30 U. CONN. L. REV. 441 (1997-98); Peter Kwan, *Jeffrey Dahmer and the Cosynthesis of Categories*, 48 HASTINGS L.J. 1257 (1997); Francisco Valdes, *Sex and Race in Queer Legal*

that class correlates to race, gender, ethnicity and other categories of identity in flexible and variegated yet *systematic* ways, rather than simply in idiosyncratic ways. This correlation is a key feature in the structure of stratification that defines many societies today, whether in the Global South or in the Global North.

This correlation of class and other forms of identity, both in the Global South and in the Global North, is made most vividly in the symposium essays by the contribution from Tiffany D. Williams, which focuses on a comparative study of three large cities that span the hemisphere: Atlanta, Panama City, and Rio de Janeiro.<sup>52</sup> Examining the demolition of public housing projects in these different geographical and sociopolitical contexts, Williams notes repeatedly how “poor” areas slated for demolition typically are neighborhoods populated by indigenous people, African-descent populations, and other traditionally marginalized groups.<sup>53</sup> Empirically, each of these social groups shares two things in common with the others, despite their different geographical and sociopolitical particularities: none are white in the European sense, and all are poor in the economic sense.

This structural, far-reaching correlation between class and other categories of sociolegal identity is also reflected in the essays by Professors Porras, Crawford and Jordan: in each instance, they note in the analyses of their respective topics how issues of material or environmental injustice oftentimes can be mapped along the lines of su-

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*Culture: Ruminations on Identities and Inter-Connectivities*, 5 SO. CAL. REV. L. & WOMEN'S STUD. 25 (1995); see also *infra* note 58 and sources cited therein (on the multidimensional nature of social and legal identities).

<sup>52</sup> Tiffany D. Williams, *The Ties that Bind: Capitalizing on the Existing Social Fabric in Public Housing to Revitalize Neighborhoods and Avoid Displacement in Panama City, Panama*, 4 TENN. J.L. & POL'Y 535 (2008).

<sup>53</sup> *Id.*

premacist identity politics based on race, ethnicity, class and similar identity axes. Professor Porras, for example, explains that re-development and gentrification of the old city of Panama was made possible only through the “displacement of the poor and mostly black community” that previously inhabited it.<sup>54</sup> Professor Crawford takes the point deeper into history, noting that “historically, the Spaniards left the wet forests and swamps of the Caribbean to the Indian and Black communities” and that this history has been “characterized by great social and economic inequality that persists to this day.”<sup>55</sup> Professor Jordan’s analysis, focused on the vexing relationship of indigenous communities and the descendants of white settlers or colonizers, similarly notes the identity-inflected distribution of land and related material resources along racial and ethnic categories:<sup>56</sup> “This historical legacy of uneven wealth distribution, that was associated with class, race and ethnicity,” he observes, was the catalyst for “an increased mobilization of indigenous peoples, peasant leagues, labor unions, student federations, and other popular organizations” in the latter half of the present century.<sup>57</sup> Thus, the authors as a whole provide a bill of particulars that concretely illustrates and establishes the correlation of class to other forms of identity in various physical and political settings; in other words, time and again they make clear the interlocking relationship of material or economic identity with “other” identities based on race, ethnicity and similar categories of law, policy and society—a relationship that resists all efforts to sever one from the other in a comprehensive analysis of present-day realities.

As these brief illustrations indicate, critical analyses of class that seek to isolate this category from other social

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<sup>54</sup> Porras, *supra* note 7 at 359.

<sup>55</sup> Crawford, *supra* note 34 at 230.

<sup>56</sup> Jordan, *supra* note 35 at 474.

<sup>57</sup> *Id.*

identities will likely overlook aspects of local and global relations that are interactive, dynamic and mutually reinforcing. Put plainly, these essays indicate that efforts to segregate “class” from its relationship to other identity categories will lead to analytical blunders. Ideally, these essays will help to motivate multidimensional analyses of social realities that take into account the interlocking nature of multi-category identity politics.<sup>58</sup>

### **B. Law and the Social Construction of Formal Democracy: The Power of the Absence**

OutCrit legal scholars have long explored the indeterminate, complex, limited, yet powerful role of law in the creation of social systems and structures.<sup>59</sup> In addition, backlash politics preaches the evils of law and of legal regulation in modern day societies, whether in the Global South or in the Global North.<sup>60</sup> Thus, from all sides, it seems that the role of law, and its complexity, is understood to be a relevant, if not essential, element in the construction of social realities. The papers presented in this symposium

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<sup>58</sup> Again, the multidimensional nature of sociolegal identities is a point developed in prior works by various LatCrit and OutCrit scholars. *See, e.g.,* Berta Esperanza Hernandez-Truyol, *Building Bridges – Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement*, 25 COLUM. HUM. RTS. L. REV. 369 (1993-94); Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561 (1997); Francisco Valdes, *Queer Margins, Queer Ethics: A Call to Account for Race and Ethnicity in the Law, Theory and Politics of “Sexual Orientation”*, 48 HASTINGS L.J. 1293, 1315-18 (1996-97).

<sup>59</sup> For a recent sampling, *see* CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes, Jerome McCristal Culp & Angela P. Harris, eds., 2002).

<sup>60</sup> For a critical unpacking of backlash jurisprudence, *see* Francisco Valdes, “*We Are Now of the View*”: *Backlash Activism, Cultural Cleansing, and the Kulturkampf to Resurrect the Old Deal*, 35 SETON HALL L. REV. 1407 (2004-05) and Francisco Valdes, *Culture by Law: Backlash as Jurisprudence*, 50 VILL. L. REV. 1135 (2005).

contribute to this discourse by painting a vivid portrait of a particular location in today's world of globalized commerce in which the absence of Law (or its principled enforcement) looms large.

In general, the symposium essays present a picture wherein formal law is oftentimes either absent or impotent, and wherein formal or customary practices help to fill to void. This dynamic, of course, is not unique to Panama. Yet, these papers do provide a vivid lesson in the dangers associated with the impotence or absence of formal law in the context of a formally democratic state.

In Panama, as the authors explain, formal law establishes a set of rules and rights that read quite reasonably, and that establish the parameters for a formal democracy. However, powerful figures and forces too often render them operationally null. Additionally, colonial and imperial legacies oftentimes leave in their wake grave gaps in legal structures and traditions, and powerful figures or forces step into this void as well. The sociopolitical bottom line is a set of laws on the books that read mighty nice but in fact exert very little influence on the dynamics of human affairs. The results for human communities and natural environments, as the essays suggest, are not only unjust but also alarming, and ultimately not only undemocratic but also self-destructive.

The various symposium essays focusing on issues relating to housing, property, land and re-development, all help to illustrate this point concretely. For example, Professor Esquirol's essay is an extended untangling of the complicated relationship between "formal" and "informal" types of law, or law-like customs, and the powerful effects of each on the human beings subject to both.<sup>61</sup> As he so piercingly shows, neither approach—formality or informality—serves a panacea to historical and contemporary injus-

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<sup>61</sup> Esquirol, *Titling and Untitled Housing in Panama City*, 4 TENN. J.L. & POL'Y 243 (2008).



tices. However, as he and other symposium contributors help to illustrate, the absence of law altogether—or of principled law enforcement—oftentimes favors the biggest animals in the social, political and economic jungles of any given locality.

Thus, formal law *can* be a tool of justice-oriented reforms, but is oftentimes misused, or is absent altogether. By way of example, Professor Suman notes the fitful and laborious yet incremental real progress that legal regulation of redevelopment in the old city center has achieved, yet concludes that “the dizzying growth of Panama City also presents numerous challenges” due precisely to the pressures of globalization that formal (or informal customs) simply cannot withstand.<sup>62</sup> The loss of cultural patrimonies is the result of this status quo, he observes: with a lack of effective and comprehensive legal protection for historical preservation, key areas within Panama City “are rapidly being altered and lost” in the local growth “explosion,” driven by globalized forces.<sup>63</sup> Shifting attention from the cultural to the natural, Professor Crawford, after reviewing available rules of formal law for environmental protection, notes that “these are powerful tools if applied intelligently and deliberately to the resolution of particular conflicts”.<sup>64</sup> Once again, the question raised in these essays regarding the role of law (or its absence) in local affairs is complex: the question extends not only to the existence of formal law, but also to its practical and principled enforcement in daily practice.

Professor Gonzalez raises the very same point with respect to the legal process—and its limitations—designed to control the billion-dollar expansion of the Panama Canal already underway.<sup>65</sup> As she so eloquently spells out, the

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<sup>62</sup> Suman, *supra* note 36 at 465.

<sup>63</sup> *Id.*

<sup>64</sup> Crawford, *supra* note 35 at 218.

<sup>65</sup> Gonzalez, *supra* note 33 at 303.

gap between law on the books and law in practice can be exploited, usually by the privileged, to manipulate and hijack legal processes, and thereby to bootstrap existing power hierarchies into even greater personal wealth for the already rich.<sup>66</sup> In each of these scenarios, this legal subversion of Law itself is the common thread mapped by the respective essays.

As a set, the symposium essays illustrate how the absence of formal law creates opportunities for informality, as in the case of housing discussed in Professor Esquirol's essay. In other instances, as in the essays by Professors Suman, Crawford and Gonzalez, the main problem is not the absence of formal law, but the absence of its principled enforcement. In these instances, we oftentimes see the embodiment of noble assertions and aspirations in the form of formal law, which are honored mostly in their breach, mostly by the rich and powerful. Thus, Law seems a central factor—whether viewed in formal or informal terms—and depending, also, on actual practices of non- or under-enforcement.

Once again these examples are brief. Yet, they capture both the centrality and complexity of Law—or its absence—in the construction of social realities or political decisions attributed to democratic self-governance. Moreover, they illustrate how the powerful dynamics of corporate globalization interact with a local status quo entrenched through colonial and imperial histories that inhibit the capacity for local democracy in actual, as opposed to merely formal, terms. More particularly, these brief examples help to show how the interaction of corporate globalization today helps to reinforce the socioeconomic hierarchy of a Euro-American heteropatriarchy, a

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<sup>66</sup> See generally *id.*

decidedly undemocratic legacy erected during colonial and imperial rule.<sup>67</sup>

### C. Knowledge-Production and De-Colonization: The Promise, the Limits and Beyond

As noted at the outset, the Study Space Seminar Series is designed to be an exercise in scholarly activism. As such, the program is designed both to exchange and to produce knowledge. The ultimate objective, however, is to employ knowledge to catalyze antisubordination action.<sup>68</sup> In this instance, the aim of action is to de-colonize; that is, to attain a truly post-colonial social reality.

The points developed in these essays, as sketched above, certainly should be sufficient to raise consciousness and motivate action responsive to the inequalities and injustices not only found in Panama, but all around us as well. The particularities mapped in the essays help us to become more aware not only of local issues, but of global patterns that structure local struggles for a post-colonial, post-subordination society. In effect, then, these acts of study, exchange, reflection and composition represent important but limited initial steps towards the development of an informed and coalitional antisubordination agenda without borders.<sup>69</sup>

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<sup>67</sup> For an elaboration of "Euro-American heteropatriarchy" as an ideological package deal, see Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender and Sexual Orientation to Its Origins*, 8 YALE J.L. & HUMAN. 161 (1996) and Francisco Valdes, *Identity Maneuvers in Law and Society: Vignettes of a Euro-American Heteropatriarchy*, 71 UMKC L. REV. 377 (2002-03).

<sup>68</sup> See *supra* notes 1-9 and accompanying text (on the Study Space concept and knowledge production).

<sup>69</sup> See *supra* notes 10-28 and accompanying text (on the Study Space concept, and knowledge production).

Thus, publication of these essays is but a part of a larger process, a process that requires continuing acts of initiative and collaboration to advance and sustain. These kinds of follow-up efforts, again, amount to academic activism designed to ensure not only the initiation but also the continuation of antisubordination knowledge and action.<sup>70</sup> And, as with all acts of academic activism, they will require imagination and persistence, as well as careful choices in the design of programs and events, to ensure productive encounters that nurture ongoing alliances. These pending choices will help to determine the potency, trajectory and durability of our ongoing efforts and experiments in LatCritical praxis.

In general, LatCrit scholars have designed our projects in democratic terms based on the lessons and insights we have drawn from other OutCrit experiments in legal scholarship.<sup>71</sup> However, as the design of the Study Space Seminar Series illustrates, and as LatCrit scholars have previously urged, democratic approaches to scholarship can be combined strategically with other traditions or models of knowledge-production to help maximize anti-subordination efficacy.<sup>72</sup> In this instance, the small and intensive design of the Study Space Seminar Series is reminiscent of the “safe space” (or “vanguard”) model of knowledge production, a model that emphasizes precisely this kind of focused and tight-knit grouping based on common reading lists and critical reflection to generate

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<sup>70</sup> See *supra* notes 10-28 and accompanying text (introducing the concept of academic activism in LatCritical work).

<sup>71</sup> See Montoya & Valdes, *supra* note 5 (describing the three main models of legal knowledge production and their general characteristics).

<sup>72</sup> *Id.* (concluding that, although democratic approaches provide the sturdiest frameworks for antisubordination theory and action, scholars should combine aspects of all models in conscious and strategic ways to maximize the material impact, or social relevance, of our work).

new insights and texts.<sup>73</sup> This vanguard-style project within a fundamentally democratic academic community thus illustrates how LatCrit (and other) scholars can and should “mix and match” methods or models or knowledge-production in creative ways to maximize antistatist punch.<sup>74</sup> In this way, the variety and richness of the papers produced by the small band of scholars that helped to inaugurate the Study Space Seminar Series in Panama during December, 2007, also serve to confirm that hybrid or combined approaches to knowledge-production *can* balance democratic elements with other scholarly traditions to generate piercing and illuminating texts designed for social justice relevance.

Such flexibility, moreover, helps to facilitate relationships and networks that hopefully will endure beyond the limited span of any given program or event. The immersion-style aspects of the Study Space design, coupled with the attendant opportunities to publish papers and plan future collaborations, ideally will help to nurture intellectual, political and human relationships among and between the diverse groups of Study Space participants. Through the planning and development of follow-up programs, these relationships can ripen into expanded networks of academic activists working collaboratively on various intersecting, synergistic projects. In time, the growth of relationships into networks can create the necessary conditions for communities and institutions devoted to this work—communities and institutions similar to the LatCrit Portfolio of Projects.<sup>75</sup> This attention to the long term, if cultivated and implemented in a principled, democratic and transparent manner, can help us stretch the reach and

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<sup>73</sup> *Id.* (describing the safe space or vanguard model of legal knowledge production).

<sup>74</sup> *Id.*

<sup>75</sup> For more information on the LatCrit Portfolio of Projects, visit [www.latcrit.org](http://www.latcrit.org).

limits of our immediate efforts. Only through this sort of programmatic and substantive continuity can we, as academic activists, hope to sustain the historical struggles against the legacies of injustice that the symposium authors examine in their essays.<sup>76</sup>

## Conclusion

This brief Foreword is dedicated to highlighting some common themes in method and substance reflected in the following symposium essays, which in turn are based on the inaugural Study Space program of December, 2007, in Panama City, Panama. The brevity of this Foreword cannot do justice to the rich detail and nuance embedded in these diverse and thoughtful essays. Nor can the effort to link these essays and project to the larger record or corpus of LatCrit and other OutCrit works be fully unfolded here. Nonetheless, the summary sketch of highlights unfolded above, and amplified in the essays below, do help to confirm, as well as to enrich, the substance and methodology associated with critical outsider jurisprudence generally, and with the LatCrit approach to democratic knowledge-production specifically. In this way, the authors presented below demonstrate not only the continuing vitality of Out-Crit legal studies, but also the promise of the Study Space Seminar Series as an exercise in critical approaches to comparative scholarship and academic activism.

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<sup>76</sup> This attention to continuity and long term planning is consistent with LatCrit praxis and OutCrit lessons in jurisprudential experiments. See *supra* notes 5, 6, and 13 and sources cited therein (on continuity as an element of effective and sustainable academic activism).







ESSAY

**SAVING BIODIVERSITY AT THE CROSSROADS OF THE  
AMERICAS**

*Colin Crawford\**

This paper will examine the ecological status and prospects of Panama's reverted areas, meaning those areas returned to the country with the reversion of sovereignty over the Panama Canal lands. Following an introductory Part I that highlights Panama's biological diversity, Part II will isolate some of the development pressures facing the reverted areas and those closest to central Panama City in particular. In addition, Part II will describe the extent of the reverted areas and identify their biological, environmental,

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social and economic value both to Panama City and the Republic. Part III will discuss the importance of protecting the reverted areas in light of global accords on biodiversity and tropical forest protection. Part III will additionally consider existing legal protections under Panamanian law and identify other examples of the legal protection of protected areas and biodiversity in the region by suggesting ways in which the Panamanian legal protections might be strengthened. Finally, Part IV will consider the prospects for successful protection of the reverted areas and will conclude with justifications and recommendations for a successful strategy to ensure the long-term viability of the reverted areas as protected areas and biodiversity havens.

## **I. Introduction: Panama's Threatened Reverted Areas**

In Panama City, Panama, construction is underway for a Biodiversity Museum. This is unsurprising; tropical Panama constitutes a biodiversity "hotspot", a place distinguished by the richness of its flora and fauna, and therefore meriting special protection.<sup>1</sup> Panama City, along with the Panama Canal, sits at the center of one of the world's most biologically diverse areas: Southern Central America. The area has more forest bird species than any other region in the world, except Amazonia and the northern and central Andes, each of which is vastly larger than southern Central America. Furthermore, Panama has as many plant species per 10,000 km<sup>2</sup> as any region in the world, more than Ama-

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<sup>1</sup> The phrase is typically credited to the British ecologist Norman Myers. See, e.g., John C. Kunich, *Fiddling Around While the Hotspots Burn Out*, 14 Geo. Int'l Envtl. L. Rev. 179 (2001) (explaining that the country is estimated to be the home to 10,000 species, of which 1,500 are endemic). See also Mireya Correa, *Diversidad en la flora de Panamá*, in *Panamá: Puente Biológico* 70-73 (Stanley Heckadon-Moreno, ed. 2001).

zonía or the Malay Peninsula.<sup>2</sup> This biological richness results largely from the geographic distinctiveness of the nation's location. As a bridge between the American continents, the country sits at the bottom territory of many species in the northern hemisphere and the top territory of many southern hemisphere species.<sup>3</sup>

The effort to build a Biodiversity Museum in this truly and symbolically central location must be recognized as both appropriate and laudable. The museum, designed by the world famous architect Frank Gehry, who has visited the country for years with his Panamanian wife,<sup>4</sup> will be the architect's first project in Latin America. It will sit on a spit of land known as "la Calzada de Amador," a tongue of land created during Canal construction with fill material, at the Canal's Pacific entrance.<sup>5</sup> The museum's design will reflect the sinuous curves and organic shapes for which Gehry is famous, and is to be richly colored in keeping with its tropical setting. Advance publicity for the Biodiversity Museum promises that the institution "[i]ntends to reflect the growing global concern for the environment and conservation, and at the same time explain to the world Panama's extraordinary natural patrimony."<sup>6</sup>

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<sup>2</sup> Robert Condit et al., *The Status of the Panama Canal Watershed and its Biodiversity at the Beginning of the 21st Century*, 51 BIOSCIENCE 389 (2001).

<sup>3</sup> The Nature Conservancy, *About Panama*, <http://www.nature.org/wherewework/centralamerica/panama/work/art19165.html?src=search> (last visited Apr. 7, 2008).

<sup>4</sup> This is only the most recent of many projects Gehry has imagined for Panama. See Colin Crawford, *Stop the Locks Schlock*, Salon.com, Oct. 5, 1999, <http://salon.com/people/feature/1999/10/05/panama/print/html> (last visited Oct. 12, 2007) (describing an architect's vision for the design of the third set of locks on the Panama Canal).

<sup>5</sup> Bertilda Herrera, *Museo de la Biodiversidad: un Puente de Vida*, LA ESTRELLA PANAMÁ, Dec. 3, 2007, at D-1.

<sup>6</sup> *Id.* ("Pretende reflejar la creciente preocupación mundial por el medio ambiente y su conservación, y a la vez difundir al mundo el extraordinario patrimonio natural de Panamá.")

On the other hand, the effort to build a Biodiversity Museum in Panama City might be seen as oddly sentimental, a tribute to a value that the country's planners and its foreign investors do not in fact support. Despite the glamorous attention the subject of biodiversity may garner in the capital city's waterfront, with its dizzying high-rise growth and the promise of a larger development of a greenbelt of which the Biodiversity Museum will be but one feature<sup>7</sup>, urban biodiversity is not receiving the attention and public concern one would hope for in a country blessed with Panama's biodiversity riches.

This is lamentable in the wake of the transfer of power for the Panama Canal because even in its most urbanized and densely settled corridor—the stretch of land surrounding the Canal, from Panama City on the Pacific to Colón on the Caribbean side—includes a largely untouched tropical forest, itself rich in biodiversity. These are part of the so-called “reverted areas” (*áreas revertidas*)—the lands returned by the United States government to the Republic of Panama along with the Panama Canal in 1990.<sup>8</sup>

## II. Panama's Reverted Areas

As a small country in a strategic location, it is impossible to consider the treatment of the reverted areas without keeping in mind the national policy for management of the country's major commercial asset, the Panama Canal. This is especially true considering the environmentally sensitive reverted areas, which surround this important economic resource. The future construction of a third set of locks for

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<sup>7</sup> Urania Cecilia Molina, *Cinta Costera Va*, LA PRENSA PANAMA, Mar. 17, 2007, at 1A.

<sup>8</sup> See Sarah N. Whitney, *Will Goals Be Met? An Examination of ARI's General and Regional Plans With Respect to Protected Areas Within the Inter-Oceanic Region, Panama*, in, PROTECTING WATERSHED AREAS: CASE OF THE PANAMA CANAL 93, 93-94 (Mark S. Ashton, Jennifer L. O'Hara & Robert D. Hauff, eds., 1999).

the Canal promises to further damage Panama's biodiversity: "[t]he destruction and fragmentation of some 490 hectares of forests will result in the loss of terrestrial ecosystems, particular species and genetic diversity of flora and fauna."<sup>9</sup> This is significant because habitat reduction not only reduces territorial size, but also impairs genetic diversity and weakens populations.<sup>10</sup> Given that the construction of the third set of locks is now a *fait accompli*<sup>11</sup> is all but more reason to emphasize the importance of protecting the biological riches in the other reverted areas. As many Panamanian commentators have noted, it is regrettable that the movement, supported by the Panama Canal Authority and President Martín Torrijos, to build the third set of locks did not proceed "with the insertion of a national development plan"<sup>12</sup> that would have, among other factors, considered long-term environmental sustainability.

#### a. Extent

The territory constituting reverted areas—returned to Panama after the departure of the U.S.-controlled Panama Canal Authority in 1990<sup>13</sup>—includes land that is both public and private, causing extreme protection challenges. In 1952, 85% of the land in the Panama Canal Watershed was forested. However, with development, some of this land has been converted to pasture and agricultural use. By 1993, the government undertook the creation of a system of

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<sup>9</sup> Fernando Manfredo, *Canal de Panamá y Medio Ambiente*, 126 TAREAS 103, (May-Aug. 2007) (the author is the ex-Administrator of the Panama Canal Commission).

<sup>10</sup> *Id.*

<sup>11</sup> Carmen G. Gonzalez, *Environmental Impact Assessment in Post-Colonial Societies: Reflections on the Proposed Expansion of the Panama Canal*, 4 TENN. J.L. & POL'Y 303 (2008).

<sup>12</sup> *Presentación*, 123 TAREAS 3, (May-Aug. 2006) (introducing a series of articles on the Panama Canal).

<sup>13</sup> *Id.*

national parks to protect some of this land. As of 1999, 231,000 hectares had “protected status” while slightly less than half of that was characterized as “protected forest.” One explanation for this differential is that 30% of the land is privately held, making administration and enforcement much more difficult.<sup>14</sup> The Canal itself is surrounded by a swath of land 50 miles long and 10 miles wide, still mostly untouched, owing both to the creation of the national parks and because it was under U.S. military control and as a result was not subject to development pressures.<sup>15</sup>

The reverted areas also contain Panama City’s Metropolitan Park (*Parque Metropolitano*), a precious forest and biodiversity reserve of 190 hectares in the heart of the city. “Park” is, in this context, a deceptive term, since it may conjure up the image of an urban oasis that serves multiple needs—such as recreation, family picnics and walks on paved trails. In fact, Panama City’s Metropolitan Park consists of largely untouched tropical forest, despite its location in the heart of the most densely populated area in the Republic of Panama. The Park alone contains fifty-

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<sup>14</sup> Jennifer L. O’Hara, *Introduction: The Panama Canal Watershed Area*, in PROTECTING WATERSHED AREAS: CASE OF THE PANAMA CANAL, 5-6 (Mark S. Ashton, Jennifer L. O’Hara and Robert D. Hauff, eds., 1999) (noting that the Panamanian decision to privatize the reverted lands dates back to 1993 as the country prepared to assume control of the Canal lands). See International Monetary Fund, IMF No. 01/41, PANAMA: RECENT ECONOMIC DEVELOPMENTS 21, available at <http://www.imf.org/external/pubs/ft/scr/2001/cr0141.pdf> (last visited Feb. 11, 2008).

<sup>15</sup> Whitney, *supra* note 8, at 5. These areas constituted an especially important habitat for migratory birds. See, e.g., Office of the Deputy Under Secretary of Defense (Environmental Security) and the National Fish and Wildlife Foundation, THE KEY ROLE OF SPECIFIC LANDS IN THE PANAMA CANAL AREA IN PRESERVING THE VALUE OF PANAMA’S NATURAL HERITAGE: A REPORT OF THE PARTNERS IN FLIGHT INTERNATIONAL WORKING GROUP FOR THE PRESERVATION OF MIGRATORY AND RESIDENT BIRDS, PANAMA CITY, PANAMA, Mar. 14-15 (1996), <http://www.dodpif.org/data/keylands.pdf> (last visited Apr. 15, 2008).

one different bird species.<sup>16</sup> By way of illustrating the threats to the park and other reverted areas, it faces the threat of development and partial or total destruction—either by squatters or by construction for public and private uses.

The reason for this oddity—a tropical forest amidst a bustling city—rests in an odd and unintentionally fortuitous legacy of the U.S. presence in Panama. Specifically, what became the reverted areas were off limits to the Republic of Panama during the colonial control of the Canal Area, not for biodiversity protection reasons, but to protect U.S. activities.

#### **a. Development Pressures and a False Economic Choice**

As noted elsewhere in this volume, Panama City is undergoing a real estate boom of epic proportions, one that threatens to wreak huge social transformations in Panamanian society, if it has not already done so.<sup>17</sup> In at least one prominent case—that of the Metropolitan Park—this development threatens the integrity and long term values served by protected areas rich in biodiversity. The Metropolitan Park was the first reverted area of significance.<sup>18</sup> In the early 1980s, a battle began over a highway, the “Northern Corridor” (*Corredor Norte*) that would run through the park. This helped mobilize the Panama Audubon Society (until then primarily a birder’s club) and other nascent environmental non-governmental organizations (NGOs),

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<sup>16</sup> Condit et al., *supra* note 2, at 393, Table 1.

<sup>17</sup> See, e.g., Eric Rogers, *Out with the Old in with the New: Housing Issues for the Middle Class in Panama City, Panama*, 4 TENN. J. L. & POL’Y 507 (2008).

<sup>18</sup> Interview with Rosabel Miró, Executive Director, Audubon Society, Panamá, William and Ester Adsett, Board Members, Audubon Society, and Dionara Víques, Director of the Metropolitan Park (Dec. 12, 2007) (notes on file with author).

who were ultimately promised a longer road that would not run through the park and, it was said, benefit more communities. Initially, the NGOs were promised a study that would examine the impact and best route for new highway construction.<sup>19</sup> The project was to be financed as a part of a World Bank highway development project, which included a proposed highway to connect national parks at Boquete and Cerro Punta.<sup>20</sup> The NGOs subsequently sought and were promised a law from the National Assembly that would specify what exactly could and could not be done with the park.<sup>21</sup> At the same time, in 1994, the government sought bids for the construction of a “Southern Corridor” (*Corredor Sur*) highway, without specifying the route. Environmental NGOs, including the Audubon Society, went to the National Assembly and sought to block the construction of the Northern Corridor, which would have run through the Metropolitan Park. They were unsuccessful in this and the highway was built and runs off to one side of the Metropolitan Park, but entirely within its boundaries: “[t]he first thing anyone knew about the change of route was when the park guards found surveyors cutting down trees [in the Metropolitan Park] and laying out the route for the highway,” according to Audubon Society

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<sup>19</sup> *Id.* The Panamanian history of promising such studies and not performing them sadly continues until the present as examined by Carmen Gonzalez in her study on the Environmental Impact Assessment process—or lack thereof—in the amplification of the Canal. See Gonzalez, *supra* note 11.

<sup>20</sup> Interview, *supra* note 18. The World Bank has funded several highway construction and rehabilitation projects in Panama since the 1980s. See IMPLEMENTATION COMPLETION REPORT (CPL-36860 SCL-3686A) ON A LOAN IN THE AMOUNT OF \$60 MILLION TO THE REPUBLIC OF PANAMA ON A ROADS REHABILITATION PROJECT, [http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2004/06/25/000090341\\_20040625105511/Rendered/INDEX/28372.txt](http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2004/06/25/000090341_20040625105511/Rendered/INDEX/28372.txt) (last visited Apr. 7, 2007).

<sup>21</sup> See O'Hara, *supra* note 14.



representatives.<sup>22</sup> In the words of a former U.S. military contractor who had been there, before and after the road went in, it constituted “an irreversible wound in the middle of the forest.”<sup>23</sup>

This method of the highway’s construction provides a litany of examples of exactly what most laws and proposed protected area management plans seek to avoid. Trees were felled without consideration of their ecological value. The principal water source for the park’s many animal species, the Río Curundú, was cut off, leaving many animals to die of thirst.<sup>24</sup> In other words, the project appears to have been driven by purely economic considerations and not by a comprehensive vision of protected areas as having distinct environmental, social and economic functions.

Subsequently, the Park management initiated a civil action against the firm responsible for the construction of the Northern Corridor, in light of “the loss of land, flora and fauna”, seeking to have the company “mitigate the harms caused in the Park.”<sup>25</sup> This led, in October 1996, to the signing of an agreement for species conservation, scientific investigation, environmental education and economic compensation resulting from the damages caused by the company in the construction of the Northern Corridor.<sup>26</sup> Subsequently, in June 1998, the Park management submitted a demand for US \$3.44 million, plus interest, in economic compensation.<sup>27</sup> In 2001 and 2005, Panamanian courts issued decisions in favor of the Park management

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<sup>22</sup> *Id.*

<sup>23</sup> Letter from Jaqueline Howard to author (May 1, 2008) (on file with author).

<sup>24</sup> *Id.*

<sup>25</sup> Patronato del Parque Natural Metropolitano, Comunicado a la Ciudadanía (Communication to the Citizenry) (on file with author).

<sup>26</sup> *Id.* at ¶ 1.

<sup>27</sup> *Id.* at ¶3

and its demands.<sup>28</sup> Despite further judicial wrangling and hearings favoring the position of the Park, however, their financial demands “for the devastation that affects approximately 33 hectares” of Park territory<sup>29</sup> remains unsatisfied. The sorry saga of the Park management’s unsatisfied effort to recover for environmental damage to this reverted—and protected—area underscores how important it is to prevent such damage from happening, rather than trying to impose liability after the fact.

In this and other reverted areas, development-related pressures threaten the long-term integrity of protected areas. For example, in 1995, the government reduced tariffs on some imported agricultural goods in an attempt to enter the World Trade Organization. Some commentators noted a negative, unsurprising reaction by the representatives of workers in the agricultural and livestock industries who worried that this would lead to “an increase in the already elevated number of displaced residents from the interior.”<sup>30</sup> At the same time, the Inter-Oceanic Regional Authority (*Autoridad Regional Interoceánica*, or ARI), the entity created specifically to administer the reverted areas, aggressively sought to attract capital investments to generate employment opportunities in the reverted areas, to the extent that it appeared to “be evidence of the Government policy, conscious or not, to promote accelerated migration in these areas of the Metropolitan Region of the City of Panama where the pending negative physical, economic and social effects [to] its population

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<sup>28</sup> *Id.* at ¶¶4 and 5.

<sup>29</sup> *Implementation*, *supra* note 20.

<sup>30</sup> Alan Smith Waite, *Municipio, Modernización Administrativa y Desarrollo*, in PLANIFICACION DEL DESARROLLO EN PANAMA: ENSAYOS CRITICOS CONSTRUCTIVOS EN RETROSPECTIVAR, DEL PRESENTE Y DE PROYECCION FUTURA 41 (2000) (“[C]ontribuirá al aumento del número ya elevado de desocupados residentes en el interior del país (The Panamanian author worked at the Organization for American States in the area of housing, development and urban affairs for nearly thirty years.)

were already considered beyond proposals and solutions. The consequence would be to contribute “to the increase in unemployment and underemployment and, as a result, to poverty.”<sup>31</sup> As Smith Waite notes, “[e]xcessive rural-urban migration has been identified by multiple investigative sources as one of the major economic and social problems for economies in development.”<sup>32</sup> Thus, as elsewhere in

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<sup>31</sup> *Id.* at 41-42 (“Aquella decisión, paralela a la agresiva promoción de la Autoridad Regional Interoceánica (ARI) para atraer inversiones de capital que generan oportunidades de empleos en las áreas a la Región Metropolitana de la ciudad de Panamá donde su población ya considera insostenibles los efectos físicos, sociales y económicos negativos pendientes aún de propuestas y soluciones. Estas acciones, fuera de un amplio marco de referencia nacional, contribuirán al aumento de desempleo y subempleo y por consiguiente a la pobreza.”). From the start, despite perfunctory acknowledgements of the importance of “sustainable development”, the ARI’s planning was marked by a desire for intense economic development that appeared aimed principally to secure immediate capital infusions. See ARI, DEVELOPMENT OF REVERTED AREAS WITH PRIVATE SECTOR PARTICIPATION (TC-96-04-21), <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=461260> (last visited Feb. 10, 2008) (stating ARI’s focus on “efficient utilization of the assets and long term job creation”). See also Whitney, *supra* note 8, at 97 (“ARI’s focus is on economic development in the Inter-Oceanic Region . . . although it also includes natural resources protection as a guiding principle.”), Keely B. Maxwell and Christopher J. Williams, *Working Toward Effective Policy Processes in Panama Canal Watershed National Parks*, in Ashton, O’Hara & Hauff, *supra* note 14, at 151 (noting the ARI’s focus on increasing economic opportunities for an international investment in the reverted areas and concluding that

“[d]evelopment of reverted lands in the Watershed will place additional pressures on existing protected lands by increasing habitat fragmentation and water consumption.”), H. Bradley Kahn, *The Prospects for Integrated Watershed Management in the Panama Canal Watershed*, *id.* at 168n (characterizing the two primary values of the ARI as “wealth and [the desire to receive institutional] respect.”).

<sup>32</sup> Alan Smith Waite, *Políticas de Desarrollo Contradictorias*, *supra* note 30, at 46 (“La excesiva migración rural-urbano ha sido señalado

the developing world, ill-considered government policies that prompted increased urban migration would put special pressure on previously undeveloped lands, such as Panama's reverted areas.<sup>33</sup>

Furthermore, Panamanian commentators feel that the promises of economic riches said to come with the construction of the third set of locks for the Panama Canal will only increase the country's social inequities. Research "appears to confirm that the extremely optimistic, long term projections of the ACP [the Panama Canal Authority, or Autoridad del Canal de Panamá]. . . will not maintain this level of dynamism for various reasons."<sup>34</sup> These reasons include, first, the likely decline in the commercial trade between China and the United States, "which has been the principal driver of movement through the Canal for the last decade."<sup>35</sup> Second, global warming threatens to make trade through previous closed routes—due to ice—possible; these routes are preferable since passage through them will be free.<sup>36</sup> Third, an increase in the development of multi-modal shipping in the United States will threaten the Canal's viability; "this is the Panama Canal's principal rival with regard to transit coming from Asia in the direction of the East Coast of the United States."<sup>37</sup> How is the

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por múltiples fuentes investigadoras como uno de los problemas económicos y sociales mejores de las economías en desarrollo.”).

<sup>33</sup> This is famously true, for example, in Rio de Janeiro, where remaining sectors of the Atlantic Rainforest are under threat from occupation by poor migrants. See, e.g. *Favelas em expansão já cercam Parque de Tijuca* [Expanding shantytowns come close to Tijuca National Park], O GLOBO, Dec., 19, 2007, at 1.

<sup>34</sup> Roberto N. Méndez, *Viabilidad financiera de un tercer juego de esclusas*, 123 TAREAS 89, 90 (May-Aug. 2007).

<sup>35</sup> *Id.* at 90.

<sup>36</sup> *Id.* at 91.

<sup>37</sup> *Id.* “Multi-modal” refers, for example, to the receipt of a cargo ship in a port like Long Beach, California, that is then broken up into containers that are sent by rail or truck across the North American continent to the East Coast. See BLACK’S LAW DICTIONARY (8th ed. 2004)

decision to construct a third set of locks related to the efforts to turn reverted areas into protected—and biodiversity-protecting areas? It reveals the need to incorporate environmental considerations into planning for truly sustainable, long-term economic development. Yet this appears not to have happened.

Moreover, the example of the treatment of the reverted area that became Panama City's Metropolitan Park and, more generally, of government policies that put pressure on development of the untouched forests surrounding the Canal, does not bode well for future efforts to manage reverted areas. It therefore merits identifying some of the values served by maintaining preserved areas. Part of the solution for sound future management rests in public education regarding the value of establishing and maintaining protected areas.

#### **b. Values Served by the Reverted Areas**

If a country is poor or developing, it merits asking why areas should be protected from development. It is not unreasonable to wonder whether even short-term economic gains may be worth sacrificing the arguable luxury of protected ecosystems. More specifically, one must ask what exactly it means to have a "protected" area. A protected area is not necessarily one that is untouchable. It is one for which there exists a management plan that recognizes the ecosystem services that make the area deserving of protection, such as the rich biodiversity that characterizes much of Panama.

In Panama, this biodiversity deserves protection for various reasons, including possible scientific uses of its bio-

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(defining "multimodal shipping" as "The transportation of freight using more means of carriage and using more than one carrier. For example, a cargo may be carried first by air or sea, then by rail or truck to its destination.").

riches in the future. It is conceivable that in the longer term the intellectual property (and specifically pharmaceutical) benefits of such areas could prove more powerful sources of income for a country like Panama than an invasion of condominium developments or agricultural uses in the reverted areas.<sup>38</sup> Panama also stands poised to develop protected areas for carefully managed tourism, as has happened in neighboring Costa Rica.<sup>39</sup>

In addition, the tropical forests within protected areas like Panama's reverted areas also merit protection because of the essential ecosystem services they provide. These tropical forests typically serve as carbon sinks.<sup>40</sup> They are also important repositories of freshwater in areas where the surface water supplies may be inadequate.<sup>41</sup> "The construction of highways in elevated reservoirs [i.e. tropi-

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<sup>38</sup> See, e.g., John Copeland Nagle & J.B. Ruhl, *THE LAW OF BIODIVERSITY AND ECOSYSTEM MANAGEMENT*, 27-29 (2002) (discussing the countless benefits of biodiversity in the curing and prevention of diseases and contributions to human health).

<sup>39</sup> *Id.* at 29. (indicating that aesthetic value of beautiful animals and plants produce economic benefits by attracting ecotourism). On Costa Rican ecotourism, see, e.g., Katherine Lieberknecht, Jennifer Papazian and Andrea McQuay, *Balancing Conservation and Economics: The Development of an Ecotourism Plan for Panama*, in Ashton, O'Hara & Hauff, *supra* note 14, at 111-14.

<sup>40</sup> *Id.* See also, James Salzman, *Creating Markets for Ecosystem Services: Notes From the Field*, 80 N.Y.U. L. REV. 870, 872-73 (2005) (discussing the critical services provided by healthy ecosystems such as water purification).

<sup>41</sup> See, e.g., Salzman, *supra* note 40, at 872. See also Salomón Aguilar, *Bosques de la Cuenca del Canal de Panamá*, in Heckadon-Moreno, *supra* note 1, at 91-97 ("Ubicados en la parte central y más angosta del Istmo, los bosques de la Cuenca del Canal contribuyen gracias a su ciclo de vida a producir agua para la vía interoceánica y para las plantas potabilizadores que abastecen de agua a las poblaciones de las ciudades de Panamá y Colón"). ("Located in the central and narrowest part of the isthmus, the Canal Watershed's forests contribute thanks to their life cycle to produce water for the interoceanic waterway and for the potabilizing plants that store water for the populations of Panama and Colón cities.").

cal forests that retain water] and land clearing that interferes with drainage and obstructs water movement can permanently interfere with biological cycles and the productivity of adjacent ecosystems.”<sup>42</sup> In a country like Panama that is prone to flooding and has a low water table, forests serve the important function of protecting against the more extreme effects of flooding.<sup>43</sup> It should be emphasized that the importance of this water retention ecosystem service is both social and economic. Water is essential for Canal operations and the country has staked much of its future development on Canal expansion. Therefore, destruction of these forests for short-term interests like highway construction is foolhardy.

The forests within the reverted areas also serve as an important habitat for sustainable food species.<sup>44</sup> As noted above, protected areas also help preserve habitat and genetic diversity, which helps maintain healthy flora and fauna populations less susceptible than non-diverse gene pools to disease and depletion.<sup>45</sup>

Development in protected areas, particularly in hot, humid tropical environments with a history of insect-borne infections like malaria, yellow fever and dengue, can also have negative consequences for human health: “[g]eneral operations for the construction of the third set of locks, roads and drainage canals, construction of encampments,

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<sup>42</sup> Manfredo, *supra* note 9, at 105.

<sup>43</sup> See James Salzman, Barton H. Thompson, Jr. & Gretchen C. Daily, *Protecting Ecosystem Services: Science, Economics, and Law*, 20 STAN. ENVTL. L.J. 309, 319 (2001) (indicating that heavy vegetation serves to prevent flooding by reducing peak flows, and discussing the relationship between watershed preservation and flood control).

<sup>44</sup> *Id.* at 323-25 (describing the significant impacts of deforestation in Costa Rica and Australia. For instance, due to deforestation, the loss of native tree cover in Australia has allowed naturally occurring salts in the soil to rise up to the surface and damage large areas of agricultural and grazing lands).

<sup>45</sup> See also Nagle & Ruhl, *supra* note 38; See generally, Manfredo, *supra* note 9.

along with other activities, has the potential to increase the breeding grounds of plagues or illness vectors” such as the malaria-and dengue-bearing mosquitoes.<sup>46</sup> An ecosystem service provided by a tropical forest can act as a damper to limit the proliferation of environments conducive to health-damaging pests.

This recognition of the benefits of ecosystem services derives from a perspective that aims to take into account the long-term sustainability of a growing society. As one Panamanian commentator has written, in a developing country like Panama, “it is fundamental . . . in terms of social security and access to adequate protection in front of labor risks, [to assure] an environment adequate to this end. Again, this is to prioritize in this case the right of the current and future population to enjoy an extensive and sufficient benefit of ecosystem services that maintain and permit the enjoyment of life. This is also here to recognize the intrinsic rights to nature and that of all living things.”<sup>47</sup>

### **III. Legal and Regulatory Protections for the Reverted Areas**

There are many models for protected and biodiversity protection areas at both the international and national levels. The remainder of this section will look at some of the more prominent examples, including regional models that could be easily adapted to the Panamanian reality.

#### **a. Global Biodiversity and Protected Area Regulation**

At a global level, there are numerous instruments designed to promote biodiversity protection. The best

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<sup>46</sup> Manfredo, *supra* note 9, at 105.

<sup>47</sup> Juan Jované, *Hacia una estrategia alternativa de desarrollo*, TAREAS 78, May-Aug. 2007.



known of these is the U.N. Convention on Biological Diversity ("CBD"), which was signed and opened for ratification at the decennial U.N. Convention on Environment and Development, in Rio de Janeiro, in 1992.<sup>48</sup> The CBD creates an umbrella framework for biodiversity protection, including a requirement for research and training (Article 12), Technology Transfer (Article 18) and the creation of a Financial Mechanism to assist state parties in preservation activities.<sup>49</sup> The companion protocol, namely the Cartagena Protocol for Biosafety,<sup>50</sup> although more specifically designed to address issues such as genetically-modified organisms and their legal treatment, also has provisions to address capacity-building (Article 22), public awareness and participation (Article 23) and contains its own financial mechanism. All of these provisions might have the result of benefiting biodiversity and protected areas as well.<sup>51</sup> Panama signed the CBD in June, 1992, and became a party in 1995 with ratification; it signed the Cartagena Protocol in 2001 and became a party with ratification in 2003.<sup>52</sup>

The World Heritage Convention ("WHC"), adopted by the United Nations Education, Cultural and Scientific Organization in 1972, protects both "cultural and natural heritage around the world considered to be of outstanding

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<sup>48</sup> Philippe Sands and Paolo Galizzi, DOCUMENTS IN INTERNATIONAL ENVIRONMENTAL LAW 691-92 (2004).

<sup>49</sup> The text of the Convention is available at <http://www.cbd.int/convention/convention.shtml> (last visited Apr. 13, 2008).

<sup>50</sup> The Cartagena Protocol was opened for signature on January 29, 2000. Background on the Cartagena Protocol available at <http://www.cbd.int/biosafety/background.shtml> (last visited Apr. 13, 2008).

<sup>51</sup> The Text of the Protocol is available at <http://www.cbd.int/biosafety/protocol.shtml> (last visited on Apr. 13, 2008).

<sup>52</sup> List of parties for both documents available at <http://www.cbd.int/convention/parties/list.shtml> (last visited Apr. 13, 2008).

value to humanity.”<sup>53</sup> Panama ratified its participation in the WHC in March, 1978.<sup>54</sup> The World Heritage List, a document issued pursuant to the WHC, contains five Panamanian sites, three of them natural sites (none of the natural sites are in the Panama City metropolitan area.)<sup>55</sup> Like the CBD, the WHC exists in part to encourage education and what is today called capacity-building to insure the preservation of listed sites.<sup>56</sup> However, despite efforts to argue that the WHC or other such international instruments could present a promising option to increase international biodiversity monitoring,<sup>57</sup> at present most commentators seem to agree that because this and similar international accords have no teeth and the pressures to develop many protected areas rich in biodiversity are now so powerful, these documents offer little in the way of guaranteed gains in biodiversity and protected areas conservation.<sup>58</sup> This work makes clear that there is no reason to think that they will effectively change behavior worldwide, except perhaps in individual cases.

One way in which international instruments have been hugely effective, however, is in shaping national legislation about biodiversity protection that is enforceable at the state level. The potential importance of this tool cannot be underestimated.

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<sup>53</sup> About World Heritage, <http://whc.unesco.org/en/about/> (last visited Apr. 13, 2008).

<sup>54</sup> States Parties: Ratification Status, <http://whc.unesco.org/en/statesparties/> (last visited Apr. 13, 2008).

<sup>55</sup> See <http://whc.unesco.org/en/list> (last visited Apr. 13, 2008).

<sup>56</sup> See About World Heritage *supra* note 53.

<sup>57</sup> John Charles Kunich, *World Heritage in Danger in the Hotspots*, 78 IND. L.J. 619 (2003) (arguing that “[t]he World Heritage Convention could become an effective tool in the struggle to save the Earth's biodiversity, given the right concatenation of circumstances and decisions.”)

<sup>58</sup> See, e.g., Alexander Gillespie, *Threatened Areas of International Significance*, 22 N.Z.U. L. REV. 432 (2007) (survey of increasing biodiversity protection threats and failures of international instruments), Kunich, *supra* note 1.

### **b. Panamanian Law: Existing Instruments and Protections**

Panama benefits from a number of legal protections that stand to serve the country. However, laws on paper are not enough; a significant portion of Panama's citizens and their allies need be mobilized to enforce Panamanian law, regulation and policy.

#### **i. Constitutional Protections.**

Like many countries in Latin America of relatively recent vintage, Panama's 1978 Constitution (amended in 1983, 1994 and 2004) contains a chapter dedicated to the environment. The chapter does more than merely guarantee as a "fundamental right that the population live in a clean environment free from contamination, in which the air, water and food satisfy the requirements for adequate development for human life," although it does that.<sup>59</sup> More importantly for the purposes of this paper, it also provides that "[t]he State and all of the inhabitants of the national territory have the right to enjoy social and economic development that prevents environmental contamination, maintains ecological equilibrium and avoids the destruction of ecosystems."<sup>60</sup> The other two articles in the chapter pro-

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<sup>59</sup> Constitución Política de la República de Panamá, Ch. 7, Art.118. ("Es deber fundamental del Estado garantizar que la población viva en un ambiente sano y libre de contaminación, en donde el aire, el agua y los alimentos satisfagan los requerimientos del desarrollo adecuado de la vida humana," available at the Political Database of the Americas, <http://pdba.georgetown.edu/Constitutions/Panama/constitucion2004.pdf> (last accessed October 11, 2008))

<sup>60</sup> *Id.* at Art. 119. "El Estado y todos los habitantes del territorio nacional tienen el deber de propiciar un desarrollo social y económico que

vide that the State shall assure access to environmental resources for all in such a way that avoids their destruction and sustainability<sup>61</sup> and also requires that the law of non-renewable natural resources not create social, economic and environmental harms.<sup>62</sup>

These are powerful tools if applied intelligently and deliberately to the resolution of particular conflicts. Among these conflicts is the proper treatment of the reverted areas. In the first instance, the guarantee to protect ecosystems would apply to the reverted areas since they constitute biodiversity "hotspots"<sup>63</sup> and would surely satisfy any definition of ecosystem. By this measure, the construction of the Northern Corridor Highway may have constituted a constitutional violation, providing the loss of habitat, wildlife and tree species alleged by Audubon and related groups could be established to a satisfactory level of legal proof. In short, this constitutional provision is the essential starting point for any protected areas or biodiversity protection action in Panama.

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prevenga la contaminación del ambiente, mantenga el equilibrio ecológico y evite la destrucción de los ecosistemas."

<sup>61</sup> *Id.* at Art. 120. "El Estado reglamentará . . . las medidas necesarias para garantizar que la utilización y el aprovechamiento de la fauna terrestre, fluvial y marina, así como los bosques, tierras y aguas, se lleven a cabo racionalmente, de manera que se evite su depredación y se asegure su preservación, renovación y permanencia."

<sup>62</sup> *Id.* at Art. 121. La ley reglamentará el aprovechamiento de los recursos naturales no renovables, a fin de evitar que del mismo se deriven perjuicios sociales, económicos y ambientales."

<sup>63</sup> See *Kunich*, *supra* note 1.

## ii. National Environmental Laws

### 1. Law 23 of 2003: “Special Treatment Areas”

Law 23 of 2003 modified Law 21 of 1997, which had established a special development zone for the former Canal Zone. Law 23 is relevant for the reverted areas because it created “special treatment areas” for designated development within the former Canal Zone. This can include, for example, “urban and cultural resources areas” and “tourist and eco-tourist areas.” Although Law 23 is not specific about what these terms mean, it does at least identify them as worthy (if competing) values and provides for a procedure to seek such designations.<sup>64</sup> At a minimum, what this suggests is that the reverted areas might be usefully selected as meriting an eco-tourist designation, which could provide a usable framework for development that would preserve some of the ecosystem values of the reverted areas but also provide a bulwark against pressures to develop for other uses. The fact, however, that Law 79 provides the opportunity for special “urban” uses reflects how immediate this conflict is for Panama, although Law 21, which this law amends, includes “green urban areas” as one urban category.<sup>65</sup>

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<sup>64</sup> Law 79 of 2003, “CONCEPTO: El concepto de área de tratamiento especial sobrepuesto se aplicará en las áreas con usos del suelo regulados por esta Ley, que permite la flexibilidad del sistema para analizar oportunidades de desarrollo en áreas específicas del Plan Regional para el Desarrollo de la Región Interoceánica.”

<sup>65</sup> Law 21 of 1997, Annex I, Part II (Categorías de Ordenamiento Territorial).

## 2. Law 41 of 1998: Framework Legislation Including Provision for Protected Areas

Panama's framework national environmental policy also enumerates protection for protected areas. Law 48 of 1998, which also created the national environmental agency and requires national environmental planning and the preparation of environmental impact statements,<sup>66</sup> addresses protected areas and biodiversity protection in the context of a statutory title dedicated to natural resources protection and use. Although this is not uncommon—indeed, many U.S. states do exactly this—it is arguably unfortunate, because the commitments to protection are juxtaposed with provisions devoted to resource exploitation, creating an inherent conflict that is difficult to resolve. Thus, the natural resource chapter sets forth as its “objective the desire to incorporate the concept of sustainability and rationality in the enjoyment of natural resources, as well as to assure that environmental protection shall be a permanent component of the policy and administration of such resources.”<sup>67</sup> A desire to do something, of course, amounts to less than a guarantee that it will be done.

Nonetheless, Law 48 does create a National System of Protected Areas, which can exist on either public or private land.<sup>68</sup> Law 48 at least contemplates, whether through law, regulation or decree, the creation of such areas with a special emphasis on the use of economic incentives

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<sup>66</sup> Titles III and IV of Law 48 of 1998.

<sup>67</sup> The original sentence reads in full: “Las normas sobre recursos naturales contenidas en la presente Ley, tienen el objetivo de incorporar el concepto de sostenibilidad y el de racionalidad en el aprovechamiento de los recursos naturales, así como asegurar que la protección del ambiente sea un componente permanente en la política y administración de tales recursos.” Law 48 of 1998, Tit. V, Ch. I, Art. 62.

<sup>68</sup> See Arts. 66 and 68 of Law 48.

and financial incentives to do so.<sup>69</sup> To be sure, the formal creation of such a system of protected areas is a step in the right direction. As intimated here, however, such a system would likely have greater integrity if, as in the Dominican and Brazilian examples discussed below, the law actually detailed the nature of the system and the areas it created. Ideally, it should do so not in a framework environmental protection law but in a freestanding law dedicated to protected areas only. As it is, Law 48 sandwiches protected areas between chapters dedicated to natural resource use and forest management; this arguably suggests a weak national commitment to special protected areas. In short, while Law 48 represents a useful foundational commitment to protected area creation, the law's special protected areas provision needs to be further detailed and elaborated with norms capable of being enforced.

### **3. Law 21 of 1997: Development Plan for Inter-Oceanic Region**

Law 21 of 1997, which creates the authority to plan for the use, conservation and development of the Inter-Oceanic Area (the former Canal Zone), including the reverted areas, is something of a mixed bag for environmental protection. The initial paragraphs of Law 21 focus primarily on economic development, although this must be done "in accordance with principles of efficiency, equity and social justice."<sup>70</sup> Only in the final paragraph of the introductory section does Law 21 express a commitment to "sustainable development."<sup>71</sup>

On the other hand, Law 21 provides that the reverted areas shall be understood as public lands that may

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<sup>69</sup> See, e.g., Arts. 68 and 71 of Law 48.

<sup>70</sup> Law 21 of 1997, ¶2.

<sup>71</sup> Id. at ¶8.

not be appropriated for private use. This provides a legal basis for opposing the private concession that benefited from the construction of the Northern Corridor. That is, the concession should be scrutinized to ensure that it does not become a profit center for a private entity, which could constitute a misuse of this provision protecting public lands.

More importantly, Law 21 creates named “wild protected areas” that include the Metropolitan Park of Panama City—the particular reverted area of focus here. The section of Law 21 treating this and other “wild protected areas” specifically provides that the Metropolitan Park shall be preserved to provide more opportunities for the population to enjoy “open air” and opportunities for “guided recreation.”<sup>72</sup> At the same time, Law 21 provides for the “demarcation of the servitudes necessary for the proposed routes as well as the corresponding [needs] for the necessary public services.”<sup>73</sup> Once again, Panamanian environmental law evidences a strong tension between a desire to develop reverted areas and recognition of the need to protect them.

In sum, while the Panamanian Constitution and some environmental laws contain provisions that could be used in support of claims favoring the protection of the reverted areas, they could be strengthened by yet more explicit protections. This lack of clarity has been a concern since the reversion of the Canal areas to Panama.<sup>74</sup> However, one need not look far within Latin America to identify strong legal examples that could usefully serve as models for Panama.

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<sup>72</sup> Law 21 of 1997, Annex I (Areas Silvestres Protegidas).

<sup>73</sup> *Id.*

<sup>74</sup> Whitney, *supra* note 8, at 104 (commenting that the ARI’s “plans lack specificity and clarity about how the natural protection efforts will be implemented and evaluated.”).



#### IV. Comparative Look: Locating Panamanian Protected Areas Legislation in a Regional Context

As a relatively small country, Panama might do well to look to the examples of laws and regulations implemented elsewhere in its region. The national examples below might serve the Panamanian nation well by virtue of the fact that they were drafted in light of environmental, social and economic conditions comparable to Panama's. In particular, each of the national laws described below were produced by nations rich in biodiversity, marked by extreme social and economic inequality and facing severe pressures of urbanization and agricultural development.

##### a. Brazil

Like Panama, Brazil is a country that is highly forested and possessed of rich biodiversity. Its National System of Conservation Units ("SNUC" is the Portuguese acronym for "Sistema Nacional das Unidades de Conservação") was enacted into law in 2000.<sup>75</sup> The law is a model of the form since it seeks to balance the widest possible range of human interventions into environmentally sensitive areas, including human intervention for economic development,<sup>76</sup> as Panamanian Law 21 apparently seeks to do<sup>77</sup>. As such, SNUC provides a detailed scheme that would usefully serve Panama as it seeks to more precisely define in law the needs its environmental laws seek to balance.

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<sup>75</sup> Lei No. 9,985 de 2000.

<sup>76</sup> SNUC's various categories are discussed in exhaustive detail in Colin Crawford and Guilherme Pignataro, *The Insistent (and Unrelenting) Challenges of Protecting Biodiversity in Brazil: Finding "the Law That Sticks,"* 39 U. MIAMI INTER-AM. L. REV 1 (2007).

<sup>77</sup> *Supra* notes 70-74.

### b. Dominican Republic

The Dominican Republic, like many less-industrialized countries with a high incidence of biodiversity, enacted a comprehensive protected areas law that permits a wide range of uses. Enacted in 2000, this law permits some of the goals implied in Panama's environmental laws—namely human activity for economic development, but in a strictly controlled and highly regulated fashion.<sup>78</sup> The sort of detailed scheme in the Dominican law could easily be copied and adjusted to the specifics of Panamanian ecology and society. The great advantage is that it would provide a clear scheme that balances different demands but also clearly commits areas such as the Metropolitan Park, already designated for special protection,<sup>79</sup> to protection under detailed terms and specific requirements. For example, the Dominican framework law follows a schematic model first introduced by the International Union for the Conservation of Nature ("IUCN"), first in the late 1970s, and refined into the 1990s. The IUCN taxonomy

. . . identifies six possible categories of protected area, embracing a wide range of possible social, economic and cultural aspects. IUCN Category I affords the highest possible degree of protection for scientific research, and demands a minimum of human intervention. Category II refers to national parks, whether merited for environmental protection or for human use and enjoyment over time. Category II protects national monuments, and spe-

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<sup>78</sup> Colin Crawford, *Protecting Environmentally-Sensitive Areas and Promoting Tourism in "The Back Patio of the United States": Thoughts about Shared Responsibilities in Ecosystem and Biodiversity Protection*

25 UCLA J. ENVTL. L. & POL'Y. 41, 64-82 (2007) (discussing the Dominican framework law in detail).

<sup>79</sup> Interview, *supra* note 18.

cifically 'areas that may contain one or more natural, specific features that may have an outstanding or unique value, owing to their intrinsic rarity, their representative aesthetic qualities or cultural significance.' Category IV protects wildlife habitat.<sup>80</sup>

The Dominican law further elaborates upon and adjusts these categories to the Dominican reality. The important point to stress here is that strong, comprehensive models exist that can easily and appropriately be adapted for use in Panama.

### c. Colombia

Of course, having model statutes is only half the battle. As Brazilians say, it is also important to find the law that "sticks".<sup>81</sup> This is possible only with vigorous enforcement. The continuing deforestation of the Brazilian Amazon demonstrates the challenges facing the effective application of its system of conservation units.<sup>82</sup>

One regional model for serving the larger goals of protected area creation and maintenance in a country with a high rate of biodiversity can be identified in Colombia.<sup>83</sup> Like Panama, Colombia's environmental laws are not as highly articulated as those in some other South American or Caribbean countries like Brazil and the Dominican Republic. However, recent challenges in the Colombian

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<sup>80</sup> No. 21, Gaceta Oficial, 2 July 1997.

<sup>81</sup> See Crawford, *supra* note 78.

<sup>82</sup> See, e.g., Leonardo Coutinho & Jose Edward, Reporte Especial, *Amazônia: A Verdade Sobre a Saúde da Floresta*, VEJA, Mar. 26, 2008, at 95, 101 (reporting an increase in deforestation of 30% "in recent months").

<sup>83</sup> INSTRUMENTOS ENCONOMICOS PARA LA GESTION AMBIENTAL EN COLOMBIA.

courts reveal the power of citizens to enforce what environmental laws exist—even with relatively small resources.

In August 2006, the Public Interest Law Group at the University of the Andes (“GDIP”, for “Grupo de Derecho de Interés Público”), in Bogotá, formed an alliance with an environmental group, the Interamerican Association for Environmental Defense (Asociación Interamericana para la Defensa del Ambiente). The groups subsequently brought a case in the Colombian Constitutional Court, alleging constitutional violations of the national forestry law.<sup>84</sup> Specifically, the non-profit groups insisted that the law be enforced to serve the goals of a clean environment and sustainable development. They were subsequently supported in their lawsuit by other civil society groups, notably those representing indigenous and Afro-Colombian populations. The lawsuit also had an environmental justice goal, namely the need to consult with indigenous and Afro-Colombian groups residing in the forests.<sup>85</sup> On January 23, 2008, the Constitutional Court

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<sup>84</sup> Law 1021 Apr. 20, 2006, D.O. on Apr. 24. In the part that was eventually challenged as not being enforced constitutionally, Law 1021 provided that the actions to stop deforestation and the illegal cutting of forests, also as a way to promote the sustainable development of the forestry sector, should be adopted and executed in a joint and coordinated manner by the State, civil society and the productive sector, tending therein to assure equal access to resources and their integrated use, within a framework of the basic requirements for conservation of ecosystems and their diversity. (Las acciones para detener la deforestación y la tala ilegal de los bosques, así como para promover el desarrollo sostenible del sector forestal, deberán ser adoptadas y ejecutadas de manera conjunta y coordinada entre el Estado, la sociedad civil y el sector productivo, propendiéndose al acceso equitativo a los recursos y a su aprovechamiento integral, en el marco de los requerimientos básicos para la conservación de los ecosistemas y su diversidad biológica.)<http://www.lexbase.biz/lexbase/normas/leyes/2006/L1021de2006.html> (last visited Apr. 17, 2008).

<sup>85</sup> GDIP website, Summary on high impact litigation <http://gdip.uniandes.edu.co/contenido/litigio.html> (last visited Apr. 17, 2008).

declared Law 1021 of 2006—the Forestry Law—unconstitutional, in light of the “recognition of ethnic and cultural diversity as a constitutional and fundamental principle of Colombian nationality.” Moreover, the Court said that Colombia is by definition “a democratic, participatory and pluralistic State and it is established with finality that the state is to facilitate the participation of everyone in the decisions that affect them.”<sup>86</sup>

Even for a relatively small nation like Panama, where civil society groups typically operate with limited funds, this Colombian example is promising since it provides a successful model—in a neighboring and historically connected country—of a constitutional challenge to a law affecting the environment that served socially and environmentally positive ends.<sup>87</sup> The Panamanian Constitution protects every citizen against ecosystem damage.<sup>88</sup> The Colombian example suggests just how effective a tool such a protection might be in the face of future challenges to develop reverted areas like the Northern Corridor project,<sup>89</sup> when linked to provisions like those creating “special treatment areas” under Panamanian Law 23 of 2003.<sup>90</sup>

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<sup>86</sup> *Presidency of the Colombian Constitutional Court, COMUNICADO DE PRENSA No. 01 de 2008* (“reconocimiento de la diversidad étnica y cultural como principio constitucional y fundamento de la nacionalidad colombiana. . . . define a Colombia como un Estado democrático, participativo y pluralista. . . ., que establece como finalidad del estado la de facilitar la participación de todos en las decisiones que los afectan; . . . .”) (on file with author).

<sup>87</sup> *See, e.g.,* Press Release, Lucia Lasso, Executive Director of the Alianza para la Conservación y Desarrollo (ACD), Situación Actual del Proyecto Hidroeléctrico Chan-75: construcción avanza gracias a la fuerza policial y no al diálogo (2008) (protesting at the lack of inclusion of affected indigenous communities in the construction of a major hydroelectric plant) (on file with author).

<sup>88</sup> *See* Constitución Política de la República de Panamá, Ch. 7, Art. 119.

<sup>89</sup> *See* Interview, *supra* note 18 and accompanying text.

<sup>90</sup> *See* No. 21, Gaceta Oficial, 2 July 1997, *supra* note 80.

## **V. Conclusion: Prospects for Preserving the Reverted Areas**

In sum, the above examples provide regional models for enhancing and strengthening Panama's legal mechanisms to defend the Metropolitan Park in Panama City and other reverted areas, and in the process to protect biodiversity. These examples come from countries that are similarly situated to Panama both with regard to the range and importance of their biodiversity and also with respect to many of their social and economic challenges. However, as the above example from Colombia suggests, it is not sufficient merely to have efficient laws on the books. It is also important to strengthen capacity in civil society to exploit available legal protections, as was imaginatively done by GDIP in Bogotá. The Study Space visit that gave rise to this paper suggests that this possibility exists in Panama.<sup>91</sup> Furthermore, it is essential to educate the public within and outside Panama about the importance of preserving protected areas and biodiversity in the crossroads of the Americas. A Biodiversity Museum is a fine idea and may itself serve an important environmental educational role, but the real exhibits should be protected outside the walls of a fantastic Frank Gehry creation.

In closing, therefore, having noted the need to enhance and deepen the reach of Panamanian environmental laws, it merits iteration of justifications and strategies for assuring protection of the environmentally valuable reverted areas within Panama.

### **a. Justifications**

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<sup>91</sup> See Lasso, *supra* note 87 (referring to the efforts of the Patronato del Parque Metropolitano and the non-profit ACD).

Two central justifications exist that support the argument to commence vigorous efforts to protect Panamanian reverted areas.

### i. Ecosystem Services

As noted above, there are many values and functions served by ecosystems,<sup>92</sup> In Panama, they serve both broader environmental health goals, such as genetic diversity, and shorter-term human health goals, such as protecting water quality. Thus, for example, in Panama this means providing the water supply essential to both urban residents and Canal operations and, thus, assuring the nation's economic stability in the future. In the case of Panama, in fact, an irony of the U.S. military occupation of the Canal Zone is that it left much of the surrounding forests, and their ecosystem services, largely intact. That is, however much suffering the U.S. occupation may have wrought, the presence of the colonial power resulted in an unexpected environmental bonus.<sup>93</sup> Consequently, before it is too late and these relatively pristine areas undergo further development for urban or agricultural use, there is an urgent need to recognize and seek to protect the potential economic benefits contained within the reverted areas. These benefits exist in the form of patentable products to be developed from rainforest plant and animal matter. As the examples of the laws of Brazil and the Dominican Republic demonstrate, well-crafted laws are an important starting point to help secure those goals. However, comprehensive laws

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<sup>92</sup> See Nagle, *supra* notes 38-40, Salzman, *supra* notes 40-41, Agvilar, *supra* note 41, Manfredo, *supra* note 42, Salzman, *supra* notes 43-44.

<sup>93</sup> Bruce A. Stein, Cameron Scott, & Nancy Benton, *Federal Lands and Endangered Species: The Role of Military and Other Federal Lands in Sustaining Biodiversity*, 54 BIOSCIENCE 339 (2008) (noting that a recent geographic survey of U.S. military lands noted the exceptionally high biodiversity on U.S. military lands).

detailing essential environmental values are not enough. The application of legal provisions must also be linked to a sustained commitment to the social and economic implications of environmental protection decisions for the entire society. Environmental justice principles provide an analytical framework to do so.

## ii. Environmental Justice

Given Panama's history, it is essential to understand the creation and maintenance of protected areas and biodiversity protection as serving the broader interest of all segments of Panamanian society to truly assure "the adequate development of human life."<sup>94</sup> Equality of opportunity and quality of life have not been characteristic features of Panamanian history.<sup>95</sup> First, the Pacific coast proved more attractive to foreign powers, whether Spanish, French or North American. "Historically, the Spaniards left the wet forests and swamps of the Caribbean to the Indian and Black communities."<sup>96</sup> They preferred to settle, instead, in the "drier central highlands and the Pacific coast," thus creating an ethnically and racially heterogeneous mix.<sup>97</sup>

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<sup>94</sup> See Constitución Política de la República de Panamá, Ch. 7, Art.118. Available at the Political Database of the Americas, <http://pdba.georgetown.edu/Constitutions/Panama/constitucion2004.pdf> (last accessed October 11, 2008).

<sup>95</sup> See, e.g., Consejo Académico de la Universidad de Panamá, *Tareas sobre la marcha: Reflexión en torno de la coyuntura*, in 123 TAREAS, 122 (May-Aug. 2006) (describing modest gains for some economic sectors through education since beginning of Panamanian republic, now imperiled by global capitalism).

<sup>96</sup> Stanley Heckadon-Moreno, *Spanish Rule, Independence, and the Modern Colonization Frontiers*, in CENTRAL AMERICA: A NATURAL AND CULTURAL HISTORY 179 (Anthony G. Coates, ed. 1997).

<sup>97</sup> *Id.*



This mixture, however, was one characterized by great social and economic inequality that persists to this day.<sup>98</sup>

In Panama, the historic inequality in the distribution of economic benefits and environmental burdens has been especially characteristic of the manipulation of the environment in and around the Canal. The Canal became reality with the obliteration of several towns submerged by the creation of Lake Gatún.<sup>99</sup> Early Canal workers suffered high rates of morbidity and mortality because of malaria and yellow fever.<sup>100</sup> With the eradication of yellow fever in 1905, workers came from around the world, although with distinctly different privileges. North Americans arrived to be paid in U.S. currency up to three times the salaries earned by other workers, while islands like Barbados supplied tens of thousands of mostly Afro-Caribbean workers to do the heavy lifting.<sup>101</sup> These workers were housed in “deplorable” accommodations, poorly fed and badly paid:

In sum, the North Americans organized in the Canal Zone a society based on racial discrimination in an imitation of that which ruled in the southern United States. As a consequence, the services and the facilities of white Americans were prohibited to blacks, who remained mar-

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<sup>98</sup> See, e.g., Benjamin Gardner, *Mutual Incomprehension or Selective Inattention? Creating Capacity for Public Participation in Natural Resource Management in Panama*, in Ashton, O’Hara and Hauff, *supra* note 14, at 137 (reporting extreme income stratification in Panama by early 1970s), CIA, *The World Factbook—Panama*, <https://www.cia.gov/library/publications/the-world-factbook/print/pm.html> (documenting that the highest 10% of household incomes have 35.7% of national wealth while lowest 10% have 1.2% of national wealth).

<sup>99</sup> Celestino Andrés Araúz, *Un sueño de siglos: el Canal de Panamá*, 123 TAREAS 5, 33 (May-Aug. 2006).

<sup>100</sup> *Id.* at 30.

<sup>101</sup> *Id.*

ginalized from the activities and the life of the white men on the “gold roll.”<sup>102</sup>

David McCullough, the Canal’s popular historian, estimated that there were 500 deaths per kilometer along the 80 kilometer Canal route.<sup>103</sup> Of these, during the period of North American control, it is estimated that of 5,609 deaths, 4,500 were of African descent. By contrast, only 350 white North Americans died.<sup>104</sup>

This is a heavy toll and is appropriately classified as an environmental justice issue since it related to acts of great environmental consequence for all Panamanians, with disproportionate burdens suffered by the most vulnerable segments of the population.<sup>105</sup> This historical burden demands consideration of future manage of the environmental resources in and around the Canal. The long-term consequences of that history should be redressed by implementing environmental protection strategies benefitting all Panamanians. An added difficulty, however, is that for many years, Panamanian sovereignty was tied to acts that

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<sup>102</sup> *Id.* at 35 (“*En definitiva, los norteamericanos organizaron en la Zona del Canal una sociedad basada en la discriminación y la segregación raciales a imitación de lo que imperaba en el sur de los Estados Unidos. En consecuencia, los servicios e instalaciones de los blancos estadounidenses estaban vedados para los negros, que permanecían marginados de las actividades y de la vida de los hombres de gold roll.*”)

<sup>103</sup> See generally David McCullough, *PATH BETWEEN THE SEAS: THE CREATION OF THE PANAMA CANAL, 1870-1914* (1978).

<sup>104</sup> *Supra* Lasso note 87.

<sup>105</sup> See Principles of Environmental Justice, proceedings, *The First National People of Color Environmental Leadership Summit* xiii (Oct. 24-27, 1992), in Clifford Rechtschaffen & Eileen Gauna, ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION 22-24 (2002) (for one early list defining environmental justice principles); See, e.g., THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS (Sheila Foster & Michael B. Gerrard, eds. 2d. ed. 2008) (discussing environmental justice generally).

sought to control and manage the tropical forest, specifically through forest clearing and agrarian expansion.<sup>106</sup> Perhaps partly as a consequence, environmental protection strategies that would protect the forests are now often viewed by the poorest actors in the agrarian sector as strategies to keep them impoverished.<sup>107</sup>

Yet as a former Panamanian official of the U.S.-controlled Panama Canal Commission, which preceded the Panamanian-controlled Panama Canal Authority, wrote about the use of the Panama-operated Canal: “[w]e must demand of those who, at present govern and make laws affecting us, that the funds coming from the operation of the Canal must be destined to projects that will better the condition of all Panamanians.”<sup>108</sup> The same must be said of the management of biodiversity conservation and preservation within the reverted areas. Just as the Canal provides direct economic resources to the Panamanian treasury in the form of transit fees that should be used for the benefit of all, so too the reverted areas should be recognized for the economic resource they are to Panama—resources that should be protected and used intelligently for the benefit of all Panamanian people.

### **b. Strategies and Possibilities**

The question, then, is how best to assure the protection and sound management of the protected areas. That is, how should the discussion about use of ecosystem resources proceed? How can the organizing principle of

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<sup>106</sup> Gardner, *supra* note 98, at 135.

<sup>107</sup> Heckadon-Moreno, *supra* note 96, at 212.

<sup>108</sup> Humberto R. Legnadier, *Retos al Canal de Panamá*, 123 TAREAS 55, 59 (May-Aug. 2006) (“*Debemos exigirles a los que, en el presente, nos gobiernan y legislan, que los fondos provenientes de la operación del Canal sean destinados a proyectos que mejoran la condición de todos los panameños*”).

environmental justice be secured? At least three strategies can be identified.

### i. Education

Environmental education is of central importance. This principle has been articulated at the international level in instruments like the Convention on Biological Diversity<sup>109</sup> and, within Latin America, in instruments like the Brazilian<sup>110</sup> and Colombian Constitutions.<sup>111</sup> Such provisions are an important step towards assuring protection of the reverted areas and other environmentally sensitive lands, but they are not enough. These provisions need to be fleshed out to include detailed education about the functions and values of ecosystems, so that the population understands that preserving protected areas is not merely a

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<sup>109</sup> Convention on Biological Diversity, Art. 13, <http://www.cbd.int/convention/convention.shtml> (last visited Apr. 17, 2008).

<sup>110</sup> Article 79 of the 1991 Constitution of the Republic of Colombia provides, in relevant part, that “[i]t is the obligation of the State to protect the diversity and integrity of the environment, to conserve areas of special ecological importance and support education for the achievement of these ends.” (*“Es deber del Estado proteger la diversidad e integridad del ambiente, conservar las áreas de especial importancia ecológica y fomentar la educación para el logro de estos fines.”*), available in the Political Database of the Americas of Georgetown University, <http://pdba.georgetown.edu/Constitutions/Colombia/col91.html> (last visited Apr. 17, 2008).

<sup>111</sup> Article 225 § VI of the 1988 Constitution of the Federative Republic of Brazil provides that all people have the right to “an environment in equilibrium,” achieved in part by “promoting environmental education at all levels of study and raising the consciousness of the public for the preservation of the environment.” (*“. . . promover a educação ambiental em todos os níveis de ensino e a conscientização pública para a preservação do meio ambiente . . .”*), available at the Political Database of the Americas of Georgetown University, <http://pdba.georgetown.edu/Constitutions/Brazil/brazil05.html> (last visited Apr. 17, 2008).

matter of providing the relative luxury of an urban oasis for recreation.<sup>112</sup> Examples of environmental education in Panama exist that are both noteworthy and exciting in their potential for replication.<sup>113</sup> The point is that there exists value in systematizing and institutionalizing these activities at the national level, and to begin to do so in Panama City, with the highest population concentration in the country and thus, arguably, the greatest immediate threat to biodiversity protection. However, this must be done by recognizing and taking into account the historical class and other social divisions of a “highly stratified society in which policy decisions are most responsive to values and demands articulated by its wealthy and politically powerful classes.”<sup>114</sup> In short, there are considerable obstacles to overcome in achieving a situation where there is informed public participation based on mutual trust.<sup>115</sup>

## ii. Public Participation

Broad-based public participation, following upon the heels of historically informed and socially aware environmental education is also essential. This will mean implementing a process that includes all stakeholders affected by a proposal in the process of deciding how a reverted area (or a particular resource existing within it) is to be

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<sup>112</sup> See Nagle, *supra* notes 38-40, Salzman, *supra* notes 40-41, Agvilar, *supra* note 41, Manfredo, *supra* note 42, Salzman, *supra* notes 43-44.

<sup>113</sup> See, e.g., Jorge Ventocilla & Valério Núñez, *Experiencias de educación ambiental en Kuna Yala*, in Heckadon-Moreno, *supra* note 1, at 228-32 (describing an environmental education project of the Smithsonian Tropical Research Institute in Caribbean coast indigenous settlement), Loyda E. Sánchez, Rosabel Miró, Rosa Montañez & Norita Scott-Pezet, CONSTRUYENDO UNA EXPERIENCIA PARTICIPATIVA DE CONSERVACIÓN 67-68 (2007) (describing one portion of a community participation program in monitoring for Panama Bay).

<sup>114</sup> Gardner, *supra* note 98, at 137.

<sup>115</sup> Maxwell & Williams, *supra* note 31, at 159 (describing difficulties in establishing community participation in Panama).

used. As shown elsewhere in this volume, that principle of public participation is not one that has always been widely supported in Panama.<sup>116</sup> Such participation is an essential first step to insure that reverted areas are protected in a way that benefits all Panamanians. To guarantee long-term use beneficial to all, participation needs to be incorporated into an elaborated management scheme like those in the cited South American and Caribbean laws described above. The process of participation needs, furthermore, to incorporate education about the economic and environmental value of protected areas.

In this, the discipline of ecological economics could prove of vital use to Panama. As the ecological economists explain, the discipline is a “transdisciplinary way of looking at the world . . . essential if we are to achieve the three interdependent goals of ecological economics,” namely “sustainable scale, fair distribution, and efficient allocation.”<sup>117</sup> In other words, sophisticated metrics exist both to value and defend the creation of protected areas and biological diversity. The use of such metrics will make it possible to avoid the suggestion that the environment is a luxury available only to the rich. They can also be applied to help explain to a population that environmental protection of spaces like the reverted areas is a necessity for all.

The remaining question is how to link these goal—that is, how to tie the effort to secure broad public participation to a deeply informed, inter-disciplinary analytical framework for understanding environmental problems. One possibility would be a participatory technique comparable to the participatory budgeting used in southern Brazil and copied elsewhere.<sup>118</sup> The idea is simple: to establish an

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<sup>116</sup> Gonzalez, *supra* note 11, at 321-33.

<sup>117</sup> Robert Costanza, John Cumberland, Herman Daly, Robert Goodland & Richard Norgaard, *AN INTRODUCTION TO ECOLOGICAL ECONOMICS* 79 (St. Lucie Press 1997).

<sup>118</sup> See, e.g. Boaventura de Sousa Santos, *Participatory Budgeting in Porto Alegre: Toward a Redistributive Democracy*, in Boaventura

organized system of social administration that gives communities at small, manageable levels the power to participate in the articulation and implementation of strategies to address the social challenges they face. A central feature of such participatory budgeting is to assure such grassroots participation at the outset of the decision making process, so that local decisions actually contribute to the final actions taken by larger units of social organization—whether cities, states or national governments. In this way, the participation is truly democratic. Such a model could be used, similarly, for participatory ecosystem management.

### **iii. Financial Support**

As a small country with limited financial resources, Panama cannot do this alone. Therefore, financial assistance is crucial. One means to provide assistance is through international legal mechanisms. Indeed, one would be hard pressed to find a more compelling example demanding United States participation in the CBD than Panama. As the principal creator and beneficiary of the area's principal economic resource for over the last hundred years, the U.S. bears a continuing financial obligation to help protect the biological integrity and sound ecosystem management of the reverted areas it once controlled. In fact, shortly before the end of the U.S. colonial presence, the need to protect the reverted areas and other parts of the Panama Canal watershed was recognized by the U.S. Congress in considering appropriations for Fiscal Year 1999.<sup>119</sup> Such financial support should be continued as both an ex-

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Sousa Santos, *DEMOCRATIZING DEMOCRACY: BEYOND THE LIBERAL DEMOCRATIC CANON* 305-276 (Verso 2005).

<sup>119</sup> United States Agency for International Development, U.S. CONGRESSIONAL PRESENTATION: PANAMA (1999) (discussing proposed Congressional appropriations and "short-term" commitment to preserving reverted areas prior to Canal reversion), available at <http://www.usaid.gov/pubs/cp99/lac/pa.htm> (last visited Feb. 10, 2008).

pression of U.S. interest in sound environmental management and economic growth policies that respect the biological integrity of the geographical region in which we live. The problem is that direct financial assistance rarely comes without conditions that benefit the donor. Given the long and tortured history of the two nations, one dominated by the stark power and economic imbalances between them, direct financial aid could likely impose conditions unacceptable to 21<sup>st</sup> century Panamanians.

Adoption of the CBD would thus help protect biodiversity hotspots like Panama without the complications of bilateral assistance agreements.<sup>120</sup> Of course, funds would not specifically go from the U.S. to Panama. However, given Panama's richness in biodiversity, it would surely be an indirect beneficiary of U.S. participation in the CBD. In addition, U.S. membership in the CBD would affirm to Panama and its citizens the recognition by an important and respected ally of the importance of protecting Panama's greatest environmental assets.

Another option that would involve more direct investment in protecting reverted areas is a model already used by the two nations. As noted, given the extended colonial relation between the U.S. and Panama, any direct investment need be accepted with caution by virtue of the continued and future control they imply. Importantly, however, a recent example of such investment appears to have been structured in such a way as to reduce the possibility for the imposition of conditions benefitting the donor only. In July 2007, the Panamanian Environmental Authority (Autoridad Nacional del Ambiente, or ANAM) and the U.S. Agency for International Development (U.S. AID) announced the creation of "a fund to finance biodiversity conservation programs in the watershed of the Panama

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<sup>120</sup> See Convention on Biological Diversity, *supra* note 111, Art. 20, 21 (detailing the financial responsibilities and mechanisms created by the Convention).



Canal.”<sup>121</sup> Initially funded with \$ 2.4 million to focus “sustainable development and poverty reduction” programs in several national parks and their watersheds, on its face this fund at least represents a promising, if modest, beginning.<sup>122</sup> A key aspect of this funding is that it is administered by the private non-profit Natura Foundation (*Fundación Natura*). This is important in that such independent management can help insure that decisions benefiting Panama are, in the end, made by Panamanians. It should be noted, however, that the fund is not focused specifically on the reverted areas.<sup>123</sup> Nonetheless, the model offers evidence of a strategy linking environmental protection and economic development in the broadest sense for the benefit of all Panamanians.

Furthermore, and, again given the long, complex and unequal relationship between the two countries, it is important that any such assistance not only be administered by non-profit, local recipients, but also that any conditions linked to the administration of such aid be imposed to benefit all Panamanians. Specifically, such aid should be given contingent upon a Panamanian commitment to environmental justice. Domestically, the United States government committed itself to environmental justice as a federal responsibility with the 1993 signature by President Bill Clinton of Executive Order 12,898.<sup>124</sup> When there is direct U.S. assistance for protection of biodiversity in Panama and

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<sup>121</sup> See ANAM, Press Release, available at <http://www.anam.gob.pa/notas%20de%20prensa/julio2007.htm> (last visited Feb. 11, 2008).

<sup>122</sup> *Id.*

<sup>123</sup> See Fundación Natura Panamá, *Fondo para la Conservación y Recuperación de la Cuenca Hidrográfica del Canal de Panamá*, available at [http://www.naturapanama.org/index.php?option=com\\_content&task=view&id=6&Itemid=10](http://www.naturapanama.org/index.php?option=com_content&task=view&id=6&Itemid=10) (last visited Apr. 17, 2008).

<sup>124</sup> See, e.g., Bradford C. Mank, *Executive Order 12,898*, in Foster & Gerrard, *supra* note 105, at 103-07.

other countries, a similar requirement could be imposed. In this way, the U.S. can assure that it does not again help the Panamanian elite perpetuate the inequalities that it both tolerated and benefitted from for so long.

To be sure, there is a place for bilateral cooperation of the type that has long existed in and benefitted Panama. Most prominently, the Smithsonian Tropical Research Institute in Panama has since 1923 conducted extensive and important biological diversity work there.<sup>125</sup> In addition, smaller institutions like the Missouri Botanical Garden played a central role in the early decades of the last century in documenting and thus seeking protection of the nation's biological riches.<sup>126</sup> The above emphasis on local Panamanian control is not meant to suggest that such U.S. and other foreign-based institutions should not continue to play valuable research roles in protecting biodiversity in Panama's reverted areas and elsewhere in the isthmus. The point, on the contrary, is that these institutional examples are admirable precedents of cooperation that worked and continues to work on behalf of Panama in ways that both respect its sovereignty and also seek to protect its environmental resources.

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As the prominent Panamanian rural sociologist Stanley Heckadon-Moreno has noted, environmental consciousness is on the rise in Panama and throughout Central America. With it, people are "demanding greater account-

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<sup>125</sup> See Smithsonian Tropical Research Institute, *About STRI*, available at [http://www.stri.org/english/about\\_stri/index.php](http://www.stri.org/english/about_stri/index.php) (last visited Apr. 18, 2008).

<sup>126</sup> See, e.g., Stanley Heckadon-Moreno, *Exploraciones botánicas de Robert Woodson en Panamá (1935 y 1938)*, in *SELVAS ENTRE DOS MARES* 280-96 (2006) (documenting the role of the Missouri Botanical Garden).

ability of governments and private enterprises.”<sup>127</sup> This is reflected in the fight of the Panamanian-led chapter of the local Audubon Society against the Northern Corridor and its consequences.<sup>128</sup> The development of national parks throughout the region, beginning in the 1970s, has experienced growing pains but nonetheless shows signs of increasing sophistication.<sup>129</sup> In brief, in Central America, “[t]he new model must seek harmony between man and nature through the substantial conservation and appropriate exploitation of biodiversity.”<sup>130</sup> Panama’s reverted areas—and notably the Metropolitan Park – are an ideal opportunity to put that commitment to the test. A Frank Gehry-designed Biodiversity Museum could thus become merely the portal through which to enter, begin to understand and appreciate Panamanian biodiversity. Exhibits in the real museum, income generating and environmental-health protecting tropical forests rich in ecosystem services, could then be visited and used responsibly for generations to come.

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<sup>127</sup> Heckadon-Moreno, *supra* note 96, at 213.

<sup>128</sup> See *supra* notes 18-22 and accompanying text.

<sup>129</sup> Heckadon-Moreno, *supra* note 96, at 213-14.

<sup>130</sup> *Id.* at 214. In the particular Panamanian context, these challenges are discussed in a paper written on the eve of the transfer of the Canal properties by Eileen Petzold-Bradley, *Panama’s Non-Traditional Security Concerns: Approaching the 21st Century* (1997), available at <http://bibliotecavirtual.clacso.org.ar/ar/libros/lasa97/petzoldbradl.pdf> (last visited Apr. 16, 2008).



ESSAY

**TITLING AND UNTITLED HOUSING IN PANAMA CITY**

*Jorge L. Esquirol\**

**I. Introduction**

Panama City is experiencing a luxury condominium building explosion. A wall of high-rises now dominates the city's coastal skyline, and more are underway despite mounting supplies of unsold units. This type of development seriously impacts its surroundings. Public utilities struggle to meet the demand for new installation and high load services. Single family neighborhoods are choked by towers rising all around them. And, an already deteriorating environment and creaky infra-structure strain against the competing goals of increased development, quality of life, urban transportation, and environmental protection.

At the same time, migration to the city from the Panamanian countryside continues unabated, and population growth continues to press on the stock of affordable housing. The over-sized construction is targeted to the luxury and international markets. As a result, most local housing needs are satisfied by privately-developed tract housing

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in the city's outskirts for those who can afford it; substandard housing in the older parts of the city; and squatting on public or private land. Strikingly, at the very moment that a fleet of residential skyscrapers appears on the waterfront, many Panamanians continue to build makeshift homes and neighborhoods on squatted land.

This Essay examines the role of law in promoting different housing patterns, especially low-income options. A common form of the latter is squatting on public land, known as a type of "informal" housing. Over the past two decades, development professionals have urged the legal formalization of these arrangements, arguing their great economic potential. On public land, property is to be privatized and titled. On "invaded" private land, the state is to negotiate and pay for the transfer of ownership from the original titleholder. This titling agenda has received the overwhelming support of international development institutions such as the World Bank and the Inter-American Development Bank. The government of Panama, along these same lines, has instituted a robust titling program. One of its express objectives is reducing the incidence of informality.

"Informality," as described in law, sociology, and economics, can have a number of different meanings, ranging from the underground economy to outright illegality. Informality, in legal theory, can also mean different things. It can refer to legal standards as interpreted by courts, areas of discretion exercised by government officials, legal deference to customary business practices, social norms different from official law, governmentally tolerated areas of legal non-enforcement, and the like. Legal informality in housing has its own particular forms. It can refer to legal yet unregistered ownership, illegal occupation of land, unauthorized subdivision of property, legally documented sale of squatted land, "squatters rights," illegal sale of collective land, on-going violations of building and housing regulation. It also encompasses less commonly considered

examples such as official discretion in zoning codes and processes, standards in laws and legal judgments, indeterminacy in the interpretation of legal rules, and other possibilities.

This essay examines the concept of “legal informality” in the context of several Panama City neighborhoods. The discussion leads to five basic points. First, it maintains that the notion of informality has been instrumentalized as an argument for development-sponsored legal reform. It has been used, with different jurisprudential meanings, to advance one or another conception of private property, either subordinate to public regulation or paramount and inviolable. In either case, the existence of informality has been marshaled to demonstrate the need for legal change.

Second, the currently-prevailing, rhetorical use of informality supports government titling programs for squatters on public land. These internationally-supported efforts reinforce a classical and uniform conception of private property. The latter is promoted as informality-reducing and thereby in the best interests of low-income residents: i.e., squatters’ informal assets are to be converted into formal legal and economic value. When analyzed more closely however, the switch is not so clearly advantageous. Additionally, titling this particular conception of private property legitimates its societal singularity and significantly forecloses alternative property conceptions.

Third, the specific situation of untitled housing on public land is more usefully understood as an alternative within law and not separate from it. Untitled homeownership is a product of the combination of existing private property law, administrative regulations, and de facto government policy. Its existence can be seen as purposeful as a political matter. My claim that this type of “informality” is part of the legal system is neither an endorsement nor a denunciation of any existing practice labeled informal. For example, it does not suggest that any grab of public land should be unconditionally condoned or that other practices

labeled informal should be automatically proscribed. Rather, it is limited to providing a more realistic assessment of property regimes in which one of its elements is untitled housing on public land. I leave for another day the discussion of illegal occupation of private land.

Fourth, “informality,” in a different sense, is no less a dimension of titled property regimes. Classical private law, for example, assigns significant legal interests to titled owners. It provides a range of privileges, affording considerable amounts of discretionary private power. This allows title-holders to externalize a number of social costs and capture public benefits more effectively than under untitled conditions. In this way, a single model of classical property may primarily benefit large financial interests able to accumulate significant holdings.

Fifth, the relative indeterminacy of legal rules provides less predictability than ordinarily assumed of the official legal system. A significant amount of variability in the application of zoning codes and indeterminacy in the interpretation of property rules are inherent and common aspects of liberal legal regimes. As a result, focusing on housing informality as foremost a question of titling squatters is misleading.

All of these ideas, however, are more fruitfully considered in disaggregated fashion as demonstrated in the examples of Panama City neighborhoods discussed in more detail below.

## II. Background

Panama gained its national independence not from Spain but rather from Colombia.<sup>1</sup> At the beginning of the twentieth century, negotiations between the United States

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<sup>1</sup> See Robert Freeman Smith, *Latin America, The United States and the European Powers, 1830-1930* in THE CAMBRIDGE HISTORY OF LATIN AMERICA, VOL. IV C. 1870-1930, 101,101.



and Colombia to build a trans-oceanic canal in Central America through Panama came to a head.<sup>2</sup> After the Colombians proved difficult negotiators, the U.S. extended support to local Panamanian leaders eager for greater autonomy.<sup>3</sup> With U.S. warships anchored off the coast, Panama declared its independence in 1903, immediately recognized by the United States.<sup>4</sup> Shortly thereafter, the new Republic of Panama granted the U.S. a concession to build the Panama Canal and, along with it, a ten-by-fifty mile swath of land across the middle of the national territory.<sup>5</sup> The Canal was completed in 1914.<sup>6</sup> It was, throughout the twentieth century, considered vital to U.S. national security interests, and during this period the Canal and the Canal Zone were effectively under U.S. sovereignty.<sup>7</sup> Even off-base residential housing remained the property of the U.S. government and was centrally assigned and leased to its occupants.<sup>8</sup>

After World War II, Panamanians became increasingly resentful of the U.S. presence, punctuated by bloody riots in 1964.<sup>9</sup> Responding to the rising demands of Pana-

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<sup>2</sup> *Id.*

<sup>3</sup> See DAVID BUSHNELL, *THE MAKING OF MODERN COLOMBIA: A NATION IN SPITE OF ITSELF* 152-54 (1993) (noting that the Colombian Senate voted unanimously against ratification of the previously negotiated Hay-Herrán Treaty, presumably on the grounds the permanent grant of control to the U.S. over the canal zone offended Colombian sovereignty).

<sup>4</sup> See Freeman Smith, *supra* note 1.

<sup>5</sup> *Id.*; Convention between the United States and the Republic of Panama for the construction of a ship canal to connect the waters of the Atlantic and Pacific oceans, 33 Stat. 2234 (Nov. 18, 1903).

<sup>6</sup> PETER M. SÁNCHEZ, *PANAMA LOST? U.S. HEGEMONY, DEMOCRACY AND THE CANAL* 79 (2007).

<sup>7</sup> See David G. Hanrahan, *Legal Aspects of the Panama Canal Zone – In Perspective*, 45 B.U. L. REV. 64, 80-81 (1965).

<sup>8</sup> See Sánchez, *supra* note 6, at 67.

<sup>9</sup> See WALTER LAFEBER, *THE PANAMA CANAL: THE CRISIS IN HISTORICAL PERSPECTIVE* 108-09 (1989); see also OMAR JAÉN SUÁREZ, *LAS*

manian officials, in 1977 Jimmy Carter began the return of the Canal Zone and the Canal to the Republic of Panama, to extend over a twenty year period.<sup>10</sup> Before the hand-over was complete, in December 1989 George H.W. Bush ordered a military invasion under the pretext of self-defense, arguing Panamanian aggression and protection of the Canal.<sup>11</sup> Thereafter, with past Panamanian president and army general Manuel Noriega imprisoned in the U.S., the final transfer was made in 1999 to local civilian authorities. The Panamanian Defense Forces, the country's highly politicized military, was turned into a police force after the U.S. invasion.<sup>12</sup> A few years later it was officially disbanded by a constitutional amendment.<sup>13</sup>

The Canal Zone was under effective U.S. government control for nearly a century.<sup>14</sup> By the time it was completely returned to Panama, it was home to two remaining U.S. military bases, as well as a number of residential areas, neighborhoods, schools and stores. Branches of U.S. universities such as Florida State University and Texas A & M have satellite campuses there, formerly serving military personnel, their children, accompanying civilians, and affluent Panamanians. Shortly after reverting to Panama, most residential properties in the Zone were sold or auc-

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NEGOCIACIONES SOBRE EL CANAL DE PANAMÁ: 1964-1970 125-53 (2002).

<sup>10</sup> See Sánchez, *supra* note 6, at 151-58.

<sup>11</sup> See John Quigley, *The Legality of the United States Invasion of Panama*, 15 YALE J.INT'L L. 276 (1990) (discussing the illegality of the invasion under international law).

<sup>12</sup> ROBERT C. HARDING, *THE HISTORY OF PANAMA* 120-22 (2006).

<sup>13</sup> *Id.*; see MAX HILAIRE, *INTERNATIONAL LAW AND U.S. MILITARY INTERVENTION IN THE WESTERN HEMISPHERE* 115-23 (1997); JOHN LINDSAY-POLAND, *EMPERORS IN THE JUNGLE: THE HIDDEN HISTORY OF THE U.S. IN PANAMA*, 188 (Duke University Press 2003).

<sup>14</sup> The Panama Canal Treaty, Sept. 7 1977, 16 I.L.M. 1021 (setting up the terms for reversion to Panama).

tioned off to individuals, corporations, and organizations.<sup>15</sup> Government sales of these properties transferred full formal title to successful bidders. The properties themselves range from typical middle class ranch houses found in any U.S. suburb to the more Mediterranean style of Coral Gables, Florida.<sup>16</sup> Although there is no longer a barbed wire fence or check point to get through, the change from one side to the other is still dramatic. The aesthetics and zoning preferences of U.S. occupation contrast with the denser Panama City and more crowded building patterns right beyond the former fence.<sup>17</sup> In fact, the funnel-like configuration of Panama City is directly related to the U.S. presence, cutting off lands to the north and the west and forcing the city to grow east and northeast.<sup>18</sup>

This Essay makes reference to several neighborhoods in and around Panama City subject to different regulatory regimes, both *de jure* and *de facto*.<sup>19</sup> The discussion of different housing patterns is meant to highlight differences among operative conceptions of property in Panama

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<sup>15</sup> See LINDSAY-POLAND, *supra* note 13, at 177-82. ("The commercial or neoliberal vision has generally dominated Panamanian policy and actions for the reverted areas."), Sarah N. Whitney, *Will the Goals be Met? An Examination of ARI's General and Regional Plans with respect to Protected Areas within the Inter-oceanic Region, Panama*, in PROTECTING WATERSHED AREAS: CASE OF THE PANAMA CANAL 93-105 (March S. Ashton, Jennifer L. O'Hara, & Robert D. Hauff, eds. 1999) (referring to the Panamanian Inter-oceanic Region Authority ("ARI") which is now defunct: "ARI's leadership feels that the key to its success is international investment in the inter-oceanic region.")

<sup>16</sup> See Stephen Frenkel, *Geographical representations of the 'Other': the landscape of the Panama Canal Zone*. 28 J. HIST. GEOGRAPHY 85, 91-96 (2002).

<sup>17</sup> *Id.* at 94-95.

<sup>18</sup> See Sánchez, *supra* note 6, at 64-65.

<sup>19</sup> These descriptions are based, for the most part, on personal observation during a group research trip to Panama City in December 2007, organized by Daniel Suman and Colin Crawford, and sponsored by the Georgia State University Center for the Comparative Study of Metropolitan Growth.

City. It is also meant to describe the relationship of the different classes of property holders. Panamanian law provides flexible zoning regulations and tax incentives for titled construction. At the same time, the city continues to experience growth of squatter settlements. It would seem that shiny skyscrapers are a sign of progress and development while self-built homes on public land recall an enduring third-worldness. Pointedly, however, some of the titled construction is greatly exacerbating the city's urban problems, while some of the squatter settlements actually reflect certain positive, public policy objectives.

Indeed, the regime of squatter settlements is nothing other than a different state regulatory scheme. It has well-known drawbacks, but it also has some potential benefits less commonly considered. Conversely, titled ownership of classical property rights has a number of known benefits, but it can also have significant disadvantages that are not so commonly acknowledged. Moreover, the different alternatives balance competing rights and regulatory claims in different ways. Formally titled classical property merely represents one line of demarcation of the relationship with the state and with other right holders. Specifically, the neighborhoods considered in this Essay consist of: (1) the former U.S. Air Force officers' residences in Albrook auctioned to private purchasers after the return of the Panama Canal Zone; (2) high rise condominiums in the city center; (3) tracts of titled "popular" (low income) housing by private developers; and, (4) several untitled settlements within the metropolitan area.

### **A. Ciudad Jardín Albrook**

The Ciudad Jardín Albrook consists mostly of former U.S. Air Force officers' quarters, now privately

owned.<sup>20</sup> The area consists of approximately 400 homes built primarily in the 1950's.<sup>21</sup> These are typically large two-story, single family residences, many of them abutting pristine shared tropical gardens and parks. They exemplify the "garden city" model of residential living. The area is nicely manicured with quiet neighborhood streets—at least until recently—connecting the several blocks of two-story homes. This is not the scenario of most development models. The typical model contemplates the titling of land occupied by squatters, so as to provide occupants with full ownership rights to finance and sell their holdings. The Albroom case consists of public land previously used as military housing now converted to private property. In this case, government property was sold to the highest bidder. The example raises some interesting questions about titling programs, but its role here is rather by way of illustration of the frustrated expectations of Albroom's titleholders, discussed in detail further below.

### **B. High-Rise Condominiums in the City Center**

Another example of title-holding is the Panama City condominium buildings mentioned above. Several waterfront areas, such as Punta Pacífica and Punta Paitilla, have been prime zones for developers.<sup>22</sup> These projects are internationally marketed and are particularly targeted to U.S. retirees, Colombians, and Venezuelans. As of the end of 2007, approximately 40,000 new units were being con-

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<sup>20</sup> Lina Vega Abad, *De base militar a "collage"*, LA PRENSA, Mar. 13, 2005 (noting the "Panamization" of Albroom).

<sup>21</sup> See About Aprojal, [http://albroom.org/html/sobre\\_aprojal.html](http://albroom.org/html/sobre_aprojal.html).

<sup>22</sup> See generally Mario Lungo, *Land Management and Urban Planning in San Salvador and Panama City*, LINCOLN INSTITUTE OF LAND POLICY, 26 (2004) (two thirds of housing investment occurs in two zones, the financial center and downtown).

structed.<sup>23</sup> One of the major appeals of investing in Panama real estate is the generous 20-year, transferable property tax exemption. Owners of property with values over \$75,000 would otherwise pay 2.1% in annual taxes.<sup>24</sup> Not all of these areas were previously residential. They include waterfront zones earlier inhabited by the urban poor and local fishermen. Still other developments are built on filled in land along the water's edge. In any case, most of these high rises hug the crescent of Panama Bay, between the Bella Vista neighborhood and the ancient remains of the first settlement of Panama City. High-rises are increasingly being erected in middle class and upper middle class low-rise family neighborhoods. The main districts threatened in this way are the Bella Vista, La Exposición and San Francisco neighborhoods, the former with its 1920's art deco houses particularly cherished by local architects and citizen

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<sup>23</sup> *Is the party in Panama over? Panama's developers hoped to lure U.S. retirees with cheap prices. Then came speculators, 380 tower projects representing more than 40,000 condos, rising prices and the possibility of a bust*, MIAMI HERALD, Aug. 21, 2007.

<sup>24</sup> Tax liability can actually be as low as one percent if eligible for the alternative tax which requires having submitted a property value "self-appraisal" by December 31, 2007. Combined with the exemption provisions exempting the owner from annual property taxes for twenty years, an over-valued self-appraisal also lowers tax liability upon resale. See Artículo 81 de la ley No. 6 de Feb. de 2005 (granting a twenty year exemption on property taxes for new construction with permits obtained prior to August 31, 2005), amended by Ley No. 34 de 9 de Nov. de 2005, Gaceta Oficial número 25,424 (extending the exemption to new construction with permits obtained prior to September 1, 2006) (On March 10, 2008, the Panamanian National Assembly once again passed – after a Presidential veto the first time—an additional extension, not yet signed by the President as of this writing, to the 20 year exemption for building permits obtained prior to July 1, 2009 and occupation permits secured by December 31, 2011. Properties valued over \$250,000 and not meeting the deadlines only enjoy the default 5 year tax exemption).

preservation groups.<sup>25</sup> Large homes on proportionally-suited lots have been bought and then razed in order to erect large skyscrapers in their place.

### C. Working-Class Tract Housing

A third example of titled property is the working class tract housing developed by private capital. These are constructed by private developers. They are typically built on a several acre plot of land with several long, grid-like streets. Astride each street are rows of identical, small square townhouses. They are tight one-story structures with very little, if any, greenery. These developments usually have one access road into and out of the neighborhood feeding onto the main highway. Many of these projects are built several miles out, along main arteries to Panama City. Homes are offered at prevailing market prices with full title, and thus—if purchasers qualify—are eligible for mortgage financing.

### D. Three untitled neighborhoods

Three examples of squatter settlements are the neighborhoods of Felipillo, Loma Cobá, and Boca La Caja.<sup>26</sup> The discussion here is limited to title-less occupation of state land—the case emphasized by development professionals.<sup>27</sup> The first two examples were both mass unauthor-

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<sup>25</sup> See Lina Vega Abad, *Crean foro ciudadano para defender la ciudad*, LA PRENSA, Oct.27, 2006; see also Alianza ProCiudad, [www.alianzaprociedad.org](http://www.alianzaprociedad.org).

<sup>26</sup> See RAUL LEIS, LA CIUDAD Y LOS POBRES 121-37, (1980) (discussing the history of squatter settlements in Panama); See, e.g., Álvaro Uribe, *La integración del área del canal y la expansión de la Ciudad de Panamá* (Lincoln Institute Research Report No. LP00z20, 2000).

<sup>27</sup> See THOMAS MCKINLEY LUTZ, SOME ASPECTS OF COMMUNITY ORGANIZATION AND ACTIVITY IN THE SQUATTER SETTLEMENTS OF PANAMA CITY (Land Tenure Center Library, University of Wisconsin,

ized occupations of state land.<sup>28</sup> On the eastern end of Panama City, Felipillo was a state-owned sugar mill subsequently controlled by the Panamanian military in the 1970's. After the U.S. invasion in 1989 and the abolition of Panama's national army, squatters settled on the unmaintained land and over a period of fifteen months built a neighborhood of over 1000 houses on 120 hectares.

Loma Cobá is located in the Canal Zone. It is considered an example, by some, of the poor's integration in the reverted areas. The area is a complex of neighborhoods located on the west side of the Canal, next to the communities of Arraiján and Veracruz that, although not officially part of Panama City, are functionally part of it. It was initiated in 1986 on lands that had reverted to Panama since 1979 but remained vacant. The process of settlement was slow but unceasing and produced a self-constructed housing complex with a population of nearly 25,000 inhabitants.<sup>29</sup> The land was leveled and individual plots were traced for individual home construction. Notably, regular plots were laid out with room for streets and sufficient yard space for the installation of utilities. In particular, space was sufficiently allocated to allow for septic tank installation. Furthermore, residents organized committees dedicated to education, health, garbage disposal, streets, water, women, work and elections.<sup>30</sup> As such, some of the practi-

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Madison 1972) (discussing squatter settlements in Panama City circa 1966).

<sup>28</sup> *Would be squatters routed*, THE PANAMA NEWS, Mar. 16-29, 2003 ("Panama tends to be tolerant when squatters invade public lands, often at the urging of construction material vendors. When private lands are taken and the owners show title and complain, as COFINA did, the police usually move in.")

<sup>29</sup> While "pirate" developers of informal settlements are not common in Panama, incidents of politician incited land grabs on private and indigenous lands have however been widely reported. See, e.g., *Legislator incites Darien land grab*, and *Representante organizes Chorrera land grab*, THE PANAMA NEWS, Aug. 3 (2003).

<sup>30</sup> See generally LINDSAY-POLAND, *supra* note 13, at 181.



cal realities of living in this area and in this way were integrated into the building configuration. These settlements are comprised of low income residents generally lacking the possibility of accessing the private housing market.

Boca La Caja is one of the oldest squatter settlements in Panama City dating from the 1930's. Approximately 600 families currently live there.<sup>31</sup> Many of them depend on fishing for their livelihood. The neighborhood was first settled approximately seventy years ago on the waterfront just east of the city Center, when the San Francisco area surrounding it was hardly developed. It is adjacent to Punta Pacífica, one of the main areas of high-end condominium development. It is a low lying zone prone to flooding. In some cases building has taken place on mud flats and within the tidal basin. Parts of this neighborhood have been titled, with estimates ranging from 25% to 60% of lots titled.<sup>32</sup> As noted, the City's building boom has grown all around them, and developers are now interested in this land.

### III. "Informality" in Law and Development

As noted above, the meaning of informality can take different forms.<sup>33</sup> In relation to economic develop-

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<sup>31</sup> Yaritza G. Mojica, *No quieren salir de Boca La Caja*, EL PANAMÁ AMÉRICA, May 12, 2007.

<sup>32</sup> *Id.* See also Mario A. Muñoz, *Boom inmobiliario llega a San Sebastián y Boca La Caja*, LA PRENSA, May 12, 2007.

<sup>33</sup> See Rogelio Pérez Perdomo & Teolinda Bolívar, *Legal Pluralism in Caracas, Venezuela*, in *ILLEGAL CITIES: LAW AND URBAN CHANGE IN DEVELOPING COUNTRIES*, (Edésio Fernandes & Ann Varley, eds., 1998); see also Saskia Sassen, *The Informal Economy: Between New Developments and Old Regulations*, 103 YALE L.J. 2289, 2291 (1994) (arguing that the informal sector is not limited to third world immigrants coming to the United States but is due to a shift in the political economy), Richard A. Epstein, *The Moral and Practical Dilemmas of an Underground Economy*, 103 YALE L.J. 2157 (1994), Jane E. Larson, *Informality, Illegality, and Inequality*, 20 YALE L. & POL'Y REV. 137,

ment, specifically, the concept of informality was reportedly popularized in the 1970's in relation to rapid urban growth and the accompanying rise of an excess labor supply.<sup>34</sup> The term has loomed large in development assistance circles since then. One observer notes:

The concept of formalization policy stems from the introduction 30 years ago of the term *informal sector* into development discourse by the International Labor Organization (ILO), giving rise to a new type of assistance to developing countries: the formalization of the informal sector.<sup>35</sup>

In the housing context, the notion of informality was first employed to describe and rebut then common views about squatter settlements as sites of social backwardness, isolated indigenous communities, outlaws, and communists.<sup>36</sup>

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141 (2002) ("within our [U.S.-Mexico] borderlands, more than 400,000 people now live in informal housing settlements known as colonias"), Edésio Fernandes and Raquel Rolnik, *Law and Urban Change in Brazil*, in *ILLEGAL CITIES: LAW AND URBAN CHANGE IN DEVELOPING COUNTRIES*, 140-56 (Edésio Fernandes & Ann Varley, eds., 1998). See generally Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963) (describing the vast informality attendant contractual relations in a sampling of Wisconsin, manufacturing industry insiders, despite the formalization of terms and presumptive predictability expected of doctrinal contract law), Alejandro Portes & Richard Schauffler, *Perspectives on the Latin American Informal Sector*, 19 POPULATION & DEV. REV. 33, 33-48 (1993) (describing the "structural approach").

<sup>34</sup> Alejandro Portes & Richard Schauffler, *Competing Perspectives on the Latin American Informal Sector*, 19 Population and Dev. Rev. 33, 38 (1993).

<sup>35</sup> Julio Calderón Cockburn, *Property and Credit: Property Formalization in Peru*, LINCOLN INSTITUTE OF LAND POLICY 1 (June 2007).

<sup>36</sup> See William Mangin, *Latin American Squatter Settlements: A Problem and a Solution*, 2 LATIN AM. RES. REV. 65, 85 (1967) (arguing against their radical politicization: "At present they seem capable of mobilization only as a group to defend their homes."); Thomas

Developmentalists, instead, attributed economic growth potential to squatter settlements and their informal norms. It was part of a larger diagnosis of state law's formalistic, backward, and socially unresponsive condition in Latin America. Informal law was perceived as an intelligible popular reaction to official legal under-development. In that era, the "informal" represented an adaptation of formal state law that was more contextual, responsive and pragmatic. It showed how squatters, for example, turned official legal categories into a system of land holding, conveying, and ultimately community organizing that responded to their actual circumstances.

Pursuing similar methodologies, commentators relied on personal interviews and surveys to describe the inner workings of social groups purportedly governed by a separate, informal law.<sup>37</sup> A classic in this genre is Kenneth Karst's study on the non-state law of Caracas barrios.<sup>38</sup> In it, he discovered that, with the exception of legal title, residents operated essentially under the national legal system. Karst principally followed the stages of squatter settlements

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McKinley Lutz, *Self-Help Neighborhood Organizations, Political Socialization, and the Developing Political Orientations of Urban Squatters in Latin America: Contrasting Patterns from Case Studies in Panama City, Guayaquil, and Lima*, 297-98 (1970) (unpublished Ph.D. dissertation, Georgetown University).

<sup>37</sup> See Kenneth Karst, *Rights in Land and Housing in an Informal Legal System: The Barrios of Caracas*, 19 AM. J. COMP. L. 550 (1971); Lutz, *supra* note 27; Lutz, *supra* note 36; Boaventura de Sousa Santos, *The Law of the Oppressed: the Construction and Reproduction of Legality in Pasagrada*, 12 LAW AND SOC'Y REV. 5 (1977).

<sup>38</sup> Compare Karst, *supra* note 37 (throughout the article, Karst argues polemically against the prototypical formalist Venezuelan lawyer—and middle class stereotypes – who would maintain that there is no law in the barrio), with Rogelio Pérez-Perdomo and Pedro Nikken, *The law and home ownership in the barrios of Caracas*, in *URBANIZATION IN CONTEMPORARY LATIN AMERICA* (Gilbert, Hardoy, & Ramirez, eds., 1982).

and survey responses from its residents.<sup>39</sup> He defended the thesis that the sense of security felt by residents in their tenure reflected an informal legal system of property – not dependent on formal land titles: “Ownership of the land seems not to be significant in this process.”<sup>40</sup> Still, these communities he observed operated in strict relation with the state law of contracts, inheritance, etc. The lesson to be learned, he maintained, was a model for more pragmatic state law better suited to promote development in contextually appropriate and participatory ways. The “informal” thus provided a working example for development planners of legal flexibility and demonstrated a source of legal creativity—or “development mentality”—driven by poverty-driven necessity.

In the 1990’s round of development reform, the informal occupied a different position. Informal regimes were also conceptualized as compensating for the failings of formal law.<sup>41</sup> This time, however, the image was not the socially or culturally discordant nature of law and society in Latin America: the social demanding of more flexibility in conceptions of property. In the 90’s, the existence of an informal sector and informal land holding were an argument to turn the informal into the formal in the case of property, and in other cases to de-regulate the sphere of government regulation.<sup>42</sup> This more current use of the turn to the informal, all the while, is premised on a rejection of

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<sup>39</sup> See, e.g., *id.* at 563 (“Thus the central fact about a squatter-owner’s rights is that nothing happens to disturb his occupancy.”).

<sup>40</sup> See *id.* at 569. But see Mangin, *supra* note 36, at 75 (“Land titles play a major role in investment in housing, and in places where a title or some assurance of permanence is thought to exist constructions are more elaborate than in those without titles.”).

<sup>41</sup> See generally HERNANDO DE SOTO, *THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD* (2002).

<sup>42</sup> See Rashmi Dyal-Chand, *Reflection in a Distant Mirror: Why the West has Misperceived the Grameen Bank’s Vision of Microcredit*, 41 STAN. J. INT’L L. 217, 278 (2005).

official state law. It is advanced as an alternative source of legal rules. Indeed, for neo-liberals, the transactional modes and operations presumably outside the ambit of government regulation are deemed a more suitable model for state law itself.<sup>43</sup>

Considering both periods of law-and-development work on squatter settlements in Latin America, "informality" generally has been invoked as a phenomenon outside the legal system. It has meant, principally, social norms separate from state law and, alternatively, self-help deregulation by the poor prompted by the high costs of legal compliance. In the first period of law and development in the 1960-70's, the concept was primarily employed to loosen claims to vested private rights to property. In the second 1990's moment the opposite was true. Informality became an argument to reinforce an expansive and inviolable conception of private rights. In this more recent era, untitled housing is considered the epitome of informality, and titling is the primary goal of most formalization programs.

The law-and-development usage of informality is not so different from the productive tension in the distinction between law and society, historically used to facilitate legal reform.<sup>44</sup> The latter was mobilized by legal realists, sociological jurists, and law and society practitioners for a number of changes in the U.S. legal system. The turn to social reality, in U.S. legal history for example, was prevalent as a reaction to Lochnerism.<sup>45</sup> This mode of arguing for legal change also has a long pedigree in continental

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<sup>43</sup>Epstein, *supra* note 33 (arguing that the reduction of government and regulation reduces informality by reducing the possibility of running afoul of law or government.).

<sup>44</sup>Jane E. Larsen, *Informality, Illegality, and Inequality*, 20 YALE L. & POL'Y REV. 137, 142-43 (2002).

<sup>45</sup>See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 33-34 (1992).

Europe and Latin America.<sup>46</sup> The general idea is that focusing on social realities would reveal the need for laws to protect society from the abuses of unchecked industrial capitalism. The plight of the masses would thus support social legislation and more government action against vested property rights anchored in the constitution. By comparison, in the development versions, the “informal” has represented, by turns, a model of legal pragmatism and a substitute set of norms.

Describing a practice as “informal” has thus provided a space for re-considering its legal status. Labeling that which is legally suspect, or outright prohibited, as informal signals the possibility that it may be “formalized.”<sup>47</sup> One way to conceptualize this is as an argument about the constitutive elements of a legal norm. So, for example, where municipal ordinances permit licensed retailers to operate and, correspondingly, repress unpermitted street vendors, characterizing the latter as “informals” – rather than law-breakers full stop—opens the possibility of re-drawing the lines. The street vendors may be afforded greater legal rights through formalization, but

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<sup>46</sup> See DIEGO LÓPEZ-MEDINA, *TEORÍA IMPURA DEL DERECHO: LA TRANSFORMACIÓN DE LA CULTURA JURÍDICA LATINOAMERICANA* 235-340 (2004); ANDRÉ-JEAN ARNAUD, *LES JURISTES FACE À LA SOCIÉTÉ DU 19ÈME SIÈCLE À NOS JOURS* 154-90 (1975); see also Duncan Kennedy & Marie-Claire Belleau, *François Gény aux États-Unis*, in FRANÇOIS GÉNY, *MYTHE ET RÉALITÉS 1899-1999 CENTENAIRE DE MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF*, ESSAI CRITIQUE 295-320 (Claude Thomasset, Jacques Vanderlinden & Philippe Jestaz, eds., Éditions Yvon Blais, 2000); DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE* 92-96 (1997); Marie-Claire Belleau, *The “Juristes Inquiets:” Legal Classicism and Criticism in Early Twentieth Century France*, 1997 UTAH L. REV. 379 (1997).

<sup>47</sup> See, e.g., Rogelio Pérez Perdomo & Teolinda Bolívar, *Legal Pluralism in Caracas, Venezuela*, in *ILLEGAL CITIES: LAW AND URBAN CHANGE IN DEVELOPING COUNTRIES* 123-39 (Edésio Fernandes & Ann Varley eds. 1998).

just as logically plausible more onerous conditions could be imposed through greater formality.

Additionally, the *notion* of informality—separate from the reality of illegal land occupation or any other practice—has been repeatedly pressed in the context of development reform in Latin America as an argument for one or another reform proposal. The continual discursive reproduction of the “informal” by scholars and commentators and its reputed extraordinariness in Latin America reinforces this trope.<sup>48</sup> Its exceptional extensiveness in the region is rather automatically accepted. To such extent, it appears as if state law was limited to the elites and then only as cover for backroom politics.<sup>49</sup>

In similar fashion, the purportedly extraordinary gap between law on the books and law in action in the region is another incarnation of this same idea.<sup>50</sup> Informality and the gap—within development literature—have been firmly established as defining deficiencies of law in Latin America.<sup>51</sup> If law in the region were better functioning, this perspective suggests, there would be no eruption of informality and informal norms—springing from local communities—to fill the void. The continuing existence of informality is offered as proof of official law’s failure. Quixotically, the guiding star for reform is eliminating informality—either by absorbing it within state law or making it itself the formal law.<sup>52</sup> However, as common to liberal legal systems, examples of informality and of different types of informality are always abundantly observ-

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<sup>48</sup> See Jorge L. Esquirol, *Continuing Fictions of Latin American Law*, 55 FLA. L. REV. 41 (2003).

<sup>49</sup> *Id.*

<sup>50</sup> See Jorge L. Esquirol, *The Failed Law of Latin America*, 56 AM. J. COMP. L. 75 (2008).

<sup>51</sup> *Id.*

<sup>52</sup> See, e.g., Julio Calderón Cockburn, *Considerations on Illegal and Informal Urban Land Markets in Latin America*, LINCOLN INSTITUTE OF LAND POLICY 2 (July 2006).

able.<sup>53</sup> As such, they are perennially available as grounds for new rounds of reform. Described below are the ways in which this concept has been marshaled to promote titling programs for untitled housing on state land.

#### IV. Titling as a means of reducing informality

The reduction of informality is a principal argument for titling squatters on state lands. The case has been forcefully made by neo-liberal reformers using this rhetoric. In the context of Latin America, specifically, this argument promotes privatization and strong property rights.<sup>54</sup> Internationally-supported, development reform has targeted land registry offices and land plotting technologies.<sup>55</sup> Monies have been lent to improve the efficiency of these offices and to make clear the rightful property owners at any time.<sup>56</sup> According to the World Bank loan documents supporting Panama's titling program:

Informality is one of the main issues of both, the urban and rural sector. To address some of these

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<sup>53</sup> *Id.* (considering urban land specifically independent of housing policy). See generally Karst, *supra* note 37; DE SOTO, *supra* note 41; Sassen, *supra* note 33, see Dyal-Chand, *supra* note 42; David Kennedy, *Laws and Developments*, in CONTEMPLATING COMPLEXITY: LAW AND DEVELOPMENT IN THE 21<sup>ST</sup> CENTURY (Amanda Perry-Kessaris & John Hatchard eds., 2003).

<sup>54</sup> See Thomas T. Ankersen & Thomas Ruppert, *Tierra y Libertad: The Social Function Doctrine and Land Reform in Latin America*, 19 TUL. ENVTL. L. J. 69 (2006) (arguing the significant elimination of social conceptions of property as a result of neo-liberal reforms).

<sup>55</sup> See, e.g., The World Bank, *Poverty and Social Development in Peru, 1994-1997* (1999).

<sup>56</sup> World Bank, Panama Land Administration Project [http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2001/01/12/000094946\\_00122905320369/Rendered/PDF/multi\\_page.pdf](http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2001/01/12/000094946_00122905320369/Rendered/PDF/multi_page.pdf) (last visited Sept 5, 2008) (granting a \$58.7 million loan to be administered by Panama's Programa Nacional de Administración de Tierras).



problems, the Government has developed a Poverty Reduction Strategy in which land tenure security is a fundamental issue. The proposed Project will help the Government to implement this strategy.<sup>57</sup>

In short, in its latest law-and-development iteration, the “informality” argument purports to turn the existing legal interests of squatters into classical property rights. This position, it bears noting, supports the neo-liberal agenda of de-regulation, privatization, and free markets. At the same time, the argument strikes a populist tone by asserting that “informals” will be better off. This is essentially the position advanced by Hernando de Soto and his followers.<sup>58</sup> The formula has become a generalized if unproven mantra. Again, the structure of the argument is not unlike early twentieth century legal theories advocating the “social” or social relations as a determinate source of legal norms.<sup>59</sup> The “informal” comes to occupy a similar role within the prescriptions of neo-liberal reformers. Indeed, turning to this domain has much the same flavor of socio-legal projects. It appears to offer a determinate, non-political source of legal rules and a populist one at that.

The promise of titling is providing greater access to home values. The premise is that these settlements are, for all intents and purposes, permanent. As such, settlers are at a minimum in possession of the land and most likely are so

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<sup>57</sup> World Bank, Panama Land Administration Project, [http://wbIn0018.worldbank.org/LAC/PA\\_LandAdmin/Doclib.nsf/4145387661f08830852565a3005f4a64/411b2ffa283aafcd85256a02005b3aab/\\$FILE/P050595.pdf](http://wbIn0018.worldbank.org/LAC/PA_LandAdmin/Doclib.nsf/4145387661f08830852565a3005f4a64/411b2ffa283aafcd85256a02005b3aab/$FILE/P050595.pdf) (last visited May 9, 2008) (projecting 45,000 titles to be granted within Panama’s urban centers).

<sup>58</sup> See generally DE SOTO, *THE OTHER PATH*, *supra* note 41; HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (Basic Books 2000).

<sup>59</sup> See Kennedy, *A CRITIQUE OF ADJUDICATION* *supra* note 46; see also Belleau, *The “Juristes Inquiets,”* *supra* note 46.

indefinitely. Yet, this form of land tenancy and the economic value that it represents are not available for circulation in the economy. So, if vested with a more cognizable property interest, *de facto* right-holders would be able to draw on the equity of their interests. This could take the form of borrowing against home equity or more freely alienating, leasing or otherwise disposing of the value in the full bundle of property rights. Promoted as being primarily beneficial to the poor, the preferred bundle of rights and privileges—urged by Developmentalists—are the classical and neo-liberal elements of full legal title. In fact, the argument is that this recognition merely cashes out the economic transfer of stable tenure already granted by the state.

In Panama City, several factors are salient: an overcrowded city, low incomes, high unemployment, low-skilled workers, short supply of affordable housing, and relative lack of government money for low income housing. Reporting on illegal occupations in 2002, the Panamanian press noted that the state at that point offered no housing programs for these low income groups.<sup>60</sup> The Panamanian Ministry of Housing currently reports four different government housing programs: public housing for 500 families in the interior of the country, a total of 1,000 awards of a \$2,000 subsidy for families obtaining commercial mortgages for properties under \$16,000; neighborhood infrastructure improvement projects and job training; and the sale of three large public lots to private developers for the building of mixed low income (under \$300/month) and lower income (over \$300/month) housing.<sup>61</sup>

The Ministry also claims that the national government between 2004 and 2006 issued a total of 30,095 titles

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<sup>60</sup> José Arica, *Camino al precarismo*, LA PRENSA, May 8, 2002.

<sup>61</sup> See República de Panamá, Ministerio de Vivienda, Programas, <http://www.mivi.gob.pa/paginasprincipales/programas07.html> (last visited Apr. 11, 2008).

to property nation-wide.<sup>62</sup> Funded by the World Bank and the Inter-American Development Bank, the Panamanian agency charged with land titling is the Programa Nacional de Administración de Tierras (PRONAT).<sup>63</sup> The World Bank fund targets 25,000 new titles issued in urban areas and 12,000 more nationally, between 2006 and 2009.<sup>64</sup> Over the same period, the Inter-American Bank fund aims at 150,000 new titles.<sup>65</sup> Clearly, with the scant public investment in the sector, the Panamanian government is primarily counting on the titling of squatted land as the centerpiece of its housing policy. Whether or not titling self-built housing on public land is the best alternative for the poor, however, is a question best answered by analyzing the positives and negatives of the different legal options.

### A. Questionable benefits

The position in favor of strong private rights has in the not so distant past been firmly championed by the propertied classes.<sup>66</sup> Indeed, one of the generally accepted reasons and diagnoses of the deficiency of Latin American democracies has been attributed to the unequal concentration of private land holding, represented by the striking image of the vast *latifundios* in the hands of an elite few.<sup>67</sup> The principal remedy for this concentration of power and wealth proposed throughout most of the twentieth century—although not very widely achieved except possibly in

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<sup>62</sup> *Id.*

<sup>63</sup> Decreto Ejecutivo No. 125, República de Panamá, Sept. 12, 2001.

<sup>64</sup> PRONAT, Objetivos y Metas, [http://www.pronatpanama.org.pa/web/index.php?option=com\\_content&task=view&id=14&Itemid=44](http://www.pronatpanama.org.pa/web/index.php?option=com_content&task=view&id=14&Itemid=44) (last visited May 8, 2008).

<sup>65</sup> *Id.*

<sup>66</sup> Joseph Thome, *The Process of Land Reform in Latin America*, 1968 WIS. L. REV. 9, 20-22 (1968).

<sup>67</sup> *Id.* at 10-14.

Cuba (and there by abolishing private property)—has been agrarian reform. In effect, the process requires expropriating land from large landholders, not making productive use of their property, and transferring it to landless agricultural workers. There have also been movements, notably in Brazil, to extend this same procedure for the benefit of urban dwellers. In any case, the principal legal obstacle to land reform has been the figure of vested rights. If anything, the plight of the property-less and squatters has been understood as worsened by the restrictions on government policy imposed by an unyielding conception of private rights. Such formal rigidity has had the effect of impeding either imaginatively or constitutionally (or both) the ability of governments to more equitably redistribute legal entitlements.

Curiously, this more recent re-alignment of strong property rights as a benefit to the poor raises some questions about this one-time government transfer.<sup>68</sup> It is not clear that these programs fulfill their own stated objectives of increasing mortgage credit, improved lending conditions, greater investment in home improvement, and a deeper secondary home sales market.<sup>69</sup> Some scholars have noted the wide support for these efforts even though its benefits remain unproven:

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<sup>68</sup> See Copello, Mercedes & Smolka, *infra* note 91 (stating that preliminary estimates in various places indicate that property values increase post titling by approximately 30%).

<sup>69</sup> Compare Cockburn, *supra* note 35, at 43-44 (In Peru these projects have been most far-reaching. There is some evidence of increased investment in housing and increases in prices of titled housing. However, note that formalization is only one among explanatory factors in a list including "various public and social policies, formalization and its diffusion, the subsidized credits of the Materials Bank, the initiatives of public services providers, and the assistance of multilateral institutions."), with Karst *supra* note 37, at 569 ("the key motivation to investment in barrio housing appears to be the occupant's ownership of the house [not the land]").

Analysts associated with the World Bank argue for legalization on the grounds that it increases land and housing values and provides access to credit for housing improvements. They do so in spite of growing evidence that tenure legalization is not required for investment in housing improvements. Squatters may even consolidate their houses faster than those with formal tenure. Both the advocates of legalization and the more skeptical, however have concentrated their attention on “technical” questions, and overlooked the political uses of illegality.<sup>70</sup>

In Peru, where mass titling programs since 1996 have been widespread, “[a]ccess to mortgage loans by virtue of owning registered property has been negligible” and “there is no evidence that formalization is leading to the development of formal land markets among the low income population.”<sup>71</sup> At the end of the day, these programs may not advance their own much vaunted goals. Instead, their only effect may be to consolidate a more rigid conception of private property rights. Furthermore, it is not clear that a monolithic slate of property rights is preferable in all cases to different modes of asset allocation. At a minimum, the overwhelming push for titled property rights limits possibilities for other alternatives.

### **B. The mystifying effect of arguments based on informality**

As noted above, there are many different sorts of legal informality. They are common to modern legal sys-

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<sup>70</sup> Ann Varley, *The Political Uses of Illegality: Evidence from Urban Mexico*, in *ILLEGAL CITIES: LAW AND URBAN CHANGE IN DEVELOPING COUNTRIES*, 172 (citations omitted).

<sup>71</sup> Cockburn, *supra* note 35, at 44-45.

tems.<sup>72</sup> For example, socio-legal scholars have amply demonstrated the variation, adaptation, and only partial relevance of legal rules to social relations generally.<sup>73</sup> As such, legal informality is the common experience of life in law and society. In addition, the legal realists showed us that legal rules, by themselves, provide no static guarantee of individual expectations on the meaning of property.<sup>74</sup> The latter are subject to regular changes in the law, the competing forces of economic exchange, and plain legal non-recognition.<sup>75</sup> Thus, there is no autonomous separate private (or informal) domain independent of legal regulation and non-regulation combined. Moreover, classical private law property contains a variety of different legally protected interests—not solely grants of actual rights.<sup>76</sup> These different legal relations can vary in terms of formalization. Either way, these alternatives to the single logic of formal rights are equally options within law. As a result, the representation of informality and other legal interests as non-official law is misleading. The formal-informal distinction primarily demarcates alternative legal devices. As such, the concept of legal informality needs to be disaggregated if it is to mean anything at all.<sup>77</sup>

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<sup>72</sup> See Macaulay, *supra* note 33.

<sup>73</sup> *Id.*

<sup>74</sup> See Robert Hale, *Coercion and Distribution in a Supposedly Noncoercive State*, 38 *Political Science Quarterly* 470 (1923), reprinted in *THE CANON OF AMERICAN LEGAL THOUGHT* 106-07 (David Kennedy & William W. Fisher III, eds., 2006) (discussing the inescapable exposure to vicissitudes of “legitimate expectations” framed as legal rights).

<sup>75</sup> *Id.*

<sup>76</sup> See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16 (1913).

<sup>77</sup> See generally Alejandro Portes & Manuel Castells, *World Underneath: The Origins, Dynamics, and Effects of the Informal Economy*, in *THE INFORMAL ECONOMY: STUDIES IN ADVANCED AND LESS DEVELOPED COUNTRIES* 12 (Alejandro Portes, Manuel Castells & Lauren A. Benton eds. 1989).

Defining informality symptomatically as either separate social norms or self-help deregulation obscures the pre-reform legal relations among squatters, the state, and third parties. Conversely, it unjustifiably equates formalization with classical property rights.<sup>78</sup> This convoluted reasoning advances the cause of broad rights and privileges to title-holders.<sup>79</sup> The sleight of hand is that the claimed source of the new proposed rights derives from areas where the state applies a different *de facto* property regime or where the state tolerates regulatory non-compliance.<sup>80</sup> Therefore, the change propounded is, in effect, either a change to a different form of property and/or the expansion of regulatory exemptions.

The classical rule of adverse possession provides a useful example here. This conventional legal doctrine regularly turns illegal trespassers into legal owners and thus routinely validates past periods of irregular—or informal—possession. In Peru, the period for adverse possession was shortened to one year, on the strength of this same argument characterizing squatters as “informals.”<sup>81</sup> There may indeed be good policy reasons to shorten the period of adverse possession. For example, it may lead to greater

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<sup>78</sup> See Horwitz, *supra* note 45, at 163-67 (describing Hohfeld's and Hale's understanding of the bundle of legal relations constituting property).

<sup>79</sup> See generally Daniela Caruso, *Private Law and State-Making in the Age of Globalization*, 39 N.Y.U. J. INT'L L. & POL. 1 (2006); Hohfeld, *supra* note 76 (describing more precisely some of the “rights,” “privileges,” “immunities,” and “powers” bestowed by law to property title-holders).

<sup>80</sup> See, e.g., George L. Priest, *The Informal Economy: The Ambiguous Moral Foundations of the Underground Economy*, 103 YALE L.J. 2259 (1994) (highlighting the high levels of informal activity in the U.S., distinguishing among types of informal activity, and defending the preference for aggregating moral justification and value of informal markets).

<sup>81</sup> Winter King, *Illegal Settlements and the Impact of Titling Programs*, 44 HARV. INT'L L.J. 433 (2003).

tenure security, regulatory compliance, social justice, personal savings, and the like. Alternatively, there may be good reasons against quickly increasing the stock of titled property rights. The latter permit a number of excesses, if not outright abuses, by titleholders often externalizing social costs, such as the harms associated with over-building, reduced quality of life to neighbors, and pollution. Commoditization of titles encourages practices of financial speculation on assets serving multiple needs, like sufficient housing.<sup>82</sup> An expansive allocation of property rights may frustrate other public policy goals. However, the force of arguments based on “reducing informality” has the effect of pre-empting more transparent consideration of the various pros and cons.

Accordingly, in relation to the housing context in particular, it may be more useful to speak in terms of different legal relations and distributional rules rather than formal and informal law.<sup>83</sup> For neo-liberals, the preferred rules are expansive interests for private property holders.<sup>84</sup> It is not clear whether or not this reduces or raises the actual aggregate amount of legal non-compliance across society.<sup>85</sup> Irrespectively, by claiming to end informality through titling, the law is changed and government regulation, planning, and more significant redistribution are made more difficult. Marshalling the argument of informality either to reinforce property rights—as in the 1990’s neo-development—or to loosen vested property rights – as in the 1960’s law and development, however, obscures the

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<sup>82</sup> See generally Claire Priest, *Creating an American Property Law: Alienability and its Limits in American History*, 120 HARV. L. REV. 385 (2006).

<sup>83</sup> See Hale, *supra* note 74.

<sup>84</sup> See Ankersen & Ruppert, *supra* note 54.

<sup>85</sup> See Alejandro Portes & Richard Schauffler, *Perspectives on the Latin American Informal Sector*, 19 Population and Dev. Rev. 33 (1993) (discussing measures of informality).



multiple policy decisions and regulatory options represented by these categories.

Indeed, marshalling informality *as a stand-alone argument* in favor of titling classical property rights eclipses the range of other policy questions implicated by squatter settlements. The latter involve not merely asset transferability, liquidity, mortgage-ability and the type of security provided by registered titles. They also include questions about access to housing, building requirements, safety, habitability, disclosure, transportation, public health, environment, and the like. These other objectives need to be better addressed, possibly even with international development assistance. Moreover, the possibilities for reform advanced by the concept of informality—advocating a change in the law—are never fully extinguished by title formalization. As the examples below will show, legitimate expectations and democratic will can be frustrated despite rights to legal title. New legislation, ministry regulations, and judicial pronouncements can reinterpret rules, apply standards, under-enforce regulations, or simply presume entitlements in favor of one right-holder versus another. These points are more fully addressed further below.

## V. An alternative conception of property

A common way of conceptualizing untitled property, as argued above, is as a failing of the formal law. This form of “informality,” it is argued, is a malfunctioning of state legal systems. Its very existence is advanced as the rationale for law reform. Recent reforms, furthermore, seek to formalize a *particular* conception of property. Within the neo-liberal program, this conception is a neo-classical version of property rights.<sup>86</sup>

By contrast, a more precise understanding of untitled property holding unveils the operation of a different

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<sup>86</sup> See Ankersen & Ruppert, *supra* note 54.

type of legal relationship. Shorn of the negative connotations of "informality," untitled housing on state land simply constitutes a different set of legal relations. It reveals the exercise of a privilege to build and reside on state land, informally yet still officially recognized by the government.<sup>87</sup> This form of tenancy is both subordinate to certain superior rights of the state, and the subject of a number of legal privileges.<sup>88</sup> It responds to demands for affordable housing at the expense of other public uses and proper regulatory compliance. Describing the Mexican context, for example:

Land tenure regularization in Mexico may be understood primarily as a means for routine, low-cost, state intervention in the production of urban land and housing for the low-income population...regularization programmes give clear expression to the predominant laissez-faire approach to housing the poor: official tolerance of illegal subdivision ensuring an abundant supply of inexpensive housing plots, and the post hoc legitimization of this process in tenure regularization programmes.<sup>89</sup>

Indeed, the *de facto* government policies that enable this form of tenancy reflect implicit policy decisions. This is not to say that in a context of more or different resources, policy makers would not affirmatively make different choices and regulations in the area of housing. Of course, it

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<sup>87</sup> See generally Pérez-Perdomo and Nikken, *supra* note 38.

<sup>88</sup> See generally Hohfeld, *supra* note 76 (for example, the privilege to exclude other non-right holders from possession and *de facto* immunity from building code enforcement action).

<sup>89</sup> Antonio Azuela & Emilio Duhau, *Tenure Regularization, Private Property and Public Order in Mexico*, in *ILLEGAL CITIES: LAW AND URBAN CHANGE IN DEVELOPING COUNTRIES* 157, 168 (Edésio Fernandes & Ann Varley, eds., 1998).

is not in reality simply a matter of limited resources. The latter could be diverted from other uses were this a foremost priority. Under different political conditions and combinations of forces, different choices about housing and the economy could be made. Likewise, it is also not simply a matter of competing political priorities as against some unchangeable background of rules of private property and government regulation. At base, the workings of property law—more difficult to perceive and to modify—directly contributes to the housing stock actually made available.

Accepting that untitled property on public land fulfills certain objectives does not mean that either government regulation or private property law should remain unchanged. In fact, a more transparent appraisal of the political and legal nature of this arrangement may make it possible to better tailor housing law and policies.<sup>90</sup> Some aspects of the relaxed regulatory environment may continue to be part of the mix; others may be recalibrated better to meet other public policy needs. The perspective advanced here, it should be noted, neither supports the “invasion” of public lands by would-be squatters nor does it advocate the automatic eviction of existing squatters in all cases. More importantly still, it does not hold out the promise of a titled piece of land *post hoc*—as the current titling policies in fact do. Rather, it recognizes the legal and economic dimensions that give rise to self-help housing settlements and proposes to tailor a more effective government response. It suggests, as part of the mix, the reform of private law for the purpose of public welfare, the environment, and government provided infra-structure.

Surely, there are comprehensible reasons why existing property owners may want expanded and reinforced

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<sup>90</sup> See generally Ugo Mattei & Fernanda Nicola, *A “Social Dimension” in European Private Law? The Call for Setting a Progressive Agenda*, 41 NEW ENG. L. REV. 1 (2006) (describing the stakes involved with the harmonization of European private law).

rights. Additionally, titling currently-untitled property holders appears to extend these same benefits to them. However, those with large titled holdings are especially in a position to reap the sum of the rewards. The broad array of rights and privileges under a broad definition of private property disproportionately benefits large owners. By contrast, shantytown dwellers will not effectively enjoy much more under their newly titled holdings than what they had before. The most notable exception would be possibly the privilege to apply for a home equity loan.

Yet, other property configurations are not impossible. In Colombia, for example, the Municipality of Bogota is experimenting with dividing the right to build from a monolithic conception of ownership rights, particularly for land planned for low-income housing.<sup>91</sup> Since 1997, Colombia has had a national law allowing municipalities to recover 30-50% for increases in land value resulting from public investment.<sup>92</sup> The primary means for recapturing this “socially-created” value is through a capital-gains-type tax.<sup>93</sup> Additionally, both property owners and “pirate” subdividers acting ahead of government action on low-income developments are in a position to extract the expected value of public investment and regulatory change. Separating out the right to build and transferring it to qualifying beneficiaries, it is suggested, would reduce the speculative value of land. However, “the policy faces enormous resistance because of the civil law tradition that unitary and

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<sup>91</sup> See Maldonado Copello, María Mercedes & Martim Smolka, *Las plusvalías en beneficio de los pobres, el proyecto Usme en Colombia*, LAND LINES, LINCOLN INSTITUTE OF LAND POLICY, July 2003; see also Mario Lungo, *Land Management and Urban Planning in San Salvador and Panama City*, LINCOLN INSTITUTE OF LAND POLICY, 44 June 2006.

<sup>92</sup> Law 388, Law of Land Development, July 18, 1997, Republic of Colombia.

<sup>93</sup> See, e.g., Liliana Bonilla Otoy & Juber Galeano Loaiza, Application of New Land Value Capture Instruments in Colombia: Desepaz Case Study, LINCOLN INSTITUTE OF LAND POLICY, June 2006.

absolute rights are associated with private land ownership.”<sup>94</sup>

This is one form of tinkering with the background rules. Granted, it is not suited for every issue, and may not be particularly transferable to Panama where “pirate developers” do not appear to be a big concern.<sup>95</sup> However, it demonstrates the role of background rules of private law on the economics of squatter settlements. By limiting our conceptions of the latter to simply the limitations of law enforcement, a separate social system of laws, the capitalist exploitation of labor, and other constructions of the sort, it renders invisible the current system of distribution of rights and privileges within property law producing the current state of affairs. Furthermore, maintaining imprecise ideas about the informal and its instrumental use as a vehicle for reform confounds the possibility for alternatives within the law. Retaining the myth of informality’s exceptional and transitory nature simply leads to an unclear approach. At the same time, the fixation on titled property as investment, accumulation, and development makes it that much harder to perceive its negatives in responding to the need for low-income housing.

#### **A. Non-Formalized Alternative Legal Interests**

In the context of Panama City, specifically, the untitled residents of Felipillo, Loma Cobá, and Boca La Caja could simply be described as mere trespassers. And, the

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<sup>94</sup> Maldonado Copello, María Mercedes & Martim Smolka, *Using Value Capture to Benefit the Poor: The Usme Project in Colombia*, LAND LINES, LINCOLN INSTITUTE OF LAND POLICY July 2003.

<sup>95</sup> See Álvaro Uribe, *Ciudad y Sostenibilidad*, Remarks at Encuentro Interamericano de Desarrollo Sostenible, Fundación Conama, Nov. 19-21, 2007, <http://www.conama.org/eima/documentos/8.pdf> (last visited Oct. 15, 2008).

construction of houses on that land can be seen as illegal possession. There is no separate category under the Civil Code of Panama for “informal tenure.”<sup>96</sup> At the same time, forms of land tenancy short of full titled rights are legally recognized, such as simple possession and adverse possession.<sup>97</sup> Squatters may possibly qualify for one of these designations under the law. Notably however, in the context of public land, adverse possession does not run against the state.<sup>98</sup>

And yet, the residents in these areas enjoy relative tenure security from government eviction. Indeed, the government itself can be seen as promoting this mode of housing.<sup>99</sup> First, by not prioritizing sufficient affordable and social housing it implicitly acts to maintain the status quo. Second, by over-relying on the market and over-estimating job growth, it knowingly accepts the predictable low-income housing shortages that will be thereby produced. Additionally, the government leads the way by example by allowing the externalization of social costs at the high-finance end, such as when it authorizes exceptions for private construction and public works projects through national parks and areas that were previously zoned more stringently.<sup>100</sup> Finally, commentators have noted that a post hoc titling program further encourages the invasion of private and public land as a route to property holding.

Other commentators confirm Panama’s *de facto* policies on squatters. For example, rural settlers may obtain title to a “patrimonio familiar,” a form of tenure that is limited to land of a certain size and value and includes immunity from judgment creditors, rights to inheritance by

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<sup>96</sup> Código Civil de la República de Panamá, Aug. 22, 1916, Art. 324-627.

<sup>97</sup> *Id.*, Art. 1696 (requiring uninterrupted possession for 15 years).

<sup>98</sup> *Id.*, Art. 1670 (amended by Cabinet Decree 75, Art. 1, Mar. 21, 1969).

<sup>99</sup> See Pérez-Perdomo & Nikken, *supra* note 38 at, 224-25.

<sup>100</sup> Arica, *supra* note 60.

heirs, an absolute prohibition on mortgages, and restrictions on alienation except in cases of absolute necessity.<sup>101</sup> As another indication of recognition, squatter neighborhood organizations are eligible to obtain legal personage. This has been noted to be particularly commonplace in Panama City, especially in certain cases where the government has organized the delivery of electricity and water to squatter settlements and charging users a fee.<sup>102</sup> These associations have also been active as a form of local government, especially beginning in 1967 when the national housing authority promoted self-help housing projects in Panama City and invested resources in them.<sup>103</sup>

Furthermore, Panama's Metropolitan Area Plan of 1997 estimated an increase in informal housing over the 1997-2005 decade, expecting a decline thereafter and ultimately a 5.6% rate of informality by the year 2020.<sup>104</sup> These estimates by the consulting firm hired to produce the report are based exclusively on the income earning potential based on very optimistic assumptions of job growth in Panama City. Their conclusion is that on the basis of more

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<sup>101</sup> Ley Número 22 de 20 de marzo 1941 sobre Patrimonio Familiar, Asamblea Nacional de Panamá, República de Panamá (Gaceta Oficial No. 8476), Ley Número 108 de 29 de diciembre de 1960, Díctanse disposiciones relativas al Régimen Provincial, Asamblea Nacional de Panamá (Gaceta Oficial No. 14,300). Compare Lutz, *supra* note 27, at 8-12, with Antonio Azuela & Emilio Duhau, *Tenure Regularization, Private Property and Public Order in Mexico*, in *ILLEGAL CITIES: LAW AND URBAN CHANGE IN DEVELOPING COUNTRIES*, 164-65 (Edésio Fernandes & Ann Varley, eds., 1998) (arguing that the Mexican experience with "patrimonio familiar" simply led to illegal transactions as a way of circumventing restrictions on alienation).

<sup>102</sup> Lutz, *supra* note 27, at 9-23. ("The results of some recent survey research studies, including my own, suggest that in Panama City the level of participation in *barriada* improvement organizations is higher than in Santiago, Chile, Lima, Peru, and Guayaquil, Ecuador").

<sup>103</sup> Lutz, *supra* note 36, at 306.

<sup>104</sup> "Plan de Desarrollo Urbano de las Áreas Metropolitanas del Pacífico y del Atlántico", *Informe Final del Plan Metropolitano*, Vol. 1, Parr. 9.2, Dec. 22, 1997, Ministerio de Vivienda, República de Panamá.

and better jobs a decade hence, the City's reliance solely on the private sector to respond to low-income groups housing needs is justified—despite the continuing and optimistically-low, 2002 estimate of private sector housing insufficiency.<sup>105</sup> Thus, untitled housing settlements can be seen as de facto policy.<sup>106</sup>

### **B. Problems with uncontrolled and unplanned settlements**

The characteristic conditions of squatter settlements resulting in overcrowding, poor sanitation, and substandard constructions are universally deplored. There is more disagreement, however, at the level of policy solutions. A recent report warns:

Any attempt to tackle the problem of existing settlements must take into account the deep-rooted causes of this phenomenon in order to design measures that will prevent it from continuing at the present speed and scope. Thus, while addressing the lack of basic infrastructure, accessibility, and public services, as well as unclear tenure rights, governments must look at policies to either stop or decrease the speed at which urban informality grows in its various dimensions. If nothing is done to reverse the current trend, the slum population may reach 1.5 to 2 billion people in 2020.<sup>107</sup>

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<sup>105</sup> *Id.*, at Vol. 2, Part 2, Parr. 13, Dec. 22, 1997.

<sup>106</sup> See generally Larsen, *supra* note 44, at 167 (“the current trend toward great wealth inequality and limited government responsibility for the basic social provision is enduring and fundamental”).

<sup>107</sup> Claudio Acioly Jr., *The Challenge of Slum Formation in the Developing World*, LAND LINES, LINCOLN INSTITUTE OF LAND POLICY, 3 (Apr. 2007).



One commentator identifies three strategies of “regularization” most recently employed by developing states as (1) short periods of adverse possession leading to full ownership for private land; (2) executive branch direct action to title squatters on public land and expropriate private land with compensation for benefit of squatters; (3) government purchase or designation of public land so that it develops and sells as low-income housing.<sup>108</sup> Analysts have also begun to highlight the ill effects of many titling programs. They note the perverse incentives that programmed regularization has on encouraging more illegal settlements.<sup>109</sup> And, it is argued that the costs of regularization programs are higher than providing publicly financed serviced land for low-income housing.<sup>110</sup>

#### i. Tenure Security

Not all untitled neighborhoods enjoy uninterrupted stability. They typically go through a process of consolidation. Newer areas of “invasion” are more likely to be recuperated by state forces. Observers have noted that occupations of public land are met with much less resistance than those on private property where the titled owner seeks to evict. In some cases, however, private owners are overpowered and must either agree to sell, settle on a low price, or simply stand by. The Panamanian Ministry of Housing has been active in negotiating sales agreement with private owners of squatter settlements. Compromises include the sale of part of the land to squatters and a relocation of some others elsewhere.<sup>111</sup> However, in longer standing settlements there is little likelihood of mass evictions.

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<sup>108</sup> King, *supra* note 81.

<sup>109</sup> Martim Smolka, *Informality, Urban Poverty and Land Market Prices*, LAND LINES, LINCOLN INSTITUTE OF LAND POLICY Jan. 2003.

<sup>110</sup> *Id.*

<sup>111</sup> “Noticias: Avanza medición de lotes en el Progreso”, Ministerio de Vivienda, República de Panamá, Dirección de Relaciones Públicas,

A change in government direction at some point could potentially overcome the implicit policy, political resistance, and practical inertia against massive squatter evictions. More likely, certain communities in areas of economic interest will simply be pressured to re-locate. This eventuality is not so different for those holding title to land. If the “persuasive” powers of the market do not work, powers of eminent domain are constitutionally available to be applied in such cases.<sup>112</sup> By way of precedent, the public use limitation may potentially be extended to include economic development cases, as we have seen in the U.S.<sup>113</sup> However, legally mandated compensation in the case of title holders may be calculated in a different and maybe more beneficial way. The political costs of uprooting a whole community would likely produce pressure as well. Those residents would likely be offered some amelioration or alternative housing by the state. Thus, in many cases, the difference between titled and untitled land holding in terms of permanence is not so great as it would seem at first blush.

Additionally, as noted above, untitled tenancy clearly does not fit within the categories of land tenure under the civil code. To the contrary, there is always in theory the potential of being charged with trespass. In practice however, the *de facto* government policies have created this alternative land structure. Certain areas of public land are routinely ceded and electoral politics are soon integrated within these neighborhoods. Moreover, residents generally conduct their affairs through regular legal forms, exchanging contractual documents to purchase and sell their hold-

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Feb. 27, 2008,  
<http://www.mivi.gob.pa/noticias/Febrero%2008/febrero08-22.html> (last visited Apr. 11, 2008).

<sup>112</sup> See generally Hale, *supra* note 74, at 93-110.

<sup>113</sup> See GREGORY S. ALEXANDER, *THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE* 64-68 (2006).

ings. Private contracts may be used and chains of "title" maintained by keeping records of past conveyances. Notably however, questions of zoning and services are dictated by practical exigencies rather than by the strict application of city codes.

## ii. Regulatory Compliance

The argument against untitled housing is often based on the low levels of regulatory compliance with building and health codes in squatter settlements. In the Loma Cobá neighborhood, for example, the residents themselves cleared and set plot lines for their own homes. "Pirate" middle-men are not believed to have played any role nor are believed to operate in Panama in any significant way. Over the past fifteen years, much of the empty land has been reforested and rendered habitable. Indeed, it has been described as meeting better standards and a more appropriate equilibrium between urbanism and the environment than many formal development projects by private capital.<sup>114</sup> The plots are more spaciouly parsed out and road flows are better designed than in some of the middle-class tract homes, which are constructed for maximum space utilization and highest sales prices. In fact, Panama City architect Álvaro Uribe has noted that:

The [informal] neighborhoods that have been produced do not correspond to the "phantom neighborhoods" of yesteryear but rather resemble true neighborhoods with an environmental quality not found in the scarce public housing projects or in the "popular" neighborhoods of the private sector, which are generally high priced and/or low quality. By contrast, all the spontaneous low-income neighborhoods have open and enclosed spaces

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<sup>114</sup> Uribe, *supra* note 95.

dedicated to communal activities and are more generous in the size of streets and individual lots, with areas 4 or 5 times greater than the lots offered by private developers or the Ministry of Housing in equivalent locations. These efforts at informal housing developments have reached levels of spatial quality, habitability and savings that do not exist in the rationalized and miniaturized designs of conventional low-income neighborhoods.<sup>115</sup>

Lots traced by settlers at Loma Cobá are rather large in size. Part of the explanation, in this particular case, may result from the benefits of building in a relatively spacious area outside the city center. It may also result from lot requirements for septic tank functioning on each plot of land, under Ministry of Housing regulations.<sup>116</sup> Responding to government regulation—albeit not in full compliance—these settlements place less strain on governmental services, and design corresponds to constraints other than profit maximization. Clearly, it would be better if these residents had more ample resources and could construct even better homes up to code. However, as one possible policy alternative, untitled housing development on public land may not always be simply irresponsible or unplanned.

### **C. Positive potential of alternative forms of property**

There are no doubt numerous dangers associated with unplanned and unregulated human settlements, as noted above. Water, electricity, sanitation, safety, environmental and other regulatory concerns are surely more imperiled and are at a higher risk of experiencing

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<sup>115</sup> *Id.* at 12-13.

<sup>116</sup> Ministerio de Vivienda, Resolución No. 160-2002, July 22, 2002, Gaceta Oficial No. 24645. República de Panamá.

noncompliance. Nonetheless, state resources could be more broadly deployed in these areas, and this mode of land holding could potentially be made to work. In most cases, Latin American governments provide public services to shantytowns after the fact, once a residents association has become organized. However, this need not be the case. Government agencies can be, and in some places are, more proactive in ensuring some levels of services and regulation. Some of the adverse effects of non-compliance—particularly in relation to health and the environment—could be lessened by government action. These need not be conditioned exclusively on the three modes of regularization noted above. It could work with alternative forms of property holding as well.

As such, untitled holdings on state land need not signify, either imaginatively or in fact, free for alls. They may simply constitute areas of different modes of regulation. The existence of differential regulation and different modes of enforcement has already been discussed.<sup>117</sup> Additionally, this regime may produce some positive goods in their own right. This mode of land holding opposite to the neo-liberal prescription reduces the liquidity of this undeniable asset. This may not be a bad thing. Indeed, many communities across the globe have struggled with the proper modalities for ensuring affordable housing. Different legal formulas have been produced whereby affordable housing is transferred by the state and then its alienation is limited to other eligible purchasers at below market prices. Untitled tenure can be conceptualized as a vehicle for lower cost housing. It maintains this sector of the property market at different values than the titled market—which generate different negatives. As a result, residents may be more hesitant to transfer their property, or not be in a position to dispose of it so easily to creditors. It may also ensure that transfers are also directed to other purchasers desiring pri-

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<sup>117</sup> See Larsen, *supra* note 44, at 18.

marily to live in the house as a primary residence. In this way, untitled holdings create a different housing market with some of the same intended consequences that societies with no significant untitled sector in place must construct by contract or other restrictive covenants.

Finally, as already alluded to above, untitled holding lessens the financially speculative dimension of housing. By de-linking housing and investment, residents are insulated against a number of financial risks. Especially in the context of the real estate debacle seen in the United States in the past year, this risk is very real. Banks and financial organizations typically do not make mortgage loans against untitled property. Again, this is the direct opposite to the neo-liberal intention of making all housing a source of investment funds. However, this form of micro-lending with recourse to borrowers' homes places them at risk of outright destitution. This is already a vulnerable segment of the population with no access or diminished access to resources. A government policy that transfers to them "rights" to their existing interests may only put them at risk of having those assets more easily stripped away. Indeed, this government policy is precisely premised on the expectation that property holders will indeed draw on the equity of their newly titled assets. At the end of the day, what it provides is simpler asset-guarantees for the financial sector and a new credit market.

## **VI. Classical property regime**

The benefits of titling are generally characterized as providing for greater security in tenure, incentives for improvements, collateral for mortgage loans, and a secondary sales market. Less discussed are some of the drawbacks that titling, under the current constellation of ownership rights, may in practice entail. In the specific context of Panama City, the expansive rights of title and permissiveness of zoning has led to a miscalibrated housing supply.

Specifically, legal rights are often exploited to their utmost degree thereby imposing many negative externalities on society at large. A number of built-in and unseen subsidies are made available to developers by government-provided infrastructure. Better planning and control by government officials are compromised by the seemingly pre-determined logic of property rights. Working class displacement, environmental degradation, and historical preservation are all made worse as a result.

From a different angle, the legal system can also fall prey to certain powerful interests to the detriment of the expectations of others. More prosaically, though, even the run-of-the-mill expected permanence of unchanging property rights, tenure security, and guaranteed expectations—under the aegis of property law—is misplaced. Textual interpretation, application of legal standards, and discretion in rule enforcement are intrinsically dynamic aspects of the legal system. Therefore some of the assumed benefits of titling are premised on the expectation of political consensus rather than some inherent feature of rule formalization. The examples below demonstrate a number of negative effects in the Panamanian context.

### **A. Over-construction of high income housing**

The clearest illustration of over-construction is the number and size of luxury condos in the city Center. Structures are erected to the ultimate possible allowances under the zoning codes and then some. These vary across the city in terms of permissible density, setbacks, and use. In reality, however, they are quite permissive, especially in the Center. The tangible result has been tall skyscrapers and condominiums in previously low-rising residential districts. Minimal or no setback requirements at the lower floors has builders building to the widest extent of their land. Zoning laws limit density by floor. Its purpose presumably is to limit urban density and traffic by limiting the number of

residents per lot. The effect has been twofold. It encourages more luxury units—to which the full density limit is assigned—to in effect reap the highest profit margin as a function of density. But, it also drives the buildings higher up in order to add more units. It thus increases the inventory of high-priced housing and encourages overbuilding both horizontally and vertically. A March 2008 Miami Herald article reports 250 new skyscrapers under construction and applications for another 400 already filed.<sup>118</sup> It is reported that the Municipality of Panama received \$1,023,000 in new construction permitting revenues for January and February 2008 combined, a 72.3 % increase over the 2007 figures.<sup>119</sup> Álvaro Uribe notes that:

The formula of continuing to make use of the advantages of conglomeration in the Center, where the flexibility of norms allows for anything goes, continues to be more persuasive than the uncertainty that still weighs over the reverted lands [in the Canal Zone].<sup>120</sup>

This leads him to the observation of a zone of “laissez-faire” that is enacted through the law of registered titles and zoning codes.<sup>121</sup> Two things are interesting to note. First, state regulatory law is very flexible.<sup>122</sup> A recent Panama City op-ed notes:

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<sup>118</sup> See *Panama's economic boom breeds pride, concern*, MIAMI HERALD, Mar. 30, 2008; see also Muñoz, *supra* note 32.

<sup>119</sup> *Panama City building permits up*, THE PANAMA NEWS, Mar. 23-Apr. 5, 2008.

<sup>120</sup> Uribe, *supra* note 26.

<sup>121</sup> *Id.*

<sup>122</sup> Law 6 of February 1, 2006, República de Panamá. See also Eric Jackson, *Panama's Emerging Urban Planning Regime*, THE PANAMA NEWS, July 8-21, 2007.



The extraordinary boom of runaway construction of large towers everywhere, although it has some situational benefits, rapidly begins to destroy the potential of the city. It occurs with the sudden changes in zoning laws without the consultation of neighbors, without streets and other infra-structure to rationally accommodate the increases in density, with no attention paid to public easements, sidewalks, green areas, open spaces, historically and architecturally valued buildings, public recreational spaces for the young and the elderly... The excessive traffic, without proper avenues or streets, the noise, the environmental pollution, the lack of parking, you can keep listing....<sup>123</sup>

Second, it prioritizes construction and private property over other public policy concerns, such as the environment, quality of life, and health.<sup>124</sup> As such, the legal system subsidizes agglomerations of title at the expense of the public rather than incorporating a greater portion of social costs within the background rules applying to housing en-

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<sup>123</sup> Nicolás Ardito Barletta, *Panamá: La ciudad (I)*, LA PRENSA, May 8, 2007.

<sup>124</sup> See, e.g., *Alcantarillado Sanitario: Obsoleto, insuficiente y contaminante*, EL PANAMÁ AMÉRICA, June 30, 2002 (“So that the million inhabitants of the capital have an idea of the problem and possible solution [of pollution in the bay, and river and streams that empty there], they should know that when they flush the toilet in their homes and businesses, the fecal matter that runs through the pipes arrives 100% raw at the bay, along the rivers and large pipes that dump directly onto the coast. The same occurs with sewage coming from sinks, bathrooms and wash tubs.”); Elizabeth A. Garrido & Wilfredo S. Jordan, *Al rescate de la bahía*, MARTES FINANCIERO, Mar. 16, 2004, Marianela Palacios Ramsbott, *Podremos bañarnos en la bahía en 2010*, LA PRENSA, Mar. 27, 2007 (announcing sewage treatment project in progress financed by \$50 million loan from Inter-American Development Bank and a second \$167 million loan from the Japanese Government).

trepreneurs.<sup>125</sup> Additionally, legal rules sanction this result and, by adopting this essentially laissez-faire baseline, render it more difficult to exercise needed re-allocation of resources to the low-income housing sector.

## **B. Misdirected public subsidies**

The attribute of title also entitles owners and builders to demand the subsidized basic services of the city. In some setting this may be justified and part of government incentives. In the context of Panama, though, city services are stretched to their limit. The city is already home to numerous residents living in precarious conditions and not connected to basic services. The city's infrastructure is decaying in parts because of disorganized spurts of growth.<sup>126</sup> The particular shape the housing boom has taken places great demands on the city's capacity for more and larger water and sewer connections. All of this is occurring simultaneously with a number of high-rise projects. Thus, in the case of complying building plans, city officials are required to scramble to provide services such as water and sewer to huge buildings. Indeed, city officials understand that they are compelled to provide the municipal services so long as all the listed requisites have been met. They are effectively powerless to impose further limits, greater sequencing, or additional fees. Certainly, public officials can propose legislation or other measures having this effect. Yet, the perception of encroachment on baseline property rights makes this difficult to achieve. Notably, no ameliorative measures have been put in place, undoubtedly because

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<sup>125</sup> See Jerry L. Anderson, *Britain's Right to Roam: Redefining the Landowner's Bundle of Sticks*, 19 GEO. INT'L. ENVTL. L. REV. 375 (2007). See generally, Hohfeld, *supra* note 76.

<sup>126</sup> Irma Elena Mordok, *Exigen desarrollo planificado*, PANAMÁ AMÉRICA, June 4, 2007.

any such proposal would be met by substantial resistance from builders and other property owners.

Finally, many of the condominium units in these skyscrapers actually remain vacant. Indeed, city officials estimate that 30 % are unoccupied (developers typically proceed when they have deposits on 70%), but in all likelihood this is a very conservative estimate if one considers all the purchases based upon speculation.<sup>127</sup> Many of the rest are also not occupied on a full-time basis. Moreover, considering the prices and maintenance costs of these units, it is not surprising that they are beyond the reach of most Panamanians. Thus, even the permissive building codes encouraging construction to the full extent of lot lines is doing little by way of resolving the demand for housing of local Panamanians since most of these units are being bought by high net worth individuals.

### C. Hiding assets and laundering money

Purchasing real estate in Panama may also provide a route to hide assets from the reach of other jurisdictions and to launder money in the form of legal real property. For instance, real estate developers are permitted to accept cash payments from buyers.<sup>128</sup> Additionally, private investors may own real estate anonymously by holding title through non-registered bearer share corporations.<sup>129</sup> Share transfers are not recorded and thus not available for inspection.<sup>130</sup> Rather, simple possession of the stock certificate controls

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<sup>127</sup> See Jim Landers, *Condo boom hits Panama – As towers rise, sellers seek to woo Americans*, THE CHICAGO TRIBUNE, Aug. 24, 2007 (estimating that 70 to 90 % of units are bought on speculation).

<sup>128</sup> *Panama*, supra note 118.

<sup>129</sup> See Ronald Edwards, *Panama Anonymous Bearer Share Corporations*, (November 13, 2006) available at [www.goinglegal.com/article\\_98649\\_86.html](http://www.goinglegal.com/article_98649_86.html) (last visited Oct. 15, 2008).

<sup>130</sup> *Id.*

disposition of the asset.<sup>131</sup> Thus, this freely and anonymously transferable asset (i.e. housing units), which from a public-policy perspective serves many purposes, can easily serve to evade legitimate creditors and to launder money.

The pressure this influx of illicit money places on the housing industry has a number of deleterious effects. The demand for stashing large amounts of cash distorts the housing market, putting pressure on more high-end units as well as building disproportionately in size and volume. Furthermore, the subsidies generally available to these users in the form of installation of services and increased capacity upgrades are misdirected away from more pressing housing needs. Indeed, they may be redirected to the luxury end of the housing sector or to illicit activities.

#### **D. Housing instability**

Another feature not typically highlighted of titling is the opposite of its purported claim to tenure security. A good example is Boca La Caja, near the high rise developments of Punta Pacífica, Paitilla, and San Francisco. Approximately 40% to 75 % of the families there live in houses without title.<sup>132</sup> Because of their proximity to the city Center, their waterfront location, and high-end neighbors, residents are under significant financial incentives to sell their homes and re-orient their livelihoods. Land titling appears to be a good solution to protect them. Indeed the legal guarantees of title would appear to permit those preferring to stay with greater security than their current status of "informal" dwellers.<sup>133</sup> This security however is somewhat illusory since it is the possibility of titling these lands by their current occupants that makes them attractive to

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<sup>131</sup> *Id.*

<sup>132</sup> Muñoz, *supra* note 32.

<sup>133</sup> Mojica, *supra*, note 31.

developers. Reflecting on government titling in the Panamanian interior, Raúl Leis observes that for micro-farmers:

The state undertakes the massive titling of lands, granting or titling individual lots, but without significantly augmenting raw materials, marketing, technology, by which the small landowner (indigenous or peasant) ends up selling his farm at low prices in the land market and migrating to the agricultural fringes or cities. Under these conditions the countryside is, more so all the time, a reservoir of extended poverty and growing.<sup>134</sup>

Indeed, in a different context, the practice of titling very small plots to Sicilian farmers has been shown to be counter-productive.<sup>135</sup> Its effects have been principally an ensuing concentration of land. Titling made it easier to consolidate the land by providing easier transferability.<sup>136</sup> And, restricting transferability defeats the professed objectives of development-oriented advocates of titling programs.<sup>137</sup> In the context of titling programs, the Minister of Housing and other officials are limited to simply exhorting residents not to sell their properties once formalized, explaining that they constitute subsidies from the state.<sup>138</sup>

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<sup>134</sup> Raúl Leis R., *Panamá: Centralismo y Metropolización*, in, COMISIÓN UNIVERSITARIA DEL CENTENARIO DE LA REPÚBLICA, PANAMÁ: CIEN AÑOS DE REPÚBLICA 247 (2004).

<sup>135</sup> Harold Lemel, *Land Titling: Conceptual, Empirical and Policy Issues*, LAND USE POL'Y, 283, 283-85 (July 1988).

<sup>136</sup> Tim Hanstad, *Developing Land Registration Systems for Developing Countries*, 13 AM. U. INT'L L. REV. 647, 666 (1998).

<sup>137</sup> See DE SOTO, *supra* note 41, at 42-43, King, *supra* note 81, at 447 ("these conditional grants of title, if intended to diminish the redistributive aspects of titling programs, have often failed to alleviate the housing shortage to which they are addressed, as they have merely provided incentives to settlers to subdivide, sell, or rent their plots illegally").

<sup>138</sup> "Noticias: 7,000 familias reciben asignaciones de lotes en Arraiján," Ministerio de Vivienda República de Panamá, *Dirección de Relaciones*

Potential title holders have been warned that if they sell their lots prior to the finalization of title they would become ineligible and the property would be awarded to someone else.<sup>139</sup> Selling newly acquired titles will likely lead to squatting on land elsewhere.

In Panama City, condominium developers are already offering significant sums of money for this *untitled* land, offering residents the funds to get them titled and then sell them for development.<sup>140</sup> Indeed, these financial incentives are spurring more precarious informal construction by new residents. More makeshift houses are being built in this area, in low lying zones, and on land part of the tidal basin, reputedly in an effort to stake out claims to valuable land, for which title will be obtained—with the help of condominium developers—and then sold to them. New squatters have been advised by the Panamanian authorities of the illegality and dangers of building on land reclaimed from the sea since they are prone to flooding. The area residents, however, point out that high rise developers are similarly reclaiming land from the sea to build their luxury buildings in contiguous areas.<sup>141</sup>

### E. Deepening sub-prime credit markets

Titling is meant to provide access to collateral. Indeed, one of the main arguments for titling squatters is that

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*Públicas*, Apr. 4, 2008,  
<http://www.mivi.gob.pa/noticias/abril09/001arraijan.html> (last visited Apr. 11, 2008).

<sup>139</sup> “Noticias: Culmina agrimensura y ordenamiento de lotes en Villa Vivian”, Ministerio de Vivienda, *Dirección de Relaciones Públicas*, República de Panamá, Apr. 1, 2008,  
<http://www.mivi.gob.pa/noticias/marzo08/marzo08-14.html> (last visited Apr. 11, 2008).

<sup>140</sup> Muñoz, *supra* note 32.

<sup>141</sup> L. Ivis & C. Franco, *Peligro ronda Boca La Caja*, EL PANAMÁ AMÉRICA, Oct. 1, 2006.

they will then be able to use the equity in their assets. Since squatter dwellings are principal places of residence, these individuals will presumably continue to live in them. Thus, the primary means of accessing such equity will not be through selling. Rather, access to capital will depend on borrowing against the value of their home equity. In this way, the untitled will then be able to, through loans, access cash and presumably put it to good use.

The difficulties with this plan are evident. This area of home financing is practically by definition a sub-prime market. Accordingly, interest rates will likely be high. There is a strong danger of predatory lending. Moreover, a default because of a missed paycheck, unrealized profit from a new business, or an economic downturn will produce a major economic crisis, foreclosures, and a newly homeless people. Thus, plugging these lower-income sectors of society into the financial markets places both them and the economy at great risk. Indeed, it may be that housing priorities for the less advantaged in Latin America should be given precedence over financial sector policy. Increasing liquidity in the economy at the expense of putting shantytowns dwellers in jeopardy of losing their homes may not be the smartest course.

Not so dissimilar is the working-class tract housing on Panama City's outskirts. As noted above, lower income developments dot the east and north routes into the city. In an effort to create more of them, the Ministry of Housing has initiated a small program to stimulate this type of private development. It plans to sell three large tracts of public land to private developers for low-cost titled housing. In turn, at the level of home purchases, qualified buyers meeting certain restrictions are granted access to preferential mortgage terms for these homes. This situation again produces the same difficulties of risky and high-cost credit as with recently-titled squatter settlements—regardless of title to real property collateral. In the place of private credit markets, then, subsidized government loans are required to

ensure individuals access to homes. It is not clear that this form of government transfer is preferable to outright investment in public utilities and infrastructure for residents on urban public land.

## VII. Intrinsic uncertainties of legal rules

An inescapable dimension of titled property regimes, somewhat counter-intuitively, is the relative indeterminacy of legal rules. Conventionally, formalization in the form of titled rights appears to offer clarity of legal rights and certainty of tenure. Moreover, as described above, an expansive definition of private property allows titleholders to capture a disproportionate share of public goods and to externalize social costs. However, this beneficial distribution of economic power to titleholders is subject to all the regular “informality” of liberal legal systems, including legislated ambiguities, regulatory discretion, indeterminate legal rules, and conflicting judicial interpretation. These aspects of the legal system are less frequently addressed as areas of informality. As a result, the latter is mostly depicted as existing outside of law.

An example of the phenomenon addressed here is the experience of residents at Ciudad Jardín Albrook. The homes there were sold by auction by the Panamanian government between approximately 1998 and 2000. Many individuals including former and retired Panamanian Canal Zone employees as well as U.S. retirees obtained homes in this way. Ownership is held through formal registered title. This formal guarantee to home and neighborhood, however, has not come without its drawbacks. A large part of the appeal of the garden city is the low height and density restrictions, reduced traffic, and the aesthetics thereby produced.<sup>142</sup> The neighborhood reflects the mandates of larger

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<sup>142</sup> See Rafael Spalding, *Noticias objetivas o propaganda en Albrook*, LA PRENSA, June 20, 2002.



setbacks, harmonious styles, and single family home character maintained by the U.S. military. The designation of a “garden city” under the 1997 Panamanian law for the Canal Zone and subsequent August 8, 2000 Resolution No. 139 of the Ministry of Housing were meant to preserve this character.<sup>143</sup>

In 2001, after most initial owners had purchased their titles, two existing buildings in the area formerly housing for single soldiers, were bought by a developer with expansion plans for greater height, added floors, and greater density.<sup>144</sup> This development, called Albrook Park, was permitted under the zoning regulations for Panama City and not the specific legislation for the “garden cities” within the Canal Zone.<sup>145</sup> Although not a skyscraper, it brings multiple units, more height, increased density, and added traffic to two-lane residential streets. The unbar-gained-for expansion, contrary to the expectations of initial owners, has changed the character of the neighborhood and harmed their environment. Additionally, it has led many to question the legal guarantees available under Panamanian law.<sup>146</sup>

Despite contrary zoning regulations in effect at that time, the Ministry of Housing approved the expansion plans. Individual Albrook owners, organized in a residents association (“Aprojal”), took action and questioned the Ministry’s decision. The Ministry, however, did not reverse

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<sup>143</sup> Ley 21 de 1997, Plan Regional y el Plan General de Uso, Conservación y Desarrollo del Área del Canal, República de Panamá, Resolución N° 139-2000, Gaceta Oficial Sept. 1, 2000, No. 24,130, Normas especiales para mantener el carácter de ciudad jardín en la región interoceánica, Ministerio de Vivienda, República de Panamá, Aug. 8, 2000.

<sup>144</sup> Resolución N° 204-2003 de 30 de Sept. de 2003, Emitida por el Ministro de Vivienda, República de Panamá.

<sup>145</sup> See Rafael Spalding, *Justicia dilatada no es justa*, LA PRENSA, Sept. 16, 2002.

<sup>146</sup> Luis A. & Méndez F., *Las burlas de la “Ciudad Jardin,”* LA PRENSA, Oct. 6, 2001.

course. Instead, government officials and even media commentators have criticized the group as trouble-making U.S. retirees, unknowledgeable about Panamanian law, expecting to live in a military-style enclave, privileged, elitist, and seeking to embarrass the Panamanian government by calling upon the U.S. embassy for support.<sup>147</sup> The Aprojal president claims to have called upon U.S. officials, simply, to warn foreign purchasers of the risks of property ownership in Panama. In any case, in Aprojal's favor, the Panama Municipal Council, on October 31, 2001, temporarily halted construction at Albrook Park based on Aprojal's complaint pending a final decision by the competent authorities.<sup>148</sup> Specifically, Aprojal sued on the basis of Resolution 139-2000, paragraph b.12 of the Ministry of Housing which provides for these reverted properties:

There should be maintained inasmuch as possible the original designs of facades in terms of texture, color, materials, number of finished floors, heights, and other physical characteristics.<sup>149</sup>

According to past Association President Rafael Spalding, they hired a lawyer who also brought the case to the Panamanian Supreme Court in 2002. The Association succeeded in convincing the government's lawyers, the Procuraduría de la Administración, of the illegality of the Ministry's

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<sup>147</sup> Manuel Domínguez & Hermes Sucre, *ARI promete no derribar ni un árbol en Albrook*, LA PRENSA, Nov. 1, 2000.

<sup>148</sup> *Consejo Municipal suspende las obras de "Albrook Park,"* LA PRENSA, Oct. 31, 2001, Mario A Muñoz, *Proyecto de Albrook Park cumplió con las normas ambientales*, LA PRENSA, Nov. 1, 2001, Víctor D. Torres, *FV Constructor amenaza al Municipio de Panamá*, LA PRENSA, Nov. 1, 2001.

<sup>149</sup> Resolución N° 139-2000, Gaceta Oficial, Sept. 1, 2000 No. 24, 130, Normas especiales para mantener el carácter de ciudad jardín en la región interoceánica, Ministerio de Vivienda, Republica de Panamá, Aug. 8, 2000.

actions. The Supreme Court, however, refused a preliminary injunction and did not decide the case.<sup>150</sup> By 2003 with still no ruling handed down the Albrook Park project was completed and occupied.

Additionally, in February 2007, the National Assembly amended Law 21 of 1997 to allow the Ministry of Housing to modify provisions of that same law relating to urban development in the reverted areas by simple resolution, retro-active to July 1997.<sup>151</sup> This law was the basis, in a recent decision by the Administrative Chamber of the Supreme Court, for lifting a prior injunction against construction on land zoned as a “green urban area” under the 1997 law. By resolution dated 2000, the Ministry of Housing changed the “green” zoning to residential medium density. The Supreme Court in a prior decision issued January 31, 2006 had granted a preliminary injunction based on a clear likelihood of success on the merits, considering the clear inconsistency of the Ministry’s resolution with the law.<sup>152</sup> However, based on the February 12, 2007 legislative amendment of the law authorizing the Housing Ministry to unilaterally re-zone and ratifying its unilateral re-

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<sup>150</sup> Demanda Contencioso Administrativa de Nulidad interpuesta por la firma forense Rosas & Rosas, en representación de Asociación de Propietarios de Viviendas de Ciudad Jardín Albrook (APROJAL), para que se declare nula, por ilegal, la Resolución N° 204-2003 de 30 de Sept. de 2003, emitida por el Ministro de Vivienda, Ponente: Adán Arnulfo Arjona L, Panamá, Corte Suprema de Justicia de la República de Panamá, Expediente No. 58-06. Mar. 20, 2006.

<sup>151</sup> Ley 12 de 12 de Feb. de 2007, publicada en la Gaceta Oficial No. 25731 de 13 de Feb. de 2007, que modifica el Artículo 13 de la Ley 21 de junio de 1997, sobre el Plan general de uso de suelos de la región interoceánica.

<sup>152</sup> Demanda Contencioso Administrativa de Nulidad, Interpuesta por el Licenciado Carlos E. Varela Cardenal, en representación de la Alianza para la conservación y el desarrollo, para que se declare nulo, por ilegal, el artículo No. 8 de la Resolución 09-2000 del 31 de mayo de 2000, emitida por la Dirección General de Desarrollo Urbano del Ministerio de Vivienda, Ponente: Victor Benavides, Panamá, Jan. 31, 2006.

zoning retro-active to 1997 the Supreme Court terminated the preliminary injunction. Petitioners are now challenging the constitutionality of the legislative amendment. Previously, an opposition congressman had already challenged the constitutionality of this amendment before the Supreme Court in March 2007.<sup>153</sup> No decision has yet been rendered on this issue. Additionally, as of this writing, the legality of the first Ministry approval of Albrook Park, challenged by Aprojal, is still pending in the Panamanian Supreme Court—six years later. Aprojal's action will no doubt be dismissed if the constitutionality of the Ministry's newly granted and retroactive powers were to be upheld.<sup>154</sup> Comparing the situation of both squatters and Albrook residents, Álvaro Uribe has noted the unexpected similarities:

These actions [by Albrook residents], respecting the differences of social group distance involved, are equivalent to the efforts of the inhabitants of the self-built popular barrios: they are struggles for permanence in the barrio and for permanence of the barrio, faced with the threat of expulsion by new projects.<sup>155</sup>

Certainly, this example can be seen as a simple matter of a violation of existing laws and a potentially improper manipulation of the legislative process. However, it may be adjudged within the legislature's powers as part of the flexibility inherent in legal and constitutional interpretation. Thus, if the Court grants the legislature the authority to make this retro-active change, the latter becomes part of the corpus of property law. This example demonstrates that,

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<sup>153</sup> Juan Manuel Díaz, *Demanda contra ley de uso de suelos*, EL PANAMÁ AMÉRICA, Mar. 20, 2007.

<sup>154</sup> Rafael Spalding, *Una corte de injusticia suprema*, LA PRENSA, Feb. 26, 2008.

<sup>155</sup> Uribe, *supra* note 26, at 13.

even in the context of title and zoning, expectations may be frustrated. Indeed, any one of the various sticks in the bundle of these rights can be re-arranged, and alternative types of legal relations may be sanctioned. Thus, the questions involve not merely the distinction between formal or informal legal relations but also the advantages and disadvantages of different property-holding regimes.

### VIII. Conclusion

This essay is an attempt to move beyond the trope of “informality” as merely an argumentative device. That is, the notion that there is informality or an informal law has often been used in the past primarily as an argument for other ends. It has been instrumentalized to argue for a more pragmatic conception of law. Conversely, it has also been used to argue for a reinforcement of private property rights. In either case, the observation that a certain segment of the population is living on land not titled in their name has supported a strategy to re-calibrate the scope of legal regulation.

Quite differently, this Essay leads to several concluding points. Untitled housing on public land is not usefully understood as simply “self-help deregulation,” opting out of the high costs of legality. Rather, this arrangement is an alternative for low-income housing that has been *de facto* sanctioned by the state. Also, it need not be uniformly negative. Not unlike the titled regime, it has its positives and negatives. Because the state has superior ownership rights does not mean it need remain otherwise unregulated or unplanned. Simply awarding titles, however, may lead to more housing insecurity, foreclosures and financial crisis, than to sustainable capital infusions in the economy coming from the equity in squatter property. Finally, the options currently available are a reflection of existing laws. The rules leading to the current situation are political and economic positions regarding the distribution of entitlements,

principally those governed by private law rules. As such, a more frank assessment of those rights and privileges may lead to the consideration of different forms of property holding and alternative modes of collective regulation.







ESSAY

**ENVIRONMENTAL IMPACT ASSESSMENT IN POST-COLONIAL SOCIETIES: REFLECTIONS ON THE PROPOSED EXPANSION OF THE PANAMA CANAL**

*Carmen G. Gonzalez\**

Vamos a hacer de estas instalaciones recuperadas (Canal de Panamá) y de esos kilómetros cuadrados (áreas de la Antigua Zona del Canal), el uso más colectivo posible. Y cuando digo el uso más colectivo, les estoy manifestando aquel uso en el que la mayor parte del pueblo panameño pueda disfrutar del esfuerzo de su lucha.<sup>1</sup>

Panama's destiny has been shaped by its geographic location at the crossroads of international trade.<sup>2</sup> Lacking

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\*Associate Professor, Seattle University School of Law. I would like to thank Daniel Suman, Frank Valdes and Colin Crawford for organizing an enlightening one week seminar in Panama during which the Canal expansion and many other topics were explored. I am especially grateful to the many Panamanian scholars, government officials and non-governmental organization representatives who took the time to meet with us and to share their thoughts and insights.

<sup>1</sup> President Omar Torrijos, Speech before the Panamanian National Assembly, August 19, 1977, (quoted in Marco A. Gandásegui, *Los Retos Que Enfrentan el País y el Canal de Panamá*, 113 TAREAS 39 (2003), available at <http://bibliotecavirtual.clacso.org.ar/ar/libros/tar113/marco.rtf>.) ("We are going to make the most collective use possible of these recovered installations (the Panama Canal) and of these square kilometers (the former Canal Zone). And when I say the most collective use possible, I mean the use which permits the majority of Panamanians to reap the rewards of their struggle.").

<sup>2</sup> See WALTER LAFEVER, *THE PANAMA CANAL: THE CRISIS IN HISTORICAL PERSPECTIVE* 3 (1989).

mineral wealth or extensive arable lands, the country has prospered or declined based on the use made by others of the country's major resource—the Panama Canal.<sup>3</sup> The Panama Canal is a potent symbol of Panamanian identity, a reminder of Panama's lengthy colonial history, and an important generator of income for the modern Panamanian nation.<sup>4</sup>

On December 31, 1999, the United States officially transferred the Panama Canal to the Panamanian government.<sup>5</sup> This transfer was the culmination of a lengthy struggle for Panamanian sovereignty and self-determination.<sup>6</sup> With the departure of the United States, Panamanians would finally have the opportunity to shape their economic and political destiny subject to the constraints imposed by the global economic order.

The transfer, however, was not a panacea. Even after the colonial power departed, the institutional and ideological vestiges of colonialism were not easily eradicated.<sup>7</sup> Commentators wondered whether the Panamanian government would operate the Canal in the interests of the Panamanian people—as President Omar Torrijos had hoped—or whether the Canal would be managed just as the United States had managed it.<sup>8</sup> This question took on particular urgency when the Panamanian government proposed to expand the Panama Canal in order to increase the Canal's competitiveness and efficiency.<sup>9</sup>

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<sup>3</sup> See *id.*

<sup>4</sup> See *id.* at 222-23.

<sup>5</sup> See JOHN LINDSAY-POLAND, *EMPERORS IN THE JUNGLE: THE HIDDEN HISTORY OF THE U.S. IN PANAMA* 172 (2003).

<sup>6</sup> See generally LAFEBER, *supra* note 2, at 63-102, 222-23.

<sup>7</sup> See MAHMUD MAMDANI, *CITIZEN AND SUBJECT: CONTEMPORARY AFRICA AND THE LEGACY OF LATE COLONIALISM* 286 (1996) (observing that the post-colonial state often reproduces key elements of the colonial state).

<sup>8</sup> See LINDSAY-POLAND, *supra* note 5, at 190.

<sup>9</sup> See Panama Canal Authority, *Proposal for the Expansion of the Panama Canal: Third Set of Locks*, Apr. 24, 2006,

On April 24, 2006, six years after the transfer, Panamanian authorities announced a \$5.25 billion plan to expand the Canal by constructing a third set of locks.<sup>10</sup> In accordance with Panamanian law, the expansion proposal was submitted to a popular referendum on October 22, 2006 and was overwhelmingly approved.<sup>11</sup> However, the referendum was plagued with procedural irregularities that raised questions about the legitimacy of the pro-expansion outcome—including the absence of a comprehensive assessment of the environmental and socioeconomic impacts of the controversial project.<sup>12</sup>

This article will examine the expansion of the Panama Canal as a case study on two distinct but interrelated challenges faced by post-colonial societies. The first is how to develop natural resources in forward-looking ways consistent with long-term national self-interest despite the tendency of colonial practices and institutions to persist long after the colonial power has departed. The second is how to use environmental impact assessment law as a tool to enhance public and governmental decision-making in the development planning process.

The article is divided into three parts. Part I introduces the Canal expansion case study and describes the controversial referendum. Part II discusses the role of environmental impact assessment in development planning, explains the Panamanian laws and regulations applicable to

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<http://www.pancanal.com/eng/plan/documentos/propuesta/acp-expansion-proposal.pdf>.

<sup>10</sup> See *id.*

<sup>11</sup> See Marc Lacey, *Panamanians Vote Overwhelmingly to Expand Canal*, N.Y. TIMES, Oct. 23, 2006, at A3.

<sup>12</sup> See NotiCen: Central American & Caribbean Affairs, *Panama Canal Expansion Approved in Heavily Criticized Referendum*, Oct. 26, 2006; Eric Jackson, *Environmental Defense of Torrijos-Alemán Zubieta Plan Collapses*, The Panama News, Sep. 17 – Oct. 7, 2006, Vol. 12, Num. 18 at

[http://www.thepanamanews.com/pn/v\\_12/issue\\_18/news\\_01.html](http://www.thepanamanews.com/pn/v_12/issue_18/news_01.html).

environmental impact assessment, and analyzes and critiques the application of this legal framework to the proposed expansion of the Panama Canal. Part III examines the ways in which the colonial legacy distorts the development planning process and discusses strategies that might be deployed to resist the re-imposition of colonial practices and institutions. Drawing upon the Canal expansion case study, Part III recommends specific amendments to Panama's environmental impact assessment laws and regulations designed to enhance governmental decision-making and to promote public participation in the development planning process.

### **I. The Panama Canal Expansion Project: Introduction to the Case Study**

In order to examine the multi-layered controversy over the expansion of the Panama Canal, it is essential to place the dispute in historical context. This Part presents a brief history of the Panama Canal, summarizes the arguments for and against the expansion project, and discusses the highly contentious referendum.

#### **A. Brief History of the Panama Canal**

From the earliest days of Spanish colonial rule until the present, Panama has played a pivotal role in international trade.<sup>13</sup> During the Spanish empire, Spanish ships arrived in the Caribbean port of Portobelo, where their goods were unloaded and hauled by mule across the isthmus to Panama City for distribution to the Spanish colonies on the Pacific Coast—from San Francisco in the north to Santiago in the south.<sup>14</sup> Likewise, Peruvian silver was

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<sup>13</sup> See LAFEBER, *supra* note 2, at 3.

<sup>14</sup> See INSTITUTO DEL TERCER MUNDO, *GUIA DEL MUNDO: EL MUNDO DESDE EL SUR* 453 (2001) [hereinafter *Instituto*].

transported across the isthmus from Panama City to the Caribbean coast for shipment to Seville.<sup>15</sup>

In 1821, Panama declared its independence from Spain and joined the Republic of Gran Colombia (a union of Venezuela, Colombia and Ecuador).<sup>16</sup> When this entity was dissolved in 1830, Panama became part of Colombia.<sup>17</sup>

As the U.S. economy expanded in the 1820s, U.S. businessmen began to eye Panama as a possible location for a canal between the Atlantic and Pacific Oceans.<sup>18</sup> U.S. interest in Panama intensified with the discovery of gold in California in the 1840s.<sup>19</sup> Because the U.S. transcontinental railroad would not be completed until 1869, U.S. financiers constructed a railroad between Panama City (on the Pacific Ocean) and the city of Colón (on the Atlantic Ocean) between 1851 and 1855 to facilitate the movement of people and goods to and from California.<sup>20</sup> In its fourteen years of operation, the railroad carried 600,000 passengers and \$750 million in gold bullion between the Atlantic and Pacific coasts.<sup>21</sup>

The first attempt to construct a canal across Panama was undertaken by the French between 1880 and 1889.<sup>22</sup> Ferdinand de Lesseps, the famed architect of the Suez Canal, attempted to construct a sea-level canal based on the Suez model.<sup>23</sup> De Lesseps abandoned the effort in 1889

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<sup>15</sup> See JOHN MAJOR, PRIZE POSSESSION: THE UNITED STATES AND THE PANAMA CANAL 1903-1979, 9 (1993).

<sup>16</sup> See U.S. CENTRAL INTELLIGENCE AGENCY (CIA), THE WORLD FACTBOOK: PANAMA, *available at* <https://www.cia.gov/library/publications/the-world-factbook/geos/pm.html>.

<sup>17</sup> See *id.*

<sup>18</sup> See LAFEVER, *supra* note 2, at 7-8.

<sup>19</sup> See *id.* at 10.

<sup>20</sup> See *id.*

<sup>21</sup> See *id.*

<sup>22</sup> See LINDSAY-POLAND, *supra* note 5, at 77.

<sup>23</sup> See *id.*

when disease, financial mismanagement, and construction setbacks doomed his project to failure.<sup>24</sup>

The project was taken up by the United States, which convinced the Colombian ambassador in Washington, DC to sign a treaty giving the U.S. a 99-year lease on a six-mile wide canal zone in exchange for a \$10 million fee and annual payments of \$250,000.<sup>25</sup> Hoping for a better deal, the Colombian senate unanimously rejected the treaty. The United States supported Panama's November 1903 Declaration of Independence from Colombia and dispatched the marines to prevent Colombian troops from repressing the Panamanian revolt.<sup>26</sup>

Contrary to popular mythology, Panama's bid for independence was the product of a lengthy struggle against Colombia. It was not simply engineered by the United States at the last minute in order to construct the Canal.<sup>27</sup> Panamanians had rebelled against Colombia in 1830 and 1831, and perhaps fifty times between 1840 and 1903.<sup>28</sup> These rebellions were nurtured by a nationalist ideology driven by the "geographical myth" that Panama was predestined to control one of the world's greatest trade routes.<sup>29</sup> This ideology also had a powerful anti-imperialist element, which was directed initially against Colombia and would later be directed against the United States.<sup>30</sup>

U.S. support for Panamanian independence came at a great price. In exchange for a \$10 million fee and a \$250,000 annual annuity, the Panamanian government was forced to sign the egregiously one-sided Hay-Bunau Varilla Treaty (negotiated on Panama's behalf by the French entrepreneur Philippe Bunau Varilla), which gave the United

<sup>24</sup> See *id.*; LAFEBER, *supra* note 2, at 11.

<sup>25</sup> See LAFEBER, *supra* note 2, at 18.

<sup>26</sup> See *Instituto*, *supra* note 14.

<sup>27</sup> See LAFEBER, *supra* note 2, at 19-20.

<sup>28</sup> See *id.* at 20.

<sup>29</sup> See *id.*

<sup>30</sup> See *id.* at 20-21.

States perpetual authority over a ten-mile wide canal zone<sup>31</sup> and the right to intervene in Panama to maintain public order “in case the Republic of Panama should not be, in the judgment of the United States, able to maintain such order.”<sup>32</sup> Panama surrendered sovereign control of the Canal Zone, and granted the United States the authority to operate the Canal Zone “as if it were the sovereign of the territory.”<sup>33</sup> The treaty also gave the United States the perpetual right to use Panama’s rivers, lakes and streams for Canal-related purposes and to use, occupy and control any lands outside the Canal Zone needed for the construction, operation or protection of the Canal.<sup>34</sup> Finally, the treaty required Panama to permit free immigration to the Canal Zone by workers (and their families) of every nationality and prohibited Panama from subjecting them to military service.<sup>35</sup>

The influence of the United States in Panama extended far beyond the Canal Zone. In order to ensure that the Canal construction would not be disrupted by social unrest, the United States supported an elite white oligarchy, crippled the opposition political party, disbanded the army, and assumed responsibility for protecting the oligarchy against both internal and external enemies.<sup>36</sup> Using defense of the Panama Canal as a pretext, the United States intervened militarily in Panama in 1912, 1915, 1918, and 1925 to repress riots and demonstrations.<sup>37</sup> The U.S. condoned widespread election fraud in the name of political stabil-

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<sup>31</sup> See The Convention Between the United States and Panama for the Construction of a Ship Canal to Connect the Waters of the Atlantic and Pacific Oceans (1903) at arts. II, XXIV, *available at* <http://www.fordham.edu/halsall/mod/1903panama.html> [hereinafter, *Hay-Bunau Varilla Convention*]; LAFEBER, *supra* note 2, at 28-33 (describing the events that led to the treaty).

<sup>32</sup> *Hay-Bunau Varilla Convention*, *supra* note 31, at art. VII.

<sup>33</sup> *Id.* at art. III.

<sup>34</sup> See *id.* at art. II, IV.

<sup>35</sup> See *id.* at art. XXII.

<sup>36</sup> See LAFEBER, *supra* note 2, at 40.

<sup>37</sup> See *id.* at 56-58.

ity—thereby thwarting Panama's political development.<sup>38</sup> Finally, the United States dictated Panama's foreign policy and dominated Panama economically.<sup>39</sup> In effect, Panama became a U.S. colony.<sup>40</sup>

The Panama Canal was officially opened on August 15, 1914, and generated huge savings for the U.S. shipping industry.<sup>41</sup> In addition to reducing by the trip between New York and San Francisco nearly 8000 miles, the Canal charged very modest tolls.<sup>42</sup> Indeed, the United States did not increase tolls between 1914 and 1973 in order to subsidize American shipping companies.<sup>43</sup>

The United States maintained a powerful military presence in Panama, with fourteen military bases and an average of 7400 troops between the two world wars.<sup>44</sup> By 1943, 63,000 troops were stationed in Panama.<sup>45</sup> During the Cold War, Panama was the site of the U.S. Southern Command, the command center for U.S. military activities in Central America and South America.<sup>46</sup> In 1946, the School of the Americas was established in the Canal Zone.<sup>47</sup> Between 1950 and 1986, the School of the Americas would train over 57,000 Latin American army and police officers in counter-insurgency operations.<sup>48</sup>

After a period of prosperity during the Second World War, the Panamanian economy suffered a severe decline, and was in a state of crisis by 1960.<sup>49</sup> The country depended on two major sources of revenue. The first was

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<sup>38</sup> See *id.* at 54-55.

<sup>39</sup> See *id.* at 58-61.

<sup>40</sup> See *id.* at 52-54.

<sup>41</sup> See *Instituto, supra* note 14, at 453.

<sup>42</sup> See LAFEBER, *supra* note 2, at 48.

<sup>43</sup> See *id.*

<sup>44</sup> See LINDSAY-POLAND, *supra* note 5, at 190.

<sup>45</sup> See *id.* at 45.

<sup>46</sup> See *id.* at 106.

<sup>47</sup> See *id.*

<sup>48</sup> See *id.*

<sup>49</sup> See LAFEBER, *supra* note 2, at 102.



banana production, which was controlled by United Fruit; the second was the North American military-industrial complex in the Canal Zone, which employed Panamanian workers and purchased goods from Panamanian merchants.<sup>50</sup> The presence of the Canal Zone created two distinct worlds within a small geographic area: the prosperous, air-conditioned First World dominated by the United States, and the steamy, slum-ridden, poverty-stricken Third World ruled by an entrenched and corrupt oligarchy (with U.S. support).<sup>51</sup> As discussed in Part III of this article, this image of the two Panamas would have a subtle but powerful impact on the management of the Panama Canal after the transition to Panamanian control.

The 1930s, 1940s and 1950s were characterized by rising nationalism in Panama as the middle class rebelled against the oligarchy and demanded better terms in the relationship between Panama and the United States.<sup>52</sup> In 1958, Panamanian university students entered the Canal Zone to plant Panamanian flags at strategic locations, but the flags were promptly removed by Canal police.<sup>53</sup> Later that month several students were shot as they participated in demonstrations demanding Panamanian sovereignty over the Canal.<sup>54</sup> The following year, Panamanian university students again marched into the Canal Zone to plant Panamanian flags.<sup>55</sup> When one student was arrested and others were repelled by Canal police and by U.S. troops with fixed bayonets, rioting broke out in Panama City.<sup>56</sup> The riots did not stop until the Panamanian National Guard was called in to restore order.<sup>57</sup> In response to the political turmoil, Pres-

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<sup>50</sup> *See id.*

<sup>51</sup> *See id.* at 83-84, 101-05, 118-19.

<sup>52</sup> *See* LAFEBER, *supra* note 2, at 63-98.

<sup>53</sup> *See id.* at 98-99.

<sup>54</sup> *See id.* at 99.

<sup>55</sup> *See id.* at 100.

<sup>56</sup> *See id.*

<sup>57</sup> *See id.*

ident Eisenhower sent his brother Milton on a fact-finding mission to Panama, where one Panamanian official explained the situation as follows:

You in the United States inherited vast mineral wealth . . . . Africa was given gold and diamonds. The Middle East is rich in oil. God gave Panama nothing but a waterway. We must make a living from our own resources as others have from theirs.<sup>58</sup>

The deadliest riots took place in 1964 after several hundred Panamanian university students marched peacefully into the Canal Zone to demand that the Panamanian flag be exhibited alongside the U.S. flag at Balboa High School.<sup>59</sup> When four to five hundred waiting North Americans confronted the students, violence broke out, and the Panamanian flag was torn.<sup>60</sup> As rumors of the confrontation swept Panama City, as many as 30,000 Panamanians marched into the streets, congregating in the area near the Canal Zone.<sup>61</sup> U.S. troops took up battle positions and exchanged gunfire with snipers.<sup>62</sup> Mobs of irate Panamanians responded by ransacking and setting fire to U.S. businesses in Panama City, overturning and burning automobiles with Canal Zone license plates, and besieging the U.S. Embassy.<sup>63</sup> The violence quickly spread into Colón and the interior of the country.<sup>64</sup> During four days of rioting, twenty-four Panamanians and four U.S. soldiers

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<sup>58</sup> *Id.* at 99 (omission in original).

<sup>59</sup> *See id.* at 108.

<sup>60</sup> *See id.*; LUIS MURILLO, *THE NORIEGA MESS: THE DRUGS, THE CANAL AND WHY AMERICA INVADED* 214 (1995).

<sup>61</sup> *See* LAFEBER, *supra* note 2, at 108.

<sup>62</sup> *See id.*

<sup>63</sup> *See id.* at 109; MURILLO, *supra* note 60, at 215.

<sup>64</sup> *See* LAFEBER, *supra* note 2, at 109.

lost their lives.<sup>65</sup> Over two hundred Panamanians and eighty-five North Americans were wounded.<sup>66</sup>

Panamanians increasingly demanded complete sovereignty over the Canal.<sup>67</sup> When General Omar Torrijos assumed control of the Panamanian government in 1968, the struggle to wrest control of the Canal from the United States was elevated to the international stage.<sup>68</sup> Torrijos sought and obtained support for his cause from other Latin American countries and the Non-Aligned Movement.<sup>69</sup> He shrewdly persuaded the United Nations Security Council to hold its March 1973 meeting in Panama instead of New York City, and used the meeting to focus world attention on the canal issue.<sup>70</sup> Delegates were given the opportunity to see for themselves the stark contrast between the manicured lawns and air-conditioned bungalows of the Canal Zone, and the wretched slums across the street.<sup>71</sup>

When Jimmy Carter was elected President of the United States, he made the Canal question one of his top diplomatic priorities.<sup>72</sup> After difficult negotiations and an arduous battle to obtain U.S. Senate approval, the Panama Canal Treaty of 1977 (the "Panama Canal Treaty") and the

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<sup>65</sup> *See id.*

<sup>66</sup> *See id.*

<sup>67</sup> *See Instituto, supra* note 14, at 454.

<sup>68</sup> *See id.*

<sup>69</sup> *See id.*

<sup>70</sup> *See* LAFEBER, *supra* note 2, at 142.

<sup>71</sup> *See id.*

<sup>72</sup> *See id.* at 150. Carter was determined to negotiate a successful Canal treaty for several reasons. First, he wanted to demonstrate that the United States could work constructively with developing countries and thereby outmaneuver the Soviet Union. Second, he believed that the Canal's strategic significance had declined while its potential to ignite conflict with Panama had increased. Third, he regarded Torrijos as an ideal negotiating partner ("reasonable and able to control his own people"), and did not want to jeopardize Torrijos' position in Panama. Finally, he viewed the negotiation and ratification of a Canal treaty as the litmus test of his ability to manage foreign affairs. *See id.* at 158.

Treaty Concerning the Permanent Neutrality and Operation of the Canal (the "Neutrality Treaty") were ratified by the U.S. Senate on April 18, 1978.<sup>73</sup> Torrijos had obtained a Canal treaty, but on terms far less favorable than he had hoped.<sup>74</sup> The Canal would not be handed over to Panama until the year 2000.<sup>75</sup> Moreover, the U.S. Senate had added a condition during the ratification process that permitted the United States to intervene militarily in Panama to reopen the Canal if the Canal were closed for any reason even after the year 2000.<sup>76</sup>

On December 31, 1999, Panamanian president Mireya Moscoso accepted the formal transfer of the Canal to the Panamanian nation at a ceremony on the steps of the Canal administration building.<sup>77</sup> At the time of the transfer, nearly forty percent of Panamanians lived below the poverty line,<sup>78</sup> and Panama had the second most unequal distribution of income in Latin America (after Brazil).<sup>79</sup> One commentator rightfully queried whether the future of the Canal would be determined by the needs of international maritime interests or by the needs of the majority of Panamanians.<sup>80</sup> In order to formulate a preliminary answer to this question, it is useful to consider the Canal's physical

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<sup>73</sup> See *id.* at 113-15, 145, 148, 159, 178-79, 182. The transfer of the Canal to Panama was so controversial in the United States that the vote in the Senate was 68-32 in favor of ratification—barely satisfying the requisite two-thirds majority. *Id.* at 182. See also Panama Canal Treaty, U.S. – C.Z., Sept. 7, 1977, 33 U.S.T. 47; Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, U.S.—C.Z., Sept. 7, 1977, 33 U.S.T. 11 [hereinafter *Neutrality Treaty*].

<sup>74</sup> See LAFEBER, *supra* note 2 at 186.

<sup>75</sup> See Panama Canal Treaty, *supra* note 73, arts. II(2), XIII(1).

<sup>76</sup> See LAFEBER, *supra* note 2, at 178-81.

<sup>77</sup> See LINDSAY-POLAND, *supra* note 5, at 172.

<sup>78</sup> See THE WORLD FACTBOOK, *supra* note 16 (estimating the population below the poverty rate in 1999 at 37 percent).

<sup>79</sup> See LINDSAY-POLAND, *supra* note 5, at 176.

<sup>80</sup> See *id.* at 184.

characteristics and the contentious debate on whether or not to expand the Canal.

### **B. The Canal Expansion Proposal and Its Critics**

The Panama Canal stretches fifty miles, connecting the Atlantic and Pacific Oceans through numerous artificial channels, three lakes, and a series of locks.<sup>81</sup> Every year 14,000 vessels pass through the Canal, accounting for approximately five percent of the world's trade.<sup>82</sup> Panamanian authorities predict that the Panama Canal will reach its maximum capacity between 2009 and 2012, and will be incapable of handling increased ship traffic without a decline in the quality of service.<sup>83</sup> Ships attempting to traverse the Canal are already experiencing significant delays, and these delays are predicted to worsen as trade volumes continue to expand.<sup>84</sup>

Additionally, the Panama Canal can only handle so-called Panamex ships—vessels specifically designed to fit through the Canal's existing locks and capable of carrying up to 5000 containers.<sup>85</sup> However, with the expansion of

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<sup>81</sup> See *Global Market Brief: The Panama Canal Expansion*, Oct. 26, 2006, [http://www.stratfor.com/global\\_market\\_brief\\_pana\\_mal\\_expansion](http://www.stratfor.com/global_market_brief_pana_mal_expansion).

<sup>82</sup> See Larry Luxner, *As Panama Plans Canal Expansion, Neighboring Countries Eye Alternatives*, WASHINGTON DIPLOMAT, Mar. 2007, available at [http://www.washdiplomat.com/March%202007/a7\\_03\\_07.html](http://www.washdiplomat.com/March%202007/a7_03_07.html)

<sup>83</sup> See *Proposal for the Expansion of the Panama Canal*, *supra* note 9, at 34.

<sup>84</sup> See *id.* at 36.

<sup>85</sup> See *Global Market Brief*, *supra* note 81; Lorne Matalon, *Panama Canal Expansion Spurs Environmental Debate*, NATIONAL GEOGRAPHIC, June 27, 2007, <http://news.nationalgeographic.com/news/2007/06/070627-panama-canal.html>; *Panama Approves Canal Expansion*, BBC NEWS, July 15, 2006, <http://news.bbc.co.uk/1/hi/world/americas/5182472.stm>.

trade between Asia and the Americas, an increasing percentage of the world's cargo is being transported on post-Panamex vessels capable of carrying up to 12,000 containers.<sup>86</sup> Unable to traverse the Panama Canal, these post-Panamex vessels currently unload goods from Asia at ports on the U.S. West Coast for road or rail transport to the eastern United States, or travel through the Suez Canal.<sup>87</sup> While only approximately one hundred vessels (or ten percent of all shipping fleets) currently exceed the capacity of the Panama Canal, it is anticipated that the number of post-Panamex ships will continue to grow.<sup>88</sup>

In light of anticipated increases in trade volume and ship size, Panamanian authorities proposed to expand the Panama Canal in order to strengthen the Canal's competitive position vis-à-vis alternative routes and in order to increase the efficiency of the Canal's operations.<sup>89</sup> The expansion project, estimated to cost \$5.25 million, consists of adding a third lane to the Panama Canal, constructing new lock facilities on both the Atlantic and Pacific sides, and widening and deepening existing navigation channels.<sup>90</sup> Panamanian authorities contend that the project will pay for itself through toll increases, will generate ten million dollars in additional toll revenues through 2025, will employ 6500 to 7000 additional workers during the peak construction years, and will produce an economic boom in Panama that will generate an additional 250,000 jobs by 2025.<sup>91</sup>

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<sup>86</sup> See *Global Market Brief*, *supra* note 81; Matalon, *supra* note 85; BBC NEWS, *supra* note 85.

<sup>87</sup> See Gary Corbin, *Panama Canal Expansion and the Global Economy*, GLOBAL ENVISION, Nov. 20, 2006, <http://globalenvision.org/library/3/1339>.

<sup>88</sup> See *id.*; *Global Market Brief*, *supra* note 81.

<sup>89</sup> See *Proposal for the Expansion of the Panama Canal*, *supra* note 9, at 31, 39-40.

<sup>90</sup> See *id.* at 3-5, 10.

<sup>91</sup> See *id.* at 57, 61, 66-68.

Critics of the project paint a far gloomier picture. First, they disagree with the government's claim that the Canal will shortly reach full capacity and question the need for the project.<sup>92</sup> Second, they contend that the government has underestimated the cost of the project and has overestimated the project's future revenues.<sup>93</sup> Third, they predict that the project will result in a net economic loss and that the Panamanian elite will siphon off the project's benefits while imposing an enormous financial burden on the Panamanian nation.<sup>94</sup> Fourth, they contend that the project will squander resources needed for health, education, transportation, and other national priorities.<sup>95</sup> Finally, the project's opponents predict an ecological disaster that could result in deforestation, loss of biological diversity, and salinization of the water supply of the Panama City metropolitan area.<sup>96</sup> These arguments are explored in greater detail in Part II, Section D of this article. They are mentioned here to underscore the controversy surrounding the expansion proposal and lay the groundwork for the discussion of the referendum.

### C. The Panama Canal Authority and the Canal Expansion Referendum

The referendum on the proposed expansion of the Panama Canal must be understood in the context of the unique constitutional status of the governmental entity responsible for the Canal's operation and management. In

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<sup>92</sup> See Roberto N. Méndez, *Por Qué Panamá Debe Decir "No" a la Propuesta del Tercer Juego de Esclusas*, 124 TAREAS (Sept.-Dec. 2006), available at <http://bibliotecavirtual.clacso.org.ar/libros/panama/cela/tareas/tar124/06mendez.pdf>.

<sup>93</sup> See *id.*

<sup>94</sup> See *id.*

<sup>95</sup> See *id.*

<sup>96</sup> See *Panama Canal Expansion Approved in Heavily Criticized Referendum*, *supra* note 12.

recognition of the important economic role of the Panama Canal and of the Canal's significance as a symbol of Panamanian nationhood, the Panamanian Constitution declares the Panama Canal the "inalienable patrimony of the Panamanian nation,"<sup>97</sup> and creates an autonomous institution, the Panama Canal Authority (Autoridad del Canal de Panamá, or ACP), to "operate the Canal in a manner that is safe continuous, efficient and profitable."<sup>98</sup> The ACP is autonomous in at least three distinct ways. First, the ACP's administrators are insulated from partisan politics by the constitutional requirement that the first board members be appointed to staggered terms.<sup>99</sup> Second, while the ACP makes annual payments to the Panamanian national treasury based on Canal revenues, the ACP's budget is separate from the national budget.<sup>100</sup> Third, the ACP's employees are subject to a merit-based employment regime similar to the regime in place prior to the transfer of the Canal from the United States to Panama.<sup>101</sup> The administrative structure and specific responsibilities of the ACP are detailed in the Organic Law of the Panama Canal Authority, National Assembly Law No. 19 (the Organic Law).<sup>102</sup>

The Panamanian Constitution makes the ACP accountable to the Panamanian electorate by requiring a referendum before certain major changes to Canal operations are undertaken.<sup>103</sup> Under article 325 of the Panamanian

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<sup>97</sup> See Constitución Política de la República de Panamá art. 315 (2004), <http://www.epasa.com/constitucion/constitucion.pdf>.

<sup>98</sup> See *id.* at art. 316.

<sup>99</sup> See *id.* at art. 318; see also PANAMA CANAL AUTHORITY, *ACP Overview*, <http://www.pancanal.com/eng/general/acp-overview.htm>.

<sup>100</sup> See Constitución Política de la República de Panamá, arts. 320-21 (2004).

<sup>101</sup> See *id.* at art. 322.

<sup>102</sup> See Organic Law of the Panama Canal Authority, Panama National Assembly Law No. 19, (June 11, 1997), <http://www.pancanal.com/eng/legal/law/law.pdf>.

<sup>103</sup> See Constitución Política de la República de Panamá, *supra* note 97, at art. 325.



Constitution, any proposal for the construction of a third set of locks or a sea-level canal on the existing route must be approved by the executive branch and then submitted to the National Assembly for approval or rejection.<sup>104</sup> If approved, the proposal must be submitted to a popular referendum no earlier than three months after the proposal's approval by the National Assembly.<sup>105</sup>

On April 24, 2006, the ACP's Board of Directors presented its proposal to Panamanian President Martin Torrijos for the construction of a third set of locks.<sup>106</sup> A few months later, President Torrijos and the Cabinet Council of Panama approved the proposal and submitted it to the National Assembly.<sup>107</sup> In July 2006, the National Assembly unanimously endorsed the expansion proposal and, pursuant to the Panamanian Constitution, passed a law mandating that a referendum be conducted at least ninety days after the National Assembly's approval of the proposal.<sup>108</sup>

The referendum took place on October 22, 2006, and nearly eighty percent of the voters supported the proposed Canal expansion.<sup>109</sup> On November 1, 2006, Panama's Electoral Tribunal published a resolution

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<sup>104</sup> *See id.*

<sup>105</sup> *See id.*

<sup>106</sup> Proposal for Expansion of the Panama Canal, *supra* note 9, at 1.

<sup>107</sup> *President Martín Torrijos Approves Panama Canal Expansion Proposal and Submits it to the National Assembly*, PANAMA CANAL AUTHORITY, June 27, 2006, <http://www.pancanal.com/eng/plan/documentos/propuesta/acp-expansion-natl-assembly.pdf>.

<sup>108</sup> *See Panama Canal Expansion Takes Major Step Forward: National Assembly Unanimously Approves Expansion Proposal, Passes Law Mandating Referendum*, PANAMA CANAL AUTHORITY, July 17, 2006, available at

<http://www.pancanal.com/eng/plan/documentos/propuesta/acp-expansion-referendum.pdf>; National Assembly Law No. 28, arts. 1, 7-8 (July 17, 2006), <http://www.pancanal.com/eng/plan/documentos/referencia/acp-plan-ref-ley-28.pdf>.

<sup>109</sup> *See* Lacey, *supra* note 11.

announcing the “Sí” victory in the referendum and authorizing the ACP to execute the proposal for the construction of a third set of locks in the Panama Canal.<sup>110</sup> Curiously, this was one of Panama’s lowest voter turnouts ever.<sup>111</sup> Since only about forty percent of eligible voters showed up at the polls, only thirty percent of the electorate actually approved the Canal expansion.<sup>112</sup>

The ostensible purpose of a referendum on the construction of the third set of locks is to ensure that the Panamanian people have a say in the management of a resource that is an important symbol of the Panamanian sovereignty and an essential source of national revenue. The low voter turnout raises questions about the ACP’s popular mandate to expand the Canal. Even more disturbing are the allegations of impropriety with respect to how the referendum was carried out. These concerns are two-fold. First, the public was not provided with the necessary information to make an informed decision about the environmental and socioeconomic impacts of the proposed Canal expansion. Second, the referendum process was fraught with procedural irregularities designed to favor the proponents of the Canal expansion and to silence the opposition. These irregularities are discussed in Part II below in the context of the applicable legal requirements regarding environmental impact assessment.

## **II. Environmental Impact Assessment and the Referendum Process**

Environmental Impact Assessment (hereinafter “EIA”) is an evaluation of the environmental consequences of proposed projects, activities and programs in order to

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<sup>110</sup> See Boletín del Tribunal Electoral, Resolución 387 (Nov. 1, 2006) (on file with the author).

<sup>111</sup> See Lacey *supra* note 11.

<sup>112</sup> See *id.*

integrate environmental protection into development planning.<sup>113</sup> Because a project or activity might also have significant social and economic consequences, social impact analysis (SIA) is often part of the EIA process.<sup>114</sup> The following sections discuss the basic principles of EIA, examine Panama's EIA legislation, and utilize this information to analyze and critique the procedural irregularities that marred the referendum process.

### **A. Environmental Impact Assessment: Origins and Basic Principles**

EIA emerged as a regulatory tool in the early 1970s with the passage of the National Environmental Policy Act (NEPA) in the United States,<sup>115</sup> and was subsequently adopted by both high and low-income countries and by international aid and financial institutions.<sup>116</sup> Currently, over 150 countries have domestic EIA legislation.<sup>117</sup> EIA requirements are so pervasive that some would argue that the duty to assess environmental impacts has become a fundamental principle of international law.<sup>118</sup>

The primary objectives of the EIA process are two-fold. First, the EIA process is designed to ensure that the possible impacts of a proposed project are fully identified

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<sup>113</sup> See DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 531 (2007).

<sup>114</sup> See UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE (UNECE), POLICIES AND SYSTEMS OF ENVIRONMENTAL IMPACT ASSESSMENT 21-22 (1991).

<sup>115</sup> See National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-46 (2001). The NEPA regulations are set forth at 40 C.F.R. §§ 1500.1-1517.7 (1985).

<sup>116</sup> See ENVIRONMENTAL ASSESSMENT IN DEVELOPING AND TRANSITIONAL COUNTRIES: PRINCIPLES METHODS, AND PRACTICE 3 (Norman Lee & Clive George, eds. 2000).

<sup>117</sup> See HUNTER ET AL., *supra* note 113, at 533.

<sup>118</sup> See *id.*

and analyzed *before* a decision is made.<sup>119</sup> Second, the EIA process is a tool to inform the public about the proposed project and to solicit meaningful public input on the project's potential costs and benefits.<sup>120</sup>

One key aspect of the EIA process is the identification of alternatives to the proposed project.<sup>121</sup> In the absence of alternatives, the EIA becomes a post-hoc justification for a decision that has already been made.<sup>122</sup> Instead of evaluating only one course of action, the EIA should consider alternative ways of achieving a particular goal so that the decision-maker may select the alternative that minimizes environmental, social and economic costs.<sup>123</sup> As explained in the following sections, Panama's EIA legislation incorporates some but not all of these established EIA principles.

### **B. Environmental Impact Assessment: Panama's Legal Framework**

Under the Panamanian Constitution and under the ACP's Organic Law, the ACP is responsible for the conservation of the Canal's water resources.<sup>124</sup> The ACP must protect the water resources of the Canal in order to operate the Canal and to supply drinking water to the communities

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<sup>119</sup> See *id.* at 531.

<sup>120</sup> See *id.* at 531-34.

<sup>121</sup> See WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 957-63 (1994); WILLIAM A. TILLEMAN, *Public Participation in the Environmental Impact Assessment Process: A Comparative Study of Impact Assessment in Canada, the United States and the European Community*, 33 COLUM. J. TRANSNAT'L L. 337, 384-393 (1995); UNECE, *supra* note 114, at 15; WORLD BANK, THE IMPACT OF ENVIRONMENTAL ASSESSMENT: A REVIEW OF WORLD BANK EXPERIENCE, World Bank Technical Paper No. 363 at 30-34 (1997).

<sup>122</sup> See UNECE, *supra* note 114, at 15.

<sup>123</sup> See *id.*

<sup>124</sup> See CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE PANAMÁ, *supra* note 97, art. 316; ORGANIC LAW, *supra* note 102, at arts. 120-21.

surrounding the Canal.<sup>125</sup> These communities comprise approximately sixty percent of Panama's population and include the nation's capital, Panama City.<sup>126</sup> The ACP, *in consultation with other government authorities*, must protect the environment in the Canal watershed, and must assess the environmental impact of projects and activities that may significantly impact the Canal watershed.<sup>127</sup>

According to the regulations promulgated by the ACP pursuant to the Organic Law, the ACP is responsible for reviewing and approving EIAs for its own projects as well as for projects conducted by third parties in the Canal watershed; these EIAs must be performed in accordance with the ACP manual developed for this purpose.<sup>128</sup> However, the ACP's regulations subject projects referenced in article 325 of the Panamanian Constitution (such as the construction of a third set of locks) to the EIA requirements of the National Environmental Authority (Autoridad Na-

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<sup>125</sup> See ORGANIC LAW, *supra* note 102, art. 120.

<sup>126</sup> Presentation by Roy Phillipps, ACP attorney, during meeting with ACP staff in the ACP office in the former Canal Zone, Dec. 13, 2007 (notes on file with the author); See also, Juan Luis Batista, *Panamá y Colón: ¿Una Sola Ciudad?*, LA PRENSA, Feb. 7, 2000 (explaining that approximately half of Panama's population resides in the area surrounding the Panama Canal).

<sup>127</sup> See ORGANIC LAW, *supra* note 102, arts. 121 (1), (5).

<sup>128</sup> See ACUERDO NO. 116, arts. 5, 7, 14, and 37-42 (July 27, 2006), <http://www.pancanal.com/esp/legal/reglamentos/acuerdo116.pdf>. At the conclusion of a meeting at the ACP's offices in the former Canal Zone on December 13, 2007, the ACP staff provided the author with a copy of the Manual Técnico de Evaluación Ambiental (2006) prepared by the ACP and with ANAM's Manual Operativo de Evaluación de Impacto Ambiental (Resolución No. AG-0292-01) (Dec. 9, 2001). The ACP staff also provided the author with the Environmental Evaluation Manual (January 1999) prepared for the Panama Canal Commission (the ACP's predecessor) by the U.S. Army Corps of Engineers, Mobile District. These EIA manuals do not appear to be available on the ACP website despite the availability of voluminous background materials on the Canal as well as the statutes and regulations applicable to the ACP. See <http://www.pancanal.com> (last visited on March 3, 2008).

cional del Ambiente, or ANAM) and to the approval of both ANAM and the ACP.<sup>129</sup> Because the ACP's own regulations subject the Panama Canal expansion project to ANAM's procedural and substantive EIA requirements, it is useful to examine the source and scope of ANAM's regulatory authority.

ANAM was created by Law No. 41, the general environmental law for the Republic of Panama, which was enacted by the National Assembly on July 1, 1998.<sup>130</sup> Law No. 41 grants ANAM the authority to enforce Panama's environmental laws, regulations, and national environmental policy.<sup>131</sup> Among ANAM's obligations are the evaluation of EIAs and the promotion of public participation in the enforcement of environmental legislation and in the development and implementation of environmental policies, strategies, and programs.<sup>132</sup>

Law No. 41 requires the preparation of an EIA prior to the commencement of any activity, work, or project in Panama that may generate environmental risks, *including projects to be conducted in the Canal watershed*, and designates ANAM as the regulatory entity responsible for EIA review and approval.<sup>133</sup> The EIA evaluation process consists of three steps: the submission of the EIA to ANAM; the evaluation of the EIA and its approval or rejection by ANAM; and, if the project is approved, the supervision and evaluation of the project's execution by the designated environmental authority.<sup>134</sup> ANAM is responsible for public consultation on the EIA, and must provide a public

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<sup>129</sup> See *id.*, art. 40.

<sup>130</sup> See Ley General de Ambiente de la República de Panamá, No. 41, art. 5 (July 1, 1998), available at [http://www/asamblea.gob.pa/NORMAS/1980/1983\\_018\\_0598.PDF](http://www/asamblea.gob.pa/NORMAS/1980/1983_018_0598.PDF).

<sup>131</sup> See *id.*

<sup>132</sup> See *id.*, at art. 7 (10), (11).

<sup>133</sup> See *id.*, at art. 23.

<sup>134</sup> See *id.* at art. 24.

comment period.<sup>135</sup> If the project proponent fails to submit an EIA or submits an inadequate EIA, ANAM may enjoin the implementation of the project or impose sanctions.<sup>136</sup> Pursuant to Law No. 41, ANAM has promulgated regulations detailing the EIA requirements and has produced an EIA manual.<sup>137</sup>

The ACP's Organic Law, which was promulgated one year after Law No. 41, is silent on the relationship between the authority of ANAM and the ACP with respect to the approval of Canal-related EIAs.<sup>138</sup> However, the Organic Law does require the ACP to protect the Canal watershed "in coordination with competent authorities,"<sup>139</sup> and authorizes the ACP to promulgate EIA regulations "taking into account the general provisions in force in Panama."<sup>140</sup> Far from displacing ANAM's authority over Canal-related EIAs, the language of the Organic Law appears to defer to pre-existing environmental legislation.

Notwithstanding the Organic Law's apparent deference to ANAM's regulatory authority under Law No. 41, the ACP promulgated regulations on July 27, 2006 (five weeks before the referendum) that make the ACP the sole arbiter of *all* EIAs for Canal-related projects except major construction projects contemplated by article 325 of the Panamanian Constitution (such as the construction of the third set of locks).<sup>141</sup> Because the ACP did carve out a

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<sup>135</sup> See *id.* at art. 27.

<sup>136</sup> See *id.* at art. 30.

<sup>137</sup> ANAM's EIA regulations are set forth in EXECUTIVE DECREE NO. 209 (Sept. 5, 2006) (on file with the author). ANAM's EIA manual, which was supplied to the author by the ACP staff, is contained in RESOLUCIÓN NO. AG-0292-01 (Dec. 9, 2001) (on file with the author) available at [www.asamblea.gob.pa/legispan/PDF\\_NORMAS/2000/2001/2001\\_303\\_3913.PDF](http://www.asamblea.gob.pa/legispan/PDF_NORMAS/2000/2001/2001_303_3913.PDF).

<sup>138</sup> See generally, Organic Law, *supra* note 102.

<sup>139</sup> See *id.*, at art. 121(1).

<sup>140</sup> See *id.*, at art. 121(5).

<sup>141</sup> See Acuerdo 116, *supra* note 128, at arts. 5, 7, 40.

narrow exception for Article 325 projects, there is no question that the proposed expansion of the Panama Canal is subject to the EIA requirements and approvals of both the ACP and ANAM.<sup>142</sup>

ANAM's EIA manual unequivocally recognizes that environmental impact assessment is a tool for enhancing and informing decision-making by government agencies and by the public—rather than a post-hoc rationalization for previously approved projects.<sup>143</sup> Similarly, while the ACP's EIA manual emphasizes the technical rather than policy aspects of environmental impact assessment, the EIA manual prepared by the U.S. Army Corps of Engineers for the Panama Canal Commission (the ACP's predecessor), which is used as a reference by the ACP, explains that the fundamental purpose of the EIA process is to enhance decision-making by government agencies and by the public by providing information about the environmental impact of proposed actions.<sup>144</sup> The ANAM EIA manual points out that EIAs should be conducted at the earliest possible stage of the contemplated project or action.<sup>145</sup> The Panama Canal Commission EIA manual emphasizes that the methodology utilized should “bring together the results of all environmental studies conducted to allow preparation of a single consolidated document describing the considered action's total im-

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<sup>142</sup> See *id.*, art. 40; Constitución Política, *supra* note 97, at art. 325.

<sup>143</sup> See ANAM, Manual Operativo de Evaluación de Impacto Ambiental (RESOLUCIÓN NO. AG-0292-01) (Dec. 9, 2001) § 1.1.2, at 10 (on file with the author).

<sup>144</sup> See U.S. ARMY CORPS OF ENGINEERS (USACE), ENVIRONMENTAL ENVIRONMENTAL EVALUATION MANUAL at 28 (Jan. 1999) (on file with the author). ACP attorney Roy Phillipps informed the author that the USCACE manual has been superseded by the ACP's EIA manual and is currently used only as a reference. See March 28, 2008 e-mail correspondence between Roy Phillipps and the author (on file with the author).

<sup>145</sup> See ANAM, Manual Operativo de Evaluación de Impacto Ambiental, *supra* note 143, at 4, 10.



pacts.”<sup>146</sup> Both the ANAM and Panama Canal Commission EIA manuals discuss the importance of evaluating alternatives to the proposed action and of analyzing environmental and socioeconomic impacts in an integrated manner.<sup>147</sup>

### C. Subversion of the Referendum Process through Environmental Non-Compliance

In light of the foregoing language in the ANAM EIA manual and in light of Law No. 41’s prohibition on the commencement of projects or activities in the absence of an EIA, one would expect that a comprehensive EIA on a project as significant as the Panama Canal expansion would be completed and submitted for public comment and for ANAM and ACP approval prior to a national referendum. In the absence of a completed EIA, it would be difficult for Panamanian voters to fully assess the costs and benefits of the proposed Canal expansion.

Regrettably, the referendum took place *before* an EIA for the Canal expansion was produced and in the face of conflicting claims about the authority of ANAM to review and approve EIAs for Canal-related projects. The comprehensive Environmental Impact Study for the construction of the third set of locks was not completed until July of 2007 (nine months after the referendum),<sup>148</sup> and was not approved by ANAM until November of that same year.<sup>149</sup> While the ACP prepared several environmental

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<sup>146</sup> See USACE, Environmental Evaluation Manual, *supra* note 144, at 28.

<sup>147</sup> See *id.* at 3-4, 190-97; ANAM, Manual Operativo de Evaluación de Impacto Ambiental, *supra* note 143, at 4.

<sup>148</sup> See Panama Canal Authority, Environmental Impact Study (EIS) for the Panama Canal Project—Third Set of Locks (2007), <http://www.pancanal.com/eng/expansion/eisa/index.html>.

<sup>149</sup> See Panama Canal Authority, <http://www.pancanal.com/esp/ampliacion/eisa/> (last visited March 2, 2008) (listing the EIAs prepared by ACP and the dates of ANAM

and socioeconomic impact evaluations prior to the referendum and presented these to the public in various fora,<sup>150</sup> these piecemeal assessments fell short of the comprehensive study recommended by the Panama Canal Commission EIA manual, and were not reviewed and approved by ANAM.<sup>151</sup>

In the weeks preceding the referendum, Panamanian citizens and non-governmental organizations (NGOs) began to criticize the “Sí” campaign (the government’s campaign in favor of the Canal expansion) for proposing to expand the Panama Canal without first having performed an EIA and for side-stepping ANAM’s regulatory authority.<sup>152</sup> In response, ANAM director Ligia Castro de Doens announced that a review of an EIA by ANAM would only be necessary if the ballot proposal was approved.<sup>153</sup> Furthermore, the ACP declared that, pursuant to the ACP’s rule making power under the 1999 Organic Law, “to de-

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approval and explaining that ANAM approved the Environmental Impact Study for the Third Set of Locks on November 9, 2007 pursuant to Resolución DIEORA 632-2007). It appears that the construction-related EIAs produced by the ACP *after* the referendum were all approved by ANAM.

<sup>150</sup> Presentation by Hortensia Broce, ACP official, during meeting with ACP staff in the ACP office in the former Canal Zone, Dec. 13, 2007 (notes on file with the author).

<sup>151</sup> See Panama Canal Authority, *Estudios Complementarios*, <http://www.pancanal.com/esp/ampliacion/esia/complementarios/index.html> (providing links to these earlier studies); Manuel Zárate, *El Canal, El Ambiente y el Proyecto de Ampliación*, 124 TAREAS (Sept.-Dec. 2006), available at <http://bibliotecavirtual.clacso.org.ar/ar/libros/panama/cela/tareas/tar124/04zarate.pdf> (discussing the inadequacy of the fragmented environmental studies).

<sup>152</sup> See Eric Jackson, *supra* note 12; *Asociación Ecologista Panameña y Asociación de Derecho Ambiental, En peligro la vida y el ambiente de los panameños*, 124 TAREAS (Sept.-Dec. 2006), available at <http://bibliotecavirtual.clacso.org.ar/ar/libros/panama/cela/tareas/tar124/10guevara.pdf>.

<sup>153</sup> See Jackson, *supra* note 12.

velop projects in the area that can affect the environment [and] to approve environmental impact studies that are required for authority projects . . . are functions of the [ACP] administrator."<sup>154</sup> In other words, the ACP took the position that ANAM's review of EIAs, as required by Law No. 41, did not apply to the ACP, and that if the referendum passed, the ACP would be authorized to approve its own EIA.<sup>155</sup>

The positions taken by ANAM and by the ACP in connection with the EIA for the Canal expansion generated controversy in Panama. Former ANAM director Gonzalo Menéndez argued that the Organic Law did not give the ACP the power to usurp Panama's environmental legislation.<sup>156</sup> Mr. Menéndez alleged that the ACP "attempt[s] with unnatural and absurd legalisms to make us believe that there is no conflict of interest if the ACP does an environmental impact study and the same ACP approves it."<sup>157</sup>

In short, the referendum process was abused. The Panamanian electorate was asked to approve an extremely expensive and controversial project in the absence of comprehensive information about the potential environmental and socioeconomic impacts and on the basis of piecemeal ACP studies that were not reviewed and approved in advance by ANAM.

#### **D. Manipulation of the Referendum Process to Suppress the "No" Vote**

In addition to the absence of a comprehensive EIA for the proposed Canal expansion project, the referendum was marred by procedural irregularities designed to favor the "Sí" campaign and silence the opposition.

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<sup>154</sup> *See id.*

<sup>155</sup> *See id.*

<sup>156</sup> *See id.*

<sup>157</sup> *See id.*

First, the government's handling of the proposed Canal expansion lacked transparency. According to former Canal administrator Fernando Manfredo, the Panamanian public was kept in the dark during the nearly ten years that the ACP developed its studies and proposals regarding the future of the Canal.<sup>158</sup> By contrast, other interested parties, including shipping companies, the international community, the Panamanian construction industry, and the Panamanian association of engineers and architects, were consulted and informed.<sup>159</sup>

When the Canal expansion proposal finally saw the light of day, the public was given only a few months to read, digest and analyze 55,000 pages of studies and supporting documents far too technical for the average lay person to understand.<sup>160</sup> To add insult to injury, the ACP's studies were initially available only in English.<sup>161</sup> As Professor Miguel Antonio Bernal from the University of Panama pointed out, English is not the official language of Panama.<sup>162</sup> Professor Bernal condemned the ACP for placing the burden on Panamanian citizens to translate the ACP's studies into Spanish.<sup>163</sup>

Second, the government was accused of using public funds to promote the "Sí" campaign by taking over the airwaves and saturating radio and television broadcasts with pro-expansion propaganda.<sup>164</sup> Much of this propa-

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<sup>158</sup> See Fernando Manfredo, *Canal de Panamá: El Proyecto del Tercer Juego de Esclusas*, 124 TAREAS (Sept.-Dec. 2006), available at [http://bibliotecavirtual.clacso.org.ar/ar/libros/panama/cela/tareas/tar124/02\\_manfredo.pdf](http://bibliotecavirtual.clacso.org.ar/ar/libros/panama/cela/tareas/tar124/02_manfredo.pdf).

<sup>159</sup> See *id.*

<sup>160</sup> See *id.*; NotiCen, *supra* note 12.

<sup>161</sup> Miguel Antonio Bernal, *The Right to Information*, The Panama News, May 7-20, 2006, Vol. 12, Num. 9 at [http://www.thepanamanews.com/pn/v\\_12/issue\\_09/opinion\\_02.html](http://www.thepanamanews.com/pn/v_12/issue_09/opinion_02.html).

<sup>162</sup> See *id.*

<sup>163</sup> See *id.*

<sup>164</sup> See NotiCen, *supra* note 12.

ganda was intended to manipulate nationalist sentiment.<sup>165</sup> For example, on April 25, 2006, in an event marked by patriotic pomp and circumstance, President Torrijos endorsed the ACP's proposal and proclaimed that the Canal expansion would elevate Panama to the status of a First World nation.<sup>166</sup> The ceremony concluded with all of the participants standing and proudly singing the national anthem.<sup>167</sup> As if to discourage the public from reading the 55,000 pages of Canal-related documents, the ACP deputized sixty functionaries to explain in simple terms all of the Canal expansion's benefits.<sup>168</sup> The ACP reportedly hired a global public relations firm to disparage anti-expansion research projects and marginalize the grassroots "No" campaign.<sup>169</sup> According to the Frente Nacional por la Defensa de los Derechos Económicos y Sociales (FRENADESO), an umbrella organization of groups opposed to the Canal expansion, the cost of the "Sí" campaign was a staggering \$1.8 billion.<sup>170</sup>

Third, the government allegedly used public funds to purchase votes from vulnerable segments of the population. President Torrijos purportedly gave indigent families a bi-monthly payment of \$35 and informed them that this assistance could only be sustained in the future if the "Sí" vote were to prevail.<sup>171</sup> Similarly, President Torrijos raised eyebrows when he gave every representative of the country's *corregimientos* (the smallest level of local govern-

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<sup>165</sup> See Manfredo, *supra* note 158.

<sup>166</sup> See *id.*

<sup>167</sup> See *id.*

<sup>168</sup> See *id.*

<sup>169</sup> See Danielle Ryan, *PR Pushing Through the Panama Canal Expansion*, Council on Hemispheric Affairs, Oct. 20, 2006, <http://www.scoop.co.nz/stories/HL0610/S00338.html>.

<sup>170</sup> See NotiCen, *supra* note 12.

<sup>171</sup> See Eric Jackson, *On the Campaign Trail for the Canal Expansion Referendum*, The Panama News, June 4-17, 2006, Vol. 12, Num. 11, [http://www.thepanamanews.com/pn/v\\_12/issue\\_11/business\\_02.html](http://www.thepanamanews.com/pn/v_12/issue_11/business_02.html).

ment) \$80,000 for social projects in the midst of the pro-expansion campaign.<sup>172</sup>

Fourth, the media collaborated with the “Sí” campaign by suppressing reports unfavorable to the expansion project during the referendum. For example, newspaper columnist Maribel Cuervo de Paredes alleged that she was fired from *La Prensa* (a major Panamanian newspaper) after 15 years of service for writing against the Canal expansion.<sup>173</sup> According to Cuervo de Paredes,

[t]he media have suppressed all the points and arguments of the proponents of the “No” [campaign]. And the reason is very simple. The owners of the media in Panama are owners of important businesses or form part of the law firms that litigate or provide services to the shipping companies or who [sic] represent firms or companies that provide services or sell products to the ACP. It's a matter of money.<sup>174</sup>

When the Catholic Church demanded a fair debate over the proposed expansion project, *La Prensa* gave twice as much coverage to expansion proponents than to the Catholic bishops and no coverage to the views of the expansion opponents.<sup>175</sup> In some instances, newspaper reporters were, themselves, compromised by association with

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<sup>172</sup> See NotiCen, *supra* note 12.

<sup>173</sup> See *id.* Cuervo de Paredes claims that she was informed by her publisher that her column would be cancelled because her views were supposedly not “objective.” See Ashley Dalman, *Expanding the Panama Canal: A Wider Canal or More Governmental Payola?* Council on Hemispheric Affairs, Aug. 8, 2006, <http://www.coha.org/2006/08/08/expanding-the-panama-canal-a-wider-canal-or-more-government-payola/>.

<sup>174</sup> See NotiCen, *supra* note 12.

<sup>175</sup> See Dalman, *supra* note 173.

the “Sí” campaign. For example, the president of the Colegio de Periodistas (the journalists’ trade association) was the owner of the firm hired by the civic associations that supported the “Sí” campaign in the referendum.<sup>176</sup>

Sixth, opponents of the Canal expansion were allegedly arrested, beaten, or otherwise intimidated in order to suppress the “No” vote. For example, anti-expansion campaigners were reportedly arrested in Chiriquí and in Panama City; subjected to detention and physical abuse in Coclé, Santiago de Veraguas, and Arraiján; and maimed in Chitré for passing out “No” campaign literature.<sup>177</sup> There is also evidence that employees of Constructora Urbana S.A. (CUSA), a construction company owned by ACP administrator Alberto Alemán Zubieta, were paid to become members of the pro-expansion “Obreros de la Construcción por el Sí,” an ad hoc organization created to give the impression that workers supported the Canal expansion.<sup>178</sup>

Finally, the voting process itself was full of irregularities. On the day of the referendum, former Panamanian President Guillermo Endara, who dressed in red from head to toe to show his opposition to the expansion, complained that polling place workers wore “Sí” clothing and handed out cards with directions on where and how to vote—with propaganda supporting the “Sí” campaign printed on the opposite side.<sup>179</sup>

### E. Why the Canal Expansion Was Controversial

The subversion of the referendum process is unfortunate because the Canal expansion proposal was contro-

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<sup>176</sup> See NotiCen, *supra* note 12.

<sup>177</sup> *Id.*

<sup>178</sup> See *id.*

<sup>179</sup> PanaGal, *Expansion of Panama Canal is Approved*, Sept. 4, 2007, <http://www.panamaexpertos.com/expansion-of-panama-canal-is-approved>.

versial and merited thoughtful public debate and analysis. While this article will not attempt to resolve the substantive controversy over the Canal expansion project, this section discusses the concerns expressed by the expansion project's critics in order to highlight the numerous environmental and socioeconomic impacts that should have been analyzed in painstaking detail in a comprehensive EIA prior to the referendum.

### 1. Environmental Concerns

The major environmental concerns voiced by the opponents of the Panama Canal expansion include salinization of the drinking water supply, the potential migration of species between the Atlantic and Pacific oceans, and deforestation.

At first glance, the proposed expansion project appears to be environmentally benign. All of the construction will take place in areas that were previously dredged, filled, and deforested during the initial Canal construction and during the aborted effort in the 1930s to begin work on a third set of locks.<sup>180</sup> The project will recycle sixty percent of the water it uses, which means that the new locks will use seven percent less water than the old locks.<sup>181</sup>

However, on closer inspection, studies performed by the ACP's own environmental consultants raise serious questions about the possible salinization of the drinking water upon which the Panama City metropolitan area relies.<sup>182</sup> Miraflores, Gatún, and Alajuela are the three freshwater lakes used to fill the Canal's locks and to supply

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<sup>180</sup> See Panama Canal Authority, *Proposal for the Expansion of the Panama Canal*, *supra* note 9, at 14, 24.

<sup>181</sup> See *id.* at 46-47; Matalon, *supra* note 85.

<sup>182</sup> See Ariel Rodríguez Vargas, *Impacto de la Ampliación en Los Lagos Gatún y Miraflores*, 124 TAREAS (Sept.-Dec. 2006), available at <http://bibliotecavirtual.clacso.org.ar/ar/libros/panama/cela/tareas/tar124/09vargas.pdf>.



drinking water to the neighboring population.<sup>183</sup> The environmental studies commissioned by the ACP suggest that the salinization of these lakes is already taking place and that the water recycling operations of the new locks will likely accelerate the intrusion of saltwater into the lakes.<sup>184</sup> In addition, underwater blasting and dredging associated with the construction project may contaminate the water supply.<sup>185</sup> According to the project's critics, the public documents prepared by the ACP prior to the referendum are misleading because they reassure the public that water quality will not be impaired by the construction of a third set of locks and do not address the considerable evidence to the contrary.<sup>186</sup>

A second concern articulated by environmentalists is that the new locks will facilitate the passage of species from one ocean to the other, potentially damaging Caribbean coral reefs and other ecosystems.<sup>187</sup> As Greenpeace observes, "[t]he creation of artificial corridors that allow migration of species from previously separate habitats is of great concern because it is highly likely to have unpredictable and potentially catastrophic consequences on the finely balanced web of life in each habitat."<sup>188</sup> Scientists have identified a number of exotic species transported into the

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<sup>183</sup> See *id.*

<sup>184</sup> See *id.*; Jackson, *supra* note 12.

<sup>185</sup> See Matthew Parker, *Changing Course*, THE GUARDIAN (Feb. 28, 2007).

<sup>186</sup> See Rodríguez Vargas, *supra* note 182; Jackson, *supra* note 12. For example, the ACP's *Proposal for the Expansion of the Panama Canal* states that "[e]ven when operating at maximum capacity, the third set of locks, equipped with water reutilization basins, will not affect the water quality of Gatún and Alajuela lakes or that of their tributaries. These lakes will keep their tropical fresh water quality with stable ecosystems, and the water will be kept to well within appropriate quality levels and standards in order that they can be made potable and used by the population." Panama Canal Authority, *supra* note 9, at 51.

<sup>187</sup> See NotiCen, *supra* note 12.

<sup>188</sup> See Parker, *supra* note 185.

waters of the Canal during the Canal's initial construction and subsequent operation, but there is a dearth of research on the effects of these species upon native ecosystems.<sup>189</sup>

Finally, the construction of a third set of locks will result in the fragmentation and destruction of approximately 490 hectares of forests.<sup>190</sup> The deforestation is anticipated to produce ecosystem disruptions and loss of biological diversity.<sup>191</sup> Among the forests potentially affected are the mangrove forests currently providing important ecosystem services in the form of flood control by absorbing billions of liters of water in their complex root systems.<sup>192</sup> The destruction of these forests may increase the risk of urban flooding during the rainy season, particularly in the city of Colón.<sup>193</sup>

## 2. Socioeconomic Concerns

The socioeconomic concerns articulated by the project's critics are complex and voluminous and are discussed only briefly below.

First, critics of the Canal expansion dispute the ACP's claim that the expansion is needed in order to maintain the Canal's competitiveness, question the economic feasibility of the project, and assert that project costs will exceed project revenues.<sup>194</sup> Numerous commentators have observed that the ACP's \$5.25 billion cost estimate is grossly understated and that the real cost of the Canal ex-

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<sup>189</sup> See Andrea Gawrylewski, *Opening Pandora's Locks*, 21 THE SCIENTIST 47, 52-53, Oct. 1, 2007.

<sup>190</sup> See Fernando Manfredo, *Canal de Panamá y Medio Ambiente*, 126 TAREAS 103, 103-06 (May-Aug. 2007).

<sup>191</sup> See *id.*

<sup>192</sup> See Gawrylewski, *supra* note 189, at 47-48.

<sup>193</sup> See *id.*

<sup>194</sup> See Méndez, *supra* note 92.

pansion is likely to exceed \$10 billion.<sup>195</sup> Project critics dispute the ACP's assertion that these costs can be recovered through toll increases without undermining the competitiveness of the Panama Canal vis-à-vis alternative routes.<sup>196</sup> These critics point out that the ACP's ability to increase tolls is constrained by competition from the Suez Canal and from the U.S. overland route.<sup>197</sup> Furthermore, if global warming opens up an Arctic route (the coveted Northwest passage)—a much shorter path than the Panama Canal for trade between Europe and Asia and between the U.S. East Coast and Asia—then the Panama Canal may have to reduce tolls in order to remain competitive.<sup>198</sup>

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<sup>195</sup> See *id.*; Luxner, *supra* note 82; Tomás Drohan Ruiz, *El Verdadero Costo de la Ampliación del Canal de Panamá*, 124 TAREAS (Sept.-Dec. 2006), available at <http://bibliotecavirtual.clacso.org.ar/ar/libros/panama/cela/tareas/tar124/05ruiz.pdf>.

<sup>196</sup> See Roberto N. Méndez, *Viabilidad Financiera de un Tercer Juego de Esclusas*, 126 TAREAS 89, 95-96 (May-Aug. 2007); Fernando Manfredo, *Los Estudios Sobre la Ampliación del Canal de Panamá*, 123 TAREAS (May-Aug. 2006), available at <http://bibliotecavirtual.clacso.org.ar/ar/libros/panama/cela/tareas/tar123/04manfredo.pdf>.

<sup>197</sup> See Manfredo, *supra* note 158.

<sup>198</sup> See *id.*; Corbin, *supra* note 87; Scott Borgerson, *The Scramble for the Arctic*, 87 FOREIGN AFFAIRS 63, 68-71 (2008). As a consequence of global warming, the Arctic ice cap has been melting at a far more rapid rate than had been projected by almost all of the computer-generated simulations. See Andrew C. Revkin, *The Arctic's Alarming Sea Change: Dwindling Ice Cap Concerns Scientists But Heartens Traders*, INT'L HERALD TRIBUNE, Oct. 3, 2007, at 5. The thinning of the Arctic ice cap increases the feasibility of the Northwest Passage as a shorter route than the Panama Canal between the Atlantic and Pacific Oceans – both during the summer months (for normal ships) and year-round (for ships equipped with ice breakers). See Robert Wade, *A Warmer Arctic Needs Shipping Rules*, FINANCIAL TIMES (Asia Edition), Jan. 16, 2008, at 11; Saran Somanthan, Peter C. Flynn & Jozef K. Szymanski, *Feasibility of a Sea Route Through the Canadian Arctic*, 9 MARITIME ECONOMICS AND LOGISTICS 324 (2007). Some experts believe that a tipping point has already been reached and that increasingly faster melting will make the Northwest Passage a viable alterna-

These critics also question the ACP's assertion that the Canal will shortly reach maximum capacity, and cite numerous studies predicting a far lower annual increase in trade volumes than projected by the ACP.<sup>199</sup> In short, the project opponents argue that the Canal expansion is of dubious economic value and that the government's limited resources should be invested in more worthwhile undertakings.<sup>200</sup>

Second, project critics caution that the Canal expansion may impose serious financial burdens on Panama.<sup>201</sup> If the expansion project's costs cannot be recovered through toll increases and through increased trade volumes, Panamanian taxpayers may wind up footing the bill.<sup>202</sup> Although the ACP claims that the expansion project is self-financing, the ACP acknowledges that it will have to obtain an additional \$500 million per year in the financial markets in order to cover expansion project requirements.<sup>203</sup> The ACP asserts that the Panamanian government will not have to endorse or guarantee these loans because the Panamanian Constitution makes the ACP financially independent from the rest of the government.<sup>204</sup> Project critics point out that it is unclear whether lenders will provide loans to the ACP without an explicit guarantee from the Panamanian government.<sup>205</sup> If a government guarantee is required, then the Canal expansion could double the national debt and reduce the government's ability to promote economic development and provide for the basic needs of the popula-

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tive route for much of the year as early as 2015—even for ships that are not equipped with icebreakers. *See* Wade, *supra* note 198, at 11.

<sup>199</sup> *See* Méndez, *supra* note 92.

<sup>200</sup> *See* Méndez, *supra* note 196, at 100.

<sup>201</sup> *See* Manfredo, *supra* note 158, at 15.

<sup>202</sup> *See id.*

<sup>203</sup> *See* Panama Canal Authority, *supra* note 9, at 61-62.

<sup>204</sup> *See id.* at 63-64.

<sup>205</sup> *See* Manfredo, *supra* note 158.

tion.<sup>206</sup> Moreover, the ACP's investment of Canal revenues in the expansion project represents a diversion of funds that could have been earmarked for more socially productive purposes.<sup>207</sup>

Third, project opponents dispute the ACP's claims that the expansion project will generate jobs and other economic benefits for Panama.<sup>208</sup> They point out that the estimated 7,000 new jobs generated during the peak construction period are temporary jobs of a relatively short duration<sup>209</sup> and few Panamanians are qualified for these highly skilled positions.<sup>210</sup> While the ACP claims that public and private entities will institute training programs to ensure that the labor force is primarily Panamanian, the project's critics question how such training programs will be financed.<sup>211</sup> The project opponents reject as completely unsubstantiated the ACP's claim that the Canal expansion will produce an economic boom in Panama that will generate over 200,000 additional jobs in the long run.<sup>212</sup> These critics maintain that only a small fraction of the funds invested in the Canal expansion will remain in Panama, and that most of the money will be used to hire foreign contractors and consultants and to import equipment, technology and materials.<sup>213</sup>

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<sup>206</sup> See *id.*; Manfredo, *supra* note 196.

<sup>207</sup> See Manfredo, *supra* note 158.

<sup>208</sup> See *id.*

<sup>209</sup> See *id.*

<sup>210</sup> See Corbin, *supra* note 87.

<sup>211</sup> See Panama Canal Authority, Proposal for the Expansion of the Panama Canal, *supra* note 9, at 67-68 (discussing the training programs); Manfredo, Canal de Panamá: El Proyecto, *supra* note 158 (questioning how the training programs will be financed).

<sup>212</sup> See Manfredo, *supra* note 158.

<sup>213</sup> See Jorge E. Illueca et al., *Algunos Mitos En Torno a la Ampliación del Canal*, 124 TAREAS, Sept.-Dec. 2006, available at <http://bibliotecavirtual.clacso.org.ar/ar/libros/panama/cela/tareas/tar124/08illueca.pdf>; Manfredo, *Los Estudios Sobre la Ampliación*, *supra* note 196.

Fourth, the project critics highlight the potentially negative impact of the Canal expansion on the Panama City metropolitan area. They assert that the Canal expansion project will enlarge the population of the metropolitan region, as rural migrants and foreign workers converge on the area in search of Canal-related employment.<sup>214</sup> Because the vast majority of migrants will not find jobs, this migration will increase urban poverty and unemployment, swell the ranks of those working in the informal sector, strain public services (including the police and the judiciary), place additional demands on the urban housing stock, and generate additional shanty towns.<sup>215</sup>

Fifth, project critics contend that the real beneficiaries of the Canal expansion will be the friends and relatives of government officials who will profit handsomely from Canal-related contracts.<sup>216</sup> These critics point out that ACP directors and administrators have blatant conflicts of interests because they own shares or have other commercial ties with the construction companies, banks, and law firms that stand to gain from this project.<sup>217</sup> These concerns were reinforced when the first company awarded a construction contract proved to be closely associated with the current ACP administrator.<sup>218</sup> On July 6, 2007, the ACP announced that Constructora Urbana S.A. (CUSA), which is owned by the family of ACP administrator Alberto Alemán Zubieta, had been awarded the contract for the excavation of the Pacific entrance for the new set of locks.<sup>219</sup>

Sixth, the project opponents maintain that the billions of dollars allocated for the Canal expansion should

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<sup>214</sup> See Manfredo, *supra* note 158.

<sup>215</sup> See *id.*

<sup>216</sup> See Méndez, *Por Qué Panamá Debe Decir "No," supra* note 92; *Doubts Over Transparency of Canal Tender*, Caribbean and Central American Report, July 19, 2007.

<sup>217</sup> See Méndez, *Por Qué Panamá Debe Decir "No," supra* note 92.

<sup>218</sup> See Caribbean and Central American Report, *supra* note 216.

<sup>219</sup> See *id.*

instead be directed toward health, education, transportation and other national priorities.<sup>220</sup> These critics point out that Panama currently has one of the most unequal distributions of wealth in Latin America.<sup>221</sup> According to the World Bank, nearly forty percent of Panama's population lives in poverty.<sup>222</sup> While the wealthiest 20 percent of the population receives 60.3 percent of the country's wealth, the poorest 20 percent receives only 2.5 percent.<sup>223</sup>

Finally, several critics of the Canal expansion project have emphasized the need to integrate the Panama Canal into the country's development strategy, rather than dealing with it as a separable entity.<sup>224</sup> These critics point out that it is necessary to develop a national development plan that will utilize the Canal to stimulate other sectors of the economy,<sup>225</sup> and that will include a strong social justice component designed to strengthen the provision of essential services, such as health, education, transportation, housing, and environmental protection.<sup>226</sup>

### **E. The Post-Referendum Environmental Impact Assessment**

Nine months after the referendum, the ACP prepared a comprehensive EIA for the Canal expansion project that encompassed both environmental and socioeconomic impacts.<sup>227</sup> Critics of the project lambasted the EIA for

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<sup>220</sup> See Méndez, *supra* note 92.

<sup>221</sup> See Zárate, *supra* note 151.

<sup>222</sup> See World Bank, *Interim Strategy Note For The Republic Of Panama FY 2006-2007*, Report No. 32887-PA (Aug. 30, 2005) at 7.

<sup>223</sup> See World Bank, *WORLD DEVELOPMENT INDICATORS 2006*, Table 2.8 (2006), available at [http://devdata.worldbank.org/wdi2006/contents/Table2\\_8.htm](http://devdata.worldbank.org/wdi2006/contents/Table2_8.htm).

<sup>224</sup> See Gandásegui, *supra* note 1; *supra* note 92; Zárate, *supra* note 151.

<sup>225</sup> See Gandásegui, *supra* note 1.

<sup>226</sup> See Méndez, *supra* note 92.

<sup>227</sup> See Panama Canal Authority, *supra* note 148.

failing to fully address one of the most devastating potential consequences of the project: the salinization of the water supply of the Panama City metropolitan area.<sup>228</sup> Nevertheless, the EIA was approved by ANAM on November 9, 2007.<sup>229</sup> While a substantive analysis of the environmental and socioeconomic concerns addressed in the EIA is beyond the scope of this paper, one significant procedural defect must be noted.

Contrary to the EIA principles discussed in Part II (A), the EIA did not analyze alternatives to the proposed Canal expansion,<sup>230</sup> presumably because the outcome of the referendum rendered such an analysis moot. It has long been recognized that the analysis of alternatives is at the very heart of the EIA process.<sup>231</sup> This analysis compares several means of achieving the project objective (including the option of not proceeding at all—the no action alternative) so as to enable the decision-maker to select the most

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<sup>228</sup> See Ariel R. Rodríguez Vargas, *Intrusión Salina en el Canal de Panamá*, BURICA PRESS, Sept. 24, 2007, available at [burica.wordpress.com/2007/09/24/intrusion-salina-en-el-canal-de-panama/](http://burica.wordpress.com/2007/09/24/intrusion-salina-en-el-canal-de-panama/) (translating the conclusions of the leading scientific studies regarding salinization and making policy recommendations); Ariel R. Rodríguez Vargas, *Cuestionan EIA y Foro Público de la ACP Sobre Ampliación*, BURICA PRESS, Sept. 8, 2007, available at [burica.wordpress.com/2007/09/08/cuestionan-eia-y-foro-publico-de-la-acp-sobre-ampliacion/](http://burica.wordpress.com/2007/09/08/cuestionan-eia-y-foro-publico-de-la-acp-sobre-ampliacion/); Ariel R. Rodríguez Vargas, *Estudio de Impacto Ambiental de la Ampliación del Canal de Panamá vs Calidad y Cantidad de Agua Dulce de Los Lagos*, BURICA PRESS, Aug. 28, 2007, available at [burica.wordpress.com/2007/08/28/ampliacion-del-canal-de-panama-vs-calidad-y-cantidad-de-agua-dulce/](http://burica.wordpress.com/2007/08/28/ampliacion-del-canal-de-panama-vs-calidad-y-cantidad-de-agua-dulce/).

<sup>229</sup> See Panama Canal Authority, <http://www.pancanal.com/esp/ampliacion/eisa/> (last visited Mar. 2, 2008) (explaining that ANAM approved the Environmental Impact Study for the Third Locks on Nov. 2, 2007, pursuant to Resolución DIERO 632-2007).

<sup>230</sup> See Panama Canal Authority, *supra* note 148.

<sup>231</sup> See Tilleman, *supra* note 121, at 384-93; RODGERS, *supra* note 121, at 957-63; UNECE, *supra* note 114, at 15.



promising alternative.<sup>232</sup> Under ordinary circumstances, one would expect the EIA for the Canal expansion project to compare the costs and benefits of the proposed action with several alternatives, including the no action alternative—the option of not proceeding at all.<sup>233</sup>

Regrettably, the subversion of the EIA process and the subversion of the referendum process proved to be mutually reinforcing. In other words, the ACP's failure to prepare a comprehensive EIA prior to the referendum impoverished the public debate over the proposed Canal expansion and arguably facilitated the victory of the "Sí" campaign. The victory of the "Sí" campaign, in turn, impoverished the EIA process by excluding alternatives to the contemplated action from ANAM and ACP's consideration. As a result, the EIA process was reduced to an empty ritual, a technical justification for a decision made at the highest levels of government and subsequently "approved" in a "democratic" referendum rather than a tool to inform and enhance public and governmental decision-making over Panama's single most important resource.

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<sup>232</sup> See UNECE, *supra* note 114, at 15.

<sup>233</sup> See Tilleman, *supra* note 121, at 384-93; Rodgers, *supra* note 121, at 957-63, UNECE, *supra* note 114, at 15. Under U.S. law, for example, the regulations promulgated pursuant to NEPA specify how the analysis of alternatives is to be conducted and provide criteria for the analysis of the no-action alternative. See 40 C.F.R. § 1502.14 (1978) (outlining the requirements for the analysis of alternatives, including the no-action alternative); 40 C.F.R. § 6.203 (2007) (providing additional guidance on the preparation and evaluation of the no-action alternative). Consistent with U.S. and international EIA practice, the EIA manual prepared for the Panama Canal Commission (the ACP's predecessor) explicitly required the analysis of the no-action scenario and the development and analysis of alternatives to the proposed action. See USACE, *supra* note 144, at 2-4.

### III. Reflections on the Colonial Legacy

While the Canal expansion project is currently in the construction phase, the case study nevertheless holds valuable lessons for Panama and for other post-colonial societies blessed (or cursed) with valuable natural resources. Wittingly or unwittingly, colonial institutions and practices persist long after the departure of the colonial power and distort economic development and governmental decision-making. This section identifies specific aspects of the colonial legacy that continue to affect the operation of the Canal and concludes with several suggestions designed to mitigate the colonial legacy by enhancing public participation in the development planning process.

#### A. The Economic Enclave Problem

The Panama Canal historically functioned as an economic enclave analogous in some respects to the oil, mining, and agricultural enclaves operated by transnational corporations throughout the Americas.<sup>234</sup> Enclaves, by definition, extract wealth from a particular sector of the economy without developing significant linkages to other sectors and without incorporating large segments of the domestic labor force.<sup>235</sup> Just as countries dependent on

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<sup>234</sup> See Zárate, *supra* note 151; Castro, *supra* note 5, at 208; Julio Yao, *¿Es el Canal Patrimonio Inalienable de la Nación o Propiedad de la ACP?* 124 TAREAS (Sept.-Dec. 2006), available at <http://bibliotecavirtual.clacso.org.ar/ar/libros/panama/cela/tareas/tar124/03yao.pdf>. The Canal Zone differed from traditional economic enclaves in two important respects. First, the Canal Zone was operated directly by the U.S. government rather than by private capital. Second, instead of exploiting the local labor force, the Canal Zone applied U.S. labor standards and paid salaries much higher than prevailing local wages. See Castro at 208.

<sup>235</sup> See Macartan Humphreys, Jeffrey D. Sachs & Joseph E. Stiglitz, *Introduction: What is the Problem with Natural Resource Wealth?*

natural resource extraction derive a substantial portion of national revenues from extractive industries, Panama, after the transfer of the Canal, would also derive a significant share of its national income from the operation of the Canal.<sup>236</sup> The Panama Canal is currently Panama's single largest generator of foreign capital but does not represent a major source of employment for Panama's largely unskilled workforce<sup>237</sup> and does not represent an integral part of a multi-sector development strategy.<sup>238</sup>

As the literature on enclave economies points out, countries that specialize in natural resource exploitation often perform worse economically than countries with fewer resources.<sup>239</sup> One of the reasons for this poor economic performance is failure to invest in other economic sectors or in the human capital necessary to develop other areas of the economy.<sup>240</sup> Education, for example, is frequently neglected because the production of current income does not require a highly diversified and skilled workforce.<sup>241</sup>

One lesson for Panama from the experience of more traditional enclave economies is the importance of integrating the Canal into the government's long-term development planning. As several Panamanian observers have noted, the ACP currently operates as a "parallel republic" whose primary mission is the efficient administra-

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ESCAPING THE RESOURCE CURSE 4 (Macartan Humphreys et al., eds. 2007).

<sup>236</sup> The Canal currently accounts for approximately 20 percent of Panama's gross domestic product and a significant share of the country's national budget. See Andrew Beatty, *Panama Canal Authority Sees Revenue Growth in 2008*, REUTERS (Feb. 19, 2008), available at <http://www.reuters.com/> (search "Andrew Beatty revenue growth 2008.")

<sup>237</sup> See Corbin, *supra* note 87.

<sup>238</sup> See Zárate, *supra* note 151; Yao, *supra* note 234.

<sup>239</sup> See Humphreys, *supra* note 235, at 1.

<sup>240</sup> See *id.* at 10, 12.

<sup>241</sup> See *id.* at 10.

tion of the Canal.<sup>242</sup> In order to relieve poverty, generate employment, and develop other sectors of the economy, it is essential to integrate the operation of the Canal into a multi-faceted development strategy designed to diversify Panama's economic base and to provide jobs, housing, education, and basic social services.

### **B. Corruption and Lack of Government Accountability**

A second feature of natural resource enclaves is corruption and lack of government accountability. Enclave economies are frequently characterized by high levels of corruption because those who control the country's wealth-producing assets can use this wealth to remain in office.<sup>243</sup> Enclave economies also tend to have weak, unaccountable governments because they rely on external income sources to fill the national coffers and are relatively less dependent on the good will of taxpayers.<sup>244</sup> Indeed, citizens often become politically passive and do not monitor government expenditures or actively participate in government decision-making.<sup>245</sup>

As explained in Part I (C), the Panamanian Constitution attempts to address the problem of corruption by insulating the ACP from partisan political pressure. The Constitution makes the ACP an autonomous legal entity whose budget is separate from the national budget, whose directors are appointed to staggered terms, and whose employees are civil servants selected on the basis of merit-based criteria.

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<sup>242</sup> See Méndez, *supra* note 92; Yao, *supra* note 234.

<sup>243</sup> See Méndez, *supra* note 92; Yao, *supra* note 234.

<sup>244</sup> See *id.* at 11-12.

<sup>245</sup> See Terry Lynn Karl, *Ensuring Fairness: The Case for a Transparent Fiscal Social Contract*, ESCAPING THE RESOURCE CURSE, at 264-65.

Despite these laudable efforts to minimize corruption, the absence of legislation prohibiting ACP employees from awarding Canal-related contracts to businesses in which they or their families hold a financial stake<sup>246</sup> creates the impression of self-dealing. It may also enable government officials and their families to benefit economically from the Canal expansion project while imposing the costs on the Panamanian public. Adoption of conflict of interest legislation (or, alternatively, ACP conflict of interest regulations) should be a priority as the Canal expansion project proceeds.

Furthermore, government accountability requires transparency and public participation in the decision-making process. In theory, Article 325 of the Panamanian Constitution promotes government accountability by requiring a referendum on any proposal for the construction of a third set of locks or a sea-level canal on the existing route. However, this provision covers only major changes to the Canal's operations and is insufficient even for this narrow range of activities in the absence of additional provisions protecting the integrity of the decision-making process.

In order to secure meaningful public input on major changes to the Canal's operations, it is essential to promulgate legislation mandating a pre-referendum comprehensive EIA. As Part II of this article makes clear, one of the fundamental problems with the Canal expansion project referendum was the absence of a comprehensive assessment of the project's environmental and socioeconomic impacts *before* the national plebiscite despite the seriousness of the concerns raised by the project's opponents. Regrettably, the preparation of a comprehensive EIA prior

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<sup>246</sup> See CARIBBEAN AND CENTRAL AMERICAN REPORT, *supra* note 216 (explaining that "in Panama there are no restrictions for companies owned by relatives of top officials gaining public contracts, including canal extension contracts with ACP.")

to the referendum was not expressly mandated by the Constitution, by the legislation calling for the referendum, by the ACP's Organic Law, or by the ACP's regulations. While the failure to prepare a comprehensive EIA prior to the referendum was inconsistent with the spirit if not the letter of Law No. 41 and of ANAM's EIA manual,<sup>247</sup> ANAM's director took the position that an EIA would not be required unless the "Sí" campaign prevailed.<sup>248</sup> One of the lessons of this debacle is that any legislation calling for a popular referendum on a project of national significance must expressly require the preparation of a comprehensive EIA well in advance of the referendum.

Moreover, in order to enhance the quality of government decision-making on all Canal-related projects, it is essential that the ACP's environmental determinations be overseen by ANAM. The ACP's EIA regulations for non-Article 325 projects erode government accountability by making the ACP the final arbiter of all Canal-related EIAs including projects undertaken by the ACP.<sup>249</sup> This arrangement is problematic because it places the ACP in the position of both promoter and regulator of ACP projects that may have significant impacts on the Canal watershed. In order to avoid actual or apparent conflicts of interest and in order to benefit from the environmental expertise of ANAM, the ACP should modify its regulations to require ANAM approval of EIAs for all Canal-related projects undertaken by the ACP and its consultants or contractors, whether or not these projects rise to the level of Article 325 projects.

Finally, the referendum and the post-hoc EIA for the Canal expansion project exposed deeper problems with the EIA process in Panama that diminish transparency and accountability. Because these problems are inextricably

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<sup>247</sup> See *supra* notes 137, 143-45, and accompanying text.

<sup>248</sup> See *id.*

<sup>249</sup> See *supra* notes 136-39 and accompanying text.

intertwined with the issue of public participation and democratic decision-making, they are discussed in the final section of this article.

### **C. The Civilizing Mission and Authoritarian Political Culture**

The Canal divided Panama into two distinct nations: the prosperous, efficiently managed U.S.-dominated Canal Zone and the poverty-stricken, “underdeveloped” Panamanian state ruled by the Panamanian oligarchy.<sup>250</sup> U.S. officials and the U.S. media justified the U.S. colonial presence in Panama by depicting the Canal Zone as an oasis of civilization amidst the “torrid, uncontrolled life of the tropics” and by constructing Panamanians, Colombians, West Indians and indigenous peoples as “natives” incapable of democratic self-government.<sup>251</sup> Sadly, this colonial construct would be internalized by Panamanians and would reinforce both the racism and the authoritarianism of the Panamanian oligarchy, which perceived the Canal Zone as a model of efficiency.<sup>252</sup>

This emphasis on efficiency at the expense of other values (such as democracy) is a vestige of the colonial experience that is evident in some of the ACP’s publications. For example, the ACP’s EIA manual (the Manual Técnico de Evaluación Ambiental) is concise and narrowly technocratic (as its name implies), with no discussion of the underlying policies, principles, and objectives of environmental impact assessment.<sup>253</sup> The ACP’s 2003 Social and Environmental Report is replete with references to the

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<sup>250</sup> See Castro, *supra* note 234, at 208-09; Zárate, *supra* note 151; LAFEBER, *supra* note 2, at 84, 101-05, 118-119; OVIDIO DIAZ ESPINO, HOW WALL STREET CREATED A NATION: J.P. MORGAN, TEDDY ROOSEVELT AND THE PANAMA CANAL 197 (2001).

<sup>251</sup> See LINDSAY-POLAND, *supra* note 5, at 3-6.

<sup>252</sup> See Castro, *supra* note 234, at 209-10.

<sup>253</sup> See ACP, *supra* note 128.

ACP's "efficiency" and "productivity" and emphasizes technocratic environmental objectives (such as energy, efficiency, best practices in reuse and recycling, and best standards to handle hazardous substances) in lieu of process-oriented objectives such as public participation in the environmental decision-making process.<sup>254</sup>

As environmental impact assessment has become widely utilized by planners and decision-makers throughout the world, two distinct variations of EIA have emerged: technocratic and democratic.<sup>255</sup> The technocratic version of EIA is designed to provide information to government officials and project promoters on the environmental impacts of projects and activities in order to comply with pre-established regulatory standards.<sup>256</sup> It tends to focus on the physical environment and may not always identify alternative courses of action.<sup>257</sup>

The democratic version of EIA is designed to integrate environmental and socioeconomic considerations into economic planning and to serve as a vehicle for public involvement in the decision-making process.<sup>258</sup> It tends to be process-oriented, externally focused, and open-ended.<sup>259</sup> Early identification of alternatives is a hallmark of this approach.<sup>260</sup>

While the EIA approach adopted by the ACP in its EIA manual incorporates socioeconomic considerations into the EIA process, the ACP's approach is nevertheless

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<sup>254</sup> See ACP, *Informe Social y Ambiental* (Social and Environmental Report) (2003), at 17, 39, *available at* <http://www.pancanal.com/common/general/reports/acp-social-environmental-report-2003.pdf>.

<sup>255</sup> See DAVID B. SMITH & MIEKE VAN DER WANSEM, *STRENGTHENING EIA CAPACITY IN ASIA 1-2* (World Resources Institute 1995).

<sup>256</sup> See *id.* at 1.

<sup>257</sup> See *id.*

<sup>258</sup> See *id.* at 1-2.

<sup>259</sup> See *id.* at 2.

<sup>260</sup> See *id.*



more akin to the technocratic rather than the democratic EIA model.<sup>261</sup> Even though the ACP has developed procedures for public involvement,<sup>262</sup> the ACP's EIA manual omits several important elements that are essential to the promotion of robust public debate about the environmental and socioeconomic impacts of proposed projects.

First, the ACP's EIA manual neglects to emphasize the importance of EIA as a planning tool and fails to provide guidance on precisely when an EIA should be developed. In the absence of explicit guidance about the timing of environmental review, there is a danger that the EIA will not be prepared until after a decision has been made (as occurred with the Canal expansion project) and will become a post-hoc rationalization rather than a deliberative document designed to facilitate the evaluation of the proposed project by the public and by government officials.

Second, the EIA manual should require public input on the scope of the EIA and the issues to be analyzed at the earliest possible stage in the EIA process.<sup>263</sup> For example, the public should have been invited to comment on the design of the EIA for the proposed Canal expansion project well in advance of the referendum. By involving the public at a preliminary stage in the EIA process, the ACP would have received early notice of the public's key concerns and would have had the opportunity to produce an EIA (prior to the referendum) designed to foster meaningful public de-

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<sup>261</sup> See ACP, *supra* note 128.

<sup>262</sup> The ACP provided the author with its public involvement guidelines at the conclusion of a meeting with the ACP staff on December 13, 2007. See ACP, *Procedimiento Para la Realización del Foro Público* (on file with the author); ACP, *Procedimiento Para la Preparación de un Plan de Divulgación y Consulta Pública* (on file with the author).

<sup>263</sup> For example, under the U.S. regulations implementing NEPA, federal agencies are required to invite citizens to participate in the EIA scoping process in order to identify major issues well in advance of the preparation of the EIA. See 40 C.F.R. § 1501.7 (1978).

bate about the costs and benefits of the proposed Canal expansion and its alternatives.

Third, the ACP's EIA manual should require the identification and analysis of alternatives to the proposed action (including the no action alternative) and should provide guidance on how to evaluate these alternatives. As explained in Part II of this article, the alternatives discussion drives the EIA analysis because it enables the public and the government to compare the environmental and socioeconomic costs and benefits of alternative ways of achieving a particular objective. If the EIA is prepared after alternatives have been foreclosed (as occurred with the Canal expansion), the public participation process becomes a meaningless ritual that frustrates and disempowers the communities affected by the proposed project.

Fourth, the ACP's EIA manual should promote meaningful dialogue about the project and its alternatives by requiring the ACP to articulate and provide a detailed response to the concerns voiced by the proposed project's opponents. In so doing, the EIA manual would force the ACP to analyze new information supplied by the public and would reassure the public that its contributions will be valued and taken seriously.

Finally, the ACP should make its EIA manual and public involvement guidelines available on its website so that members of the public can understand and monitor the EIA process.

Because the ACP's EIA manual is consistent with the EIA regulations promulgated by ANAM in Executive Decree 209,<sup>264</sup> the recommendations set forth herein apply with equal force to ANAM's EIA regulations. Indeed, given ANAM's statutory obligation to protect the environment and to promote public participation, it is essential that ANAM take a leadership role in promoting a democratic rather than technocratic conception of EIA. Although

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<sup>264</sup> See Executive Decree 209, *supra* note 137.

ANAM's EIA manual is vastly superior in this respect to the ACP's EIA manual, ANAM's EIA regulations generally provide little to no guidance on the key EIA reforms proposed herein.

As Panama struggles to rid itself of its authoritarian legacy, the adoption of a democratic conception of EIA and the promotion of public participation in government decision-making will fulfill several important objectives. The first objective is to generate additional information. The EIA process invites the public to present additional information and perspectives to decision-makers in order to help overcome bureaucratic inertia or tunnel vision.<sup>265</sup> The second objective is to enhance government accountability. Public participation mechanisms facilitate public oversight of government decision-making by requiring decision-makers to publicly justify and explain their decisions.<sup>266</sup> The third objective is to create formal mechanisms for public input in order to prevent government "capture" by powerful economic interests.<sup>267</sup> In the absence of such mechanisms, the public would lack the resources, the "insider" relationships, and the organization to influence the decision-making process.<sup>268</sup> Finally, public participation mechanisms promote democratization and civic engagement by fostering informed and reasoned debate about whether a particular project or decision will promote the common good.<sup>269</sup> The democratic conception of the EIA process is particularly compelling in the case of the Panama Canal in light of the Canal's economic and symbolic significance to the Panamanian nation and in light of the danger that this valuable resource will be "captured" by the economic elite.

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<sup>265</sup> See Stephanie Tai, *Three Asymmetries of Informed Environmental Decisionmaking*, 78 TEMPLE L. REV. 659, 677 (2005).

<sup>266</sup> See *id.* at 677-78.

<sup>267</sup> See *id.*

<sup>268</sup> See *id.*

<sup>269</sup> See *id.* at 678-79.

While the recommended reforms are an important first step in ensuring that the Canal expansion debacle will not be replicated in the evaluation of other projects, public participation in the development planning process will not become a reality in the absence of the political will to depart from the country's authoritarian past and to embrace a more democratic conception of the common good.

## Conclusion

The Panama Canal case study illustrates the ways in which the colonial legacy frustrates the development planning process in post-colonial societies and highlights the importance of public participation as a counterweight to the persistence of colonial institutions and practices. In addition to the domestic, legal, and political constraints discussed in this article, Panama's options with respect to the Canal are profoundly constrained by the interests of the Canal's users: the international shipping industry and the countries whose merchandise traverses the Canal (particularly the United States, China, Korea, Japan and the European Union).<sup>270</sup> While an analysis of these international constraints is beyond the scope of this article, it is important to remember that Panama's destiny (at least in the foreseeable future) will continue to be shaped by its strategic location at the crossroads of international trade. Whether the Canal will be managed in the interests of the Panamanian people will depend on the country's ability to overcome the domestic legacy of colonialism and to skillfully manage the challenges posed by the international economic order.

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<sup>270</sup> See Ruiz, *supra* note 195.





## ESSAY

**PANAMA CITY REFLECTIONS: GROWING THE CITY IN  
THE TIME OF SUSTAINABLE DEVELOPMENT**

*Ileana M. Porras<sup>1</sup>*

**Introduction**

The image that frames our arrival in Panama City is unexpected, yet pervasive. From the moment we land we are aware of the skyscrapers. Improbably enough, in this mostly flat, hot, humid, congested third world urban landscape, fronting on the Pacific, luxury residential skyscrapers are rising everywhere. On our first morning in the city, we take a couple of taxis to the *Parque Metropolitano*,<sup>2</sup> a small, relatively untouched green area within the city limits. This area is a legacy of the U.S. controlled Canal Zone, protected for now, because of its status as an essential component of the canal watershed.<sup>a</sup> We hike up the hill through an exuberant tropical forest and, within twenty minutes, we have reached one of the best vista points over the city. From our bird's eye view, the city opens up before us, old and new. As we make our way from the first *mirador* up the steep stairs to the second platform the initial

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<sup>1</sup> Visiting Professor, Sandra Day O'Connor College of Law, Arizona State University. I would like to thank all those involved in the planning of our week-long Study Space Workshop in Panama City. In particular, I would like to thank Colin Crawford and Daniel Suman who made it all come together. I would also like to join in thanking all our hosts in Panama City who generously gave of their time and shared their passion and expertise to help us understand their city.

<sup>2</sup> The *Parque Natural Metropolitano* (232 hectares) is within the *Corregimiento* (administrative sub-district) of Ancon, in Panama City, in what was until recently the U.S. controlled Canal Zone, and offers one of the highest viewpoints over the city and its surrounding area. See <http://www.parquemropolitano.org> (last visited June 6, 2008).

view of a quiet “sea of green” of the Canal Zone, spotted with its distinctive white-painted, red-roofed, barrack villages gives way to the dense, bustling, concrete urban space of the city, engaged, it would seem, in a frenzy of construction. When we get to thirty, we give up trying to count the cranes that sit atop the high rises under construction.

From this vantage point, we can also observe the diminutive peninsula where the traumatized residents rebuilt their city within fortified walls after the original and unprotected town was sacked (and burnt) by the infamous pirate/privateer Captain Morgan in 1671.<sup>3</sup> Known as the *Casco Antiguo*,<sup>4</sup> this peninsula, the once decaying heart of the old city of Panama, was designated a UNESCO World Heritage Site in 1997. Today it is in the throes of redevelopment, gentrification and commodification as a tourist destination. This change has resulted in the displacement

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<sup>3</sup> See Peter Earle, *THE SACK OF PANAMA: CAPTAIN MORGAN AND THE BATTLE FOR THE CARIBBEAN* (2007) [hereinafter *SACK OF PANAMA*]

<sup>4</sup> The term *Casco Antiguo* or *Casco Viejo* (“Ancient” or “Old” Quarter) is often used to refer to the historical and monumental center of San Felipe (once Panama City *intra-muros*) and it is this section of the old town, along with a small portion of Santa Ana, which has been designated by UNESCO as a World Heritage Site. See Eduardo Tejeira Davis, *Historia Concisa del Casco Antiguo de Panamá*, in *EL CASCO ANTIGUO DE LA CIUDAD DE PANAMÁ* 56 (2001) (hereinafter *HISTORIA CASCO ANTIGUO*); See also *World Heritage List: Panamá (Panamá)*, ICOMOS, No. 790 (1997), [http://whc.unesco.org/archive/advisory\\_body\\_evaluation/790bis.pdf](http://whc.unesco.org/archive/advisory_body_evaluation/790bis.pdf). Technically, however, the historical city of Panama includes the three administrative districts of San Felipe, Santa Ana and Chorrillos. Furthermore, the Casco Antiguo benefits from the special conservation and investment incentives law, which provides for a public-private partnership for redevelopment of the area. See Ley No. 4 de 15 de Enero de 2002. “Que modifica el Decreto Ley 9 de 1997, sobre un régimen especial de incentivos para el Casco Antiguo de la Ciudad de Panamá, y dicta otras disposiciones,” *Gaceta Oficial* No. 24,472 (Jueves 17 de Enero de 2002).



of the poor and mostly black community that had progressively taken up residence in the historical center when it was abandoned by the gentry and middle classes in the mid 20<sup>th</sup> century.<sup>b</sup>

From our perch, however, it becomes obvious that the *Casco Antiguo's* designation as a UNESCO World Heritage site, has at least saved it from the upward push to which the rest of the city appears to be dedicated. Absent this designation, it seems likely that the *Casco Antiguo* would have been bulldozed and transformed into its mirror image at Punta Paitilla.<sup>5</sup> There, a little to the south, separated from the *Casco Antiguo* by the length of the Avenida Balboa,<sup>6</sup> which runs parallel to the Bahía de Panama, we could observe a crowd of skyscrapers densely congregated on a confined waterfront perch, already precariously pushing their way out into the water on the new landfill of Punta Pacifica.<sup>c</sup> Across the city, wherever we turned, we observed the tell-tale sign of skyscrapers under construction,

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<sup>5</sup> The most recent development at Punta Paitilla took off as a result of the concession granted to a Mexican company (ICA S.A.) in 1995 for the construction of the Corredor Sur, the 19.5 kilometer toll highway that links the downtown financial district to the eastern parts of the city and to the international airport at Tocumen. See Felix Wing Solis & Claudia Saladin, *Panama's Corredor Sur: Turning the Bay of Panama into a "Fecal Swamp"* (2000) at <http://www.ciel.org/Publications/IFCCSPanama.pdf>. An integral component of the compensation structure for the project was a grant of property rights for development of about 30 hectares on the mainland (the old Paitilla airport) and 35 hectares of landfill in an adjoining area. See *id.* Today's Cinta Costera is in effect a continuation of the Corredor Sur – its “second phase.”

<sup>6</sup> The portion of the Bay adjacent to the Avenida Balboa is the site of the controversial project for a *Cinta Costera*, which had “broken ground” just days before our arrival in the city. For the official version see the project's website at <http://www.cintacostera.com.pa/index.html>. For a more critical review of the project see <http://burica.wordpress.com/2008/04/11/cinta-costera-oxigeno-o-cemento/>, for a series of articles criticizing the *Cinta Costera* project [hereinafter “Burica Press on Cinta Costera”].

some incongruously rising out of quiet old residential neighborhoods, playing havoc with all sense of urban scale.<sup>7</sup>

Looking out to the west, to the Bay and sea beyond, it was obvious what all these towers sought to provide: the promise of unobstructed ocean views<sup>8</sup> at a fraction of the cost of a similar ocean view apartment in Miami Beach. Just beyond the causeway and the three small islands of Naos, Perico and Flamenco that today form a kind of sea wall at the mouth of the canal,<sup>9</sup> we could make out an endless line of container ships waiting their turn to enter the canal on their nine hour, fifty-one mile-long, West-East shortcut from the Pacific to the Atlantic.<sup>10</sup> These ships served as a reminder of the city's enduring vocation as a port of passage, standing sentinel at one end of the most important inter-oceanic trade route in the Western world. In 1519, the Spaniards founded Panama City, the first permanent European settlement on the Pacific coast, locating it

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<sup>7</sup> A good example of this is in the neighborhoods of Bella Vista and San Francisco. Presentation of Arq. Manuel Trute to Study Space Group December 14<sup>th</sup>, 2007. [Notes from presentation on file with author].

<sup>8</sup> In reality the "promise" of unobstructed views is often little more than a "fantasy," for the density of these towers, and the lack of meaningful urban planning limits, means that today's view will be blocked by tomorrow's high rise, if it is not so already.

<sup>9</sup> The three islands and the causeway that links them (built with rock excavated from the Canal) are part of the reverted areas. Since the Panamanian government obtained control over the area it has promoted a high end tourist development with marinas, resorts, convention centers, restaurants and upscale shopping facilities. This area is also the projected site for a new harbor and for the Frank Gehry designed biodiversity museum. See *The Building in Context*, <http://www.biomuseopanama.org/en/index.html>

<sup>10</sup> Apparently it is not uncommon for up to 100 vessels to be queued up on either end of the canal at any given time. See Andrew Gumbel, *Panama Canal: work begins on a \$5bn project to widen the canal that revolutionised the transport of goods*, THE INDEPENDENT, Sept. 3, 2007 [hereinafter "*Panama Canal: work begins*"].

at the lowest and narrowest point of the landmass that separated the Atlantic from the Pacific. From its inception the city's fate had been intimately linked to its function in facilitating international trade. It had served as a launching pad for the Iberian conquest of the Incan Empire. Then for almost three centuries it had served as the critical transit point for the two-way traffic with Spain. Silver and gold from the Andean mines was ported from Panama City, west to east, across the isthmus to the waiting Spanish galleons anchored at the Atlantic port of Nombre de Dios (later Portobello).<sup>11</sup> In return, from east to west, came European goods and African slaves on their way to the Andes' settlements. When European shipping became adept at navigating through Cape Horn the City's fortunes began a long period of decline. The City rose to prominence again only when in 1855 the first transoceanic railway was built across the isthmus to service the demand for fast transportation of people and cargo from the East Coast of the United States to California during the "gold rush" of 1849.<sup>12</sup> Boom times in Panama City accompanied the de Lesseps' French sea level canal project begun in 1880 and abandoned in 1893 amidst financial scandal and horrific loss of life) and rebounded again in 1904 when the United States began work

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<sup>11</sup> See WALTER LAFEBER, THE PANAMA CANAL: THE CRISIS IN HISTORICAL PERSPECTIVE 3-5 (1989).

<sup>12</sup> The Panama Railroad Company was a U.S company, which obtained from the government of New Granada (Colombia and Panama) a 49 year concession. The railway, granted extensive rights of way, including large properties adjacent to its terminal on the outskirts of what was then Panama City, proved extremely successful until the 1880s when it began to face competition from the new railway lines in the United States. It was subsequently purchased by a French consortium and put to the service of building the French canal in the mid 1880s. When the French *Compagnie Nouvelle du Canal de Panama* failed, its shares and assets, including the railway were purchased by the U.S. government. See *Ibid.* at 10.

on the Panama Canal.<sup>13</sup> Consciousness of their country's historic vocation and of Panama's economic dependence on maintaining her status as a privileged trans-isthmian trade route, led the people of Panama in 2006, only six years after Panama finally established sovereignty over the canal and its zone, to approve by referendum a plan to enlarge the canal by building a third set of locks at an estimated cost of \$5.25 billion.<sup>14</sup> This massive project, touted as the vehicle that will pull Panama out of the third world into the first, had begun just three months before our arrival in Panama City.<sup>15</sup>

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<sup>13</sup> As is well known, the Colombian government's rejection of the U.S. application for the concession to build a canal across the Panamanian isthmus prompted the U.S. government to assist secessionist forces in what was then a province of Greater Colombia. The Republic of Panama declared independence in November of 1903 and two weeks later the U.S. and the new republic entered into the Hay-Bunau-Varilla Treaty of 1903 by which Panama granted the U.S. the right to build and manage the canal as well as exclusive control over the Canal Zone in perpetuity. Work on the canal was completed in 1914, just in time for the Great War. *See Ibid.* at 11-45.

<sup>14</sup> Despite the headlines, endorsement of the expansion project was in fact lukewarm. While just under 80% of those voting in the referendum voted "yes," voter turnout was uncharacteristically low, with an abstention rate estimated at about 60%. *See Voters overwhelmingly approve Panama Canal expansion plan in referendum*, IHT, October 22, 2006. The project to enlarge the canal was driven by the concern that the long-term viability of the canal would be compromised by its inability to provide passage to the ever larger cargo boats, and because the slowness of the lock process and the increased traffic resulted in long waits for passage. *See generally Panama Canal: Work Begins*, *supra* at note 10. For official information and updates on the \$5.25 billion projected expansion project which began in September 2007, see the Panama Canal Authority's website at <http://www.pancanal.com/eng/plan/index.html>.

<sup>15</sup> In his speech to the nation introducing the canal expansion project, President Martin Torrijos made a reference to the canal as Panama's "oil," and suggested that just as new oil deposits must be explored and exploited, the canal's viability must be extended. *See Discurso en Inicio de Periodo de Divulgación del Proyecto de Ampliación del Canal de Panamá*, Apr. 26, 2006, at

As our week in Panama City progressed, however, it was the image of the skyscrapers that stayed with us. Skyscrapers closing off our line of vision; skyscrapers etched on billboards and on the fences enclosing construction sites—promising that not even the sky is the limit; skyscrapers proudly displayed in the city’s publicity materials; skyscrapers, each more fantastical than the other, emerging out of the ubiquitous glossy magazines offering real estate opportunities to all and sundry.<sup>16</sup> Each day as we struggled with the urban congestion, the city’s noise and air pollution, we kept coming back to the question: “Why skyscrapers?”

### I. Sustainable Development and the City

According to the statisticians and demographers compiling population data for the United Nations, we have arrived at a milestone in human history.<sup>17</sup> It was recently

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<http://www.presidencia.gob.pa/discurso.php?cod=866>; See also *Panama Canal: Work Begins*, *supra* at note 10. He further stated that Panama’s geographic position and the new international reality (globalization and the growth in the volume of international seaborne trade) created a significant opportunity for Panama to rise above the barrier of underdevelopment and enter the first world. See *Discurso en Inicio de Periodo de Divulgación del Proyecto de Ampliación del Canal de Panamá*, Apr. 26, 2006, at

<http://www.presidencia.gob.pa/discurso.php?cod=866>. See also *Panama Canal: Work Begins*, *supra* at note 10.

<sup>16</sup> Accurate figures on buildings and construction in Panama City are hard to come by. Arquitecto René Paniza from the Alcaldía de Panama (Panama City Municipality) informed us that 107 new high-rises had been approved. According to SkyscraperPage.com, a website dedicated to skyscraper enthusiasts, Panama City already boasts 128 skyscrapers, with 122 under construction and at least 22 more proposed. See <http://skyscraperpage.com/cities/?cityID=864>.

<sup>17</sup> Department of Economic & Social Affairs, Population Division, World Urbanization Prospects: The 2007 Revision Highlights, at 1, U.N. Doc. ESA/P/WP/205 (Feb., 2008), available at

predicted that half of the world's population would be living in urban areas by the end of 2008.<sup>18</sup> Moreover, this proportion is expected to grow to 70% during the next half century as developing countries, especially those in Asia and Africa, become increasingly urbanized.<sup>19</sup> By mid-century, as the world's population climbs from 6.7 billion in 2007 to 9.2 billion in 2050, it is projected that the number of human beings inhabiting urban spaces will reach 6.4 billion.<sup>20</sup> While the reliability of these numbers and projections can certainly be questioned,<sup>21</sup> there is no denying the fact that the world is increasingly becoming urbanized.<sup>22</sup>

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[http://www.un.org/esa/population/publications/wup2007/2007WUP\\_Highlights\\_web.pdf](http://www.un.org/esa/population/publications/wup2007/2007WUP_Highlights_web.pdf). The database may also be consulted at <http://esa.un.org/unup/>.

<sup>18</sup> See *id.* at 1-2.

<sup>19</sup> See *id.* at 1-2.

<sup>20</sup> See *id.* at 3.

<sup>21</sup> See e.g. Montgomery, M. R., et al., CITIES TRANSFORMED: DEMOGRAPHIC CHANGE AND ITS IMPLICATIONS IN THE DEVELOPING WORLD 128-154 (2003) [hereinafter "CITIES TRANSFORMED"]; see also David Satterthwaite, *The Scale of Urban Change Worldwide 1950-2000 and its Underpinnings*, Human Settlements Discussion paper, IIED (2005) available at <http://www.iied.org/pubs/pdfs/9531IIED.pdf>.

<sup>22</sup> From the perspective of managing the world's limited natural resources, increased urbanization may not be a bad thing. Moreover, the figures are somewhat deceptive. In fact, overall, the annual rate of population growth in urban areas is slowing down. (The average annual rate of growth between 1950-2007 was 2.6 per cent, whereas it is expected to be 1.8 per cent from 2007-2050). It should be noted that more than half of the population of the developed world was already urbanized by 1950, and today that proportion has reached between 72% in Europe to over 80% in North America. Moreover, Latin America already exhibits high degrees of urbanization (78%). The regions that will experience the highest rate of urban growth between now and 2050 are those presently least urbanized: Asia and Africa, with India and China projected to account together for a third of the increase in the urban population in the next few decades. See *id.* at 1-12. The real issue from the perspective of sustainable development is not increased urbanization per se, but net population growth. While the popular IPAT formula (Impact=Population x Affluence [or Consumption] x Technology), most commonly associated with the work of Paul R.

Across the globe, a disproportionate amount of production takes place in urban areas, while the ecological footprint of consumption and waste in the city is deep and spills out far beyond any city limits. Cities may be hubs of government, culture, education, entertainment and social services, but they also provide the setting for the most extreme disparities of wealth. Cities have become the privileged sites of human habitation, production and consumption. The question is: can they become the privileged sites of sustainable development?<sup>23</sup>

In its 1987 report, "Our Common Future," the Brundtland Commission adopted the concept of "sustainable development" to challenge the dominant paradigm of

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Erlich, is a useful reminder that environmental impact is determined not only by population size, but also by patterns of consumption and the availability of more sustainable technologies, it is undeniable that each additional human being (or consumer) adds to the pressure on the earth's "carrying capacity." Furthermore, recent research suggests that if present patterns persist much of the projected urban growth will swell the already large proportion of urban dwellers who live in inadequate conditions in the world's squatter settlements or slums. See THE CHALLENGE OF SLUMS - GLOBAL REPORT ON HUMAN SETTLEMENTS 2003 (UN-Habitat) available at <http://www.unhabitat.org/pmss/getPage.asp?page=bookView&book=1156>.

<sup>23</sup> The literature on sustainable cities has grown by leaps and bounds in the last decade. Many city governments have explicitly committed themselves to sustainability, especially in the developed world. The problem, as David Satterthwaite and others have pointed out, is that "[s]uch a diverse range of environmental, economic, social, political, demographic, institutional and cultural goals have been said to be part of 'sustainable development' that most governments or international agencies can characterize some of what they do as contributing towards sustainable development." David Satterthwaite, *Sustainable Cities or Cities that Contribute to Sustainable Development?*, 34 URB. STUD. 1667, 1668 (1997) [hereinafter Satterthwaite, *Sustainable Cities*]. Satterthwaite's insight is consistent with my own conclusions about Panama City's commitment to "sustainable development."

development as equivalent to economic growth.<sup>24</sup> The report's oft cited formulation states, "[S]ustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs."<sup>25</sup> The key concern of the Brundtland Report was to establish the proposition that there might be certain limits or constraints on economic growth. In the familiar Brundtland definition of sustainable development, however, the limits were not specifically attributed to excessive ecological burdens or the problems of unnecessary waste and negligent environmental destruction. Instead, the limits to growth were deemed to be imposed by the oddly hypothetical, yet compelling, "future generations," whose ability to meet their hypothetical future needs by their own means must be taken into account when making development choices today; choices assumed to be

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<sup>24</sup> See WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT: OUR COMMON FUTURE (1987), available at <http://habitat.igc.org/open-gates/wced-ocf.htm> [hereinafter, THE BRUNDTLAND REPORT].

<sup>25</sup> *Id.* at ch.2. To be fair, the Commission's definition does not stop there, but continues in its first paragraph: "Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts:

- the concept of 'needs', in particular the essential needs of the world's poor, to which overriding priority should be given; and
- the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs."

This first paragraph is followed by fourteen further paragraphs, which elaborate on the concept. *Id.* Many are concerned with issues of poverty and "equity," both inter and intra-generational and with the problems posed by environmental degradation. *See id.* Ch.2, subsec.2. Anthropocentric as it is, the full report is a conceptually ambitious and insightful document, which has nonetheless suffered the fate of so many group efforts produced for UN consumption. The bulk of the text has receded into oblivion while the first sentence of its "definition" has come to stand for the whole.



driven equally by the pressing needs of the present generation.

The Brundtland Commission's formulation and the concept of sustainable development that it spawned have been much written about, elaborated on and critiqued, since the concept was endorsed at the 1992 Rio Earth Summit.<sup>26</sup> Since then, the term has given rise to a bewildering array of homologous concepts such as sustainable economy, sustainable business, sustainable agriculture, sustainable energy, sustainable communities, sustainable tourism, sustainable design, etc. It is not my purpose here to join that debate, or to attempt to disentangle the confusion that has arisen from the sudden popularity of the adjective "sustainable." I note merely that since 1992 the term "sustainable development" has been catapulted onto the international stage, widely espoused in official texts and pronouncements by all levels of government, civil society and even the private sector.<sup>27</sup> Arguably, the objective of

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<sup>26</sup> United Nations Conference on Environment and Development, UNCED (1992), *available at* [www.ciesin.org/datasets/unced/unced.html](http://www.ciesin.org/datasets/unced/unced.html). For a discussion of the 1992 Rio Declaration and how it attempts to shape the concept of "sustainable development," see Ileana Porras, *The Rio Declaration: A New Basis for International Cooperation*, in GREENING INTERNATIONAL LAW (Philippe Sands ed., 1994).

<sup>27</sup> The objective of sustainable development was endorsed in Panama's first comprehensive environmental legislation, which created the National Environmental Authority (ANAM) *See* Ley No. 41 de 1 de Julio de 1998, por la cual se dicta la Ley general de Ambiente de la Republica de Panamá y se crea la Autoridad Nacional del Ambiente, G.O. 23,578 de 3 de Julio de 1998. Sustainable development is defined as: "Proceso o capacidad de una sociedad humana de satisfacer las necesidades y aspiraciones sociales, culturales, políticas, ambientales y económicas actuales, de sus miembros, sin comprometer la capacidad de las futuras generaciones para satisfacer las propias." *See* Ley General de Ambiente, *La Asamblea Legislativa Decreta*, Capítulo II, Art.2 *available at* <http://www.anam.gob.pa/normasambientales/Ley%20Gral%20Ambient.html> (process or capacity of a human society to meet the needs and

sustainable development is on its way to becoming, like “peace,” “democracy” or “free trade,” one of the standard *desiderata* of the liberal international agenda package.

It is indisputable, of course, that some of the term’s popularity and the ease with which it has emerged as an international norm is due to its “brilliant” ambiguity, flexibility and open-endedness. To some the term, properly understood, requires a radical reorientation of the economic, environmental and social status quo, not just at the national but also at the international level; for others, however, it merely connotes the need for a little tinkering. For all that, it is possible to argue, that a commitment to “sustainable development” can and should be taken to denote (at a minimum) a recognition that economic growth cannot be pursued without due regard to its environmental impact or to considerations of inter—and intra-generational equity.<sup>28</sup> Sustainable development calls for a holistic cost-

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the social, cultural, political, environmental, and economic aspirations of its members without compromising the capacity of future generations to meet their needs and aspirations (author’s translation)), Sustainable development continues to drive ANAM’s agenda. See, e.g., *Estrategia Nacional del Ambiente: Gestión Ambiental para el Desarrollo Sostenible 2008-2012*, ANAM (2007).

<sup>28</sup> This perhaps explains the popularity of the quasi-scientific instrument known as the Environmental Impact Assessment which is used whenever a “major” project is proposed. The production of an EIA, in accordance with the relevant legislation, gives the decision maker confidence that he has adequately “balanced” the economic imperative (growth) against the environmental constraints. In some cases it may even allow him to believe that he has “balanced” the equity concerns. As with all such policy tools, of course, the determination of the point at which a prospective environmental harm will trump the projected economic benefit, is, in the end, a political decision under the guise of a routine administrative procedure. This is not to suggest that EIAs are of no use at all; they may often serve as a means to reduce potential harm by forcing project designers to consider alternatives or by requiring the project developer to mitigate the harm. The “sustainable development” *imprimatur* that EIAs procure project proposers and decision makers, however, is almost always unwarranted.

benefit approach to decision making: the recognition that policy areas are interconnected and that the decision to build a new highway in Panama, for instance, or the designation of an area as a protected wilderness, will have potential economic, environmental and societal impacts both short term and long term, and that it would be irrational not to take these into account. In this respect, sustainable development corresponds perfectly to our era's spirit of globalization and to our general preoccupation with the new reality of inter-dependence. In the end, "sustainable development" is a political not a scientific term, because the "right outcome" can only be determined in relation to an antecedent political choice setting priorities and policy goals. Indeed, whether or not sustainable development is viewed as a radical critique or as a refinement on the status quo depends on how we assess the status quo. While it is unlikely that an objective test can be developed to answer the question of whether or not a given project or a particular policy meets the criteria of sustainable development, it should nevertheless be possible to ascertain how the proposed project or policy purportedly furthers the goal of sustainable development and how the competing interests have been balanced. To the extent sustainable development is a political process, it will be helpful to begin to identify how the competing economic, environmental and social interests have been prioritized and to what extent the "needs" of the most vulnerable segment of the present generation are to be met. Sustainable development may require the balancing of costs and benefits across policy sectors and across the population. Almost by definition, balancing requires that some interests be sacrificed to the promotion of others. If, in practice, however, the interests of the poor in the present generation are routinely discounted in favor of the interests of growing the economy, protecting the environment or preserving the capacity of future generations to meet their own needs, then this pattern

of sacrifice must be made visible so that the political process can be reformed.

Of course, many expressions of commitment to the goal of sustainable development can be dismissed as lip-service by politicians, bureaucrats, and other entrepreneurs in pursuit of public approval or the significant funding that has been ear-marked for sustainable development projects. Yet, sustainable development is also being endorsed and promoted with urgency and in good faith by countless civil society entities: international, national, and local organizations, communities, groups and individuals. Are all these efforts leading to better, more sustainable development choices?

Given the population trends already alluded to, it is evident that for the concept of sustainable development to have any purchase, it must be possible to implement it in the cities—where over half of the world's population currently resides. What does a commitment to sustainable development mean for the city and its residents? How are we to read the city, especially the city in the developing world—where so many of the world's poor are concentrated—through the optic of sustainable development? Has the theoretical shift from the traditional development paradigm to the holistic approach of sustainable development made any inroads in the city? Has it served the urban poor in any way?

The most prominent environmental and social problems shared by the fast growing urban areas in the developing world are simply exacerbated forms of the urban problems that plague many of the cities of the developed world. At the top of the list are: traffic congestion; air pollution; noise; inadequate low cost housing options; inadequate provision of services such as electricity, water, sanitation, and municipal waste collection; lack of access to education and affordable health care; inadequate public transportation and deficient security. Other critical problems include spatial segregation of city residents based on

wealth; the non-separation of incompatible land uses (such as the location of industrial and manufacturing facilities in the midst of densely populated areas); high levels of insecurity; and underperforming local government institutions. Anyone who has ever lived in a city will recognize some of this litany of ills. Even with the material and technical resources available in the wealthy industrialized countries, it is hard to manage a city. In the developing world, lack of economic resources, poor basic infrastructure, the vertiginous growth of the urban population in the post-colonial period and the desperate poverty of a large segment of the population have combined to make these urban problems seem intractable. What does it mean in these places to adopt a model of development that “meets the needs of the present without compromising the ability of future generations to meet their own needs?”<sup>29</sup>

## II. Placing the City: The Case of *Ciudad de Panamá*

The concept of sustainable development may be one of general application, yet it also requires attention to the particularity or specificity of place. Indeed, the focus on “place” seems to offer great promise, in that, while taking into account the multi-scalar character of sustainable development, it also recognizes that sustainable development is ultimately implemented at the local level, in furtherance of local objectives and pursuant to local initiatives.<sup>30</sup> What

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<sup>29</sup> See *supra* at note 24.

<sup>30</sup> See Martin Purvis, *Geography and Sustainable Development in* EXPLORING SUSTAINABLE DEVELOPMENT: GEOGRAPHICAL PERSPECTIVES 33-49 (Martin Purvis & Alan Grainger eds., 2004) [hereinafter *Geography*]. In a sense sustainable development has inherited the mantle of the environmental movement with its injunction to “Think globally, act locally!” The “localism” of sustainable development differs from that of the environmental movement in that it is concerned not just with local action regarding environmental protection but with local action regarding development “needs.”

may pass for sustainable development in one place may simply not pass muster in another. In order to explore the relationship between sustainable development and the city, it is thus indispensable to delve into "place." Each place is formed by a unique convergence of geography and history. All cities are made up of people, communities, corporations, buildings, neighborhoods, sacred spaces, public spaces, infrastructure, culture, government and law. Yet in each particular space, these exist, and are determined, not just by the history of the place but also by the ecological systems on which the city has physically superimposed itself. In addition, each city is in an ongoing relationship with a "hinterland" from which it draws people and resources and in a complex exchange relationship with the world beyond its borders; for the city is by no means self-sufficient. In order to understand a city, it is necessary to perceive it as part of a web of connections, past and present to the nation, the region, other cities and spaces around the world.

Panama City is no exception, and in order to understand the city's present trajectory in relationship to the pursuit of sustainable development, it is necessary to uncover its history. Panama City is a city on the move, but it is no mega-city.<sup>31</sup> The metropolitan region has reached the not insubstantial population of one million inhabitants. This represents a tripling of the population since 1960.<sup>32</sup> Ap-

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<sup>31</sup> Usually defined as cities with over 10 million inhabitants. More attention has been paid to mega cities yet in many ways the smaller large cities are just as critical. Indeed as Satterthwaite reminds us urbanization is not all taking place in the largest urban centers. See David Satterthwaite, *Outside the Large Cities: The Demographic Importance of Small Urban Centres and Large Villages in Africa, Asia and Latin America* 2006. Human Settlements Discussion Paper—Urban Change 3 (2006) available at, <http://www.iied.org/pubs/display.php?o=10437IIED>.

<sup>32</sup> According to the 2000 census, the Metropolitan City of Panama composed of the districts of Panama and San Miguelito, contained a total of 979,635 residents. Álvaro Uribe, *La Integración del Área del*

proximately one third of the country's population lives in this urban area alone.<sup>33</sup> As might be expected, the major urban challenges in Panama City include the characteristic problems of any city in the developing world whose rapid growth has outstripped its infrastructure and its resources. Poverty, affecting a large segment of the population, is at the top of the list.<sup>34</sup> Other problems include traffic congestion, air pollution, noise, sanitation issues, water pollution and inadequate shelter. These problems are exacerbated by the income based spatial segregation that characterizes the city; the ongoing displacement of lower income communities to peripheral zones distant from employment opportunities; and the concentration of private and public

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*Canal y la Expansión de la Ciudad de Panamá*, LINCOLN INSTITUTE RESEARCH REPORT, 1, 8, tbl.1 (2000), [hereinafter *Integración*] It is possible that the area has now hit the million residents mark. It should be noted, that as in much of the rest of the world, the urban growth rate has slowed down in the past two decades.

<sup>33</sup> If we consider the urban area that is formed by the interconnected communities that are strung along parallel to the canal, from the Pacific to the Atlantic coast—the so called “trans-isthmic” or “transoceanic” city—the number rises to half of the country's population. See *Panamá y Colón ¿Una Sola Ciudad?* La Prensa Web, (February 7th, 2000) at <http://mensual.prensa.com/mensual/contenido/2000/02/07/lunes/trasfondo.html>. Like the rest of Latin America, Panama is already highly urbanized. According to UN figures, in 2005, almost 71% of Panamanians lived in urban areas; a number which is expected to grow to 80% by 2020. See *supra* WORLD URBANIZATION PROSPECTS at note 16.

<sup>34</sup> Panama's overall HDI Rank (Human Development Index) is 62 out of 177 countries for which the UNDP collects data. However, in terms of income inequality (Gini Index), Panama ranks amongst the worst 15 countries. In a state where the GDP is \$7,605 per capita, according to the latest data available: 37.3% of the population lives under the national poverty line. Of these 18% live on under \$2 per day; 7.4% under \$1 per day. See HUMAN DEVELOPMENT REPORT 2007-8 (UNDP) available at

[http://hdrstats.undp.org/countries/data\\_sheets/cty\\_ds\\_PAN.html](http://hdrstats.undp.org/countries/data_sheets/cty_ds_PAN.html)

investment in the central areas of the city.<sup>35</sup> Urban pressures on the natural habitat include invasion of rural and forested areas for use as squatter settlements, the ongoing in-filling of sensitive coastal zones and dredging of wetlands by private economic actors for real estate development purposes, and the destruction of riverine habitats through uncontrolled urban and industrial pollution.

At the heart of many of the major problems of Panama City is the disorderly and haphazard growth resulting from a radical failure of urban planning.<sup>36</sup> Ironically, it was not always so. Indeed, Panama City was the beneficiary of an early form of urban land use planning. As with all settlements established by the Iberians in the New World, the City of Panama was imagined from its foundation as an ordered Christian enclave in a world otherwise dedicated to Satan.<sup>37</sup> The famous *Ordenanzas de las Indias* of 1573 (Ordinances for the Discovery, the Population and the Pacification of the Indies) issued by Phillip II, were the culmination of a series of instructions issued by the Crown seeking to order the space of these new urban settlements along Renaissance lines with an eye on the City of God.<sup>38</sup> The *Ordenanzas* provided ordered sacred, public and private space along a grid centered on a *plaza mayor*. The city was to serve as a physical representation of the natural order, reinforcing the social and hierarchical distinctions of

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<sup>35</sup> Based on general observations of the city during our visit and the lectures we heard. On the difference in investment see *Integración supra* note 29, at 9.

<sup>36</sup> See, e.g. Álvaro González Clare, *Realidad Urbana: La bruta densidad en la ciudad de Panamá*, Oct. 17, 2007 available at <http://burica.wordpress.com/2007/10/17/la-bruta-densidad-en-la-ciudad-de-panama/>.

<sup>37</sup> See Jorge Cañizares-Esguerra, *PURITAN CONQUISTADORS: IBERIANIZING THE ATLANTIC, 1550-1700* (2006).

<sup>38</sup> See *The Laws of the Indies* and Jean-François Lejeune, *Dreams of Order: Utopia, Cruelty and Modernity in CRUELTY AND UTOPIA: CITIES AND LANDSCAPES OF LATIN AMERICA*, Jean-François Lejeune, ed. (2003) 18-29, 30-49. See Augustine, *CITY OF GOD*.



early modern Spain as it tamed and extended its dominion over the wilderness of America. Yet, curiously the *Ordenanzas* were also, informed by an almost monastical conception of self-sufficiency, an early model for sustainable living – since the instructions ordered each new settlement to address the problems of food provision, water supply, sewage disposal, security, defense, health and sanitation from the moment of its founding. The *Ordenanzas de las Indias* were, in effect, a conscious response to the discovery period's initial images of the New World as one of pre-edenic harmony and simplicity (where nature provided man's few needs), a world that must now give way to civilization and be re-oriented towards the "New Jerusalem," imagined as a built and ordered environment.

The original City of Panama was founded in 1519, before these texts were fully developed, but when the city was rebuilt in 1673,<sup>39</sup> the new Panama did seek to conform, as far as possible to these instructions. As a coastal town that had already once been attacked and destroyed, the "new" City of Panama was, contrary to the *Ordenanzas'* ideal city, built on a small, defensible peninsula, with its back to the sea, and enclosed within a city wall. The constraint of the fortified wall and its peninsular location, made the City of Panama unusual among Iberian New World cities, for the *Ordenanzas* provided for open cities built on the premise of growth. Instead, Panama City soon occupied all of the space available *intra-muros*, leaving the residents with no formal room for expansion. Ironically, in the midst of an abundance of open space, the city grew dense and crowded within its formal boundaries. Further, the constraint on formal city space reinforced another pattern instituted by the *Ordenanzas*—the spatial segregation between the races. Settlers of Spanish or European origin or descent were in the seventeenth century very much a minority in Panama City. The greatest part of the urban population

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<sup>39</sup> See HISTORIA CASCO ANTIGUO 28 *supra* at 4.

was made up of African slaves and free blacks, with mestizos<sup>40</sup> and others of mixed races making up the remainder.<sup>41</sup> The non European population of Panama City was almost immediately relegated to the unofficial urban space *extra-muros*, in the areas immediately adjacent to the walled city; a pattern which can be observed still today, as the quarters of the city closest to the old town are poor and predominantly black.

The constricting effect of the fortified walls on the city's expansion was only the first of a series of strategic choices that spatially shaped and distorted the city as it grew. The fortunes of the City of Panama, linked intimately to its geographical location and to its monopoly over the transisthmic portion of the Iberian transatlantic trade, declined rapidly in the mid 18<sup>th</sup> Century when the great markets at Portobello were finally suspended and new commercial routes were established. In 1821, Panama along with the rest of northern South America, declared independence from Spain and joined with the Bolivarian federation of Gran Colombia. When the federation dissolved following Bolivar's death in 1830, Panama, by then little more than an economic backwater, remained with Colombia as Nueva Granada. Its geographic destiny as major inter-oceanic point of passage was rediscovered with the advent of the California gold rush in 1849, which led to an economic rebirth.

So opened a period of major works in Panama: first, the construction of the transisthmic railway; second, the French attempt to build a sea-level canal, a task which, though left incomplete, was a major enterprise; and finally the construction of the U.S. Canal.<sup>42</sup> Panama City's econ-

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<sup>40</sup> Mestizos was the term used for the offspring of Spanish settlers with indigenous women and their descendants. See SACK OF PANAMA 122 *supra* at note 3.

<sup>41</sup> See *id.*

<sup>42</sup> See *supra* at note 11.

omy grew, in this period, along with its population, as waves of immigrants arrived to take advantage of the new economic opportunities. Thus, Afro-Caribbean and Chinese laborers were brought in to work in the brutal construction projects. Many of these migrants stayed on and contributed to the City's already complicated ethno-racial composition.

From a spatial urban perspective, however, the most dramatic effect of these major works was that significant areas of land adjacent to the City were ceded to the foreign companies in charge of the projects. The cession had two effects. First, it required the creation of a new land market where none had existed, which in turn began the transformation of the class of erstwhile rural *hacendados* into rich urban land barons. Second, the ceded lands, including significant areas of desirable property adjacent to the city, became off-limits to the City's expansion precisely at a moment of intense growth.<sup>43</sup>

Cut off to the West by the US Canal Zone, which inherited the railway's right of way and terminal, the City's center migrated to the East and South, leaving the old city behind on the periphery. As roads were built to the North, towards the Atlantic port of Colon, population followed. Unplanned and unmonitored, human settlements further damaged important ecological habitats already compromised by the introduction of roads. In any case, the roads failed to deliver prosperity as economic activity and employment opportunities continued to be concentrated in the city center. The shape of the City that grew up alongside the distorting mass of the U.S. Canal Zone has been aptly described as a "Y" with a short stem.<sup>44</sup> In contrast to the dense and constricted City of Panama, the U.S. Canal Zone was lightly populated and composed of small discrete garden cities set in their natural environment.

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<sup>43</sup> See HISTORIA CASCO ANTIGUO 47 *supra* at note 4.

<sup>44</sup> See *Integración*, *supra* note 29, at 3.

Coinciding with completion of the Canal in 1914, the well-to-do residents of Panama City began to emulate their North American counterparts by building spacious residences in the open and exclusive suburban spaces to the East of the walled city. The desertion of the *Casco Antiguo* by the wealthy had begun. Two distinct property regimes evolved side by side in the Panama City area. In the city, property ownership was the exception rather than the rule. Most low-income residents were subject to the rental system known as *inquilinato*. Entire families resided in one-room rental units with shared bathroom facilities at the end of the corridor in buildings designed to maximize occupancy. The properties were milked for profit and the buildings and the infra-structure that supported them were allowed to decay. The handful of private property owners were thus effectively in charge of “land use planning” in the city. By contrast, in the Canal Zone all property was owned exclusively by the United States’ government. Together with the military the U.S. government made all land use decisions, managed all construction works and allocated housing and other premises to zone residents. Given the importance of the canal’s watersheds for the proper functioning of the canal, much attention was lavished on protecting the remaining ecological integrity of the Zone.<sup>45</sup> The Zone had become a green enclave of order and prosperity in the midst of urban decay (save for the few “suburbs” of the wealthy, which rapidly became Panama City’s real center). In an intriguing re-casting of the original Iberian morality play of a civilized Christian city embedded in and ordering the Pagan wilderness, North Americans imag-

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<sup>45</sup> Of course construction of the canal was itself a major ecological disturbance, including the damming and flooding of large areas to create the artificial lakes that would together act as reservoirs for the canal’s locks and produce electricity. It should also be remembered that US military bases in the Canal Zone did much damage.

ined the Zone as a preserve of civilization in the middle of the jungle.

By the time of the Torrijos-Carter Treaties of 1977, which began the process of reversion of the canal and its zone to Panama, the population of the metropolitan city had grown to just over half a million, as a result of an unprecedented growth spurt led by rural migration to the city. The prospect of the imminent reversion of the Canal Zone fired imaginations and gave life to new projects. After years of disorderly, unplanned growth in the city and the constraints imposed by the overbearing presence of the U.S. in the Canal Zone (the intimate stranger in their midst) the people of Panama seemed ready to take on the challenge of creating an urban space, which would integrate the ex-Canal Zone into the city proper. Despite the setback of the U.S. invasion in 1989, which left some of the poorest neighborhoods of the city in cinders, hope was in the air. At last, not only Panama but the City of Panama would be one. It would be a "new city."

In 1997 the government of Panama commissioned a general urban land use plan that encompassed not only Panama City and the reverted Canal Zone, but also the City of Colon and its urban periphery on the Atlantic side of the isthmus.<sup>46</sup> It was an audacious idea. Panama City and Colón together would grow into the world's first (and only) transisthmic city. The 1997 plan made projections through the year 2025. Among its major recommendations was the creation of a nodal urban arrangement in which employment, housing, and services would be decentralized across the transisthmic city's space so as to reduce pressure on the

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<sup>46</sup> See Plan de Desarrollo Urbano de las Áreas Metropolitanas del Pacífico y del Atlántico (Dec. 22, 1997), <http://www.mivi.gob.pa/urbanismo/4URBANISMO/urbanismo/volumen2b/indiceIIa.html>.

existing city centers and improve the quality of life for residents across the whole city.<sup>47</sup>

Unfortunately, it was not to be. The plan was not given legal effect. Instead, it remained little more than a road map whose main recommendations were soon ignored by decision makers at every level of government. Lack of serious political commitment to managed urban growth led to a failure to adopt the necessary regulatory framework of land use planning, zoning regulations, and environmental assessment requirements that underpin rational urban planning. Moreover, the government did not invest in the basic infrastructure necessary to address the pressing needs of low-income residents or to facilitate a transition to the new decentralized city envisaged by the plan. Further, the government failed to put in place any meaningful fiscal incentives to encourage the private sector to invest in the development of new nodal urban centers at the heart of the strategy to reduce pressure on the existing city centers. Instead, the government left in place the existing weak regulatory structure and antiquated zoning regulations, while providing generous tax holiday incentives for private investments in high value real estate. Further, as part of a concession agreement with a Mexican multinational (ICA, S.A.) for the construction of a 19.5 km toll-highway (the *Corredor Sur*) linking the downtown financial district to the eastern parts of the city and the international airport at Tocumen, the government made a fateful decision. The decision was to grant the company property rights for development of about 30 hectares on the mainland adjacent to the bay (the old Paitilla airport) and the additional right to fill-in up to 35 hectares of the adjoining bay.<sup>d</sup> As might have been expected, the result was not the rational growth envisaged in the 1997 Plan, but a chaotic building boom, concentrated almost exclusively in the center of town and

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<sup>47</sup> *Id.*

along the Bay, with its most intense focus in Punta Paitilla and the new landfill at Punta Pacifica.<sup>48</sup>

While the 1997 Plan remains the official reference point, it was bypassed within five years—its projections meaningless in the wake of the building frenzy that overtook the city.<sup>49</sup> The past ten years of unregulated urban growth have produced a city ever more centralized and congested, and local government authorities who claim to be powerless to intervene.<sup>50</sup> In this context, land use decision-making has been effectively delegated to private economic actors whose concern is not with the city as a whole, or with the quality of life of its residents, but with maximizing their investment. Moreover, the reverted Canal Zone, which seemed to offer so many prospects for facilitating decentralized, rational growth across the isthmus, has so far failed to fulfill expectations. The Zone's more highly regulated environment has failed to attract significant private investment for either residential or commercial development, because developers have found it more congenial to build in the virtually unregulated city center which doubles as the commercial heart of the region. Instead, the trend within the Zone has been to conserve the traditional garden

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<sup>48</sup> See Felix Wing Solis and Claudia Saladin, *Panama's Corredor Sur: Turning the Bay of Panama into a "Fecal Swamp,"* 2000, <http://www.ciel.org/Publications/IFCCSPanama.pdf>. Today's Cinta Costera is in effect a continuation of the Corredor Sur; its "second phase."

<sup>49</sup> Notes from *Arquitecto* René Paniza's presentation to the Study Space group at the Panama City Municipality, December 10, 2007.

<sup>50</sup> *Id.* Paniza explained that the Mayor's office (Panama City) was indeed concerned with the rate at which high rises were continuing to be proposed by developers, and in particular worried about the additional stress such buildings were placing on already strained city services. Yet when asked to explain why the local government continued to approve building permit applications for high rises, Paniza responded: "our hands are tied, we have no basis to deny them." Whether or not this statement is strictly accurate, it clearly reflects a defensible bureaucratic position.

city character of its urban areas, thereby preserving an oasis for those who can afford to live away from the city's congested center. In addition, the transfer of the local city airport from Punta Paitilla in the Bay, to the airfield at Albrook in the Zone, led to the imposition of strict building height restrictions in one of the Zone's most promising urban areas. Today, the Zone and the City are far from integrated and instead of becoming a nodal city, Panama City appears set on becoming an unworkable imitation of Manhattan on the Pacific.

### III. Development as Mimesis: Skyscrapers and Retirement Havens

Gazing down on the city from our vantage point in the *Parque Metropolitano*, and later looking at the Punta Paitilla and Punta Pacifica developments from across the Bay during our visit of the *Casco Antiguo*, the term that came to mind was "Manhattan." It was an image that was invoked often during our visit to Panama City. When the likeness was voiced by locals, there was an unmistakable note of pride, accompanied, more often than not, by a shaking of the head; a counterpoint of disbelief. The disbelief, however, was not critical. It did not denote disappointment or frustration about the city's development choices. It was closer to an expression of amazement that Panamanians were bringing into being a "modern" city so soon after shaking off the U.S. Empire.<sup>51</sup>

The Manhattan skyline, it turns out, continues to capture the global imagination. Though high-rises are ubiquitous around the world today, and despite the fact that

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<sup>51</sup> For Panamanians, the U.S. Canal Zone came to be experienced as trauma. Outside of Panama, the narrative of Panama's birth was always told as merely an accident of the U.S. desire for a transisthmian canal. Panama was, until the year 2000, not only dominated by U.S. commercial and military interests, but literally cut in half by the U.S. presence on the ground.



many cities boast at least as great a concentration of skyscrapers as New York, all skylines seem still to refer back to Manhattan. To build skyscrapers is a statement about identity. To (re)produce a Manhattan skyline at home is to present to the world the ultimate face of modernity and to make a claim about an already achieved development. Even the wounding of Manhattan on 9/11 has failed to dent this dreamscape of modernity and progress.

There is something somewhat paradoxical of course in Panamanians' mimetic impulse to recreate Manhattan on the Pacific at the very moment when independence from the U.S. was finally achieved. It may be as simple as a visual, steel and concrete manifestation of a rejection of the self-image of Panama as an economically backward jungle hinterland; an image that Panamanians found reflected back at them from the U.S. Canal Zone. In Panama, the U.S. performed the role of quasi-colonial administrator, with the Zone functioning as an expatriate civilized white enclave – distinct and separate—a permanent reminder of U.S. cultural and technological superiority over the “locals,” who were dismissed as naturally backward. The Canal may have been built *through* Panama, but it was not *of* Panama. Read this way, the decision to build the city skywards (as much as the later decision to widen the Canal) is no more than a continuation of the declaration of independence, an act of self-enfranchising separation: “We are as good as they are. We too inhabit the concrete urban city, not the jungle. We too are full of energy and creativity. We too are civilized, not barbaric and backward. Let us show you how we too can manage big works.” Thus, the mimetic gesture here is implicitly not a rejection of U.S. values, but rather a validation of these values accompanied by an assertion of equality. Mimesis is a form of appropriation, and can involve a re-inscription or even a reversal, but it also is inescapably a form of tribute. In the Panamanian case there is unfortunately little evidence that the production of skyscrapers has in any way subverted their signification. Fur-

thermore, as a development strategy, the production of luxury residential skyscrapers is hard to reconcile with even the most open-ended concept of sustainability.<sup>52</sup> Unless, that is, the term sustainable development is used merely as a synonym for economic growth, in which case, the creation of employment opportunities in construction work and the attraction of foreign investment to feed the boom could arguably be taken as sufficient ends in themselves.

For a state ridding itself of the dominant foreign power within and eager to leave behind its image of dependency and sense of inferiority, a certain contradiction arises from the fact that only a small proportion of the skyscrapers have been devoted to commercial use and that only a tiny fraction of the luxury residential apartments will likely be lived in by local Panamanians. Instead, most of the skyscrapers being built are destined for use as secondary residences or investment properties for wealthy foreigners or are being marketed to middle class retirees from the "first world."<sup>e</sup> Although the government is seeking to promote more traditional and conference-based tourism and to encourage the creation of additional hotel capacity in Panama City, the most active economic sector appears to be the real estate market targeted at foreigners. Practically and symbolically, this use destination of skyscrapers is at odds with the conception of high rises as the locus and representation of economic power and self-determination.

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<sup>52</sup> High rises impose heavy burdens on a city's infrastructure. In a city where there is little or no sewage treatment capacity, where water and power provision are already seasonally stressed, and where traffic congestion and air pollution are significant problems, the superimposition of skyscrapers without a corresponding requirement to improve public services simply makes a bad situation worse. Furthermore, not only do skyscrapers contribute to some increase in population density and their demand on services, but physically they contribute to the problems. Their reflective surfaces in particular increase heat and glare and act as a heat trap, while rising city temperatures lead to the increased use of energy for air conditioning.

Indeed, the City of Panama, following the lead of the national government, appears to have embraced first world retirement as a major axis of its development strategy. Despite much competition from cities and states around the world, it has succeeded in becoming a favorite destination. INTERNATIONAL LIVING MAGAZINE,<sup>53</sup> for instance, aimed at (mostly) US retirees, and claiming a readership of over 400,000, is currently promoting Panama, “the whirring hub of the Americas,” as one of its top destinations.<sup>54</sup> In addition to its success with retirees, it appears that Panama has also become a popular location for the secondary home market.<sup>55</sup> It is still too early to know how the global housing financial crisis or the fear of recession in the US will affect retirees’ choices or the investment decisions of the well-to-do in the US and Europe. However, it is probable that sales of luxury apartments will decline.<sup>56</sup> Be that as it may, there is no question that the construction boom in Panama City has created at least temporary employment opportunities for skilled and low skilled workers. The downside, however, is that development pressure in the city center and rising property values have become a significant factor contributing to the displacement of low and middle income residents from their traditional neighborhoods to less desirable areas of the city. This displacement

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<sup>53</sup> International Living, *International Living*, <http://www.internationalliving.com> (last visited October 5, 2008).

<sup>54</sup> See International Living, *International Living in Panama*, <http://www.internationalliving.com/countries/panama> (last visited October 5, 2008).

<sup>55</sup> See e.g. Amy Gunderson, *House Hunting as Vacation*, N.Y. TIMES Dec. 12, 2007, [http://www.nytimes.com/2007/10/12/travel/escapes/12your.html?\\_r=1&oref=slogin&pagewanted=print](http://www.nytimes.com/2007/10/12/travel/escapes/12your.html?_r=1&oref=slogin&pagewanted=print).

<sup>56</sup> There is some evidence that much of the building boom in Panama City has been driven by speculation and that there is now an overproduction of units, resulting in low occupancy rates. See Jim Landers, *Condo boom hits Panama—As towers rise, sellers seek to woo Americans*, CHI. TRI. Aug. 24, 2007.

has exacerbated the problem of spatial segregation by income across the metropolitan area. Furthermore, the building boom has been accompanied by a disproportionate cost to the local environment, in the form of additional air and water pollution, noise, traffic congestion, energy use and waste production, not to mention the heat trapping characteristic of high rises and the obstruction on air flows and vistas. The lower cost of acquiring a luxury apartment in Panama City, compared to a similar unit in Miami Beach is due in large part to lower property values and labor costs, and to the Panamanian government's generous tax incentives. There is no question, however, that lower or non-existent environmental regulations contribute to comparatively lower prices. When foreigners acquire real estate in under-regulated markets, they are in effect externalizing their environmental and social costs on the local population. Given that the end use of residential high rises is essentially non productive, that owners of residential luxury real estate in Panama have been granted a tax holiday, and that their construction and operation imposes a significant environmental and social burden on the local economy, it is unclear how they can contribute to a long term sustainable development strategy.

#### **IV. Conclusion: Traditional Development, Sustainable Development and Binge Development**

How then are we to think of Panama City's present trajectory in relationship to the concept of sustainable development? In this essay I have focused almost exclusively on the city's present love affair with skyscrapers. Of course, I would not want to suggest that Panama City is unique in its sudden devotion to developing a real estate market in luxury residential apartments. Miami, Florida, for instance is in the midst of an upward growth spurt, while Punta del Este in Uruguay, has become not only a hot tour-

ist destination, but also a hub of real estate speculation. Furthermore, the building boom I have described is, by no means, all that is going on in the City of Panama. Nonetheless, my sense is that the city's primary development orientation is being driven by the construction industry and real estate developers, while all other development activity dovetails to some extent with the building boom.

A good example is that of the controversial *Cinta Costera*, a major bay landfill project that is being undertaken by the Ministry of Public Works (Ministerio de Obras Publicas) and which is projected to be completed in April 2009, a month before the next Presidential elections. The proposed *Cinta Costera* (or coastal strip) will encompass 25 hectares of new landfill, and provide the city with a wide strip of new "land" running along the stretch of Avenida Balboa that runs between the *Casco Antiguo* and *Punta Paitilla*. Despite the heavy traffic congestion that transforms it into a noisy and polluted parking lot during most of the day, *Avenida Balboa* is still one of the City's most scenic areas. This is because, apart from the egregious case of the 168 m., 55-story tall Intercontinental Hotel Miramar and Miramar Towers, the Bay side of this stretch of Avenida Balboa has thus far been preserved from development. Accordingly, it is one of the few remaining areas of the city where pedestrians can still enjoy unobstructed views of the Bay.

Estimated at a cost of \$189.1 million, the *Cinta Costera* is being promoted as a solution to the problem of vehicular congestion and air pollution in the city.<sup>57</sup> Indeed, most of the landfill's 25 hectares of "new land" will be dedicated to a four lane highway that connects to the Cor-

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<sup>57</sup> The EIA prepared for the *Cinta Costera* can be found at the MOP (Ministerio de Obras Publicas) website at [http://www.mop.gob.pa/Video\\_Cinta\\_costera.htm](http://www.mop.gob.pa/Video_Cinta_costera.htm) along with the promotional video for the project.

*redor Sur*, the 19.5 km stretch of toll-highway that presently runs from Punta Paitilla to Tocumen airport. After the project design had already been approved, last minute input by urban community group *Alianza Pro Ciudad*<sup>58</sup> led the City to modify its project to include highway overpasses, green areas, pedestrian walkways and bicycle paths—areas dedicated to recreation and security posts. With these embellishments, it has become easier for the city to justify the *Cinta Costera* as a coherent urban planning project designed to improve and beautify the city by providing much needed green spaces for the populace. As critics have pointed out, however, the proposal to create green spaces and provide useful recreational areas is likely to prove unfeasible. First, is the problem that the new green spaces will be physically cut off from the city by the massive concrete and asphalt structure of the four lane highway, which will, in addition, have to be protected by an effective barricade to keep pedestrians from attempting to cut across. The sense of the highway as an impenetrable barrier between the city on one side and the new green areas and the Bay on the other, will be exacerbated by the noise and air pollution that the fast moving traffic will inevitably produce. Further, there are doubts concerning the long term viability of green areas on a salt water land-

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<sup>58</sup> See Alianza Pro Ciudad, *Alianza Pro Ciudad*,

<http://www.alianzaprociudad.org/> (last visited October 5, 2008)

Alianza Pro Ciudad is one of the community groups that has emerged in response to the City's failure to take responsibility for rational urban planning. Its membership is drawn largely from urban professionals and a middle class affronted by the dramatic urban changes taking place in their neighborhoods over which they have been given no voice. Pro Ciudad's most notable success so far was the City's agreement to amend the already approved design for the *Cinta Costera* in light of the group's proposals. Other Pro Ciudad projects call for a moratorium on demolition permits and approval of new high rises in historic middle class residential neighborhoods such as Bella Vista and Exposición where these buildings would be out of scale and impose excessive burdens on local infrastructure.

fill, given that many trees and plants cannot thrive in soil characterized by high salinity.<sup>59</sup>

In any event, given the underlying cost of the *Cinta Costera* project, it is evident that its purpose is simply to provide the land necessary for constructing a new highway to facilitate vehicular transit across the city.<sup>60</sup> It is, in practice, a “second phase” extension of the *Corredor Sur* and, has, not surprisingly, given rise to a new wave of real estate speculation. Already high property values on the stretch of Avenida Balboa running between the Casco Antiguo and Punta Paitilla have risen astronomically as investors seek to capitalize on the new urban vision.<sup>61</sup> A quick review of ongoing and proposed building projects in Panama City confirms the impression that within the next five years a “wall” of skyscrapers (many over seventy stories high) will rise along the avenue, effectively blocking in the city. Behind this wall, the city will be cut off not only from its most aesthetic feature, a view of the Bay, but from the air flows that at present help cleanse the city’s already compromised air quality. Meanwhile, increased residential and commercial density on *Avenida Balboa* will almost certainly increase local traffic on the Avenue’s six lanes and produce a new source of congestion, which will soon negate the already dubious environmental and quality-of-life improvements that the new highway was supposed to deliver to the city’s residents.

In reflecting on the overall scenario of politically backed economic activity underway in Panama City, it is

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<sup>59</sup> See Eduardo A. Esquivel, *Las aventuras de la cinta costera*, prensa.com, Apr. 15, 2008, <http://mensual.prensa.com/mensual/contenido/2008/04/15/hoy/opinion/1322309.html>.

<sup>60</sup> See Burica Press on *Cinta Costera* *supra* at note 6.

<sup>61</sup> See Ebrahim Asvat, *La cinta costera y corrupción*, Apr. 21, 2008, <http://burica.wordpress.com/2008/04/21/la-cinta-costera-y-corrupcion/>, stating that property values on Avenida Balboa have risen to as much as \$5,000 per m<sup>3</sup>.

easy to wonder how this scenario fits in with an official commitment to sustainable development. Without question, the City is the midst of a frenzy of economic activity fed in large part by foreign investment. In addition to the building boom, supported by tax incentives and a lax regulatory environment, a significant number of major urban projects are underway in the City. These include: construction of the *Cinta Costera*; the urban renewal project in the *Casco Antiguo*; the Panama City and Bay sanitation project; the development of the City of Knowledge in the Canal Zone;<sup>62</sup> and development of the Amador causeway's high-end touristic potential. In addition, both the Canal expansion project and the completion of the Panama-Colon highway are likely to have a major impact on the city's residents.

With the significant exception of the City and Bay sanitation project, however, there is little evidence that any of these projects are directly intended to benefit the poor residents who constitute the majority of the city's population. For the most part, these projects seem designed instead to enhance the City's appeal to foreigners by making the city more physically appealing as a modern (high-rises), convenient (easy airport access), fun (Amador) yet quaint

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<sup>62</sup> The City of Knowledge is located in the ex US military base of Fort Clayton in the Canal Zone. The City of Knowledge, managed by a Foundation and governed by a generous regulatory incentive package to attract foreign investment is designed to bring together technological business enterprises, academic centers and international organizations. See *City of Knowledge*, [http://www.cdspanama.org/index.php?set\\_language=en&ccpage=indx](http://www.cdspanama.org/index.php?set_language=en&ccpage=indx). Since its inception in 1999 the Foundation appears to have been relatively successful in attracting businesses, university centers and international organizations, yet it is too early to say whether the much vaunted "synergies" will contribute in any measurable way to local employment or to local capacity building. The generous package of tax incentives and privileges granted to foreign employees are likely to produce a foreign knowledge enclave with little spill over effects into the local economy.



(*Casco Antiguo*) destination for retirees, second home vacationers, business and recreational tourists, while rendering it more attractive as an investment haven for foreign capital. In effect these projects can be understood as part of a concerted strategy by the government of a small nation (and a large city) to secure for itself a meaningful place in the globalized economy. As always, the benefit to the majority is assumed to arise indirectly from some indeterminate form of trickle down effect in the future.

It is of course an open question whether or not an economy based on tourism, retirement and construction of residential real estate is viable in the long term. Tourism is fickle, retirees, whose overall economic value to the receiving state is in any case dubious, are liable to being courted by the next cheaper, even more fiscally advantageous destination, while real estate busts tend to follow booms. Even the nation's canal expansion project may prove financially risky as construction costs are likely to be much higher than anticipated, while the projected volume of transoceanic trade from China to the East Coast of the United States and Europe is likely to have been overestimated. While the long term economic benefits are doubtful, it is nonetheless clear that the economic activity in Panama City is producing short term economic benefits for some small segment of the local population. It is equally clear that quality of life for the vast majority of the residents of the city is being compromised by this frenzy of activity, as air and water pollution levels increase, congestion intensifies, commuting distances and times increase, low and middle income residents are pressured out of their neighborhoods, and spatial segregation by income levels is accentuated. From an ecological perspective some of the evident present harms are the damage to the coastal zone ecosystems from additional in-filling and increased waste discharges, the destruction of forest and mangrove eco-systems, and the increased energy and water consumption associated with the construction frenzy, the first world consumption habits of tourists and

retirees, and due to the heat trap effect of so much new concrete and glass in the city. The needs of the majority of the present generation are not being met, and it seems likely that today's development choices have compromised the ability of future generations to meet their own needs.

If we approach Panama City as a case study for sustainable development in the city, it is hard not to conclude either that local policy makers have badly misunderstood the concept or that the government's apparent commitment to the goal of sustainable development is simply window dressing. One response to the evidence on the ground in Panama City, might be to suggest that, despite the rhetoric, there has been no development paradigm shift at all, and that today's development policies are simply a continuation of development policies adopted during the heyday of the traditional conception of development as economic growth—the more the better. However, there is a sense in which we have collectively lost our innocence. In the days before “sustainable development” it was possible to believe that the sky was the limit. The economic growth spurt in the developing world's economies—China and India of course, but also Panama—would have been interpreted as unmitigated goods. The general consensus was that growing the economy was the way out of poverty and the solution to all of poverty's attendant ills.

Today the concept of sustainable development marks our new understanding of the interrelationship between economic activity, environmental impact and issues of intra- and inter-generational equity. Today, we are aware that quality of life on earth depends on the integrity of the natural systems that we once took for granted. While they are difficult to quantify and value we know that we rely on a series of eco-system services for everything from drinking water to energy to food production. And we have come to learn that while nature is abundantly resilient; there comes a point of collapse. Given time we may be able to resurrect a seemingly dead river, but this comes at a

great cost, and we cannot make it teem again with salmon. Even if we could, there would be no way to compensate for the lost revenue. Further, we are no longer so sanguine about the earth's non-renewable resources. The possibility of future scarcity can no longer be denied. Depletion of ground water reserves may prove even more critical than depletion of oil reserves. Our wasteful, energy inefficient, natural resource intensive patterns of production and consumption have come under review. Meanwhile, we have become much more knowledgeable about the impacts on human health and life expectancy of pollutants in our air, water and food supply. The human species is inventive, creative, and innovative. At times it seems that there is nothing we cannot do if we put our minds to it. For all that technology promises, however, we know that we can no longer behave as if there were no repercussions. Our development choices impose a cost today and may compromise the choices of the future. What sustainable development calls on us to do is not to limit economic growth in any particular instance, but to be as conscious as possible of the short term and long term costs and benefits of our development choices, and of how these costs and benefits are allocated within the present generation.

What we can observe in Panama City today, as in countless other places, is that development choices are being made with an eye to economic growth, with little effort to engage in any meaningful attempt at the kind of cost benefit analysis required by sustainable development. For all that, what we have today is not simply a continuation of traditional development. Instead, I would argue, what we are observing is something that we could term "binge" development.<sup>63</sup> Development can be termed

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<sup>63</sup> I am borrowing (and reframing) the image of the "binge" developed by Richard Wilk in the context of what he terms "binge consumerism." See Richard Wilk, *Consumer Culture and Extractive Industry on the Margins of the World System*, CONSUMING CULTURES, GLOBAL PER-

“binge” development when it is exclusively present-oriented, clearly excessive, unconstrained by any sense of limits and blissfully unconcerned with future repercussions. While on the ground it may look indistinguishable from traditional development, it is binge development because the context today is informed by the prudential concept of sustainable development. We know there are consequences; we know it is not sustainable; yet we continue to consume in a manner that is out of control and irresponsible: as though there were no tomorrow. Has the fear of future scarcity, the concern that our future choices may indeed be limited, actually exacerbated the problem and contributed to irrational development patterns?

#### **V. Modest Proposals for Actions in Pursuit of More Sustainable Development in Panama City**

Without question, one of the most serious urban problems affecting the quality of life of all sectors of society in the City of Panama is the combined burden of air pollution and traffic congestion. Poor air quality and traffic congestion are due as much to the failure of urban planning, as to the number of motorized vehicles on the roads. The rise in air pollution can be directly attributed to an increase in the absolute number of motorized vehicles, including a significant proportion of older vehicles with poor or nonexistent emissions controls, but also to the massive amount of uncontrolled dust produced by the countless construction projects. The increase in car ownership and daily use can be attributed to two factors: first, an inade-

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SPECTIVES: HISTORICAL TRAJECTORIES, TRANSNATIONAL EXCHANGES (John Brewer & Frank Trentmann, eds., 2006), 123-44. Binge consumerism is a form of present oriented consumption that stands in stark opposition to that of the rational (protestant) idea of frugality and prudential saving for the future.

quate public transportation system that relies on privately owned and operated antiquated buses with a poor safety record and an enormous fleet of privately owned taxis; and second, on the increasing commuting distance from employment opportunities for the vast majority of low and middle income workers. The city's number one priority must be to adopt a comprehensive transportation policy, including the introduction of a safe, effective and affordable public transportation system. Such a system, however, will fail to produce meaningful results unless transportation policy is approached as an integral component of an urban land use management plan for the whole city. This will likely require a political commitment at all levels of government to the nodal model promoted by the 1997 Plan.<sup>64</sup> Furthermore, until such a plan is put into effect, it may be necessary to place a moratorium on incentivized private investment in the center of the city.

This is a tall order, yet Panama City cannot hope to become sustainable if it does not commit itself to transportation reform and land use planning. Of greatest urgency is the need to revisit the logic of the project for the *Cinta Costera*. Ideally the project should be abandoned. However, at a minimum, if indeed the purpose of the project is to relieve air pollution and traffic congestion, then the government must ensure that the highway running through the *Cinta Costera* is not a toll road but open to all drivers regardless of means. Otherwise, like the *Corredor Sur* it will turn into a convenient and underutilized thoroughfare for the privileged while it is externalizing its environmental costs on the city's residents. Further, the *Cinta Costera* project must be redesigned to include a dedicated corridor for collective public transportation.

Moreover, the speculative bonanza for developers on Avenida Balboa must be reined in. It would be inconsistent with the goal of reducing air pollution and traffic

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<sup>64</sup> See *supra* note 44.

congestion to allow more luxury high rises to be built on this already overburdened strip of urban space. In addition to the urban blight that such structures represent for city residents trapped behind these structures, high rises will add to traffic congestion as residential and commercial density increases, have negative impacts on airflows, and contribute to a rise in city temperatures. Today promoters of the *Cinta Costera* are counting on the ground level development of high rises as shop fronts on Avenida Balboa to make the experience of the city street less alienating. There are two problems with this. First, the existing regulatory regime does not require it, so it will be a matter for the private developers to determine whether it is in their interest. Thus, the result is likely to be a patchwork at best. Second, if the Avenida Balboa is transformed into an avenue for upscale shoppers, this will simply add to the traffic congestion problem. In addition, in the absence of rational and safe public transportation options more shopping will require more parking which is already at a premium in the area. Indeed, it is my prediction that if the *Cinta Costera* is built without a serious re-evaluation of its justification and design, it will ultimately turn into one big parking lot. The result will be more congestion and more air pollution.

### Appendix

<sup>a</sup> **Parque Metropolitano.** The park, designated an ecological, scientific and cultural reserve, *see Ley* N° 8 de 1985; Gatica Oficial 20,352 (19 de Julio de 1985), is located within what until recently was the US controlled Canal Zone, an area which quite literally bisected the Republic of Panama, extending, as it did, about five miles out along the whole length of the canal on either side. This land, granted to the US “in perpetuity” by the Hay-Bunau-Varilla Treaty of 1903, finally reverted back to Panama by operation of the Torrijos-Carter treaties of 1977, which entered into force in 1979. While the *Parque Metropolitano* bills itself

as the “lungs of Panama City,” its protected status is due less to the undoubted eco-services it renders the city, nor even to its ecological importance as one of the few remaining dry tropical forests in the region, but rather to its function as a key component of the so called “canal watershed”. The Panama Canal is dependent on large quantities of freshwater for its proper functioning as, each time the locks empty, 52 million gallons of freshwater are drained into the sea. See web site of the Panama Canal Authority (ACP) at <http://www.pancanal.com/eng/noticiero/canalfaq/index.html>. Thus, since its inception, the Canal Zone’s watersheds, rivers and lakes have been dedicated to this purpose. Even so, the park is today under increasing pressure. Despite its protected status, in 1995 the Panamanian government approved the construction of a new highway, the Corredor Norte, through the eastern sector of the park, a decision, justified by the need to ease the city’s severe traffic congestion, which was a source of air and noise pollution. In its response to a petition filed before the Inter-American Commission on Human Rights challenging the project, the government averred that in approving the construction of the new highway it had complied with the EIA requirements and was, in any case, acting pursuant to its “duty to promote development to prevent environmental pollution.” See *Parque Natural Metropolitano v. Panama*, Caso 11.533, Informe No. 88/03, Inter-Am. C.H.R., OEA/Ser.L/V/II.118 Doc. 70 rev. 2 en 524 (2003), §25 (author’s translation). Today the park’s “empty” lands are under great pressure from the crowded city’s poorer residents who view the area as an attractive new frontier for informal settlement.

<sup>b</sup> **Gentrification of the Casco Antiguo.** Panama City’s black residents today are mostly Afro-Caribbean descendants of the West Indian workers who were brought to Panama to work on the US Canal in the early 20<sup>th</sup> Century. See WORLD DIRECTORY OF MINORITIES AND INDIGENOUS

GROUPS, Minority Rights Group International at <http://www.minorityrights.org/?lid=4210>. Excluded from the strictly segregated US Canal Zone, the Afro-Panamanian community was forced to take up residence in the doubly peripheral neighborhoods of Chorrillos and Rio Abajo, squeezed in between the walled city of San Felipe and the US Canal Zone. As the historical center was abandoned by its traditional residents, drawn to the more spacious and “modern” garden city suburbs to the north of the city, the empty buildings were subdivided into single-room dwellings and rented out to mostly Afro-Panamanians. Lack of investment by property owners and neglect by local government led to the inevitable deterioration of the housing stock. The neighborhood, overcrowded, decaying and characterized by the poverty of its residents gained notoriety as a hub of criminal activity. See *HISTORIA CASCO ANTIGUO* at note 4, 47 et seq.

The project to save Panama’s cultural heritage in the *Casco Antiguo* has resulted in the condemnation of numerous dangerous residential structures, the displacement of old time residents from buildings slated for renovation and a radical change in the character of the local community. While the law regulating the redevelopment of the *Casco Antiguo* provides for some degree of compensation for ousted long term tenants and the responsible Governmental entity, the *Oficina del Casco Antiguo* (OCA), has made some determined efforts to follow the law’s prescription to provide low income housing within the district to retain the mixed income character of the historic center, such efforts cannot begin to address the housing needs of the vast majority of the community. See Ley 4 de 2002, *Ibid* at note 4, Art. 5 & 8. See also Ariel Espino, *Casco Antiguo: Su Gente* in PATRIMONIO HUMANO: ESPACIO ARTE, OFICINA DEL CASCO ANTIGUO, CIUDAD DE PANAMÁ, 2007, 17 et seq., and *Demolerán siete casa condenadas en El Chorrillo y San Felipe*, June 8, 2007 news article posted on the web site of the Ministry of Housing



[http://www.mivi.gob.pa/6NOTICIAS/porfechas/junio\\_07/jun\\_14.html](http://www.mivi.gob.pa/6NOTICIAS/porfechas/junio_07/jun_14.html). Displaced residents from the *Casco Antiguo* will likely find themselves swelling the already densely populated low income neighborhoods of the city, such as Curundú, or be pushed further out to the outskirts of the city, to the informal squatter settlements which lie distant from the city's employment opportunities.

<sup>c</sup> **Punta Paitilla and the Bay Cleanup.** Real estate websites advertising residential properties in Punta Paitilla (and Pacifica) refer to it as an exclusive neighborhood and emphasize the high quality shopping available at its U.S. style shopping malls. See *Punta Pacifica – Panama Realtor*, available at [www.panamarealtor.com/locations/53/punta-pacific](http://www.panamarealtor.com/locations/53/punta-pacific). They do not mention that at the point where the Avenida Balboa meets the main entrance to Punta Paitilla, just across from the undoubtedly modern and fancy Multi-centro Mall, the Matasnillo River, today one of the crowded city's open sewers, dumps its untreated and foul smelling domestic and industrial waste waters directly into the Bay. Up in their air-conditioned towers the fortunate residents may enjoy their views of the Pacific, those seeking to enjoy the views from down below along the walkway of the Avenida Balboa, which skirts the Bay, must hold their nose and push on past. Swimming in these waters is, of course, out of the question, and fishing and shellfish collection have been severely compromised in the Bay. "The local population and the city's industrial and commercial establishments generate a daily volume of approximately 280,000 m<sup>3</sup> of wastewater. Virtually all of it flows untreated into the rivers running through the city, or directly into Panama Bay." See *Panama City and Bay Sanitation Project (1)* Loan Proposal IDB PR-3021 (7 February 2006) at 1, available at <http://www.iadb.org/projects>. With financial assistance from the IDB, EIB and the Japan Bank for International Co-operation, plans are underway to build wastewater collectors, a wastewater interceptor and a

wastewater treatment plant for Panama City. When fully implemented, this expensive (estimated at \$360 million) and ambitious project will collect and treat about 50% of the city's wastewater and will thus contribute significantly to improvement of the city's and the Bay's sanitation. Remaining concerns include the need for better standards and controls over industrial and manufacturing waste water discharges at source, the potential significant ecological impact of siting the proposed plant in one of the few remaining mangrove areas bordering the city in Juan Diaz, and the structure of service charges that is to be established to recover project and waste water treatment costs.

<sup>d</sup> In hindsight it is interesting to speculate whether the Mexican company's project to construct the Corredor Sur was not designed primarily to take advantage of the lucrative opportunity for real estate development rather than driven by the much less viable highway construction. When it was proposed, the Corredor Sur was justified by the urgent need to relieve traffic congestion in the city, to reduce travel time and decrease air pollution. As any visitor to Panama can attest, the Corredor Sur makes travel from and to the airport a relatively painless experience, as the road is direct, in excellent condition and unobstructed by other vehicles. Indeed, it would appear that high tolls charged for use of the highway keep most Panamanians off the Corredor Sur. Given how little of the city's daily vehicular traffic that must make its way into and out of the city along this axis makes use of the highway, it is certain that neither the goal of easing traffic congestion nor decreasing air pollution were achieved. Rather, the opposite was the result. The high value and dense real estate and commercial developments of Punta Paitilla and Pacifica added to the congestion. Meanwhile, air quality suffered further deterioration not only from increased vehicular traffic and the new bottlenecks but from the significant quantities of dust produced by the construction process.

<sup>e</sup> An amusing story hit world headlines just as our Study Space group was making its way to Panama. On December 5th, 2007, The Mirror, a British tabloid, published a photograph of a happy looking retiree couple posing with their real estate agent in Panama City. See picture at <http://www.mirror.co.uk/news/topstories/2007/12/05/dead-canoeist-arrested-for-fraud-pictured-with-wife-in-2006-89520-20205194/> (last visited Apr. 8, 2008). The smiling husband in the picture was identified as none other than John Darwin: the “dead” canoeist. Presumed dead since 2002, Mr. Darwin, had come to the attention of the press a few days before publication of the Mirror photograph by walking into a police station in London, claiming to have no memory of the five years elapsed since his mysterious disappearance during a solo canoeing trip in the North of England. See *Canoeist Resurfaces Five Years On*, BBC NEWS, Dec. 2, 2007, [http://news.bbc.co.uk/2/hi/uk\\_news/england/7124119.stm](http://news.bbc.co.uk/2/hi/uk_news/england/7124119.stm) (last visited Apr. 8, 2008). From her new home in Panama City, his widow, Anne, had expressed surprise and delight at his sudden re-appearance. Unfortunately for the scheming couple, presumably involved in a life insurance scam, The Mirror’s snapshot, drawn from the “satisfied customers” section of the website of MOVE TO PANAMA showed the happy couple shopping together for their ideal Panama City apartment a year before his unexpected re-appearance. See *Welcome to Panama*, <http://www.movetopanama.com/> - “If you are looking for the best place in the world to live - That place is in Panama!” claims the website.

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ESSAY

**TAMALES & BOLLOS—PATRIMONIO DE LA HUMANIDAD /  
WORLD HERITAGE: CHALLENGES FACED BY RESTORA-  
TION EFFORTS IN PANAMA CITY’S SAN FELIPE HISTORIC  
DISTRICT**

*Daniel Suman\**

**Introduction**

On a street corner in Panama City’s historic San Felipe neighborhood (and World Heritage Site) in December 2007, a vendor was selling tamales and bollos (traditional corn meal wraps). Few foods could be more typically Panamanian than these that were being sold in Panama City’s oldest neighborhood. The vendor cries “bollos—patrimonio de la humanidad” or “bollos—“patrimony of humanity.” This vendor represents the dichotomy evident in San Felipe today. For the past 50 years, San Felipe has been a “popular” neighborhood with a majority low income residents, active street life, and cultural and social diversity. Moreover, the Presidential Palace, the Ministry of Government and Justice, and the Ministry of Foreign Affairs also made San Felipe one important node of political activity of the Nation. A two-decade-long movement to protect the architectural heritage of the neighborhood culminated in 1997 with designation of San Felipe as a United Nations Educational, Scientific, and Cultural Organization (UNESCO) World Heritage Site, as specified by the 1972 World

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Heritage Convention.<sup>1</sup> Historic preservation legislation, the UNESCO declaration, and new legislation promoting restoration through economical and fiscal incentives has jump-started a dramatic process of restoration. The result has been increasing restoration activity with much more on the horizon. At the same time, the majority of the former residents (both renters and squatters) have been displaced by wealthier new owners.<sup>2</sup> Today, the price per square meter of restored residences in the historic district is among the highest in Panama City.<sup>3</sup> The danger is that the historic neighborhood of San Felipe in the near future may contain many newly restored buildings occupied by high income (and foreign) residents. Many of these new residents will only spend a fraction of the year in Panama. Chic boutique restaurants will continue to multiply, and the deli will replace the Chinese-owned corner grocery. As a result, the typical Panamanian street life and culture may become increasingly absent, and social diversity may become a distant memory.

This manuscript describes the San Felipe neighborhood and its historic significance to Panama City and its urban space, details the legislation adopted to protect the architectural values of the neighborhood, and discusses some of the challenges that this effort faces.

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<sup>1</sup> See generally UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 11 INT'L LEGAL MATERIALS 1358, available at <http://whc.unesco.org/archive/convention-en.pdf> (last visited Sept. 10, 2008).

<sup>2</sup> Angela de Picardi, *Pasado y Presente se Funden en un Solo Valor: Lo Humano*, PATRIMONIO HUMANO: ESPACIO ARTE, OFICINA DEL CASCO ANTIGUO CIUDAD DE PANAMÁ, 2007, at 10.

<sup>3</sup> EDUARDO TEJEIRA DAVIS, *Aspectos Sociales y Económicos (Social and Economic Aspects)*, in CIUDAD: EL CASCO ANTIGUO DE LA CIUDAD DE PANAMÁ (CITY: PANAMA CITY'S OLD QUARTER) 58, 76 (Oficina del Casco Antiguo, 2001).

## I. A History of Spatial and Social Changes in Panama City and the Casco Antiguo

Panamá Viejo (Old Panama) was the first Spanish settlement located on the Pacific coast.<sup>4</sup> It was founded in 1519 by the Spanish conquistador Pedrarias Dávila and served as an important trade and communications link between Spain and its colony in Peru.<sup>5</sup> The trans-isthmian route passed from Panama on the Pacific to Nombre de Dios and later Portobelo on the Caribbean.<sup>6</sup> Major natural disasters struck the town: earthquakes in 1541 and 1641 and fires in 1539, 1563, and 1644.<sup>7</sup> Abandonment occurred in 1671 after pirate Henry Morgan sacked and burned the city.<sup>8</sup> The low-lying, swampy site provided no natural defenses from attack and no natural port.<sup>9</sup>

Consequently, the Spanish moved their city to a site about 7.5 km to the southwest on a more easily defended peninsula on January 21, 1673.<sup>10</sup> They constructed fortress walls to protect their new city from possible attack from the

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<sup>4</sup> *World Heritage List: Panamá (Panamá)*, ICOMOS, No. 790 at 91 (1997),

[http://whc.unesco.org/archive/advisory\\_body\\_evaluation/790bis.pdf](http://whc.unesco.org/archive/advisory_body_evaluation/790bis.pdf).

<sup>5</sup> EDUARDO TEJEIRA DAVIS, *Historia Concisa del Casco Antiguo de Panamá: A Concise History of Panama City's Old Quarter*, in CIUDAD: EL CASCO ANTIGUO DE LA CIUDAD DE PANAMÁ (CITY: PANAMA CITY'S OLD QUARTER) 24, 26, 30-31 (Oficina del Casco Antiguo, 2001).

<sup>6</sup> *Id.* at 24, 31.

<sup>7</sup> Rebeca H. Sandoya, *El Crecimiento Espacial y Demográfico de la Ciudad de Panamá*, in GEOGRAFÍA DE PANAMÁ (Omar Jaén Suárez ed., 1985) at 404-20, 411.

<sup>8</sup> SHOSHANNA LEVY & EFRAÍN GÓMEZ, *EL CASCO ANTIGUO: THE OLD QUARTER* 12 (1999); *World Heritage List: Panamá (Panamá)*, *supra* note 4, at 91.

<sup>9</sup> TEJEIRA DAVIS, *supra* note 5, at 24, 28.

<sup>10</sup> Patricia Pizzurno, *Un Nuevo Recorrido por el Centro Histórico*, 434 *La Prensa - Talingo*, 7, 8 (Feb. 17, 2002), 8; Levy & Gómez, *supra* note 8, at 12; Sandoya, *supra* note 7, at 411; Tejeira Davis, *supra* note 5, at 24, 28.

sea, as well as a wall across the peninsula to protect from land attack.<sup>11</sup> The walls enclosed a 16 ha area.<sup>12</sup> The walls had an additional function; they separated the social and economic elite who lived inside the walled city from the servants and lower classes who resided outside the walls.<sup>13</sup> At this time, the city continued to administer Spanish commerce in the New World.<sup>14</sup>

However, before the collapse of the Spanish Empire in 1820, Panama had already lost its importance, as shipments of Peruvian gold began to pass to Spain via the southern route of the Río de la Plata instead of the northern route through Panama.<sup>15</sup> Additionally, disastrous fires destroyed major parts of the settlement in 1737, 1756, and 1781.<sup>16</sup> The plight of San Felipe changed following the collapse of the Spanish Empire and independence from Spain (as a department of Colombia) in 1821.<sup>17</sup>

Panama City's growth continued sporadically in the 19<sup>th</sup> Century due to external factors, such as the 1848 discovery of gold in California.<sup>18</sup> Many prospective miners preferred to travel from the East Coast of the United States to California by sea via Panama instead of traveling by train across the continental United States.<sup>19</sup> To meet this demand, a consortium built the trans-isthmian railroad from

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<sup>11</sup> TEJEIRA DAVIS, *supra* note 5, at 24, 28-29. See generally Eduardo Tejeira Davis, *La Traza y las Murallas a lo Largo del Tiempo/The Layout and the Walls: Over Time*, in CIUDAD: EL CASCO ANTIGUO DE LA CIUDAD DE PANAMA (CITY: PANAMA CITY'S OLD QUARTER) 80, 87 (Oficina del Casco Antiguo, 2001).

<sup>12</sup> Sandoya, *supra* note 7, at 411.

<sup>13</sup> Pizzurno, *supra* note 10, at 9; Sandoya, *supra* note 7, at 412.

<sup>14</sup> Pizzurno, *supra* note 10, at 8; TEJEIRA DAVIS, *supra* note 5, at 24, 31.

<sup>15</sup> *World Heritage List: Panamá (Panamá)*, *supra* note 4, at 91.

<sup>16</sup> TEJEIRA DAVIS, *supra* note 5, at 24, 33.

<sup>17</sup> Pizzurno, *supra* note 10, at 8; TEJEIRA DAVIS, *supra* note 5, at 24, 31.

<sup>18</sup> ERNESTO CASTILLERO, *HISTORIA DE PANAMÁ* 95 (1962); EDUARDO TEJEIRA DAVIS, *PANAMÁ: GUÍA DE ARQUITECTURA Y PAISAJE: AN ARCHITECTURAL AND LANDSCAPE GUIDE* 118 (Panamá – Sevilla 2007).

<sup>19</sup> TEJEIRA DAVIS, *supra* note 18, at 118.



1850 to 1855.<sup>20</sup> The Pacific terminus of the railroad was located about one km from San Felipe.<sup>21</sup>

Some of San Felipe's most defining moments involved attempts to construct the Panama Canal. In 1878, a French company, under the direction of Ferdinand de Lesseps, obtained a concession from the Colombian government for the purpose of building a trans-oceanic canal.<sup>22</sup> The headquarters of the French canal company were located on the main square in San Felipe near the Cathedral.<sup>23</sup> Faced with numerous financial, technical, and public health problems, the French abandoned their canal dreams in 1889.<sup>24</sup> However, French influence on San Felipe architectural styles remains today.<sup>25</sup>

A possible trans-isthmian canal remained Panama's principal potential.<sup>26</sup> In 1903, Colombia rejected a proposed treaty with the United States regarding an inter-oceanic canal.<sup>27</sup> As a result, the United States supported Panamanian nationalists who declared independence from

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<sup>20</sup> PANAMÁ HOY: RETRATO DE LA NACIÓN 93 (KENNETH JONES ED., FOCUS PUBLICATION 2002); Pizzurno, *supra* note 10, at 8; TEJEIRA DAVIS, *supra* note 5, at 24, 36.

<sup>21</sup> CASTILLERO, *supra* note 18, at 167; TEJEIRA DAVIS, *supra* note 5, at 24, 42, 47.

<sup>22</sup> PANAMÁ HOY, *supra* note 20, at 92-93; WALTER LAFEBER, THE PANAMA CANAL: THE CRISIS IN HISTORICAL PERSPECTIVE 13 (New York, 1978).

<sup>23</sup> Reinier Rodríguez Ferguson, *Casco Antiguo: Su Arquitectura*, PATRIMONIO HUMANO: ESPACIO ARTE, OFICINA DEL CASCO ANTIGUO, CIUDAD DE PANAMÁ, 2007, at 22, 25; TEJEIRA DAVIS, *supra* note 18, at 222.

<sup>24</sup> LAFEBER, *supra* note 22, at 14.

<sup>25</sup> Rodríguez Ferguson, *supra* note 23, at 25-27; Eduardo Tejeira Davis, *Evolución de la Arquitectura del Casco Antiguo/Evolution of Architecture in the Old Quarter*, in CIUDAD: EL CASCO ANTIGUO DE LA CIUDAD DE PANAMÁ (CITY: PANAMA CITY'S OLD QUARTER) 106, 138 (Oficina del Casco Antiguo, 2001). Eduardo Tejeira Davis,

<sup>26</sup> PANAMÁ HOY, *supra* note 20, at 92-93; BONIFACIO PEREIRA JIMENEZ, HISTORIA DE PANAMÁ 289 (1969).

<sup>27</sup> LAFEBER, *supra* note 22, at 22.

Colombia in 1903.<sup>28</sup> Soon afterwards, the new leaders signed a canal treaty with the United States—opening a new era in Panamanian history that, among other political, social, and economic impacts, greatly affected the face of Panama City.<sup>29</sup> During the canal construction period and in later years, the United States played a dramatic role in Panama City's urban development.<sup>30</sup> Balboa became the center of the U.S.-controlled Canal Zone, canal operations, and Panama's principal Pacific port. In Panama City proper, the canal authorities constructed a drainage system and aqueduct in San Felipe, paved streets, and exterminated mosquitoes.<sup>31</sup> These infrastructure developments improved the public health of Panama City residents.<sup>32</sup> The new Republican government also built new monumental buildings in San Felipe, including the National Theater in 1908.<sup>33</sup> Also built in 1908 was the Club Unión, a social center for the elite.<sup>34</sup> Modernity had arrived.

During this century, Panama City's population (essentially San Felipe and surrounding areas) grew from about 5,000 in 1821 (Independence from Spain) to 13,000 during the California gold rush period, to 24,000 at the end of the French Canal period, and finally to 60,000 in 1914 when the U.S.-constructed canal opened.<sup>35</sup>

The construction of the canal also created a need for workers. Many West Indians arrived in Panama during the

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<sup>28</sup> *Id.* at 23-24; PANAMÁ HOY, *supra* note 20, at 93.

<sup>29</sup> See TEJEIRA DAVIS, *supra* note 18, at 125-35; ANDREW ZIMBALIST & JOHN WEEKS, PANAMA AT THE CROSSROADS: ECONOMIC DEVELOPMENT AND POLITICAL CHANGE IN THE TWENTIETH CENTURY 22-39 (1991).

<sup>30</sup> TEJEIRA DAVIS, *supra* note 5, at 24, 50.

<sup>31</sup> *Id.* at 24, 46.

<sup>32</sup> *Id.* at 24, 50.

<sup>33</sup> Pizzurno, *supra* note 10, at 9.

<sup>34</sup> TEJEIRA DAVIS, *supra* note 3, at 58, 68.

<sup>35</sup> *World Heritage List: Panamá (Panamá)*, *supra* note 4, at 91-92; TEJEIRA DAVIS, *supra* note 5, at 24, 39, 47.

first two decades of the 20<sup>th</sup> Century to fill this need.<sup>36</sup> The influx of construction workers created a need for housing and stimulated the construction of rental tenements in El Chorrillo, Santa Ana, Marañón, and Calidonia, areas adjacent to San Felipe.<sup>37</sup> At this time, San Felipe was surrounded by low-income workers' rental housing.<sup>38</sup> These rental neighborhoods were located in close proximity to the railroad station located on the Plaza 5 de Mayo from which laborers commuted to their work sites.<sup>39</sup>

In 1915, to celebrate the opening of the Canal, the first administration of President Belisario Porras (1912-1916) organized an international exposition in Panama.<sup>40</sup> To promote this celebration, the government filled swampy lands along Panama Bay and constructed Avenida Balboa and the new neighborhoods of La Exposición and Bella Vista.<sup>41</sup> Many of the wealthy families living in San Felipe moved to these new neighborhoods.<sup>42</sup> As the elite aban-

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<sup>36</sup> PANAMÁ HOY, *supra* note 20, at 93.

<sup>37</sup> Pizzurno, *supra* note 10, at 9; Sandoya, *supra* note 7, at 413; TEJEIRA DAVIS, *supra* note 5, at 24, 52.

<sup>38</sup> TEJEIRA DAVIS, *supra* note 3, at 58, 63.

<sup>39</sup> The railway station was built on the Plaza 5 de Mayo. Pizzurno, *supra* note 10, at 7; TEJEIRA DAVIS, *supra* note 5, at 24, 25, 51.

<sup>40</sup> "La Explosión: Struggling to Survive in the Midst of Luxury and Urban Blight," 13 PANAMA—THE VISITOR/EL VISITANTE 4, Feb. 9-22, 2007, available at [http://www.focuspublicationsint.com/New\\_Site/Visitor13-4/tours\\_visitor.html](http://www.focuspublicationsint.com/New_Site/Visitor13-4/tours_visitor.html) (last visited Sept. 14, 2008); CASTILLERO, *supra* note 18, at 167; Jorge Luis Mitchell, *Las Dos Caras de Bella Vista*, LA PRENSA (Panama), June 12, 2006, available at <http://mensual.prensa.com/mensual/contenido/2006/06/12/hoy/panoram/631831.html> (last visited Sept. 14, 2008).

<sup>41</sup> Rodríguez Ferguson, *supra* note 23, at 28-29.

<sup>42</sup> Pizzurno, *supra* note 10, at 18, 28; Rodríguez Ferguson, *supra* note 23, at 28; Ariel Espino, *Casco Antiguo: Su Gente*, PATRIMONIO HUMANO: ESPACIO ARTE, OFICINA DEL CASCO ANTIGUO, CIUDAD DE PANAMÁ, 2007, at 16, 18; PANAMÁ HOY, *supra* note 20, at 111; Sandoya, *supra* note 7, at 413; TEJEIRA DAVIS, *supra* note 5, at 24, 52, 55; Olmedo J. Varela, Modeling the Changing Urban Landscape of a Latin

doned San Felipe, their properties were subdivided into rental units and the neighborhood became a melting pot that represented multi-cultural Panama: Blacks, Mestizos, and whites; new migrants from the interior provinces; as well as Arab, Jewish, Chinese, and Hindu immigrants.<sup>43</sup> During much of the 20th Century, Panama's population became more ethnically and culturally diverse; however, the quality of the housing stock in San Felipe gradually deteriorated.<sup>44</sup>

Additional factors also contributed to the deterioration of the housing stock in Panama City. For example, in response to a new tax on real property in 1925, owners' increased rents between 25% and 50%.<sup>45</sup> This stimulated the Renters' Movement of 1925, which resulted in the freezing of rents in Panama City.<sup>46</sup> The rent freeze created an incentive for owners not to maintain their properties and also led to an increase in condemned properties which continued to be occupied.<sup>47</sup> Subsequent rent controls in 1945 and 1959 returned rents in both cases to their 1941 levels.<sup>48</sup> The populist military government of Omar Torrijos again froze rents in 1973.<sup>49</sup>

During much of the 20<sup>th</sup> Century (1920-1970), San Felipe was abandoned to its fate as the elite moved out and buildings continued to deteriorate.<sup>50</sup> During this half cen-

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American City: Lessons from the Past and Considerations for the Future of Metropolitan Panamá City (Sept. 24-26, 1998). (Unpublished manuscript on file with American Studies Associations Conference).

<sup>43</sup> Ferguson, *supra* note 23, at 28-29.

<sup>44</sup> TEJEIRA DAVIS, *supra* note 5, at 24, 53; *See also* Espino, *supra* note 42 at 18, Ferguson *supra* note 23 at 28.

<sup>45</sup> TEJEIRA DAVIS, *supra* note 3, at 58, 65.

<sup>46</sup> *Id.* at 58, 65-66.

<sup>47</sup> Pizzurno, *supra* note 10, at 9.

<sup>48</sup> TEJEIRA DAVIS, *supra* note 3, at 58, 68.

<sup>49</sup> *Id.* at 58, 70. "Dictanse Medidas Sobre los Arrendamientos," Ley No. 93, at art. 36, de 4 de Octubre de 1973; Gaceta Oficial No. 17.456 (lunes 22 octubre de 1973).

<sup>50</sup> TEJEIRA DAVIS, *supra* note 5, at 24, 52-56.

tury, government policy gave no importance to historic preservation.<sup>51</sup> The deterioration also occurred in the adjacent rental neighborhoods of El Chorrillo, Santa Ana, and Calidonia.<sup>52</sup> In the 1950s the government constructed three-story cement housing units, and in the 1960s, 12 story housing blocks.<sup>53</sup> Much of El Chorrillo neighborhood burned in the 1989 U.S. invasion—adding to the urban blight. However, despite the decline of the Casco Antiguo, it remained the seat of the Panamanian Government with government offices such as the Presidential Palace, the Ministry of Government and Justice, and the Ministry of Foreign Affairs housed in the newly renovated Salón Bolívar, site of the Bolivarian Congress in 1826.<sup>54</sup>

Architects and urban planners soon became alarmed at the deterioration of the architectural and historic monuments of San Felipe.<sup>55</sup> Owners of buildings preferred to allow their abandoned properties to deteriorate beyond repair and failed to save ornamental and decorative elements.<sup>56</sup> Saving San Felipe from deterioration required more than an isolated investment in restoration of a single building or a plaza; rather, a master plan for the entire area was essential. Part of this effort required that the govern-

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<sup>51</sup> EDUARDO TEJEIRA DAVIS, *Restauración y Conservación en Panamá: Una Retrospectiva*, in ENSAYOS SOBRE CONSERVACION Y RESTAURACION, 95, 96-102 (Nunzia Guardiani & Eduardo Tejeira Davis eds., 2004).

<sup>52</sup> Eduardo Tejeira Davis, Address at the Conference on "Centros Históricos y Desarrollo Incluyente," Canal Musuem, San Felipe, Panama (December 6, 2007).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*; PANAMÁ HOY, *supra* note 20, at 111-14; TEJEIRA DAVIS, *supra* note 18, at 202-03, 211-13.

<sup>55</sup> Sebastián Sucre, *San Felipe: Su Arquitectura, su Futuro*, in ARQUITECTURA, URBANISMO, ARTE 46-49 (Sebastián Sucre, ed., 1997). This essay was previously published in "Ellas," the supplement to the Diario La Prensa, November 13, 1996.

<sup>56</sup> *Id.* at 49.

ment invest in and restore its own properties.<sup>57</sup> The other components of the solution included encouraging private owners and investors to restore and preserve historic structures.<sup>58</sup>

In the 1970s, as the Torrijos government began to demonstrate a new interest in the values of San Felipe, the tide began to change.<sup>59</sup> This administration created the National Directorate of Historical Patrimony and facilitated San Felipe's first master plan.<sup>60</sup> Although the political and economic crisis of the 1980s slowed the restoration process, the resurgence of civilian governments in the 1990s expanded interest in preservation of San Felipe.<sup>61</sup>

## II. Values of the Casco Antiguo

### a. Spatial Arrangement

The Casco Antiguo historic district occupies approximately 30 ha of land on a peninsula projecting south into the Pacific Ocean.<sup>62</sup> The district maintains its original orthogonal grid street layout with many streets paved in brick from the early 20<sup>th</sup> Century.<sup>63</sup> The heart of the district is the Plaza de la Independencia bordered by the Cathedral, the Municipal Palace, the Hotel Central, and the former headquarters of the French Canal Company (the Canal Museum today). Two smaller plazas also exist in blocks that were destroyed by the 18<sup>th</sup> Century fires.<sup>64</sup> The

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> TEJEIRA DAVIS, *supra* note 51, at 95, 102-08.

<sup>60</sup> Pizzurno, *supra* note 10, at 9; TEJEIRA DAVIS, *supra* note 5, at 24, 55.

<sup>61</sup> TEJEIRA DAVIS, *supra* note 51, at 95, 108-12.

<sup>62</sup> *World Heritage List: Panamá (Panamá)*, *supra* note 4, at 92.

<sup>63</sup> *Id.*

<sup>64</sup> Oficina del Casco Antiguo, *El Casco Antiguo y sus Plazas/The Old Quarter and its Squares*, in CIUDAD: EL CASCO ANTIGUO DE LA

colonial sea fortifications survive on the southern tip of the peninsula, but only a few ruins exist today of the Spanish colonial wall across the peninsula. The southern tip of the peninsula is the site of an additional plaza (Plaza de Francia) between curves in the sea fortifications in front of the French Embassy and old the Supreme Court building which today houses the National Institute of Culture (INAC).

### **b. Buildings**

San Felipe's architecture is a mixture of Spanish colonial architecture and its early American variations, as well as French styles from the late 19<sup>th</sup> Century.<sup>65</sup> According to the UNESCO World Heritage Evaluation Committee, this combination of architectural styles creates a unique quality among Latin American colonial cities. Panamanian authorities have identified some 17 buildings in San Felipe as being important for 17<sup>th</sup> to 19<sup>th</sup> Century architectural heritage, and the UNESCO World Heritage Committee has agreed with these evaluations.<sup>66</sup>

These important structures include numerous religious sites, including the Cathedral (1791), La Merced Church built with stones transferred from Old Panama (1688), San Felipe de Neri Church (1688), San José Church (1677), and San Francisco Church and convent where Bolívar celebrated the Bolivarian Congress in 1826 (originally built in the 18<sup>th</sup> Century).<sup>67</sup> Public buildings recognized for their architectural heritage include the Municipal Palace, the French Canal headquarters (originally,

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CIUDAD DE PANAMA (CITY: PANAMA CITY'S OLD QUARTER) 152, 153 (Oficina del Casco Antiguo, 2001).

<sup>65</sup> *World Heritage List: Panamá (Panamá)*, *supra* note 4, at 92; LEVY & GÓMEZ, *supra* note 8, at 17.

<sup>66</sup> *World Heritage List: Panamá (Panamá)*, *supra* note 4, at 92.

<sup>67</sup> LEVY & GÓMEZ, *supra* note 8, at 21, 24, 29, 72; TEJEIRA DAVIS, *supra* note 18, at 211, 215; *World Heritage List: Panamá (Panamá)*, *supra* note 4, at 92.

the Grand Hotel; subsequently, the Post Office; and today, the Canal Museum), the National Theater, and the Presidential Palace (1673 with reconstruction in 1921), among others.<sup>68</sup> The Municipality restored the Casa Góngora (1760), a former privately-owned residence that today serves as an art gallery and cultural center.<sup>69</sup> Additionally, the World Heritage designation recognized the importance of numerous multi-family tenement houses constructed since the mid-19<sup>th</sup> Century.<sup>70</sup> These structures marked a change from the more traditional single-family upper class homes that were one to three stories in height, to multi-family units.<sup>71</sup> This change symbolizes the social shift toward an increasingly complex social stratification.<sup>72</sup>

Architects note the human scale of construction in San Felipe.<sup>73</sup> No building is taller than five stories and all points are easily accessible by foot. Four major public plazas are located in the historic district, and residents and visitors can view the ocean and other parts of Panama City from numerous viewing spots.

Buildings in San Felipe represent many different architectural styles. The 17<sup>th</sup> and 18<sup>th</sup> Century churches and convents represent Spanish colonial styles (Santo Domingo Church and convent (1675), La Compañía Jesuit Church and convent, La Merced Church, San José Church, the

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<sup>68</sup> PANAMÁ HOY, *supra* note 20, at 111-14; LEVY & GÓMEZ, *supra* note 8, at 18, 21, 24, 29, 62.

<sup>69</sup> The Casa Góngora is a rare example of a structure in San Felipe that was expropriated by the Dirección Nacional de Patrimonio Histórico (DNPH). This occurred in 1995, and the property was transferred to the Municipality that same year for restoration. LEVY & GÓMEZ, *supra* note 8, at 79-80. The former owner had removed the roof to accelerate deterioration of the structure. Interview with Ariel Espino, Director of the Oficina del Casco Antiguo, San Felipe, Panama (December 12, 2007).

<sup>70</sup> *World Heritage List: Panamá (Panamá)*, *supra* note 4, at 92.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> SUCRE, *supra* note 55, at 46-49.



Cathedral).<sup>74</sup> Buildings constructed in the late 19<sup>th</sup> Century and early 20<sup>th</sup> Century display numerous architectural styles, including Gothic and Romanic (San Francisco Church), Neo-classical (Municipal Palace, National Theater), and Art Nouveau and Art Deco (buildings on Avenue A).<sup>75</sup>

Only about 10% of the space in the Casco Antiguo Historic District is occupied by public buildings.<sup>76</sup> Municipally-administered parks, plazas, and public infrastructure account for some 35% of the area.<sup>77</sup> The Archdiocese owns about 5% of the space while the remaining 50% of the area is privately-owned structures and lots.<sup>78</sup>

When Panama nominated the Casco Antiguo for inscription as a World Heritage Site in 1995, the majority of buildings displayed significant deterioration.<sup>79</sup> Panama's nomination dossier noted that only 5% of the structures were reasonably conserved while 70% displayed significant physical or functional deterioration.<sup>80</sup> The principal causes of the deterioration included a lack of regular maintenance and high population densities in the sector which produced more wear-and-tear of buildings and also altered their structural integrity.<sup>81</sup>

### c. People and Social Diversity

San Felipe corregimiento (borough) is a dense urban neighborhood that occupies only approximately 30 ha of land.<sup>82</sup> National Census data indicate that the population

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<sup>74</sup> LEVY & GÓMEZ, *supra* note 8, at 32.

<sup>75</sup> *Id.* at 47.

<sup>76</sup> *World Heritage List: Panamá (Panamá)*, *supra* note 4, at 92.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 93.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 92.

of San Felipe increased from 11,447 people in 1950, to 14,145 people in 1970.<sup>83</sup> However, since 1970, population has declined—11,696 people in 1980, to 10,282 people in 1990, to 6,928 people in 2000.<sup>84</sup> The dramatic decrease of residents during the 1990s was a result of both evictions because of restoration and real estate speculation.<sup>85</sup> Additionally, the deteriorating housing stock *may* have also led some people to abandon the neighborhood.<sup>86</sup> The National Census of 2010 will provide the next official indicator of San Felipe demographics. Some urban planners estimate that the 2010 population will be less than 4,000 people.<sup>87</sup>

Social indicators point to the socio-economic diversity of San Felipe's residents. According to the 2000 National Census, the median income of residents in Panama City (Panama District) was \$362 per month.<sup>88</sup> However, the median income in San Felipe was merely \$305 per month and those of neighboring corregimientos were similar: El Chorrillo at \$280 per month and Santa Ana \$324 per month.<sup>89</sup> Median incomes in the middle class corregimientos in the central city were approximately twice as high: Betania at \$684 per month, Bella Vista at \$912 per month, and San Francisco at \$646 per month.<sup>90</sup> Income levels in San Felipe are similar to those in corregimientos on the urban periphery, such as Tocumen at \$300 per month and Chilibre at \$284 per month.<sup>91</sup> Recent surveys of over 200 residents in San Felipe shed light on the housing

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<sup>83</sup> TEJEIRA DAVIS, *supra* note 3, at 73.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> See TEJEIRA DAVIS, *supra* note 5, at 24, 53.

<sup>87</sup> Ariel Espino, Address at the Conference on "Centros Históricos y Desarrollo Incluyente," Canal Museum, San Felipe, Panama (December 6, 2007).

<sup>88</sup> TEJEIRA DAVIS, *supra* note 3, at 58, 74-75.

<sup>89</sup> *Id.* at 75.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

situation there: about 42% of respondents lived in rental housing while a similar percentage occupied condemned or abandoned structures.<sup>92</sup> In addition, only 6% of respondents resided in a unit or house that they owned.<sup>93</sup>

Displacement and eviction of many of San Felipe's low income residents, and the subsequent occupation of restored buildings by wealthy residents will certainly change these data in the 2010 National Census. The population is expected to decrease significantly. At the same time, however, San Felipe's median income should increase dramatically due to the influx of wealthy residents.

#### **d. UNESCO World Heritage Designation**

UNESCO has granted World Heritage designation to areas in over 26 Latin American cities, including Panama's San Felipe neighborhood.<sup>94</sup> On September 29, 1995, the Government of Panama nominated the San Felipe historic district for inclusion in the World Heritage List.<sup>95</sup> Four criteria were cited as justification for San Felipe's nomination.<sup>96</sup> First, Panama advocated nomination based on the buildings, their fortifications, and their layout which "reflect the importance, interchange, adaptation, and persistence of human values that for centuries have been oriented towards further inter-oceanic communications at this strategic site on the Central American isthmus."<sup>97</sup> Second,

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<sup>92</sup> María Adames, Address at the Conference on "Centros Históricos y Desarrollo Incluyente," Canal Museum, San Felipe, Panama (December 6, 2007).

<sup>93</sup> *Id.*

<sup>94</sup> SEBASTIAN SUCRE, PUERTAS Y VENTANAS DEL BARRIO DE SAN FELIPE: TESTIMONIO DE UN VALIOSO LEGADO 8 (February, 2003); EDUARDO ROJAS, INTER-AMERICAN DEV. BANK, OLD CITIES, NEW ASSETS: PRESERVING LATIN AMERICA'S URBAN HERITAGE 7 (1999).

<sup>95</sup> *World Heritage List: Panamá (Panamá)*, *supra* note 4, at 91-92.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 91.

Panama emphasized San Felipe's 16<sup>th</sup> to 18<sup>th</sup> Century styled houses as exceptional because of their unique narrow lots and internal layout.<sup>98</sup> In fact, such houses can only found in this region of the Americas.<sup>99</sup> Additionally, Panama explained that the multiple family homes from the end of the 19<sup>th</sup> Century and early 20<sup>th</sup> Century illustrate "how society has reacted to new requirements, changes, and influences brought about by modern world-wide communications."<sup>100</sup> In other words, these houses are a monument to tenement buildings built to house construction workers of the Canal, and illustrate San Felipe's increasingly diverse social structure when compared to the original elite families of San Felipe.<sup>101</sup>

Also highlighted was the threat to conservation of San Felipe's cultural property by the deterioration of living conditions and increasing levels of poverty.<sup>102</sup> The Panamanian Government was more polite in its characterization; it explained that "immovable cultural property is affected by a society seeking to resolve its manifold contradictions."<sup>103</sup> Finally, Panama's nomination noted the historical significance of Panama to Spanish expansion and commerce in South America, as well as the historic significance of the Salón Bolívar, the site of Simón Bolívar's Congress in 1826 which attempted to forge Latin American unity.<sup>104</sup>

After Panama's nomination, an expert mission representing the International Council on Monuments and Sites (ICOMOS)<sup>105</sup> evaluated the nomination and sent a

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> ICOMOS (International Council on Monuments and Sites) is an advisory body mandated by the World Heritage Convention that evalu-

team to Panama in February 1996.<sup>106</sup> The group recognized the significance of Casco Antiguo's mixture of Spanish colonial, Early American, and French architecture—which was a product of Panama's position as an international crossroads.<sup>107</sup> The ICOMOS mission, however, requested a complete and final plan for revitalization of the historic district before it would grant final approval.<sup>108</sup> The mission also asked for clarification of the role of the Panamanian Tourist Institute (IPAT) in the Casco Antiguo revitalization plan.<sup>109</sup>

In 1996, the Bureau of the World Heritage Committee adopted the recommendations of ICOMOS that withheld final approval until Panama clearly delineated the spatial area of the historic district and its buffer zone.<sup>110</sup> The World Heritage Committee also requested additional support for restoration efforts—including the detailed master plan and legislation that controlled activities in these areas.<sup>111</sup> Panama supplied the requested information in January 1997, to the approval of ICOMOS experts.<sup>112</sup>

The World Heritage Committee finally approved the inscription of the San Felipe Historic District on the World Heritage List in September 1997.<sup>113</sup> The justification was based on three criteria (ii, iv, and vi) which recognized the significance of street layout and buildings.<sup>114</sup>

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ates nominated sites. World Heritage Convention, Glossary, *available at* <http://whc.unesco.org/en/glossary/> (last visited on April 17, 2008).

<sup>106</sup> *World Heritage List: Panamá (Panamá)*, *supra* note 4, at 93.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* At that time, plans existed for the creation of a “buffer zone.”

However, this concept was eventually dropped from Decree Law No. 9 of 1997. TEJEIRA DAVIS, *supra* note 5, at 24, 56.

<sup>113</sup> *World Heritage List: Panamá (Panamá)*, *supra* note 4, at 93-94.

<sup>114</sup> *Id.* at 93.

Criterion v, which noted the growing threats to the patrimony of the area was rejected.<sup>115</sup> The inscription read:

Panama was the first European settlement on the Pacific coast of the Americas, in 1519, and the Historic District preserves intact a street pattern, together with a substantial number of early domestic buildings, which are exceptional testimony to the nature of this early settlement.<sup>116</sup>

The World Heritage Committee also recognized the significant historical importance of the Salón Bolívar.<sup>117</sup> The twenty-first session of the World Heritage Committee approved the inscription of the "Historic District of Panama" (Casco Antiguo Historic District) on the World Heritage List at its meeting in Naples, Italy, in December 1997.<sup>118</sup>

### III. Evolution of Preservationist Legislation for the Casco Antiguo

Panamanian legislation to protect the cultural patrimony of San Felipe has evolved significantly in the past decades. The first protective legislation from 1941 declared several structures in that area as National Historic Monuments.<sup>119</sup> These included the Cathedral, the San

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<sup>115</sup> *Id.* Although there is no formal documentation of the rejection of Criterion v, ICOMOS did not include this criterion in its justification for its September 1997 recommendation.

<sup>116</sup> *Id.* at 93.

<sup>117</sup> *Id.* at 94; LEVY & GÓMEZ, *supra* note 8, at 72.

<sup>118</sup> World Heritage Committee, Report of the Twenty First Session, Naples 1997, WHC-97/CONF.208/17 (Feb. 27, 1998), available at <http://whc.unesco.org/archive/repcom97.htm#790>, at 48 (last visited Sept. 10, 2008).

<sup>119</sup> "Sobre Monumentos Históricos Nacionales," Ley No. 68 de 11 de Junio de 1941; Gaceta Oficial No. 8.538 (Jueves 19 de Junio de 1941).

Felipe Church, the San Francisco Church, and the Flat Arch (Arco Chato) located in the ruins of the Santo Domingo convent and church.<sup>120</sup> This early legislation prohibited the sale, destruction, or alteration of these monuments and also designated the Department of Fine Arts of the Ministry of Education the responsible institution for the conservation of these sites.<sup>121</sup> However, efforts focused merely on the protection of monuments and allegedly were poorly respected.<sup>122</sup>

#### a. Law No. 91 (1976)

In 1976, Panama's National Assembly adopted legislation which, for the first time, focused on preservation of the Casco Antiguo as a whole rather than protection of individual monuments.<sup>123</sup> This legislation declared three sites—the historical areas of Portobelo and the Portobelo National Park on the Caribbean coast, the Old Panama ruins (Panamá Viejo), and the Casco Antiguo—“Monumental Historical Sites” (Conjuntos Monumentales Históricos) as they testify to the Nation's past.<sup>124</sup> Additionally, this designation covered similar intact buildings or ruins which had recognized architectural, historical, and aesthetic values.<sup>125</sup>

Law No. 91 designated the Panamanian Tourist Institute (IPAT) as the agency responsible for administering, conserving, restoring, and promoting these three sites.<sup>126</sup> An advisory body, the National Council of Monumental

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<sup>120</sup> *Id.* at art. 1.

<sup>121</sup> *Id.* at arts. 2 & 3.

<sup>122</sup> TEJEIRA DAVIS, *supra* note 51, at 95, 98.

<sup>123</sup> “Regúlense los Conjuntos Monumentales Históricos,” Ley No. 91 de 22 de Diciembre de 1976; Gaceta Oficial No. 18.252 (Miércoles 12 de Enero de 1977). See also TEJEIRA DAVIS, *supra* note 5, at 24, 55.

<sup>124</sup> Ley No. 91, *supra* note 123, at art. 5.

<sup>125</sup> *Id.* at art. 2.

<sup>126</sup> *Id.* at art. 4.

Historical Sites, comprised of representatives of four governmental agencies and two groups from civil society, was to advise IPAT on protection, administration, and restoration of the sites.<sup>127</sup> All construction or restoration projects required the permission of IPAT and the approval of the Council.<sup>128</sup> The Council also possessed the authority to recommend to IPAT and the Executive that the "Monumental Historic Sites" be declared "Historic Monuments."<sup>129</sup> The legislation set forth guidelines for the "Historic Monuments."<sup>130</sup> They could not be sold to private individuals, their use had to be compatible with their historic condition, and if they were privately owned, they could only be sold to the State or expropriated.<sup>131</sup> The legislation defined the Casco Antiguo Historic Site spatially, by including the area on the peninsula to the east of Twelfth Street from shoreline to shoreline.<sup>132</sup> As a result, the Panama City Municipal Engineer's office could not grant construction permits for any building within the Casco Antiguo Historic Site without the prior approval of IPAT and the National Council of Monumental Historic Sites.<sup>133</sup>

The legislation also established general construction guidelines in the historic area. These guidelines mandated that any new construction must be in harmony with existing adjacent buildings, as well as those in the historic site.<sup>134</sup> For example, new buildings could not exceed four stories nor vary more than two stories from adjacent buildings.

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<sup>127</sup> *Id.* at art. 6 & 7. The members of the Council represented the National Directorate of Historical Patrimony of the National Institute of Culture, the Ministry of Finance, the Housing Ministry, the Ministry of Agricultural Development, the Panamanian Academy of History, and the Archdiocese of Panama. *Id.* at art. 6.

<sup>128</sup> *Id.* at art. 9.

<sup>129</sup> *Id.* at art. 12.

<sup>130</sup> *Id.* at art. 13.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at art. 37. See also TEJEIRA DAVIS, *supra* note 5, at 24-25.

<sup>133</sup> Ley No. 91, *supra* note 123, at art. 38.

<sup>134</sup> *Id.*



Door and window levels also had to be similar to the existing buildings, as did the external walls, façade, and decorative roof.<sup>135</sup>

The 1976 legislation was significant because it recognized the importance of preservation of the entire historic district and established general criteria for new construction which required harmony with the existing architecture. However, despite this significant step, this initial legislation failed to involve private groups and owners in the process and lacked subsidies or incentives for private restoration efforts.<sup>136</sup> In fact, the legislation offered no financial support of any kind for restoration. With IPAT as the lead agency, the ultimate goal of the law appeared to be promotion of tourism—a common goal in initial stages of historic preservation.<sup>137</sup>

#### **b. Law No. 14 (1982)**

In 1982, the National Assembly passed additional legislation which changed the institution responsible for conservation and administration of the nation's historical patrimony.<sup>138</sup> The National Institute of Culture, through its National Directorate of Historical Patrimony, was now

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<sup>135</sup> *Id.*

<sup>136</sup> This legislation did not include provisions for inclusion of citizens groups in any stage of the decision-making process and also lacked an incentive regime.

<sup>137</sup> ROJAS, *supra* note 94, at 14-16. These public actions, however, do not ensure the viability of preservation, the long-term sustainability of restored buildings, or the engagement of the private sector in these efforts. *Id.* at 19. Direct government investment has resulted in successful historic preservation in some Latin American cities, such as Salvador, Bahia, Brazil, and Santo Domingo, Dominican Republic. *Id.* at 20.

<sup>138</sup> "Por la cual se dictan medidas sobre custodia, conservación y administración del Patrimonio Histórico de la Nación," Ley No. 14 de 5 de Mayo de 1982; Gaceta Oficial No. 19.566 (Viernes 14 de Mayo de 1982).

charged with the stewardship, conservation, administration, and investigation of Panama's historical patrimony.<sup>139</sup> This agency had to approve any restoration project involving national monuments.<sup>140</sup> A deliberative body—the National Commission of Archaeology and Historical Monuments—advised the National Directorate.<sup>141</sup> The legislation reiterated that urban areas, such as streets, plazas, neighborhoods, or ruins could be considered national monuments.<sup>142</sup> The 1982 legislation created the possibility of sanctions of up to B/.10,000, as well as ten months imprisonment for persons who destroyed these national monuments.<sup>143</sup>

**c. Ministerial Resolution No. 75-90 (1990)  
(MIVI)**

In 1990, the Housing Ministry (Ministerio de Vivienda or MIVI) promulgated special regulations for urban development in the Corregimiento de San Felipe<sup>144</sup> (San Felipe borough) which took into account the existing legislation pertaining to the Casco Antiguo Monumental Historical Site.<sup>145</sup> MIVI's special norms limited the uses of buildings in the Casco and set out structural parameters for construction, including restrictions on population densities, areas of occupation of a parcel, building height, construction lines, lateral and rear setbacks between buildings, and parking.<sup>146</sup> The resolution also reiterated the restrictions on

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<sup>139</sup> *Id.* at art. 1.

<sup>140</sup> *Id.* at arts. 40, 42.

<sup>141</sup> *Id.* at art. 4.

<sup>142</sup> *Id.* at art. 37.

<sup>143</sup> *Id.* at art. 42.

<sup>144</sup> The limits of the Corregimiento de San Felipe (San Felipe Borough) are almost identical to the limits of the Casco Antiguo as defined by the 1976 legislation.

<sup>145</sup> "Por la cual se aprueba Norma Especial para el Corregimiento de San Felipe," Resolución Ministerial No. 75-90 de 13 de Diciembre de 1990; Gaceta Oficial No. 21.701 (Jueves 10 de Enero de 1991).

<sup>146</sup> *Id.* at art. 2.

construction and restoration of dwellings (single and double-family residences, row houses, apartments—but excluded rooming houses); cultural, religious, and educational facilities; small businesses such as pharmacies, bookstores, craft shops, corner grocery stores, and small restaurants.<sup>147</sup> According to the legislation, use should not adversely affect the residential nature of the Casco nor conflict with the area's architectural style.<sup>148</sup> Additionally, the height restrictions limited new buildings to four stories (ground floor plus three floors), and affirmed that neighboring buildings could have no more than two stories difference.<sup>149</sup>

Although this resolution was not a proactive plan for the restoration of the Casco nor detailed zoning, it nevertheless remains significant as the first effort to guide new construction in the historical zone. The posture of the State with respect to the Casco Antiguo would change radically several years after MIVI's resolution.

#### **d. Decree Law 9 (1997)<sup>150</sup>**

Decree Law No. 9, passed in 1997, symbolized a significant shift in historical preservation in Panamá as it utilized fiscal incentives to encourage preservation and restoration of structures in the San Felipe historic district. Essentially, the legislation recognized that historic preservation of the Casco Antiguo was beyond the capacity of the public sector and that the private sector should also bear the cost of preservation. This legislation expanded the area

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> "Por medio del cual se establece un régimen especial de incentivos para la restauración y puesta en valor del Conjunto Monumental Histórico del Casco Antiguo de la Ciudad de Panamá," Decreto Ley No. 9 de 27 de agosto de 1997; Gaceta Oficial No. 23.366 (sábado 30 de agosto de 1997).

included in the San Felipe “Monumental Historic Site” several blocks further to the northwest—approximately from 12<sup>th</sup> Street to 14<sup>th</sup> Street.<sup>151</sup> Additionally, the Decree Law recognized that not all structures within the district possessed the same historic value.<sup>152</sup> The National Directorate of Historic Patrimony (DNPH) was charged with classifying structures based on parameters that the Decree Law described in Article 3.<sup>153</sup> The classification indicated the degree of human intervention allowed.<sup>154</sup>

Buildings classified as first-order structures represented the highest historical and cultural values and were generally constructed prior to 1850.<sup>155</sup> Nevertheless, more modern structures might fall into this class if they were determined to be one of the best examples in the country of the architecture of that time period. First-order structures were to be conserved and restored using scientific methodologies, although discordant elements could be eliminated.<sup>156</sup> Buildings classified as second-order structures presented some important architectural elements of their architectural period—regardless of the date—and were also considered to have a relatively high value. Restoration was to focus on high value elements, although discordant elements could be eliminated.<sup>157</sup> Buildings classified as third-order structures offered little architectural value but may have created important “environmental” values.<sup>158</sup> The legislation mandated the conservation of the façade of these structures and the elimination of discordant elements. At

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<sup>151</sup> *Id.* at art. 3. See also TEJEIRA DAVIS, *supra* note 5, at 24, 25.

<sup>152</sup> Decreto Ley No. 9, *supra* note 150, at art. 3.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at art. 3(a).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at art. 3(b).

<sup>158</sup> Although Decree Law No. 9 does not define “environmental values,” they might include “aesthetic” values or “city-scape” values that create enjoyable urban spaces.

the same time, renovation could not significantly alter the exterior that was visible from the street. No new floors could be added to the front of the building; the front roof had to maintain its original angle and form; and the existing window openings “vanos” had to be conserved without the addition of new windows.<sup>159</sup> Finally, buildings classified as fourth-order structures were defined as those built post-1940 which offered little or no architectural or environmental value.<sup>160</sup> In these cases, remodeling was less strict. However, restoration had to improve the environmental quality of the site and respect exiting norms.<sup>161</sup> Sites where new construction was allowed were limited to fourth-order structures and empty lots.<sup>162</sup> However, in both cases new structures had to maintain the architectural style of nearby buildings.<sup>163</sup>

Decree Law No. 9 established the procedure for architects and developers wishing to restore structures in the Historic District.<sup>164</sup> Project proponents had to submit new development or restoration plans to the National Directorate of Historic Patrimony (DNPH).<sup>165</sup> Within fifteen days, the DNPH would then convene a meeting of the National Commission of Archaeology and Historical Monuments to evaluate the proposal.<sup>166</sup> The Commission could recommend approval, denial, or modification.<sup>167</sup> The DNPH and the Commission also had to grant approval for final plans.<sup>168</sup> Additionally, the legislation required that the Municipality not approve construction plans or permits in the

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<sup>159</sup> Decreto Ley No. 9, *supra* note 150, at art. 3(c).

<sup>160</sup> *Id.* at art. 3(d).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at art. 4, 5, & 6.

<sup>165</sup> *Id.* at art. 4.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at art. 5.

Historic District unless the project proponent had obtained written approval from the DNPH.<sup>169</sup>

An innovative aspect of Decree Law No. 9 was the regime of economic incentives it used to support restoration activities by numerous real property actors in San Felipe. Incentives were offered to mortgagees who used borrowed funds to purchase or restore historic properties, current owners beginning restoration, investors in restoration projects, and renters of restored properties.<sup>170</sup> The legislation primarily focused on incentives for financing restoration projects. Banks could participate in a system of "Preferential Mortgages for Restoration" which were used exclusively for purchasing a building located in the Casco Antiguo, financing the total or partial restoration of a building located in the historic district, or constructing a new building in the historic district on a parcel where none existed.<sup>171</sup> In order to take advantage of these preferential loans, the current or future owner had to have his project plans approved by the DNPH and also use the object property as collateral for the loan.<sup>172</sup>

Decree Law No. 9 also specified that the construction or restoration project be financed by a preferential mortgage which would have to begin within one year after approval of the loan.<sup>173</sup> The legislation also specified how

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<sup>169</sup> *Id.* at art. 7.

<sup>170</sup> *Id.* at Chapters III & IV (arts. 8 – 32). Decree Law No. 9 marks the initiation in Panama of a shared public-private effort to protect the cultural patrimony of the Casco Antiguo. The government established a regulatory environment to attract private investment and protect the public interest. The regulatory environment included the regime of fiscal incentives, as well as standards, norms, and procedures for restoration. The expectation was to encourage private residential and commercial real estate investors to take advantage of opportunities in the Casco Antiguo. See ROJAS, *supra* note 94, at 8.

<sup>171</sup> Decreto Ley No. 9, *supra* note 150, at art. 9.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at art. 21.

the preferential rate would be calculated.<sup>174</sup> Each quarter, the Director of the National Banking Commission would publish a local market reference interest rate based on mortgages, with no less than a fifteen year period offered by the participating financial institutions.<sup>175</sup> These preferential rates were based on the average interest rate offered for these loans by the five largest financial institutions during the month immediately prior to the date of publication of the new preferential rate.<sup>176</sup> The preferential interest rate offered by participating banks and mortgages companies could not be more than three percentage points less than the calculated average interest rate.<sup>177</sup> The legislation also offered participating financial institutions an incentive to participate in this regime. During the loan period these financial institutions would receive a fiscal credit equal to the difference between the income they would have earned with and without the preferential interest rate mortgages.<sup>178</sup> The fiscal credit could be earned during the lifetime of the original loan and could be applied against the institution's tax on earnings.<sup>179</sup> The credits could be applied against the financial institution's tax obligations for three years after they were generated or could even be transferred to other taxpayers via written agreement.<sup>180</sup>

Additionally, the legislation created fiscal incentives to encourage the sale of historic properties with the ultimate goal of promoting restoration by the new owners. Current property owners who sold their buildings or land in the historic district were exempt from taxes on the profits from the property transfer if the sale occurred within two years from the date of approval of Decree Law No. 9 (Au-

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<sup>174</sup> *Id.* at art. 10.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at art. 11.

<sup>178</sup> *Id.* at art. 12.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

gust 30, 1999).<sup>181</sup> Similarly, such property transfers were also exempt from property transfer tax which was two percent of the sales value.<sup>182</sup> Additionally, property transfers within the two year window were also exempt from property tax obligations.<sup>183</sup> However, if the new owner had failed to initiate restoration, construction, or reconstruction within 5 years of the purchase date, he would be subject to back taxes with interest and penalties.<sup>184</sup>

An additional suite of incentives targeted current owners or developers who undertook construction or restoration activities on property in the Casco Antiguo. Owners who restored or built properties were exempt from taxes on profits from property sale, rental, or transfer of the property for a period of ten years measured from the date of the occupancy permit.<sup>185</sup> Owners of these new or restored buildings who obtained occupancy permits after the passage of the Decree Law No. 9 were exempt from property taxes for a period of 30 years.<sup>186</sup> The first transfer of the renovated property after the date of passage of the legislation was also exempt from the property transfer tax, as long as the minimum investment in restoration of the building was more than B/. 50,000 [US \$50,000].<sup>187</sup> Similarly, a property owner who constructed or restored the property within five years subsequent to passage of the legislation was exempt from the Tax on Profits from Commercial, Professional, or Industrial Activities that the property owner conducted on the property for a five year period measured from the date of the occupancy permit.<sup>188</sup> A final

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<sup>181</sup> *Id.* at art. 22.

<sup>182</sup> *Id.* at art. 23.

<sup>183</sup> *Id.* at art. 24.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at art. 26. The Código Fiscal (Tax Code) establishes this 10% national tax on profits.

<sup>186</sup> *Id.* at art. 27.

<sup>187</sup> *Id.* at art. 28.

<sup>188</sup> *Id.* at art. 29.



provision provided an exoneration of import taxes for any equipment or materials used in construction or restoration activities in the Casco Antiguo, provided that the equipment or materials were not produced in Panama in the desired quantity and quality.<sup>189</sup> This legislation also contained several additional incentives. Renters of renovated or newly constructed buildings in the Casco Antiguo could deduct their monthly rents from their general incomes for personal income tax purposes for a period of five years measured from the time of the occupancy permit.<sup>190</sup> Persons who used lots or buildings for public parking purposes were exempt from paying taxes on the generated income for a period of ten years from the date of the occupancy permit.<sup>191</sup> Furthermore, any legal or natural person could include amounts invested in the construction, restoration, maintenance, or improvement of parks, churches, green spaces, or any other public site in the Casco Antiguo as a deduction from his or her income tax.<sup>192</sup>

In addition to the sweeping set of fiscal incentives for property owners who renovated buildings in the historic district, Decree Law No. 9 also recognized the plight of renters and squatters who would be displaced as a result of restoration activities. The legislation mandated that the Housing Ministry "take the necessary measures to facilitate the relocation of persons who currently live in buildings in the Casco Antiguo that were to be restored or renovated."<sup>193</sup> Although, the legislation failed to define "necessary measures," the legislation demanded that the Housing Ministry's General Directorate of Rental Properties be informed of all eviction requests related to Casco Antiguo structures.<sup>194</sup> A property owner in the historic district who

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<sup>189</sup> *Id.* at art. 30.

<sup>190</sup> *Id.* at art. 31.

<sup>191</sup> *Id.* at art. 32.

<sup>192</sup> *Id.* at art. 25.

<sup>193</sup> *Id.* at art. 33.

<sup>194</sup> *Id.* at art. 34.

planned to renovate his building in conformity with the established regulations and norms also had to file an eviction notice with the Agency.<sup>195</sup> The Decree Law also established a non-extendable thirty-day period during which the General Directorate of Rental Properties had to approve or reject the eviction request via summary hearing.<sup>196</sup> If the Ministry failed to reject the eviction request within the 30 days, the eviction was presumed approved.<sup>197</sup>

The legislation also referred to renter's rights. Faced with eviction, the renter had to abandon the premises within 30 days but could extend the final occupancy period by an additional month for every 12 months of occupancy to a maximum of 6 months.<sup>198</sup> In addition, the property owner had to compensate all renters who were current with their rental payments.<sup>199</sup> The compensation was equivalent to one month's rent for 12 months of occupancy with a maximum payment equivalent to 6 months' rent.<sup>200</sup> Additionally, property owners who requested eviction but failed to begin restoration within a year, or failed to continue restoration once begun, faced fines.<sup>201</sup> The fines were not less than B/. 1,000 nor more than B/. 10,000.<sup>202</sup>

The Decree Law also created additional sanctions. Owners of unoccupied buildings who "fail[ed] to take the necessary measures to protect the structure or diminish the deterioration of the building" could face fines ranging between B/. 100 and B/. 10,000.<sup>203</sup> These penalties could be levied by the DNPH of the INAC.<sup>204</sup> The DNPH also had

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<sup>195</sup> *Id.* at art. 35

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at art. 36.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at art. 37.

<sup>202</sup> *Id.* B/. 1 is equivalent to US \$1.

<sup>203</sup> *Id.* at art. 38.

<sup>204</sup> *Id.*

additional authority to levy fines against owners of unoccupied properties in the Casco Antiguo who, for at least two years, failed to “take the necessary measures to conform to the restoration policy of the Monumental Historic Site.”<sup>205</sup> These fines ranged between B/. 1,000 and B/. 10,000.<sup>206</sup> These fines and penalties were then to be deposited into a special fund to restore and conserve the Casco Antiguo Monumental Historic Site.<sup>207</sup> Finally, the legislation noted that persons who took advantage of the incentives created by Decree Law No. 9 had to complete their projects within 5 years of the date of promulgation of the Decree (August 30, 2002).<sup>208</sup>

**e. Law No. 4 (2002)<sup>209</sup>**

Almost five years after the passage of Decree Law No. 9, the National Assembly approved Law No. 4; many of the provisions revised articles of the earlier legislation. The new legislation was necessary because the applicability of many of the fiscal incentives were limited to the five-year period after promulgation of the Decree Law No. 9, which ended on August, 30 2002.<sup>210</sup> The new legislation extended the older provisions concerning evictions and

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<sup>205</sup> *Id.* at art. 39.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at art. 40.

<sup>208</sup> *Id.* at art. 41.

<sup>209</sup> “Que modifica el Decreto Ley 9 de 1997, sobre un régimen especial de incentivos para el Casco Antiguo de la Ciudad de Panamá, y dicta otras disposiciones,” Ley No. 4 de 15 de Enero de 2002; *Gaceta Oficial* No. 24,472 (jueves 17 de enero de 2002).

<sup>210</sup> Article 41 of Decreto Ley No. 9 stipulated that the incentive regime applied to property transfers that occurred five years after its promulgation – meaning the date of its publication in the *Gaceta Oficial*. Publication occurred on Aug. 30, 1997. Decreto Ley No. 9, *supra* note 150, at art. 41. Therefore, applicability of the first incentive regime terminated on Aug. 30, 2002.

created low income "social housing" within the historic district."<sup>211</sup>

Article 1 of the new law extended the tax exemption period (paid on profits gained from the transfer of real property in the Casco Antiguo) as long as the transfer occurred before the end of 2003.<sup>212</sup> Furthermore, real property transfers before the end of 2003 were exempt from the Property Transfer Tax.<sup>213</sup> Property transfers during this time period were also exempt from property tax obligations.<sup>214</sup> The 2002 legislation, like Decree Law No. 9, required a new property owner to commence reconstruction or restoration within five years, or pay back the tax exemption benefit with interest and penalties.<sup>215</sup> However, the new legislation forgave new owners who had begun to evict occupants but had not been able to complete process due to factors beyond their control.<sup>216</sup> Article 4 of the new legislation extended the period of exemption of the tax on profits from commercial, professional, or industrial activities of property owners in the building for a five year period measured from the date of the occupancy permit.<sup>217</sup> This tax exemption covered new or renovated properties for the ten-year period from promulgation of Decree Law No. 9 (August 30, 1997 to August 30, 2007).<sup>218</sup>

The new legislation also modified provisions for eviction of current occupants of buildings to be renovated.<sup>219</sup> While the 1997 Decree Law stipulated that the owner would pay of one month's rent for each 12 months of occupancy to a maximum of six months, the amended arti-

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<sup>211</sup> *Id.* at arts. 7, 8, 9, 10.

<sup>212</sup> *Id.* at art. 1.

<sup>213</sup> *Id.* at art. 2.

<sup>214</sup> *Id.* at art. 3.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at art. 4.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at art. 5.

cle changed this payment into a flat fee depending on the number of years of occupancy.<sup>220</sup> For example, a person occupying a rented unit for more than 40 years would have the right to receive B/. 5,000, while a person renting the unit for less than 10 years would could receive B/. 2,000.<sup>221</sup> Again, the property owner could claim these payments as tax credits.<sup>222</sup> Further, the new legislation extended the period during which property owners were eligible for fiscal credits and incentives to August 30, 2007—or ten years after promulgation of Decree Law No. 9.<sup>223</sup>

Law No. 4 referred to low income housing in the historic district. Article 8 demanded that the Housing Ministry along with the National Mortgage Bank renovate properties owned in San Felipe for purpose of constructing low-income housing [“vivienda social” or “social housing”] according the architectural parameters of the National Directorate of Historic Patrimony.<sup>224</sup> These low income housing projects soon became symbols of government efforts to maintain the social diversity and fabric of San Felipe as the city underwent social transformation.

#### **f. Executive Decree No. 51 (2004)<sup>225</sup>**

In 2004, the Ministry of the Presidency promulgated detailed rules for the restoration of the Casco Viejo historic district. These rules incorporated the classification of

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<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at art. 8.

<sup>225</sup> “Por Medio del Cual se Aprueba un Manuel de Normas y Procedimientos para la Restauración y Rehabilitación del Casco Antiguo de la Ciudad de Panamá,” Decreto Ejecutivo No. 51 de 22 de abril de 2004, Gaceta Oficial No. 25.039 (jueves 29 de abril de 2004).

structures defined in Decree Law No. 9 and provided specific requirements for the classification of structures.<sup>226</sup>

The Executive Decree also detailed allowable use of space in Casco Antiguo.<sup>227</sup> For example, its provisions required that electric cables, telephone lines, sewers, drains, and water pipes be buried.<sup>228</sup> Streets were to be paved with clay bricks similar to those which currently existed.<sup>229</sup> Vehicles weighing more than seven tons and longer than seven meters or wider than two meters were prohibited on Casco Antiguo streets.<sup>230</sup> The rules also identified different zoning categories and defined permitted uses for each category.<sup>231</sup>

Owners and developers had to follow certain procedures that the Executive Decree laid out when they proposed construction, modification, or renovation.<sup>232</sup> Developers had to present a pre-proposal to the National Directorate of Historic Patrimony (DNPH) when they wished to construct new buildings, restore first-order or second-order structures, intervened in more than 35% of the total area of a building, or proposed a land use change.<sup>233</sup> After inspecting the site, the DNPH convened a meeting of the National Commission of Archaeology and National Monuments to evaluate the proposal within fifteen days.<sup>234</sup> Ultimately, the DNPH could approve, modify, or disapprove the proposal within 15 days after the meeting of the Commission.<sup>235</sup> Last, after obtaining this approval, a

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<sup>226</sup> *Id.* at arts. 125-33.

<sup>227</sup> *Id.* at arts. 134-52, 156-98.

<sup>228</sup> *Id.* at arts. 27, 29, 34, 38, 40, 44.

<sup>229</sup> *Id.* at art. 59.

<sup>230</sup> *Id.* at art. 64.

<sup>231</sup> *Id.* at arts. 8-16.

<sup>232</sup> *Id.* at título IV, arts. 199-238.

<sup>233</sup> *Id.* at art. 202.

<sup>234</sup> *Id.* at art. 219.

<sup>235</sup> *Id.* at arts. 218-20.

developer had to apply for a construction permit from the municipality's construction office.<sup>236</sup>

The rules also provided for numerous sanctions. A developer who began work without a permit from the DNPH or who violated a permit may have had to demolish the new structure or reconstruct the destroyed structure.<sup>237</sup>

Total or partial destruction or demolition of a building in the Casco Antiguo without permission could have lead to a maximum fine of B/. 50,000.<sup>238</sup> If an owner evicted tenants but failed to begin restoration, he or she could have faced fines between B/. 1,000 and B/. 10,000.<sup>239</sup> An owner of an unoccupied building who through inaction failed to avoid the deterioration of the building may have been fined between B/. 100 and B/. 10,000.<sup>240</sup>

The Executive Decree appeared to contemplate establishing a Casco Antiguo "buffer zone" but instead created a "transition area with structures of historic or archaeological interest."<sup>241</sup> Under this Decree, the land use rules of the Casco Antiguo apply to the "transition area;"<sup>242</sup> however, the Executive Decree failed to spatially define the "transition area" or define "buildings of interest."<sup>243</sup>

Thus, almost 30 years after the designation of the Casco Antiguo historic district, detailed rules exist to guide developers or renovators of structures, public utilities, and the use and construction of public infrastructure. An incentive regime is also in place to encourage private owners to restore their properties, and sanctions exist for actions that violate the spirit of preservation.

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<sup>236</sup> *Id.* at art. 225.

<sup>237</sup> *Id.* at art. 232.

<sup>238</sup> *Id.* at art. 233.

<sup>239</sup> *Id.* at art. 234.

<sup>240</sup> *Id.* at art. 235.

<sup>241</sup> *Id.* at art. 6.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

#### IV. Restoration Efforts and Results

During the past several decades, many civil and professional groups dreamed of the restoration of the Casco Antiguo and hoped that one day it would enjoy protection similar to Cartagena, Colombia; San Juan, Puerto Rico; or La Habana, Cuba. Their dreams were blocked by numerous factors: occupation of structures by poor residents who did not pay rent or protect the buildings, absentee owners who had no interest or incentive in maintaining their properties, lack of financial resources and a plan to channel restoration, and lack of government support for such a project.

The Torrijos military government in the early 1970s focused new energy toward the renovation of San Felipe.<sup>244</sup> Carlos Flores Marini developed a master plan between 1972 and 1975 focusing on revitalization of San Felipe's national monuments and public spaces.<sup>245</sup> During the Torrijos Administration, actual restoration of government buildings in the Casco Antiguo occurred with the assistance of the Inter-American Development Bank following the approval of Law No. 91 (with the exception of the National Theater which was restored later).<sup>246</sup> These initial restoration efforts from 1977 to 1985, included the façade of the Cathedral, the Plaza de la Independencia, the San Francisco Church, and the Mano de Tigre Bastion.<sup>247</sup> Additional conservation efforts restored the Municipal Palace (1977), the Casa de la Municipalidad (1979-83), the Santo Domingo monastery (1981-83), the Jesuit Church (1981-83),

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<sup>244</sup> TEJEIRA DAVIS, *supra* note 5, at 24, 55; TEJEIRA DAVIS, *supra* note 51, at 95, 102-08.

<sup>245</sup> TEJEIRA DAVIS, *supra* note 5, at 24, 55; TEJEIRA DAVIS, *supra* note 51, at 104.

<sup>246</sup> *World Heritage List: Panamá (Panamá)*, *supra* note 4, at 92-93; TEJEIRA DAVIS, *supra* note 51, at 104.

<sup>247</sup> *World Heritage List: Panamá (Panamá)*, *supra* note 4, at 92-93.



and three additional plazas.<sup>248</sup> Further evidence of the increasing interest in cultural patrimony was Panama's ratification of the World Heritage Convention in 1978.<sup>249</sup>

From 1990 to 1991, after a decade of political and economic crisis in the 1980s, and the end of the authoritarian military government, the new civilian administration of President Guillermo Endara created an ad hoc presidential commission for the conservation of the historic district.<sup>250</sup> Additionally, in 1995, during her active term as mayor, Mayín Correa initiated a Revitalization Plan which adopted many of the aspects of the original 1972 master plan.<sup>251</sup> This plan, sponsored by the Inter-American Development Bank, considered that the Municipality would take the lead in restoration.<sup>252</sup>

Despite these initial attempts to protect public spaces and buildings, San Felipe restoration did not begin in earnest until the administration of President Ernesto Pérez-Balladares, with the passage of the Decree Law No. 9 in 1997, and the UNESCO World Heritage Site designation in

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<sup>248</sup> *Id.*; TEJEIRA DAVIS, *supra* note 5, at 24, 56.

<sup>249</sup> Ley No. 9 de 27 de octubre de 1977, Gaceta Oficial No. 18.552 de 7 de abril de 1978, "Por la Cual se Aprueba la Organización de las Naciones Unidas para la Educación, la Ciencia y la Cultura"; States Parties: Ratification Status, at <http://whc.unesco.org/en/statesparties/>; TEJEIRA DAVIS, *supra* note 51, at 106.

<sup>250</sup> Vanessa Spadafora, *El Casco Antiguo de la Ciudad de Panamá: Gestión, Planificación y Puesta en Valor*, in ENSAYOS SOBRE CONSERVACIÓN Y RESTAURACIÓN 117, 119 (Nunzia Guardiani & Eduardo Tejeira Davis eds., 2004). Endara was President of Panamá from 1989-1994. INSTITUTO DEL TERCER MUNDO, GUÍA DEL MUNDO: EL MUNDO VISTO DESDE EL SUR 2001/2002 454-55 (2001).

<sup>251</sup> *World Heritage List: Panamá (Panamá)*, *supra* note 4, at 93; Spadafora, *supra* note 250, at 117, 119.

<sup>252</sup> Vanessa Spadafora, *El Plan Maestro: Objetivos y Metodología* (The Master Plan: Objectives and Methodology), in CIUDAD: EL CASCO ANTIGUO DE LA CIUDAD DE PANAMÁ (CITY: PANAMA CITY'S OLD QUARTER) 172, 182 (Oficina del Casco Antiguo, 2001).

1997.<sup>253</sup> For the first time in Panama, preservationist legislation attempted to create economic incentives to promote the restoration of privately-owned properties.<sup>254</sup>

Following approval of Decree Law No. 9 and the designation of the World Heritage Site, the Pérez-Balladares Administration created a high-level commission charged with the elaboration of a master plan to coordinate activities to protect the Casco Antiguo patrimony.<sup>255</sup> The commission included representatives of the institutions responsible for plans and activities necessary for successful restoration of the historic district—the Vice-Minister of the Presidency, the Vice Minister of the Housing Ministry, the Director of the Panamanian Tourism Institute (IPAT), and the Director of the National Institute of Culture (INAC).<sup>256</sup> The commission was charged with elaborating the master plan for restoration of the Casco Antiguo, defining the lines of action, and determining the different allowable uses of the area.<sup>257</sup> The Executive Decree stipulated that the master plan should contain themes related to traffic circulation, uses of public areas, infrastructure and basic services, public outreach of uses of the area, training programs for people involved in restoration activities, and cultural and artistic activities.<sup>258</sup> For the first time, the Decree also created a technical office which would answer to the Vice Minister of the Presidency, be composed of restoration

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<sup>253</sup> Pérez-Balladares was President of Panama from 1994-99. INSTITUTO DEL TERCER MUNDO, *supra* note 250 at 455.

<sup>254</sup> The legislative analysis in Section III of this manuscript clearly illustrates Decreto Ley No. 9 provided for the first fiscal incentives for restoration of private-owned building in the Casco Antiguo.

<sup>255</sup> “Por el cual se crea la Comisión de Alto Nivel para la Restauración y Puesta en Valor del Conjunto Monumental Histórico del Casco Antiguo de la Ciudad de Panamá,” Decreto Ejecutivo No. 84 de 14 de Abril de 1998, Gaceta Oficial No. 23,524 (viernes 17 de abril de 1998).

<sup>256</sup> *Id.* at art. 1.

<sup>257</sup> *Id.* at art. 2.

<sup>258</sup> *Id.* at art. 3.

experts, and develop and coordinate the implementation of the master plan.<sup>259</sup>

The subsequent administration of President Mireya Moscoso produced another Executive Decree in 2000, which was almost identical to the 1998 version.<sup>260</sup> This version added the Mayor of Panama City to the commission, and changed the name to the Office of the Casco Antiguo (OCA).<sup>261</sup> A technical group also answered to the OCA and was the body responsible for coordination of restoration activities.<sup>262</sup> The OCA attempted to avoid the centralized models that were the norm in the 1970s and 1980s.<sup>263</sup> Instead, it strived to coordinate the actions and interventions of government agencies, take advantage of aid and cooperation from foreign governments, and foster public-private partnerships.<sup>264</sup> Its primary task was the implementation and coordination of the actions set forth in the master plan.<sup>265</sup>

Development of the master plan for the Casco Antiguo took many variables and data sets into account to evaluate the conditions and characteristics and architectural remains; among these were census demographic data and social indices, public services and transportation infrastructure, spatially-referenced (GIS) historical and current land uses, inventories of more than 800 properties in San Felipe.<sup>266</sup>

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<sup>259</sup> *Id.* at art. 5.

<sup>260</sup> "Por el cual se crea la Oficina para la restauración y puesta en valor del Conjunto Monumental Histórico del Casco Antiguo de la Ciudad de Panamá," Decreto Ejecutivo No. 192 de 20 de Noviembre de 2000; Gaceta Oficial No. 24.187 (viernes 24 de noviembre de 2000).

<sup>261</sup> *Id.* at art. 1. Executive Decree No. 192 also included the Minister of the Presidency and the Minister of Housing instead of the Vice-Ministers.

<sup>262</sup> *Id.* at art. 5.

<sup>263</sup> Spadafora, *supra* note 250, at 117, 119.

<sup>264</sup> *Id.* at 117, 119, 126.

<sup>265</sup> *Id.* at 119.

<sup>266</sup> *Id.* at 117, 119-126; Spadafora, *supra* note 252, at 172, 174-79.

The dynamic and flexible master plan attempted to define the areas in need of intervention, revitalization and restoration in Casco Antiguo.<sup>267</sup> The plan was organized around seven themes.<sup>268</sup>

1. Economic vitalization and training of skilled workers—Training school (“Escuela Taller”) in restoration skills, preparation of local guides, improved social services for residents, strengthening of small businesses.<sup>269</sup>
2. Housing—Outreach about fiscal incentives, “social housing” projects, actions to stop abandonment and deterioration of structures.<sup>270</sup>
3. Tourism and cultural activities—Plans for a museum in the Jesuit Church ruins, cultural center in the ruins of the Santo Domingo Convent, promotion of hotel development, promotion of cultural activities.<sup>271</sup>
4. Infrastructure—Plans for more than 680 new parking spaces; studies to consider pedestrian zones, and public transport alternatives; burial of electric and telephone cables, illumination of streets.<sup>272</sup>

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<sup>267</sup> Spadafora, *supra* note 250, at 117, 119; Spadafora, *supra* note 252, at 172, 173.

<sup>268</sup> Spadafora, *supra* note 250, at 127-28; Spadafora, *supra* note 252, at 172, 211.

<sup>269</sup> OFICINA DEL CASCO ANTIGUO (OCA), REVIVE LA COMUNIDAD: DESARROLLO E INTEGRACIÓN SOCIAL (n.d.); Spadafora, *supra* note 252, at 172, 212.

<sup>270</sup> OFICINA DEL CASCO ANTIGUO (OCA), REVIVE LA ARQUITECTURA: RECUPERACIÓN DE INMUEBLES (n.d.); Spadafora, *supra* note 252, at 172, 218-19.

<sup>271</sup> OFICINA DEL CASCO ANTIGUO (OCA), REVIVE EL TURISMO: NUEVOS DESTINOS TURÍSTICOS (n.d.); Spadafora, *supra* note 252, at 172, 222-23.

<sup>272</sup> OFICINA DEL CASCO ANTIGUO (OCA), REVIVE LA CALIDAD: INFRAESTRUCTURA Y SERVICIOS URBANOS (n.d.); Spadafora, *supra* note 252, at 172, 224-25.

5. Improvement of Public Services—reformulation of traffic routes, improvement of trash collection, improvements if security.<sup>273</sup>
6. Legislation, Regulations, and Management—Provision of a legal framework for Casco Antiguo restoration and development, creation of a technical office<sup>274</sup>
7. Specific Projects—Restoration of numerous public buildings and spaces in the Casco Antiguo.<sup>275</sup>

The results of the restoration efforts speak for themselves. Property values in the Casco Antiguo historic district skyrocketed. Most buildings in the district have recently been purchased, although not yet restored.<sup>276</sup> In 2002, the purchase price for un-restored properties ranged between \$150 and \$400 per square meter.<sup>277</sup> At that time, restored property values ranged between \$1,000 and \$1,600 per square meter.<sup>278</sup> In early 2008, restoration activities were evident on almost every block in San Felipe,<sup>279</sup> and renovated property values averaged around \$2,000 per square meter. These values rank among the highest in the Panama City real estate market today.<sup>280</sup> The complete restoration of the San Felipe historic district now appears to be highly probable.

The origin of investors and developers evolved. The incentive legislation (Decree Law No. 9 of 1997) attracted largely Panamanian purchasers, although slowly. In

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<sup>273</sup> *Id.* at 172, 226-27.

<sup>274</sup> *Id.* at 172, 228-29.

<sup>275</sup> *Id.* at 172, 232-33.

<sup>276</sup> PANAMÁ HOY, *supra* note 20, at 110.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*; TEJEIRA DAVIS, *supra* note 3, at 58, 76.

<sup>279</sup> Interview with Ariel Espino, *supra* note 69. According to Espino, some 30 restoration projects were in progress in December 2007.

<sup>280</sup> Interview with Ausberto Rosas, Legal Counsel, Sanson, Rosas y Asociados, in Panama City, Panama (April 10, 2008).

recent years, however, most developers have been foreign and largely European (Spanish, Italian, and French).<sup>281</sup> The fiscal incentive program offered only small savings to investors who were willing to spend a million dollars or more on a restoration project. Additionally, the Spanish Government is funding a Training School (Escuela Taller) that offers two years of training in restoration arts (wood-working, masonry, iron-working).<sup>282</sup> Over fifty male and female students—all Casco Antiguo residents—are currently participating in this training which develops skills needed for restoration activities.<sup>283</sup> In fact, the students are currently renovating the Santo Domingo Church and Convent.<sup>284</sup>

## V. Challenges to Restoration Efforts

Recently, conservation of cultural and historic patrimony in San Felipe has faced many challenges. The cities structures lost many of their unique qualities during the 20<sup>th</sup> Century due to social pressures, lack of maintenance, growth, neglect by government officials.<sup>285</sup> During this period, many buildings were irrevocably lost to decay and deterioration. Nevertheless, in recent years restoration efforts have begun in earnest, thanks to recent legislation creating fiscal incentives for restoration and preservation activities. Important government buildings located in San Felipe, the majority of which have been restored during the past 35 years, also provide an anchor for restoration efforts.

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<sup>281</sup> *Id.*

<sup>282</sup> *Escuela Taller en Plena Restauración del Convento de Santo Domingo*, LAS ÚLTIMAS DEL CASCO (OFICINA DEL CASCO ANTIGUO, CIUDAD DE PANAMÁ), Mar. 2007; Interview with Ariel Espino, *supra* note 69.

<sup>283</sup> Interview with Ariel Espino, *supra* note 69.

<sup>284</sup> *Id.*

<sup>285</sup> See above Sections I and II(b) of this manuscript. See also TEJEIRA DAVIS, *supra* note 5, at 24, 52-55.

Moreover, the historic district has gained the international recognition which is clearly deserved. Nevertheless, numerous challenges to the successful restoration and preservation of San Felipe still remain.

### a. Competition in the Housing Stock

The most significant impetus to restoration of San Felipe was Decree Law No. 9 which the National Assembly approved in 1997. This legislation created numerous tax incentives which jump-started redevelopment of the historic neighborhood. However, this process began more slowly than expected.<sup>286</sup> One of the reasons for the slow start was the oversupply of middle-class and upper-class housing in metropolitan Panama City during the 1990s.<sup>287</sup> Intense development of high-end condominiums in Marbella, Paitilla, and San Francisco began. Additionally, the Panamanian government through the Inter-Oceanic Regional Authority (ARI), began to sell residential properties in the former-Canal Zone and U.S. military bases, in areas such as Albrook, Balboa, Curundú, Diablo, and Clayton.<sup>288</sup> These properties were attractive because of their green-space and “garden city” layouts. Middle-class Panamanians had numerous housing choices in the 1990s.

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<sup>286</sup> TEJEIRA DAVIS, *supra* note 51, at 114-15. Another reason for the slow start of active participation in the incentive regime was the economic recession of the late 1990s that had significant adverse affects on the local real estate market. E-mail from Ausberto A. Rosas R., Legal Counsel, Sanson, Rosas & Asociados, (March 25, 2008 13:23:01 GMT) (on file with author).

<sup>287</sup> Pizzurno, *supra* note 10, at 11.

<sup>288</sup> TEJEIRA DAVIS, *supra* note 3, at 58, 76; Olmedo Varela, *supra* note 42, at 7.

**b. Failure to Adequately Protect Structures located in the San Felipe Historic District**

As the San Felipe area began to deteriorate in the 1920s, numerous administrations failed to act to protect the national cultural patrimony of the area. The National Assembly approved the first preservationist legislation in 1941, but this merely declared a hand-full of sites as "National Historic Monuments."<sup>289</sup> It was not until the 1976 legislation that the entire Casco Antiguo area as a whole was considered worthy of preservation.<sup>290</sup> This legislation also established guidelines for construction in the clearly-defined area.<sup>291</sup> Despite this theoretical evolution in historic district preservation, government investments focused on the publicly-owned monumental structures in the area. Additionally, the government provided no fiscal incentives to private investors to encourage restoration and did not take action to restore decaying residential buildings in the Casco Antiguo.<sup>292</sup>

The 1995 dossier prepared by the Panamanian Government to support World Heritage Site designation for the Casco Antiguo noted that about 70% of the structures in the area displayed marked deterioration.<sup>293</sup> Today, the majority of unrestored occupied buildings are degraded, overcrowded and dangerous. Many empty buildings are boarded, and numerous blocks of San Felipe resemble a wasteland. Of the 830 structures in San Felipe, more than 100 are presently abandoned, and many of these have been abandoned for decades.<sup>294</sup> Interiors of buildings are de-

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<sup>289</sup> TEJEIRA DAVIS, *supra* note 51, at 95, 97-98.

<sup>290</sup> See above Section III(a) of this manuscript.

<sup>291</sup> *Id.*

<sup>292</sup> As noted previously, legislation regarding renovation of the Casco Antiguo did not provide for economic or fiscal incentives until the 1997 Decreto Ley No. 9. See above Section of this manuscript III(d).

<sup>293</sup> *World Heritage List: Panamá (Panamá)*, *supra* note 4, at 93.

<sup>294</sup> Espino, *supra* note 42, at 17.



stroyed, walls and roofs are crumbling, and balconies appear likely to fall at any moment. An unfortunate incident in February 2007, illustrates the physical decay of many buildings. Part of the eaves and roof from an occupied 132-year old three-story building on Avenida Central collapsed killing a mother and her two children as they exited a bakery on the street level.<sup>295</sup> The deterioration of structures even poses a risk to passers-by on the street.

Part of the difficulty of restoration in the Casco Antiguo is the high percentage of private properties. About 90% of the buildings are privately owned.<sup>296</sup> Many owners ceased to maintain their properties because of populist government policies which froze rents.<sup>297</sup> The abandonment of the San Felipe by the elite in the first half of the 20<sup>th</sup> Century and the occupation by lower-income renters and squatters has also encouraged deterioration of structures. Additionally, the government failed to take the initiative in restoration activities of residences during the decline of San Felipe or to intervene to stop deterioration. The Housing Ministry, Municipality, or National Institute of Culture (INAC) all failed to purchase deteriorated properties and subsequently restore them. The government could then have rented or sold its restored residences. Direct government intervention might have jump-started restoration of residences in the Casco Antiguo.<sup>298</sup> Active govern-

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<sup>295</sup> Manuel Vega Loo, *Caída de Alerón Deja Tres Muertos*, LA PRENSA, (2007) available at <http://mensual.prensa.com/mensual/contenido/2007/02/26/hoy/panorama/902261.html> (last visited Sept. 14, 2008).

<sup>296</sup> Interview with Ariel Espino, *supra* note 69.

<sup>297</sup> TEJEIRA DAVIS, *supra* note 3, at 58, 68-69, 70-71.

<sup>298</sup> In Guayaquil, Ecuador, the Municipality expropriated decaying properties in the historic district of Las Peñas for \$4.5 million and subsequently restored them for rental properties. *Con la Casa Urbina, el Barrio Las Peñas Completa su Restauración* (July 5, 2007), available at <http://www.eluniverso.com/2007/07/05/0001/18/597A9711194747349AAA963CCF8B173B.aspx>.

ment participation and leadership in the creation of “social housing” several decades ago could have promoted the social diversity of San Felipe’s population and avoided the gentrification occurring today in the area. Yet, the political will was absent.

Speculation by investors or property owners also may slow restoration efforts. For example, the current or new owners of property in San Felipe often have decided to hold on to empty, unrestored properties with the expectation that increasing property values will make future sales much more profitable.<sup>299</sup> Moreover, many “flippers” consider an empty property more “attractive” than an occupied property.<sup>300</sup> Recent legislation contained provisions that the government could use in these cases. For example, Article 37 of Decree Law No. 9 stipulated that owners who requested eviction but failed to begin restoration within one year could face fines.<sup>301</sup> Article 38 of the same law noted that owners of unoccupied buildings who failed to stop deterioration could be fined.<sup>302</sup> According to Article 41, persons who take advantage of fiscal incentives must complete restoration by 2002.<sup>303</sup> All of these provisions require active government oversight, inspection, and enforcement.<sup>304</sup> In a resource-limited environment, this is often

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<sup>299</sup> Espino, *supra* note 42, at 17.

<sup>300</sup> *Id.*; E-mail from Ausberto A. Rosas R., Legal Counsel, Sanson, Rosas & Asociados, (March 25, 2008 13:23:01 GMT) (on file with author).

<sup>301</sup> See above Section III(d) of this manuscript. Decreto Ley No. 9, *supra* note 150, at art. 37.

<sup>302</sup> See above Section III(d) of this manuscript. Decreto Ley No. 9, *supra* note 150, at art. 38.

<sup>303</sup> See above Section III(d) of this manuscript. Decreto Ley No. 9, *supra* note 150, at art. 41.

<sup>304</sup> Government expropriation of condemned structures in the Casco Antiguo does not appear to be a viable alternative. The Constitution allows expropriation only in instances of urgent social interest, during war time, or during serious disturbances to the public order. Decreto Ley No. 9, *supra* note 150, at art. 51.

challenging. Nevertheless, the Oficina del Casco Antiguo has sanctioned owners of abandoned and deteriorating buildings.<sup>305</sup> In fact, in December 2007, some 60 sanctions were “in process.”<sup>306</sup>

Additionally, even “approved” restoration projects are sometimes questionable and appear to further destroy cultural patrimony. For example, the Hotel Central located on the Plaza de la Independencia was constructed in the late 19<sup>th</sup> Century (1880), and was Panama’s finest hotel until the 1920s.<sup>307</sup> However, gradual deterioration of the neighborhood and the physical structure led to the hotel’s closure in the late early 1990s.<sup>308</sup> A Spanish consortium finally purchased the property in 2006, and is currently “restoring” the structure which will eventually serve as a five-star luxury hotel and meeting center thanks to a \$20 million investment.<sup>309</sup> Many observers of the restoration process, however, note with alarm the complete gutting of the building.<sup>310</sup> As of April 2008, only three exterior walls remained.<sup>311</sup> The DNPH of the INAC had classified the hotel as a “Second Order Structure” which requires that restora-

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<sup>305</sup> Interview with Ariel Espino, *supra* note 69.

<sup>306</sup> *Id.*

<sup>307</sup> TEJEIRA DAVIS, *supra* note 18, at 224.

<sup>308</sup> José Arcia, Hotel Central, reducido a escombros, La Prensa (Panamá) (Mar. 16, 2008), available at <http://mensual.prensa.com/mensual/contenido/2008/03/16/hoy/panoram/1295513.html>, also available at <http://biblioteca.prensa.com/contenido/2008/03/16/15-6a-notadelhotel.html> (last visited Sept. 14, 2008).

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*; Untitled and unauthored article in La Prensa (Panamá) (Mar. 16, 2008), available at <http://biblioteca.prensa.com/contenido/2008/03/16/16-9b-news1.html> (last visited Sept., 14, 2008); Hoy por hoy, La Prensa (Panamá) (Apr. 13, 2008), available at <http://biblioteca.prensa.com/contenido/2008/04/13/13-1a-hoyporhoy.html> (last visited Sept. 14, 2008).

<sup>311</sup> Arcia, *supra* note 308.

tion highlights the high value elements.<sup>312</sup> Included among these high value elements were a wooden staircase imported from New York in 1884 which connected the central patio to the upper floors, as well as the gallery railings, pivoted windows and skylights, and masonry facade.<sup>313</sup> However, when gutting the building, developers destroyed the wooden staircase even though it was in good condition, as well as all the other structures.<sup>314</sup> Even the three remaining walls may be lost due to destabilization, according to Manuel Choy, President of ICOMOS.<sup>315</sup> This project occurred even though the National Commission of Archaeology and Historical Monuments (Conamuh) had not approved the final restoration plans.<sup>316</sup> Many critics question whether the government inspectors were even monitoring this important “restoration” (i.e. “demolition”) project—located on the main plaza and only two blocks away from the INAC and OCA offices. The failure of authorities to regulate the restoration of this important structure suggests that in the future they will be even less able to respond to demands of investors and developers.<sup>317</sup> Some have even suggested that the failures to protect the

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<sup>312</sup> José Arcia, *Demolición arriesga patrimonio*, La Prensa (Panamá) (Mar. 22, 2008), available at <http://biblioteca.prensa.com/contenido/2008/03/22/22-5a-not3.html>, also available at <http://mensual.prensa.com/mensual/contenido/2008/03/22/hoy/panoram/1301662.html> (last visited Sept. 14, 2008); Decreto Ley No. 9, *supra* note 150, at art. 3(b).

<sup>313</sup> *Untitled and unauthored article in La Prensa*, *supra* note 310.

<sup>314</sup> *Id.*

<sup>315</sup> *Untitled and unauthored article, LA PRENSA (Panamá)* (Mar. 22, 2008), *available at*: <http://biblioteca.prensa.com/contenido/2008/03/22/22-9b-news1.html> (last visited Sept. 14, 2008).

<sup>316</sup> Arcia, *supra* note 308.

<sup>317</sup> *Untitled and unauthored article, LA PRENSA*, *supra* note 315.

cultural heritage of San Felipe may lead to placing this site on the World Heritage in Danger List.<sup>318</sup>

The above example refers to a private project. Perhaps the government does a better job of preserving its own properties? This is somewhat questionable, however, as the following examples illustrate. On November 7, 2003, the 325-year old Arco Chato (Flat Arch) in the ruins of the Santo Domingo Convent collapsed.<sup>319</sup> The arch extended 50 feet across the nave at a height of 35 feet.<sup>320</sup> The exact causes of this loss of cultural heritage may never be completely clarified. Excessive rainfall, natural deterioration of materials, vibrations from traffic, and lack of maintenance were all suggested as possibilities.<sup>321</sup> During the past decade, this author has observed many incompatible activities in the ruins below in the arch, including parties with high-volume electronic music. The State clearly must take some of the responsibility for this loss due to its lack of maintenance and allowance of what most would consider activities that are “incompatible” with archaeological ruins.

The ruins of the Jesuit church provide another example. The OCA website listed the rehabilitation of these

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<sup>318</sup> Arcia, *supra* note 312.

<sup>319</sup> Franco Rojas, *Confabulación contra el Arco Chato*, LA PRENSA (Panamá) (Nov. 22, 2003), *available at* <http://biblioteca.prensa.com/contenido/2003/11/22/22-4a-not1.html>, *also available at* <http://mensual.prensa.com/mensual/contenido/2003/11/22/hoy/portada/1369795.html> (last visited Sept. 14, 2008); José Quintero De León, *Sucumbe el Arco Chato*, LA PRENSA, (2003), *available at* <http://biblioteca.prensa.com/contenido/2003/11/08/8-1a-not1.html>, *also available at* <http://mensual.prensa.com/mensual/contenido/2003/11/08/hoy/portada.shtml> (last visited Sept. 14, 2008).

<sup>320</sup> *Id.*

<sup>321</sup> *Gentío: ¿Qué Opina usted del desplome de la estructura del Arco Chato?* LA PRENSA (Panama) (Nov. 9, 2003), *available at* <http://biblioteca.prensa.com/contenido/2003/11/09/9-3sondeo.html> (last visited Sept. 14, 2008); Rojas, *supra* note 319.

ruins in December 2004 as a priority project.<sup>322</sup> However, as of April 2008, this project had yet to begin.<sup>323</sup> Not only is public access denied and educational signage extremely limited; vegetation grows on the walls of these ruins. Clearly, the State could do much more to protect this 17<sup>th</sup> Century cultural resource.

Many factors have contributed to the failure to adequately protect structures. High quality restoration of historic structures is a costly undertaking that requires political will, professional expertise, and funding. Not all of these have been present in the Casco Antiguo. Additionally, the high percentage of privately owned buildings requires vigorous government oversight and monitoring of restoration activities, as well as the evolving condition of the structures. Panama's model of a public-private partnership to restore the Casco Antiguo demands great commitment from the authorities, including a clearly-defined master plan, technical assistance, and oversight of the private sector's restoration activities.<sup>324</sup> Inspectors also need to actively fine owners who fail to restore their private property and thus fail to satisfy their social responsibility. This government role is also costly in terms of effort and trained personnel. Property values speculation has led to many abandoned and unrestored buildings, as owners wait for the "best" moment to invest or sell. In the interim, structures continue to deteriorate. The majority of privately owned buildings were occupied by low income renters or squatters during much of the 20<sup>th</sup> Century; thus, owners had little incentive to maintain their property. Regardless of the varied causes for the deterioration of the housing stock in San Felipe, the abandoned and decaying buildings need to be addressed

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<sup>322</sup> José Arcia, *Un Edificio Antiguo a la Espera de Rehabilitación*, LA PRENSA, Apr. 13, 2008, at 6A.

<sup>323</sup> *Id.*

<sup>324</sup> ROJAS, *supra* note 94, at 21-22.

immediately before structures literally collapse. Restoration in the Casco Antiguo is clearly a race against time.

### c. Incentive Regime and Government Oversight

The current incentive regime laid out in Decree Law No. 9 (1997) and Law No. 4 (2002) has expired.<sup>325</sup> To benefit from the various fiscal incentives, properties must have been transferred prior to the end of 2003.<sup>326</sup> Proposals exist to extend the incentive regime for an additional period.<sup>327</sup> However, it appears unlikely that the National Assembly will approve controversial new legislation for the Casco Antiguo before an election year (2009).<sup>328</sup> Perhaps at this time, fiscal incentives would only be marginally beneficial as most of the housing stock has already been purchased by new investors. The sharp increase in housing prices in recent years perhaps provides sufficient incentive for restoration activities.

More direct government action is needed to guarantee protection of private properties. Other instruments exist besides fiscal incentives. Subsidies could be offered to developers to create “social housing.” New taxes on developments could also fund “social housing.” Stricter monitoring and inspections of the San Felipe housing stock and

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<sup>325</sup> See Section III(e) of this manuscript. As noted above, in art. 1 of Law No. 4 (2002), the incentive regime only applies to properties that were transferred by the end of 2003. Ley No. 4, *supra* note 209, at art. 1.

<sup>326</sup> Ley No. 4, *supra* note 209, at art. 1.

<sup>327</sup> In January, 2008, the Oficina del Casco Viejo (OCA) provided the author with a draft of proposed legislation to extend a modified version of the current incentive regime for the Casco Antiguo.

<sup>328</sup> Panama will celebrate nationwide general elections for President, Legislators and Representatives on May 3, 2009. See Decreto 9 (Apr. 9, 2008), available at <http://www.tribunal-electoral.gob.pa/elecciones/elecciones-2009/decretos/Decreto-9.pdf> (last visited Jul. 17, 2008).

implementation of norms is essential. Providing technical support in restoration activities as a service to developers could also enhance proper renovation. Administrative sanctions for violations are rather low considering the current property values in San Felipe and, were they ever applied, hardly serve as a disincentive for developers to “sit” on unrestored properties.

**d. Gentrification and changing social structure of the Casco Antiguo**

As discussed previously, from the 1920s to the end of the century, San Felipe became an increasingly “popular” or more lower-income neighborhood, abandoned by the elites who moved to neighborhoods further to the east along the waterfront.<sup>329</sup> These new residents represented a cross-section of Panamanian society in class, race, and culture.<sup>330</sup> The restoration process is clearly changing the social composition of San Felipe. New owners are evicting renters and squatters before they restore the structures.<sup>331</sup> Restored properties in the Casco Antiguo represent some of the highest property values in Panama today.<sup>332</sup> New residents are inevitably wealthier than those whom they displace and often are foreigners who only reside for part of the year in Panama.<sup>333</sup> This social change appears result in streets that are empty and without life where there was once color, activity, and noise. The new residents are also more dependent on private automobiles as well, creating parking problems.<sup>334</sup> Historic preservation always creates winners

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<sup>329</sup> TEJEIRA DAVIS, *supra* note 5, at 24, 52.

<sup>330</sup> See also Espino, *supra* note 42 at 18; Rodríguez Ferguson *supra* note 23 at 28.

<sup>331</sup> Espino, *supra* note 42, at 17.

<sup>332</sup> TEJEIRA DAVIS, *supra* note 3, at 58, 76; Espino, *supra* note 42, at 17.

<sup>333</sup> *Id.*

<sup>334</sup> Ariel Espino, Director of the Oficina del Casco Antiguo, considers that low income residents place less demands on infrastructure than



and losers.<sup>335</sup> In this case, the winners are the local and foreign investors in restoration projects and the new residents. The displaced low income residents are the losers.

The thorny issue of displacement of low-income residents prior to commencement of architectural restoration presents many perspectives. On the one hand, a new owner of a property faces the reality of a semi-abandoned structure occupied by up to fifty families who do not pay rent. Although theoretically the Municipality should be responsible for eviction, in reality, the new property owner must resolve this difficult issue. Even though these residents have no legal basis for remaining, the Civil Code grants them certain rights. Thus, even though the Decree Law No. 9 and Law No. 4 discuss compensation for evicted families and established time limits for families to remain in their homes, this process has often been very slow and arduous. Real evictions are often slower than may appear in theory.

The social inequity is also troubling. Low-income residents, many of them long-term residents in San Felipe are displaced and the community structure is disrupted. While some displaced people find new housing in low-income neighborhoods in the central city (El Chorrillo, Santa Ana, Calidonia), others have no option but to move to areas with accessible housing in the periphery of Panama City some 20 km away (Tocumen or Arraiján). Public transportation from the periphery to the center of Panama City often requires a commute of several hours one way. Do only wealthy people have the right to live in the central city with easy access to services? A group of urban artists recently asked just this question:

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new wealthier residents because they consume less and use public transportation instead of private automobiles. Espino, *supra* note 87.

<sup>335</sup> Joseph Scarpaci, Address at the Conference on “Centros Históricos y Desarrollo Incluyente,” Canal Museum, San Felipe, Panama (December 6, 2007).

We're used to assuming that only the wealthiest people have a right to live downtown in the most attractive areas and that the poor people have no option but to accept "exile" in poor neighborhoods that surround the city and grow daily. Life in the center city should be democratic. Cultural heritage belongs to everyone.<sup>336</sup>

Noticeably absent in San Felipe are grassroots resident initiatives to restore properties via cooperative brigades and subsequently gain title to the restored residences.<sup>337</sup> In the Old Port neighborhood of Montevideo, Uruguay (Ciudad Vieja), numerous buildings have been restored by brigades of residents. Women often form the core of these work brigades.<sup>338</sup> This type of restoration action by squatters who restore the space they occupy is absent in Panama. Perhaps the social and political organization of groups in Uruguay, or support and encouragement

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<sup>336</sup> "Estamos acostumbrados a presumir que solo los más pudientes tienen derecho a vivir en el centro, en las áreas más atractivas, y que los pobres no les queda otra que exiliarse en esos lejanos cinturones de pobreza que crecen día a día . . . La vida en el centro . . . se debe democratizar. . . . (E)l patrimonio es de todos." Espino, *supra* note 42, at 20 (translation by author).

<sup>337</sup> Recent surveys of San Felipe residents indicate that 95% do not belong to a neighborhood organization of any kind. Adames, *supra* note 92.

<sup>338</sup> *Desde Marzo Otorgan Préstamos para Rehabilitar Viviendas de Ciudad Vieja*, LA REPÚBLICA (Montevideo, Uruguay) (Feb. 27, 2006), available at <http://www.larepublica.com.uy/comunidad/203715> (last visited Sept. 14, 2008); Diana Cariboni, *Cooperativa de Viviendas por Ayuda Mutua MUJEFA: Reciclando el Futuro*, available at <http://www.chasque.apc.org/vecinet/mujefa.htm> (last visited Sept. 14, 2008); Raúl Vallés, "Derecho al Centro": Proceso de Acceso y Permanencia de los Sectores Populares al Área Central de la Ciudad de Montevideo, Presentation at the V Jornada Internacional de Vivienda Social – El Derecho a la Ciudad y a la Vivienda: Propuestas y Desafíos en la Realidad Actual.

from authorities explain the success of the Uruguayan example and its absence from Panama.

San Felipe only offers a few cases of direct government intervention to restore buildings to create “social housing” or low-income housing.<sup>339</sup> Several notable examples exist on the periphery of the Casco Antiguo Historic District—Casa Boyacá, la Casa Rosada, among others.<sup>340</sup> These are government residential properties belonging to the Panamanian Tourism Institute (IPAT) and the Banco Hipotecario.<sup>341</sup> With funding from the Junta de Andalucía, the Office of the Casco Antiguo restored a two-story triangular-shaped wooden tenement (Casa Boyacá).<sup>342</sup> Some twenty-six families rent subsidized units in Casa Boyacá for monthly rents that are as low as \$30.00.<sup>343</sup> While this example is symbolic and represents an innovative solution to create low-income rental possibilities, it clearly only makes a small contribution to the social diversification of the Casco Antiguo.

Perhaps revised legislation could create additional fiscal incentives for owners to create several low-income

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<sup>339</sup> However, near the Casa Boyacá the government owns some 38 lots (but not the structures) on the site of the demolished colonial wall. Many of the owners of the structures have not been identified. The Oficina del Casco Antiguo hopes to eventually use these government-owned parcels as sites for affordable housing. Grassroots groups are also advocating this solution. Interview with Ariel Espino, *supra* note 69.

<sup>340</sup> The Casa Boyacá is a two story wooden triangular structure that probably dates from 1890. It resembles the prow of a ship. The building’s location next to the old Spanish wall forced the building’s shape. LEVY & GÓMEZ, *supra* note 8, at 82.

<sup>341</sup> OFICINA DEL CASCO ANTIGUO (OCA), REVIVE LA ARQUITECTURA: RECUPERACIÓN DE INMUEBLES, (n.d.).

<sup>342</sup> TEJEIRA DAVIS, *supra* note 18, at 231; Interview with Ausberto Rosas, Legal Counsel, Sanson, Rosas y Asociados, in Panama City, Panama (April 11, 2008).

<sup>343</sup> Interview with Ausberto Rosas, Legal Counsel, Sanson, Rosas y Asociados, in Panama City, Panama (April 11, 2008); Espino, *supra* note 87.

units in their restored properties or in other units in or near San Felipe. Alternatively, a percentage of permitting fees or hotel and restaurant taxes could contribute to a special fund (“Social Housing Fund”) which would finance affordable housing in San Felipe, as had been the example in La Candelaria, Bogotá, Colombia. Although investors may complain that no extra resources exist to contribute to such a fund, some observers of the Casco Antiguo situation estimate that the profit margin for investors in restoration projects is greater than 20%.<sup>344</sup>

Alternatively, the issue of social housing is one area that could benefit from increased and more direct government investment. Authorities should actively use eminent domain powers to condemn deteriorating structures and then invest in their restoration for social (low cost) housing.<sup>345</sup>

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<sup>344</sup> Interview with Raisa Banfield, Architect and Alianza Pro Ciudad member, Panama City, Panama (March 28, 2008).

<sup>345</sup> ROJAS, *supra* note 94, at 17. Efforts to preserve the historic quarter in Quito, Ecuador, also provide a good example of attempts to avoid displacement of local residents.

### **e. Traffic –Parking issues and traffic control**

San Felipe streets were not constructed for the traffic of the 21<sup>st</sup> Century, as streets are narrow. Only limited parking is available in several municipal lots and around several plazas.<sup>346</sup> The Casco Antiguo Office regulates the entry of large buses and trucks into the historic district, as mandated by the San Felipe land use norms enacted in 2004.<sup>347</sup> Other options for parking may exist. Buildings built since 1940 are generally classified as Fourth Order buildings and may be demolished.<sup>348</sup> Some owners of restored buildings have also purchased a nearby building constructed after 1940 and demolished it to create parking for their residents. Additional proposals include a large public parking lot on the site of the demolished Public Market, trolley service in the historic district, or street closure to most vehicles. However, movement on these projects has been slow.

### **f. Absence of a Citizens' Advisory Committee**

A public-private partnership to restore the Casco Antiguo requires the active participation of a wide mix of social actors with different interests, including government and cultural elites, citizen and community organizations, political parties, tourist operators, real estate investors, and community residents.<sup>349</sup> This requires acceptance of the important role of the private sector in transparent decision-making.

Restoration efforts in San Felipe have been very “top-down” and led by the national government through legislation and master plans. Urban planners and architects

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<sup>346</sup> Spadafora, *supra* note 252, at 172, 206.

<sup>347</sup> Decreto Ejecutivo No. 51, *supra* note 225.

<sup>348</sup> Decreto Ley No. 9, *supra* note 150, at art. 3(d).

<sup>349</sup> ROJAS, *supra* note 94, at 8, 23.

advocated for preservation of the neighborhoods patrimony, but little evidence exists of grassroots citizens' efforts to protect "their" neighborhood. In addition, notably absent from the restoration process in San Felipe is a citizens' advisory committee. Many new and old residents of San Felipe are extremely concerned by the direction of restoration process, the challenges and obstacles that it faces, and the social changes in the area. A citizens' advisory committee could offer important recommendations to government officials concerning potential solutions "numerous quality of life" issues. Additionally, such a committee could provide important information to officials on neighborhood problems and cases non-compliance with the existing regulations. A citizen's committee could also be a valuable conduit of information from government officials to residents.

#### **g. Development of Panama and Outside Threats to the Integrity of Casco Antiguo**

Numerous developments in Panama City could impact the restoration activities and quality of life in San Felipe. One of these is the "Cinta Costera" (Coastal Belt), a major project begun in 2007 to fill in (reclaim) approximately 30 ha of Panama Bay adjacent to Avenida Balboa.<sup>350</sup> The reclaimed area extends for almost 3 km along Avenida Balboa.<sup>351</sup> The Ministry of Public Works' primary purpose for this project is construction of additional high-

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<sup>350</sup> Cinta Costera – La Vitrina del Nuevo Panamá, *available at* <http://www.cintacostera.com.pa/proyecto-caracteristicas.html> (last visited Sept. 10, 2008); Coastal Beltway (Cinta Costera), Panamá City, Panamá, *available at* <http://www.roadtrafficttechnology.com/projects/cintacosta/> (last visited Sept. 10, 2008); Urania Cecilia Molina, *Cinta Costera Va (Green Light for the Coastal Beltway Project)*, LA PRENSA (Panamá), Mar. 17, 2007, at 1A.

<sup>351</sup> *Id.*

way lanes to ease the traffic congestion in central Panama City and connect with a partially-constructed system of expressways.<sup>352</sup> Great debate surrounds the amount of “green space” that will eventually exist on the newly-filled lands.<sup>353</sup> The filled area in the “Cinta Costera” project will end only 500 m from the beginning of the Casco Antiguo Historic District.<sup>354</sup> Moreover, a large number of vehicles will pass on these new highways only a short distance from San Felipe. The potential impacts on air quality, visual aesthetics, or traffic impacts in the Casco Antiguo of the “Cinta Costera” have not been considered.

An additional concern for San Felipe is the serious deterioration of the low-income neighborhoods that surround it: El Chorrillo, Santa Ana, Calidonia, and central artery—la Avenida Central. The housing stock and infrastructure of these neighborhoods are deteriorating as the commercial activities have moved to several new shopping centers in more accessible areas for automobiles. Many structures of significant architectural value are deteriorating

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<sup>352</sup> Urania Cecilia Molina, *Nuevo Diseño de la Cinta Costera (New Design for the Coastal Beltway)*, LA PRENSA (Panama), Mar. 17, 2007, at 5A.

<sup>353</sup> Ana Teresa Benjamín, *Cinta Costera en el Ojo del Huracán (Coastal Beltway in the Eye of the Hurricane)*, LA PRENSA (Sección Construcción) (Panamá), Mar. 27, 2007, at 4; La Cinta Costera de Panamá (The Coastal Beltway of Panamá), ALIANZA PRO-CIUDAD, available at <http://alianzaprociudad.org/cintacostera.html> (last visited Sept. 10, 2008); Eric Jackson, *Bern Upset with Newspaper Coverage of his Hotel and the Cinta Costera*, THE PANAMA NEWS, Vol. 14, No. 13 (Jul 8, 2008), available at [http://www.thepanamanews.com/pn/v\\_14/issue\\_13/economy\\_07.html](http://www.thepanamanews.com/pn/v_14/issue_13/economy_07.html) (last visited Sept. 10, 2008); *Green Areas Shrink in Cinta Costera's Updated Plans*, English News Panama, available at [http://englishnewspanama.com/index.php?option=com\\_content&task=view&id=687&Itemid=176](http://englishnewspanama.com/index.php?option=com_content&task=view&id=687&Itemid=176) (taken from LA PRENSA, May 2, 2008) (last visited Sept. 13, 2008).

<sup>354</sup> The Cinta Costera Project will end at the Mercado del Marisco (Seafood Market) less than half a kilometer from the Casco Antiguo. Benjamín, *supra* note 353.

in these neighborhoods, and lack of security is a continuing problem. Some type of historic district or a San Felipe “buffer zone” must be declared for these areas that are important in their own right and also entry points for San Felipe.

#### **h. Linking the Casco to Other Historical Districts—Panama Viejo & Balboa/Canal Areas/Bella Vista & La Exposición**

A major challenge facing the Casco Antiguo is the need to develop connections to other historic areas of Panama City, including the ruins at Old Panama. The World Heritage Committee designated the ruins of Old Panama as a World Heritage Site in 2003.<sup>355</sup> Both sites (Old Panama and the San Felipe Historic District) form the UNESCO World Heritage Site, yet they are not managed together and are separated by a distance of 7.5 km.<sup>356</sup> No promotional or education materials exist that link the two sites despite the history that connects them.

The San Felipe historic district also needs links to the neighborhoods that surround it, including El Chorrillo, Santa Ana, and Calidonia. These are all low income areas that were “extramuros” or outside the walls of the colonial city.<sup>357</sup> They were also the site of rental buildings for Canal workers.<sup>358</sup> The historic district of San Felipe needs a formal “buffer zone” that includes these neighborhoods. Although the “buffer zone” concept was proposed, it was not included in the 1997 or the 2002 legislation.<sup>359</sup> Historical important structures in these areas must also be preserved

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<sup>355</sup> Archaeological Site of Panamá Viejo and Historic District of Panamá, *available at*

[http://whc.unesco.org/en/list/790/multiple=1&unique\\_number=934](http://whc.unesco.org/en/list/790/multiple=1&unique_number=934).

<sup>356</sup> *Id.*

<sup>357</sup> TEJEIRA DAVIS, *supra* note 5, at 24, 47.

<sup>358</sup> *Id.*

<sup>359</sup> See Sections III(d) and III(e) of this manuscript.



and restored, and harmonious links should be developed with San Felipe. Moreover, urban planners must develop synergies between preservation of cultural patrimony in all these neighborhoods and urban renewals efforts.<sup>360</sup>

The neighborhoods of Bella Vista and La Exposición, constructed between 1915 and 1940, drew the elite from San Felipe.<sup>361</sup> They offer many examples of art deco and neo-colonial Mediterranean-style single-family and multi-family structures. However, their architectural heritage is rapidly disappearing today, victim of urban redevelopment, rising property values, and the real estate and development boom that is converting these neighborhoods into high-rise condominium zones.<sup>362</sup> They both lack historic designation, but clearly together with San Felipe, represent the diversity of the architectural patrimony of the city.

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<sup>360</sup> ROJAS, *supra* note 94, at 24.

<sup>361</sup> See Section I of this manuscript. Espino, *supra* note 42 at 18, Rodríguez Ferguson *supra* note 23 at 28-29; TEJEIRA DAVIS, *supra* note 5, at 24, 52.

<sup>362</sup> As the elite left San Felipe during the first half of the 20<sup>th</sup> Century for Bella Vista, it also abandoned Bella Vista and La Exposición for El Cangrejo and Paitilla in the 1960s-1970s. Most of the original neo-classical homes have been converted to apartments or demolished in recent years to make room for modern high-rise buildings. See Panama-The Visitor/El Visitante *supra* note 40. A citizens' group, Alianza Pro Ciudad has been advocating the preservation of Bella Vista's and La Exposición's architectural patrimony. The National Institute of Culture (INAC) declared the Bella Vista corregimiento a "Zone of Cultural Interest" in 2004 via Resolución No. 246 (Nov. 16, 2004). "Por la Cual se Declara un Área del Corregimiento de Bella Vista como Zona de Interés Cultural," Resolución No. 246DG/DAJ de 16 de Noviembre de 2004; Gaceta Oficial No. 25.201 (miércoles 22 de diciembre de 2004). However, this resolution is poorly implemented by the Municipality and the Housing Ministry and is purely precatory. *Restacemos Bella Vista y La Exposición*, ALIANZA PRO CIUDAD, Nov. 29, 2006, at 1-2.

San Felipe should also develop links with nearby Balboa and the "garden city" that was the hub of the U.S. administered Canal Zone. This area also represents a very different model of urban planning that should also be a protected part of Panama's cultural and architectural patrimony.

## VI. Final Thoughts

Panama's Casco Antiguo incentive law (Decree Law No. 9 from 1997) appears to cause a very unique preservation success story in Panama City. The key has been the creation of a public-private partnership which has positive externalities for private investment in the Casco Antiguo. Although it appeared to begin slowly, today, ten years after its approval, most properties have now been sold. Restoration projects have increased significantly in recent years, and a new face is beginning to appear in the Casco Antiguo. Today, about 20% of the total housing inventory has been restored.<sup>363</sup> Besides the legislation creating fiscal incentives, the 1997 designation of the Casco Antiguo Historic District as a UNESCO World Heritage Site has also stimulated restoration activities and provided guidance and security for the restoration process. This designation is also a source of great pride for Panamanians. Panama's early 21<sup>st</sup> Century real estate boom also appears to have spilled over to the Casco Antiguo. Foreign and domestic investors may also consider the Casco Antiguo an alternative type of real estate investment. Real estate values in the historic district today are among the highest in Panama City.

Despite these successes, many challenges still remain to successful preservation of the Casco Antiguo. These include the social issues, the management of traffic and increasing numbers of tourists, and the changing face

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<sup>363</sup> Espino, *supra* note 87.

of this neighborhood that is a symbol for all Panamanians. The dizzying growth of Panama City also presents numerous challenges for San Felipe. Some broader urban development issues in the metropolitan region also may adversely impact San Felipe; for example, the Cinta Costera project (land reclamation project along 3 km of Panama Bay), increasing levels of traffic, and the general urban decay of the adjacent neighborhoods of El Chorrillo, Santa Ana, and Calidonia. Clearly, the Casco Antiguo requires a broad "buffer zone." This isolated pocket of cultural patrimony must be better connected to other nearby areas in Panama City, such as La Exposición and Bella Vista, which lack adequately enforced historic preservation protection and are rapidly being altered and lost with the explosion of high-rise structures.

Restoration changes the nature of the Casco Antiguo from a low-income residential neighborhood to a wealthier community that is increasingly becoming a tourist attraction. Globalization is reaching San Felipe as visitors and residents arrive from all over the world. The old Spanish wall separated the inner settlement ("intramuros") where the elite resided from the lower classes outside the wall ("extramuros").<sup>364</sup> The colonial wall was demolished in the late 19<sup>th</sup> and early 20<sup>th</sup> Centuries.<sup>365</sup> However, it is being replaced with a new invisible wall that separates classes based on property values. Despite this, hope remains that San Felipe will continue to be a vibrant living urban neighborhood which will be home to people who represent the great cultural and social diversity of Panama. Hopefully, in 10 years it will still be possible to purchase a home-made bollo or tamale from the street vendor in San Felipe instead of a frozen one at the local gourmet deli.

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<sup>364</sup> TEJEIRA DAVIS, *supra* note 3, at 58, 59.

<sup>365</sup> TEJEIRA DAVIS, *supra* note 11, at 80, 98.



ESSAY

**"I ENTERED DURING THE DAY, AND CAME OUT DURING  
THE NIGHT": POWER, ENVIRONMENT, AND INDIGENOUS  
PEOPLES IN A GLOBALIZING PANAMA**

*Oswaldo Jordan\**

For months now, the widow has clung to her tiny shack in this picturesque village above the Changuinola River—even when local officials and hydroelectric workers said she must leave, even when a bulldozer roared into her yard in the summer. "I will not go," insists Isabel Becker, 59, a diminutive Ngobe Indian who lives in a dirt-floored home. "If the company wants to send police to kill me, go ahead."<sup>1</sup>

The story of the Ngobe widow Isabel Becker, living in the Province of Bocas del Toro in Northwestern Panama, who entered at mid-day to an unknown business tower in Panama City, and was not able to leave that building until mid-night, may easily be interpreted as yet another of countless cases of local indigenous women being abused by the mighty power of corrupt governments and multinational corporations. For the casual observer, the same plot could be laid out in almost any country in the humid tropics: Indonesia, Malaysia, Nigeria, Brazil or Guatemala. Yet, under the surface of what Paul Farmer (2004) has called the

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<sup>1</sup> Ben Shors, MIAMI HERALD, Oct. 2, 2007.

“ethnographically visible,”<sup>2</sup> we can discover that the drama of Isabel is not simply an archetype of the continuous tragedy of indigenous peoples, but instead a reflection of a complex web of social relations, embedded in and creating of the legal framework of a national state that is simultaneously global and parochial, liberalized and oppressive, the booming Panama of the XXI century without the welfare state that sought for the protection of the Ngobe regime of *de facto* political autonomy in the 1970s.

Under this light, the story of Isabel is not yet another tragedy of any indigenous widow in a Third World country. Instead, the destiny of Isabel is an open-ended question about the place of the Ngobe womb in a globalizing economy, a question that demands a definitive answer from all of those who participate in this continuous struggle for power. In spite of the celebrated legal victories of indigenous peoples in Latin America, the case of Panama reveals a number of disturbing questions about the persistence of colonial relations between indigenous peoples and the descendants of the colonizers. The widow Isabel Becker appears not to have any place in a globalizing Panama of skyscrapers, beach resorts, and expanded waterways.

## I. Changing citizen regimes in Latin America

The end of the Cold War prefigured profound transformations in Latin American societies. With the legacy of a code-based legal system, and what many observers would call the burden of patriarchal, Catholic authoritarianism, every Latin American country, with the possible exception of Cuba, embarked upon a double transition from state-control into market economics, and from top-down authoritarian rule into liberal democracy in the 1990s. Inimical to

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<sup>2</sup> Paul Farmer, *An Anthropology Of Structural Violence*, CURRENT ANTHROPOLOGY 45 (2004), at 305.

this “modernization” of Latin American society was the dismantling of those corporatist structures that maintained an ingrained intertwining of state and society.<sup>3</sup> The marriage between popular organizations and centralized governments, allegedly based on class distinctions, was expected to recede in the wake of free enterprise and equal citizenship. State companies should be disaggregated and sold to private investors who would not only bring new technology and capital investment, but improve efficiency and overall customer satisfaction. In general, the structural (and social) adjustment of the Latin American economies was associated with lifting restrictions against private initiative and individual accomplishment.

In spite of this Washington Consensus that promised citizen equality and personal liberty, many social scientists perceived an unexpected rise of assertive “new” indigenous movements that emerged from the foundations of previous class-based organizations, such as peasant leagues and worker unions.<sup>4</sup> The 1990 Ecuadorian “General Uprising” and the Bolivian “March to La Paz” symbolized the arrival of these new social movements of a postmodern Latin America, the expression of suppressed identities that had been sequestered by leftist guerrillas and Marxist intellectuals many years before.<sup>5</sup> Under this scenario, the legal

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<sup>3</sup> DONNA LEE VAN COTT, *THE FRIENDLY LIQUIDATION OF THE PAST: THE POLITICS OF DIVERSITY IN LATIN AMERICA* 3 (2000); Willem Assies, *Indigenous Peoples and Reform of the State in Latin America*, in *THE CHALLENGE OF DIVERSITY: INDIGENOUS PEOPLES AND THE REFORM OF THE STATE IN LATIN AMERICA* 9-10 (Willem Assies, Gemma van der Haar & Andre Hoekema eds., 2000); DEBORAH YASHAR, *CONTESTING CITIZENSHIP IN LATIN AMERICA: THE RISE OF INDIGENOUS MOVEMENTS AND THE POST LIBERAL CHALLENGE* 65-66 (2005).

<sup>4</sup> Xavier Albo, 9 *El Retorno del Indio Revista Andina* 299-345 (1991).

<sup>5</sup> Kay B. Warren, *Indigenous Movements as a Challenge to the Unified Social Movement Paradigm for Guatemala*, in *CULTURE OF POLITICS, POLITICS OF CULTURE: RE-VISIONING LATIN AMERICAN SOCIAL MOVEMENTS* 165-66 (Sonia Alvarez, Evelina D'Agnino & Arturo Escobar eds., 1998).

recognition of special indigenous rights in several Latin American constitutional reforms—Nicaragua (1987), Brazil (1988), Colombia (1991), Ecuador (1998), Venezuela (1999)—was regarded as a major victory against the legal barriers that separated the descendants of the colonists from those of the colonizers.<sup>6</sup>

These new multicultural citizenship regimes granted special rights to indigenous peoples and Afro-Descendants without compromising the liberal principle of citizen equality and the sovereignty of the State.<sup>7</sup> Special indigenous rights should be acknowledged based on the historical claims of indigenous peoples (and in some cases Afro-descendants). Although not all of the Latin American countries adopted multicultural citizenship regimes, constitutional reforms at the national level were also paralleled by the development of an international regime of indigenous rights, beginning with the enactment of ILO 169 and culminating with the 2007 United Nations Declaration on Indigenous Peoples.<sup>8</sup> Even when national legislation did not explicitly recognize the rights of indigenous peoples, international human rights legislation bolstered their claims for territory and autonomy, as was demonstrated by the decisions adopted by the Inter-American Human Rights Court in favor of the Mayangna of Awas Tingni in Nicaragua and the Saramaka in Surinam. Even the World Bank and the Inter-American Development Bank (IADB), harshly criticized and held responsible for the plight of indigenous peoples in the 1970s, officially recognized indigenous rights and enacted special guidelines for the pro-

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<sup>6</sup> See generally COTT, *supra* note 3; Assies, *supra* note 3; YASHAR, *supra* note 3.

<sup>7</sup> See generally WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995).

<sup>8</sup> *INDIGENOUS PEOPLES AND DEMOCRACY IN LATIN AMERICA* 6-8 (Donna Lee Van Cott ed., 1994); see generally ALLISON BRYSK, *FROM TRIBAL VILLAGE TO GLOBAL VILLAGE: INDIAN RIGHTS AND INTERNATIONAL RELATIONS IN LATIN AMERICA* (2000).



tection of indigenous peoples in their development initiatives.<sup>9</sup> In legal terms, the multicultural revolution had been launched, and the new legislation promised to build a new framework for both citizen equality and cultural tolerance in Latin America.

In spite of the optimism of the 1990s, other social scientists have questioned the extent and the intent of multicultural reforms in the context of neo-liberal government policies.<sup>10</sup> According to Hale, what he called neoliberal multiculturalism is not only an incomplete response to racial discrimination and social exclusion, but may actually hinder the development of more ambitious initiatives, imposing the terms of participation and suppressing the expression of what would be called "extreme" opinions.<sup>11</sup> According to Diaz Polanco, multiculturalism is inimical to the construction of a global empire, in which the other is not only embraced, but refashioned by the forces of global capitalism.<sup>12</sup> As a new dawn of constitutional reforms extends through Latin America, indigenous peoples and their advocates are seriously questioning the capacity of multicultural citizenship regimes to accommodate ethnicity

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<sup>9</sup> See generally JONATHAN A. FOX & L. DAVID BROWN, *THE STRUGGLE FOR ACCOUNTABILITY: WORLD BANK, NGOS, AND GRASSROOTS MOVEMENTS* (1998).

<sup>10</sup> See generally Charles Hale, *Does Multiculturalism menace? Governance, Cultural Rights and the Politics of Identity in Guatemala*, 34 JOURNAL OF LATIN AMERICAN STUDIES 485-524 (2002); Otero Gerardo & Heidi Jugenitz, *Challenging National Borders from Within: The Political-Class Formation of Indigenous Peasants in Latin America*, 40 CANADIAN REVIEW OF SOCIOLOGY AND ANTHROPOLOGY 504-24 (2003); Otero Gerardo, *Global Economy, Local Politics: Indigenous Struggles, Civil Society, and Democracy*, 37 CANADIAN JOURNAL OF POLITICAL SCIENCE 325-47 (2004); HECTOR DIAZ-POLANCO, *EL LABERINTO DE LA IDENTIDAD* 23-56 (2006).

<sup>11</sup> Hale, *supra* note 10, at 485-524.

<sup>12</sup> DIAZ-POLANCO, *supra* note 10, at 23-56 (2006).

beyond the confines of mere cultural difference or what Stanley Fish labeled “boutique multiculturalism.”<sup>13</sup>

## II. Puente del Mundo y Corazon del Universo

Although Panama has never officially recognized multicultural citizenship in the National Constitution, the country has historically been heralded as a pioneer of indigenous political autonomy in Latin America. With no powerful landed oligarchy submitting the native masses to coerced labor, the staunchly Liberal Panamanian merchant elite—the same that wore British outfits in the mid-XIX century—advocated for equal opportunities for whoever capitalized the advantages that were provided by the cosmopolitan inter-oceanic passageway—Jewish, Chinese, Hindu, or Italian immigrants, they would all be welcomed in this land of unfettered opportunities.<sup>14</sup> In this respect, why should Panama be declared multicultural, like Nicaragua or Ecuador, if the country was by its very “nature” open to people of all “races,” faiths, and ideologies? In an intrinsically multicultural Panama, indigenous peoples and Afro-descendants, like European and Asian migrants, would all possess a corner in this crossroads of the world. No other time was this national myth more eloquently expressed than in the heated election for the presidency of the National Assembly in September 1999, when the new fe-

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<sup>13</sup> Stanley Fish, *Boutique Multiculturalism, or Why Liberals are Incapable of Thinking about Hate Speech*, 23 CRITICAL INQUIRY 378-95 (1997).

<sup>14</sup> For a historical account of the development of Liberal cosmopolitanism as a dominant ideology in Panama, see ALFREDO FIGUEROA-NAVARRO, DOMINIO Y SOCIEDAD EN EL PANAMA COLOMBIANO (1821-1903): ESCRUTINIO SOCIOLOGICO 215-22 (Editorial Universitaria 1982); PETER SZOK, LA ULTIMA GAVIOTA: LIBERALISM AND NOSTALGIA IN EARLY TWENTIETH CENTURY PANAMA 13-34 (2001); AIMS MCGUINNESS, PATH OF EMPIRE: PANAMA AND THE CALIFORNIA GOLD RUSH 84-7 (2008).

male President Mireya Moscoso eagerly awaited the results of the election between Afro-descendant Haydee Milanes de Lay from Darien and Kuna indigenous legislator Enrique Garrido from San Blas. Regardless of the final outcome favoring Garrido, Panama had accomplished its ultimate destiny as a country of equal opportunities for people of all racial and ethnic backgrounds.<sup>15</sup>

With such a cohesive national myth, Panamanians have avoided explaining the virulent nationalism of the 1930s; the continued conflict between cattle ranchers and Ngobe indigenous peoples in Western Panama; and the Kuna insurrection of 1925, among other instances of ethnic conflict.<sup>16</sup> In particular, the Kuna insurrection of 1925 has been reinvented to signify the creation of an innovative Panamanian regime of indigenous political autonomy, and not as the violent reaction of indigenous peoples against the imposition of colonial rule by an assertive national state. The armed insurrection of indigenous leader Victoriano Lorenzo between 1899 and 1902 has also been transformed by nationalist writers into a “peasant” struggle against Colombian political domination. In spite of all the historical

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<sup>15</sup> The whole story was revisited by the Panamanian daily *El Siglo* on September 4, 2008. This newspaper reproduced the declarations of Haydee Milanes de Lay just a few days before the primary elections of the Revolutionary Democratic Party (PRD). On September 7, Balbina Herrera, whom Milanes de Lay had accused of bribing her to become the nominee for the presidency of the National Assembly in 1999, received the majority of the party votes to become the PRD presidential candidate for the upcoming general elections in May 2009.

<sup>16</sup> See Francisco Herrera, *The State-Indian Relations in Panama, 1903-1983* 88-89 (Masters Thesis, University of Florida, 1989) (referencing the historical conflict between cattle ranchers and Ngobe indigenous peoples); THOMAS PEARCY, *WE ANSWER ONLY TO GOD: POLITICS AND THE MILITARY IN PANAMA, 1903-1947* 88-89 (1998) (discussing the institutionalization of discriminator practices against West Indians, Middle Easterners, and East Asians); SZOK, *supra* note 14, at 110-14 (2001); JAMES HOWE, *A PEOPLE WHO WOULD NOT KNEEL: PANAMA, THE UNITED STATES, AND THE SAN BLAS KUNA* (1998) (discussing the Kuna Insurrection of 1925).

evidence supporting the claim that ethnic relations have been replete with different levels of political conflict in Panama, the hegemonic discourse of innate multiculturalism has permeated all layers of society, concealing a deeply skewed distribution of income in which indigenous peoples comprise the majority of the poor.

This historical legacy of uneven wealth distribution, that was associated with class, race and ethnicity, began fracturing the Panamanian political system in the 1960s, auguring an increased mobilization of indigenous peoples, peasant leagues, labor unions, student federations, and other popular organizations in the coming years.<sup>17</sup> In 1965, the proclamation of an independent Ngobe republic by the leaders of the Mama Tata revival movement reflected the malaise that plagued the country, only a year after student protestors had been massacred by US armed forces in the Canal Zone.<sup>18</sup> Like Isabel Becker of Charco de La Pava, the Prophet of Mama Tata, Delia Bejarano, was a Ngobe woman who was trying to draw the map of her own destiny. According to anthropologist Guionneau-Sinclair, she had recently left the banana plantations of Pacific Western Panama after many Ngobe labor organizers had been fired by the Chiriqui Land Company, a subsidiary of the United Fruit Company. An isolationist spiritual movement that was at the same time critical of the Ngobe traditions of polygamy, *chicha*<sup>19</sup> drinking and ritualized fighting,<sup>20</sup> Ma-

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<sup>17</sup> GEORGE PRIESTLEY, MILITARY GOVERNMENT AND POPULAR PARTICIPATION IN PANAMA: THE TORRIJOS REGIMES, 1968-1985 21-26 (1986).

<sup>18</sup> FRANCOISE GUIONNEAU-SINCLAIR, MOVIMIENTO PROFETICO E INNOVACION POLITICA ENTRE LOS NGOBE (GUAYMI) DE PANAMA, 1962-1984 74-125 (1988).

<sup>19</sup> The term *chicha* refers to a variety of fermented drinks that are used by indigenous peoples in Latin America.

<sup>20</sup> The Ngobe tradition of ritualized fighting, or *balseria*, was the most important trans-kinship ceremony before the advent of the Mama Tata movement in the 1960s. For a complete ethnography of this cultural

ma Tata called for the separation of the Ngobe from the corruption of Spanish-speaking society. For this reason, this movement sparked the political mobilization of the Ngobe who had been claiming for the legal recognition of their territorial rights during many years. After the unexpected death of the prophet in 1964, and the declaration of an independent Ngobe republic by her followers a few months later, the State response was the dispatch of a National Guard unit to the Ngobe territory under the command of Mayor Omar Torrijos Herrera. Here the official account of Guionneau-Sinclair presented an unexpected turn of events. Mayor Torrijos refused to repress the Ngobe protesters and fostered a dialogue with the indigenous leaders, who eventually decided to recognize Panamanian sovereignty. Had Torrijos not become the "supreme leader" of Panama four years later, the overarching implications of this episode would have probably not only been forgotten, but grossly underestimated.

### III. The Corporatist Legacy of the Torrijos Dictatorship

After an internal quarrel within the National Guard, Omar Torrijos Herrera emerged as the main leader of the so-called 1968 revolutionary process.<sup>21</sup> Like Velasco Alvarado in Peru, Torrijos redefined the contours of the State relations with indigenous peoples.<sup>22</sup> The persistence of indigenous territorial rights was formally recognized in the

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practice, *see* PHILIP YOUNG, *NGAWBE: TRADITION AND CHANGE AMONG THE WESTERN GUAYMI OF PANAMA* 204-12 (1971).

<sup>21</sup> STEVE ROPP, *PANAMANIAN POLITICS: FROM GUARDED NATION TO NATIONAL GUARD* 38-41 (1982); PRIESTLEY, *supra* note 17, at 26-27; WALTER LAFEBER, *THE PANAMA CANAL: THE CRISIS IN HISTORICAL PERSPECTIVE* 125-27 (1989); CARLOS GUEVARA-MANN, *PANAMANIAN MILITARISM: A HISTORICAL INTERPRETATION* 106-09 (1996).

<sup>22</sup> Herrera, *supra* note 16, at 94-99.

1972 Constitution, and the Kuna exception was adopted as a national model of political autonomy. Torrijos committed himself to the creation of *comarcas* for the protection of the collective lands of all indigenous groups in the country. The personal, direct and even occasionally affectionate relations between Torrijos and several of the main indigenous leaders have been recorded in numerous anecdotes of real or imaginary encounters between Torrijos and these ethnic leaders. As controversial of a figure as Torrijos was, both a candidate for the Nobel Peace Prize and at the same time accused of human rights violations; after the 1981 plane crash in which he prematurely died, it would be impossible to decipher his real intentions for developing such a close association with indigenous leaders.

As the head of a military dictatorship, Torrijos was reputed for declaring that he was not with the Left nor with the Right, but with the Panamanian people. As a result, the Torrijos government was composed of the most disparate characters that anybody could ever imagine, from a US educated and later to become Vice-President of the World Bank, Nicolas Ardito Barletta, to some of the most renowned communist intellectuals in the country. The eclecticism of the Torrijos coalition reflected both its intent, and its inherent contradiction. The General tried to create a powerful State that would incorporate all different sectors of society into a common struggle for national liberation and economic development. He came to practice what has been referred as *corporatism* in Latin America, ruling in response to organized groups both created and submissive to the national government. Under this model, the interests of indigenous peoples would be incorporated into state decisions, yet indigenous peoples would never be expected to act independently of government-defined national interests. In this regard, the indigenous, and other corporate interests, would always be considered secondary to the principal goal of recovering the Canal Zone from the control of the United States. In the same token, the Canal Zone

would be visualized as a national public good for the benefit of all Panamanians without any distinctions—the golden cup that was lost for many years and that would produce wealth for the rest of the country.

After the approval of the Panama Canal treaties in 1977, the second phase of the Torrijos government could be implemented, integrating the national territory into a coherent organic entity, in which all groups would contribute and receive benefits from the inter-oceanic passageway.<sup>23</sup> Indigenous peoples were certainly the poorest among all Panamanians, yet their territories were loaded with valuable natural resources that could be harvested for the welfare of the country. Timber, water resources for oil-free energy, and precious metals were all present in the Naso, Ngobe, Kuna, and Embera territories. Loyal to his promise, Torrijos would not demand the indigenous peoples to relinquish their lands using the threat of government repression. Instead, he directed his state bureaucracy towards the formal recognition of indigenous territorial rights through the creation of *comarcas*; yet he also expected that the indigenous peoples would contribute to the wealth of the nation by offering their natural resources. Apparently, Torrijos was not aware of the inherent contradiction of the policies that he was promoting, that once indigenous peoples were empowered and entitled to their lands, they would also be free to make their own decisions about the use of their natural resources, even against the alleged benefit of the rest of the country.

The bargaining approach promoted by the *Dictadura con Carino*<sup>24</sup> of Omar Torrijos led to the signing of the Farallon Accords, in which the Kuna of Bayano ac-

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<sup>23</sup> Herrera, *supra* note 16, at 107; ALAKA WALI, KILOWATTS AND CRISIS: HYDROELECTRIC POWER AND SOCIAL DISLOCATION 16-17 (1989); CHRIS GJORDING, CONDITIONS NOT OF THEIR CHOOSING: THE GUAYMI INDIANS AND MINING MULTINATIONALS IN PANAMA 31-35 (1991).

<sup>24</sup> "Dictatorship with Love"

cepted that their ancestral lands be flooded for the construction of the Bayano hydroelectric project in Eastern Panama.<sup>25</sup> In compensation for this extraordinary sacrifice, the State would provide the Kuna with health facilities and potable water; and would protect the existing forests for the Kuna to maintain their traditional culture and to continue with their subsistence economy. We would never know what the fate would have been of the Torrijos corporatist model of indigenous participation had his author survived into the 1980s; yet the future tensions that would be generated by this regime of corporatist citizenship were subsumed by the spontaneous expression of a Kuna woman during a meeting about the Bayano negotiations: “*Acaso Usted es Dios para prometer tanto*” (Franciso Herrera personal communication). No new indigenous *comarcas* were created during the lifespan of Torrijos, and after his death, all the internal contradictions of his revolutionary movement, and all the disparate forces that had been subtly repressed by his military corporatism emerged with sufficient pressure to confront indigenous peoples against the government bureaucracy of the Revolutionary Democratic Party (PRD).<sup>26</sup>

#### IV. A Struggle for Power: Indigenous Peoples against the Revolutionary Process

After the death of Omar Torrijos, his successors inherited many promises that were difficult to fulfill. Torrijos had committed his government with the Embera, the

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<sup>25</sup> WALI, *supra* note 23, at 81-84; Stephanie Wickstrom, *The Politics of Development in Indigenous Panama*, 30 LATIN AMERICAN PERSPECTIVES 48-49 (2003); Lynn Horton, *Contesting State Multiculturalisms: Indigenous Land Struggles in Eastern Panama*, 38 JOURNAL OF LATIN AMERICAN STUDIES 838-39 (2006).

<sup>26</sup> The Revolutionary Democratic Party, or PRD, was created by Omar Torrijos himself in 1978 as part of the democratic opening that followed the signing of the Panama Canal treaties.



Ngobe, the Bugle and the Naso for the creation of new *comarcas*; yet he had also embarked the country into a course of development that would demand the same land, energy and mining resources that were contained in the indigenous territories.<sup>27</sup> During the first years after the death of Torrijos, the bureaucracy of the Revolutionary Democratic Party (PRD)<sup>28</sup> engaged in simultaneous negotiations with the different indigenous groups for the creation of their *comarcas* and to obtain their approval for development projects. However, government officials soon encountered Ngobe opposition to the construction of hydroelectric projects in Tabasara and Teribe-Changuinola, and to the exploitation of the Cerro Colorado mines, located in the heart of the Ngobe Territory. As negotiations with the Ngobe stalled, the Government was only able to proceed with the creation of the Embera-Wounaan Indigenous Comarca in 1982.

The Ngobe negotiations collapsed in 1983 after unsolvable disagreements about the continuation of the Cerro Colorado mines and the limits of the *comarca* in the Veraguas region.<sup>29</sup> The failure of the negotiations coincided with a period of increasing turmoil in Panama, as the country approximated to the first direct general elections since 1968. General Manuel Antonio Noriega had defeated his main political opponents within the military, and was

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<sup>27</sup> John Bort & Mary Helms (eds.), *Panama in Transition: Local Reactions to Development Policies*. Museum of Anthropology, University of Missouri, Columbia 3-16 (1983); WALL, *supra* note 23, at 16-17; GJORDING, *supra* note 23 at, 31-35.

<sup>28</sup> Although there were high-ranking government officials involved in these negotiations, I have chosen to use the term bureaucracy to refer to all of them, since they were all part of a whole generation of Panamanian civilians who had developed their careers with the support of the military, and who typically occupied different positions in government service until the end of the "revolutionary process" with the US Invasion in 1989. During this entire period, actual political power resided in the hands of the military.

<sup>29</sup> Herrera, *supra* note 16, at 113-15.

prepared for seizing control of the government in favor of his candidate, former head of the World Bank for Latin America, Nicolas Ardito Barletta.<sup>30</sup> In fact, the revolutionary process had continued a decisive movement to the right that started during the last years of Torrijos. In spite of the boisterous populism of the military regime, the Generals were fully aware that Panama would soon have to implement the structural adjustment measures of the Washington Consensus, in order to salvage the indebted economy that they had inherited from the pharaonic projects of the 1970s.

Rather than preparing the stage for a controlled transition to civilian rule, the 1984 elections initiated a period of profound political instability as news spread that the elections had been rigged by the military.<sup>31</sup> Although the first structural adjustment package was eventually defeated when popular mobilizations appealed to the legacy of social conquests bequeathed by the military; the internal quarrel within the rank and files of the PRD further debilitated the legitimacy of the government. Combined with the burden of the debt crisis, this crisis of governance foreclosed any possibility of discussing the issue of the indigenous *comarcas*, and delayed even the promotion of the ambitious national development agenda of the 1970s, that included roads, dams and mining complex. During this period, however, the increasing participation of a new generation of Western-educated indigenous leaders in the ranks and files of the PRD, reinforced the corporatist structures that had been laid out by Torrijos and his leftist supporters – also called *La Tendencia*.<sup>32</sup> As the power of the military was eroded by brutal repression and accusations of corruption, most indigenous leaders remained loyal to the

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<sup>30</sup> LAFEBER, *supra* note 21, at 194-97.

<sup>31</sup> *Id.* at 196-98.

<sup>32</sup> *La Tendencia* referred to a group of PRD members who identified themselves with Marxism-Leninism and other leftist tendencies.

revolutionary process, hoping that the protection of their collective lands would be achieved through the creation of *comarcas*. In spite of all the unresolved controversies about the use of natural resources, these indigenous leaders assumed that the corporatist agenda would be resumed once the crisis with the United States was finally resolved. The onset of the American intervention to oust Noriega in 1989, however, did not lead to a new coalition between the government and indigenous peoples, but instead to a complete reinvention of the Panamanian state along the lines of privatization and individualism. The odds were thrown against the continuation of any form of *de facto* indigenous political autonomy, and in favor of the private exploitation of natural resources by international corporations.

## V. Indigenous Comarcas and Development Projects in the New Liberal Era

The phantom of structural adjustment resurfaced after the US Marines began leaving a war-torn and devastated Panama in 1990. The claims of PRD anti-imperialists were absolutely confirmed as they battled against the economic reform package of the first Minister of Economic Planning of the new democratic period, Guillermo Ford; and against George Bush himself during his infamous visit to Panama City in 1992.<sup>33</sup> Apparently, the party of the people was not willing to sanction the dismantling of the Torrijos legacy of corporatist governance, and was opposed to what they called the return of the oligarchic rule that had dominated the country before the 1960s. In this context, indigenous peoples resumed their political mobilizations,

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<sup>33</sup> See Michael Wines, THE NEW YORK TIMES, June 13, 1992 (noting that George Bush made a stop in Panama on his way to the Earth Summit in Rio de Janeiro. He was greeted by large demonstrations, in which prominent PRD figures protested in the streets against the 1989 U.S. occupation, including presidential candidate for the upcoming 2009 general elections, Balbina Herrera).

once again demanding the legal recognition of their territorial rights. In 1993, the Governor of Panama province was held by the Kuna of Bayano, who claimed for the fulfillment of the Farallon Accords and for the creation of their *comarca* seventeen years after their lands had been flooded by the rise of the Bayano reservoir.<sup>34</sup> Faced with widespread opposition at many different fronts, the postwar government of Guillermo Endara adopted a conservative stance—the implementation of the Washington Consensus would only be advanced until the limits imposed by the political and social instability that had been left in the country by the US military action.

Paradoxically, and reminiscent of similar developments in Peru, Argentina, Bolivia and Mexico in the 1980s and 1990s; the party of the Torrijos Revolution, the PRD, inherited the mission to implement structural adjustment policies, and so they did with unexpected fervor. The new President Ernesto Perez Balladares was commissioned with the daunting task of lifting the PRD out of the ashes of the US invasion. A former banker, minister of economy and Noriega rival, Perez Balladares moved the pendulum away from military corporatism and into what he called the “modernization” of the Panamanian economy. Under the neo-liberal reforms, the promises of Torrijos to the Bayano Kuna were completely buried, as the Bayano Corporation was abolished, public utilities were privatized, and the former Directory of Community Development was eliminated. Even the Ministry of Economic Planning was transformed into the Ministry of Economy, signaling the disappearance of the welfare state of centralized planning and state protagonism in national development.

As a well-educated adherent to neo-liberalism, Perez Balladares, however, understood that private investment required the creation of regulating institutions, like

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<sup>34</sup> Horton, *supra* note 25, at 842-43.

the *Ente Regulador de los Servicios Publicos* (ERSP)<sup>35</sup> and the *Autoridad Nacional del Ambiente* (ANAM),<sup>36</sup> that would ensure free competition, citizen rights and business accountability. These moderating reforms, however, lagged behind the rapid elimination of government-owned corporations. Worried about the future of their collective lands in the midst of the private allocation of natural resources, the Ngobe and the Bayano Kuna increased their mobilization, which ultimately led to the creation of their respective *comarcas* through Law 10 of 1997 and Law 24 of 1996, respectively. How would these autonomous regimes fare in an era of private investment and deregulation?

The creation of the Ngobe-Bugle<sup>37</sup> and the Madungandi<sup>38</sup> *comarcas* during the Perez Balladares administration revealed the contested legacy of the Torrijos corporatist model. The same party that had defended national sovereignty and the incorporation of the marginalized populations in the 1970s had now dismantled public corporations and set the stage for the arrival of new private actors. In compensation for the Torrijos promises, or perhaps as a recourse to demobilize the indigenous population,

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<sup>35</sup> The Ente Regulador de los Servicios Publicos (ERSP), or Public Services Regulatory Entity, was created through Law 26 of 1996 and became responsible for concessioning the provision of national public services like electricity and telephone and for protecting customers against the potential abuses of private corporations.

<sup>36</sup> The Autoridad Nacional del Ambiente (ANAM), or National Environmental Authority, was created by Law 41 of 1998, and became responsible for approving environmental impact assessments, enforcing environmental norms, and granting concessions for the use of natural resources, such as timber and water resources.

<sup>37</sup> The Bugle is a very small indigenous group (<10,000) with strong cultural affinities with the Ngobe. Therefore, they decided to conform a single *comarca* with the Ngobe. A similar request was turned down by another indigenous group, the Naso.

<sup>38</sup> The Bayano Kuna *comarca* was officially denominated *Comarca Indigena Kuna de Madungandi*.

Perez Balladares had paid the historical debt to the Ngobe and the Bayano Kuna with the creation of the *comarcas*. However, his government had also ensured that article 48 of Law 10 of 1997 would limit the autonomy of the Ngobe by denying their right to decide on the use of natural resources; and that article 21 of Law 24 of 1996 guaranteed the user rights of the non-indigenous colonists that had invaded the Kuna lands after the construction of the Bayano hydroelectric project. Instead of receiving an unrestricted support from the party of the Revolution, indigenous leaders were forced to negotiate the terms of their political autonomy; and many indigenous leaders unrelentingly accepted these compromises as members of the PRD government party. Such a contradiction revealed the inherent limitations imposed by the corporatist model of citizenship. In the 1970s, indigenous peoples were considered part of the Revolution and supporters of the anti-colonial struggles intimately associated with the welfare state of Omar Torrijos; yet in the 1990s they would be auctioned to the best bidder during the process of privatization.

The creation of the Kuna Comarca of Wargandi in 2000 by the new presidential administration of Mireya Moscoso (1999-2004), precisely during the congressional presidency of the Kuna legislator Enrique Garrido, marked the epitaph of the alliance between the government and indigenous peoples. In spite of all the implicit references to multiculturalism during the inauguration of Mireya Moscoso, the aspirations of indigenous peoples conflicted with the projections of government officials for economic growth and national development. The development of hydroelectric infrastructure throughout the country, under a new modality of private investment, represented a direct threat to the integrity of indigenous territories and to the worldview of indigenous peoples. The course of collusion of the 1970s had become the road to collision in the 1990s, and the future of Isabel Becker and many other Ngobe widows

would be pending on the unavoidable confrontation between the capitalist logic of a renewed state bureaucracy and the resistance position of indigenous communities. In this process of dissociation, indigenous leaders who had initiated their political careers hands in hands with the Torrijos corporatist model of citizenship would be captured by their double loyalties, exposed and discredited in the face of growing grassroots opposition to the privatization of their indigenous territories.

## VI. The Bonyic Hydroelectric Project and the Unfulfilled Promise of the Naso Comarca

Although the Ngobe and the Bayano Kuna *comarca* negotiations dominated most of the government discussions and media coverage about indigenous issues during the 1980s and 1990s; most Panamanian citizens ignored the existence of another group of distinct indigenous peoples living close to the border between Panama and Costa Rica, the Naso (also called Teribe in Panama and Terraba in Costa Rica). Before the Mizkitu invasions of the XVIII century, the Naso had constituted the most numerous indigenous group living in what today is the Caribbean Province of Bocas del Toro in Northwestern Panama. Their historical territory, and their ferocious resistance against the Spanish colonization, had been avidly recorded by the Franciscan missionaries that had traveled from Costa Rica to evangelize this frontier.<sup>39</sup> Possibly for multiple reasons that have never been properly investigated, the Naso population declined drastically; and their substantial demographic recovery was not possible until the mid-twentieth

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<sup>39</sup> For information about the colonial history of the Naso, see Fernandez-Guardia, Ricardo 1969 *Resena Historica de Talamanca*. Imprenta Nacional, San Jose, Costa Rico; BURTON L. GORDON, A PANAMA FOREST AND SHORE: NATURAL HISTORY AND AMERINDIAN CULTURE IN BOCAS DEL TORO 39-40, 152-57 (Boxwood Press, 1982); Castellero-Calvo *supra* note 14, at 291-310.

century. By that time, the Naso territory had been reduced to encompass only the Lower Teribe and the Upper San San river watersheds in Panama, as well as an isolated community in the Southern Pacific of Costa Rica.<sup>40</sup> The Naso had lost most of their vast historical territory, yet they had been able to maintain their language and their distinct form of political organization—a monarchy.

With such a reduced number of people,<sup>41</sup> and hundreds of kilometers away from Panama City, the Naso enjoyed *de facto* autonomy and absolute control of their ancestral territory during most of the XX century. However, they would eventually be reached by the prolonged arms of the Torrijos Revolution.<sup>42</sup> During the 1970s, the Teribe-Changuinola watershed was identified as the most important national reserve for hydropower generation in the whole country. As a matter of fact, the revolutionary government had planned to develop this area after the completion of the Bayano hydroelectric project. Since the Naso were also demanding legal recognition of their territory, once again Omar Torrijos committed himself personally with King Simeon Santana to grant *comarca* status to the Naso lands.<sup>43</sup> As Panama fell into political and economic chaos after the death of Torrijos, the promise of a Naso *comarca*, as well as the ambitious plans to build a gigantic hydroelectric complex in the Teribe-Changuinola, were left dormant for over a decade. Only after the “economic modernization” of Perez Balladares had begun to appear in the horizon, were the Naso lands brought back to the memory of decision-makers in Panama City. As a matter of fact,

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<sup>40</sup> According to Gordon this group had been relocated by the Franciscan missionaries in what today is the Costa Rican town of Terraba. Gordon, *supra* note 39, at 39.

<sup>41</sup> Today the Naso number around 3,000 people.

<sup>42</sup> Jason Paiement, *The Tiger and the Turbine: Indigenous Rights and Resource Management in the Naso Territory of Panama* 64-66 (2007) (Ph.D. dissertation, McGill University).

<sup>43</sup> Personal communication with Adolfo Villagra.



even before the privatization of the government-owned electric company, *Instituto de Recursos Hidraulicos y Electricificacion* (IRHE), a group of local entrepreneurs had asked the Government of Panama for a concession to construct the first of the dams of the Teribe-Changuinola hydroelectric complex, that would be located on the Bonyic River, a tributary of the Teribe River.

The return of government plans to exploit the Teribe-Changuinola watershed for hydropower generation revived the Naso struggle for the creation of a *comarca*. Since the Naso had previously rejected the proposal of the Ngobe to form a single *comarca*, their collective lands were not included in Law 10 of 1997.<sup>44</sup> This confronted the Naso with the difficult challenge of negotiating a *comarca* of their own with the national government. The political tensions associated with the irruption of external actors in the Naso Territory, from Ngobe colonization to government aid to the advent of the Bonyic Project, had ruptured the traditional political organization, creating a rift between King Cesar Santana and his nephew Luis Tito Santana.<sup>45</sup> After many months of internal disputes, Cesar recognized Tito as the legitimate King. Tito arrived with the promise that he would achieve the ultimate aspiration of the Naso, the recognition of their collective lands as a *comarca*. For this purpose, Tito recurred to the remnants of the corporatist governing structures that had been left by Torrijos, perhaps unaware than in this new period of neo-liberal multiculturalism, the interests of indigenous peoples would be completely secondary to private investment and national economic growth.

In 2001, the World Bank approved a loan contract with the Government of Panama for a countrywide landti-

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<sup>44</sup> Personal communication with Jose Cruz Monico.

<sup>45</sup> Paiement, *supra* note 42, at 133-35.

tling program.<sup>46</sup> The Land Administration Program (PRO-NAT) involved the delimitation and demarcation of indigenous lands and protected areas, as a corrective measure to avoid the privatization of these collective areas by the voracious land market. The World Bank contractors and associated government bureaucrats expected that the protection of the Naso lands would proceed uneventfully, without any major hurdles. In fact, in 2003 the limits of the Naso lands had already been identified and mostly agreed upon by the Bank consultants, government officials, and Naso authorities. A few months later, draft legislation would be proposed to the National Assembly for the declaration of the Naso Tjer-Di Indigenous Comarca. Had unexpected events never occurred, the Naso lands would have probably been declared a *comarca* during the presidential administration of Mireya Moscoso, like had previously happened with the Wargandi Kuna Comarca in 2000. However, the unanticipated purchase of the Bonyic concession by the Empresas Publicas de Medellin (EEPPM), a Colombian utilities company, once again destabilized the Naso traditional governance structures, and in this case, led to a crisis of representation that would be much more pronounced, prolonged, and vicious than any previous conflicts in the Teribe River.

In November 2003, several members of the Naso Council<sup>47</sup> declared that they were opposed to the construction of the Bonyic Project without the creation of the *Comarca*, and accused King Tito Santana of having been

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<sup>46</sup> Project Information Document No. PID8082. Panama—Land Administration Project (PAPE 0595) ([www.worldbank.org](http://www.worldbank.org)).

<sup>47</sup> Besides the King, the traditional Naso governance structure is formed by the Naso Council and the Naso Assembly. The Council is a special deliberative and advisory body composed of representatives of the eleven official Naso communities. The Assembly is considered the highest decision-making body, and is formed by all the Naso people who are considered adults according to Naso traditional norms.

bribed by the hydroelectric company.<sup>48</sup> Initially, the Naso tried to solve this controversy internally, and in February 2004, the different factions had agreed to form an ad hoc commission to examine the questions of the Comarca and of the hydroelectric project. Unfortunately, King Tito decided to ignore this agreement, and a few weeks later, he removed the President of the Naso Council, Adolfo Vil-lagra, and several other prominent Naso leaders from the ad hoc commission. In response, on May 30, the dissenting group called for a Naso General Assembly, and announced the overthrow of King Tito Santana, proclaiming his uncle Valentin Santana as the new King of the Naso. These events occurred only a few weeks after Martin Torrijos, the son of former General Omar Torrijos Herrera, had been elected as the new President of Panama. Even before the official transfer of power, however, in June 2004, the National Assembly voted against the law project that created the Naso Comarca. This congressional decision signaled a reversal of the previous government policy of protecting indigenous *comarca* lands, and suggested that the historical alliance between the government and indigenous peoples was finally over.

In spite of the negative signs given by the National Assembly during the last days of the Moscoso administration, the election of another Torrijos as President raised incredible expectations among the Naso and many other indigenous peoples around the country. Before the transfer of power, the Naso held talks with indigenous leaders associated with the PRD and even agreed on the designation of the new Director of Indigenous Affairs of the Ministry of Government and Justice.<sup>49</sup> In addition, a few weeks before the swearing of the new national government on September 1st, the supporters of both Tito and Valentin Santana agreed on holding elections within the Naso community to

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<sup>48</sup> Paiement, *supra* note 42, at 135-43.

<sup>49</sup> Personal communication with Felix Sanchez.

solve the existing crisis of legitimacy. They expected that the new PRD authorities would certify the winner of these elections, a mechanism that had proven successful during the previous controversy between Cesar and Tito Santana.

During the first months of the Torrijos administration, the followers of Valentin Santana invited the national authorities to mediate in the Naso governing crisis.<sup>50</sup> As opposed to the very personal style of the late Omar Torrijos, these communications were never responded by the PRD bureaucracy. The supporters of Valentin Santana did not actually realize that the new administration had thrown its lots in favor of Tito Santana and the Colombian company until the month of December. Then, the Deputy Minister of Commerce, and the Deputy Minister of Government and Justice, both participated in a public ceremony in the town of Changuinola to sign the compensation agreement between Tito Santana and EEPPM for the construction of the Bonyic Project. Confronted with such a betrayal by the same PRD party that they had trusted for several decades, the Naso leaders reclaimed their *de facto* autonomy regime, and forcefully expelled Tito Santana from the Naso Territory on January 5, 2005.

During the next months, government officials from the Ministry of Government and Justice finally began organizing elections within the Naso Territory.<sup>51</sup> However, these conversations stalled over the specific provisions of the electoral statute. Whereas supporters of Valentin Santana demanded the use of the same rules that had governed the election of Tito Santana, government bureaucrats insisted on the implementation of a new statute that would prevent several supporters of Valentin from participating in the elections, particularly young people under eighteen years. When no agreement was reached after several weeks of negotiations, the supporters of Valentin Santana decided

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<sup>50</sup> *Id.*; Paiement, *supra* note 42, at 151-52.

<sup>51</sup> Paiement, *supra* note 42, at 156-59.

to boycott the elections since they considered that these elections were in violation of Naso customary law (*usos y costumbres*). As a result, on April 3rd, Tito Santana was reelected as King of the Naso running as a sole candidate, although with less than half of the voting population that was included in the electoral list that had provoked the controversy.

Since the elections did not solve, but aggravated the Naso conflict, the contours of the neo-liberal multicultural State that had replaced the Torrijos corporatist model finally became entirely visible. When the followers of Tito Santana tried to occupy the Naso government headquarters in the community of Siey Llik, around twenty heavily armed police units were dispatched into the Teribe River by the national government to uphold this operation.<sup>52</sup> Reminiscent of Omar Torrijos Herrera forty years before, the police officer that was responsible for the armed contingent decided to dialogue with the Naso leaders and refused to forcibly evict the supporters of Valentin from the Naso government seat. As a result, the official inauguration of Tito Santana occurred in the backyard of a house located along the Teribe River, after which the “King,” his Council and the accompanying government delegation all traveled back to his place of exile outside the Naso Territory. Although the Police had refused to exercise the state monopoly over the legitimate use of force, the neo-liberal multicultural State of the 2000s had demonstrated that in this struggle for power, the government was not willing to tolerate those indigenous leaders who challenged the sovereignty of the State, and instead would support leaders like Tito Santana who were subservient to the demands of international capital and government-defined national interests.

Although the supporters of Valentin Santana had appealed to those regulatory institutions that had been es-

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<sup>52</sup> Paiement, *supra* note 42, at 160-62.

tablished by the Perez Balladares administration as formal mechanisms to defend citizen rights within a neo-liberal state model; neither the Ombudsman Office nor the Public Services Regulatory Entity (ERSP) nor the National Environmental Authority (ANAM) were capable of representing the interests of the Naso as if they were equal citizens within a neo-liberal State, let alone protecting any special minority rights within a multicultural framework. The Ombudsman Office visited the Naso Territory and provided assistance for the peaceful resolution of the conflict during early 2004; yet when the controversy escalated, this Office did not have any effective means to protect citizen rights and/or special minority rights. The ERSP, that was created with the purpose of regulating public utilities, did not have any mandate to mediate in conflicts between private companies and people affected by development projects. And finally, the National Environmental Authority (ANAM) that could have rejected the Environmental Impact Assessment of the Bonyic Project, that was planned to be constructed within the Palo Seco protected area,<sup>53</sup> preferred to ignore the demands of the hundreds of Naso who traveled to the town of Changuinola to participate in the public hearing of the Project in June 2005. As the State no longer provided the corporatist means of participation that characterized the former Torrijos period; and yet did not implement neither equal citizen rights (neo-liberal) nor special indigenous rights (multicultural); the Naso leaders threatened to renounce en masse to the party that they had supported for so many years, the Revolutionary Democratic

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<sup>53</sup> The Naso Territory overlaps with two nationally protected areas, the Palo Seco Forest Preserve and the La Amistad International Park (PI-LA). Both of these areas are part of the internationally-recognized La Amistad Biosphere Reserve. The Bonyic hydroelectric project was planned to be constructed within the boundaries of Palo Seco, and according to environmentalists, this Project would also affect the ecosystems of the La Amistad International Park, which is also a UNESCO World Heritage Site.

Party (PRD) of General Omar Torrijos and of his son, current President Martin Torrijos.

In 2005, the Naso expressed their opposition to the imposition of a King and of a hydroelectric project by the same neo-liberal multicultural State that had rejected the creation of their *comarca* a year before. This tense situation could have escalated into more direct and serious confrontations had the international regime of multicultural citizenship rights not intervened to stifle the conflict. In July, and after several months of discussions, the Private Sector of the Inter-American Development Bank (IDB) decided to stop considering for financing the Bonyic Hydroelectric Project.<sup>54</sup> The withdrawal of the Bank represented an unforeseen victory for the followers of Valentin Santana, and an unanticipated defeat for Tito, the national government and the Colombian company.<sup>55</sup> Facing an unresponsive neo-liberal multicultural State, the Naso had sought for accountability and the recognition of their special rights as indigenous peoples at the international level.<sup>56</sup> As the Ngobe widow Isabel Becker inadvertently continued tendering her cacao groves, the dark cloud that was looming over the heads of the last surviving Naso migrated northeast to the Ngobe Territory in the neighboring Changuinola River. As the thrust of capitalist development forbade the explicit recognition of the Naso *de facto* regime of political autonomy; the Ngobe, who had successfully

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<sup>54</sup> Letter from Robert Montgomery of the Inter-American Development Bank (IADB) to Osvaldo Jordan (Alianza para la Conservacion y el Desarrollo), Aaron Goldzimer (Environmental Defense), and Jose Yunis (Natural Resources Defense Council).

<sup>55</sup> Paiement, *supra* note 42, at 163-67.

<sup>56</sup> For a general discussion about transnational advocacy networks, see MARGARET KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998); for a discussion of the special policies of international banks towards indigenous peoples and environmental conservation, see also FOX & BROWN, *supra* note 8, BRYSK, *supra* note 8 (for current discussions about the internationalization of indigenous struggles).

mobilized against the Teribe-Changuinola hydroelectric complex in the early 1980s and had been granted their *comarca* status in 1997, were expected to pay back for this favor to the successors of Omar Torrijos.

## VII. Teribe-Changuinola ten years after the Comarca: Redefining the Ngobe Struggle for Territorial Rights

"We are against the neocolonialism of the transnational corporations that try to destabilize politically and create complications in the economic life of the country, when they are confronted with the legitimate demands of the Sovereign in defense of its natural resources,"<sup>57</sup>

According to an unofficial story told repeatedly by Ngobe grassroots leaders, the Ngobe of Valle de Risco in the District of Changuinola rejected the proposal to belong to the Ngobe-Bugle Indigenous Comarca when Law 10 of 1997 was finally drafted by the Perez Balladares administration. The position of the Ngobe of Valle de Risco angered many of the other Ngobe leaders that were struggling for their territorial rights, yet Valle de Risco and several other communities in the Changuinola and Bocas del Toro districts in the Province of Bocas del Toro were granted a special status as annex areas of the Comarca.<sup>58</sup> In spite of the decision allegedly made by the inhabitants of Valle de Risco and of the other annex areas to part away from the rest of the Ngobe people, several Changuinola leaders have occupied very prominent positions in the now institutional-

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<sup>57</sup> Omar Torrijos Herrera, *Respuestas a Garcia Marquez*, Ediciones, Reforma Educativa, Panama (1975) (cited in Jose de Jesus Martinez, *Ideario Omar Torrijos*, 113 (Osvaldo Jordan trans., Editorial Universitaria Centroamericana. 1982)).

<sup>58</sup> Law 10 of 1997, Article 4; Law 69 of 1998, Article 8; Executive Decree 194 of 1999, Articles 12-14.



ized Ngobe-Bugle governing structure.<sup>59</sup> Loyal to the legacy of Omar Torrijos, most of them were members of the PRD; and like the Naso of the neighboring Teribe watershed, they also expected that the government of Martin Torrijos would favor the interests of indigenous peoples, as was vociferously proclaimed by his father and by other important PRD figures in the Province of Bocas del Toro. As a matter of fact, shortly after the transfer of power, several Ngobe leaders of Changuinola were assigned to key positions in the regional government bureaucracy, including the regional administrator of ANAM, Ngobe leader Valentin Pineda from Valle de Risco.

When a small company, Hydroteribe, S. A., organized the public hearings for the environmental impact assessments (EIAs) of three hydroelectric projects proposed in the main stem of the Changuinola River in the vicinity of Valle de Risco (Chan 75, Chan 140 and Chan 220); the Ngobe leadership was confronted with the same conflict of interests that had haunted a whole generation of indigenous leaders after the approval of Law 10 of 1997. Most of the people directly affected by the projects, including the Ngobe widow Isabel Becker, never attended the public hearings, and were completely unaware of the implications of these projects that were presented by *chui* who spoke the language of the Conquest.<sup>60</sup> Another group of more politically active Ngobe leaders had already organized gatherings to oppose the projects since October 2004. Yet, there was also a critical sector of the Ngobe leadership that remained committed to what was sold as a “state” project, and who envisioned the benefits that would be provided for

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<sup>59</sup> Law 10 of 1997 provided for the creation of several official positions at the Comarca level, such as the Governor, caciques, congress presidents and council coordinators. Besides, international cooperation also produced important salaried positions that were usually occupied by Ngobe with strong political connections.

<sup>60</sup> The word *chui* refers to non-indigenous people, especially mixed-blood *mestizos*.

“the poor” by such an outpour of financial investment. Regardless of these internal divisions, the three hydroelectric projects appeared to be a fantasy until ANAM approved the EIAs in October 2005. A few months later, a major North American corporation, Allied Energy Services (AES) from Arlington, Virginia, would claim ownership of the three hydroelectric projects, and would walk hand in hand with government officials, including Ngobe leaders, to promise benefits that would surpass any of the early utopias of General Omar Torrijos.

From the beginning, the Changuinola projects suffered from a pathology that would only be imaginable in the context of the persistent memory of Omar Torrijos among the indigenous population: They were sold simultaneously as government-sponsored state projects in the same corporatist tradition of the 1970s, but also as private initiatives originating from neo-liberal economic modernization. As the former category, the projects should be supported wholeheartedly by the government bureaucracy, including the Ngobe leaders, and by the local communities, in the same way that the Kuna and the Embera had relinquished their ancestral lands for the welfare of the nation during the construction of Bayano Project in the 1970s. However, as purely private initiatives, the State was not responsible for any compensations or liability negotiations, and government institutions would only be limited to a minimal regulation of private corporations according to the Perez Balladares institutional reforms of the mid-1990s. As AES moved decisively into the Changuinola River, and visited the Ngobe communities with gifts and monetary offerings of all sorts, many of the indigenous leaders that were previously opposed to the hydroelectric projects began working for the Company; or receiving contracts for their lands, their houses, and other kinds of services. The internal division of the Ngobe population reached its zenith in the Valle de Risco gathering of May 2006, in which those who supported the hydroelectric projects were denied the opportu-

nity to participate in the meeting by those who opposed hydroelectric development.<sup>61</sup>

The Valle Risco gathering also marked the irruption of the neo-liberal multicultural State into the Changuinola conflict. In this meeting, the people opposed to the projects announced a series of demonstrations in the dam sites (including Bonyic) on June 5, World Environment Day. A few days before this date, however, the Government deployed police forces all around the Changuinola District, searching for specific Naso and Ngobe leaders; and cordoned off the entrances to the communities of Valle de Risco and Nance de Risco to control access to the dam sites.<sup>62</sup> Although these government abuses were denounced to the Ombudsman Office, there has never been any official pronouncement about these irregular activities. During the coming months, AES began negotiating individually the relocations for an estimated 100 families that would be “directly” affected by the Chan 75 reservoir, without the official participation of any government institution.<sup>63</sup> However, local government officials, including several Ngobe leaders, participated in the public events organized by the Company, signaling that the projects had the blessing of the government as if they were state business.

According to Isabel Becker, on January 3, 2007, she and several of her family members were transported by AES representatives to Panama City for a tour of the capi-

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<sup>61</sup> Officially, the Valle Risco meeting was also expected to be attended by Naso and Bribri leaders, and was therefore called Naso-Ngobe-Bribri Congress. The Bribri is a different ethnic group that also lives in the Changuinola District between the Naso Territory and the Costa Rican border.

<sup>62</sup> Personal communication with Felix Sanchez and Pedro Abrego.

<sup>63</sup> The ANAM resolutions approving the environmental impact assessments for the three projects established that Chan 75 should be constructed before Chan 140 and Chan 220. The number of people affected by the Chan 75 project has never been officially determined, and AES only takes into consideration the communities of Changuinola Arriba, Guayabal, Valle Rey, and Charco de La Pava.

tal. After some shopping in the morning, however, they were all taken to the headquarters of AES, where the widow Isabel, who does not speak Spanish and does not know how to read and write in any language, was asked to sign an agreement conceding her lands to the hydroelectric company. As Isabel struggled against her inevitable destiny, many hours passed before she finally accepted to print her thumb into a document that she could not understand. Many days later, Isabel would refuse to abide to this agreement, when AES employees insisted that she needed to leave her place for safety reasons. During this prolonged stalemate, no government institution assumed any responsibility for the plight of Isabel, as well as of hundreds of other Ngobe who were being pressured to renounce to their land rights; not even the regional head of ANAM, Valentin Pineda, who supervised the nationally protected area in which Isabel lived and where the hydroelectric project was planned to be constructed.<sup>64</sup> Ironically, according to several community leaders, the Palo Seco Forest Preserve was the main reason that most Ngobe of the Changuinola River Watershed had been denied the opportunity to register their land rights years before. They had been told that they were living within a protected area.

The drama of Isabel grew increasingly tense, as the company maintained that she had to leave her property. Changuinola Mayor, Virginia Abrego, also an Ngobe, intervened in the controversy, at some point even holding Isabel against her will in her "new house" in the town of

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<sup>64</sup> The Chan 75, Chan 140 and Chan 220 hydroelectric projects are also located in the Palo Seco Forest Preserve. Like in Bonyic, environmental organizations argue that these projects will not only affect this reserve, but the La Amistad International Park (PILA), a World Heritage Site that protects the headwaters of the Changuinola River. In spite of this argument, in May 2007, ANAM signed a contract with AES granting an administrative concession of 6,215 Hectares of the Palo Seco Forest for the construction of the Chan 75 hydroelectric project.

Changuinola.<sup>65</sup> Between July and October, many other government officials visited the widow, claiming that they represented the government and that Chan 75 needed to be constructed for her own welfare and for that of the rest of the country. In contrast with the Kuna and the Embera during the Torrijos years, no community meetings were ever held to discuss the relocation plans, and no public negotiations ever occurred between the government and the affected communities.<sup>66</sup> The Ombudsman Office did visit the area in several occasions, but never took any commitment to act on behalf of Isabel or of any other of the Ngobe residents of the Changuinola River. The Ombudsman officials withheld the claims of the Company that this was an entirely private transaction between an illiterate Ngobe widow, who did not speak Spanish, and a multinational corporation based in the vicinity of Washington, D. C. After many months of continued harassment and of unrelenting suffering, on October 19, Isabel finally accepted to print her thumb into a new agreement that like the previous document, she did not understand. Less than a week later, she would be escorted away from her farm by the National Police, while AES executives and government officials gloriously celebrated the inauguration of the construction of the Chan 75 project in a nearby location. On October 19, the National Public Services Authority (ASEP), the

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<sup>65</sup> That same day, July 21, 2007, a bulldozer had stormed into Isabel's property. From the impression, she had fainted, and municipal authorities had taken her to the town of Changuinola supposedly for medical attention. After she left the physician, she was carried to a house in the outskirts of Changuinola that had been acquired by AES for her temporary relocation. After crying for the whole night, she was finally taken back to her house in the Changuinola River on the following day.

<sup>66</sup> The ANAM meetings held in August and November 2007 limited themselves to presenting the relocation plans that had been proposed by AES and allegedly revised by ANAM. The Company always maintained that compensation agreements should be negotiated individually, and not collectively. *See* Cultural Survival Quarterly, Winter 2007 (detailing a complete report about the November meeting).

successor of the Public Services Regulatory Entity (ERSP), had issued resolution AN 1228-Elec, declaring the Changuinola projects of public and social interest.<sup>67</sup>

In contrast with the Naso relentless opposition to the same governing party that had allied itself with indigenous peoples in the 1970s, the Ngobe leadership had succumbed to a combination of government offerings, private enticements, and direct coercion. The same government that had promised to protect the indigenous lands as *comarcas* under the Torrijos model of corporatist citizenship had now demanded the continued loyalty of indigenous peoples, even when government officials negotiated their collective lands with private corporations. The Chan 75 hydroelectric project, and the tragedy of Isabel Becker, revealed the monstrosity of the neo-liberal multicultural citizenship regime that had been adopted by the Panamanian State in the 1990s. Special indigenous rights and universal human rights would only be respected in the boutique fashion described by Stanley Fish (1997). Indigenous peoples would indeed make excellent characters for postcards and multicultural displays. Yet, confronted with the contradictory national/private interest of business and government, the institutional mechanisms established by Perez Balladares to regulate private investment and protect citizen rights would be rendered completely ineffective, and the collective land rights of indigenous peoples would have to be relinquished peacefully to the lures of money, or forcibly to the batons of the National Police.

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<sup>67</sup> Law 10 of 2006 had restructured the Public Services Regulatory Entity (ERSP) into the National Public Services Authority (ASEP).

### VIII. Rolling back the State: Neo-liberal Multicultural Citizenship and the Disempowerment of Indigenous Peoples in Globalizing Panama

The cases of the Naso and of the Ngobe of Western Panama illustrate the profound transformations that have been happening in the relations between indigenous peoples and national governments after the process of neo-liberal state reform and structural adjustment. For many authors, these dislocations provided an impetus for the increasing mobilization of indigenous peoples in the 1990s, and for constitutional reforms that incorporated notions of multicultural citizenship.<sup>68</sup> In spite of the significance of a “politics of recognition,” however, the adoption of models of neo-liberal multicultural citizenship ultimately concealed the power inequalities that existed between indigenous peoples and other political actors, like multinational corporations.<sup>69</sup> Such a deceiving attempt at recognizing without empowering can be complicated by two aggravating situations that proved tragic in the two cases described above. First, the symbolic persistence of notions of corporatist citizenship even during those situations in which the legal framework and the political praxis denounced the existence of a completely different playing field, the transition from the welfare state of the 1970s to the neo-liberal regimes of the 1990s. Initially, the Naso tried to recur to the corporatist structures of the 1970s, but when they felt betrayed by the PRD government, they reclaimed the *de facto* regime of political autonomy that had allowed them to survive through centuries of ethnic wars, Catholic evangelization, and the encroachment of international capitalism. In con-

<sup>68</sup> COTT, *supra* note 3, at 1-35 (2000); Assies, *supra* note 3, at 9-16; YASHAR, *supra* note 3, at 54-82 (2005).

<sup>69</sup> See generally Hale, *supra* note 10, at 485-524 (2002); Gerardo Otero, *Global Economy, Local Politics: Indigenous Struggles, Civil Society, and Democracy*, CANADIAN JOURNAL OF POLITICAL SCIENCE 37 (2): 325-347 (2004); DIAZ-POLANCO, *supra* note 10, at 32-56.

trast, the Ngobe leaders of the District of Changuinola preferred to ally with the governing party, even when that implied abandoning a grandmother like Isabel Becker, leaving her alone to fight against forces that she could not even comprehend.

In addition to the persistence of corporatist loyalties, the collapse of those institutions that had been created by the neo-liberal state to equilibrate the power of business and citizens left indigenous peoples vulnerable to the temptations of capitalism and to the violence of a State that was simultaneously absent and omnipresent. The dispatch of police forces to the Naso Territory was only the prelude to the outright occupation of the neighboring Ngobe Territory a year later. Whereas state officials did not acknowledge any responsibility in the process of relocation of Chan 75, they actively participated in the siege of Isabel Becker, arguing that the project was important for her own benefit and for that of the "nation." The Office of the Ombudsman proved completely ineffective in both cases. The National Environmental Authority (ANAM) essentially delivered the management of the Palo Seco Forest Preserve to AES, and ignored the claims of the hundreds of Naso who traveled to the town of Changuinola to express their opposition against the construction of the Bonyic hydroelectric project in 2005. The Public Services Regulatory Entity (ERSP) never intervened on behalf of the people affected by the hydroelectric projects, and instead issued a resolution upholding the continuation of the Chan 75 project even after the case of Isabel Becker had become known in the media nationally and internationally.

In Panama, the prospects for indigenous peoples under a neo-liberal multicultural citizenship regime are completely dismal. Not only are the corporatist mechanisms of popular participation of the former Torrijos years no longer available, but in these times of a new and younger Torrijos, indigenous peoples have also been denied the possibility of equal citizenship rights or of special multicult-



tural provisions beyond the mere recognition of cultural difference and boutique expressions of uniqueness. Under these circumstances, indigenous peoples were only left with the collective titles that they had obtained during the period of corporatist citizenship, with the uncertain possibility of reaching to the international regime of multicultural citizenship, or with the alternative of recurring to their pre-existing regimes of *de facto* political autonomy. Yet, even these persistent spaces of autonomy are also increasingly under siege as the tentacles of private business and government bureaucracies extend into the *comarca* lands themselves.<sup>70</sup> The Naso decided to reclaim their *de facto* political autonomy in January 2005, following the examples of the Lacandon Mayas in 1994, the Ngobe in 1964, and the Kunas in 1925. Yet, the question still remains of how long would the neo-liberal multicultural State tolerate these challenges to its purported national sovereignty, and when would they respond using what Weber avidly defined as the monopoly over the legitimate use of force. Isabel Becker did not wait for this dreadful moment, and walking over the footprints of millions of indigenous women in countless places and endless times in history, she chose a dignifying exit of her beloved homeland, as opposed to the stoic voicing of her complains, or the humiliating loyalty of the Ngobe bureaucrats of the governing party. Since there is no place for her in the Panama of skyscrapers, beach resorts and expanded waterways, she would rather abandon her lands than betraying her ancestors for the rewards of private payoffs or government positions.

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<sup>70</sup> In 2006, a group of North American speculators obtained a concession over the whole Caribbean Coast of the Ngobe-Bugle Indigenous Comarca. As the Damani Beach Project created divisions even among those Ngobe leaders loyal to the PRD, this dreadful precedent sent warning signs that indigenous collective lands were not safe even within the limits of the *comarcas*.

## Epilogue

In November 2007, seven Naso protestors were detained in the Teribe River as they blockaded the advance of the machinery of the Empresas Publicas de Medellin (EPPM). The Company had obtained financing for the continuation of the Bonyic hydroelectric project, yet the Naso continued defending their *de facto* regime of political autonomy. In February 2008, seven other people were taken to jail for the same reason, and between April and September, there were several violent confrontations between the followers of Tito Santana and Valentin Santana over the continuation of the Bonyic Project.

In December 2007, hundreds of Ngobe protestors occupied the property that had belonged to the Ngobe widow Isabel Becker to stall the continuation of the Chan 75 hydroelectric project. On January 3, they were violently repressed by the National Police that persecuted protest organizers into the neighboring communities and in the mountains of the La Amistad Biosphere Reserve. After that date, the Chan 75 area has been permanently occupied by the Police, controlling access to the communities and escorting AES machinery to work on any Ngobe family property, even against the will of the rightful owners of that land. On March 7, 2008, Alianza para la Conservacion y el Desarrollo (ACD) and Cultural Survival presented a petition to the Inter-American Human Rights Commission (IAHRC) for the protection of the human rights of the Ngobe population of the Changuinola River. As this paper was finished, AES continued building the hydroelectric project a few meters away and against the opposition of the Ngobe residents of Charco de La Pava. When an AES employee asked Ana Castillo, the only daughter of Isabel Becker to have remained in the community, to leave her house, she said that “she did not want money, but to live in

her land, that her grandparents had lived in these lands, that she will never go and that she will always protect her house.”<sup>71</sup>

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<sup>71</sup> Declarations of Ana Castillo taken by human rights lawyer Karine Rinaldi between September 27-28, 2008.



STUDENT ESSAY

**OUT WITH THE OLD IN WITH THE NEW: HOUSING ISSUES  
FOR THE MIDDLE-CLASS IN PANAMA CITY, PANAMA**

*Eric J. D. Rogers\**

**Introduction**

Panama City is currently experiencing unprecedented growth in all sectors of its economy.<sup>1</sup> An abundance of foreign investment, coupled with a stable socio-political environment, and several large infrastructure investments by the Panamanian government, created a boom of economic expansion in Panama's capital city.<sup>2</sup> This recent surge in enterprise has led to several societal benefits, including growth in the middle-class and an influx in employment.<sup>3</sup> However, as with most economic upheavals, this recent surge is not without negative repercussions. In the twentieth century, housing shortages plagued Panama. Exacerbated by the current economic trend, these housing shortages are likely to continue into the twenty-first century.

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<sup>1</sup> CIA WORLD FACTBOOK, PANAMA, <https://www.cia.gov/library/publications/the-world-factbook/geos/pm.html> (last visited Mar. 26, 2008).

<sup>2</sup> Lourdes Garcia-Navarro, *Panama's Exploding Economy Attracts Investors* (NPR radio broadcast, July 21, 2007) available at <http://www.npr.org/templates/story/story.php?storyID=12043743>.

<sup>3</sup> See *infra* text accompanying note 23.

Despite the fact that many prosperous societies have large and stable middle-classes,<sup>4</sup> the middle-class is often a forgotten segment in an economic analysis.

Despite this growth, one of the biggest problems, facing even middle-class Panamanians, is the inability to maintain adequate housing. This inability to maintain adequate housing leads to increased costs of living, not only from the higher costs of attaining needed resources, but also due to the necessity of renting. These extra costs prevent the middle-class from obtaining valuable assets, both material and financial.<sup>5</sup> The inability to procure assets thwarts the middle-classes ability to obtaining capital, which is the key to upward mobility in a capitalist economy.<sup>6</sup>

Housing shortages are not merely a lower-class problem in Panama.<sup>7</sup> With the influx of hundreds of construction projects, as well as foreign residents from the United States, Canada, Europe and elsewhere, there simply is not enough affordable housing for working middle-class Panamanians. The average income in Panama in 2006 was \$4,890.<sup>8</sup> As a result, middle-class Panamanians are forced outside of Panama City into growing developments of charmless, simple houses dotting the outskirts of the city. As Panama's expansion continues, even these housing options dwindle. The only alternatives left are to join the

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<sup>4</sup> Andrés Solimano, *Asset Accumulation by the Middle-class and the Poor in Latin America: Political Economy and Governance Dimensions* 8 (Macroeconomía del Desarrollo Series No. 55, 2007).

<sup>5</sup> *Id.* at 13.

<sup>6</sup> HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 49, 51 (2000).

<sup>7</sup> Tiffany Williams, *The Ties that Bind: Capitalizing on the Existing Social Fabric in Public Housing to Revitalize Neighborhoods and Avoid Displacement in Panama City, Panama*.

<sup>8</sup> Panama Data Profile,

<http://devdata.worldbank.org/external/CPPProfile.asp?PTYPE=CP&CCODE=PAN> (select "Panama" from dropdown list).

informal housing sector by constructing a home even further outside the city or to rent.<sup>9</sup>

To some, housing is merely a shelter, but to others, housing is more than that.<sup>10</sup> Housing affects a society in many different ways: from the economy, to the social fabric of society, to the political stability of a country,<sup>11</sup> housing has a wide net of impact. This impact comes from housings influence on everything, from social cohesion and stability, to asset valuation, employment, and wealth.<sup>12</sup>

The lack of adequate title to property, for example, is a problem for those who choose to build their own homes.<sup>13</sup> Without a stake in the property, a homeowner's ability to use his or her house as an asset is hindered, causing this investment to become nothing more than a temporary shelter. Renters face similar problems. Because the percentage of their income spent on housing increases, renters see little to no return on their investment. These effects of Panama's housing shortage prevent the middle-class from translating wages into investments. During times of prosperity renters remain stagnant, and during times of economic hardship they decline as they have no economic foothold other than wages.<sup>14</sup> Property is a form of physical capital which can play multiple roles.<sup>15</sup> Property can be

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<sup>9</sup> Presentation by Manuel Trute, Urban planner, Panama City (Dec. 14, 2007) (notes on file with the author).

<sup>10</sup> Kenro Dowers & Pietro Masci, REFORMING LATIN AMERICAN HOUSING MARKETS: A GUIDE FOR POLICY ANALYSIS 1 (Inter-American Development Bank, 2003) *available at* <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=419948>.

<sup>11</sup> *Id.* at v.

<sup>12</sup> *Id.* at 1.

<sup>13</sup> Shlomo Angel, *The Housing Policy Assessment and Its Application to Panama*, 10 J. HOUSING ECON. 176, 186 (2001).

<sup>14</sup> DE SOTO, *supra* note 6 at 49.

<sup>15</sup> Orazio Attanasio & Miguel Székely, *An Asset-Based Approach to the Analysis of Poverty in Latin America* 8 (Inter-Am. Dev. Bank, Working Paper No. R-376, 1999), *available at* <http://www.iadb.org/res/publications/pubfiles/pubr-376.pdf>.

used “to buffer temporary shocks, [produce] income, and can be accumulated for long-term objectives such as financing consumption after retirement.”<sup>16</sup>

Another consequence of the location of these houses is that more money is required to get to and from work and obtain basic goods and services. For example, in 2000, the average commute in Panama City was sixty minutes. This figure will likely increase as more and more people continue to move to the city.<sup>17</sup> Additionally, living inside the city leaves the middle-class with less money to spend on education, quality of life purchases, and housing improvements. The increased cost of living associated with housing, along with the inability of many middle-class citizens to turn wages into investments, stifles upward mobility and exacerbates the wealth disparity in Panama.

Not only does increased wealth disparity hurt the middle-class, but it can also lead to an unstable political system.<sup>18</sup> The lack of socio-political mechanisms to provide for asset accumulation and upward mobility is destabilizing.<sup>19</sup> A population which sees possibility in a capitalist economy is less prone to support destabilizing policies such as populist or authoritarian regimes.<sup>20</sup> On the other hand, proper mechanisms which ensure a more equal distribution of asset ownership lead to a safer, more stable country.<sup>21</sup>

This paper will address the current housing issues facing the middle-class living in Panama City and the socio-political implications. Although Panama City currently faces serious housing issues, especially with respect to working and lower income classes,<sup>22</sup> this paper will focus

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<sup>16</sup> *Id.*

<sup>17</sup> Angel, *supra* note 13, at 194.

<sup>18</sup> Solimano, *supra* note 4.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 13.

<sup>21</sup> *Id.*

<sup>22</sup> Williams, *supra* note 7.



on those in the middle-class who usually receive less direct assistance from the government.

Part I analyzes Panama's current economic expansion and the factors driving it. Part II addresses the laws and programs enacted by the Panamanian government which encourage and regulate economic development. Zoning laws, tax incentives, and current government programs aiding the middle-class in obtaining housing will also be explored. Part III focuses on the social and political implications that these laws and economic development have on the middle-class. Part IV explores alternatives and amendments to the current legal framework which could balance Panama's economic development with its need to provide adequate housing to the middle-class.

## I. Current Economic

In 2006, Panama's economy grew 8.1%, and is estimated to have grown 7.8% in 2007.<sup>23</sup> This recent economic growth sparked a real estate boom in Panama City, causing the skyline to give birth to dozens of new skyscrapers.<sup>24</sup> The amount of construction taking place in Panama City is astronomical given the city's population is a mere .5 million. This construction benefits Panama because it creates jobs and brings in foreign money which stimulates the economy.<sup>25</sup> In fact, in 2007, Panama boasted a 7.2% unemployment rate. This rate is a far lower than the 13% unemployment rate which existed for much of the 1990's and early 2000's.<sup>26</sup> The newer unemployment rate indicates a promising economic stimulus which could help

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<sup>23</sup> CIA FACTBOOK, *supra* note 1.

<sup>24</sup> Richard Lapper & Adam Thompson, *Gates Unlocked to Surprise Prosperity*, FIN. TIMES, July 24, 2007, at 1, available at <http://www.ft.com/cms/s/01/40406796-391f-11dc-ab48-000779fd2ac,dwp-uuid=8ad4e3ee-3920-11dc>.

<sup>25</sup> *Id.*

<sup>26</sup> CIA FACTBOOK, *supra* note 1.

move Panama towards greater wealth equality. A necessary ingredient to expedite this equilibrium will be the placement of the proper mechanisms.<sup>27</sup>

There are several factors driving the new wave of construction, the influx of capital, and the economic growth in the city formally quiet Latin American capital. The Panama Canal ("Canal") is one of the main catalysts for this explosion.<sup>28</sup> In 1999, the United States ceded total control of both the Canal and the entirety of the land making up the Canal Zone.<sup>29</sup> Further, Panama now receives all of the fees, tolls, and other revenue generated from the thousands of ships that float through the Canal annually.<sup>30</sup> In fact, this revenue makes up 14% of Panama's GDP.<sup>31</sup> With this increased revenue, Panama was able to invest more in its infrastructure and modernization programs.<sup>32</sup> Additionally, the land acquired in the former Canal Zone gave Panama an opportunity to develop other businesses related to shipping, ranging from shipyards to suppliers of provisions and bunker fuels.<sup>33</sup>

In addition to Canal ownership, the increasing size of the waterway itself is helping to spur economic growth. In 2006, the Panamanian people voted to increase the size of the locks.<sup>34</sup> When the construction is complete, the Canal will be equipped to handle not only twice as much traffic within the thoroughfare, but an increased capacity for larger ships. The Canal, for the first time, will accept Post-

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<sup>27</sup> Dowers & Masci, *supra* note 10, at 2.

<sup>28</sup> Adam Thompson, *Panama Exudes Pride as Widening of Canal Begins*, FIN. TIMES, Sept. 3, 2007, at 1.

<sup>29</sup> Brad Reagan, *The Panama Canal's Ultimate Upgrade*, POPULAR MECHANICS, Feb. 2007, available at <http://www.popularmechanics.com/technology/transportation/4212183.html?page=1>.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Lapper & Thompson, *supra* note 24.

<sup>33</sup> *Id.*

<sup>34</sup> Thompson, *supra* note 28.

Panamax ships, which represent about 37% of the world's container ships.<sup>35</sup> The expansion is designed to assure investors that the economy will continue to grow in the coming years and that the Canal will remain a relevant trade route in the 21<sup>st</sup> century.<sup>36</sup> By investing in such large infrastructure projects, the Panamanians are encouraging foreign companies to risk millions of dollars in developing the country.<sup>37</sup> These investment firms include United Kingdom-based London & Regional. Recently awarded a contract that could be worth up to \$10 billion dollars, the firm plans to create an urban city center on what used to be the Howard US Air Force base.<sup>38</sup>

The second major catalyst driving Panama's economic growth is the rapid growth of real estate construction, the majority of which is in high-rise condominiums. Much of this housing development is aimed at "baby boomer" retirees and second home buyers from the US, Canada, and Europe.<sup>39</sup> Almost thirty thousand condos went on the market between July 2006 and July 2007, totaling about \$5.7 billion in sales.<sup>40</sup> As of July 2007, there were 175 projects under construction and 120 more that have been approved by the government, but have yet to begin construction.<sup>41</sup> Of these current projects 11,000 more condos were expected to go online in the second half of 2007.<sup>42</sup>

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<sup>35</sup> Reagan, *supra* note 29.

<sup>36</sup> *Id.*

<sup>37</sup> Richard Lapper & Adam Thompson, *Panama Builds on Economic Boom*, FIN. TIMES, July 11, 2007, available at <http://www.ft.com/cms/s/7834d0e4-2fd6-11d0-a68f-000077fd2ac,dap-uid=>.

<sup>38</sup> *Id.*

<sup>39</sup> Lapper & Thompson, *supra* note 24.

<sup>40</sup> Eliza Barclay, *Latin America's Real Estate Panamania*, FORTUNE, July 5, 2007, available at [http://money.cnn.com/magazines/fortune/fortune\\_archive/2007/07/09/100122336](http://money.cnn.com/magazines/fortune/fortune_archive/2007/07/09/100122336).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

The political and social stability of Panama is also one of the driving factors for the large immigration of people and finance. According to the World Bank report on government stability, Panama has remained very constant in all six areas that are computed to determine a country's constancy over the past ten years. Those areas are voice<sup>43</sup> and accountability, political stability and absence of violence, government effectiveness, regulatory quality, rule of law, and control of corruption.<sup>44</sup> In fact, based on this stability, a large number of the upper and middle-class from Venezuela and Columbia have migrated into Panama City. Searching for less restrictive government policies, increased investment opportunities, and an escape from the possibility of threat of violence and social unrest, often-times these expatriates are finding the answer on the shores of Panama rather than their native countries.<sup>45</sup>

The preceding factors constitute the main catalysts for the sudden growth of Panama's economy. Foreign investors see a great deal of potential in Panama City as both a hub of shipping and industry, as well as a retirement mecca for North Americans and Europeans.<sup>46</sup> The Panamanian government enacted focused legislation to regulate the current growth and to alleviate the burden being placed on the middle-class.<sup>47</sup> The current mechanisms that are in effect in Panama will be discussed in the following section.<sup>48</sup>

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<sup>43</sup> *Country Data Report for Panama, 1996-2006*, World Bank Institute, 2006, available at <http://info.worldbank.org/governance/wgi2007/pdf/c171.pdf> (voice has to do with the freedom of press).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Garcia-Navarro, *supra* note 2.

<sup>47</sup> *See infra* Part II.

<sup>48</sup> *Id.*

## II. The Legal Framework

### a. La Hipotecaria

One program that the Panamanian government enacted to deal with the housing issue is called La Hipotecaria.<sup>49</sup> La Hipotecaria is a non-bank institution in Panama that is designed to provide middle income people with loans for residences. The Government gives a tax credit at the end of the year to compensate home buyers for the difference between the preferential rates and the actual market rates. In doing so, the La Hipotecaria allows a portion of the population to afford housing that would otherwise not. One problem with this initiative is that it only addresses the demand side of the market. The middle-class are able to afford the housing, but it is either non-existent or is way outside of the city center.<sup>50</sup> The average income of those that borrow money from La Hipotecaria have a monthly income between \$400-\$800. The average loan size that is given is around \$23,000, and roughly 500 are given every month. This equates to 6,000 loans every year.<sup>51</sup> Further, the program is only open to those that are salaried employees,<sup>52</sup> excluding non-salaried employees, small business owners, and those working in the informal sector.<sup>53</sup> Furthermore, these preferential loans are only available for new housing, and not for the resale of old housing.<sup>54</sup> This distorts the resale value of middle-class

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<sup>49</sup> La Hipotecaria is Spanish for "*The Mortgage Store*." See La Hipotecaria, [www.lahipotecaria.com](http://www.lahipotecaria.com) (last visited Mar. 26, 2008).

<sup>50</sup> *Id.*

<sup>51</sup> La Hipotecaria, Company Profile, [http://www.lahipotecaria.com/english/generales\\_empresa.htm](http://www.lahipotecaria.com/english/generales_empresa.htm) (last visited Mar. 26, 2008).

<sup>52</sup> Angel, *supra* note 13, at 197.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

housing, as it limits the number of people who can afford to buy it.<sup>55</sup>

The La Hipotecaria program is innovative and has opened up credit to a segment of the population that would otherwise be unable to afford a house. It is not, however, completely flawless.<sup>56</sup> Certainly, the program must exclude some who cannot prove their creditworthiness, otherwise it would go bankrupt. The problem is with the manner in which they determine credit. Many people who could make the payments are excluded because of the manner in which they make their money.<sup>57</sup> There need to be other methods of proving credit than just showing proof that an individual has a salaried job.<sup>58</sup> Creating a mechanism that will allow non-salaried persons to obtain preferential loans will help ensure that certain segments of the population are not arbitrarily excluded. The goal of housing mechanisms should be to include as many people as possible without jeopardizing the program. Including those that can prove their credit, even if they do not have a traditional salary, will be a step in that direction. One such option that will open up the program is to allow for a rental trial period to establish credit.<sup>59</sup>

## **b. Zoning Laws**

Panama City's main tool for controlling development is density restrictions. The law stipulates that only a certain amount of "dwellings" are to be built on a specific tract of land.<sup>60</sup> The density zoning restrictions were enacted

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 201.

<sup>59</sup> See *infra* note 150.

<sup>60</sup> "Por la cual se crea la corporacion Azucarera La Victotoria," Ley No. 9. de 25 de enero de 1973; Gaceta Oficial No. 17.276 (viernes 2 de febrero de 1973).

in 1973, and they have not been updated to reflect the changing development in the city.<sup>61</sup> There are no current height restrictions in Panama City, except for the historical colonial center, Casco Antigua.<sup>62</sup> This has created high rise buildings that are fifty stories tall, but only have two dwellings per floor.<sup>63</sup> As a result, Panama's population density in 2000 was only 5,835 people per square kilometer.<sup>64</sup> This is about 500 less than the ordinary lower-middle-income country and about 800 less than the ordinary upper-middle-income country.<sup>65</sup> When comparing Panama City to other cities around the world, Panama City is not maximizing the potential of its urban land.<sup>66</sup> Therefore, Panama needs to update a zoning plan that is over thirty years old to effectively concentrate the growing population in the city.

The drawback to light density zoning is that it makes building middle-class housing in the city economically disadvantageous. If a developer is limited in the amount of units he or she can put on a tract of land, then the logical response to ensuring a larger profit is to build more expensive units. This is not to say that there should not be certain restrictions on density, but to blanket the entire city with a very low density restriction is to artificially deflate the housing market. This then causes urban sprawl. Other cities have dealt with this issue in various ways.<sup>67</sup> Mechanisms exist that can maintain sustainable

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<sup>61</sup> *Id.*

<sup>62</sup> Indira Lakshmanan, *In Panama City's Old Quarter, a Rebirth Takes Place*, BOSTON GLOBE, Jan. 22, 2007, available at [http://www.boston.com/news/world/articles/2007/01/22/in\\_panama\\_citys\\_old\\_quarter\\_a\\_rebirth\\_takes\\_place](http://www.boston.com/news/world/articles/2007/01/22/in_panama_citys_old_quarter_a_rebirth_takes_place).

<sup>63</sup> Kevin Brass, *Developers Press Ahead in Panama City*, INTERNATIONAL HERALD TRIBUNE, Jan. 31, 2008, available at <http://www.iht.com/articles/2008/01/30/properties/repan.php>.

<sup>64</sup> Angel, *supra* note 13, at 194.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> See *infra* Section IV.

growth in a city center, while at the same time ensuring that ample housing exists for middle income dwellers.<sup>68</sup> Some of these options include inclusionary zoning and infill housing coupled with effective investment in the city infrastructure.<sup>69</sup>

### c. Tax Incentives

Another mechanism used by the government to stimulate and control growth is tax incentives. One such law gave complete property tax relief to any housing valued at \$30,000 or less and completed by August of 2005.<sup>70</sup> The law also dictates that if the property is worth more than \$30,000, then taxes must only be paid on the amount greater than \$30,000.<sup>71</sup>

The legislature decided to make this incentive permanent and expanded it to include all property. The current property tax structure in Panama exempts the first \$30,000 of value in the property from any property tax.<sup>72</sup> The rate of tax on the property then increases as the value of the property increases. This property tax structure does not directly encourage the new construction of middle-class housing. If the exemption were given only to property under \$30,000, then there would be an incentive to keep the property at a lower cost.

The programs and incentives created by the Panamanian government are far from what is necessary to maintain a stable balance in the real estate market. The main

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Property Tax Exonerations/Incentives for New Construction, <http://www.panamarealtor.com/real-estate-law-incentives/tax-exonerations> (last visited Mar. 26, 2008).

<sup>71</sup> *Id.*

<sup>72</sup> Panama Tax Code, art. 764, *available at* <http://www.panamarealtor.com/real-estate-law-incentives/panama-real-estate-taxes>.



focus of the actions taken are to help the middle-class obtain financing or to ease the burden of taxes once they purchase the property. There are, however, no substantial programs that stimulate the construction of middle-class housing, especially in areas close to job centers and transit routes. The lack of housing on the market has created many difficulties for the middle-class, and it will continue to exacerbate the wealth disparity that already exists in Panama.<sup>73</sup> The following section will address the implications that the housing shortage has on the average middle income Panamanian.<sup>74</sup>

### III. Socio-Economic Implications

The impact of the current housing shortage is much more than a momentary setback for the middle-class. The implications of a continued disenfranchisement of the middle-class to the outskirts of the city and a continued inability to find adequate housing could lead to much greater social and political problems for Panama.<sup>75</sup> In a capitalist society, a house represents more than a dwelling or a shelter for a family. A house is an asset that can allow a person to build capital and develop credit in order to procure other assets.<sup>76</sup>

Asset building is an integral part of upward mobility in an economy.<sup>77</sup> One of the key factors to building a stronger middle-class is providing better access to housing, which is one of the main assets a population accumulates.<sup>78</sup>

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<sup>73</sup> Solimano, *supra* note 4, at 13.

<sup>74</sup> See *infra* Section IV.

<sup>75</sup> Solimano, *supra* note 4, at 5 (explaining that when middle and lower income classes of people are unable to obtain assets they have no upward mobility, and without upward mobility, democracy is much harder to maintain).

<sup>76</sup> DE SOTO, *supra* note 6, at 51.

<sup>77</sup> Solimano, *supra* note 4, at 15.

<sup>78</sup> *Id.*

Hindering an individual's ability to obtain housing thwarts the main avenue to upward mobility. When that happens, the gap between the wealthy and the poor will increase, and a greater squeeze will be put on the middle-class. Economic inequality already plagues Panama, and according to the Gini index, an indicator of income inequality, Panama is the fourteenth worst country for wealth disparity in its citizenry.<sup>79</sup> If this problem is exacerbated because of unsatisfactory housing policies, then political turmoil could follow. When populations have no possibility of a better future, they are more likely to favor more radical regimes, and when that happens, foreign investment ceases to flow.<sup>80</sup>

The housing problems for the middle-class hinder the ability to acquire assets in two ways. First and foremost, the shortage of affordable housing in the city for the middle-class eliminates the possibility of a segment of the middle-class to acquire the most common asset.<sup>81</sup> A survey taken in 1995 of middle-class housing showed that 35% of the middle-class in Panama City were not homeowners.<sup>82</sup> This segment of the population will remain economically stagnant during economic booms because they are unable to translate wages into an investment. During economic downturns this group will decline in the social ladder because of the inability to acquire any lasting asset.

The income this group earns is spent on rent, which supplies a present need but offers no long-term benefit. As long as economic times are stable in Panama, this segment will not suffer. The problems arise when wages and jobs are cut due to an economic downturn. In the event of recession, renters will be one of the most vulnerable groups of people because they have no savings or assets to rely on in

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<sup>79</sup> CIA FACTBOOK, *supra* note 1.

<sup>80</sup> Solimano, *supra* note 4, at 16.

<sup>81</sup> *Id.* at 15.

<sup>82</sup> HAROLD KATSURA & CLARE ROMANICK, HOUSING DEMAND AMONG PANAMA'S MIDDLE- AND LOW-INCOME POPULATION 3-4 (1996).

this situation.<sup>83</sup> If the middle-class had adequate access to housing, the wealth disparity would shrink, and the middle-class would be more stable during economic downturns.<sup>84</sup>

The second problem is that the housing that exists or is being built for the middle-class does not allow for further asset accumulation or savings accumulation. This situation will exacerbate the wealth disparity in Panama.<sup>85</sup> The current trend in housing development for the middle-class is to build rows of identical houses on the outskirts of the city. These houses are usually sold for around \$20,000 but lack access to any of the essentials necessary for sustainable living, such as schools, health care, grocery stores, or jobs.<sup>86</sup> They are placed there for one reason only: to provide shelter to the middle-class. Most everything the middle class needs is in the center of the city.<sup>87</sup> Even though this group can afford the houses, the added costs to basic necessities make it more difficult for income to be saved or invested in other assets. An example of the added costs a person living in these dwellings incurs is the commute to work. Buses are the only public transportation that exists in Panama City.<sup>88</sup>

Aside from the fare for each destination, a rider must consider the cost of the time commuting, which can exceed two hours each way.<sup>89</sup> The only alternative to commuting via bus is to own a car or take a taxi.<sup>90</sup> When taking a car from these neighborhoods, the commute is usually an hour each way in gridlocked traffic.<sup>91</sup> Thus, a person living

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<sup>83</sup> Solimano, *supra* note 4, at 8.

<sup>84</sup> *Id.*

<sup>85</sup> Solimano, *supra* note 4, at 5.

<sup>86</sup> Trute, *supra* note 9.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Jason Margolis, *Part II: Developing Panama City*, THE WORLD, May 22, 2007, available at <http://www.theworld.org/?q=node/10252>.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

in the outskirts may own a house, but getting to the city for basic necessities or work requires a car, gas, maintenance, and other expenses that go along with long commutes to work. These added expenses eliminate a person's ability to save money and to acquire assets, such as better housing or improvements on the housing they already own. The added costs of living outside of the city center restrict the mobility, both physically and economically, of the citizenry.

#### IV. Alternative Regulatory Mechanisms

There are many regulatory or legal options that the Panamanian government can choose to employ in an effort to deal with the current housing situation in the capital city.<sup>92</sup> This section will address some of the overarching policies and laws that need to change, in order to effectuate a better balance between the current economic growth and the need for adequate housing for the middle-class.

In regards to housing, a major problem that arises in many urban areas is the scarcity of land. Panama City is no different. The government has not aided in this problem by its policies either. Currently, zoning regulations are artificially depreciating the amount of possible dwellings in the city.<sup>93</sup> Because Panama City places restrictions on the amount of dwellings that may be placed on a certain hectare, the total possible amount of dwellings is minimized. This not only limits the amount of people who can move to the city, but it also raises the price of the existing dwellings.<sup>94</sup> Panama must first alter its density zoning laws to afford the possibility of more middle-class housing in the city. As mentioned, the middle-class has a dire need to be

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<sup>92</sup> Dowers & Masci, *supra* note 10, at 12.

<sup>93</sup> *Supra* note 59.

<sup>94</sup> John J. Delaney, *How We Got into a Workforce Housing Crisis: And Why Getting out of It Will Not Be Easy*, LAND USE INST. (ALI-ABA COURSE STUDY MATERIALS) 5 (2006).

closer to necessary resources and work.<sup>95</sup> One of the reasons why there are density restrictions in place is because there is a limited ability of the current infrastructure to handle more people. Infrastructure development is an important part of developing housing for a wide array of the population. The following zoning changes will not be possible if the proper infrastructure is not in place. Solutions for improving the infrastructure in the city will be discussed later in this section.<sup>96</sup>

A zoning tool that has been implemented in various urban areas to directly deal with the problem of middle-class housing shortages in the United States is inclusionary zoning.<sup>97</sup> The main function of inclusionary zoning is to lift certain density restrictions on a development, but in return, the developer must make a certain number of the units affordably priced for the middle-class. This ensures that only those in the middle-class are purchasing these units.<sup>98</sup> This type of zoning is in place in states as different from one another as, for example, California and Maryland.<sup>99</sup> This housing is usually set aside for those households that make between 80% and 120% of the average income.<sup>100</sup> In order to offset the added cost to developers, the government can give density bonuses or tax incentives. The goal is to mix the levels of income in a specific area and allow the middle-class easy access to job markets and transportation hubs.<sup>101</sup>

Another development technique that is being utilized in markets with housing crises is infill housing. Infill housing is a technique of ensuring that land in an urban

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<sup>95</sup> *Id.* at 7.

<sup>96</sup> *See infra* notes 113-33.

<sup>97</sup> Delaney, *supra* note 94, at 8.

<sup>98</sup> *Id.* at 9.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

setting is being fully utilized to its maximum potential.<sup>102</sup> The purpose of infill housing is to create denser housing in areas that are not being properly utilized. It can involve the creation or modification of condos, apartments, townhouses, or single family homes. The purpose of the development is to place more dwellings in areas that can sustain them.<sup>103</sup> Usually such housing redevelopment is done near existing or planned transit routes, job centers, or within walking distance of amenities and services.<sup>104</sup> The placement of these dense centers of housing is important because if they are near these public amenities, they allow middle and low income households to reap the benefits of their location.<sup>105</sup> It will also require specific funding for the improvement of the infrastructure in that area to deal with the increased population.<sup>106</sup>

Infill housing does not come without its own problems and obstacles. Because it entails developing denser housing in already established areas of a city, city officials will often face a backlash from those already living in the area.<sup>107</sup> This problem is to be expected, as bringing denser housing can cause many more difficulties for the pre-existing communities, such as higher congestion and greater pressure on the existing infrastructure.<sup>108</sup> Depending on the political structure for zoning decisions, legislative amendments to the city's general plan and zoning regulations may be required in order for an infill development to be built.<sup>109</sup>

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<sup>102</sup> Jonathan C. Curtis & Mary C. Klima, *Department Practice Tips: The Challenges of Infill Housing*, 27 LOS ANGELES LAW 12 (2005).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 2.

<sup>105</sup> *Id.*

<sup>106</sup> See *infra* notes 113-33.

<sup>107</sup> Curtis, *supra* note 102, at 3.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

Since there can be a wide array of problems to acquiring infill housing approval and development, the initial time and capital investment into these types of projects is essential. A team of professionals that are not only knowledgeable about infill developments but are also familiar with the city, its infrastructure, and government is essential to getting an infill project started and ensuring that it is in the proper area of a city.<sup>110</sup> Infill housing should be left to the private sector to build, but there are several legal mechanisms the government can use to encourage this type of efficient development. Examples of policies that have been used are lower impact fees if a developer upgrades infrastructure, a smoother and faster process of permit acquisition, lessening of zoning restrictions, or tax break incentives.<sup>111</sup> Flexible land use policies and building restrictions can improve the private provision of serviced land and houses, which makes them available to households across the wealth spectrum.<sup>112</sup> Infill housing is an individualized process of urban development, so each project may require different incentives and may encounter various problems. Knowledgeable professionals and a thorough understanding of the city are essential to effective infill projects.<sup>113</sup>

In order to facilitate these types of specific zoning development, the city also needs to invest in the infrastructure of these areas.<sup>114</sup> The term infrastructure refers to a wide variety of things such as water supply, sewage systems, traffic lights, green space and road conditions.<sup>115</sup> It is necessary that a given area's infrastructure be up to date if

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 2.

<sup>112</sup> Dowers, *supra* note 10, at 81.

<sup>113</sup> Curtis, *supra* note 102, at 4.

<sup>114</sup> Angel, *supra* note 13, at 205.

<sup>115</sup> Catherine Michel, *Brother, Can You Spare a Dime: Tax Increment Financing in Indiana*, 71 IND. L.J. 457, 458 (1996).

more people are going to live in that area.<sup>116</sup> In order to develop infrastructure, many urban areas across the United States utilize a funding tool known as tax increment financing (TIF).

A TIF finances redevelopment and community improvement in a specific area of a city. In the area set apart for the TIF, the property taxes are frozen at a particular level.<sup>117</sup> Once the level of property taxes has been frozen, all of the revenue generated by the property taxes will go into a fund for the redevelopment of that area.<sup>118</sup> The projected increase in tax revenue that will occur because of the redevelopment is then calculated.<sup>119</sup> From that projected amount, bonds are issued by the government and placed in a special account that can only be used to fund projects in that area.<sup>120</sup> As the tax revenue is generated over the years, the bonds are paid back by the increases in the tax revenue.<sup>121</sup> The tax revenue raised will be used to combat the issues that normally arise in densely populated areas.<sup>122</sup> TIF funds are commonly used to build and maintain roads. Traffic is a constant problem in Panama City, which is evidenced by the long commute times of workers in the city.<sup>123</sup> TIF funds would need to be used to create new roads, improve existing ones, and install traffic lights. The Panamanian General Assembly would have to pass a law that would allow the Ministry of Housing to issue bonds for these particular projects.

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<sup>116</sup> Angel, *supra* note 13, at 205.

<sup>117</sup> Neighborhood Capital Budget Group, *How Do TIF's Work?*, available at [http://www.ncbg.org/tifs/tif\\_how.htm](http://www.ncbg.org/tifs/tif_how.htm) (last visited April 8, 2008).

<sup>118</sup> *Id.*

<sup>119</sup> Michel *supra* note 115, at 458.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *See supra* note 91.



The key to TIF is that the tax revenue generated from a specific area can only be used for improvements in that area. By allowing a city to target areas for growth, it gives it more control over urban planning.<sup>124</sup> Along with the previously mentioned zoning tools, the city could adequately control the amount and placement of middle-class housing. Panama City could create a TIF to both redevelop an underused part of the city, and to ensure that an adequate amount of middle-class housing is available. In order to accomplish this, the city could use inclusionary zoning to make sure developers put up more than just high-end units.

Another area of city infrastructure that needs to be addressed is public transportation.<sup>125</sup> Without some system of public transportation the city cannot sustain a large migration of people into the city center.<sup>126</sup> The city already has a plan in place for public transit, but the national government has stalled the project.<sup>127</sup> Their plan is to mimic the system of long, accordion-style buses with dedicated lanes that has proven effective in Curitiba, Brazil.<sup>128</sup> The buses would essentially act as an aboveground subway.<sup>129</sup> The bus stops would be glass tubes that more closely resemble train stops than bus stations.<sup>130</sup> The Curitiba system is able to carry about the same amount of passengers as a subway would, and it cost 100 times less.<sup>131</sup> This system needs to be a top priority if the city wants to continue to grow in an efficient manner. The areas around the bus “sta-

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<sup>124</sup> *Id.*

<sup>125</sup> René Paniza, City Planner, Presentation in Panama City (Dec. 11, 1999) (notes on file with author).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> Arthur Lubow, *The Road to Curitiba*, N.Y. TIMES, May 7, 2007, available at [http://www.nytimes.com/2007/05/20/magazine/20Curitiba-t.html?pagewanted=1&\\_r=2&th&emc=th](http://www.nytimes.com/2007/05/20/magazine/20Curitiba-t.html?pagewanted=1&_r=2&th&emc=th) (last visited April 8, 2008).

tions" would be ideal areas to implement some of the zoning mechanisms discussed earlier. They would be close to transit centers which would make the daily commute for middle-class citizens more affordable.

None of these proposed solutions alone can solve the housing problems in Panama City. Rather, it will take the implementation of all of the aforementioned mechanisms to achieve a better situated and housed middle-class. Without ensuring that the infrastructure in a newly rezoned area is adequate to support the increased density, the problems will only be exacerbated. If the water system, for example, cannot support the increased population then the idea of making resources more available to the middle-class by moving them into the city becomes a futile objective. Also, if roads and public transportation are not improved, then commutes to work will not decrease even though the people live closer to their employment. If, however, the government works to balance the current high-end housing growth in the city center with an adequate amount of middle-class housing and proper infrastructure, there can be an alleviation of the current housing problems.

Outside of getting more middle-class housing in the city center, the government can also help the middle-class by improving their current housing situation. A large percentage of middle-class households choose to incrementally build their own houses, as opposed to purchasing them.<sup>132</sup> In 1996, 70% of the middle to lower-middle income home owners built their houses.<sup>133</sup> One way the government could facilitate this type of construction is through the use of microfinancing.<sup>134</sup> Microfinancing for housing entails small loans, usually between \$250 to \$5,000, and a relatively short amortization period, between 2 to 10 years.<sup>135</sup>

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<sup>132</sup> Katsura, *supra* note 82, at 17.

<sup>133</sup> *Id.*

<sup>134</sup> Dowers, *supra* note 10, at 73.

<sup>135</sup> *Id.* at 77.

These smaller loans can be used to either improve one's house or to expand it.<sup>136</sup> The obstacle to establishing a microfinancing market in a developing country is that these types of loans are often not profitable for banks.<sup>137</sup> These small loans require high transaction and monitoring costs and low repayment rates.<sup>138</sup> Because of these economic hurdles, the market, on its own, will often not supply these types of loans even though the demand exists for them.<sup>139</sup>

Microfinancing is an example of how innovative governmental policies can encourage the marketplace to perform differently than it would under normal conditions.<sup>140</sup> The Panamanian government could enact a program that would guarantee these microloans for private banks, thus taking the risk factor out of the equation for the banks.<sup>141</sup> Another alternative would be for the government itself to create a program that gave out these loans.<sup>142</sup> However, many housing economists believe that government policies work best when they enable the marketplace as opposed to becoming a market player.<sup>143</sup> Encouraging and incentivizing nongovernmental organizations to offer microloans is also a very effective way to fill this gap in the market.<sup>144</sup> An example of a microfinance bank that has flourished is the Grameen Bank.<sup>145</sup> This bank gives out small loans to impoverished individuals in Bangladesh to allow them to start businesses and obtain housing.<sup>146</sup> It has allowed individuals unable to enter the normal credit and

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<sup>136</sup> *Id.*

<sup>137</sup> PATRICE FRANKO, THE PUZZLE OF LATIN AMERICAN ECONOMIC DEVELOPMENT, 407 (2007).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> See Dowers, *supra* note 10, at 78.

<sup>141</sup> *Id.*

<sup>142</sup> Angel, *supra* note 13, at 202.

<sup>143</sup> *Id.*

<sup>144</sup> See Dowers, *supra* note 10, at 78.

<sup>145</sup> Grameen Bank, <http://www.grameen-info.org/bank>.

<sup>146</sup> *Id.*

loan sector to develop assets.<sup>147</sup> A similar microfinance program in Panama could offer the same benefits to some sectors of the middle-class. The Grameen Bank is a private entity, so the Panamanian government would need to create incentives to encourage the development of such a program.<sup>148</sup>

In order to encourage private organizations to offer microloans for home improvements, the government could institute a program similar to La Hipotecaria, but for microloans. Often, the rates offered for smaller loans are higher as a result of the added costs of this type of financing for banks.<sup>149</sup> If the government were to subsidize the rates they would become more affordable to a wider base and would lower the cost for housing improvements by those participating in the program.<sup>150</sup> This program should not be open to a group as large as La Hipotecaria. The majority of those that incrementally build their houses are in the lower part of the middle-class. Thus, limiting the section of the population that may take advantage of the program would ensure that the funds invested are reaching those that most need the assistance, the lower strata of the middle-class.

Finally, the government needs to expand its subsidized loans to include households made up of non-salaried workers.<sup>151</sup> One option would be to develop hire-purchasing housing. Families that did not meet the criteria for preferential housing loans could rent a house for several years to prove their creditworthiness, and then purchase it.<sup>152</sup> The government would not have to manage this pro-

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> See Alfredo Stein and Luis Castillo, *Innovative Financing for Low-Income Housing Improvement: Lessons from Programmes in Central America*, 17 *Environment and Urbanization* 47, 52 (2005).

<sup>150</sup> *Id.* at 56.

<sup>151</sup> Angel, *supra* note 13, at 201.

<sup>152</sup> *Id.*

gram, but it could give preferential rates to developers on their loans during the period in which they hold and rent the asset.<sup>153</sup> By offering lower rates on loans to developers during the rental period, the developers are more likely to go along with these programs. It does not affect their profit margin as much to keep properties for longer periods of time because they have to pay less in interest on their outstanding loans.<sup>154</sup>

## V. Conclusion

Housing in today's economies is more than just a place to rest one's head. It is a stepping stone to greater wealth and upward mobility.<sup>155</sup> A house is one of the more common assets people acquire.<sup>156</sup> It can be used as collateral to allow the owner to invest in other markets, and it can also give financial security during economic downturns.<sup>157</sup> If a country impedes the middle-class's ability to obtain adequate housing it stifles their economic future, and exacerbates the gap between rich and poor.<sup>158</sup>

The current housing policy framework in Panama does not adequately protect and encourage the middle-class during this current economic boom.<sup>159</sup> The current financing programs, such as La Hipotecaria, extend housing credit to some of the middle-class who would otherwise be unable to obtain a mortgage, but they also exclude a large cross-section of the middle-class at the same time.<sup>160</sup> The zoning laws of Panama City are not flexible enough to

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<sup>153</sup> *Id.* at 202.

<sup>154</sup> *Id.*

<sup>155</sup> Dowers, *supra* note 10, at 1.

<sup>156</sup> Solimano, *supra* note 4, at 16.

<sup>157</sup> *Id.* at 16.

<sup>158</sup> *Id.*

<sup>159</sup> *See supra* Part I.

<sup>160</sup> *See supra* text accompanying notes 56-59.

allow for efficient use of urban land.<sup>161</sup> As a result of the density restrictions on development in the city, Panama City has a lower population density than the average city of similar wealth.<sup>162</sup>

These shortcomings in Panama City's framework place a heavy financial toll on the middle-class. Because the middle-class must put forth a much greater financial effort to obtain adequate housing, their ability to move up the economic ladder is diminished.<sup>163</sup> Stagnant economic mobility in a country can have tumultuous political consequences.<sup>164</sup> As stated earlier, the political stability of Panama is one of the driving forces behind the current economic boom.<sup>165</sup> If the widening socioeconomic gap were to create an unstable political situation, an economic downturn would likely follow.<sup>166</sup> Therefore, housing policies that enable the middle-class to obtain adequate housing would benefit the country as a whole, and help ensure that the current wave of fortune does not subside.

In order to fix the current framework, Panama needs to look to more progressive methods of urban planning including inclusionary zoning and infill housing.<sup>167</sup> These zoning policies will promote a more efficient use of the land in Panama City.<sup>168</sup> Along with more efficient use of the land, the city needs to invest more in developing the infrastructure of the city.<sup>169</sup> Without better infrastructure, the city cannot handle greater population density.<sup>170</sup> As for financing, the government needs to help develop a strong

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<sup>161</sup> See *supra* text accompanying notes 61-67.

<sup>162</sup> Angel, *supra* note 13, at 194.

<sup>163</sup> Solimano, *supra* note 4, at 19.

<sup>164</sup> *Id.*

<sup>165</sup> See *supra* Part I.

<sup>166</sup> Solimano, *supra* note 4, at 18.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

microfinance market that will enable the middle-class to build, improve, and enlarge their housing.<sup>171</sup> The government also needs to expand the preferential housing loan program to include the segment of the middle-class made up of non-salaried workers.<sup>172</sup> A hire-purchasing program would open up the system to this disenfranchised group.<sup>173</sup> The government needs to ensure that the current prosperity in Panama does not land in the hands of the few, but rather facilitates greater equality. With greater equality, greater stability and economic growth will follow.<sup>174</sup>

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<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> See *supra* text accompanying notes 152-54.

<sup>174</sup> Solimano, *supra* note 4, at 21.





STUDENT ESSAY

**THE TIES THAT BIND: CAPITALIZING ON THE EXISTING  
SOCIAL FABRIC IN PUBLIC HOUSING TO REVITALIZE  
NEIGHBORHOODS AND AVOID DISPLACEMENT IN PA-  
NAMA CITY, PANAMA**

*Tiffany D. Williams\**

**Introduction**

Governmentally sponsored gentrification,<sup>1</sup> by way of the demolition of public housing projects leaves many of the world's poor out in the cold, with absolutely no opportunity to enjoy the purported benefits of pending development. From Rio de Janeiro, Brazil to Atlanta, Georgia, neighborhoods established by governments as public housing projects or abandoned as slums have been transformed into new havens for the affluent, with promises of affordable housing for those displaced ringing hollow in the

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<sup>1</sup> The term "gentrification" traditionally refers to the rapid or gradual influx of affluent residents into traditionally poor neighborhoods. For the purposes of this paper, I will refer to governmentally funded gentrification, which I use to refer to state action that relocates people already living on governmental land in purported efforts to revitalize neighborhoods. This is distinguishable from traditional gentrification because there the government is the primary actor, not private landlords. *See* Powell & Spencer, *infra* note 2, at 435-50.

background.<sup>2</sup> This means that those unfortunate enough to dwell on government land are fighting a growing battle against displacement.<sup>3</sup> Moreover, they are fighting to preserve the valuable social fabric of their communities.<sup>4</sup> Many champions of gentrification<sup>5</sup> point out that it pours important economic resources into neighborhoods in disrepair.<sup>6</sup> With regard to public housing specifically, proponents of this kind of demolition exploit horrifying crime statistics and living conditions as evidence of the need for complete overhauls. Unfortunately, these narrow analyses fail to appreciate the value of preserving community identity as a tool to facilitate community improvement.

Panama City, Panama is currently undergoing rapid urban growth.<sup>7</sup> New roadway construction, neighborhood renewal, and luxury high rise residential developments are springing up all over the city.<sup>8</sup> Indeed, the cityscape of Panama City is beginning to resemble that of cities such as

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<sup>2</sup> See generally John A. Powell & Marguerite L. Spencer, *Giving Them the Old "One-Two": Gentrification and the K.O. of Impoverished Urban Dwellers of Color*, 46 HOW. L.J. 433 (2003).

<sup>3</sup> See Sean Purdy & Nancy H. Kwack, *New Perspectives on Public Housing in the Americas*, JOURNAL OF URBAN HISTORY 357 (2007). Purdy and Kwack note the long-standing problem of urban housing by quoting urban reformer Charles Abrams in 1964, Housing progress lags far behind industrial progress in every part of the world. The technical genius that broke the secrets of speed, sound, space, and light still cannot build a house cheap enough for the rank and file. . . A Negro laborer's family in New York and a squatter in Caracas may both have television sets, but neither can afford a decent house. *Id.* at 357.

<sup>4</sup> Powell & Spencer, *supra* note 2.

<sup>5</sup> See generally J. Peter Byrne, *Two Cheers for Gentrification*, 46 HOW. L.J. 405 (2003).

<sup>6</sup> *Id.* at 406. See also Eric Rogers, Out with the Old in with the New: Housing Issues for the Middle Class in Panama City, Panama.

<sup>7</sup> See generally Landau, *infra* note 9.

<sup>8</sup> Parte II, Plan de Desarrollo Urbano de las Áreas Metropolitanas del Pacífico y del Atlántico, <http://www.mivi.gob.pa/urbanismo/4URBANISMO/urbanismo/volumen2b/punto14nodal1.html> (last visited Sept. 28, 2007).

Miami Beach, Florida.<sup>9</sup> However, some neighborhoods do not seem poised to benefit from this prosperity. One such neighborhood is Curundú, a low-income housing project in Panama City that seems to be entirely isolated from the growth so rampant in other areas of the city.<sup>10</sup> Curundú is a group of multiple unit, high-rise buildings originally built as housing projects.<sup>11</sup> Over time, this community has become one of the nine high crime neighborhoods in Panama City listed by the Overseas Security Advisory Council in its travel advisory.<sup>12</sup> Extreme poverty, violent crime, and arson characterize Curundú in Panamanian media.<sup>13</sup> The cement structures of Curundú are so dilapidated that many

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<sup>9</sup> See generally Justin Gould, *Trump: Panama Property Investment Project*, THE PANAMA REPORT, June 5, 2006, <http://www.thepanamareport.com/real-estate-in-panama/trump-panama-property-investment-423.html>, Matt Landau, *Investing Ahead of the Growth Curve*, PANAMA NEWS, May 6-19, 2008, [http://www.thepanamanews.com/pn/v\\_13/issue\\_09/opinion\\_01.html](http://www.thepanamanews.com/pn/v_13/issue_09/opinion_01.html).

<sup>10</sup> See generally Entreculturas, *Social Crisis in Panama City* (June 6, 2007), [http://www.entreculturas.org/noticias/news/social\\_crisis\\_in\\_Panama\\_city](http://www.entreculturas.org/noticias/news/social_crisis_in_Panama_city) (last visited Mar. 30, 2008). Entreculturas, a non-profit organization doing community work in Curundú, quotes the Social Pastora of the Maria Reina Parish, [w]hat happens in Curundú and in neighboring areas, is no accident, it is the consequence of a social exclusion process which stems from a development vision which places the buildings, tourist centres, exclusive residential areas and luxury commercial centres, before the individual. Urban development has forgotten that development should be for all, with equity, but what we can say of one of the most unequal countries in the world. *Id.*

<sup>11</sup> See generally Entreculturas, *supra* note 10. Note that Curundú is named after the Curundú River in Panama and should not be confused with Curundú Heights, which is situated in the former Canal Zone and formerly housed American contractors and their families. Curundú Heights is now a middle-class neighborhood situated near a former Air Force base.

<sup>12</sup> See Overseas Security and Advisory Council Global Security News and Reports, Panama City Crime and Safety Report (2007), <http://www.osac.gov/Reports/report.cfm?contentID=62157>.

<sup>13</sup> See generally Entreculturas, *supra* note 10.

residents have opted to build their own informal residences on the grounds of the development. Despite this despair, the people who call Curundú home have a shared community history and identity.<sup>14</sup> Should gentrification take place in Curundú, as seems likely given its convenient location in the city center, residents will risk losing this history and identity which facilitates their way of life. Additionally, they will find themselves in a disadvantageous bargaining position because they live on governmentally-owned land and have few financial resources. This paper will examine options available to governments to “revitalize” communities like Curundú without causing extreme social and physical displacement in the face of rapid urban growth.

Part I of this paper will briefly discuss the history and current state of the Curundú housing project in Panama City. Curundú provides an interesting point of reference where gentrification is concerned because the neighborhood is centrally located in Panama City,<sup>15</sup> yet neither its structural landscape nor the characteristics of its inhabitants appears to be substantially affected by the rapid pace of development in other parts of the city.<sup>16</sup> Given the combination of central location, poorly maintained structures, extreme poverty, and crime, Curundú is a prime candidate for Panama’s government to use city wide “urbanization” as an opportunity to demolish Curundú and build more attractive and profitable housing for the numbers of people relocating to the city.

Part II will discuss models of governmentally sanctioned gentrification in two communities that share some

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<sup>14</sup> *Id.* This is not to suggest that the people of Curundú have one homogenous identity; rather, they are neighbors sharing a common struggle to preserve their livelihoods. Recently, for example, many have joined organizations to tackle gang violence and arson in their communities.

<sup>15</sup> Curundú is situated in the Northwest end of the city near the Panama International Airport.

<sup>16</sup> See generally Entreculturas, *supra* note 10.

characteristics with Curundú: Techwood & Clark Howell Homes in Atlanta, Georgia and Cidade de Deus—the “City of God” neighborhood—in Rio de Janeiro, Brazil. Both communities discussed in this section are similar to Curundú in that they are massive housing developments within cosmopolitan cities where inhabitants have few property rights and are significantly affected by poverty and crime. Yet, they differ from each other because the Atlanta developments began as public housing projects with the state converting them to mixed-income neighborhoods, while Cidade de Deus, originally a public housing project in Rio de Janeiro, was constructed when the governing military dictatorship forcibly removed inhabitants of the Catacumba favela, which was located in the more fashionable parts of the city, in 1970.<sup>17</sup> In both instances, crime and poverty continue as problems in those communities after the governmental intrusion. Thus, the policy decisions made in both Atlanta and Rio de Janeiro regarding development may demonstrate that effective, long-term community revitalization as a tool to reduce concentrations of poverty and crime require that the government to do more than merely build new structures and move inhabitants around.

Finally, Part III will discuss governmental approaches to remedy the problem of public housing that do not require the demolition of vital community ties to resources in the event that governments do demolish buildings. An example of an attempt at this kind of comprehensive legislation is HOPE VI in the United States, which requires housing authorities to focus on self-sufficiency and resident improvement as a means to community revitalization. Although HOPE VI has been used as a means to demolish neighborhoods, legislation of its kind

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<sup>17</sup> Janice E. Perlman, *Longitudinal Panel Studies in Squatter Communities: Lessons from a Re-study of Rio's Favelas: 1969-2003* 2, 3 (2003), [http://www.megacitiesproject.org/Lessons\\_from\\_Rio\\_RE-study\\_1969-2003.pdf](http://www.megacitiesproject.org/Lessons_from_Rio_RE-study_1969-2003.pdf).

has the potential to provide governments with tools to repair public housing structures while strengthening the existing social fabric through resident involvement, self-sufficiency training, and community-oriented crime prevention.

### **I. Squalor Amidst Sprawl: The Curundú Housing Projects in Panama City, Panama**

Though the Curundú housing projects were originally built for low-income Panamanians, the majority of Curundú's population is now composed of Colombian refugees from the Chocó region of Colombia.<sup>18</sup> The cement high rises of Curundú are fully inhabited and hundreds more live in informal housing on the property grounds.<sup>19</sup> Thus, Curundú is a hybrid community, with both formal public housing units built by the government, like those in Techwood and Clark Howell Homes in Atlanta, and informal housing units like those in the favelas of Brazil.<sup>20</sup> Common among all three community groups—in Atlanta, Rio de Janeiro and Panama City—is the absence of land rights for the residents. All of the inhabitants live on governmentally owned land and therefore have significantly diminished bargaining power where issues concern-

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<sup>18</sup> The Chocó region of Colombia is inhabited largely by indigenous people and African descent populations. See Jesuit Refugee Service, JRS Dispatch No.216, Panama: Second Arson Attack in Curundú, (May 31, 2007),

<http://www.jrs.net/news/index.php?lang=en&sid=2050>.

<sup>19</sup> In the documentary film, *Curundú*, filmmaker and producer Ana Endara Mislov followed a Curundú resident named Kenneth and exposed the isolation and poor conditions experienced by Curundú residents. See Raúl Leis, *Curundú*, THE PANAMA NEWS, Jan. 20, 2008-Feb. 2, 2008,

[http://www.thepanamanews.com/pn/v\\_14/issue\\_02/opinion\\_02.html](http://www.thepanamanews.com/pn/v_14/issue_02/opinion_02.html); see also Entreculturas *supra* note 10.

<sup>20</sup> Leis, *supra* note 19, Entreculturas *supra* note 10.

ing community development arise.<sup>21</sup> Additionally, afflictions such as crime, poverty, and dilapidated structures run rampant among the communities.<sup>22</sup>

As is the case in many poor, inner-city communities, the pressures of scarcity have produced a high crime rate in Curundú.<sup>23</sup> While gang violence<sup>24</sup> and drug trafficking flourish, the structures in the community are under frequent attack.<sup>25</sup> On January 18, 2008, Curundú fell victim to its third major fire in six months.<sup>26</sup> In March of 2007, an entire sector of the neighborhood was destroyed, leaving 500 residents homeless.<sup>27</sup> In May of 2007, another fire left 355 homeless.<sup>28</sup> Both the March and May fires were reportedly gang-related arsons.<sup>29</sup> Thus, both the peo-

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<sup>21</sup> Perlman, *infra* note 35, at 107-36. To be clear, inhabitants in some favelas often buy and sell their homes, so in a sense there are semi-formal property rights among residents, but favela residents by definition do not have legal title to their land. Moreover, in 1970, the people of the Catacumba favela had no legal claim to their land, which is why the government bulldozed the neighborhood without giving any kind of compensation to the residents. Present day favelas are not the favelas of 1970. Indeed, Perlman's research reflects that favela inhabitants now enjoy many of the material trappings of those in the "formal" world, such as televisions and name brand clothing. Also, due to both grassroots organization among favela residents and more recent governmental legislation, those living in favelas often have access to electricity, indoor plumbing, and roads. Further, living conditions in some favelas are superior to conditions in other so-called formal housing. *Id.*

<sup>22</sup> See generally ARIAS FOUNDATION FOR PEACE AND HUMAN PROGRESS, *infra* note 23.

<sup>23</sup> ARIAS FOUNDATION FOR PEACE AND HUMAN PROGRESS, *Panama, In THE FACE OF URBAN VIOLENCE IN CENTRAL AMERICA*, at 241, 252-56, ARMS, VIOLENCE & YOUTH SERIES (2006), <http://www.arias.or.cr/download/INGLES.pdf>.

<sup>24</sup> *Id.* at 253. The murder rate in 2003 for Curundú is 108.7 murders per 100,000 individuals, making it the highest murder rate in the city. *Id.*

<sup>25</sup> Jackson, *infra* note 31.

<sup>26</sup> Jesuit Refugee Service, *supra* note 18.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* See also Jackson, *infra* note 31.

ple and the structures of Curundú appear to be falling apart under very dangerous conditions.

Aside from diminishing residents' sense of personal security, arson also diminishes the number of housing units available to them.<sup>30</sup> In the wake of crises caused by these fires, the need for adequate housing becomes even more of a concern for those displaced. Some members of the Panamanian press have criticized the reaction of the Ministry of Housing to the fires because, according to reports, authorities bulldozed debris resulting from a recent fire before residents were able to recover their belongings, including zinc roofing that could be used to rebuild informal housing.<sup>31</sup> The Ministry reportedly plans to rebuild housing to replace damaged units, but only residents who qualify will be allowed to move back in. It is unclear whether residents who lived on the grounds in self-built structures would qualify to live in the new housing.<sup>32</sup> Efforts to revitalize Curundú must consider the quality of the existing relationships in the community. Violence and crime inevitably damages those relationships. One factor that may affect the cohesiveness of the Curundú community is that the social fabric is very much a patchwork, consisting of Panamanians, Colombians, and poor immigrants from other nearby countries who arrived at various points in the neighborhood's history.<sup>33</sup> For example, when interviewed about crime in Curundú, an immigrant cited that *Panamanian*

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<sup>30</sup> Jackson, *infra* note 31. The informal housing in Curundú are often wood structures and are therefore more susceptible to fire damage. *Id.*

<sup>31</sup> Eric Jackson, *Three Kids Killed, Alleged Perpetrators Held, Curundú Burns in Gang Row, Police Show of Force Ineffective*, THE PANAMA NEWS, April 2007, available at [http://www.thepanamanews.com/pn/v\\_13/issue\\_07/news\\_03.html](http://www.thepanamanews.com/pn/v_13/issue_07/news_03.html).

<sup>32</sup> *Id.*

<sup>33</sup> Janice E. Perlman, *Marginality: From Myth to Reality in the Favelas of Rio de Janeiro, 1969-2002*, in MARGINALITY: FROM MYTH TO REALITY IN THE FAVELAS OF RIO DE JANEIRO 1968-2005, 109 (forthcoming) [http://www.megacitiesproject.org/myth\\_to\\_reality\\_rio\\_1969-2002.pdf](http://www.megacitiesproject.org/myth_to_reality_rio_1969-2002.pdf).



gangs were responsible for the crime in the neighborhood.<sup>34</sup> Although historical lines along which community ties are traditionally formed are not necessarily as pronounced in Curundú as in communities with a strong presence of families who lived in that neighborhoods for decades, there is still an opportunity for Curundú residents to unite through the shared experience of living in a neighborhood that has been permitted to deteriorate before the country's very eyes.<sup>35</sup> Indeed, the example of Rio de Janeiro proves that people from different origins are capable of forming very strong community ties.

## **II. Public Housing Meets Gentrification: Atlanta, Georgia and Rio de Janeiro, Brazil**

This section will discuss the governmentally sponsored gentrification of the public housing projects Clark Howell and Techwood Homes in Atlanta, Georgia and the Catacumba favela in Rio de Janeiro. Transitions in Atlanta housing were the product of aggressive planning centered around the Centennial Olympic Games in 1996, which forced the city to improve conditions in and around downtown Atlanta. Clark Howell and Techwood Homes were demolished and were replaced with mixed-income housing. The Catacumba favela in Rio de Janeiro, Brazil was razed in 1970 and inhabitants were moved to housing projects such as Cidade de Deus, in outlying areas of the city. Cidade de Dues is now characterized as a favela because of

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<sup>34</sup> Jesuit Refugee Service, *supra* note 18.

<sup>35</sup> See Newman, *infra* note 40, at 6. In the City of Atlanta, a shift in the demographic of the Clark Howell/Techwood Homes communities changed when Clark Howell became integrated. Whites fled the project and blacks from rural areas and other parts of the United States moved into public housing projects in Atlanta. Likewise, the favela communities in Rio de Janeiro are now composed of people from different parts of the country and other parts of South America. *Id.*

the extreme poverty and number of irregular housing units on the grounds.

In both Atlanta and Rio, residents were isolated by the transition process, their relationships to one another and the city being largely disregarded. Also in both cities, residents organized and fought actively against displacement, thereby forming valuable community ties. This section will discuss the ways in which residents were isolated, it will argue that perhaps isolation is partly responsible for governmental failures to revitalize these communities while also maintaining the social fabric.

### **A. Techwood Homes and Clark Howell Homes in Atlanta, Georgia**

The City of Atlanta has undergone substantial growth over the past two decades.<sup>36</sup> Much of the housing redevelopment was sponsored by the Atlanta Housing Authority with substantial involvement from city officials.<sup>37</sup> An analysis of the gentrification of Atlanta's housing projects of Techwood Homes and Clark Howell Homes may provide insight into the possibilities for Curundú because the state of public housing in Atlanta during the time these projects were demolished was similar in significant ways to the current state of affairs in Curundú. Namely, both housing projects were in a state of disrepair, suffered from numerous vacancies, and saw their residents primarily concerned with crime. Now the area is the site of a new mixed-income community, a new YMCA, a new elementary school, and Olympic landmarks. Unfortunately, few of the original residents of these communities are in a position

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<sup>36</sup> Mary Lou Pickel, Metro Atlanta 2<sup>nd</sup> in growth nationwide, ATLANTA JOURNAL-CONSTITUTION, Mar. 27, 2008.

<sup>37</sup> Ronald Smothers, Barcelona Games Start, And Atlanta is Staring, N.Y. TIMES, July 27, 1992, available at <http://query.nytimes.com/gst/fullpage.html?res=9E0CE5DA143BF934A15754C0A964958260&sec=&spon=&pagewanted=all>.

to enjoy these amenities since they have been relocated to distant parts of the city.

The first public housing projects in Atlanta were built during the Great Depression as an effort to stimulate the economy through creating jobs.<sup>38</sup> Due to the high demand for low-income residences during these years and the high quality of housing units produced, applicants for public housing were carefully screened on the basis of several criteria, including race.<sup>39</sup> Techwood Homes opened first in 1935 for low-income whites, originally housing 604 families.<sup>40</sup> University Homes was built soon thereafter for low-income blacks. Clark Howell Homes was erected in 1940 adjacent to Techwood Homes for low-income whites and was the last housing project to be built in Atlanta during this era.<sup>41</sup>

The City of Atlanta suffered tremendously when thousands began to abandon the city center for the suburbs, causing the concentration of poverty to increase significantly. The end of racial segregation in public housing also played a role. The desegregation of Atlanta resulted in race no longer being an acceptable criterion for placement in

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<sup>38</sup> HARVEY K. NEWMAN, ATLANTA HOUSING AUTHORITY'S OLYMPIC LEGACY PROGRAM: PUBLIC HOUSING PROJECTS TO MIXED INCOME COMMUNITIES, 6 (2002), <http://aysps.gsu.edu/publications/researchatlantaAHA%20%Olympic%20Legacy%20Prog.pdf> [Hereinafter *Report*]. The construction of the projects provided employment opportunities to those affected by the Depression. *Id.* See also DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, A HISTORICAL AND BASELINE ASSESSMENT OF HOPE VI, VOL. 1 4-2. (1996).

<sup>39</sup> Newman, *supra* note 40, at 6. Residents were screened on the basis of race, family composition, employment, and living habits. *Id.*

<sup>40</sup> *Id.* When Techwood Homes was built, apartments had closets in every room, new kitchen appliances, and built-in bathtubs, which was quite a step up for many new residents who had just relocated from the "slum" of Techwood Flats. *Id.* See also DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *supra* note 40.

<sup>41</sup> *Id.*

housing.<sup>42</sup> Thus, many whites fled formerly white only housing projects that would soon be inhabited by blacks.<sup>43</sup> Despite the departure of those white residents, the need for public housing in Atlanta continued to grow.<sup>44</sup> Urban renewal efforts and expressway construction during the 1960's and 1970's in Atlanta displaced thousands of poor blacks.<sup>45</sup> Additionally, many blacks had already begun migrating in large numbers into Atlanta and other major cities between 1940 and 1970.<sup>46</sup> Although the demand for public housing grew in Atlanta, the number of inhabitants steadily declined.<sup>47</sup> Meanwhile, the metropolitan area<sup>48</sup> continued to grow after 1970.<sup>49</sup> To illustrate, the popula-

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<sup>42</sup> Newman, *supra* note 40, at 6-7. Public housing applicants were also no longer being screened according to family composition or employment. *Id.*

<sup>43</sup> *Id.* at 7.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 6. Newman says that 67,000 people were displaced because of expressway construction and urban renewal, at least 77% of whom were African-American and all of whom were described as "poor and disadvantaged with special needs and special problems." *Id.* See also Kevin Fox Gotham, *Redevelopment for Whom and for What Purpose*, in 6 RESEARCH IN URBAN SOCIOLOGY: CRITICAL PERSPECTIVES ON URBAN DEVELOPMENT 441-42 (Kevin Gotham ed., 2001) ("[A]s the history of urban renewal, gentrification, and urban expressway building shows, central city divestment and reinvestment are part of the dynamics of urban race relations, with African Americans and other minorities having to bear the brunt of displacement and neighborhood destabilization.").

<sup>46</sup> Newman, *supra* note 40, at 7. Newman's research showed that over 5 million blacks moved to cities during this time period. *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> The Atlanta metropolitan area is defined by the United States Census Bureau as the 5,392.8 miles encompassing Barrow, Bartow, Cherokee, Clayton, Cobb, Coweta, DeKalb, Douglas, Fayette, Forsyth, Fulton, Gwinnett, Henry, Newton, Paulding, Rockdale, Spalding, & Walton Counties. See Department of Housing and Urban Development, AMERICAN HOUSING SURVEY FOR THE ATLANTA METROPOLITAN AREA v (2005), <http://www.census.gov/prod/2005pubs/h170-04-21.pdf>.

<sup>49</sup> Newman, *supra* note 40, at 7.

tion in the city was 496,973 in 1970, as compared to 394,017 in 1990. At the same time, the population of the outlying suburbs grew to 1.5 million people.<sup>50</sup> Thus, the population in public housing in Atlanta grew just as hundreds abandoned the city, resulting in a social and physical isolation that persisted until the 1990s.

The decrease of the city's population and increase in public housing tenants were met with an increase in the level of poverty. Between 1980 and 1990, though the number of poor people in the metropolitan area decreased,<sup>51</sup> the percentage of poor people within the city limits jumped from 82.7 percent to 84.1 percent.<sup>52</sup> Thus by the 1990's, public housing expansion, mass migration, and other externalities<sup>53</sup> left Atlanta with one of the highest concentrations of public housing per capita of any city in the United States.<sup>54</sup> In fact, Atlanta had the second highest concentration of public housing in the nation, second only to Newark, New Jersey.<sup>55</sup> By the 1990s, housing projects Techwood Homes and Clark Howell Homes were recognized as some of the worst neighborhoods in Atlanta.<sup>56</sup>

By the 1990s, Atlanta's entire public housing system had hit embarrassing lows in the areas of maintenance and management. When Atlanta was selected to host the 1996 Centennial Olympic Games (Games) in 1990, the proximity of several potential competition sites to dilapidated public housing projects forced city officials to quick-

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<sup>50</sup> *Id.*

<sup>51</sup> For a definition of the Atlanta metropolitan area, see DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *supra* note 50 at v.

<sup>52</sup> Newman, *supra* note 40, at 9-10.

<sup>53</sup> *Id.*

<sup>54</sup> Newman, *supra* note 40 at 7. According to Newman, one of ten residents of the City of Atlanta lived in public housing by 1990. *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *supra* note 40, at 3-22.

ly address a myriad of public housing issues.<sup>57</sup> By this time, the Department of Housing and Urban Development (HUD) pronounced the city's public housing problem one of the worst in the country because of exceedingly poor management and maintenance by the Atlanta Housing Authority (AHA).<sup>58</sup> Thus, in 1990, the AHA and city officials seized the opportunity to use the Games as a catalyst to create the Olympic Legacy Program (OLP) which was an effort to reduce the concentration of poor people living in Atlanta by converting public housing projects near Olympic Game sites into mixed income communities.<sup>59</sup>

The combined 1,845 units in Techwood Homes, Clark Howell Homes,<sup>60</sup> and one other property<sup>61</sup> were the first properties targeted by the OLP. Aside from decreasing the concentration of poor residents in the city, other justifications cited for the OLP included (1) providing adult residents with expanded employment opportunities through interaction with diverse residents sharing the apartment complex; (2) improving education by providing children with diverse learning environments; (3) providing children with role models from different income levels; and (4) decreasing the crime rate.<sup>62</sup> Despite its purported merits,

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<sup>57</sup> Newman, *supra* note 40, at 10-12.

<sup>58</sup> *See id.* at 8. (In 1994 HUD threatened Atlanta and Chicago with the prospect of having their housing authorities taken over by the federal government. In 1994, HUD gave the Atlanta Housing Authority a score of 39 of a possible 100.)

<sup>59</sup> *Id.* at 13.

<sup>60</sup> *Id.* at 4. *See also* DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT *supra* note 40, at 4-2. (Techwood Homes and Clark Howell Homes constituted 52.9 acres of land in Atlanta's center near Georgia Institute of Technology).

<sup>61</sup> The other property targeted was the East Lake Meadows Community in DeKalb County, Georgia. This paper discusses only the Clark Howell/Techwood Homes communities because they are located in the Atlanta city center and were commonly regarded as one property. *See* Newman, *supra* note 40, at 15.

<sup>62</sup> *See id.* at 4.

the OLP was subject to public scrutiny in part because its implementation was precipitated by an increase in evictions for minor lease infractions, an official AHA refusal to accept partial payments that had been acceptable before the plan, and increased security concerns prompted by increasing vacancies on the properties.<sup>63</sup> Moreover, only 545 of the 1,115 households in residence in 1990 received relocation assistance from the AHA.<sup>64</sup> Of that number, over half<sup>65</sup> received Section 8 vouchers<sup>66</sup> and the next largest group of residents were moved into other public housing projects. Those who did not receive relocation assistance most likely moved or were evicted before demolition commenced.<sup>67</sup> Before the Games commenced, the AHA had relocated 1,576 families from these areas.<sup>68</sup> These families were often moved to outlying suburbs while renovations took place.<sup>69</sup> After demolition, 1,442 units were constructed.<sup>70</sup>

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<sup>63</sup> *Id.* at 12.

<sup>64</sup> *Id.* at 13.

<sup>65</sup> 367 residents received Section 8 vouchers. *Id.* "Section 8" requirements appear at 42 U.S.C. § 1437f (2000), which provides for low-income housing assistance whereby private owners enter into contracts with the federal government of the United States of America whereby they are permitted to rent units to low-income residents where certain conditions are met.

<sup>66</sup> According to HUD data, residents receiving vouchers were widely dispersed throughout the city and the eastern county of DeKalb, but were still clustered in seven concentrated groups throughout the city. Those who were not clustered are scattered across 87 neighborhoods in the city. See Newman, *supra* note 40, at 18-19.

<sup>67</sup> The AHA stopped keeping track of many of the families who were evicted or moved independently. Additionally, 76 families were evicted, 106 "skipped out" on rent and 14 moved without assistance. *Id.* at 18.

<sup>68</sup> See *id.* at 5. The numbers of families relocated as a result of the OLP: 114 from Techwood, 588 from Clark Howell Homes, 470 from East Lake Meadows, and 434 from other projects.

<sup>69</sup> See *id.* at 18.

<sup>70</sup> *Id.* at 4.

While the OLP has arguably attained the broad objective of decreasing the concentration of poverty in the City of Atlanta, it has left many residents in the same condition or worse than when the project began.<sup>71</sup> Further, although merely substituting Section 8 Vouchers<sup>72</sup> for public housing decreased the concentration of poverty in certain areas, the overall number of poor living in the city has not changed significantly, especially considering that over 80% of those receiving vouchers remained in the City of Atlanta.<sup>73</sup>

Critics have questioned whether the OLP's primary purpose was to improve conditions for residents in projects like Techwood and Clark Howell or whether it was merely a slum clearance project to make accommodations for private interests.<sup>74</sup> Like many public housing projects, Techwood and Clark Howell Homes suffered both geographical and social isolation from larger society.<sup>75</sup> Techwood and Clark Howell were not surrounded by other important large neighborhoods; they were surrounded by a major institution of higher learning, Georgia Institute of Technology (Geor-

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<sup>71</sup> Praise for the mixed-income community that has replaced Clark Howell/Techwood and Centennial Place gives too little attention to the fact that few of the original residents have benefited from the new development. See Keating, *infra* note 80. For an example of the kind of praise the Centennial Place community has received, see also Ken Edelstein, *A New Mixed-Income Village for Downtown Atlanta*, N.Y. TIMES, Nov. 24, 1996 at 5, Barney Simms, *Poor Atlantans have more choices now*, ATLANTA JOURNAL-CONSTITUTION, Sept. 14, 2007, at A1, Newman *supra* note 40, at 18-19. (83% of those relocated from Clark Howell and Techwood Homes remained inside the city, which means that the actual number of poor people in Atlanta did not decrease significantly.) *Id.*

<sup>72</sup> Section 8 vouchers are provided pursuant to 42 U.S.C. § 1437f (2000).

<sup>73</sup> Newman, *supra* note 40, at 18-19.

<sup>74</sup> See generally *id.* at 20.

<sup>75</sup> *Id.* at 10-13.



gia Tech), and by Coca-Cola Headquarters.<sup>76</sup> Both Georgia Tech and Coca-Cola are major fixtures in the City of Atlanta and have extensive resources.<sup>77</sup> Over the last forty years Georgia Tech had demonstrated their power several times by expanding into nearby neighborhoods. Furthermore, Coca-Cola executives had long pushed to remove Clark Howell and Techwood Homes.<sup>78</sup>

A closer look at the proactive measures taken by the AHA prior to the implementation of the OLP provides significant insight into the possible root of the Authority's failure. The AHA invested very little in the residents of Techwood and Clark Howell Homes despite the dire need for resources among tenants. In 1993, the median household income for families in Techwood and Clark Howell

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<sup>76</sup> DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *supra* note 59, at 4-20. See also, Newman, *supra* note 40, at 20.

<sup>77</sup> Coca-Cola's net profits for 2007 totaled \$5.981 Billion Dollars. Forbes Magazine, Coca-Cola At a Glance, available at <http://finapps.forbes.com/finapps/jsp/finance/compinfo/CIAtAGlance.jsp?sedol=2206657>. Georgia Tech has one of the largest endowments among colleges and universities in the United States at \$1.3 Billion Dollars. Georgia Institute of Technology, *Recent Trends and Milestones*, June 2007.

<sup>78</sup> Larry Keating & Carol A. Flores, *Sixty & Out: Techwood Homes Transformed by Enemies & Friends*, 26 J. URBAN HIST. 275, 284 (2000). Keating and Flores explain the climate surrounding the integration of Clark Howell Homes:

The shift in racial composition alarmed Paul Austin, chief executive officer of Coca-Cola, Techwood's neighbor to the west. In a memo to Robert W. Woodruff, the dominant figure in much of the Coca-Cola company's success, Austin voiced the fear that when Techwood and Clark Howell became 'all black, the felony rate will triple.' To avoid the perceived threat, Austin proposed demolishing the communities, removing the residents to the outskirts of the city, and redeveloping the property with an ultra modern middle-income community. *Id.*

respectively were \$3,960 and \$3,960.<sup>79</sup> Only 14% of households in Clark Howell had actual earned income and only 15% of Techwood households did.<sup>80</sup> Furthermore, AHA properties experienced a spike in crime during the late 1980s.<sup>81</sup> Yet, AHA did very little to address the issues of crime and poverty in communities. Structures, not people, appeared to be the AHA's primary focus. The AHA had only a small security force to work in senior citizens' buildings and only forty five police officers enrolled in the AHA community policing program.<sup>82</sup> Further, AHA was one of the housing developments evaluated that provided residents with absolutely no drug treatment/prevention programs; they were also one of five major U.S. cities who offered no resident services or self-sufficiency programs.<sup>83</sup>

### **B. Catacumba Favela to Cidade de Deus, Rio de Janeiro, Brazil**

Cidade de Deus, a public housing project turned favela in Rio de Janeiro, was built to house the former inhabitants of the Catacumba favela<sup>84</sup> after they were displaced by slum clearance policies promulgated by the former dictatorship government of Brazil<sup>85</sup>. Catacumba was situated

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<sup>79</sup> DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *supra* note 58 at 1-24.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 2-12.

<sup>82</sup> *Id.* at 2-12. Exhibit 2-4.

<sup>83</sup> *Id.*

<sup>84</sup> Janice Perlman, *Marginality: From Myth to Reality in the Favelas of Rio de Janeiro, 1969-2002* (2002). According to Perlman, Cidade de Deus also housed families from other razed favelas in Rio, but it was primarily populated by former Catacumba residents.

<sup>85</sup> Perlman, *supra* note 35. Informal housing developments or shantytowns are often referred to as favelas in Brazil. Favelas are typically thought of as squatter settlements established by families infringing on public land to which they have no rights. Although it was established as a public housing project in 1970 Cidade de Deus is now considered a

in the upscale South Zone of Rio de Janeiro. Not surprisingly, the elite of the South Zone felt threatened by the close proximity of the favela to their homes. Eventually, the dictatorship responded by systematically evicting Catacumba's residents and relocating many of them to public housing on the outskirts of the city.<sup>86</sup> Carlos Lacerda, then governor of the state of Rio de Janeiro, established the removal plan. Despite vigorous opposition from grass roots community groups, 2,074 families in Catacumba were removed in 1970 and relocated to public housing projects such as Cidade de Deus.<sup>87</sup>

In the larger national context, favela eradication was an ineffective tool for redressing poverty or the lack of affordable housing in Rio. Despite the government's later attempts to integrate favelas into the city through "formalizing" them with electricity, indoor plumbing, and public roads, favelas continue to grow in number, size and complexity.<sup>88</sup> In fact, the number of favelas in Rio has nearly doubled since 1969.<sup>89</sup> Janice Perlman reports that

[I]n every decade between 1950 and 2000, Rio's *favela* population grew much more rapidly than the city as a whole with the exception of the 1970s when *favela* eradication programs forcibly removed over 100,000 people into public housing or sent them back to the countryside. Most striking is that during the period 1980 to 1990, when the

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favela due to the growth of informal housing on and near the original property grounds.

<sup>86</sup> *Id.* Many Catacumba residents also went on to populate a strip of favelas called Complexo del Maré, located near the airport in Rio.

<sup>87</sup> *Id.*

<sup>88</sup> Perlman, *supra* note 84, at 107. The Brazilian government cites three factors as being responsible for the spike in population in favelas: (1) migration from towns in the Brazilian countryside; higher fertility rates among favela residents; and migration from favelas outside of the city to favelas within the city.

<sup>89</sup> *Id.* at 107.

overall city growth rate dropped to 8% but *favela* populations surged by 41%. Then, from 1990 to 2000, when the city's growth rate leveled off at just less than 7%, *favela* populations continued to grow by 24% resulting in a current all-time high percentage of Rio's population. These numbers demonstrate that Rio de Janeiro's housing needs continue to climb. Much of this growth has been attributed to immigration from migrants from the countryside and, more recently, movement from within the city.

Perlman studied the success rate of favela residents who had been relocated thirty years after her 1968 study and found that community ties were especially important in predicting the success of residents. Her 1998 study revealed that former Catacumba residents who were relocated in 1970 have enjoyed higher rates of success<sup>90</sup> than those relocated from other favelas and housing projects largely because of the strong community network Catacumba residents formed through organizing to resist eviction.<sup>91</sup> She suggests that after eviction and relocation Catacumba residents kept in touch with one another and were able to help

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<sup>90</sup> Perlman's study traced life trajectories across four generations: the original interviewees, their parents, their children and their grandchildren. In her words, she Combine[d] qualitative and quantitative methods including direct observation, in-depth open-ended interviews, participatory re-creation of the community history in each community, (using the DRP - Rapid Participatory Diagnostic - method), the application of survey instruments (questionnaires), the collection of life histories, and the reanalysis of existing data sets and research materials. We work with the concepts of transgenerational transmission of poverty, inequality, marginality, exclusion, and social mobility.

Janice E. Perlman, *Longitudinal Panel Studies in Squatter Communities: Lessons from a re-study of Rio's favelas: 1969-2003*, WORLD BANK WORKSHOP, URBAN LONGITUDINAL RESEARCH METHODOLOGY LONDON, May 28-29, 2003.

<sup>91</sup> Perlman, *supra* note 83, at 109.

each other more than those in other communities.<sup>92</sup> Perlman tells the story of a woman named Marga<sup>93</sup> who was one of the 17,000 families removed from Catacumba in 1970.<sup>94</sup> She was relocated to a housing project in the outskirts of the city called Conjunto de Quintungo, but said that the former residents of Catacumba would remain her life-long friends.<sup>95</sup> When Marga was forced to relocate due to threats from a neighborhood gang in the housing project, she stated that being so far away from her support network was unmanageable and she hoped to be able to move back to a neighborhood closer to the city sometime soon.<sup>96</sup> Perlman's findings suggest that while community ties are not destroyed by demolition, if conditions were actually improved in communities like Catacumba without moving residents farther away from resources such as education and employment, the ties could be leveraged to achieve sustainable, livable communities.

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<sup>92</sup> Perlman, *supra* note 84, at 109-10. In the caption to figure 5.5. she states that

The location in the midst of the upscale residential South Zone gave residents abundant access to service and construction jobs as well as to the good schools and clinics in the area. Despite their removal in 1970 to disparate housing projects, their common struggles created strong communal ties which persist to this day. *Id.*

<sup>93</sup> *Id.* at 110-12. Marga was born and raised in Catacumba and grew up to raise two young children while living in Catacumba. She was a domestic worker, and as such, she lived with her employers during the week with her children and then lived in the favela over the weekend. Because of this living arrangement, her children were able to attend better schools because she could use her employers' address. This was not possible after relocation because of the sheer distance of her new home to potential employers' homes. Some relocated families were separated by as much as four hours of travel. *Id.*

<sup>94</sup> *Id.* at 108.

<sup>95</sup> See generally *id.* at 111.

<sup>96</sup> *Id.* at 111-12.

While the favela population continues to grow in Rio, public housing projects like Cidade de Deus are themselves becoming favelas since these public housing projects are dominated by informal settlements and characterized by crime and desperate conditions.<sup>97</sup> Perlman's 1969 study<sup>98</sup> suggested that people living in favelas were not truly marginal; rather they were stigmatized by their neighborhood: "[i]t is my contention that the favela residents are not economically and politically marginal, but are excluded and repressed; that they are not socially and culturally marginal, but stigmatized and excluded from a closed class system."<sup>99</sup> She suggested that the formation of favelas demonstrated a desire on the part of the people to establish a functional way of life.<sup>100</sup> Perlman's more recent research shows that the stigma attached to being from a favela is far more negative than the stigma attached to living in Brazilian public housing.<sup>101</sup> However, this stigma reattaches itself once public housing transforms into a "favela." Social stigma

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<sup>97</sup> *Id.* at 142. See also James Brooke, Rio Slum Children Find Death in 'City of God', N.Y. TIMES, November 3, 1980.

<sup>98</sup> JANICE PERLMAN, THE MYTH OF MARGINALITY: URBAN POVERTY AND POLITICS IN RIO DE JANEIRO, (Univ. of Col. Press 1976).

<sup>99</sup> Perlman, *supra* note 83, at 121.

<sup>100</sup> *Id.* Perlman states that. . . the marginality ideology was so strong in Brazil in the 1970s that it created a self-fulfilling prophecy. In particular, the favela-removal policy it justified perversely created the conditions it was designed to eliminate. In fact, the favela was an extremely functional solution to many of the problems faced by its residents. It provided access to jobs and services, a tightly knit community in which reciprocal favors mitigated hardship, and above all, free housing. This was clearly not the case in the housing projects . . . to which favela residents were consigned by the government. In the government projects, they were separated from kin and friendship networks; located far from jobs, schools and clinics; and charged monthly payments beyond their means. Relocation also diminished family earnings by eliminating many of the services and odd jobs family members could perform after school, while caring for children, or when filling in time between other tasks. *Id.*

<sup>101</sup> *Id.*

affects everything from a resident's ability to find employment to the way in which she formulates her dreams. Thus, the failure to provide acceptable housing with measures in place to encourage the neighborhood maintenance ensures that the residents will always be marginalized.<sup>102</sup>

### III. Possible Answers for Curundú: Community-Focused Legal Responses to Public Housing in Need of Community Revitalization

In examining the relationship between the gentrification of low-income communities and concentrated poverty, John A. Powell and Marguerite L. Spencer assert that "with its displacement of low-income residents, gentrification and perpetuation of concentrated poverty are not opposite trends, but actually operate similarly and recursively. Both push low-income people of color away from resources, opportunities and vital institutions."<sup>103</sup> Like many others<sup>104</sup> Powell and Spencer recognize that low-income families have few options for relocation when they are displaced because of their limited resources.<sup>105</sup> If few places remain in the city where families can access affordable housing, they are forced to move to less desirable locations where employment, education, and other necessities are more difficult to access.<sup>106</sup>

Government has a special duty to address a wide spectrum of issues that affect conditions in public housing such as structural integrity, maintenance, crime, concentrated poverty, and social mobility of residents. While government provision of public housing is a valuable and necessary resource for low-income residents, with this

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<sup>102</sup> See generally Perlman, *supra* note 83, at 126.

<sup>103</sup> Powell & Spencer, *supra* note 2, at 441.

<sup>104</sup> See, e.g., J. Peter Bryne, *supra* note 5 (complaining of the wealth of scholarly discourse discouraging gentrification).

<sup>105</sup> Powell & Spencer, *supra* note 2, at 442.

<sup>106</sup> *Id.*

provision comes the governmental responsibility of maintenance and oversight. In the United States and abroad, many public housing projects have become dilapidated because of government neglect.<sup>107</sup> Such was the case in Atlanta with Techwood and Clark Howell Homes before they were demolished and in Cidade de Deus and other Brazilian public housing projects after they were constructed.<sup>108</sup> Additionally, poverty is highly concentrated in and around public housing.<sup>109</sup> Thus, the issue of poverty must be considered when implementing public housing policy.<sup>110</sup> Crime also remains a paramount concern to public housing residents in most countries.<sup>111</sup> When government bodies fail to give adequate attention to the value of human capital in public housing residents, they become complicit in a system that creates a permanent class of people who will always live in public housing. By failing to involve residents in the improvement process, authorities place limitations on the progress that is made and alienate the supposed beneficiaries from the benefits of revitalization.

Too often, the above negative factors are considered intrinsic to the people of a community. The result is that rebuilding does not give enough attention to the existing strengths of residents because the residents are seen as the

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<sup>107</sup> See Florence Roisman, *Keeping The Promise: Ending Racial Discrimination And Segregation In Federally Financed Housing*, 48 HOW. L.J. 913 (2004). See generally DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *supra* note 76.

<sup>108</sup> Because favelas are informal settlements, the Brazilian government had no legal responsibility to maintain any properties on the Catacumba favela before its destruction.

<sup>109</sup> Florence Roisman, *Intentional Racial Discrimination and Segregation by the Federal Government as a Principal Cause of Concentrated Poverty: A Response to Schill and Wachter*, 143 U. PA L. REV. 1351 (1995).

<sup>110</sup> See *id.* at 135.

<sup>111</sup> See generally Purdy & Kwack, *supra* note 3.



problem.<sup>112</sup> For example, in the United States, HUD addressed crime in housing projects and vilified residents by imposing a zero-tolerance policy for its residents. In *HUD v. Rucker*, the Supreme Court permitted local housing authorities to evict tenants of public housing when household members or guests were in violation of anti-drug policies, even if the tenant was unaware of the drug activity.”<sup>113</sup> In Rio de Janeiro, Brazil, government raids on narcotics dealers and gangs in favelas are common practice.<sup>114</sup> In Curundú, the Panamanian Ministry of Housing responds to arson in the community by bulldozing debris and promising new housing for “qualified” families.<sup>115</sup> In these scenarios, lawful citizens suffer a double assault, first from criminals and then from the government. Often, positive results can be obtained when the governments of high-crime areas assist residents in organizing to minimize the occurrence of and mitigate the effects of criminal activity; however, this can occur only when residents are made to feel a part of the community improvement process, rather than objects of harsh regulation.<sup>116</sup>

Thus, the people in public housing rather than the system in which they are trapped are considered to be the problem. The policy models like those in Atlanta and Rio de Janeiro, which primarily involved the construction of new structures and citizen relocation, are ineffective in

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<sup>112</sup> Perlman, *supra* note 86, at 122.

<sup>113</sup> See Dept. of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002).

<sup>114</sup> See e.g., Stuart Grudgings, Elite Police Squad Courts Controversy in Brazil, REUTERS/BOSTON GLOBE, July 1, 2008, available at [http://www.boston.com/news/world/latinamerica/articles/2008/07/02/elite\\_police\\_squad\\_courts\\_controversy\\_in\\_brazil/](http://www.boston.com/news/world/latinamerica/articles/2008/07/02/elite_police_squad_courts_controversy_in_brazil/).

<sup>115</sup> Jackson, *supra* note 31.

<sup>116</sup> In Rio de Janeiro, the Primer Entrega program, which means “first job” is doing what the government has struggled to do, by providing job training, extra-curricular education and artistic courses for people living in a Rio favela. Primer Entrega seeks to change the conditions in the favela by changing the lives of the people. Visit of Tiffany Williams to Cidade AltaFavela, Primer Entrega Program, June 2006.

addressing the roots of the deplorable conditions governments allegedly seek to improve, because those programs merely cause a geographic shift in concentrated poverty.<sup>117</sup> Further, in both Atlanta and Rio de Janeiro, the government left significant numbers of families without housing or forced families to relocate to parts of the city that were far away from their places of employment.<sup>118</sup>

By contrast, if Curundú faces a state-sponsored overhaul, its population could benefit from policy implementation that acknowledges the unique value of social networks and support systems to working-class communities that is often disrupted when they are forced to move miles away from those resources.<sup>119</sup> The conditions in Curundú reflect the need for comprehensive approaches to rebuilding long neglected public housing properties both to improve the quality of life for residents and the general welfare for the city.

### **A. Existing Panamanian Governmental Programs**

In October 2007, Panama's Minister of Housing proposed legislation that would give inhabitants in 10,360 public housing units title to their land based on the number of rent payments they had made to the state.<sup>120</sup> Residents who paid rent for at least sixteen years would receive full

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<sup>117</sup> See Roisman, *supra* note 109. (noting that by failing to address issues like social mobility, residents have few options to work themselves out of public housing.

<sup>118</sup> See generally Newman, *supra* note 40, at 5.

<sup>119</sup> DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *supra* note 58, at v. With regard the relationships among neighbors in distressed public housing, the report stated, "[d]espite the socio-economic difficulties faced by these communities and their residents, some also benefit from a rich network of community resources including churches and non-profit organizations whose staffs and members provide important services and political leadership." *Id.*

<sup>120</sup> Winner, *infra* note 123.

title, and those who had paid rent at least 199 times would receive partial title of between 25% and 75%.<sup>121</sup> This initiative simultaneously acknowledges that public housing inhabitants acquire informal yet recognizable interests in their communities that cannot be entirely disposed of merely because of their lack of property rights and the importance of formal property rights to the empowerment of residents. However, the focus on homeownership does not adequately address the fact that inhabitants in places like Curundú lack the financial resources to accomplish the kind of structural improvement the community requires. Additionally, squatters have presumably never paid rent and will not benefit from any transfer of title.

While the Ministry's legislation regarding transfer of title has not yet been enacted, the Ministry of Housing has proposed other programs intended to provide inhabitable housing to the poorest of Panamanians.<sup>122</sup> PROVISOL, the Program for Supportive Living, provides a \$2,000 subsidy to families earning less than \$300 per month toward the purchase of a home upon a determination of creditworthiness.<sup>123</sup> The Program for Integral Improvement of Neighborhoods (PROBEMA), is a two part strategy that seeks both to (1) modernize physical infrastructure and (2) provide social programs and employment training.<sup>124</sup> It does not appear that inhabitants of Curundú could benefit substantially from PROVISOL because a mortgage subsidy is not helpful in a community where most of the housing is substandard or uninhabitable. However, PROMEBE in-

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<sup>121</sup> Don Winner, Panama to Give Government Owned Apartments to the Poor, PANAMA GUIDE, <http://www.panama-guide.com> (Oct. 4, 2007).

<sup>122</sup> Ministerio De Vivienda - Republica De Panamá , Resumen Préstamo De Innovación ¶ 3 [Ministry of Housing, Republic of Panama, Innovation Loan Summary], available at <http://www.mivi.gob.pa/paginasprincipales/programas07.html>.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

volves the improvement of existing structures and the promotion of property rights and not the elimination of a particular community.<sup>125</sup> This combination of goals is a more comprehensive approach because it provides services to residents, which suggests an acknowledgement that the residents are important components of community improvement.

### **B. The Potential of HOPE VI as a Legislative Framework to Reinforce the Community Fabric**

The United States has attempted to encourage housing authorities to be creative when attempting to address the housing problem because authorities must address poverty, crime, structural maintenance, and community service to receive funds. If implemented and enforced responsibly, HOPE VI has the potential to be a useful tool to revitalize neighborhoods because of the broad latitude granted to housing authorities in planning. In 1993, the U.S. Congress attempted to improve distressed public housing through the Homeownership and Opportunity for People Everywhere Program (HOPE VI).<sup>126</sup> HOPE VI provides government grants to overhaul severely distressed public housing through rehabilitation, reconfiguration, demolition with on-site, off-site or Section 8 voucher replacement housing, and development of additional low-income and market-rate housing.<sup>127</sup> Some or all of these options can be combined into the plan for a single development, but demolition has

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<sup>125</sup> *Id.*

<sup>126</sup> HOPE VI was first enacted in 1993 and was subsequently revised in 1995. The revision to HOPE VI eliminated the requirement that housing authorities replace demolished units on a 1:1 ratio. *See Newman, supra* note 40, at 12.

<sup>127</sup> DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *supra* note 40, at 5-3, 5-4.

been integral to most HOPE VI sites to date.<sup>128</sup> This is unfortunate because development that focuses on demolition and relocation alienates targeted communities from the planning process.

HUD asserts that HOPE VI funding can accomplish the Department's goals by investing in "sites, buildings, and people."<sup>129</sup> Indeed, HOPE VI projects could include efforts like those in PROMEBA and PROVISOL in Panama. However, it appears that the "people" HOPE VI funds have been used to benefit may not always be public housing residents. As of 1996, the implementation of social programs and resident involvement in HOPE VI projects has been marginal at best.<sup>130</sup> The City of Atlanta's use of HOPE VI funds demonstrates the potential for housing authorities to overemphasize the component of demolition and neglect the requirements for community and residential services.<sup>131</sup> Both Techwood and Clark Howell were listed among the worst for the level of resident involvement in 1996.<sup>132</sup> In fact, Atlanta was found to have actually discouraged resident involvement although residents were represented by legal counsel during HOPE VI proceedings.<sup>133</sup>

Indeed, Atlanta paled in comparison to cities like Charlotte where authorities built on relationships estab-

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<sup>128</sup> *Id.* at 1-26. Exhibit 1-7 shows that demolition on the table for all but seven of the thirty four HOPE VI projects that participated in the study while renovation was only proposed for eleven properties.

<sup>129</sup> *Id.* at ii.

<sup>130</sup> DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *supra* note 58, at vi-vii.

<sup>131</sup> Initial HOPE VI plans for Techwood and Clark Howell involved renovation, but plans changed to demolition. *See id.* at 5-6, exhibit 5-2.

<sup>132</sup> DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *supra* note 58, at vii.

<sup>133</sup> *Id.* at 5-13, 5-14, exhibit 5-4. Atlanta residents were forced to seek legal representation to be involved in the HOPE VI process. Georgia legal services negotiated a "Further Assurances Agreement," that called for continual involvement of residents throughout planning. *Id.*

lished from existing community organizations. Atlanta was described as having only “a small array of programs to support special projects or events” at the time HOPE VI funding was obtained,<sup>134</sup> whereas resident involvement and community organization seemed to be integral to Charlotte’s process before and during planning.<sup>135</sup> Charlotte employed a resident consultation model, involving several existing community groups in the planning process as well as at least 30 residents.<sup>136</sup> The residents’ input was then incorporated into Charlotte’s HOPE VI plan.

Charlotte’s policy preceding the implementation of HOPE VI also demonstrates that community involvement can serve as a vehicle to address crime without depending on the city’s police force or minimal security resources.<sup>137</sup> Even before the receipt of HOPE VI funding, Charlotte had 36 resident organizations sponsoring numerous services through two integral programs, the Drug Abuse, Treatment, Outreach, and Prevention Program (DATOP) and the Safe Neighborhood Awareness Program (SNAP).<sup>138</sup> Both DATOP and SNAP have reduced crime by 15 percent in targeted developments.<sup>139</sup> Thus, Charlotte is reinforcing and even strengthening the valuable community ties that Perlman emphasizes in her findings in order to preserve com-

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<sup>134</sup> *Id.* at 2-16, exhibit 2-5.

<sup>135</sup> *Id.* at 5-14. HOPE VI requires that each participating city shall make contributions for supportive services in an amount equal to 15 percent of the funding provided for supportive services and that these contributions shall be derived from non-Federal sources. *Id.* at 1-9.

<sup>136</sup> *Id.* at 5-14.

<sup>137</sup> *Id.* at 2-16, exhibit 2-5.

<sup>138</sup> *Id.* While DATOP does involve the eviction of tenants who have found to be engaged in drug-related activity, it involves residents. The program “trains and supports a youth advisory council aimed at developing drug education and prevention and provides on-site out-patient treatment and after-care.” *Id.* at 2-15. Another program sponsored by the housing authority in Charlotte trains teens to recognize symptoms of drug abuse so that they may help their peers obtain treatment. *Id.*

<sup>139</sup> *Id.* at 2-14.

munities. The community members are involved in the preservation *and* rebuilding process of their neighborhood.

HOPE VI requires self-sufficiency resources for residents, to encourage social mobility. Charlotte had already implemented two programs, Gateway and Stepping Stone, before they obtained HOPE VI funding.<sup>140</sup> Both programs have become national models for transitional housing programs.<sup>141</sup> To further encourage social mobility, Charlotte formed the Homeownership Institute of the Charlotte Housing Authority, which used HOPE VI funding to educate selected residents about “all aspects of homeownership” over a period of 13 months. The program’s success rate is 75 percent—meaning that 75 percent of its graduates have bought or will buy a home.<sup>142</sup> Again, this effort focuses on the potential of residents to overcome their obstacles to become even more useful members of their community without completely removing them from their social network.

HOPE VI is not by any means perfect, but it at least provides housing authorities with a framework in which to work to address the many facets of community improvement including using existing ties in communities to help neighborhoods help themselves. By providing for community service, residential service, self-sufficiency support, crime-prevention and educational services in the statute, residents are empowered to form specific expectations of the government. They may also be more encouraged to become involved in the planning process, like the citizens of Charlotte. Also, by providing for renovation, remodeling in addition to demolition, HOPE VI gives housing authorities room to explore and apply creative solutions to the low-income housing problem. Communities like Curundú

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<sup>140</sup> *Id.* at 2-16, Exhibit 2-5.

<sup>141</sup> *Id.*

<sup>142</sup> DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, HOPE VI: COMMUNITY BUILDING MAKES A DIFFERENCE (2000).

may benefit from broad legislation like HOPE VI because they may employ the strength of their existing community ties to work with the government to improve their conditions.

#### IV. Conclusion

The world's poor are fighting to keep roofs over their heads. Unfortunately, the people are too often perceived as the root of, and not solutions to, the affordable housing crisis. Accordingly, it seems that governments too often seek to remove people instead of thoughtfully addressing problems. In Atlanta, the Atlanta Housing Authority alienated the residents of Techwood and Clark Howell Homes from the planning process and relocated the majority of them to neighborhoods distant from their original homes. Now, a new mixed-income community, a dormitory, YMCA, elementary school and other resources sit where Techwood & Clark Howell once were<sup>143</sup>, but many of the former residents live so far away that they cannot enjoy these amenities. In Rio de Janeiro, the Brazilian government razed favelas in an attempt to rid the city of the problem, but thirty years later, the number of favelas is far greater than it was in 1970. Further, public housing designed to house former favela residents have themselves become favelas, carrying with them the debilitating stigma that residents may have thought they escaped.

Curundú sits in the center of a city that is rapidly transforming itself before the world's eyes. Still, the incidence of violent crime and arson does not seem to be subsiding. Police raids and bulldozers are not solving the problem. Thus, the Panamanian government today has the opportunity to take a holistic approach to improving Curundú for the benefit of its residents. Undoubtedly, the entire city too can benefit from improvements in Curundú.

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<sup>143</sup> *Id.*



Instead of adopting the common approaches of demolition and relocation, Panama should leverage the collective power of residents to prove that overcoming housing obstacles does not require that they entirely deny the existing residents opportunity to enjoy the benefits that revitalization brings.



