ARTICLES

The Tax Calculus of Corporate Locational Decisions

Elizabeth Chorvat

Enforcement Cooperation in Combating Illegal and Unauthorized Fishing: An Assessment of Contemporary Practice

Stuart Kaye

Toward a Patent Exhaustion Regime for Sustainable Development

Benjamin Pi-wei Liu

The National Historic Preservation Act: Preserving History, Impacting Foreign Relations?

Mark P. Nevitt

REVIEWS

Review of Food Crises and the WTO by Baris Karapinar and Christian Häberli (Eds.)

Kathryn Bowen

Review of Human Rights in the Constitutional Law of the United States by Michael J. Perry

Anuthara Hegoda

Review of International Commercial Tax by Peter Harris and David Oliver

Colby Mangels

Review of Rough Justice: The International Criminal Court in a World of Power Politics by David Bosco

Anna Mathew

Review of Intellectual Property and Human Development: Current Trends and Future Scenarios by Tzen Wong and Graham Dutfield (Eds.)

Sorin G. Zaharia

Vol. 32, No. 2, 2014
ABOUT THE JOURNAL

The Berkeley Journal of International Law (BJIL) (ISSN 1085-5718) is edited by students at U.C. Berkeley School of Law. As one of the leading international law journals in the United States, BJIL infuses international legal scholarship and practice with new ideas to address today’s most complex legal challenges. BJIL is committed to publishing high-impact pieces from established and newer scholars likely to advance scholarly and policy debates in international and comparative law. As the center of U.C. Berkeley’s international law community, BJIL hosts professional and social events with students, academics, and practitioners on pressing international legal issues. The Journal also seeks to sustain and strengthen U.C. Berkeley’s international law program and to cultivate critical learning and legal expertise amongst its members.

Website: http://scholarship.law.berkeley.edu/bjil/


Subscriptions: To receive electronic notifications of future issues, please send an email to bjil@law.berkeley.edu. To order print copies of the current issue or past issues, contact Journal Publications, The University of California at Berkeley School of Law, University of California, Berkeley, CA 94720. Telephone: (510) 643-6600, Fax: (510) 643-0974, or email JournalPublications@law.berkeley.edu.

Indexes: The Berkeley Journal of International Law is indexed in the Index to Legal Periodicals, Browne Digest for Corporate & Securities Lawyers, Current Law Index, Legal Resource Index, LegalTrac, and PAIS International in Print. Selected articles are available on LexisNexis and Westlaw.

Citation: Cite as Berkeley J. Int’l L.

Submissions: The editors of the Berkeley Journal of International Law invite the submissions of manuscripts. Manuscripts will be accepted with the understanding that their content is unpublished previously. If any part of a paper has been published previously, or is to be published elsewhere, the author must include this information at the time of the submission.

Citations should conform to THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (19th ed.) except where common sense dictates otherwise. Please review our website for additional submissions guidance and send all manuscripts to bjilsubmissions@law.berkeley.edu.

Sponsorship: Individuals and organizations interested in sponsoring the Berkeley Journal of International Law should contact the Editors-in-Chief at bjil@law.berkeley.edu.

Copyright: Copyright for material published in the Journal is held by the University of California Regents except where otherwise noted.
CONTENTS

Articles

THE TAX CALCULUS OF CORPORATE LOCATIONAL DECISIONS
Elizabeth Chorvat .......................................................... 292

ENFORCEMENT COOPERATION IN COMBATING ILLEGAL AND UNAUTHORIZED FISHING: AN ASSESSMENT OF CONTEMPORARY PRACTICE
Stuart Kaye ................................................................. 316

TOWARD A PATENT EXHAUSTION REGIME FOR SUSTAINABLE DEVELOPMENT
Benjamin Pi-wei Liu ...................................................... 330

THE NATIONAL HISTORIC PRESERVATION ACT: PRESERVING HISTORY, IMPACTING FOREIGN RELATIONS?
Mark P. Nevitt ........................................................... 388

Reviews

REVIEW OF FOOD CRISSES AND THE WTO BY BARIS KARAPINAR AND CHRISTIAN HÄBERLI (EDS.)
Kathryn Bowen ............................................................ 445

REVIEW OF HUMAN RIGHTS IN THE CONSTITUTIONAL LAW OF THE UNITED STATES BY MICHAEL J. PERRY
Anuthara Hegoda .......................................................... 461

REVIEW OF INTERNATIONAL COMMERCIAL TAX BY PETER HARRIS AND DAVID OLIVER
Colby Mangels ............................................................ 472

REVIEW OF ROUGH JUSTICE: THE INTERNATIONAL CRIMINAL COURT IN A WORLD OF POWER POLITICS BY DAVID BOSCO
Anna Mathew ............................................................... 487

REVIEW OF INTELLECTUAL PROPERTY AND HUMAN DEVELOPMENT: CURRENT TRENDS AND FUTURE SCENARIOS BY TZEN WONG AND GRAHAM DUTFIELD (EDS.)
Sorin G. Zaharia .......................................................... 501
The Tax Calculus of Corporate Locational Decisions

Elizabeth Chorvat*

INTRODUCTION

Seeking to improve the welfare of their citizens, many lesser-developed nations have adjusted their tax rules to attract foreign investment.1 Assuming a

* Elizabeth Chorvat is a PhD candidate at the University of Chicago and an SJD from the University of Michigan Law School. The author would like to thank Reuven Avi-Yonah, Jim Hines, Kyle Logue, Doug Kahn, and Paul Volcker for their invaluable comments. An earlier version of this paper was awarded a prize by the Tannenwald Tax Competition.

1. Joel Slemrod & Reuven Avi-Yonah, (How) Should Trade Agreements Deal with Income Tax Issues?, 55 TAX L. REV. 533, 543 (2002). With technical advances and fewer barriers to trade, capital has become more mobile and, in turn, more responsive to differences in the income tax rates. This increased mobility of capital, whether in the form of portfolio capital or the factors of production, has created an opportunity for developing countries to compete for mobile capital by promising higher after-tax returns, which is to say, by lowering tax rates on income from foreign investment. See Reuven S. Avi-Yonah, Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State, 113 HARV. L. REV. 1573, 1575–76 (2000). See also Bishnodat Persaud, The OECD Harmful Tax Competition Policy: A Major Issue for Small States, in INTERNATIONAL TAX COMPETITION 25, 29 (Rajiv Biswas ed., 2002) (describing the use of favorable tax rules to attract
concomitant decrease in revenues, governments in the developed world have become concerned about their ability to continue to spend significant amounts to aid the poor within their own borders. The assumption underlying this concern is that mobile capital flows are highly elastic to tax rates and that capital accretions to the developing world come necessarily at the expense of the developed world. Several prominent academics have argued that tax competition must be resisted for this reason, arguing that the very existence of the welfare state is threatened by that erosion of the tax base which necessarily attends tax competition. More specifically, the protection of the territorial tax base from income shifting and what have come to be known as base-erosion payments has become a central issue for governments of almost every developed nation, and it has prompted a call in June of 2012 by the Secretary General of the Organisation of Economic Co-Operation and Development ("OECD") for a global action plan on tax harmonization. Because tax competition has not yet

foreign investment as one of the few opportunities available to small States).

2. Since Otto von Bismarck introduced the first national social insurance program in 1889, the developed countries of the world have relied on individual and corporate income taxes as a revenue base for fiscal policies which redistribute wealth solely within the boundaries of their respective countries. See Avi-Yonah, supra note 1, at 1573, 1575–76, 1632. See also Julie Roin, Competition and Evasion: Another Perspective on International Tax Competition, 89 GEO. L.J. 545–47 (2001) (arguing that tax competition does not necessarily have negative consequences on the whole). Thus, the phrase “tax competition” need not have a pejorative connotation. However, to those who see tax competition as a threat to existing levels of government expenditure within developed countries, the issue is framed as either “harmful tax competition” or the need for “tax harmonization.” See Avi-Yonah, supra note 1, at 1575–76; see also Roin, supra, at 545–50. Historically, developed nations encouraged investment in lesser-developed countries because they recognized that it promoted economic development. Lawrence G. Franko, Foreign Direct Investment in Less Developed Nations: Impact on Home Countries, 9 J. INT’L BUS. STUD. 55, 55–56 (1978). However, beginning in the 1970s, some countries in the developed world began to take a less positive view of foreign direct investment, as they began to consider that this investment might come at some cost to them. Id. at 57–59. Proposals for tax harmonization have been diverse, ranging from voluntary cooperation to global mandate by a “World Tax Organization.” Roin, supra, at 546, 548–49; Charles E. McClure, Jr., Globalization, Tax Rules and National Sovereignty, in FOUNDATIONS OF INTERNATIONAL INCOME TAXATION 539–54 (Michael J. Graetz ed., 2003).

3. See Reuven Avi-Yonah & Yoram Margalioth, Taxation and Development: A Short Review of Some Recent Literature 19 (Michigan Law School Working Paper, 2006) (describing a two-tiered approach to harmonization based on per-capita GDP); Avi-Yonah, supra note 1, at 1575–76 (arguing that unfettered tax competition will likely result in significant reductions in social spending by the developed nations); Larry Summers, Tax Administration in a Global Era (Address to the 34th General Assembly of the Inter-American Center of Tax Administrators, Washington, D.C., July 10, 2000) (stating that “[t]he OECD’s work and our unilateral initiatives are first steps in ensuring that our policy objectives can be realized without fear of eroding our tax base”); Hugh Ault, Tax Competition: What (If Anything) To Do About It?, in FESTSCHRIFT FOR KLAUS VOGEL 1 (Paul Kirchhof et al. eds., 2000) (arguing that tax competition ultimately eliminates taxation on mobile income, making redistribution impossible and causing States to shift to other sources of revenue, especially labor taxation, ultimately reducing social welfare programs to a suboptimal level). See also Michael McIntyre, Defense of OECD Harmful Competition Report, 81 TAX NOTES 1437, 1437–8 (Dec. 14, 1998). On the general issue of whether source-based capital taxation distorts investment, see Joel Slemrod, Are Corporate Tax Rates, or Countries, Converging?, 88 J. PUBL. ECON. 1169–86 (2004); Johannes Becker & Clemens Fuest, Optimal Taxation When Firms are Internationally Mobile (University of Cologne Working Paper No. 1592, 2005).

4. Addressing Base Erosion and Profit Shifting, G20 LEADERS DECLARATION (OECD, Los
been significantly restricted, however, we should have observed a contraction in the size of governments in the developed world if this concern were well-founded. In fact, however, we have observed the exact opposite. At the same time that tax competition has prevailed largely unchecked, the size of the public sector in the developed world has, if anything, increased. This paper argues that the view that tax competition necessitates an erosion of the tax base in the developed world fails to take into account the empirical evidence on tax competition and thus fails to articulate the actual effects of tax-motivated corporate locational decisions on the fiscal systems of the developed world.

While the simple application of economic theory may predict that tax competition will result in a winnowing of the availability of public goods due to the erosion of the tax base, empirical observation indicates that this has not occurred. Why? I would argue that, utilizing the standard economic intuitions regarding the selection criteria for public goods and the risk-shifting features of the income tax, it is not surprising that developed nations are able to support large public sectors. Moreover, individuals in these countries will continue to demand significant public sectors and, by only slightly altering the tax instruments used, the effect of tax competition on lowering rates may be essentially vitiated.

One might ask why, if tax competition stimulates economic activity in low-tax and high-tax jurisdictions alike, so many governments in the developed world have gone to such lengths to stifle competition for business investment. I believe that the answer lies in an intertemporal agency problem inherent in the evaluation of tax policy with respect to developing nations by governmental agents in the developed world.

Contrary to the prevailing view in the literature, the market-based allocation of capital and investment will generally prove efficient for development. An important empirical finding by Dharmapala and Hines demonstrates that countries are more likely to become tax havens if they have stable governments which protect property rights. Furthermore, by allowing for greater advantages to those countries which have low rates of taxation, we may be giving an additional incentive for countries to improve their policies with

---

5. An important recent study of all tax havens by Dharmapala and Hines adopts the Hines & Rice definition. Dhammika Dharmapala & James R. Hines, Jr., Which Countries Become Tax Havens? (BER Working Paper No. 12802, 2006) (investigating the relationship between quality of government and likelihood of becoming a tax haven, and concluding that there is a positive and significant correlation between quality of government and likelihood of becoming a tax haven).
regards to foreign investment. While those developing countries that have become tax havens are poor, they are less likely to remain as desperately poor as similarly situated countries that lack the appropriate governmental motivation. As a consequence, allowing for a tax competition should further a more efficient pattern of development than one based on transfer of capital from governments.

Part I of this paper addresses the chief arguments in favor of restricting tax competition and, in particular, the activities of so-called tax havens. Part II discusses how the empirical evidence does not support the prevailing notion that tax competition will necessarily lead to a “race to the bottom” in the taxation of mobile factors. Part III offers an economic analysis of why tax competition may not actually lead to significant reductions in the level of public goods provided by government. Furthermore, although tax competition will impact the tax systems of the developed world to some extent, such effects may lead to beneficial results in that governments will be encouraged to adopt more efficient forms of taxation than political considerations would have allowed rather than reduce the size of services provided. Parts II and III incorporate theoretical approaches—including the Tiebout selection model, the Domar-Musgrave model, and theoretical work by Agnar Sandmo—with important empirical work by Hines & Dharmapala, and Dani Rodrik not currently reflected in the legal academic literature. Finally, the paper discusses the intertemporal agency problem inherent in the evaluation of tax policy with respect to developing nations by governmental agents, which may serve to explain why governments in the developed world have resisted tax competition.

I. TAX COMPETITION AND THE INTERNATIONAL COMMUNITY

A. The Nature of Tax Competition

Nations engage in tax competition when they compete in the form of lower tax rates or other tax-beneficial provisions to attract business investment to their jurisdictions. Such business investment, in turn, results in externalities—spillovers to the community in the form of additional jobs (which in turn lead to higher tax revenues), additional demand for the services of local suppliers of

8. See EUGENE STEURLE, THE TAX DECADE (1991) (discussing how the results of the political process are often governed by considerations other than efficiency).
9. See Roin, supra note 2, at 546.
10. See Thomas F. Field, Tax Competition in Europe and America, 29 TAX NOTES INT’L 1235, 1235–37 (2003). See also Joze P. Damijan et al., The Role of FDI, R&D Accumulation and Trade in Transferring Technology to Transition Countries, 27 ECON. SYS. 189 (2003) (stating that “[f]oreign direct investment provides probably the most important and cheapest channel of direct technology transfer to developing countries”).
the factors of production (for example, local construction companies, delivery services, raw material producers)\(^1\) and, if the increase is large and sustained, a change in the business culture which encourages additional investments in human capital and local entrepreneurship.\(^2\) One study by James Hines indicates that tax havens are better off and experience increased economic growth as compared with similarly situated countries which are not like-minded in establishing favorable rate structures to promote business investment.\(^3\)

It is well established in the economics literature that the competition for these positive externalities can and should yield the efficient allocation of business capital, because countries that derive the most benefit from business investment will offer the lowest income tax rates and therefore attract the most capital.\(^4\) That is, to the extent that capital will create larger externalities in a jurisdiction, that jurisdiction will be more willing to give the investment tax breaks, and so investors will choose to invest where total social output is higher, rather than only considering their own private returns. Especially for those lesser-developed countries which have few if any resources to attract business capital, but which have governments with high degrees of integrity, tax competition offers what may be their only opportunity to develop an economic base and create the type of infrastructure that most Western nations take for granted.\(^5\)

This is tax competition in the best sense, promoting economic development where it is most needed and providing for the efficient allocation of business capital. Notwithstanding the benefits to economic development and increases in the efficient allocation of capital, however, it is also the case that, depending on local-country factors such as market structure, multinational corporations might in fact exploit favorable tax regimes to derive all the benefits of the externalities

\(^{11}\) See Field, \textit{supra} note 10, at 1235–37.

\(^{12}\) See id.

\(^{13}\) Hines, \textit{supra} note 7. Indeed, this study found that between 1982 and 1999 “tax havens” had an average annual growth rate of 3.3% as compared to the world average of 1.4%. The study did find that, given the population characteristics, these countries tended to have smaller public sectors than one would expect; however, given that the average ratio of government expenditures to GDP in these countries was found to be approximately 25%, they are not massively below modern levels of government expenditure in the developed world. Hines defines the term “tax haven” to mean those countries identified in \textit{WALTER DIAMOND & DOROTHY DIAMOND, TAX HAVENS OF THE WORLD} (2002) or in James Hines & Eric Rice, \textit{Fiscal Paradise: Foreign Tax Havens and American Business}, 109 Q. J. ECON. 149 (1994). These countries generally have either a very low rate of income tax or none at all.

\(^{14}\) One can derive these results from the well-known model developed by Charles Tiebout, which addressed the issue of how jurisdictions would compete if they provided benefits in the form of public goods in exchange for tax revenues. Charles M. Tiebout, \textit{A Pure Theory of Local Expenditures}, 64 J. POL. ECON. 416, 419–24 (1956). Tiebout demonstrated that, in such a world, the efficient allocation outcome would result from allowing unfettered competition between jurisdictions. \textit{Id.}

\(^{15}\) Dharmapala & Hines, \textit{supra} note 5, at 22–24 (demonstrating that the most important factor in determining whether a country will become a tax haven is the level of integrity of the government).
they create, leaving relatively little for the local jurisdiction.\footnote{16} In addition to extracting benefits that might otherwise accrue to the local jurisdiction, multinational corporations might attempt to derive income from a high-tax jurisdiction that has decided to invest heavily in public goods, and structure its operations so as to claim the income as having arisen taxed in the low-tax jurisdiction, thus avoiding paying for those public goods they actually use.\footnote{17} Prominent academics have argued persuasively that this could result in the underfunding of public goods and should be avoided.\footnote{18} Virtually all high-tax jurisdictions, however, have transfer-pricing regimes in place which, properly enforced, should preclude mischaracterization of the source of business income.\footnote{19}

\subsection*{B. The Case for Tax Harmonization}

As the world has become more integrated, the ability of nations that are so inclined to attract business away from others by means of favorable tax regimes has increased.\footnote{20} A number of academics, including Hugh Ault, Reuven Avi-Yonah, Lawrence Summers, and Michael McIntyre, have argued that tax competition will effectively create a race to the bottom, where tax rates on income derived from capital will drop to levels inconsistent with the ability of governments of the developed world to maintain a modern welfare state.\footnote{21} The notion is that this will occur in part because the marginal cost of government for a single additional business or investment is negligible. We can analogize taxes to the price charged by government for its services, which is to say, for public goods. These public goods are valued both by businesses and individuals. For example, an efficient transportation system, public education, law enforcement, and effective protection of property rights all have significant value to

\footnote{16. See Damijan et al., supra note 10, at 190–203 (testing for productivity spillovers in developing countries and finding that significant positive spillovers to domestic firms from foreign direct investment occurred in Slovenia, Poland, and Romania). The authors theorized that a higher rate of positive spillover resulted when local-country firms had the ability to absorb and exploit knowledge transfers where some level of research and development had already occurred in local firms. Id. at 198, 203.}

\footnote{17. OECD, HARMFUL TAX COMPETITION 28–29 (1998) [hereinafter 1998 OECD REPORT] (discussing the need for “transparency”).}

\footnote{18. See, e.g., Ault, supra note 3, at 2; Avi-Yonah, supra note 1, at 1575–80, 1632–39.}

\footnote{19. While some reforms to the current transfer pricing system may be optimal, the basic idea of arms’ length transfer is generally accepted as the appropriate method to allocate income among jurisdictions. See, e.g., Elizabeth Chorvat, Forcing Multinationals to Play Fair: Proposals for a Rigorous Transfer Pricing Theory, 54 ALA. L. REV. 1251 (2003).}

\footnote{20. See, e.g., Avi-Yonah, supra note 1, at 1579.}

\footnote{21. See Ault, supra note 3; Avi-Yonah, supra note 1; Summers, supra note 3; BRIAN J. ARNOLD & MICHAEL J. McINTYRE, INTERNATIONAL TAX PRIMER 137–42 (2d ed. 2002). Not all academics share this opinion, see Karen B. Brown, Missing Africa: Should U.S. International Tax Rules Accommodate Investment in Developing Countries?, 23 U. PA. J. INT’L ECON. L. 45, 57 (2002) (characterizing the OECD as “[a] group of industrialized nations [advocating] elimination of tax regimes which are viewed as unfairly competing for investment dollars of multinational enterprises”).}
businesses, and they will be willing to pay for these benefits. However, if under perfect competition between governments for investment capital the price charged by a country for public goods were to equal the marginal cost of government, the tax rates on income derived from mobile capital would essentially drop to zero.22

From the perspective of the European Union and other high-tax jurisdictions, the real problem posed by tax competition is that it may operate as a market mechanism to limit the level and the kinds of taxes that a government can impose.23 Limitations on revenue, in turn, limit government spending. More specifically, commentators sympathetic to tax harmonization have argued that tax competition will limit the ability of governments in developed nations to adopt policies aimed at improving the welfare of their poor.24 These expenditures now constitute the lion’s share of government expenditures at the national level of most developed countries.25

To some extent, international tax competition issues arise whenever there is income earned from activities conducted in more than one jurisdiction and the tax rates imposed by the jurisdictions differ.26 To the extent that tax competition is viewed as a problem, it is a growing one, because international trade continues to expand at a rapid pace.27 As worldwide trade expands, the ability of countries to compete with favorable tax regimes will continue to enlarge.28 It is clear that the members of international organizations such as the OECD perceive a sufficient threat to their tax base that they have undertaken to prevent countries both within and without their sphere of authority from using tax competition in what they view as overly aggressive.29 We might do well, however, to examine the results of empirical studies relating to the assumption that mobile capital flows are highly elastic to tax rates and that capital flows to the developing world will necessarily lead to a race to the bottom.

25. At least in the United States, income taxes make up a much smaller percentage of subnational (that is, state and local) government revenue.
27. See, e.g., Avi-Yonah, supra note 1, at 1578, 1596–97.
29. Id. at 16, 37–52.
II. THE EMPIRICAL PUZZLE OF TAX COMPETITION

A number of empirical studies undercut the factual premises on which the argument against tax competition is based. According to harmonization advocates, the risk that a country will face problems funding its public goods increases with exposure to competition from other governments.30 That is, drawing the analogy to the industrial organizations literature, the more competition a government faces, the closer its prices will have to be to marginal cost, which we have seen would essentially be equal to zero for capital income.31 Moreover, tax competition theory would suggest that the countries most hurt by the existence of tax havens would be the countries most similar to the havens in their essential characteristics. This is to say that, to the extent that countries with similar characteristics are found near each other, those countries in the vicinity of the haven would have the most to lose. As intuitively appealing as these arguments may be, none of them are supported by the empirical literature. Most importantly, the empirical evidence does not suggest that the supply of public goods will significantly drop as result of tax competition.

It does not appear that tax competition significantly alters locational decisions, at least not to the point of significantly altering the supply of public goods. This is the conclusion of the most prominent empirical study on the effects of tax competition between the cantons in Switzerland.32 The study by Kirchgassner and Pommerehne found that tax competition has some influence on how individuals with high income locate among the cantons, and that this difference was partly capitalized into housing prices and apartment rents.33 According to the study, however, tax competition neither leads to a collapse of public good supply nor does it make redistribution impossible. Switzerland is uniquely situated for such a study because, owing to the small size of the country and its subfederal units, private and corporate taxpayers can easily move to lower their tax burden, tax competition is possible, and any negative consequences are readily apparent. There are three levels of government specified in the Swiss constitution: federal, cantonal, and that at the local

31. Because the marginal cost of providing public service is essentially equal to zero, if the government were to structure tax rates based on marginal cost, the rate would likewise become essentially zero where government is forced to compete for capital income. See text accompanying note 22, supra.
33. Empirical studies show that income and property taxes do have some effect on where some individuals, especially high-income individuals, reside. Id. at 359. These results are in line with other studies for Switzerland which show that residency decisions between central cities and their suburban areas are influenced by tax rates, especially for high-income individuals. Werner W. Pommerehne & Suzanne Krebs, Fiscal Interactions of Central City and Suburbs: The Case of Zurich, 28 URB. STUD. 738–801 (1991).
community level.34 The main progressive taxes on personal and corporate income are cantonal and local taxes, whose rates differ from canton to canton and, within cantons, from municipality to municipality. The central government relies mainly on indirect (proportional) taxes, the general sales tax, and specific consumption taxes like the mineral oil tax.35 Owing to the small size of the country and its subfederal units, private and corporate taxpayers can easily move from place to place to decrease their tax burden. Tax competition clearly exists and any negative consequences should become readily apparent—all the more so because it is occurring in a country as small as Switzerland, with a very homogeneous, business-minded populace.36

One would expect that, if tax competition exerted a significant influence on locational decisions, public expenditures as a share of GDP should decline. In fact, Switzerland has had a total increase in the share of public spending during the last forty years commensurate with the increase in the size of other European governments.37 Thus, tax competition did not appear to lead to any significant reduction in public goods in Switzerland.

Perhaps the most interesting result of the study was that tax competition did not seem to have any significant effect on the redistribution of income within cantons.38 They found that the amount of redistribution is approximately the same in Switzerland as in the United States, is somewhat higher than in Canada, and is a little lower than in Germany.39

34. Pommerehne & Krebs, supra note 33, 738–801.
35. Indirect taxes are taxes that are assessed based on features that do not vary between individuals. A paradigmatic example of an indirect tax would be a sales tax.
36. Kirchgassner & Pommerehne note that it is well known that there are two tax havens in or near Switzerland: the small country of Liechtenstein, which forms an economic union with Switzerland and, more important for our investigation, the canton of Zug. Kirchgassner & Pommerehne, supra note 32, at 353. While these are the two most prominent tax havens, income taxes in Switzerland actually differ significantly between cantons. Id. Normalizing to 100 for the weighted average for income taxes in Switzerland, the authors describe the variance of the burden from personal income and property taxes in 1990 as from 54.8 in the canton Zug to 150.5 in the Valais. Id. That is to say, a family with two children earning a taxable income of SFr200,000 had to pay SFr18,223 in state and local income taxes in Zug, but SFr41,944 in Solothurn, two cities less than 100 km apart. Id.
37. As was demonstrated by the authors, total government expenditure in relation to GDP rose between 1950 and 1985 from 19.6% to 25.9%. Kirchgassner & Pommerehne, supra note 32, at 360 (citing Kirchgassner & Pommerehne, Zwischen Parteien und Bundesstaat: Staatshandeln in der Schweiz und in der Bundesrepublik Deutschland, in STAATSFITIGKEIT IN DER SCHWEIZ 234 (H. Abromeit & W.W. Pommerehne, eds., 1992). Of course, this is clearly below the corresponding figures for Germany, which rose during the same time from 24% to 31.2%. While it is true that Switzerland has the lowest government share (measured as total outlay of government as a percentage of GDP) of all OECD countries, it exhibited the same development of government growth during the last few decades, so there is little reason to believe that tax competition significantly limited the growth of the public sector in Switzerland. In fact, they note that compared with Germany, the share of public consumption from GDP was higher in Switzerland during the 1980s, and the share of public investment was higher in Switzerland than in Germany even since the 1970s.
39. See, e.g., Hans-Werner Sinn, Tax Harmonization and Tax Competition in Europe, 34
For further evidence that the theoretical case against tax competition is incorrect, a recent econometric study by Dani Rodrik of Harvard has demonstrated that there is a positive and robust correlation between exposure to international trade and more extensive social insurance programs.\textsuperscript{40} Rodrik argues that the positive correlation between exposure to competition and big government exists because voters demand government insurance against the risks associated with an open economy.\textsuperscript{41} There is a growing body of literature suggesting that the risk-sharing function of government stimulates investment in those assets that are subject to differential taxation.\textsuperscript{42} That is, taxation can itself provide some benefit to taxpayers. This would explain why we do not necessarily observe flight from a high-tax state.\textsuperscript{43} It would thus be reasonable to infer that developed nations that provide public goods efficiently should be able to retain their welfare state at current levels.

Two recent studies suggest that, rather than drawing capital away from surrounding countries, tax havens actually improve the welfare of surrounding high-tax countries. Desai, Foley, and Hines demonstrate that the empirical evidence, “properly interpreted,” suggests that activity in tax havens increases economic activity in nearby nonhavens, which therefore may have an overall stimulative effect.\textsuperscript{44} This is a very interesting result because the standard story would suggest that surrounding countries would be most likely to suffer as a result of tax competition if they were similar to the haven in their essential characteristics and closely competing with the tax haven.\textsuperscript{45}

Using weighted GDP growth rates as an instrumental variable for economic activity outside the havens, Desai, Foley and Hines presented evidence that increased nonhaven activity correlated positively with demand for havens, suggesting that the use of haven operations stimulates economic activity in nonhaven operations.\textsuperscript{46} Modeling the profit-maximizing behavior of firms investing in havens and nonhavens simultaneously, the authors found that tax haven investment operates to stimulate economic activity in nonhavens because

\textsuperscript{41} Rodrik discusses a study by David Cameron which finds an extremely high correlation (specifically, a correlation coefficient of .78) between tax revenue and the openness of an OECD country (as measured by imports plus exports divided by GDP). \textit{Id.} at 999 (citing David R. Cameron, \textit{The Expansion of the Public Economy: A Comparative Analysis}, 72 AM. POL. SCI. REV. 1243 (1978)).
\textsuperscript{42} For explanations of how imposing higher taxes might lead to greater investment in the taxed item on account of this risk-sharing, see Agnar Sandmo, \textit{Differential Taxation and the Encouragement in Risk-Taking}, 31 ECON. LETTERS 55–9 (1989).
\textsuperscript{43} Rodrik, \textit{supra} note 40, at 998.
\textsuperscript{44} Desai et al., \textit{Do Tax Havens Divert Economic Activity?}, 90 ECON. LETTERS 219 (2006).
\textsuperscript{45} \textit{Id.} at 220. \textit{See also} James R. Hines, Jr., \textit{Treasure Islands}, 24 J. ECON. PERSP. 103, 104, 107–08 (2010) (describing similar concerns and empirical findings regarding the effect of competition from tax havens on capital investment in neighboring countries).
\textsuperscript{46} Desai et al., \textit{supra} note 44, at 220–21.
the favorable tax position afforded by the haven investment reduces the marginal product of capital required for nonhaven investment. Rephrasing in the vernacular, tax haven operations are essentially used to “shelter” income earned in neighboring high-tax jurisdictions and reduce the cost of deferral. In turn, the lower cost of nonhaven operations stimulates demand for havens.

Further empirical evidence relating the size of the public sector and the openness of the economy supports the notion that the more open the economy, the larger the public sector. Duane Swank argues that, contrary to the standard tax competition argument, openness to trade and capital movement does not result in what Swank calls “the lowest common denominator.” Swank performed a pooled time-series study over the period between 1966 and 1993, relating capital flows, financial liberalization, and business taxes, and found openness to be positively correlated with business taxes. The effect of globalization and increased competition, if anything, appears to be to alter the structure of taxes to those with broader bases and lower marginal rates, which is to say, more efficient tax systems. This evidence runs precisely contrary to the theory that tax competition will lure capital to exclusively low-tax jurisdictions. The total burden of—or conversely the total revenue raised by—business taxes does not seem to be greatly affected by increased openness. If the tax competition indeed destroyed the ability of nations to have taxes on corporate income, as advanced by its opponents, we should find that it is the most open countries that are the most vulnerable to capital flight. Instead, the most open countries are more likely to attract capital. Moreover, it appears to comport

47. Id. Optimizing the profit-maximization function of a firm investing simultaneously in the haven and non-havens, the first order condition for investment in both results in:

\[
\frac{\partial Q(K_1^*, K_2^*)}{\partial K_1} = \frac{(1 - \tau_1)}{(1 - \tau_2)} \frac{\partial Q(K_1^*, 0)}{\partial K_1}
\]

where \(K_1^*\) is the level of invested capital in non-havens, \(K_2^*\) is the corresponding investment in non-havens, and \(\lambda\) is the opportunity cost of capital. Note that the multiplier is less than one, such that the firm is willing to invest more because of the declining marginal product of capital (or, in other words, the “hurdle rate” required for investment in the non-havens).


50. Id. at 675.

51. Id. at 681–84.

52. Id. If the theory used to argue against tax competition were correct, we should observe that the most open economies are the most vulnerable to capital flight. Swank finds precisely the opposite. Therefore, the empirical evidence indicates that the empirical evidence used to argue against tax competition is incorrect.
with the notion that the ultimate effect of globalization and the emergence of tax haven operations may be more efficient forms of income taxation. Finally and perhaps most importantly, a recent paper by Hines presents strong evidence that tax competition is not at odds with large social welfare systems and may, in the long run, encourage the growth of such systems.\textsuperscript{53} Regressing on the level of social welfare spending and per-capita GDP, Hines finds a strong correlation between high national income and greater demand for social welfare programs.\textsuperscript{54} Furthermore, Hines reports that systems that have large social welfare programs do not generally receive a high percentage of their revenue from internationally mobile sources of income, such as corporate income taxes. Indeed, he determines that the ratio of corporate income taxes to GDP is negatively correlated with social welfare spending, although this finding is not statistically significant. These results imply not only that governments have been able to adapt to tax competition, but also that the efficiency gains associated with such competition are likely to result in an increase in the size of social welfare systems rather than the reverse. Hines concludes that, while one can never know the future or what chain of events tax competition might set into motion, based on this evidence, tax competition may be associated with increased—rather than decreased—social welfare spending.\textsuperscript{55} According to the June 2012 OECD report, this may well have been the case.\textsuperscript{56}

Taken together, it appears that the empirical evidence severely undercuts the notion that tax competition, which up to the present has largely been unregulated, will necessarily result in a race to the bottom. Rather, the evidence indicates that such competition should support economic development in the havens and, in turn, stimulate the economies of nonhavens.

However, this empirical work presents a puzzle. Why is it that tax competition does not in fact cause a race to the bottom? As discussed in Part I, under standard economic theory, perfect tax competition should result in the rate of taxation on mobile factors of production like capital being essentially zero at equilibrium. This paper will argue that, taking into account standard economic theory relating to the selection criteria for public goods and the risk-shifting features of the income tax, it is not surprising that there has not been a race to the bottom. This analysis also suggests that it is unlikely that such a race will occur. It does suggest, however, that tax competition may force countries to adopt more efficient types of tax systems than they may otherwise have adopted.
III.
WHY A RACE TO THE BOTTOM HAS NOT AND WILL NOT OCCUR

The empirical evidence presents us with a puzzle. A simple application of economic theory indicates that tax competition should result in a winnowing of the availability of public goods, yet we have not observed this occurring. This section argues that, utilizing the standard economic intuitions regarding the selection criteria for public goods and the risk-shifting features of the income tax, it is not surprising that developed nations are able to support large public sectors. In particular, we can predict that individuals in developed nations will continue to demand significant public sectors and, by only slightly altering the tax instruments used, the effect of tax competition on lowering rates may be essentially vitiated.

A. Tiebout Selection

Under the standard model of the local provision of public goods, first presented by Charles Tiebout, individuals will choose to locate where the tax policies and the local provision of public goods most closely match their tastes. Under this model, localities effectively compete for individuals who vote with their feet so that jurisdictions that do not supply a level of public goods demanded by a large number of people will not attract immigrants and will lose out in this competition.

There are many other economic models in which the Tiebout selection model has been extended to describe the competition by government for business as well as individuals, as jurisdictions compete for mobile corporate income in order both to increase levels of wage income in the jurisdiction and to enlarge the local tax base. These models produce a series of “invisible-hand theorems” in which interjurisdictional competition leads to Pareto-efficient outcomes. In one sense, this should not be too surprising. So long as local residents care about the provision of public goods as well as their levels of private consumption, governments will seek to provide public goods as well as a reasonable level of taxation. In addition, local jurisdictions will wish to extend invitations to new business for which the benefits exceed the costs, both by low taxes as well as the provision of public goods such as roads and an efficient legal system. As Stigler framed the issue, “[c]ompetition among communities offers not obstacles but opportunities to various communities to choose the type and scale of government functions they wish.”

57. Tiebout, supra note 14.
59. In these models, tax competition allows those with different preferences to sort themselves by location, thereby increasing general welfare. Id.
60. George J. Stigler, The Tenable Range of Functions of Local Government, in JOINT ECONOMIC COMMITTEE, FEDERAL EXPENDITURE POLICY FOR ECONOMIC GROWTH AND STABILITY
These models would then place a second limit on the level of public goods, but this would be a floor rather than the ceiling, which would seem to be imposed by tax competition. That is, if citizens of developed countries demand a certain level of public goods, their governments will have to provide it, and a business that wishes to operate in these jurisdictions will have to subject itself to the taxes imposed by these jurisdictions.

The Tiebout selection model and the standard arguments against “harmful” tax competition are in conflict. Tiebout selection would argue that those businesses with operations that have significant needs for public goods will locate in those jurisdictions with higher levels of public goods and those that do not will locate in jurisdictions with low tax rates. To the extent that the Tiebout model is descriptive, it will not be the case that all businesses will flee to low-tax jurisdictions, but rather there will be a sorting among these businesses, with some choosing to locate in low-tax jurisdictions and others locating in high-tax jurisdictions. For example, businesses that rely heavily on roads and good schools will likely locate in jurisdictions that have higher taxes while business that have easily transportable products that do not require a highly educated workforce may locate in jurisdictions where the supply of these public goods is lower. Similarly, businesses that rely on heavy enforcement of patent rules will select jurisdictions with well-developed patent and property regimes.

Those arguing against tax competition allege that tax competition from developing nations will “induce potential distortions in the patterns of trade and investment and reduce global welfare.” However, one can make the argument for allocating greater capital to lesser-developed regions based on fundamental notions from microeconomics. In particular, the concept of declining marginal returns to capital argues in favor of reallocating capital to jurisdictions offering the lowest cost for that bundle of public goods which is provided in accordance with the taxpayer’s preferences. The notion here is that, as capital is added to an activity, the additional increase in productivity for each marginal increment of capital is less. This argument is similar to the argument about the redistribution of wealth in connection with declining marginal utility of wealth. Here, though, it does not rely on such abstract notions of utility, but rather on an empirically verifiable hypothesis related to the declining marginal productivity of capital.

216 (1957).

63. DAVID FRIEDMAN, PRICE THEORY 122–23 (2d ed. 1990).
64. MUSGRAVE & MUSGRAVE, supra note 62, at 608–09. For a discussion of the empirical evidence for the declining marginal productivity of capital, the key article in this line of the literature is Gregory Mankiw, David Romer & David Weil, A Contribution to the Empirics of Economic Growth, 58 Q. J. ECON. 407 (1992).
It is generally believed that economic competition allows for the optimal allocation of capital. Just as competition in the market allocates capital to the most efficient producers, tax competition will help to allocate capital to countries in which the capital will create the greatest number of positive externalities. In contrast to the harmonization story, however, this will include nations with the domestic policies, resources, and incentives that accrue to business investment and offset the disincentive of higher tax rates. As Tiebout described, it is for the government to ascertain the market for public goods and tax accordingly.

Recent research by Dharmapala and Hines adds further evidence in support of the Tiebout model as applied to tax competition. Their research indicates that the chief determinants of whether a country will become a tax haven are (i) the size of the country, (ii) whether it scores high on their measure of government integrity, and (iii) its distance from a major financial center. From the Dharmapala and Hines results, we can infer that the prediction from the Tiebout model, that countries which elect to become tax havens are those most likely to profit from significant amounts of capital investment—which is to say, because they value the investment the most—holds true empirically. Why might this be the case? First, the smaller the country, the greater the impact a given amount of capital inflow will have on the well-being of its citizens. Second, the greater the integrity of the government, the more investors will be willing to trust the government not to expropriate profits earned in that country, and therefore the greater the willingness of the investors to allocate capital to the business activity in that country. Finally, the further the distance from a financial center, the less likely capital would be to come to the jurisdiction without a special incentive. Therefore, just as the Tiebout selection model would predict, the jurisdiction that can profit the most from capital inflows will offer the lowest tax rates on income from capital.

According to the public finance literature, competition for business investment in the form of public goods and taxation can and should yield the efficient (worldwide) allocation of business capital as governments adapt to business preferences for the public goods/tax mix. The Tiebout model describes the cost-benefit analysis performed by individuals seeking the optimal mix of taxes and public goods. The implication is that, even with tax competition

---

66. Tiebout, supra note 14, at 423–24 (demonstrating how allowing for competition amongst different jurisdictions will promote the efficient provision of public goods).
68. Dharmapala & Hines, supra note 5.
69. Id. at 36 (describing the results of their regression run using status as a tax haven as the dependent variable).
among jurisdictions, rates will not necessarily decline to zero and firms will locate where they find the optimal mix of tax cost and public goods provided. The “rational consumer,” which Tiebout describes as voting with his feet, is an appealing metaphor for the haven/nonhaven business investor as described by Desai, Foley, and Hines who utilizes preferential haven rates to reduce the required marginal product of capital in nonhavens. The challenge to determine and satisfy revealed preferences and tax accordingly seems not at all insurmountable in the global business environment.

While some have argued for increased aid to developing countries by the governments of the developed world, by allowing for the market to allocate capital to where it is most productive, we can overcome some of the inefficiencies inherent in the public-sector allocation of capital. That is, unless there is some special provision in the budgetary process removing such decisions from the political arena, direct foreign aid—as contrasted with the market allocation of capital—will always be based to some extent on political rather than efficiency considerations. Moreover, as demonstrated by Dharmapala and Hines, those countries most likely to engage in tax competition have good governments, are least likely to waste resources, and are therefore best suited for capital transfers.

B. Risk-Shifting Features of the Income Tax

Advocates of harmonization argue that tax competition limits the ability of developed nations to adopt and retain welfare states. But, because taxes shift risk away from capital to government, taxes should not necessarily cause capital flight. If properly structured, a corporate income tax may have a minimal—even nonexistent—burden on corporate capital.

One of the key features of an income tax is that the tax is lower when income is lower and higher when income is higher. Consequently, the tax provides a form of implicit insurance whereby some of the risk of the business is essentially shifted to the government, who we can assume does not change the level of public goods provided based on the level of taxes paid. It has been demonstrated that imposing this type of tax at a higher level can actually result in more investment in a high-tax jurisdiction rather than a lower level. That is, it is not so clear that imposing a higher level of tax on its own will necessarily result in investment leaving a jurisdiction, as is commonly assumed by those opposed to tax competition.

Domar and Musgrave demonstrated that, assuming a properly structured corporate tax regime, there is essentially no burden imposed on the taxpayer by

---

the tax. The intuition is that the income tax has effectively made the government a partner in the investments of the taxpayer—a partner which, because taxes paid or loss offsets credited depend upon the profits of the corporation, shares in both the upside and downside risk. In other words, the government takes on risk and is compensated for doing so, effectively issuing an insurance policy to the firm. Taxpayers are thus essentially able to eliminate the tax burden on capital income by shifting investments to risky assets until the tax on investment capital is effectively eliminated. This analysis is the same whether we are speaking of active or portfolio investments. Moving to a perfectly efficient tax structure would require two elements: exempting the risk-free return (which is generally only a very small portion of income earned) and the implementation of full-loss offsets. While examples of systems that approximate the Domar-Musgrave ideal exist outside of the United States, current proposals for reform would accomplish a similar result in the United States. A consumption tax, for example, would exempt the risk-free rate of return on investments (as well as the inflation rate). As many authors have pointed out, the key distinction between consumption taxes and labor taxes on the one hand, and the income tax on the other, is that effectively consumption and labor taxes exempt the risk-free rate of return on investments and the inflation rate. Because this rate is generally only a very small portion of the income earned, increased reliance on such taxes is unlikely to lead to significant inefficiencies.

73. See generally Domar & Musgrave, supra note 71.
74. In other words, the corporate income tax effectively shifts some of the risk of the taxpayer’s investments to the government. This risk shifting results in the government sharing both in the income and the loss of an investment.
75. DAVID BRADFORD, THE X TAX AND THE WORLD ECONOMY: GOING GLOBAL WITH A SINGLE, PROGRESSIVE TAX (2005). By “full-loss offsets,” I mean to say that taxpayers are granted full deductions against net income for operating losses incurred during the same taxable year.
76. Because Ibbotson’s finds that the risk-free return has historically been less than one-half of one percent, one may argue that the difference between any standard income tax and a Domar-Musgrave tax is negligible with respect to the first prong, which is to say, taxing the risk-free return. IBBOTSON ASSOCIATES, STOCKS BONDS BILLS AND INFLATION 2004 YEARBOOK 88 (2005). Moreover, there are a number of countries which essentially allow for full loss offsets. For example, in Sweden, there is essentially a credit granted equal to tax value of the loss. HUGH AULT & BRIAN ARNOLD, COMPARATIVE INCOME TAXATION: A STRUCTURAL ANALYSIS 237–39 (2nd. ed. 2002). Several current proposals for reform would approximate the Domar-Musgrave ideal. See, e.g., BRADFORD, supra note 75 (proposing a tax on consumption via the exemption of certain portions of income); Michael J. Graetz, One Hundred Million Unnecessary Returns: A Fresh Start for the U.S. Tax System, 112 YALE L.J. 261 (2002) (proposing a consumption tax for the majority of Americans).
78. See id.
79. But see John R. Brooks, Taxation, Risk, and Portfolio Choice: The Treatment of Returns to Risk Under a Normative Income Tax, 66 TAX L. REV. 255 (2013) (arguing that a normative tax is not possible where there is a positive risk-free rate). Some scholars have argued for these forms of taxes based on their increased inefficiency.
This feature is particularly relevant in making sense of the finding of the Swank study that openness does not result in a smaller public sector but rather a shift in the methods of taxation. It is very likely that one of the ways in which countries adjust their tax systems to make them more efficient is to make them more closely resemble a normative Haig-Simons income tax, which is to say, one which does not place non-economic limits on the use of losses. To the extent that a country can adopt such a system, it will likely experience more rather than less capital investment. Indeed this solution is further suggested by the finding of Dani Rodrik that the greater the risk a country faces due to its “terms of trade” the larger the public sector. That is, the more the risk the country faces, the higher the demand for risk minimizing through the public sector.

Based on this analysis, it may very well be the case that tax competition does indeed affect the structure of the tax systems of the developed world. However, the effects may be different than are commonly assumed. The effect may merely be to develop more efficient methods of taxation.

C. Why the Governments of the Developed World Do Not Support Tax Competition

If tax competition stimulates economic activity in low-tax and high-tax jurisdictions alike, one may ask why so many governments in the developed world have gone to such lengths to stifle competition for business investment. However, the reasons for this opposition become clearer upon an examination of the incentives of government agents. This section discusses how the incentives of governmental agents systematically differ from the country as a whole, and therefore lead the agents to oppose tax competition. There are two applications of public choice theory to the tax harmonization debate. First, it brings further doubt to the notion that tax competition will decrease efficiency. Second, it helps to explain why most governmental and quasi-governmental agencies support tax harmonization.

1. Public Choice and the Provision of Public Goods

The view of tax competition in the academic community has been shifting. One of the key examples of this shift in attitudes is Agnar Sandmo’s presidential address to the European Economic Association. In his address, he contrasts the views of the welfare state by economists in the 1940s and 1950s with those of the current generation. Sandmo argues that economists generally, and in

80. Swank, supra note 49, at 691.
81. But see Brooks, supra note 79.
82. This refers to a variety of risks, most prominently featuring exchange rate risk.
83. Agnar Sandmo is a professor of economics at the Norwegian School of Economics and is a past president of the European Economic Association.
particular Scandinavian economists, have moved from being strong advocates for the welfare state to being much more critical.\textsuperscript{85} This is a result both of the expansion of the public sector in recent decades and of the development of economic theory in the areas of public finance, insurance and incentives, and public choice. Sandmo argues that the strong belief in central planning and social engineering has yielded to a new emphasis on consumer sovereignty, the efficiency of competitive markets and the crucial role of private incentives as constraints on economic policy.\textsuperscript{86} More specifically, the view of benevolent politicians who work for the benefit of individual consumers and workers who were supposed to react rather passively to the allocation mechanisms introduced by the social engineers.\textsuperscript{87} This view of economic and social policy has been criticized from several angles in recent years.\textsuperscript{88} Sandmo argues that the recent work in the fields of public finance, insurance, and incentives have led to a much better understanding of the importance of private incentives as constraints on public economic planning.\textsuperscript{89} An important contribution of the public choice school has been to point out that incentives by agents in the public sector to implement economic policy must be taken into account.\textsuperscript{90}

The “naïve” view against which Sandmo argued might be described as follows. Suppose that a case of market failure has been identified, for example, as the result of externalities or informational asymmetries. An adherent of the naïve view would then conclude that a gain in social welfare or efficiency would result from transferring the activity in question to the public sector.\textsuperscript{91} The fallacy in this line of reasoning is obvious. One fails to consider the opportunities and incentives of public-sector agents to implement the policy required to attain the optimum.\textsuperscript{92} To some extent this naïve view is embedded in the negative assessment of tax competition. If the government and its actors are viewed as wholly beneficial, then any restriction on its power is likely to be welfare reducing. However, if the view of government and its actions is more complicated, then restrictions on the ability of government to tax capital income is less clear. In particular, restrictions on government’s ability to tax may in fact increase the efficiency of the economy rather than reducing it, as is feared by the OECD.\textsuperscript{93} In fact, according to OECD data, corporate taxes as a percentage of GDP increased annually between the years 2009 and 2011, from 2.8 to 3.0.\textsuperscript{94}

\begin{itemize}
\item \textsuperscript{85} Id. at 213.
\item \textsuperscript{86} Id. at 238.
\item \textsuperscript{87} Id. at 235.
\item \textsuperscript{88} Id. (citing GEOFFREY BRENNAN & JAMES M. BUCHANAN, THE POWER TO TAX (1980)).
\item \textsuperscript{89} Id.
\item \textsuperscript{90} Id.
\item \textsuperscript{91} For a description of the difference between the two views, see generally JAMES BUCHANAN & RICHARD MUSGRAVE, PUBLIC FINANCE AND PUBLIC CHOICE: TWO CONTRASTING VISIONS OF THE STATE (1999).
\item \textsuperscript{92} Sandmo, supra note 84, at 239.
\item \textsuperscript{93} Gary S. Becker & Casey Mulligan, Deadweight Costs and the Size of Government (NBER Working Paper No. 6789, 1998). They argue that a tax system which is suboptimal from a simple
If, contrary to the evidence, it is the case that tax competition has a negative impact on the size of government, then one could formulate a public choice argument in favor of tax competition to the effect that governmental agents have an incentive to cause government to be larger than its optimal size. This is in part due to the fact that their compensation is in some sense a function of the size of the organization they oversee.95 In addition, the larger government, the more it will profit individuals to lobby agents and hence the more favors they will receive.96 Tax competition may help to reduce government to the optimal size. While this may be quite a cynical view of governmental agents, there does seem to be some merit in it.

This argument is based on the assumption that tax competition does in fact limit the size of government. Of course, if tax competition only limits the types of taxes that can be used and not the overall level of government, then the public choice argument only applies to the choice of tax instrument by the governments. That is, in the absence of tax competition, government agents may have an incentive to utilize less efficient means of taxation because they are more politically palatable rather than being optimal from a policy perspective.97 With tax competition, there would be greater pressure on politicians to choose efficient tax instruments which would thereby again cause tax competition to improve the efficiency of the system.

To the extent that this argument is taken to its logical conclusion, because no one government or group of government agents derives a large share of the benefits of third-world development, when capital leaves their individual jurisdiction, they suffer the entire cost. This results in a “tragedy of the commons” problem for allowing investment in developing countries.98 Individual governments will therefore attempt to allow too little investment in developing countries than is optimal. Allowing tax competition would, alternatively, allow that amount of capital flowing to developing countries to more closely approach its optimal level.

perspective can actually improve taxpayer welfare because the system creates additional political pressure for suppressing the growth of government. They argue that spending was not decided upon and then taxes were introduced, but rather taxes were raised and then spending was increased.

94. G20 LEADERS DECLARATION, supra note 4, at 16. From a longer-term perspective we see that, at least with respect to OECD countries, corporate taxes as a percentage of GDP have increased from 2.2% of GDP in 1965 to 3% of GDP in 2011. BASE EROSION REPORT, supra note 4, at 16 (2013).


96. Id. at 286–88.

97. See STEURLE, supra note 8 (discussing how the results of the political process are often governed by considerations other than efficiency).

98. A tragedy of the commons results when individual agents do not realize the entire cost of their actions, but derive the entire benefit. See EUGENE SILBERBERG, THE STRUCTURE OF ECONOMICS: A MATHEMATICAL APPROACH 229–30 (2d ed. 1990). An inefficient allocation results, with less than optimal results for all. Id. This is exemplified in the game-theory model, “the prisoners’ dilemma,” in which both players in the game end up making choices that make them collectively worse off than had they been able to cooperate. DOUGLAS G. BAIRD ET AL., GAME THEORY AND THE LAW 33, 48–49 (1994).
Moreover, even if it were true that tax competition will result in a decreased ability of governments to fund their public sector with capital taxation, it may not necessarily follow that restricting tax competition will allow governments in the developed world to retain the “rents” derived from their current competitive advantage. As pointed out by Julie Roin, countries can compete along many dimensions, and merely restricting one dimension will not prevent them from competing along others.99 Restricting tax competition does not mean that competition for foreign investment will end. Competition will simply shift to spending programs or other types of behavior.100 For example, one empirical study shows that tax harmonization will also lead to countries adopting a lower audit rate in order to effectively reduce taxation. The study shows that harmonization could turn an honest country into an evading one.101 The authors of the study suggest that tax harmonization can make both high-tax and formerly low-tax countries worse off.102 By altering the basic approach to laws and legal decisions, these changes can subvert fundamental notions of behavior in these societies.103 Analytically, this is an extension of the point that there are many margins along which these countries will compete. Merely closing down one dimension of competition will not end competition. These other forms of competition might have worse social consequences than tax competition.

2. Public Choice and the Governmental Reports

Under a public choice view of tax competition, it is obvious why governmental advisers have a bias in favor of tax-harmonizing policies.104 Harmonization allows government agents a fuller set of potential tax instruments to use to raise revenue for the projects they favor.105 Furthermore, to the extent that tax competition replaces foreign aid, the governmental agents will lose some rents that could be extracted from lobbying for such aid.

99. This is an example of “rent dissipation.” RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 280–81 (6th ed. 2003). See also Roin, supra note 2, at 570–72.
100. Roin, supra note 2, at 570–85.
101. Helmuth Cremer and Firouz Gahvari, Tax Evasion, Fiscal Competition and Economic Integration, 44 EUR. ECON. REV. 1633 (2000) (showing, in the context of examining the implications of tax evasion for fiscal competition and tax harmonization policies in an economic union, that tax integration may turn an honest country into an evading country). Special interests generally favor harmonization of the government policies of different jurisdictions because governments control the benefits to harmonized policies, while the benefits to competition are determined by the market. Competition, however, tends to undermine the influence of special interest groups because market mechanisms dominate rather than government decision-makers.
102. Id.
103. Id.
105. Id. at 339.
While the theory of public choice has grown strongly in importance and become an accepted economic principle, the area of international tax policy has remained singularly un receptive. The academic commentary on international taxation has been largely dominated by the assumption that governments maximize social welfare. As the public choice literature has demonstrated, this is a rather naïve assumption to make. The result of the rejection of the public choice theories has been that the limitations that tax competition imposes on governments are necessarily welfare reducing. A more nuanced approach may not yield the same results.

One of the first results from applying public choice theory to the tax-harmonization debate is to realize that there is a selection effect that operates to favor economists and other advisers who are in support the harmonization of tax rates. Governmental agents are interested in finding those whose opinions favor their actions and are therefore more likely to appoint individuals who are favorable to their views to committees that will examine the impact of tax competition. In addition, individuals who believe that government is an unalloyed force for good in society are more likely to want to serve on such commissions, and the same is true for those who believe that tax competition represents a major social evil. If an individual believes in the public choice view, they are much less likely to view the output of any such commission as likely to promote the social good, and so less likely to devote resources to it. Another reason why such committees are likely to find that harmonization is optimal is that they can effectuate harmonization, whereas effective tax competition is beyond their power. The results of tax competition will only emerge as time passes. They generally cannot be predicted ahead of time with any reasonable degree of accuracy. Therefore, committees are less likely to be inclined towards tax competition because it leads to uncertainty in the distribution and amount of benefits.

Viewing tax-harmonization committees as cartels leads to the prediction that the result of such committees will always be a universal increase in taxes. One example of this was a preliminary agreement reached by the European Community Council of Ministers in June 1991, that from 1993 onward the rate

106. Sandmo, supra note 84, at 239.
107. Id. at 241.
109. James M. Buchanan, Politics Without Romance, in THE THEORY OF PUBLIC CHOICE II 13 (James M. Buchanan & Robert D. Tollison eds., 1984) (characterizing the American theory of politics prior to the emergence of public choice theory in the 1950s as "the romantic assumption that all persons in their political roles seek only to further their own conceptions of some "common good," and with utter and total disregard for their own more narrowly defined self-interest").
110. For a summary of this work, see SIJBREN CNOSSEN, TAX STRUCTURE DEVELOPMENTS IN THE E.C. (1987).
111. Frey & Eichenberger, supra note 104, at 339.
112. Id.
113. Id.
of value added taxes should be no less than fifteen percent in all member countries. This resulted in three member nations—Germany, Spain and Luxembourg—being forced to raise their tax rates. The inability to exit these agreements and the suppression of dissent have been identified as major threats to the ‘citizens’ welfare in public choice theory.114

Another argument for why the governments of the developed world are not very interested in promoting development in the third world if it requires tax competition has to do with the timing of the returns from investments made in the developing nations.115 If the developing world loses some capital to the third world, this results in a loss of tax revenue now. If this capital is more productive in the third world and ultimately results in development of these nations, very likely these results will occur years, if not decades in the future.116 Even if there is not an actual loss of capital from the developed world, there is certainly a restriction of the available taxing methods, which may reduce the payoffs that politicians receive. In addition, to the extent that lesser-developed countries seek investment capital through market mechanisms as opposed to seeking foreign aid, the governmental and quasi-governmental agents in the developed world will wield less power than they would otherwise. Therefore, governmental agents will encounter a price for tax competition, which has an immediate effect, while the positive effects on the growth and development of poorer nations will not be in evidence until well after the politicians are out of office. The government agents who will have to make the decision to forgo revenue will not be in office when the benefits are reaped, and therefore they are less interested in fostering long-run development.117

CONCLUSION

This paper has attempted to demonstrate that, taking into account standard economic theory relating to the selection criteria for public goods and the risk-shifting features of the income tax, it is not surprising that there has not been a race to the bottom in the share of corporate tax revenues that contribute to the tax base for funding government welfare programs. Rather, according to several tenants of standard economic theory, including the selection criteria for public goods and the risk-shifting features of the income tax, we should expect that tax competition will force countries to adopt more efficient tax systems than those which they might otherwise have adopted. Notwithstanding the tenor of the recent G2O Leaders Declaration at the 2012 meeting of the OECD in Los Cabos, and the 2013 action plan which followed, OECD data indicates that the

114. See, e.g., id. at 341. While the politicians in power benefit most from the rents created by harmonization, the politicians in opposition may also appropriate part of this rent.


116. See id.

117. BUCHANAN & TULLOCK, supra note 95, at 31–43.
contraction of corporate tax revenues has not materialized. Therefore, absent harmonization, but rather by restructuring their tax systems to more closely align with a normative income tax which does not place noneconomic limits on the use of losses, developed nations should continue to attract business investment, funding the redistribution of wealth within their own borders, while allowing developing nations to compete for capital and investment.
Enforcement Cooperation in Combating Illegal and Unauthorized Fishing: An Assessment of Contemporary Practice

Stuart Kaye

INTRODUCTION

The emergence of the exclusive economic zone (EEZ) in the 1970s placed potentially vast areas of the sea under national jurisdiction. Moving from relatively modest territorial seas close to the coast as the only basis of fisheries jurisdiction for States, the international community suddenly embraced a new form of jurisdiction over resources that extended fisheries up to 200 nautical miles from land. This extension brought over one third of the world’s oceans, or, more importantly, approximately 90% of the world’s wild fish catch, under national jurisdiction.1

While the possibility of bringing these areas’ resources under national control was of tremendous value to many developing States, the difficulties of

---

enforcement over such areas were not so readily considered. Some States, notably the States of the South Pacific, but by no means restricted to them, simply lacked the capacity to police their waters and protect their resources from the depredation of others. Adding a vast area subject to national jurisdiction often required that States expend substantial assets—at sea and in the air—in order to effectively patrol, police, and enforce their new jurisdiction. For oil and gas exploitation, the lack of a significant coast guard or naval force to deploy in the EEZ was not a huge problem as exploitation of the seabed is a slow and expensive business. For fisheries, which can be exploited far more cheaply, and in a more transitory fashion, this lack of enforcement capacity represented a potentially serious impediment.

In the years since the United Nations Convention on the Law of the Sea was opened for signature, many States have learned that maintaining a capability to enforce their laws in their EEZ is expensive and difficult. Some valuable fisheries have been seriously damaged by illegal, unreported, and unregulated (IUU) fishing, often in areas that are difficult to patrol by virtue of geography and lack of capacity. In the latter case, the inability to enforce the fisheries laws of the coastal State has been credited as a contributing cause of the rise of piracy in the waters around Somalia in the past decade. Considering the difficulties present in enforcing coastal State law, combined with the inexorable rise in IUU fishing and a greater emphasis on international cooperation in the management of straddling and high seas fish stocks, it is natural that States have begun to explore the possibility of cooperation in the patrol and enforcement of their EEZ.

This paper will consider the range of responses by States to their individual lack of enforcement capacity and the types of cooperative response that have arisen from the present situation.

I. TYPES OF COOPERATION

Cooperation between States over issues of maritime enforcement can be characterized into a number of types based on a continuum of engagement in cooperation. For the purposes of argument here, cooperation has been placed into one of three categories:

- Data exchange and observers
- Boarding and referral to the flag State
- Boarding and arrest by a third State

---

Each type of cooperation represents a different level of enforcement engagement along a continuum from virtually nothing to another State stepping into the shoes of the flag State. Strictly speaking, exchanging data and the deployment of independent observers is very much at the lowest end of engagement, where everything but the collection of the most basic eye-witness testimony as to fishing activities and catch volumes still rests with the flag, coastal, or port State. Boarding and referral represents a greater level of engagement, where only a portion of the authority is vested in a third party. Finally, boarding and arrest represents the complete vesting of jurisdiction and authority in a third party.

The frequency of the use of these different arrangements is inversely proportional to the level of authority given to a third State seeking to enforce the law. Such a situation is to be expected given the great reluctance of States to cede their authority to others. Nevertheless, the difficulties of enforcement and concerns over IUU fishing have compelled some States to be prepared to cooperate even at the expense of what they might see as their traditional prerogatives.

A. Data Exchange and Observers

Far and away the most common arrangement for cooperation in maritime enforcement is data exchange and the deployment of observers. Cooperation in the sharing of data and the use of observers in fisheries has been employed in a number of agreements. It has typically been used as a mechanism to ensure that compliance is effectively monitored by flag and port States.

A system of observation and inspection typically involves a Regional Fisheries Management Organization (RFMO) facilitating the placement of an observer aboard a fishing vessel for all or part of its voyage. Generally, the observer will be from another State and will be able to watch the fishing activities and inspect the catch. The observer will also have the ability to report back to the RFMO with respect to any possible breaches of fisheries conservation measures that occurred aboard the vessel.

It is important to note that an observer has no ability to affect the conduct of fisheries operations aboard a vessel, nor does the observer have a power of arrest. The observer’s presence is passive, and the report he or she provides typically factors into discussions by State parties at meetings of the RFMO, rather than providing a basis for punitive action by the flag State.

The Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) gives an example of an observation and inspection scheme in action.

---

The Convention itself provides for the scheme under Article XXIV, although the details of its operation are limited since the State parties chose to leave the mechanics of such a scheme to a later date. The Convention did, however, prescribe three principles under which the scheme would operate:

- Cooperation between States to establish procedures for boarding and inspection and for flag State prosecutions, consistent with international practice;
- Observation and inspection of vessels engaged in harvesting or research; and
- Inspectors remaining subject to jurisdiction of the member State of which they are nationals, and reports from them being transmitted to the Commission.

It took over half a decade to bring the scheme to fruition, and the State parties formally adopted it in 1989, eight years after the Convention entered into force. It operated under the auspices of a Standing Committee on Observation and Inspection (SCOI), which established a system of observation and inspection in 1988.

The system adopted provides for the designation of qualified individuals as inspectors and observers who may be placed aboard vessels engaged in scientific...
research or harvesting in the CCAMLR area. Inspectors are drawn from a register maintained by the CCAMLR, must be nationals of the State party nominating them, and must speak the language of the flag State of the vessel to be observed or inspected. When aboard a vessel, an inspector remains solely subject to the jurisdiction of his or her nominating State. Each State party must provide prior notification of all vessels intending to enter the CCAMLR area to harvest resources during the year commencing July 1 by May 1 of the same year. Any such vessels are potentially subject to inspection.

The inspector has wide powers with respect to access, but not enforcement. Inspectors may observe and inspect the catch, the gear used, data collected, and any records of and reports on catch and location data. Inspectors also may photograph alleged violations of conservation measures and affix identification marks to gear allegedly used in contravention of conservation measures. In the event a breach is observed, the inspector is only empowered to alert the master of the vessel of the breach and log it in the official inspection report. This report is transmitted to the flag State from the inspector’s State via CCAMLR, although the flag State can comment upon the report prior to its formal consideration at a Commission meeting. Enforcement action is the responsibility of the flag State alone.

It is clear from this system that although the inspector has wide powers to collect evidence of a breach, only the flag State has the right to prosecute an offense. There is no requirement that the flag State take any action, even when


14. Observation and Inspection System, supra note 13, item II.

15. Id., item I(c). This is consistent with CCAMLR art. XXIV(2)(c). See CMMALR, supra note 6.

16. Observation and Inspection System, supra note 13, item I(d) (appearing to assume that the captain and crew also speak the language of the flag State).

17. Observation and Inspection System, supra note 13, item I(c). This is consistent with CCAMLR art. XXIV(2)(c). See CMMALR, supra note 6.

18. Parties must provide information including the name of the vessel, the call sign of the vessel registered with appropriate flag State authorities, the home port and nationality of the vessel, the owner or charterer of the vessel, and notification that the ‘vessel’s master is aware of the conservation measures in force for the areas where the vessel will be harvesting. See Observation and Inspection System, supra note 13, item IV.

19. Id., item VI.

20. Id., item VI(e).

21. Id., item VIII.

22. Id., item IX. These procedures were amended in 1992, 1996, and 1997 to provide for time limits on the submission of reports, and expedition of consideration of reports by flag States. See Comm’n for the Conservation of Antarctic Marine Living Res., Rep. of the 11th Meeting of the Comm’n, 92 (1992); Rayfuse, supra note 13, at 593.
presented with conclusive evidence of the most egregious breach. This demonstrates the significant limitation inherent in the inspection and observation system.

B. Boarding and Referral to Flag State

The next type of cooperative response vests an ability to board and inspect in a third State but continues to leave enforcement action in the hands of the flag State. To some extent, this type of action superficially resembles the placing of an inspector aboard, although the reality of the intervention is a little more involved.

Upon the high seas, there are substantial restrictions upon the boarding of a vessel by any ship other than a Government vessel of the vessel’s flag State. The circumstances where a boarding can be undertaken are extremely limited and largely apply to Stateless vessels or instances of serious international crimes such as piracy or the slave trade. In the ordinary course of events, without the concurrence of the flag State, a boarding to do anything more than establish identity is contrary to international law.

The concurrence of the flag State can be supplied in a variety of ways. First, a flag state can concur by way of a bilateral agreement between it and the boarding State. Such an agreement would be a treaty-level document and would permit a right to stop and board in certain circumstances. The most widely cited examples of these are the agreements, which are not directed at fishing activity, between the United States and a range of largely open registry States to permit boarding to investigate for the presence of weapons of mass destruction or their precursors.23

Second, a flag State can provide consent to a third party through the use of multilateral agreements. This is the most common way such boarding permission is achieved, and a number of examples of this can be identified. For example, under Article 21 of the United Nations Fish Stocks Agreement,24 State parties to a regional fisheries arrangement effectively authorize other State parties to board and inspect their fishing vessels while fishing on the high seas in the area covered by that arrangement.25 If a boarding were to take place pursuant to Article 21 in relation to violations of any conservation measures, any


evidence is secured and the flag State notified. The flag State then has a limited period in which to initiate an investigation itself or to authorize the inspecting State to do so. Serious violations that are not the subject of a response by the flag State could see a vessel directed to the nearest appropriate port.

In practice, few boardings under Article 21-style arrangements appear to have taken place. That this is so should not be surprising. First, the efficacy of undertaking boardings in these circumstances still depends upon the flag State undertaking a prosecution—a circumstance that would not be certain without prior arrangement between the State parties. As a result, there have been few boardings stemming from an opportunistic encounter at sea. Second, few States will be interested in undertaking enforcement operations far from home in waters beyond their national jurisdiction.

C. Boarding and Arrest By a Third State

The rarest and most invasive form of cooperative enforcement is where one State empowers another to act on its behalf, effectively placing itself in the position of the flag State. This is essentially using another State’s vessel and personnel to undertake boarding and arrest. The ultimate prosecution of arrested individuals is still retained by the coastal State, but all elements prior to the handover of arrested persons and their vessel are in the hands of a third State. This mechanism gives tremendous reach of enforcement, as, in addition to a coastal State’s own platforms, it may be able to make use of the ships and aircraft of another State.

There are a number of issues to be considered in such a situation. First, one should look at the jurisdictional space in which such activities might occur. In the ordinary course of events, there is no freedom of navigation in the territorial sea of a coastal State for foreign ships. A right of innocent passage can be asserted, but undertaking enforcement operations will manifestly fall within the list of matters in Article 19 of the Law of the Sea Convention that are inconsistent with such passage. As such, any enforcement arrangement will need either to be inapplicable to illegal fishing in its territorial sea or to provide the

---

26. UNFSA, supra note 24, art. 21(5).

27. Id., art. 21(6).

28. The term “serious violation” is defined to include nine offenses, including: fishing without a valid authorization from the flag State; failing to maintain accurate records of the catch as required by the regional fisheries organization; fishing in a closed area, during a closed season, or without or beyond an authorized quota; fishing for a stock that is prohibited or subject to a moratorium; using prohibited gear; falsifying or concealing the markings, identity, or registration of the vessel; concealing, tampering with, or disposing of evidence relating to an investigation; multiple violations that constitute a serious disregard of conservation and management measures; and, other violations specified as such by the regional organization. See UNFSA, supra note 24, art. 21(11).

29. UNFSA, supra note 24, art. 21(8), 21(10).
flag State with an authority to undertake actions beyond what is permitted by innocent passage.30

Second, mechanisms need to be in place to facilitate consistency between the flag State and the coastal State’s laws. The use of another State’s personnel in enforcement will naturally require harmonization of laws with respect to matters such as the appropriate use of force, search and evidentiary matters, custodial matters and handover, and the liability of personnel in the event of an authorized activity taking place. Each of these matters has a substantial impact upon a specific operation. A prosecution may ultimately fail if there are breaches of rules of evidence or mistreatment of arrested persons. In addition, future cooperation may be jeopardized if personnel undertaking a boarding or arrest are pursued through the coastal State’s courts.

Finally, although an enforcement operation is being undertaken, it may be assumed that a flag State will not wish to prejudice the sovereign immunity of its vessel. Although it is exercising the jurisdiction of another State, a flag State will not wish to consent to any action that might create a situation where the coastal State’s laws have any application aboard their ship.

1. Case Study: Ad Hoc Cooperation—South Tasman Rise Disputes

The South Tasman Rise is an area in which the continental shelf extends a substantial distance to the south of the large Australian island of Tasmania. The area of relatively shallow water extends a little over 200 nautical miles from the territorial sea baselines around Tasmania’s south-eastern coast; consequently, there are rich fishing grounds in waters just outside Australia’s EEZ. These waters provide a habitat for the orange roughy, a species that has suffered from heavy commercial fishing around southern Australia and New Zealand since the early 1980s.

The orange roughy is an unusual fish whose life cycle has impacted efforts at commercial exploitation. The species is extremely long-lived, and breeds only when decades old, meaning that its exploitation was unsuited to a more common pattern of size being used as a designator of breeding maturity. Full-sized orange roughy might be decades away from breeding, and their removal from the biomass has implications for the stock’s ability to regenerate. Unfortunately, the details of the orange roughy’s life-cycle were not fully understood when commercial exploitation began. As a result, stocks in waters proximate to Australia and New Zealand were heavily overfished. This made more remote stocks, like those on the South Tasman Rise, very appealing to fishing vessels.

The two disputes concerning orange roughy exploitation on the South Tasman Rise both have their origins in the element that was responsible for the Estai dispute between Spain and Canada.31 In both the Estai and Tasman cases,

30. This situation is dealt with explicitly in the 2007 Australia-France Enforcement Agreement, infra note 44.
a fishery with a straddling stock extended just out of a coastal State EEZ, the coastal state was concerned about limiting exploitation of a threatened stock, and Distant Water Fishing Nations (DWFN) sought to exploit the stock in the waters beyond national regulation. In 1997, New Zealand fishing vessels targeted the South Tasman Rise fishery just outside the Australian EEZ. The Australian response was to raise the matter at a diplomatic level with New Zealand and attempt to negotiate a solution. Australia did not pursue a more forthright response along the lines of Canada’s arrest of the Estai in 1995 because it endeavored to remain within the bounds of accepted international practice. Rather, the parties initiated negotiations, consistent with Article 116 of the Law of the Sea Convention, and reached a mutually acceptable solution. Early in 1998, the two States concluded an arrangement that set precautionary catch limits for orange roughy in the areas beyond the Australian Fishing Zone and provided for collaboration of the two States in a research program to better manage the stock. Both the arrangement and cooperation on the management of the fishery have continued.

The travails of the orange roughy on the South Tasman Rise by no means ended in 1998. The following year, vessels flagged in States outside the region began to take an interest in the stock, again just outside the Australian Fishing Zone. In 1999, at least four vessels were observed on the high seas portion of the South Tasman Rise fishing for orange roughy. The vessels were flagged in South Africa and Belize, and the Australian Government immediately approached these two States to request that the vessels cease fishing orange roughy. The requests were based on the fact that the stocks were subject to an international management regime with New Zealand, and that South Africa and Belize should desist fishing pending their participation in negotiations to assist in the management of the fishery, consistent with Article 116 of the Law of the Sea Convention.


34. The TAC (total allowable catches) dropped dramatically from 2400 tons in 1999 to only 200 tons in 2006–2007, and even this modest level was not reached. Australia and New Zealand agreed to a TAC of zero tons in 2007–2008 and indefinitely thereafter. See Austl. Gov’t Dep’t of Agriculture, South Tasman Rise Trawl Fishery 239–41 (2007).

The responses from both States were encouraging. South Africa requested that its vessels cease fishing, on pain of revocation of high seas fishing licenses. South Africa ultimately applied this sanction. Belize requested that its vessel cease fishing, to no avail. Belize subsequently deregistered the vessel, and via formal written authorization, requested that Australia enforce Belize law on its behalf if the vessel continued to fish. Shortly after Belize gave its authorization, the vessel departed.\(^{36}\) The incidents are good examples of the type of ad hoc cooperation that may be possible to deal with managing fisheries. In both cases, Australia lacked the regulatory responsibility to unilaterally enforce conservation measures on the South Tasman Rise as the waters were beyond national jurisdiction.

2. Case Study: Enforcement Cooperation—Niue Treaty

The Niue Treaty\(^ {37}\) was concluded in 1992, with a view to assisting the States of the South Pacific in patrolling and enforcing fisheries laws within the vast areas of maritime jurisdiction within their EEZs.

The Niue Treaty’s purpose of facilitating cooperation is explicit in Article III:

1. The Parties shall cooperate in the enforcement of their fisheries laws and regulations in accordance with this Treaty and may agree on forms of assistance for that purpose.

2. The Parties shall cooperate to develop regionally agreed procedures for the conduct of fisheries surveillance and law enforcement. Where appropriate, fisheries surveillance and law enforcement will be conducted in accordance with such regionally agreed procedures.\(^ {38}\)

The cooperation is made manifest in a variety of ways. First, there is cooperation on the dissemination of data about fishing activities throughout the region. This allows States to be more effective in their enforcement activities. This becomes particularly valuable where States have few platforms to conduct enforcement.

Article VI considers cooperation through boarding and arrest. It provides in part:

1. A Party may, by way of provisions in a Subsidiary Agreement or otherwise, permit another Party to extend its fisheries surveillance and law enforcement activities to the territorial sea and archipelagic waters of that Party. In such circumstances, the conditions and method of stopping, inspecting, detaining, directing to port and seizing vessels shall be governed by the national laws and regulations applicable in the State in whose territorial sea or archipelagic waters the fisheries surveillance or law enforcement activity was carried out.


\(^{38}\) Id. art. III.
2. Vessels seized by another Party pursuant to an agreement under paragraph 1 of this Article in the territorial sea or archipelagic waters of a Party shall, together with the persons on board, be handed over as soon as possible to the authorities of that Party.39

In essence, Article VI provides that a State party can use a Subsidiary Agreement to allow for the boarding and arrest of vessels flying its flag by an enforcement vessel of another State. Such an agreement will spell out the circumstances and nature of the use of a power of boarding and arrest. The Subsidiary Agreement empowers the vessels of one State party to undertake EEZ enforcement operations on behalf of another State, effectively widening the range and number of enforcement vessels that can undertake enforcement operations.

There are a number of limitations on the effectiveness of the Niue Treaty. First, there are very few Subsidiary Agreements that subsist on a permanent basis.40 Some agreements have been negotiated as temporary arrangements, but even these have been few and far between. Second, even with a larger number of Subsidiary Agreements, there is still a dearth of vessels to undertake enforcement operations. For example, during operation Tui Moana 12, which was designed to give effect to the Subsidiary Agreement between the Cook Islands and Samoa, vessels from the two States were joined by Royal New Zealand Navy ships, Royal New Zealand Air Force aircraft, and French and American patrol aircraft.41 While it is encouraging that such an operation took place at all, had the efforts been left to Samoa and the Cook Islands, there would have been very little impact given their relative paucity of equipment and platforms for patrolling a vast area.

The limited number of Subsidiary Agreements has undermined the effectiveness of the Niue Treaty, as it limits the efficacy of cooperation to essentially data exchange and related activities. This has long been a concern and has spurred along efforts to negotiate a multilateral Niue Treaty Subsidiary Agreement. The negotiation of a general multilateral Subsidiary Agreement has been afoot since 2009.42 Such an agreement would be a boon to the operation of

39. Id. art. VI.
the Niue Treaty, as it would see a significant rise in the use of Article VI of the Treaty and would increase the level of enforcement operations in the South Pacific. \(^{43}\)

3. Case Study: Enforcement Cooperation—Australia-France Southern Ocean Agreements

The remoteness of the far south of the Indian Ocean has encouraged cooperation between Australia and France. This represents the most complete level of cooperation between States with interests in managing the fisheries in and around their respective EEZs.

Australia and France have built upon this ad hoc cooperation with respect to their possessions in the Indian Ocean sector. Both States concluded a treaty in 2003, \(^{44}\) providing for continuing cooperation in surveillance, \(^{45}\) intelligence, \(^{46}\) and scientific research. \(^{47}\) This arrangement permitted a speedier response to Southern Ocean cooperation, and allowed both States to make more efficient use of precious assets in such a remote region.

More controversially, the treaty also provided that one State could authorize vessels of the other to continue a hot pursuit through its territorial sea, as long as no enforcement action took place within the territorial sea. \(^{48}\) This may be inconsistent with the letter of Article 111 of the Law of the Sea Convention, \(^{49}\) but the legality of the provision is still moot since none of the hot pursuits undertaken to date have passed through a third State’s territorial sea.

The treaty was successful and was followed up with a more ambitious arrangement in 2007. Australia and France entered into a subsequent agreement to provide for cooperative enforcement within the EEZs of Australia and France in the Southern Indian Ocean. \(^{50}\)

The reach of the treaty is of interest. Cooperative enforcement is defined as: “Fisheries enforcement activities such as the boarding, inspection, hot pursuit, apprehension, seizure and investigation of fishing vessels that are

---


43. See Niue Treaty, supra note 37, art. VI.


45. Id. art. 3 and Annex I.

46. Id. art. 5.

47. Id. art. 3.5 and Annex II.

48. Id. art. 3.3, 4.

49. UNCLOS, supra note 2, art. 111(3) (explaining that the right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State).

believed to have violated applicable fisheries laws, undertaken by one Party in cooperation with the other Party.\textsuperscript{51}

Notably, the definition makes it clear that the 2007 Agreement directly encompasses apprehension, seizure, and investigation. As such, there is cooperation with respect to policing elements up to the handover of the offending vessel and its crew to the other party and prosecution of offenses through the coastal State’s domestic courts.\textsuperscript{52} This is a remarkable level of cooperation.

The Agreement deals with a range of matters that are designed to ensure the smooth running of any cooperative enforcement operations. Most importantly, there is a requirement that an appropriate fisheries officer of the coastal State be aboard the enforcing vessel. This presence is important as it gives the coastal State a scintilla of its own enforcement mechanisms within the enforcement activity undertaken upon its behalf. That said, the Agreement does not create a fiction of the single official exercising jurisdiction alone. Article 5 makes it clear that jurisdiction is being exercised by the other party in the coastal State’s EEZ, although every effort will be made to comply with the laws of the coastal State.\textsuperscript{53}

The Agreement deals with a range of aspects of cooperative enforcement that are also important. First, the officers undertaking the enforcement are given immunity for any actions they take in the course of enforcing the coastal State’s law. This is an important safeguard in facilitating cooperation as well as maintaining the sovereign immunity of the warship carrying out enforcement.\textsuperscript{54} Second, the Agreement notes that the cost of cooperation is ordinarily assumed to be borne by the enforcing rather than the coastal State. This would seem to assume that both States will undertake cooperative operations to an approximately equal extent, although the Agreement does foresee that some adjustment might be necessary if too much of the burden is borne by a single State.\textsuperscript{55}

The Agreement has now been afoot for some time, and there are reports of its having been utilized in enforcement actions,\textsuperscript{56} although with little public fanfare. Given that the two States concerned have similar capacities in the

\textsuperscript{51} \textit{Id.} art. 1.4.

\textsuperscript{52} Vessels seized by a party pursuant to Article 3 in the maritime zone of the other party, or following a hot pursuit undertaken on behalf of the other party pursuant to Article 4, shall, together with the persons, equipment and any documents and catch on board, be handed over as soon as possible to the authorities of the other Party. \textit{See id.}

\textsuperscript{53} Art. 5(1) provides: “The Party whose authorised vessel, and its crew, is undertaking cooperative and enforcement activities in accordance with this Agreement, shall take all appropriate measures to ensure that the laws of the other Party are observed and respected.” \textit{Id.}

\textsuperscript{54} \textit{Id.}, art. 5(2).

\textsuperscript{55} \textit{Id.}, art. 8.

region at issue and face similar challenges in combating illegal fishing in their EEZs, there is every reason to believe this effective cooperative regime will continue for the foreseeable future.

CONCLUSION

Cooperation in maritime enforcement is certainly growing, but to date examples beyond the most basal are relatively rare and are largely restricted either to areas that are very remote or where vast EEZs are essentially unpatrolled by extremely small States. Even in these unusual circumstances, anything beyond very simple cooperation is almost non-existent. Even an arrangement such as the Niue Treaty, which has existed for well over a decade, with the obvious and stated aim of facilitating cooperative enforcement, has largely gone unused. The reluctance of States to surrender any of their prerogatives to uphold their sovereign rights is certainly very strong and should not be underestimated. Given their limited capacity to effectively police their EEZs, many States have great incentive to embark upon cooperative measures, so it is telling that relatively little actual progress has been made.

That said, there is still some reason to be optimistic. The recent efforts to provide for a permanent subsidiary agreement to the Niue Treaty and the Australia-France Agreement demonstrate that cooperation as a solution is still an avenue for some States. In the far-flung reaches of the world’s oceans, the prospect of using cooperative measures to resolve the difficulties of enforcement is still being considered, and such measures may be actively used to clamp down on illegal fishing. Perhaps in time, they may provide a way forward for greater cooperation.
Towards a Patent Exhaustion Regime for Sustainable Development

Benjamin Pi-wei Liu*

INTRODUCTION .................................................................................................................. 331

I. REFURBISHMENT AS A TOOL OF DEVELOPMENT .................................................. 333
   A. Learning by Repairing .......................................................................................... 333
   B. Promoting Resource Sustainability ................................................................. 336
   C. Stimulating the Economy .................................................................................... 339

II. THE PATENT BARRIERS TO REFURBISHMENT, A PRIMER.............................. 341
   A. The Repair-Reconstruction Doctrine ............................................................... 342
      1. The Ultimate Legal Inquiry: Repair or Making? ......................................... 343
      2. The Subject of Analysis: Process or Product? .............................................. 345
      3. The Content of Proof: Physical Attributes or Totality of Circumstances .......... 347
      4. The Significance of Parts: All Elements or Essential Elements ...................... 349
   B. Geographical Limitations of Exhaustion .......................................................... 350
   C. Contractual Limits on Exhaustion ..................................................................... 354
   D. Summary .............................................................................................................. 356

III. PATENT POLICY AND THE DOWNSTREAM MARKET .................................... 357
   A. Patent Incentive .................................................................................................. 359
   B. Purchasers’ Rights .............................................................................................. 361
   C. Parallel Import .................................................................................................... 364
   D. Counterfeit and Trademark Infringement ......................................................... 366

* Assistant Professor of Law, The John Marshall Law School. I am grateful to Shubha Ghosh, Daryl Lim, Doris Long, Glenn Lunney, Sean Pager, Sarah Rajec, Joshua Sarnoff, and Peter Yu, as well as my colleagues and the participants of the John Marshall faculty work-in-progress presentation, the 2011 Annual Patent Conference at University of Kansas School of Law, the 2012 IP Scholarship Roundtable at Drake University Law School and the 2013 Junior Scholars in Intellectual Property Workshop at Michigan State Law School. My gratitude also goes out to Dean Ralph Ruebner and Dean John Corkery for their support and encouragement, and to Megan Niedermeyer, Tara Capsuto and their Board for their assistance working with this piece. Research Librarian Raizel Liebler and Research Assistant Sophie Yanling Jiang provided outstanding help. All errors and omissions remain my own.
INTRODUCTION

The IT retail center of Beijing, China, lies in a cluster of mid-rise computer malls within the Haidian district. A modest example of one such shopping venue is the “Silicon Valley Computer City”—a six-story building outside the West Gate of the elite Beijing University. Several dozen retail stalls fill each level, further dividing the floor into 100–200 square-foot plots. Parts vendors and repair services, along with floor-to-ceiling stacks of desktops and piles of printers, occupy dimly lit stalls toward the rear of the building. A number of products hawked in “Computer City” appear to be second-hand pieces, refurbishments, or those cobbled together from salvaged parts. Men crouch outside the building; their makeshift signs promise high prices for spent ink cartridges or broken laptops. Inside the façade of Silicon Valley Computer City, two giant red banners remind customers to “Protect Intellectual Property, Boycott Illegal Counterfeits,” and to “Implement ‘Plastic Control Order,’ Repel ‘White Pollution.’” The slogans on display certainly tout unassailable policy goals: protecting intellectual property (IP) rights and promoting environmentalism. But the refilled cartridges and salvaged desktop rigs inside the shopping center point to a latent conflict resting between these aspirations:

1. This account is based on the author’s visit in the summer of 2011.


What happens when attempts to protect IP rights conflict with goals of sustainable development?

Patent holders have sued commercial refurbishers who make a business out of restoring and selling their proprietary products. While courts generally agree that extensive refurbishment can amount to patent infringement, they recognize that some refurbishment is permitted under the doctrine of patent exhaustion. Exhaustion embodies the notion that legitimate purchasers and downstream users of a patented product may “use or resell the product free of control or conditions imposed by the patent owner,” which in theory protects refurbishers from infringement claims. But the distinction between permissible repair and impermissible reconstruction remains elusive. Following 150 years of jurisprudence in this area, the United States Court of Appeals for the Federal Circuit still refuses to draw a bright-line distinction. No international norms exist either: The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)—the multilateral agreement which sets the minimum standard of protection in many areas of IP law—allows individual countries to determine the scope of exhaustion doctrine. Designing a working exhaustion doctrine given this flexibility can be daunting for developing countries such as China, where refurbishment is an actively pursued industrial policy (as opposed to a measure for protecting purchaser rights, as it is often perceived in the developed countries).

This Article argues that the current exhaustion doctrine, when applied to the refurbishing industry, fails to balance its mandate of promoting technological progress with the broader program of sustainable development and is therefore unsuitable for countries on the modernization path. First, what constitutes an infringing “making” remains underdetermined. Second, the evidentiary hurdle for proving legal refurbishment is too onerous for the low-margin and under-resourced refurbishing industry. Finally, the all-or-nothing approach to judging infringement fails to account for the nuanced cost-benefit nexus that exists between patentees, refurbishers, and society at large and

4. 1 DONALD S. CHISUM, CHISUM ON PATENTS § 16.03(2)(a) (2008).
5. See infra notes 61–65 and accompanying text.
7. Policy documents such as the Outline of National Intellectual Property Strategy highlight the important social framework of China’s patent law. Whereas the U.S. Constitution grants Congress the power “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries,” the guiding principle of the Chinese IP Strategy situations IP protection as “support for the effort to make China an innovative country and develop a moderately prosperous society in all respects.” Compare U.S. Const. art. VIII, with STATE INTELLECTUAL PROPERTY OFFICE OF THE P.R.C., Outline of the National Intellectual Property Strategy (June 5, 2008), http://english.sipo.gov.cn/laws/developing/200906/t20090616_465239.html (“Balance the need for patent protection and the need to protect public interest properly.”). For a general discussion of these two, possibly irreconcilable views of patent law, see generally Cynthia M. Ho, Unveiling Competing Patent Perspectives, 46 HOUS. L. REV. 1047 (2009).
discourages private ordering. To recalibrate the balance between technological progress and sustainable development, this Article proposes several alternatives to the predominant exhaustion doctrine that are better aligned with the goals of sustainable development.

The argument is organized as follows: Section I identifies several ways the refurbishing industry promotes sustainability and economic development. Section II outlines three aspects of the exhaustion jurisprudence affecting global refurbishment trade: the repair-reconstruction doctrine, the territorial reach of exhaustion, and the enforceability of single-use restrictions. Relevant examples are drawn from the United States, Japan, Europe, and China, which together showcase the range of analytical approaches courts have applied to the refurbishment infringement disputes that are often at odds with the needs of commercial refurbishers. Section III explores the tension between the refurbishing business and the underlying patent policy. Unfortunately for refurbishers, the policy justification for permissible repair applies poorly to them. Section IV details the fallout of this tension, leading to a suboptimal level of refurbishment even where it is legitimate. The last section proposes several alternative exhaustion doctrines developing countries may explore to reconcile patent law with commercial refurbishment.

I.
REFURBISHMENT AS A TOOL OF DEVELOPMENT

Refurbishment can provide significant public benefit in a rapidly developing country, by (1) offering an entry point for technological diffusion and catch-up, (2) mitigating the environmental impact of industrialization through conserving resources, and (3) providing empowering opportunities to entrepreneurs and the public at large.

A. Learning by Repairing

The aftermarket of replacement parts, repairs and services connects developing countries across a technological value chain, linking the street stalls of Ghana with the glass offices of Cupertino.8 It is not a mere coincidence that many business empires in Asia grew out of the refurbishing industry. Honda Soichiro was the son of a bicycle repairman, who began his career recycling automobile and motorcycle engines before creating the Japanese auto giant that bears his name.9 Akio Morita and Masaru Ibuka, the founders of SONY, were

former radio repairmen.\textsuperscript{10} It was therefore no accident that SONY’s first breakthrough product was a radio, later disrupting the industry with the famous Walkman model.\textsuperscript{11} Chung Ju-yung, the founder of Hyundai, had no prior engineering experience before operating an automobile repair garage.\textsuperscript{12} Lim Goh Tong, at one time the richest man in Malaysia with a net worth of $4.2 billion, began as a scrap metal and second-hand machinery trader who salvaged motor parts from discarded heavy equipment.\textsuperscript{13}

Since patented products generally embody the most advanced technology, the refurbishment and repair of these products directly transfers tacit knowledge and know-how to developing economies. A viable refurbishment regime is especially important in World Trade Organization (WTO) countries, given that TRIPS effectively foreclosed the historical development path for countries to imitate and hack their way up the developmental ladder.\textsuperscript{14} Refurbishing operations mitigate the economic barriers to technology catch-up. They provide income to build a capital base for future industrial upgrades. They also provide new companies a low-cost entry point to leapfrog current technology, thereby speeding the climb up the technological ladder, such as in the case of SONY and Honda.\textsuperscript{15} Moreover, these business opportunities connect developing nations to the broader technological ecosystem, offering their budding companies

\begin{footnotesize}
\begin{enumerate}
\item Lim Goh Tong, My Story, 23–24 (2004).
\item Llewelyn Joseph Gibbons, Do as I Say (Not as I Did): Putative Intellectual Property Lessons for Emerging Economies from the Not So Long Past of the Developed Nations, 64 S.M.U. L. REV. 923, 942–45, 954 (2011) (describing how TRIPS reduced the ability of developing countries to follow the “well-worn path” of development through uncompensated technology transfer); see generally Ha-Joon Chang, Kicking Away the Ladder: Development Strategy in Historical Perspective (2002); William Kingston, An Agenda for Radical Intellectual Property Reform, in INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 653, 658 (Keith E. Maskus & Jerome H. Reichman eds., 2005) (”The thrust of the TRIPS Agreement is to ensure that this process of growth by copying and learning by doing will never happen again.”).
\item Robert Davison et al., Technology Leapfrogging in Developing Countries – An Inevitable Luxury?, THE ELECTRONIC J. ON INFO. SYS. IN DEV. COUNTRIES, 2000, 2–3 (discussing the leapfrog process generally); see generally Yong Geng & Brent Doberstein, Developing the circular economy in China: Challenges and Opportunities for Achieving ‘Leapfrog Development,’ 15 INT’L J. SUSTAINABLE DEV. & WORLD ECOLOGY 231 (2008) (“The paper describes current measures being implemented in China for the long-term promotion of a circular economy, including the formulation of objectives, legislation, policies and measures, so that the country can ‘leapfrog’ its way from environmentally-damaging development to a more sustainable path.”); Jeffrey James, The human development report 2001 and information technology for developing countries: an evaluation, 23 INT J. TECH. MGMT. 643 (2002), available at http://inderscience.metapress.com/content/dpde8g5b1j1nx89/.
\end{enumerate}
\end{footnotesize}
economic opportunities through “learning by doing” and studying consumer preferences. Andy Grove, the former Intel chairman, believes that hands-on manufacturing opportunities are ultimately the source of new innovations and the key to the commercialization of future technology—a statement with which scholars of development agree.

To be sure, this policy objective has not been used to influence the boundary of repair versus reconstruction in mature patent regimes. However, even in the United States the benefit of “learning by doing” is acknowledged at least in the experimental-use defense to patent infringement and the exception to manufacture and study a patented drug for FDA approval. At the other end of the spectrum, excessive IP protection may undermine practical learning and innovation through refurbishment. The Digital Millennium Copyright Act (DMCA) has been criticized for its “chilling effect” on software innovation by preventing software developers from studying computer codes through reverse engineering. That the laws of Japan and the United States downplay the

16. Andy Grove, How America Can Create Jobs, BUSINESS WEEK, (July 1, 2010) http://www.businessweek.com/magazine/content/10_28/b4186048358596.htm (“Not only did we lose an untold number of jobs, we broke the chain of experience that is so important in technological evolution. As happened with batteries, abandoning today’s ‘commodity’ manufacturing can lock you out of tomorrow’s emerging industry.”).

17. Nile W. Hatch & David C. Mowery, Process Innovation and Learning by Doing in Semiconductor Manufacturing, 44 MGMT. SCI. 1461 (1998); INTELLECTUAL PROPERTY RIGHTS, DEVELOPMENT, AND CATCH-UP 412 (Hiroyuki Odagiri et al. eds., 2010) (noting that machines and equipment contributed to catch-up because they “provided opportunities for ‘learning by using’”); see also Gibbons, supra note 14, at 956 (“An industry in a developing country which is developed from independently reverse engineering a product and the associated manufacturing process has gained more than one that merely received an instruction manual, foreign advisors, and a prefabricated factory.”).


19. 35 U.S.C. § 271(e)(1) (2010). The legislative intent of the exception was to permit makers of generic drugs to study and experiment with the patented drugs in order to develop data for FDA approval without fear of patent infringement. H.R. Rep. No. 98-857 at 45–46 (1984), reprinted in 1984 U.S.C.C.A.N. at 2678–79 (“The purpose of 271(e)(1) and (2) is to establish that experimentation with a patented drug product, when the purpose is to prepare for commercial activity which will begin after a valid patent expires, is not a patent infringement.”).

20. Unintended Consequences: Twelve Years under the DMCA, ELECTRONIC FRONTIER FOUNDATION (Mar. 3, 2010), https://www.eff.org/es/wp/unintended-consequences-under-dmca (collecting DMCA claims against reverse engineers); Dan L. Burk & Julie E. Cohen, Fair Use Infrastructure for Rights Management Systems, 15 HARV. J. L. & TECH. 41, 76 (2001) (“Although the DMCA includes a provision allowing circumvention of rights management systems for reverse engineering purposes, the provision is quite narrow and does not cover the range of reverse
developmental importance of refurbishment should not discourage developing countries like China or Brazil from exploring this approach within the flexibility offered by TRIPS.21

B. Promoting Resource Sustainability

Refurbishment-and-reuse practices advance the sustainability goals and resource needs of developing countries, conserving significant resources and reducing pollution.

Industry associations state that “rebuil[t] automotive parts re-use[] 88% of the raw material from the original parts, and rebuil[t] engines consume 50% of the energy required to produce a new engine.”22 It has been estimated that the reuse of a computer system offers potential energy savings between five and twenty-times greater than possible savings through recycling.23 Refurbishing ink cartridges “keeps some 84,000 tons of industrial-grade plastics and metals out of landfill.”24 Refilling and reusing an ink cartridge also reduces the risk that the residual ink in a discarded cartridge will leak and contaminate the soil or water. Extending the service life of existing products also reduces the rate of resource depletion.25

Governments recognize these benefits. The Chinese Circular Economy Law, promulgated in 2008, explicitly acknowledged the environmental benefits of encouraging refurbishment.26 In the United States, procurement guidelines for government agencies encourage the use of refurbished and recycled engineering activities that would be legitimate under current judicial formulations of fair use.”).

21. TRIPs, supra note 6, art. 6 (“For the purpose of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.”).


23. Eric Williams & Yukihiro Sasaki, Strategizing the End-of-Life Handling of Personal Computers: Resell, Upgrade, Recycle, in COMPUTERS AND THE ENVIRONMENT: UNDERSTANDING AND MANAGING THEIR IMPACTS 191 (Ruediger Kuehr & Eric Williams eds., 2003); see also Eric Williams et al., Environmental, Social and Economic Implications of Global Reuse and Recycling of Personal Computers, 42 ENVTL. SCI. & TECH. 6446, 6447 (“Thus, extension of lifespan through reuse is a strategy that can be particularly effective at mitigating life cycle impacts.”).

24. Brief for Automotive Aftermarket Industry Association et al., supra note 22.


products. It should be noted that some countries support the Basel Convention that bans the exportation of spent equipment to developing countries due to the fear that unregulated disposition of electronic products (through practices such as acid bath or wire burning) causes severe pollution. This is mainly due to the action of e-waste disposers, not refurbishers. Moreover, legitimate refurbishment operations help combat the e-waste problem—reusable equipment in the waste stream increases the profitability of collection programs overall, thereby increasing the commercial attractiveness of the reuse-recycle business generally while encouraging responsible treatment of non-renewable waste by off-setting its cost.

Brand manufacturers have implemented their own recycling programs to combat the e-waste disposal problem and to drain the starting material away from the secondary market. The result is mixed. For example, only 400 ink cartridges were collected during the first year Canon began collecting spent ink cartridges in China. Even when there is a collection program in place, original equipment manufacturers (OEMs) of ink cartridges generally do not refill their cartridges. OEMs may find the sale of extensively reused products challenging, raising issues of quality control, supply-chain control, price erosion, increased competition, and customer confusion.


30. Id. at 191.


cement, or disposable cameras turned into plastic pellets. In any event, it is in the interest of OEMs to minimize the secondary market. Legitimate commercial refurbishment reduces the risk of illegal waste disposal and promises greater environmental benefits than an OEM-operated recycling program, consistent with studies showing that reuse and refurbishment offer greater environmental benefits than recycling.

Refurbishers have unsuccessfully raised the environmental benefits of their operations as a defense to patent infringement claims in the United States and Japan. Should the threat of patent infringement cast a shadow over the legitimate refurbishing industry, it is likely to drive more waste stream toward the unscrupulous waste operators. This chilling effect extends beyond the patented products. For example, a patent may cover 1% of the computer monitors in the marketplace. However, a refurbisher, or his patent attorney, has to research the patent coverage or evaluate the various refurbishing processes against the doctrine of permissible repair for every computer monitor that comes out of a crate of discarded electronics in order to avoid liability. The significant investments in money and time made legal services strain the ability of the secondary market to sort the incoming waste stream and hinder the repair of unpatented items in the waste stream. If the risk of infringement is sufficiently high, refurbishing operations may leave the business altogether, even if there are significant noninfringing products to be refurbished. It also reduces the incentive for manufacturers to recapture and recycle the waste they generate because they no longer need to share the market with their own previously sold products.


34. A vibrant used product market will inevitably transfer some market share from the new sales market. Thus, OEMs do not have adequate incentives to sell used products. V. Daniel R. Guide, Jr. et al., Matching Demand and Supply to Maximize Profits from Remanufacturing, 5 MANUFACTURING & SERV. OPERATIONS MGMT. 303 (2003); Atalay Atasu et al., Remanufacturing as a Marketing Strategy, 54 MGMT. SCI. 4(10): 1751 (2008).


36. Hashiguchi, supra note 35, at 180–189 (noting that Grand Panel in Canon Inc. v. Recycle Assist Co. “acknowledged the significance of environmental conservation” but “the case’s impact on the recycling industry did not persuade the [c]ourt to change its conclusions”).

37. See infra notes 213–217, and accompanying text.
C. Stimulating the Economy

In *Stealth of Nations: The Global Rise of the Informal Economy*, journalist Robert Neuwirth delved into the undercroft of economic activities and brought back tales of self-reliant entrepreneurs who drive bottom-up economic development.38 At an estimate of $10 trillion a year, the informal economy, in the aggregate, dethrones China as the second largest economy in the world and employs half of the world’s workers.39 The secondary market, enabled by second-hand and refurbished goods, forms an important pillar of support to the informal economy.

The refurbishing industry is, first and foremost, a for-profit business activity aimed to meet the needs of growing economies. By one account, America’s biggest export category to China is “scrap and trash.”40 This is the feedstock of China’s refurbishing and recycling industry. The Silicon Valley Computer City and the refurbished mobile phone market are manifestations of the refurbishment business that targets China’s vast “good enough” market.41 But lest one think refurbishment is limited to fly-by-night operations, national policy makers have targeted repurposed and refurbished equipment for developing, for example, the semiconductor industry. SEMI, a global trade association of the electronic industry, reported:

Through national government policies, such as $586 billion National Economic Stimulus plan, and the 2008–2020 National Technology Development Planning program—and regional investment plans by provincial governments—China will invest billions over the next several years into repurposing and refurbishing 200 mm and 300 mm fabs, utilizing primarily used and refurbished equipment.42

Similarly, analysts estimate that the global market for refurbished medical devices will top $4.4 billion dollars by 2016.43 The refurbishment business provides economic opportunities ranging from multi-million dollar semiconductor fabs to cellphone refurbishing booths.

The robust demand for refurbished products in turn employs laborers at the lower end of the economic ladder. Adam Minter, a scrap-industry reporter and blogger in Shanghai, notes anecdotal evidence of 20% annual wage increases for semi-skilled scrap metal sorters who now enjoy wages that exceed those of a Chinese college graduate. The same story is replicated in other developing countries: Electronics retrofitters in Nigeria find their income sufficient for all basic needs and consider their job “prestigious and high-tech,” while in Ghana, the workers note “a certain level of satisfaction with their incomes.”

In addition, the refurbishment industry lowers barriers to accessing welfare-enhancing technologies. The vibrant trade in refurbished medical equipment promises to bring advanced medical technology to developing countries with less technical sophistication. Charities, such as the International Medical Equipment Collaborative (IMEC), provide impoverished countries with discarded or retired medical equipment that volunteers refurbish. In the communications field, the availability of mobile technology is transforming developing countries in Africa. The availability of cheaper refurbished cell phones deepens cell phone penetration, putting technologies into the hands of those new to mobile phones, those on low incomes, manual workers, and those under eighteen, thereby fostering a new generation of technologists and opening up new possibilities.


45. Andreas Manhart et al., Informal e-waste management in Lagos, Nigeria – socio-economic impacts and feasibility of international recycling co-operations, ÖKO-INSTITUT E.V. 31 (June 2011), http://www.oeko.de/oekodoc/1371/2011-008-en.pdf ("Even apprentices who do not have any regular income yet, are mostly positive about their career perspectives and are looking forward to start their own business."); Siddharth Prakash & Andreas Manhart, Socio-economic Assessment and Feasibility Study on Sustainable E-Waste Management in Ghana, 34 (Aug. 2010), http://www.oeko.de/oekodoc/1057/2010-105-en.pdf (noting that in Ghana, “workers were not overly positive about their working conditions, but still indicated a certain level of satisfaction with their incomes.”).

46. KRISHANU BHATTACHARJEE, THE MARKET OUTLOOK FOR REFURBISHED MEDICAL DEVICES TO 2016: REGULATORY ENVIRONMENT, OPPORTUNITIES, AND MARKET FORECAST 62–71 (2011) (discussing the refurbished medical device market in Brazil, Mexico, South Africa, Russia, and India).


49. Take Romania, one of the lowest GDP countries in Europe, for example. A survey shows
II. THE PATENT BARRIERS TO REFURBISHMENT, A PRIMER

Despite its virtues, the business of refurbishment can run afoul of patent law. In theory, the doctrine of patent exhaustion should free purchasers of patented products from infringement liability. In his patent treatise, Chisum provides a typical statement of this doctrine: “An authorized sale of a patented product exhausts the patent monopoly as to that product. Thus, a purchaser of such a product from the patent owner or one licensed by the patent owner may use or resell the product free of control or conditions imposed by the patent owner.”

This permissive statement, also known as the “first sale doctrine” in the United States, masks three legal distinctions that hinder the refurbishment of patented products.

First, a refurbisher can only repair, not create, a product. Under the first-sale doctrine, an unrestricted sale of a patented item ends the patentee’s control over that particular item. Therefore, a subsequent owner may repair the item without interference from the patentee. However, he cannot work an item so completely that it amounts to an infringing making.

The distinction between permissible repair and impermissible reconstruction gives rise to the repair-reconstruction doctrine. Second, refurbishment may also be subject to geographical limits. Under the law of national exhaustion, only products originally sold in the United States may subsequently be resold in the United States without infringement. Japan and China, on the other hand, permit the refurbishment and resale with their borders of products previously sold anywhere in the world. Third, a patentee may condition the sale of the product on a contractual restriction against use or transfer. The enforceability of such restraint is ambiguous and varies among jurisdictions. It is also unclear whether a breach of the restriction triggers patent remedies in addition to remedies under contract law.

That 16.6% of mobile phone customers use a second-hand handset, and 93% of the respondents cite price as the reason for purchasing a second-hand mobile phone. James Goodman, Return to Vendor: how second-hand mobile phones improve access to telephone services, FORUM FOR THE FUTURE at 10–1, Nov. 2004, http://www.kiwanja.net/database/document/document_phone_recycling.pdf. This is truer in Africa, where landline infrastructure is less reliable. Id. at 4–5.

50. DONALD S. CHISUM, CHISUM ON PATENTS § 16.03(2)(a) (2008).

51. It is possible to exhaust the rights in a product through exercise of the patent other than an authorized sale, and therefore the first sale doctrine is a narrower concept. However, most refurbishment disputes involve the authorized transfer of patented goods to purchasers.

52. Aro Mfg. Co. v. Convertible Top Replacement Co., 365 U.S. 336, 346 (1961) (“[R]econstruction of a patented entity, comprised of unpatented elements, is limited to such a true reconstruction of the entity as to ‘in fact make a new article.’”).

The following subsections detail how the repair-reconstruction doctrine, the national exhaustion doctrine, and the conditional sales doctrine each obstructs the refurbishing industry, using the law of United States as the primary illustration as well as looking to significant variations outside the United States. While this is not meant to be an exhaustive cross-country survey, the comparative method showcases the wide range of approaches countries have adopted.

A. The Repair-Reconstruction Doctrine

The term “refurbish” is “a convenient neutral term without legal significance, intended to connote neither ‘repair’ nor ‘reconstruction.’” The act of refurbishment ultimately results in either repair (a species of permissible use) or reconstruction (a species of impermissible making). The challenge to the refurbisher is that “the difference between a repair and a reconstruction is a difficult question that must be resolved case by case.” Federal Circuit Judge Newman concedes that “it is not always clear where the boundary lies: How much ‘repair’ is fair before the device is deemed reconstructed.” Federal Circuit Judge Gajarsa similarly describes the test: “we know a reconstruction when we see it.” Mark Janis, in his seminal survey of the repair versus reconstruction jurisprudence in 1999, critically observed: “Courts long ago abandoned all efforts to cabin the repair-reconstruction dichotomy within a rigid framework of rules. Instead, they rest their decisions on ‘the exercise of sound common sense and an intelligent judgment.’”

According to Janis, the current test is based on “spentness”: Refurbishment is permissible as long as the product still retains some useful life, which is indeterminate and better off replaced with a test based on the intention of the parties. The literature of repair and reconstruction doctrines across countries reveals an even more dizzying array of treatments. The approaches rejected in

54. Jazz Photo Corp. v. Int’l Trade Comm’n, 264 F.3d 1094, 1098 n.1 (Fed. Cir. 2001) (“We use ‘refurbish’ as a convenient neutral term without legal significance, intended to connote neither “repair” nor ‘reconstruction’ of the used cameras.”).


57. Gajarsa et al., supra note 56., at 1222; see also FMC Corp. v. Up-Right Inc., 21 F.3d 1073, 1078 (Fed. Cir. 1994) (“To the extent that FMC requests us to provide some type of bright-line test for determining whether reconstruction has taken place in those cases where all of the replacement under investigation has taken place at the same time, we decline to do so on the basis that this case does not present us with such a scenario.”).


59. See generally id.

60. Several prior studies report the law of patent exhaustion in different countries. See
one country can be the accepted approach in another. While a listing of country
treatment may seem bewildering, the gamut of judicial logic can be sorted into a
taxonomy of four distinct fault-lines: (1) whether the ultimate legal inquiry is to
prove repair or to prove reconstruction; (2) whether the subject of analysis is
the character of the process or the identity of the product; (3) whether the proofs
are drawn from the totality of circumstances or physical features; and (4)
whether any physical components are elevated into essential elements or not.
The more a court focuses on “making,” on the identity of the product, on the
totality of circumstances, and on essential elements of the product, the more
likely it is to find impermissible reconstruction in refurbishing situations.

1. The Ultimate Legal Inquiry: Repair or Making?

The outcome of the repair-reconstruction test may depend on whether one
is looking for repair or reconstruction. It seems counterintuitive—after all, both
are part of the same repair-reconstruction test. But the reality is that litigation
procedure necessarily places these two concepts on an unequal footing.

In the United States, the courts frame the procedural issue as whether the
third-party commercial refurbisher can show permissible repair. Since the
restoration of a patented product necessarily makes an article covered by the
claims of the patent, so the reasoning goes, patentees can always prove
infringement in the technical sense (prima facie infringement). The real issue
becomes whether the evidence produced by the accused refurbishers satisfies the
affirmative defense of permissible repair. Such is the legal framework the Court
of Appeals for the Federal Circuit applied in Jazz Photo Corp. v. U.S. Int’l Trade
Commission, concerning a long-running dispute between Fuji Photo Film
Co. and a group of camera refurbishers.61 Fuji asserted a portfolio of design and
utility patents covering its disposable cameras in the International Trade
Commission (ITC) against refurbishers outside the United States. These
refurbishers collected used single-use cameras, loaded them with new film,
sealed the back cover with tape and repackaged the single-use cameras in a new
sleeve under their own brand.62 Although the ITC found the process infringing,
the Federal Circuit disagreed and held that this reloading operation qualified as
permissible repair in principle.63 This process undoubtedly restored the broken
or used cameras to some semblance of functionality, and judges examining this
process understandably saw “permissible repair.” Nonetheless, the Federal

generally Mineko Mohri, Repair and Recycle as Direct Patent Infringement?, in SPARES, REPAIRS
AND INTELLECTUAL PROPERTY RIGHTS 59 (Christopher Heath & Anselm Kamperman Sanders eds.,
2013), https://blog.smu.edu/towercenter/2014/01/02/shubha-ghosh-the-implementation-of-
exhaustion-policies. See also AIPPI’s report based on a survey conducted in 2008 investigating the
operation of exhaustion law in thirty-five countries. Exhaustion of IPRs in cases of recycling and
61. 264 F.3d 1094, 1105 (Fed. Cir. 2001).
62. Id. at 1189.
63. Id. at 1110–11.
Circuit maintained the finding of infringement to those infringers that failed to adduce any evidence to meet the requisite burden of proof. 64 U.S. judges have also invoked the concept of “akin to repair” to protect purchasers who modify a patented product from infringement claims. 65 The “akin to repair” concept, while not directly relevant to third-party commercial refurbishment, reveals the tendency of U.S. courts to see permissible repair because it is what they seek.

By contrast, courts in the United Kingdom ask whether an act of “making” has taken place, according to United Wire Ltd. v. Screen Repair Services Ltd. and Others, a case involving the refurbishment of a patented sifting screen used in the oil industry. 66 In United Wire, a third-party commercial refurbisher sold reconditioned screens by attaching new mesh to frames recovered from the patentee’s product (not unlike refurbishers placing new film into empty camera bodies recycled from Fuji’s single-use cameras). The trial court treated the case as a repair of the sold screen. The Court of Appeal reversed and explicitly rejected an analysis based on the repair argument where no separate, independent right of repair existed. 67 Lord Bingham explained the ambiguity of repair thus:

For repair may involve no more than remedial action to make good the effects of wear and tear, involving perhaps no replacement of parts; or it may involve substantial reconstruction of the patented product, with extensive replacement of parts. Both activities might, without abuse of language, be described as repair, but the latter might infringe the patentee’s rights when the former did not. 68

Instead, the correct test is “whether, having regard to the nature of the patented article, the defendant could be said to have made it.” 69 The evidence showed refurbishers combining parts, including the previously sold frame, into a new working product just as they would have done had the frame come from a parts vendor.

64. See, e.g., Fuji Photo Film Co., Ltd. v. Jazz Photo Corp., 394 F.3d 1368, 1374 (Fed. Cir. 2005) (upholding liability against “those remanufacturing facilities for which discovery was refused or where the evidence offered was found incomplete or not credible” due to an unwillingness to “exculpate unknown processes from the charge of infringing reconstruction”).

65. Wilbur-Ellis Co. v. Kuther, 337 U.S. 422, 425 (1964) (holding that the modification of unpatented components of a canning machine to accommodate different can sizes is “akin to repair”); Hewlett-Packard Co. v. Repeat-O-Type Stencil Mfg. Corp., 123 F. 3d 1445, 1452 (Fed. Cir. 1997) (holding that modifying unpatented printer cartridge plastic caps to provide refillable capacity is akin to repair); Surfco Hawaii v. Fin Control Systems, Ltd., 264 F.3d 1062, 1066–67 (Fed. Cir. 2001) (holding that modifying surfing board fin to provide a safer rubber edge is akin to repair); Husky Injection Molding Systems Ltd. v. R & D Tool & Engineering Co., 291 F.3d 780, 787–88 (Fed. Cir. 2002) (holding that modifying injection mold and carrier plate of a patented injection molding system is akin to repair).


67. Id.

68. Id.

69. Id.
Chinese courts take the “making” inquiry up a notch with the notion of “akin to making” in a line of cases involving the refilling of liquor bottles under design-patents protection. Even though the bottle refillers neither repaired nor reconstructed the patented bottles, the court held that the act of salvaging the bottles from trash, cleaning them, and refilling them with liquor provides the bottles a second life that is “akin to making” and infringed the patent rights of the company that originally manufactured and used the bottles. This analysis contrasts sharply with the “akin to repair” analysis in the United States and highlights the importance of the judicial distinction between the concepts of repair and reconstruction: U.S. courts begin their analysis from repair and expand the safe harbor to situations that are “akin to repair,” while Chinese courts begin their analysis from reconstruction and expand the prohibition to situations that are “akin to making.”

Like the young woman/old maid perceptual illusion, the repair-reconstruction test resolves itself as one or the other to different observers. Those looking for permissible repair, like judges in the United States, are able to find permissible repair. Those looking for impermissible making, like the judges in the United Kingdom and China, similarly find impermissible making. Each would insist that his or her view is correct to the exclusion of the other, while both outcomes are equally supported in their own terms.

2. The Subject of Analysis: Process or Product?

The doctrinal moniker of “repair-reconstruction test” implicitly ascribes a process as its subject, and courts in the United States adopt the process-oriented approach by examining the steps of the refurbishment. But courts in Japan and Germany look first to the product itself both before and after refurbishment, given that patent exhaustion limits infringement immunities to the owners of the product. In this way, the “repair/reconstruction test” can be reframed as a product-based test of whether the refurbished product retained its original identity or received a new commercial identity through a new creation. As it turns out, the choice to focus on the process of refurbishment or the differences in the product before and after the act of refurbishment can lead to different case outcomes.

A process-oriented doctrine examines the continuous flow from the pre-refurbished state to the post-furbished state. This method of analysis gave rise to a metaphysical discussion in Fuji v. Jazz Photo as to whether the refurbishment


71. The young woman/old maid perceptual illusion is a famous optical illusion in which some observers see a young woman while others perceive an old woman, within the same image.

process should be characterized as four, eight, nineteen or more steps, or whether the number of steps even matters. The Fuji court reasonably thought that it did not, but the court’s answer is pre-ordained by its process-centric preoccupation which avoided the real issue: how does one distinguish one continuous repair process from another continuous reconstruction process? Like Zeno’s tortoise paradox, the spent stock material inches along the scrolling conveyer belt, ever-extending the zone of permissible repair. There is never a clear defining moment when one more step crosses over to impermissible reconstruction. Therefore, an analysis focusing on the refurbishing process favors the conclusion of permissible repair.

In contrast, a test focusing on the end product favors a court finding impermissible construction. Mark Janis noted this identity test in older U.S. cases before Aro I. Today, the product-identity approach is exemplified by the reasoning of the Japanese Supreme Court in Canon KK v. Recycling Assist concerning an ink-cartridge patent where the ink formed an air barrier. In Canon, refurbishers refilled empty printer ink cartridges and performed incidental manufacturing steps to aid the process, including cleaning out dried ink particles and drilling holes in the ink chambers. The Supreme Court recognized infringement “when an article sold . . . by the patentee is modified or its parts are replaced, and because of this a new instance of the patented article having a new identity is created.” It concluded that “new patented products which lack the identity from the original products were created.” According to Toshiko Takenaka, who analyzed Canon closely, the Supreme Court framed the key inquiry as “whether the recycled products are identical to the products legally sold by the patent owner and its licensees.” Likewise, in the 2005 Flügelradzähler case, the German Federal Supreme Court framed the issue as “whether the measures taken maintain the identity of the specific patented product . . . or are the equivalent of the creation of a new product.”

---

73. Fuji Photo Film Co. Ltd. v. Jazz Photo Corp., 249 F. Supp. 2d 434, 446–47 (D.N.J. 2003) (“Whether these refurbishment procedures are counted as four, eight or nineteen ‘steps’ is a matter of semantics, as virtually any step can be divided into multiple ‘sub-steps.’ The legal issue is whether the totality of the refurbishment procedures are of such a nature that they preserve the useful life of the patented article, or whether they in fact recreate the article after it has become spent.”).

74. Janis, supra note, at 448–49.


76. Id.

77. Id.


product-based test asks judges to juxtapose discrete pre- and post-refurbished ink cartridges. This side-by-side comparison accentuates their differences and leads the legal analysis down the path of impermissible reconstruction.

In this sense, the choice of examining the process versus the product is a choice between continuity and break, between incrementality and abruptness, and between repair and reconstruction. Conceptually the process-based “repair-reconstruction test” and the product-based “identity” test are two statements of the same doctrine. In practice, they can lead to different outcomes.

3. The Content of Proof: Physical Attributes or Totality of Circumstances

Another distinction among repair-reconstruction decisions turns on the content of the proof required. U.S. courts ostensibly limit examination to the physical characteristics of the repair-reconstruction process, including the steps of restoration and the extensiveness of replacement. However, many decisions inside and outside the United States discuss the totality of circumstances that admit market and social considerations beyond mere physical attributes. This is especially prevalent in jurisdictions using the product-identity test, given the breadth of what makes up the identity of a product.

The first strand is evident in the U.S. Supreme Court decision in Aro Manufacturing Co. v. Convertible Top Replacement Co. (Aro I). There, the plaintiff patented a convertible automobile top structure and licensed the patent to manufacturers of convertible cars. A third-party supplier was sued for contributory infringement for selling the unpatented fabric element designed to replace the worn original fabric and act as a repair to the convertible top frame. The majority explicitly eschewed a repair analysis based on multiple factors in favor of examining physical transformations such as the “replacement of individual unpatented parts.” The fabric wore out over time, but the structure remained sound.

The Federal Circuit followed the same reasoning in Dana Corporation v. American Precision Company, Inc. There, the Federal Circuit limited the analysis exclusively to the physical refurbishment process and found no difference between the repair of a single broken clutch for a customer and the commercial rebuilding and sale of clutches using parts collected from broken clutches. The identity of the refurbishers (purchasers versus a third-party

758, 36 IIC 963 (2005) (Ger.).
80. Janis, supra note, at 479–85 (tracing the rejection of the “economic” approach in the United States).
81. Mohri, supra note 60, at 66.
83. Dana Corp. v. American Precision Co., Inc., 827 F.2d 755, 759 (Fed. Cir. 1987) (“[U]se of the production-line method cannot convert what Dana concedes is permissible repair to impermissible reconstruction.”).
84. See id. at 758–59 (citing Wilbur-Ellis Co. v. Kuther, 377 U.S. 422 (1964) and General Electric Co. v. United States, 572 F.2d 745 (1978)); see generally Janis, supra note, at 480–81.
business), the scale of the operation, and the customs of the marketplace did not enter the calculus. The *Fuji v. Jazz* case also relied on this reasoning and permitted the eight-step (or nineteen-step) process as repair, even though (1) the refurbisher had to practice the film loading process patent in its entirety, (2) the price charged by the patentee was calibrated for a single-use, and (3) the product was a single-use camera that the consumer had no expectation of repairing or reusing. *Dana v. American Precision* and *Fuji v. Jazz* may have supported a finding of reconstruction in favor of the patentee had they been decided under the totality of circumstances.85

Nonetheless, the totality-of-circumstance test still lingers here in the United States and is alive and well elsewhere. Although the *Aro I* majority declined to adopt the multiple-factor test, Judge Brennan advocated a multiple-factor test in a concurrent opinion.86 The Federal Circuit occasionally applies this approach, such as in the case of *Sandvik Aktiebolag v. E.J. Co.* The *Sandvik* case concerns the refurbishment of a carbide drill tip, which was left with a specific geometry after it had been used and worn.87 The Federal Circuit held that it was permissible repair to resharpen a worn tip, but not to retip a damaged drill bit. In reaching this conclusion, the court identified a list of factors including: “whether a market has developed to manufacture or service the part . . . and objective evidence of the intent of the patentee.”88

Likewise, the Japanese Supreme Court in *Canon* considered “the totality of the circumstances including the attributes of the patented article, the content of the patented invention, the manner in which the article was modified or its parts replaced, as well as the actual conditions of the commercial transaction, etc.”89 Chinese courts took the totality of circumstance to the other extreme in the bottle-recycling cases mentioned earlier. Although the bottles did not undergo any physical alteration, their economic resurrection from the trash heap, and their second life as refilled bottles, convinced Chinese judges to rule against the bottle refillers.90 In 2013, the U.K. Supreme Court endorsed the totality-of-circumstance test in *Schütz v. Werit*, a case relating to a container for holding bulk liquid comprising a plastic bottle nestled inside a metal cage.91 Lord Neuberger, writing for the court, permitted the refurbisher to replace a damaged plastic bottle upon considering factors including: the relative useable life of the

---

85. See Mohri, supra note 60.
86. *Aro I*, 365 U.S. at 364–65 (“The life of the part . . . in relation to the useful life of the whole combination, the importance of the replaced element to the inventive concept, the cost of the component relative to the cost of the combination, the common sense understanding and intention of the patent owner and the buyer of the combination as to its perishable components, whether the purchased component replaces a worn-out part or is bought for some other purpose, and other pertinent factors.”).
88. Id.
89. *Recycle Assist Co.*, supra note 75.
90. *Liu*, supra note 70.
bottle vis-à-vis the metal cage, the relative separateness of the bottle and the metal cage, the relative value of the container before and after the replacement, and whether the replaced plastic bottle embodied the inventive feature. With respect to economic factors, Lord Neuberger noted:

If an article has no value when it has been used and before it is worked on, and has substantial value after it has been worked on, that could fairly be said to be a factor in favour of the work resulting in the “making” of a new article, or, to put the point another way, in favour of the work involved amounting to more than repair.92

Although the outcome of this case differed from the Chinese bottle-recycling case, courts in both the U.K and China appear to accept the idea that a finding of reconstruction is more likely when the starting stock material literally has no value.

4. The Significance of Parts: All Elements or Essential Elements

The last divide turns on whether all parts of a patented article are created equal. The Aro I majority stated that the patent “covers only the totality of the elements in the claim and that no element, separately viewed, is within the grant.”93 Therefore, all elements of a patented article are created equal and the replacement of one part does not amount to the creation of the whole.94 Supreme Court Justices rejected the essential-element test and permitted the sale of an unpatented component.95 However, commentators including Federal Circuit Judge Gajarsa noted the continued influence of the essential-element test in refurbishment cases since Aro I.96

In contrast, a country applying the essential-element test assigns greater importance to those parts that are essential to the invention, which therefore cannot be replaced without causing infringement. Toshiko Takenaka observes that the Japanese Supreme Court, “focusing on essential elements and the advantage of the invention, has made it easy for patentees to circumvent the exhaustion doctrine and unreasonably restrict the right of the owner for a specific patented product.”97 The ink inside a printer cartridge became an essential element and as a result, refilling the ink amounted to reconstruction in the Canon case. This doctrinal difference between Japan and the United States

92. Id. at 20.
94. See, e.g., Porter v. Farmers Supply Serv., Inc., 790 F.2d 882, 885 (Fed. Cir. 1986) (quoting Dawson Chem. Co. v. Rohm & Haas Co., 448 U.S. 176, 217 (1980)) (refusing to consider “whether the element of the combination that has been replaced is an ‘essential’ or ‘distinguishing’ part of the invention”).
95. Aro I, 365 U.S. at 346.
96. See Bernard Chao, Breaking Aro’s Commandment: Recognizing That Inventions Have Heart, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1183, 1208 (2010); Janis, supra note 58, at 455–57.
97. Takenaka, supra note 78.
results in the infringement liability imposed on camera refurbishers in Japan but not the United States.98

This is not to say that the essential-element test always yields a finding of infringement. In Schütz v. Werit, the U.K. Court observed that “the replaced part . . . is a free-standing item of property, which does not include, or relate to, the inventive concept.”99 When courts adopt an essential-element test based on the inventive concept, it follows that some refurbishing operation will relate to the inventive concept and some will not. Schütz v. Werit notwithstanding, courts applying the essential-element test are more likely to find infringement because the replacement of a single essential element may satisfy the definition of making.100 Where a nonessential part of the invention is replaced, a court applying the all-elements test is likely to find permissible repair in any event.

To summarize, the core test for the probity of refurbishment under patent law spawns a slew of analytical methods—whether the ultimate legal question is one of repair or reconstruction, whether the subject of analysis focuses on the refurbishment process or product identity, whether the evidence of refurbishment include physical changes or the totality of the circumstances, and whether any of the physical components are considered essential. Although individual cases adopted specific variations over the meaning of “making,” the plethora of arbitrary tests expose refurbishers to infringement risk that is beyond their ability to evaluate ex ante. The complexity of the test also imposes a burden of coming forward with extensive evidence that may be financially and logistically challenging to a refurbisher.

B. Geographical Limitations of Exhaustion

The second barrier arises out of the geographical limits of exhaustion. The geographic scope of a country’s exhaustion doctrines refers to the area in which an authorized sale will exhaust the patent rights attached to the product, which may take the form of international exhaustion, regional exhaustion or national exhaustion. This is a doctrinal area undergoing active developments in Japan, China, and the United States.

The doctrine of international exhaustion allows a refurbisher to repair and sell a patented product that was previously sold anywhere in the world. Under this regime, refurbishers have access to a greater pool of spent goods and incur fewer transaction costs by not having to sort the spent stock material according to their country of first sale.101 Chinese patent law adopted international

98. Id.
100. This split echoes the split among the justices in Aro I. Four Justices espoused a multiple factor test that looks into whether a replaced component is essential and therefore infringing. Justices Harlan, Frankfurter, and Stewart answered yes to infringement. Aro I, 365 U.S. at 369. Justice Brennan also endorsed the essential elements test but found no infringement under it. Id. at 362.
101. The single use camera cases and the ink cartridge cases provide examples of injunctions against refurbishers requiring refurbishers to sort through its stock. See, e.g., Fujifilm Corp. v.
exhaustion under the Third Revision of the patent law. This is also the current rule in Japan following the decision of the Japanese Supreme Court in *BBS v. Japan-Auto Products.* The Japanese rule does have an additional caveat, where the patentee may prevent the application of international exhaustion through a conditional sale if the product was originally sold but without the permission to import into Japan. In any event, Japanese and Chinese refurbishers may repair and sell a patented product without regard to where the original product was first sold and refurbished under the default rule.

Countries in the European Union operate under regional exhaustion. Articles 28 and 30 of the European Community (EC) Treaty and Articles 11 and 13 of the European Economic Area (EEA) Agreement guarantee the free movement of products among the member states, although it has not been an issue in refurbishment-related disputes. Thus, refurbishers in the United Kingdom can repair and sell any products originally sold in the EC or EEA countries.

Under the principal of national exhaustion, only the sale of products inside the United States will exhaust U.S. patent rights and permit repair. Refurbishment of products sold outside the United States, on the other hand, constitutes infringement. The Court of Appeals for the Federal Circuit adopted the principal of national exhaustion for the United States in *Jazz Photo*

---

102. Patent Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 12, 1984, amended Dec. 27, 2008, effective Oct. 1, 2009), arts. 69 (“None of the following shall be deemed as infringement of the patent right: (1) where, after the sale of a patented product or a product obtained directly by a patented process by the patentee or any entity or individual authorized by the patentee, any other person uses, offers to sell, sell, or imports that product . . . .”) [hereinafter CPL].


104. See Association Internationale pour la Propriete Intellectuelle (AIPPI), Report Q205 (Japan), available at https://www.aiippi.org/download/committees/205/GR205japan.pdf (reporting that, according to the BBS case in Japan, “parallel importation of goods was permissible unless the parties concerned agreed to exclude Japan from the countries and regions where the goods were to be sold or used and explicitly indicated to that effect on the goods”).


106. Association Internationale pour la Propriete Intellectuelle (AIPPI), Report Q156 (United Kingdom), https://www.aiippi.org/download/committees/156/GR156japan.pdf (“UK patent rights are exhausted if a patented product is put on the market by or with the consent of the patentee anywhere within the EEA. This applies even when the patentee does not have an equivalent patent in the country of first marketing, when there is no patent protection available there or where the local legislation fixes an artificially low sales price for the products there.”).

107. See id.
Corp. v. International Trade Commission, the Fuji single-use camera dispute.\textsuperscript{108} Fuji cannot prevent the importation and sale of cameras refurbished from those that Fuji had first sold in the United States earlier, but it retains the right to do so against cameras refurbished from those that Fuji had first sold outside the United States.\textsuperscript{109} Similarly, in Ninestar v. International Trade Commission, a Chinese company collected spent ink cartridges from non-U.S. sources, refurbished the cartridges, and sold the refilled cartridge in the United States.\textsuperscript{110} On appeal to the Court of Appeals for the Federal Circuit, the refurbisher argued that the United States should adopt the principle of international exhaustion but the court reaffirmed the national exhaustion doctrine articulated in the Fuji cases.\textsuperscript{111} The national exhaustion requirement created a difficult trial issue for refurbishers. The legality of their operation depends on a fact possibly beyond their knowledge: where the patentee initially sold the patented product. The burden of proving whether and how many products the patentee sold in the United States is particularly onerous when the patentee sells similar products globally.\textsuperscript{112}

Two recent Supreme Court decisions, Quanta v. LG Electronics in 2008 and Kirstaeng v. John Wiley & Sons, Inc. in 2013, hint at a possible shift toward international exhaustion in the United States. Quanta relates to a computer chip technology that LG, the patentee, licensed to another company, Intel.\textsuperscript{113} The Justices refused to impose patent infringement liability against purchasers of the Intel chips, who used the chips inconsistently with the upstream licensing agreement between LG and Intel.\textsuperscript{114} The opinion stated broadly that “[t]he authorized sale of an article that substantially embodies a patent exhausts the patent holder’s rights and prevents the patent holder from invoking patent law to control post sale use of the article.”\textsuperscript{115}

On remand, the district court faced the issue of whether the exhaustion doctrine applied to chips first sold outside the United States. Although the


\textsuperscript{109} Jazz Photo Corp. v. Int’l Trade Comm’n, 264 F.3d 1094, 1105 (Fed. Cir. 2001).


\textsuperscript{112} See, e.g., Jazz Photo Corp. v. U.S., 439 F.3d 1344 (Fed. Cir. 2006) (affirming the order of the Court of International Trade to segregate refurbished cameras based on the country of the original sale); Commission Opinion, \textit{In re Certain Ink Cartridges and Components thereof}, Inv. No. 337-TA-565, Consolidated Enforcement Proceeding and Enforcement Proceeding II, 13–14 (2010) (“[T]he ALJ found that the Ninestar Respondents failed to meet their burden of proving permissible repair by a preponderance of the evidence as they did not establish from whom or where the cartridge at issue had originated.”).

\textsuperscript{113} Quanta Computer, Inc. v. LG Electronics, Inc., 553 U.S. 617 (2008).

\textsuperscript{114} \textit{Id.} at 636–38.

\textsuperscript{115} \textit{Id.} at 638.
Supreme Court did not address the geographical scope of exhaustion, the district court applied international exhaustion based the broadly framed first sale doctrine in Quanta.\footnote{LG Electronics, Inc. v. Hitachi, Ltd. 655 F. Supp.2d 1036, 1047 (N.D. Cal. 2009).} The Court also raised the policy concern that a national exhaustion regime would allow a company such as LG to profit twice from the same patented product, once for sales outside the United States, and once for sales inside the United States.\footnote{See id. at 1046.} It should be noted that no other U.S. courts have followed this rationale. The Federal Circuit explicitly affirmed national exhaustion in cases regarding the Fuji single-use camera and Ninestar ink cartridge disputes that arose after Quanta.\footnote{See Fujifilm Corp. v. Benun, 605 F.3d 1366, 1371-72 (Fed. Cir. 2010); see also Ninestar Technology Co., Ltd., v. Int’l Trade Comm’n, 667 F.3d 1373 (Fed. Cir. 2012) (applying national exhaustion to find a foreign refurbishing infringing).}

The second decision, Kirtsaeng v. John Wiley & Sons, Inc., altered the United States’ copyright exhaustion regime from national exhaustion to international exhaustion. In Kirtsaeng, the Supreme Court refused to impose copyright infringement liability against an importer who purchased genuine copies of English textbooks in Thailand for resale in the United States.\footnote{Kirtsaeng v. John Wiley & Sons, Inc., 133 S. Ct. 1351 (2013).} Although the first sale doctrine is codified in the copyright statute, the Supreme Court placed substantial emphasis on the common law origin of the first sale doctrine. Tracing what it viewed as “an impeccable historic pedigree” of the first sale doctrine, the Supreme Court endorsed the traditional policy underlying the first sale doctrine that “[a] law that permits a copyright holder to control the resale or other disposition of a chattel once sold is similarly ‘against Trade and Traffic[,] and bargaining and contracting.’”\footnote{Id. at 1363 (quoting 1 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND § 360, 223 (1628)).} The Court also expressed a policy reason a bit closer to home: “[t]he ‘first sale’ doctrine also frees courts from the administrative burden of trying to enforce restrictions upon difficult-to-trace, readily movable goods. And it avoids the selective enforcement inherent in any such effort.”\footnote{Id.}

By relying on early copyright cases and the language of the copyright statute, the Supreme Court ostensibly did not disturb the exhaustion regime in patent law.\footnote{Sarah Wasserman Rajec, supra note 108, at 360 (analyzing the statutory basis of the Kirtsaeng decision and reached the same conclusion that “[t]he statutory interpretation that underlies the Kirtsaeng decision, while interesting, does not constrain the possibilities for patent law”).} Nonetheless, if the twin policy considerations, the free movement of goods and the difficulty of enforcement, are appropriate for the adoption of international exhaustion in copyright, they appear even more apropos to the patent context. The secondary market of patented products is particularly vulnerable to a weak exhaustion regime, given that patents implicate more categories of products, and each product can be the subject of multiple
overlapping patents. As for the administrative cost of complying with a national exhaustion regime, one need not look further than the *Fuji v. Jazz* or the *Epson v. Ninestar* line of cases for the potential quagmire of sorting out products that were first sold in the United States from those that were first sold elsewhere. As product supply chains extend globally, it has become more and more difficult to distinguish what is first sold in the United States from what is sold in other parts of the world. Although the ban was technically partial as to those products refurbished from stock material initially sold outside the United States, patentees were able to leverage this partial victory to impose additional compliance on imports and to saddle refurbishers with the burden of proving exhaustion.

The U.S. Supreme Court recently had an opportunity to address the issue of national versus international exhaustion after *Quanta* and *Kirtsaeng* when the defendant in *Ninestar* sought *a certiorari* but it declined to do so. The result: the U.S. border remains a wall against foreign refurbishers. Nonetheless, the pro-exhaustion language in *Quanta* and *Kirtsaeng*, and the defection of the district court, show up as small fissures and cracks.

C. Contractual Limits on Exhaustion

Even after a refurbisher complies with the ambiguous repair-reconstruction doctrine and the draconian national-exhaustion rule, he may still run afoul of licensing conditions which limit refurbishment. Patentees occasionally try to avoid competing with their own products by imposing single-use conditions that limit the application of the patent exhaustion doctrine. This creates another barrier to refurbishers.

U.S. courts have not addressed this question consistently. Some decisions held that subsequent owners of the product may not refurbish a patented article sold under a single-use restriction. For example, in one nineteenth century Supreme Court ruling, *American Cotton-Tie Co. v. Simmons*, a refurbisher recycled pieces of the belt and buckle of a cotton-tying belt by piecing them back together and reusing it in a patented cotton-tie combination. The Supreme Court found this to be an impermissible reconstruction, noting that the cotton-tie was sold with the phrase: “[l]icensed to use once only.” The 1992 Federal Circuit decision in *Mallinckrodt v. Medipart* furnishes the contemporary legal framework for analyzing whether a conditional sale restrains post-sale

---

123. This is also true for some products subject to overlapping copyrights, such as cars or computers containing different software programs. I am grateful to Sarah Rajec for pointing this out. See Brief of Association of Service and Computer Dealers International, Inc. as Amicus Curiae Supporting Petitioner, 6–7, *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013) (No. 11-697).

124. See *supra* note 112 and accompanying text.


126. *Brief for Automotive Aftermarket Industry Association et al.*, *supra* note 22, 18

activities. Mallinckrodt involves a company that reconditioned a patented medical nebulizer (by pasteurizing it through irradiation). The nebulizer was sold to hospitals under a single-use restriction and the product itself bears the sign: “Single Use Only.” The Federal Circuit found the refurbishment infringing and reasoned that because the sale was conditioned on single use, the purchaser and downstream refurbishers had no authority to reuse the nebulizer. Farmers have been prohibited to save and replant patented seeds sold under single-planting restrictions. U.S. courts have refused to enforce single-use restrictions in other cases. For example, in Jazz Photo Corp. v. Int’l Trade Comm’n, the court held that the “single-use” designation on disposable cameras sold by Fuji did not prevent third-party refurbishment. According to the Federal Circuit, “the patentee’s unilateral intent, without more, does not bar reuse of the patented article, or convert repair into reconstruction.”

The effect of single-use restrictions under the patent law came into doubt after the Supreme Court decisions in Quanta Computer v. LG Electronics. There, the patentee LG Electronics contractually required its licensee Intel to notify downstream purchasers of patented computer chips that the chips are not to be used with non-Intel parts. In Quanta, the Court held that such patent licensing language was insufficient to prevent the exhaustion of patentee’s rights pursuant to an authorized sale of the patented chips. While the facts in Quanta do not address single-sale per se, commentators remain divided on whether the holding in Quanta restricts the patentee’s ability to limit patent exhaustion through conditional sale. Shubha Ghosh argues that use restrictions apply only to the direct purchaser of the product under Quanta—an interpretation that is favorable to third-party refurbishers. Likewise, Herbert Hovenkamp contends that Quanta heralds a strong patent-exhaustion regime that overruled cases upholding single-use restrictions like Mallinckrodt. In

---

129. Id. at 702.
130. Id.
131. Id. at 709.
132. See, e.g., Monsanto v. Scruggs, 459 F.3d 1328 (Fed. Cir. 2006) (holding no patent exhausting for the harvesting and replanting of patented seeds because the original sale condition prohibits replanting and, in the alternative, because the making of new seeds is infringing making).
134. Id. at 1106; see also Hewlett-Packard Co. v. Repeat-O-Type Stencil Mfg. Corp., 123 F.3d 1445, 1453 (Fed. Cir. 1997).
136. Several commentators argued that Quanta does not limit a patentee’s ability to impose patent law through contractual limitations against post-sale activities. See, e.g., Matthew W. Siegal & Kevin C. Ecker, Quanta Computer, Inc., et al. v. LG Electronics, Inc.: Patent Exhaustion Restrictions May Not Be . . . Exhausted, 11 INTELL. PROP. STRATEGIST 1 (2008); see also Erin Julia Daida Austin, Reconciling the Patent Exhaustion and Conditional Sales Doctrine in Light of Quanta Computer v. LG Electronics, 30 CARDozo L. Rev. 2947, 2979 (2009); Herbert Hovenkamp, Innovation and the Domain of Competition Policy, 60 Ala. L. Rev. 103, 131 n.35 (2008). The Quanta decision explicitly declined to address this issue in a footnote. Quanta, 553 U.S. at 637 n.7.
contrast, some read *Quanta* as a case of poor contract drafting.\(^{137}\) Lower courts are split on the application of *Quanta*. In an unreported order relating to the replanting of genetically modified seeds, the Northern District Court of Mississippi held that *Quanta* does not limit a patentee’s ability to contractually invoke patent law against post-sale activities.\(^{138}\) However, the Eastern District Court of Kentucky read *Quanta* decision to implicitly overrule *Mallinckrodt* and removed a patentee’s ability to invoke patent law against ink cartridge refurbishers through contractual single-use restrictions in *Static Control Components, Inc. v. Lexmark Intern., Inc.*\(^{139}\)

Even if single-use restrictions are enforceable as a matter of law, a third-party refurbisher who recovers an item from a trash heap may not be aware of the restrictions or circumstances surrounding the initial contract formation between the patentee and the original purchaser. Hovenkemp explains that the exhaustion doctrine plays the role of avoiding accidental violation by innocent downstream purchasers:

As a general matter one can be guilty of patent infringement without having any notice whatsoever. If that rule were applied to post-sale restraints, the result could be a significant problem of hold-up, as innocent subsequent purchasers could be sued for patent infringement for violating conditions they knew nothing about.\(^{140}\)

A patentee rarely knows of (and therefore cannot notify) a refurbisher until the refurbished product appears on the market. By the time a patentee receives notice, the refurbisher would already have made the manufacturing and distribution investment. Even Hovenkemp, who is otherwise sympathetic to some post-sale restrictions and critical of the strong exhaustion regime, as articulated in *Quanta*, warns that a single-use restriction to limit output and the reuse of durable goods is a “socially harmful” act that “not only prevents the rise of a used goods market but limits the use of each good to a single cycle.”\(^{141}\)

**D. Summary**

The discussion of exhaustion doctrines within the United States and the comparison between the United States, Japan, the United Kingdom, and China illustrates the legal complexity confounding refurbishers operating in the global

---

137. Some commentators argue that the *Quanta* decision is a lesson in proper contract drafting. William LaFaze et al., *The Conditional Sale Doctrine in a Post-Quanta World and Its Implications on Modern Licensing Agreements*, 11 J. MARSHALL REV. INTELL. PROP. L. 295, 316 (2011) (“The Quanta opinion makes clear that conditions drafted to avoid patent exhaustion must be explicitly described in the body of the licensing agreement and follow classic principles of contract law.”).


141. *Id.* at 530.
economy. Each of these legal hurdles is a doctrinal muddle, exacerbated by the uniqueness of the underlying technology, variations of the refurbishment process, and the idiosyncrasies of the product market space.

The common moniker of the repair-reconstruction test belies a range of approaches between countries and even among courts within the same country. U.S. courts focus on the physical process of repair and appear more inclined to find permissible repair than courts in Japan, the United Kingdom, or China. Chinese courts have adopted the narrowest analysis of exhaustion and imposed liability against liquor-bottle recyclers even without any physical sign of reconstruction. In this area of unsettled law, how judges frame the repair-reconstruction question in a particular case is just as important as the facts underlying the case. With respect to territorial limits of exhaustions, China and Japan have adopted international exhaustion and permit the refurbishment of products previously sold anywhere in the world. In Europe, the rule of regional exhaustion permits the refurbishment of products previously sold in the European Community and European Economic Area. U.S. courts apply domestic exhaustion, but the recent Supreme Court decisions in Kirtseang and Quanta signal possible shift to international exhaustion in the future. Furthermore, Quanta calls into question whether post-sale single-use restriction can extend patent rights beyond the first sale.

This summary reveals another curious pattern: Even when one of the three barriers permits refurbishment, others threaten to remove the safe harbor. For example, Chinese and Japanese refurbishers can better access stock material under the international exhaustion rule, but the product-identity test under the totality of circumstances increases the likelihood of finding reconstruction. In the United States, courts are more sympathetic to the refurbisher under the repair-reconstruction doctrine. But national exhaustion increases the cost for refurbishers due to the need to sort waste-stock materials and to evidence the source of their product in a legal dispute. The possibility of single-use restrictions also threatens to take away refurbishers’ already limited legal safe harbor. Contractual conditions can deny permissible repair in toto in the United States or reduce the breadth of international exhaustion in Japan. To the refurbisher, the exhaustion doctrine gives with one hand and takes away with the other. To sustainability at large, the exhaustion doctrine does not appear to promote technological enablement, conservation or economic development. This underlying tension between sustainable development and patent policy is the subject of the next section.

III. PATENT POLICY AND THE DOWNSTREAM MARKET

Scholars have noted the ways sustainable development may intersect patent law.142 Henning Grosse Ruse-Khan reminds us that a sustainable development

142. See generally RICARDO MELENDEZ-ORTIZ & PEDRO ROFFE, INTELLECTUAL PROPERTY
perspective can guide the interpretation of IP provisions, tailoring the IP protection to societal and environmental concerns. The World Trade Organization recognizes the hope of developing countries to receive welfare-enhancing technology when they agreed to abide by the stronger patent rules in TRIPs. There have also been repeated calls for the transfer of green technology to help developing countries combat the pollution following industrialization and urbanization. However, these proposals focus on challenges and contributions that are exogenous to patent doctrines. The technological content of a coal emission scrubber or high-vitamin rice is the element that proposes to enhance welfare in developing countries. Patent law plays a facilitator role.

In contrast, the problem presented by the jurisprudence of refurbishment is endogenous to patent law. The raison d’être of patent law is to promote innovation by granting a right to exclude, and the refurbishing business erodes that exclusivity. But for the exclusivity granted by patent law, free market forces would have sustained ink-cartridge refills and single-use camera recyclers. The current exhaustion doctrines have ignored sustainable development, with the consequence that much of the refurbishing activity is taking place under the shadow of patent infringement. This clash sets the refurbishment conundrum apart from the other intersections of IP and conservation. Estelle Derclaye, who otherwise defends the compatibility between IP rights and human rights, nonetheless concedes that “the right for the patentee to object to reconstruction of the products beyond repair” is an “apparent conflict.”

Perhaps patent doctrines and commercial refurbishment are destined to collide. Although some exceptions are made for a user’s property rights through the exhaustion doctrine, a refurbisher subverts the usual justification because it exists as a chimeric creature somewhere between a competitor and a...
They straddle uncomfortably across the three patent fault lines and threaten the truce between patentees and users. This section identifies patent policy concerns that shape how patent law treats refurbishers, including: (1) diminished patent incentive; (2) consumer’s right to repair; (3) leakage through parallel importation; and (4) possible counterfeit concerns.

### A. Patent Incentive

From the patentees’ perspective, every refurbished product represents a lost sale and reduces the profitability of a patent, especially when a third-party business collects and refurbishes products on a commercial scale. The restoration creates a substitute good in some segment of an otherwise exclusive marketplace. This is problematic for theories justifying the patent system. Whether the purpose of the patent system is to reward inventors, enable commercialization, signal a firm’s strength or to encourage disclosure, it is unclear why the patent incentive for inventors should differ simply because one product can be recycled multiple times, while another product can only be recycled once, and yet a third product cannot be recycled and therefore extracts the most reward. The irony of the situation is that patent incentives for reusable inventions are the strongest when the law prohibits reuse, and the incentives are the weakest when it allows unfettered reuse.

Even if patent law permits reuse, private parties may redirect resources to the search for anti-reuse inventions, a phenomenon surely familiar to anyone who owns an inkjet printer. As if channeling Lawrence Lessig’s multiple codes, printers and ink cartridges come packaged with technological locks and legal protections that have little to do with the printing utility but much to do with preventing downstream ink refills. In addition, printer manufacturers aggressively seek patent claims, with the practical effect of blocking the range of permissible refurbishment and improving their odds at the repair-reconstruction roulette. They even manage to shut refurbishers out of the casino entirely at times by contractually foreclosing the possibility of permissible repair under patent law. This dynamic is similar to what Scott Kieff observed in the context of terminator genes that prevent farmers from

147. See infra Section III.B.


149. See Mohri, supra note 60, at 66–73 (attributing the outcome of the Japanese ink cartridge refurbishment litigation to, among other reasons, how different Japanese courts applied distinct interpretation of the patent claims). It was reported that Epson sought 1045 Chinese patents in 2005 alone. Zhang Jiang (张健), Alipusheng zhuanti wei ji de beihou (爱普生专利危机的背后), DIANNAO AIHAOZHE (电脑爱好者) 2006:15.

150. Arizona Cartridge Remanufacturers Ass’n, Inc. v. Lexmark Intern., Inc., 421 F.3d 981 (9th Cir. 2005) (finding ink cartridge refilling a violation of conditional sale that triggers patent liability). Japanese approach offers another interesting blend of contract law and patent exhaustion doctrine. In one exhaustion case, the Japanese court opined that contract law may alter the default international exhaustion rule and prevent the exhaustion of a Japanese patent. E.g., Kuroda & Katayama, supra note 103.
saving the future generations of genetically engineered seeds, thereby forcing farmers to buy new seeds at every planting.\footnote{151} He notes that the exclusivity of patent law “provides individual actors with a legal alternative to self-help approaches that may have more pernicious impact on the ability to obtain use.”\footnote{152} The agriculture company Monsanto developed the terminator gene technology in the 1990s to ensure that genetically modified plants could only live for a single generation, which is analogous to the locking chip in an ink cartridge. Public outcry ensued over the terminator gene technology, and Monsanto pledged not to use it.\footnote{153} Unable to rely on technological exclusivity, Monsanto had to rely on patent suits against farmers for saving and replanting seeds. One of these lawsuits, \textit{Bowman v. Monsanto Company}, eventually wound its way to the U.S. Supreme Court.\footnote{154} There, the Justices concluded that the replanting of genetically modified seeds is infringing “making” and do not qualify as permissible “use,” in order to preserve incentive for biotech innovations.\footnote{155}

The analogy with patented seeds can only go so far, however. A single seed can multiply indefinitely, while products are refurbished one at a time. True-bred seed reproduces its traits perfectly. Its progenies are perfect substitutes of the patented seeds and threaten to supplant the entire market of the patented seed. The nature of the competition between refurbished products and their patented originals is much more ambiguous. To be sure, refurbished products are substitute goods, but they are imperfect substitutes perceived to have lower quality than the genuine product. The erosion of market share due to lost sales is therefore rarely one-to-one. The exact competitive impact necessarily varies from industry to industry. A CRT television with a defunct capacitor may be functionally perfect after a part replacement. The cracked body of a used disposable camera can be restored only by tape in a crude way, which may suffer light leakage.\footnote{156} Consumer protection law also plays a role: In China as well as the United States, consumer protection regulations govern whether refurbished or used products may be sold as new.\footnote{157} Consumer demographics are another compounding factor. Some buyers of discounted refurbishments will not pay full price for the product directly from the original manufacturer.
sold to this segment of the market does not translate to a lost sale of the original product. Loss may instead take the form of price erosion. A patentee may need to lower prices in order to defend the share of a market created by its invention, trading unit profit for total sales. Amidst these economic complexities, the ultimate redress is an injunction that restores the patentee’s exclusivity.

The primary discourse of patent law casts the give-and-take between refurbishers and the patentee in the narrative of a competitor threatening an inventor’s due reward. However, this framing ignores the complex relationships between the patentee and refurbisher, while overlooking the social contribution of a refurbisher, such as when a refurbisher tinkering with the latest technological castoffs contributes to technological progress in the same capacity as an innovator or when patentees and refurbishers must collaborate to form a closed-loop industry ecology system.

B. Purchasers’ Rights

Repair issues in patent law first arose in the United States out of a desire to protect a consumer’s right to control and make full use of the chattel he or she purchased. Wilson v. Simpson, the very first repair case in the United States, endorsed a purchaser’s ability to replace the dull blade on the patented wood planing machine he purchased. To the extent refurbishers get any break from patent law, it is through their roles as owners and users of the product. Specifically, the exhaustion doctrine provides a safe harbor to protect two interests: the expected use of the product that the consumer bargained for and the ownership rights in the physical item free from IP encumbrance. But here again, the business of refurbishments does not quite fit with the policy concerns underlying these safe harbors.

---

158. James Bandler, Two Big Film Makers Strive to Crush Renegade Recycler, WALL ST. J. (Dec. 4, 2002), http://online.wsj.com/article/SB1038952978842326113.html (reporting that refurbishers drove “the average price of a single-use camera to $5.87 today from $8.82 in the beginning of 1999”).

159. See supra Section A.


With respect to the first “bargain” interest, Shubha Ghosh notes that exhaustion “is desirable because some degree of freedom to operate is desirable for the purchaser of a product without having to engage in licensing negotiations or the threat of a lawsuit.” Given the myriad possible transactions post-sale and the transaction cost potentially incurred if every user is required to enter an IP negotiation, patent exhaustion functions as a good default rule that vests the initial allocation of rights in the user. This transactional perspective manifested through the concept of implied license, where the consumer “has an implied license under any patents of the seller that dominate the product or any uses of the product to which the parties might reasonably contemplate the product will be put.” Similarly, Janis argued that the entire U.S. repair-and-reconstruction doctrine should be reconfigured according to the implied license theory—a position that Robert Merges and John Duffy echoed in the latest edition of their patent law casebook.

Refurbishment operations challenge this transactional view of exhaustion in two ways. First, it presupposes a permissive contractual relationship between the patentee and the user of the product. Commercial refurbishers are rarely the initial purchasers but instead acquire the patented stock material from a trash heap. They lack any contractual tie with the patentee, implied or otherwise. Some refurbishers may acquire the product from the original purchasers or their privy and therefore maintain indirect privity with the patentee. It is not clear that they will receive a benefit of exhaustion under the implied-license theory due to the indirectness of their relationship. But even if the theory does protect this subset of refurbishers, there are no principled policy reasons why a theory of exhaustion will treat these two types of refurbishers differently. After all, the economic effect of a refurbisher collecting its stock from a trash dump does not differ from a refurbisher collecting its stock from the consumer. If refurbishment is socially desirable, it should be desirable for the entire class of goods whether the refurbisher acquired the product through a second-hand purchase or from the trash dump.

Second, the idea of a default exhaustion rule that eliminates the transaction cost of licensing negotiations only makes sense when existing between the patentees and their direct customers who are truly in a position to negotiate for a right to repair products sitting in the customers’ factory or home. Regardless of how wide or narrow we construe the privity between the patentee and refurbishers, no rational patentee would willingly create its own competition by licensing the patented technology to a third party who did not originally purchase the product from the patentee. If patent exhaustion is truly premised on

162. Ghosh, supra note 60, at 47; Sarah Wasserman Rajec, supra note 108, at 343 (listing historical US exhaustion cases involving “questions of the scope and ability of licenses to restrict downstream uses”).


an implied permission to use and sale, no refurbishers can ever enjoy that permission. This rationale underpinned the Chinese liquor-bottle cases—one court justified its finding of infringement and constructive making based on the subjective intent of the patentee to reject subsequent uses.\footnote{See e.g., Weixue Piju Group Ltd. Co. v. Heiiian Hinliao Ltd Design Patent Dispute (河南维雪啤酒集团有限公司与济源市王屋山黑加仑饮料有限公司外观设计专利权纠纷案), Henan High People’s Court, available at http://www.hncourt.org/public/detail.php?id=114333.}{165} Belgium and France do make this distinction by treating commercial repair as infringement while exempting private repair.\footnote{See Estelle Derclaye, Repair and Recycle between IP Rights, End User License Agreements and Encryption, in SPARES, REPAIRS AND INTELLECTUAL PROPERTY RIGHTS 29 (Christopher Heath & Anselm Kamperman Sanders eds., 2009) (citing Article L. 613-5 of the French Intellectual Property Code and Art. 28 of the Belgian Patent Act).}{166} In contrast, courts in the United States treat purchasers and third parties alike; consumer rights thus shaped the law governing dissimilar interests in third-party commercial refurbishment situations. In summary, the implied-license rationale of the exhaustion doctrine is premised on the interest of direct consumers and cannot provide the justification necessary to exempt third-party commercial refurbishers, unless we are willing to postulate environmentally conscious consumers who are negotiating and paying for the future fate of their purchases.

The second “free chattel” interest protects users’ bundle of property rights (including the right of use and the right to alienate) that originated with physical ownership.\footnote{See Amelia Smith Rinehart, Contracting patents: A Modern Patent Exhaustion Doctrine, 23 HARV. J.L. & TECH., 483, 492 (2010) (justifying the patent exhaustion rule based on personal property interest). See also Andrew T. Dufresne, Note The Exhaustion Doctrine Revived? Assessing the Scope and Possible Effects of the Supreme Court’s Quanta Decision, 24 BERK. TECH. L.J. 11, 14–15 (2009) (noting the tendency of the exhaustion doctrine to disfavor personal property servitude).}{167} It also extends a safe zone for those who provide materials, parts, and repair labors to the consumer.\footnote{In the United States, parts and service suppliers are liable only for indirect infringement if consumers engage in direct infringement when repairing patented products in their possession. Therefore, the tendency to immunize consumers in turn protects their suppliers. See Aro I, 365 U.S. 336, 341 (1961) (“[I]t is settled that, if there is no direct infringement of a patent, there can be no contributory infringement . . . . [I]f the purchaser and user could not be amerced as an infringer, certainly one who sold to him . . . cannot be amerced for contributing to a nonexistent infringement.”) (internal citation omitted).}{168} Ghosh explains:

Exhaustion provides a way to free chattels of servitudes and thereby providing users some clarity in how they can use items they have purchased . . . . Just as dead [hand] control over real property interests are suspect so should the threat of intellectual property infringement in ordinary day to day activities.\footnote{Ghosh, supra note 60, at 50.}{169}

This view of exhaustion relates to, but runs deeper than, the justification of implied license, for it projects forward with the chattel beyond its initial owner and its subsequent privy. Thus, according to Ghosh, “[t]he doctrine of repair as
it exists under patent law in the United States and Japan is an example of how servitudes can be extinguished."

But even here, the refurbisher finds itself in limbo because the flip side of the “doctrime of repair” is the “doctrine of reconstruction”—resurrecting the dead hand of patent servitude. Currently the repair-reconstruction doctrine defines the boundary of infringement and provides a margin of safety to a purchaser. Refurbishers, on the other hand, dance right at the edge of the abyss. But if we truly want chattels to be free, why stop at the repair-reconstruction test? Why not provide infringement immunity to refurbishment based on a previously sold chattel, regardless of whether it is being repaired or reconstructed? The freedom-of-movement rationale better fits within the situation of the commercial refurbishers but the repair-reconstruction boundary it draws appears under-inclusive and difficult to apply in refurbishment cases.

The exhaustion doctrine embodies the public policy of consumer protection and sets a “hard limit” on patent rights. While commercial refurbishers rely on exhaustion, they are square pegs attempting to fit into a round hole designed for users. They are technologists that subvert the patent-incentive narrative as much as they are downstream users that stretch the rationale underlying exhaustion.

C. Parallel Import

Rationales for the geographical limit fall under two categories: the jurisprudential justification recognizes the territorial limit of the patent statute, while the economic justification recognizes the economic benefit of giving patentees the ability to segment the market based on geographic area.

Under domestic exhaustion, patentees can prevent arbitragers from purchasing their products cheaply in one country for resale at a higher price in another country. Thus, patentees can charge different prices in different jurisdictions without fear of arbitrage. In theory, this strategy leads to several policy consequences: the patentee can reap greater patent rewards than if it had to set a single global price; users in less wealthy countries might enjoy more affordable prices indexed to their income; and the cost of maintaining this pricing model is passed onto the State and its custom enforcers. On the other hand, a regime of international exhaustion permits the free movement of goods in international trade and removes the ability of patentees to shift the cost of

170. Id.
171. Rajec, supra note 108, at 361 (“[T]he economic argument against international exhaustion posits that the geographical price discrimination that is possible under national exhaustion carries benefits that would be lost in a move to international exhaustion.”).
172. Id. at 363–64 (“[E]limination of geographical price discrimination would result in lower returns to patent holders, lower prices in high income markets, and less access for those in lower income countries.”).
173. Id. at 330 (“From a trade viewpoint, a national exhaustion rule may be characterized as a trading cost that hinders efficient downstream sales and uses of products because of the requirement to seek authorization for each contemplated resale market.”).
enforcing its private market structure onto the government. However, the actual consequence of exhaustion regimes remains an open empirical question.\textsuperscript{174}

To be sure, the effectiveness of a particular exhaustion regime varies from country to country and from industry to industry. A national exhaustion regime is only as robust as the ability of customs officers to detect the influx of cross-border products.\textsuperscript{175} And even under an international exhaustion regime, patentees may still target cross-border resale through technological locks such as regional codes, controlled distribution chains such as the drug prescription system, product differentiation according to local language or preference, contractual and licensing arrangements, or controlling the amount of product supplied into the market.\textsuperscript{176}

Issues of domestic exhaustion are heavily litigated in refurbishment cases such as \textit{Ninestar} and the \textit{Fuji v. Jazz}. In both cases, the refurbishers were able to show the permissible repair of single-use cameras and ink cartridges under the repair-reconstruction rule. It was only through the national exhaustion regime that refurbished imports were blocked.\textsuperscript{177} This phenomenon highlights the close connection between exhaustion and the globalized refurbishment industry today. Patentees’ problem of reduced profits is exacerbated when refurbished products are imported into countries at an increased profit margin. Foreign refurbishers are particularly threatening to the lucrative U.S. market as they combine geographical arbitrage with secondary-market arbitrage. Thus, the current U.S. exhaustion doctrine may reflect a policy response to the double arbitrage. This unique combination of lax repair-and-reconstruction doctrine with the stringent national exhaustion doctrine allowed U.S. courts to permit refurbishment within the United States while preventing foreign third-party refurbishers from profiting. In this way, the national exhaustion regime can become a super-reconstruction doctrine against foreign refurbishers while preserving the domestic refurbishing industry and circumventing the national-treatment requirement of the WTO.\textsuperscript{178}

\textsuperscript{174} Id. at 363–367 (surveying competing scholarly views regarding the impact of international exhaustion regime).

\textsuperscript{175} Counterfeit Products, UNITED NATIONS OFFICE OF DRUG AND CRIME, 181, available at http://www.unodc.org/documents/data-and-analysis/tocta/8.Counterfeit_products.pdf (estimating the rate of custom detection for counterfeit products to be between 3% and 30%, and likely to be 7% of the counterfeit product flow).


\textsuperscript{177} Supra note 112 and accompanying text.

\textsuperscript{178} TRIPs, supra note 6, art. 3 (mandating national treatment in the intellectual property
D. Counterfeit and Trademark Infringement

Although doctrinally distinct from patent law, concerns for counterfeit products provide an important backstory to refurbishment disputes. The United States Supreme Court in Champion Spark Plug Co. v. Sanders held that when remanufactured goods bear the original trademark, sellers must provide notice to consumers that the goods were remanufactured or they will otherwise violate trademark and unfair competition law. To be sure, U.S. law cabins trademark and patent disputes to their respective doctrinal areas, but concerns of source ambiguity and inferior products can color our view of the refurbishing industry and patent law even absent a trademark violation.

For example, the United States Department of Defense issued a report lamenting the national security danger of counterfeit components in military equipment. According to the report, the largest risk came from unscrupulous suppliers selling used or refurbished parts as new. Interestingly, although the traditional definition of counterfeit typically includes some element of trademark violation or passing-off concerns, the report adopted an idiosyncratic definition that includes all forms of passing off used parts as new, with or without trademark violations. Perhaps this semantic move reflects the close connection between refurbishment and trademark violation. It may also reflect a policy choice to address issues of quality control or commercial fraud (of using old products as new) through the international IP enforcement regime-complex.

Emerging legal systems may further blur the distinction between trademark policy and patent policy. This is especially true in China where counterfeiting is rampant. For example, counterfeit and refurbishment is closely linked in the Chinese printer cartridge business. The overall Chinese printer ink market is...
roughly divided at a 5:2:3 ratio between printer manufacturers (for example, Canon, HP, and Epson), domestic replacement cartridges, and “counterfeits” that bear the trademark of branded cartridges. The counterfeit category encompasses the business model of refilling discarded brand toners and selling them at close to brand prices—a practice that enjoys profit margins greater than those of drug trafficking. In contrast, legitimate refurbishers who sell toner properly identified as refilled comprise only 5% of the domestic replacement cartridges (or 1% of the overall domestic Chinese ink cartridge market). In other words, of all the refurbishers who must contend with patent exhaustion, 95% of them also violate trademark law. Perhaps it is not a coincidence that the published refurbishment decisions in China relate to design-patent disputes addressing the legality of refilling a competitor’s liquor bottle for reuse. Although the opinions focus on the patent-law rubrics of exhaustion, implied license, and reconstruction, the reuse of a distinctive bottle design raises trade dress and passing-off concerns.

Legitimate (non-counterfeiting) refurbishers stand to lose the most amidst the fight between brand owners and counterfeiters. Legitimate refurbishers complain that empty toners are diverted to counterfeiters who can afford to pay a higher price to collectors even though China generates billions of cartridges. Consequently, non-counterfeiting refurbishers have looked outside China, importing non-Chinese cartridges and exporting the refurbished product to the world market, triggering patent disputes such as Ninestar in the United States and Canon in Japan. The business pattern in the printer cartridge industry may explain why multinational corporations like Fuji and Cannon waged patent wars against Chinese refurbishers and local importers under the reconstruction theory in the United States and Japan but have yet to follow this path in China. Instead, they primarily rely on administrative and criminal


185. The seizure of counterfeit ink cartridge in China on May 2013 exemplifies the connection between counterfeit and refurbished goods in China. See Zhang Lulu (张璐璐), Shexian shou jia di anpu mo he xi gu zao chakou (涉嫌售假 店铺墨盒硒鼓遭查扣), Bandao Chenbao (半岛晨报), May 30, 2013, available at http://epaper.hilizi.com/shtml/bdcb/20130530/36902.shtml; see also Tom Spring, Fake Ink Catridges Ooze Into the Market, PCWORLD (May 21, 2013), http://www.pcworld.com/article/110835/article.html (noting that “fake ink is a gold mine for terrorist organizations, because it can be as profitable as drugs and is more easily sold”).


187. Id.


189. See infra section (noting the absence of civil patent litigations involving cartridge refurbishment).

https://scholarship.law.berkeley.edu/bjil/vol32/iss2/1
DOI: https://doi.org/10.15779/Z387362
enforcement of trademark law against counterfeiters. Occasionally patent infringement lawsuits have been brought against makers of generic replacement cartridges, but these disputes are conventional patent infringement litigation without a refurbishment component.

To summarize, patent doctrines reflect policy choices that often presuppose dichotomies that are ill suited for analyzing the refurbishing industry. The right to exclude presupposes innovators and imitators but many innovators today began as imitators and have reached their present accomplishments through “learning by refurbishing.” Similarly, the exhaustion doctrine presupposes a seller and a consumer but refurbishers buy and sell the same product while remaining outside the original first-sale transaction. In this way, their iconoclastic interaction with the patent system creates the legal complexity observed in Section II above. Meanwhile, refurbishers’ potential for sustainability, conservation, economic entry, and capacity building remains underexplored in patent law.

IV. THE LIMIT OF EXHAUSTION FOR SUSTAINABLE DEVELOPMENT

Ten years after the ITC ruling in *In re Lens-Fitted Film Packages*, the Federal Circuit issued a *per curiam* opinion in 2010 that introduced the dispute by noting: “This is the sixth appeal from decisions finding liability for infringing Fuji’s LFFP patents” by a refurbisher and his companies. The Supreme Court took up twice in the span of three years the seminal repair and reconstruction case, *Aro Manufacturing Co. v. Convertible Top Replacement Co.* The Japanese Supreme Court decided *Canon* in 2007. The Supreme Court of the United Kingdom decided *United Wire v. Screen Repair* in 2000 and *Schütz v*

---


Werit in 2013. Exhaustion issues seem to demand more than their fair share of attention from the world’s leading courts and cash-strapped litigants.

This section examines the likely impact of the current patent jurisprudence on the refurbishment industry. First, legal tests based on an undetermined definition of “making” inherently undermine refurbishment. Second, whether we look to the repair-reconstruction doctrine, the territorial reach of exhaustion, or the enforceability of single-use restrictions, the legal ambiguity and vacillation lead to extensive fact-finding and recordkeeping. For example, the territoriality limitation imposes costly sorting and tracking programs and the repair-reconstruction test requires close documentation of the refurbishing process. This imposes business and litigation costs even if the refurbisher should prevail in the end. Third, the winner-takes-all outcome of a lawsuit encourages scorched-earth litigation rather than settlement or ex ante licensing negotiation. The resulting high cost of compliance, coupled with the low-margin economics of the industry, means that in reality most refurbishers simply ignore patents and risk infringement liability. Thus, what transpires in the mature patent systems proves a poor model for developing countries looking to exercise their policy freedom under TRIPs.

A. The Indeterminate Definition of “Making”

Of the three legal hurdles to refurbishment, the repair-reconstruction test remains the linchpin of the analysis since it applies in all refurbishment cases without regard to geographical or contractual specificities. Yet for the central role it plays in refurbishment cases, the test itself is indeterminate. Cases such as Dana and Jazz (in which courts found permissible repair in situations that just as likely pass for impermissible reconstruction) demonstrate this unpredictability. A court that asks whether a refurbishment process is permissible repair, focusing on the physical alternations of the product, will likely find the permissible repair. A court that asks whether a refurbished product is reconstructed, focusing instead on the totality of the circumstance and the replacement of essential parts, will likely find impermissible reconstruction. When judges blend approaches, the result defies consistency. The euphemism of “case-by-case” reflects the arbitrary picking and choosing of subtests that should not, but in fact do, predetermine the outcome.194

The real culprit lies in the intractable repair-reconstruction test, which is centered on a contested meaning of “making” that has challenged thinkers since antiquity. Courts have acknowledged the connection between the repair-reconstruction doctrines and the paradox of the apocryphal axe, which is itself the American version of a 2000-year-old conundrum.195 In 75 B.C., Plutarch described the ship of Theseus paradox:

195. FMC Corp. v. Up-Right, Inc., 816 F. Supp. 1455, 1464 n.15 (N.D. Cal. 1993), aff’d,
The ship wherein Theseus and the youth of Athens returned had thirty oars, and was preserved by the Athenians down even to the time of Demetrius Phalereus, for they took away the old planks as they decayed, putting in new and stronger timber in their place, insomuch that this ship became a standing example among the philosophers, for the logical question of things that grow; one side holding that the ship remained the same, and the other contending that it was not the same.196

Was the ship Theseus arrived in identical to the ship he boarded? To state it differently, was Theseus’s ship repaired or reconstructed? The Ship of Theseus paradox, and the repair-reconstruction problems more generally, are puzzles that challenge our notion of identity as it changes across time. Some philosophers tackle the paradox by focusing on conflicting notions of identity, while others locate the paradox in competing intuitions of the relationships between the parts and the whole.197 At the heart of the paradox is the incompatibility among a group of intuitions regarding the definition of an object, and the answer to the paradox requires us to abandon one of the conflicting intuitions. The final answer (whether the ship on arrival was or was not the Ship of Theseus) turns on which intuition judges maintain or abandon—a prospect that excites philosophers but spells disaster for refurbishers and patentees.

For a more modern analogy of the problem, we can look to the concept of “making” in another field preoccupied with the creation of tangible items: art. There, the “making” gradually moved away from material and physical composition toward a conceptual and non-corporal process in a way that parallels the evolving thinking on repair and reconstruction between jurisdictions. Marcel Duchamp, the French modern artist, created one of the most iconic and controversial artworks of the twentieth century by turning a factory-made urinal on its side and naming it the “Fountain” (1917).198 This work subverted the traditional definition of art-making through the physical act of constructing an object and instead located the act of creation in the mental process of conceiving a new identity and context surrounding the object.199 “The Fountain,” together with Duchamp’s other found object art, are known as the ready-mades: “The Fountain” was made (and the urinal unmade) at the moment when it was thought of and recognized as a piece of art titled “The Fountain.”200 This redefined what it means to “make” an art object in the same

21 F.3d 1073 (Fed. Cir. 1994); see generally Janis, supra note.
198.  MARCEL DUCHAMP, FOUNTAIN (1917).
199.  Duchamp himself highlighted the centrality of human intention in the making of an object: “Whether Mr. Mutt made the fountain with his own hands or not has no importance. He CHOSE it. He took an article of life, placed it so that its useful significance disappeared under the new title and point of view – created a new thought for that object.” The Richard Mutt Case, THE BLIND MAN, 5 (May 1917), available at http://sdrc.lib.uiowa.edu/dada/blindman/2/index.htm
way the Chinese courts redefined what it means to “make” a patented product. The Chinese jurisprudence is arguably more consistent with the transforming notion of creation and waste in contemporary life. The focus of transformation on the creative and the generative takes the definition of “making” out of an industrial process and places it into a conceptual space—a dramatic departure from our own industrial-era discourse of repair versus reconstruction that obsesses over what is broken, what is stored, and what is relative value of the parts to the whole.

The struggle over the identity of a thing, from ancient philosophy to modern art, perhaps helps explain the doctrinal differences between the approaches of the United States, Japan, and China. U.S. jurisprudence on the identity of a thing emerged in the nineteenth-century industrial era and is deeply rooted in a physical notion of making. Although U.S. courts made it work today, the concept grows increasingly incongruous in contemporary life and frays before the myriad variations of the refurbishment process. Japanese courts confronted the problem in the twentieth century and grew more receptive to a totality-of-circumstantial analysis that takes into account the economic non-corporeal life of a product. Unfortunately for refurbishers, avoiding this expanded notion of making is more difficult than the purely physical definition. Now in the twenty-first century, the post-modernists have thoroughly deconstructed “making” and liberated it from the material realm, just as Chinese courts nonchalantly pronounce that glass-bottle recycling is “akin to making” even though there is not a single physical alteration to the object. Occasionally, these intuitions compete within the same case, leading to legally inconsistent outcomes. Therefore, a new jurisdiction of refurbishment is needed to increase the ex-ante certainty for refurbishers without prohibiting refurbishment altogether as China appears to have done.

B. The Evidentiary Demands of the Refurbishment Defense

The three legal barriers require detailed examination of an ever-expanding list of factors. While this analytical framework allows judges flexibility to dispense equity ex post, it is a less useful tool when attempting to ascertain the legality of a particular refurbishment arrangement ex ante. Therefore, it fails to provide refurbishers assurance before they embark on the path of restoration. And even where refurbishment is permissible, parties have to expend significant resource to establish the defense in litigation. Consequently, the extent doctrines increase the likelihood of false-positive decisions that erroneously enforce patents against legitimate refurbishers who cannot meet the burden of proving permissible repair.201

201. In the economic theory of law enforcement literature, false positive (also known as a Type II error) occurs when jurists mistakenly assign liability to legitimate activities. See A. Mitchell Polinsky & Steven Shavell, The Economic Theory of Public Enforcement of Law, 38 J. ECON. LIT. 45, 60 (2000). Andre Sawicki recently provided a systematic treatment of examining false positives and negatives in patent law. However, his treatment focuses on the propriety of granting patent
The repair-reconstruction doctrine alone depends on the physical refurbishing process, supply and distribution chain, the make-up of the refurbished products, the relative value and durability of the components, and the contribution of the patented technology. The details of every item on this list can only emerge at the end of discovery, following separate lines of inquiry in the litigation process. The “identity”-based repair-reconstruction test articulated by the Japanese Supreme Court in Canon imposes a similar if not higher evidentiary burden. To reach its ultimate conclusion of infringement, the Court had to consider the recreation of the air-seal claim feature and the scale of the production and distribution. Because it examines commercial factors in addition to the physical repair steps, the Japanese “identity test” amounts to a super-repair test that requires more evidence than its counterpart in the United States.

The compliance cost increases further when the intended market of the refurbished product operates under a national exhaustion system. The refurbisher must implement a sorting system to ensure that products are only refurbished from stock materials first sold in that market. In Kirtsaeng, Goodwill Industries International submitted an amicus brief on this exact point:

Goodwill lacks the resources to determine whether a particular item was manufactured abroad and, if it was manufactured abroad, whether the item was imported into the United States with the copyright owner’s consent. Given the sheer number of donations made to Goodwill, conducting these investigations would be financially and operationally impossible.

A charity that depends on the donation of second-hand products is right to be concerned. Although the issue in Kirtsaeng addresses copyright exhaustion, the concern applies to patented goods with equal force.

Assessment problems persist with single-use restrictions. The Automotive Aftermarket Industry Association, Automotive Parts Remanufacturers Association, and International Imaging Technology Council detailed their plight confronting single-use restrictions in an amicus curiae brief submitted in Bowman v. Monsanto:

Businesses that later upgrade or repair products... may be unaware of a purported downstream restriction. Aftermarket competitors likely never will see the outer container of the original vended item, and have no information to determine whether the outer container was slapped with a post-sale restriction or whether such a restriction legally could prevent repair. Many of these service companies receive empty consumable articles through intermediaries, such as


204. Brief for Automotive Aftermarket Industry Association et al., supra note 22.
commercial brokers and “cash for trash” charitable drives. . . .

The problem of assessment cost is more severe in developing countries that stand to benefit more from sustainable development. For example, the Chinese judicial system lacks the institutional capacity and legal authority to engage in this fact-intensive adversarial process, much less the tools to compel the amount and type of facts required determine repair *vis-à-vis* reconstruction. Some problematic features of the system include: limited discovery, limited use of experts, reliance on written evidence over oral testimony, and formality requirements for introducing written documents. Consequently, a patentee cannot compel the production of documents relating to the refurbishing operation process, cannot enter the factory to film the production line, and cannot depose the refurbishing workers. The refurbisher will be hard-pressed to develop a document trail evidencing the “chain of title” of its products as they originate from the patentee and passes through the consumer. The refurbisher cannot expect to rely on statements of a factory worker to demonstrate a non-infringing process where Chinese courts almost exclusively rely on written evidence. One Justice of Beijing’s First Intermediate Court summarizes the problem of admitting witness testimony in patent litigation: “(1) [F]ew witnesses appear before the court, and their testimony cannot be cross examined during court hearings, which is a defect in the procedure; (2) witness’s low credibility, false testimony, untruthful statements is prevalent, which makes it difficult to trust witness testimony in practice.”

Applying a fact-intensive test in a fact vacuum is an empty judicial exercise that prejudices the party saddled with the burden of proof. It also risks undermining people’s confidence in China’s nascent legal institution if litigants believe the adjudicated facts are inconsistent with the actual facts or perceive the ambiguity as a cover for extra-judicial influence. In a country where discovery is weak and the manufacturing process difficult to prove in court, a U.S.-style permissible-repair defense may not allow companies to organize their activities with a better view of the risks.

Chinese refurbishers have already faced this problem in the United States in *Epson v. Ninestar* and *Fuji v. Jazz*. Now they may be facing the same problem in China. In the only reported administrative enforcement concerning refurbishment, Epson asked the Shanghai Intellectual Property Office to enforce its ink-cartridge patents against a seller of infringing cartridges. In response, the

---

205. *Id.* at 19–20.


The seller asserted the defense of exhaustion. Epson ultimately prevailed because the seller was not able to prove that the refurbished cartridges originated from Epson. It is unclear how the refurbisher would have done so vis-à-vis an uncooperative patentee. The refurbisher was not the original purchaser of the ink cartridge and was unlikely to produce a receipt showing the patent exhausting sale. The proof of first sale may lie inaccessible with the patentee or otherwise raise the cost of paperwork in the course of operating a low margin business. Even if the law permits refurbishment in theory, the transaction cost associated with the legal determination can thwart a legitimate refurbisher.

The current legal test overemphasizes the initial allocation of entitlements and indulges in an allocation method that imposes excessive costs. Therefore, it fails to maximize welfare and reflect equity between parties when applied to refurbishment cases. The current test further imposes significant procedural demands, skewing the result towards those with legal resources.

C. The Imprimatur of All-or-None Outcome of Refurbishment Cases

Another negative outcome of the triple doctrinal barriers is the all-or-none outcome that discourages socially beneficial private ordering. Refurbishment disputes follow property rules. A refurbisher either wins the privilege of unfettered repair or faces an injunction. Property rules are often praised for their lower transaction costs and compatibility with private ordering. However, application of the property rule in the refurbishing context pushes patentees and refurbishers towards litigation and away from the right kind of private ordering needed for sustainable development—an ex-ante license to restore products.

Patentees have no incentive to grant refurbishers licenses to undermine their own pricing strategy and market ex ante. Conversely, they are driven to litigate when refurbishers do emerge to avoid the potential loss of monopolistic pricing. The stakes are high from the patentee’s perspective: a finding of permissible repair exposes its pricing strategy and market share to competition. This is especially true within a developing country like China because many innovations there are protected by design patents and utility model patents that are easy to refurbish (such as the liquor bottles). A finding of permissible repair is particularly discouraging to these innovators. Even if courts generally permit refurbishment as repair, the outcome in a specific application of the repair-reconstruction test is unknown ex ante, and patentees can always hope that the fact of their particular case justifies a finding of impermissible

208. Liu, supra note 70 (detailing the Chinese bottle refill cases).
209. See, e.g., Fujifilm Corp. v. Benun, 605 F.3d 1366 (Fed. Cir. 2010) (upholding the imposition of injunction against a refurbisher).
Moreover, the costs associated with discovery and trial preparation may financially cripple refurbishers regardless of merit. The financial calculus therefore encourages patentees to wage scorched-earth, hold-no-prisoner wars. Under the current system, the only acceptable settlement to the patentee is the complete withdrawal of refurbishers from the market.

In response, refurbishers have a choice between fight or flight. Those with the financial wherewithal have an incentive to litigate. Their profit motive encourages the establishment of refurbishment-based business. If refurbishers win, they partake in the market carved out by the patent without accounting to the patentee. They can set prices in the shadow of the patent monopoly above the marginal cost, since they are the only ones allowed to compete with the patentee. They also enjoy a share of the new market created by the patent innovation that is off-limits (or accessible at a cost) to other manufacturers. Hence, they stand to enjoy a windfall should they prevail. Moreover, the affirmative defense of permissible repair generally conveys a permissible message to the refurbishing industry, even if the case-by-case analysis makes the actual outcome uncertain. When their conduct is ultimately challenged in court, the fear of losing the initial investment and profitable product lines, along with a perceived likelihood of success ultimately encourage litigation.

The iconic Fuji single-use camera dispute illustrates the distance between the perception of permissible repair and the reality against refurbishment. Toward the end of the single-use camera saga, the refurbisher sought bankruptcy protection from Fuji’s infringement awards. The bankruptcy judge observed: Fuji pursued the LFFP refurbishers, most relentlessly as to Benun and Jazz as they resisted. Though Benun and his company scored some conceptual points (notably overcoming Fuji’s basic thesis that LFFPs could not be “repaired”), and met with some degree of success sub judice, the ultimate results have been catastrophic for Benun (and Jazz). Fuji could never have hoped to recover its full measure of damages and costs. Rather it sought the result it got – at what by any measure was a huge investment in attorney time and related costs. Money, in terms of interest or expenses, was not the Fuji object. Market position relative to LFFPs was important to this plaintiff, but seemingly paramount to Fuji is its

211. Mineko Mohri, Repair and Recycle as Direct Patent Infringement?, in SPARES, REPAIRS AND INTELLECTUAL PROPERTY RIGHTS 82 (Christopher Heath & Anselm Kamperman Sanders eds., 2009) (“The real issue here is that the criteria for ‘permissible’ repair cases are not necessarily transparent for either patentee or repair services, especially for the latter, who have fewer resources to go through patent litigation.”).

212. This is comparable to the six months exclusivity a generics drug manufacturer enjoys for successfully challenging an Orange Book patent under the Hatch-Waxman act. Studies show that during this period of duopoly, the price of the drug does not decrease significantly. See, e.g., Luke M. Olson & Brett W. Wendling, The Effect of Generic Drug Competition on Generic Drug Pricing During the Hatch-Waxman 180-Day Exclusivity Period tbl. 1, BUREAU OF ECONOMICS, FEDERAL TRADE COMM’N WORKING PAPER NO. 317 (Apr. 2013), available at http://www.ftc.gov/be/workpapers/wp317.pdf (there is a slight reduction of price, from 1 to 0.9, in a two competitors market when there are less than five competitors ultimately). The refurbished product is not an exact substitute.
image as a fierce protector of its patent rights. 213

Although the repair-reconstruction doctrine in the United States purports to be generous to permissible repair, the single-use camera refurbisher merely scored “conceptual points” amidst “catastrophic” results. 214 Results like these, together with the legal uncertainty and costs discussed in the previous section, cast a dark cloud over some of the would-be refurbishers who would sooner give up than test their operations in court. This second group of refurbishers is less noticeable because its (non)battle does not result in a citable legal saga. In 

_{Fuji v. Jazz,}_ many refurbishers failed to participate in the initial ITC investigation, possibly because they were not able to fund their day in court. 215 Meanwhile, several ink-cartridge refillers have decided not to repair Lexmark cartridges because they “cannot reasonably assess risks associated with their business plan,” including the risk of “increased damages, attorney fees awards, and injunctions.” 216 Thus for every Jazz or Ninestar that wages full-out firefights with the patentees, many more sulk away.

A more recent example poignantly illustrates the social loss associated with the flight response. Sanho was a Chinese company in the business of selling after-market computer accessories, marketed chargers, battery packs designed to extend the life of Apple products, and providing functionalities not available through Apple, such as a car-charging adaptor. 217 In 2010, Apple asserted six utility and design patents covering various Apple specific connectors against Sanho. In response, Sanho noted that the connectors used in Sanho’s chargers were recycled Apple connectors. 218 Nonetheless, Sanho withdrew the connectors from the market and settled soon following the suit instead of pursuing a possible permissible repair defense. 219 Perhaps Sanho had recycled Apple connectors first sold in China—connectors which therefore would not have been subject to exhaustion rulings. Yet even if these connectors were first sold in the United States, Sanho may not have had the wherewithal to prove their geographic origin or establish permissible use in court, while Apple could

213.  _In re Benun_, 386 B.R. 59 (D.N.J. 2008)

214.  _Id._


219.  _Id._
have outspent Sanho’s legal budget. As a result of Sanho’s exit, defunct Apple power cables will either sit in a landfill or enter the e-waste recycling stream, and consumers are deprived of product options that Apple itself refused to supply.

Not only does the all-or-none nature of the physical reconstruction test disincentivize private contracting between patentee and refurbishers, it also fails to reflect broader public policy confronting developing countries. The refurbishment business is encouraged or encumbered based on contingent facts of the patented technology or the location of exhaustion, without corresponding to the utility of the recycling operation or its economic impact. In Canon, the refurbisher recycled empty printer cartridges, which seemed like a good example of sustainability. But such conduct was nevertheless ruled to be an infringement. So was the reuse of empty bottles. In these refurbishing cases, the success of a permissible-repair defense depended on the business organization of the refurbisher, the refurbishing process, the geographical locations of sale and the technical features of the refurbished product—not the level of sustainability, choice to the consumer, or other positive externalities.

Notwithstanding the desire to demarcate a viable product ecosystem for refurbishers through the exhaustion doctrine, the reality is that repair-reconstruction doctrine cannot fend off a patentee wielding technological locks, cleverly drafted patent claims, and contractual restrictions. The combination of high financial stakes and a winner-takes-all outcome, all based on an indeterminate test, either encourages drawn-out litigation or the premature abandonment of otherwise-legal refurbishment operations. Neither of these outcomes is socially beneficial. An alternative set of rules are needed to replace the excess of the current refurbishment tests.

V.
A SUSTAINABLE PATENT EXHAUSTION DOCTRINE

How can developing countries address commercial refurbishment and strike the appropriate balance between a patentee, a purchaser, a refurbisher, a conservationist, and the public? This section suggests several alternatives paths that courts may take to alleviate the policy tension: (1) permitting the repair defense with international exhaustion, (2) shifting the burden of proof of proving exhaustion, (3) permitting refurbishment generally, or (4) adjusting the remedy regime to eschew injunctions in favor of damages.

A. Adopting the Repair Defense with International Exhaustion

As noted earlier, aspects of the exhaustion doctrines do not line up properly. The United States generally permits repair but erects the wall of national exhaustion. Japan and China adopt international exhaustion but impose a stricter repair-reconstruction test. Therefore, the low hanging fruit for promoting refurbishment is to combine a liberal repair defense with international exhaustion.
Chinese commentators suggest that China should adopt the United States’ repair-reconstruction test that permits the commercial refurbishment of patented products short of making a new article. Drafters of Chinese patent law have studied foreign IP systems extensively, and the Chinese exhaustion doctrine may restore the safe harbor for refurbishers in the future. Since, at the moment, the starting point in China is to forbid third-party refurbishment, adopting the repair-reconstruction doctrine undoubtedly promotes conservation, technological learning, and economic opportunities.

A full transplantation of the repair-reconstruction jurisprudence may not strike the right policy balance for all of the faults within the exhaustion doctrine. Despite the rhetoric of permissible repair, the prevailing repair-reconstruction framework does not give refurbishers total peace of mind for the reasons mentioned in the previous section. Transplanting refurbishment jurisprudence whole-cloth from mature patent regimes may replicate the compliance cost, the unpredictable outcome, and the lack of private ordering that undermines sustainable development efforts. However, it will be an outcome more consistent with sustainability than the current state of affairs in China.

B. Adjusting the Procedural Burden

Adopting the permissive-repair defense used in the United States merely opens the door to sustainability considerations. It means little when the requisite legal and compliance cost extend beyond the refurbisher’s wherewithal. Therefore, the implementation of the defense should minimize litigation and compliance costs. One adjustment is to shift onto the patentee the evidentiary burden of proving the absence of authorized first sale. This lowers the legal cost of proving permissible repair and discourages those patentees that mount strategic litigation to run legitimate refurbishers out of business.

A hypothetical based on the Shanghai Epson cartridges disputes illustrates this approach. Currently it is up to the refurbisher to prove that the product was repaired from what the patentee originally sold once a patentee demonstrates that its patent covers a product. The seller of infringing cartridges was not able to prove that the ink cartridges were refurbished from Epson under the existing law. Under the new proposal, the burden is placed on Epson to come forward with the evidence showing the absence of patent exhausting the first sale. The result lowers the refurbisher’s cost of proving permissible repair and promotes more socially beneficial refurbishment at the margin.

220. See, e.g., Hu Kaizhong (胡开忠), 专 利产品的修理、再造与专利侵权的认定——从再生墨盒案谈起 (zhuanli chanpin de xiuli, zaizao yu zhuansi qinquan rending – cong zaisheng mohe an tanqi) [The Repair/reconstruction of Patented Products and the Determination of Patent Infringement – From Recycled Cartridges Case], 12 LEGAL SCI. MONTHLY (法学) 145, 149 (2006); Yan Wenjun (闫文军), Cong youguan Meiguo pan li kan zhuanli chanpin xiuli yu zaizao de qufen (从有关美国判例看专 利产品的修理与再造的区分) [From the look on US patent jurisprudence distinction Repair and reconstruction], PATENT LAW RESEARCH 401 (2004).
Consequentialist arguments aside, this change is also justified on the grounds of doctrinal consistency, efficiency, and procedural fairness. The burden of proving unauthorized making is on the patentee. This includes the burden of proving that a making or sale is unauthorized. In cases implicating refurbishment, proving the absence a patent being exhausted at first sale is a part of proving the lack of authorization. This also means that the initial burden of proving non-exhausting foreign sales in a national exhaustion jurisdiction should lie with the patentee.

Placing the burden of proving the absence of patent exhaustion on the patentee is also more efficient and likely to lower the overall litigation costs. A patentee is better equipped to determine whether an alleged infringing item is refurbished from its own product in the first place. Consumer products contain lot and model designations for customer service purposes. Epson’s ink cartridges may contain markings traceable to Epson through internal documents inaccessible to refurbishers. Epson may also possess marketing or technical documents listing all the makes and models of ink cartridges that it sells around the world. A better practice would be to require the patentee to come forward with the evidence showing the absence of a patent exhausting first sale and require the refurbisher to show only that the refurbishment process is permissible repair or to rebut patentee’s evidence showing an absence of first sale. After all, how can we expect the refurbishers to know the place of first sale if the patentee cannot do it in the first place?

This modified procedure is also likely to produce aggregate outcomes that are more consistent with the underlying merit of the infringement claim. As mentioned earlier, the current law places the majority of the burden on the refurbishers; they systemically bear the risk of an erroneous false-positive determination. Consequently, society loses the benefit of legitimate refurbishers who are mistakenly treated as infringers, but never enjoy the benefit of infringing refurbishers who are mistakenly permitted to operate. Once some of the burden is shifted onto the patentee, more legitimate refurbishers can avail themselves to the defense of exhaustion. Under this new burden regime, patent litigations may continue to produce occasional mistakes inconsistent with the underlying merit. However, the mistakes will spread among legitimate refurbishers who cannot adduce evidence to support permissible repair and deserving patentees who cannot rebut permissible repair, thereby enhancing sustainability.

221. Medtronic, Inc. v. Mirowski Family Ventures, LLC, No. 12–1128, slip op. at 6 (Jan. 22, 2014) (Breyer, J.) (“It is well established that the burden of proving infringement generally rests upon the patentee.”).

222. The ordinary rule of civil procedure places the burden of proof on a litigant likely to have knowledge of the relevant facts. See Campbell v. U.S., 365 U.S. 85 (1961) (“[T]he ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary.”). See also Concrete Pipe and Products of Cal, Inc. v Constr. Laborers Pension Trust for Southern Cal, 508 U.S. 602, 626 (1993); United States v New York, New Haven & Hartford Railroad Co, 355 U.S. 253, 256 n.5 (1957).
Thus, for countries that choose to negotiate the conflict between innovators and refurbishers through the prevailing repair-reconstruction doctrine, the procedural adjustment of requiring the patentee to prove the absence of exhaustion is consistent with the infringement doctrine, legal efficiency, the underlying merit of the dispute, and the aspiration of sustainable development.

C. Permitting Refurbishment Generally

Each of the first two options preserves the legal status quo and the underlying welfare calculus in favor of the patentee, allowing the patentee to foreclose socially beneficial refurbishment unless it occurs within a single useful life for which the patentee has already extracted the monopoly rent. All three approaches share the repair-reconstruction test, while differing on how the test is applied.

Policymakers in developing countries may also walk away from the repair-reconstruction test altogether and treat all refurbishment as permissible repair. The refurbishment industry provides an important positive externality for the sustainable development agenda: It offers the opportunity of providing industrial learning, conserving resources, facilitating access to the latest welfare enhancing technology, and generally providing raw inputs for the informal economy. Whether the starting point is an empty ink cartridge, a used single-use camera, or liquor bottles, the positive externality accrues at the moment of refurbishment regardless of whether a court later deems it permissible repair or impermissible reconstruction. If Chinese policymakers determine that the total public and private welfare accrued from these spillover effects outweighs the loss of innovation due to reduced patent incentives, it makes sense to expand the scope of permissible repair to cover the entirety of refurbishment activities. It also seems fair that the patent system, as a system that promotes innovation based on the making and sale of tangible goods, should internalize the cost it imposes on the society for shifting the pattern of production of consumption towards patented goods.

Exempting all refurbishment from patent infringement shifts patent law toward sustainable development in three ways. First, it expands the range of permissible activities and allows more products being recycled. Second, it provides more certainty in the aftermarket by removing the need for the subjective repair-reconstruction test. An ink-cartridge refurbisher no longer needs to worry whether his or her conduct may be infringing based on subjective factors such as whether a refurbished component is an essential part of the cartridge, whether the refurbishment exceeds normal repair, or whether a

223. See Adams v. Burke, 84 U.S. 453, 456 (1873) (“That is to say, the patentee or his assignee having in the act of sale received all the royalty or consideration which he claims for the use of his invention in that particular machine or instrument, it is open to the use of the purchaser without further restriction on account of the monopoly of the patentees.”); Vincent Chiapetta, Patent Exhaustion: What’s It Good For, 51 SANTA CLARA L. REV. 1087, 1093–92 (2011) (explaining the single royalty justification).
particular ink cartridge has outlived its useful life. Third, it reduces the complexity of refurbishment disputes—the only issue remaining is a threshold question of what constitutes refurbishment. After all, infringers should not be allowed to avoid liability because they happened to use recycled screws to produce a patented article.

As it turns out, judges already possess the tools to address these concerns and recognize refurbishment without a problem. For example, courts in the single-use camera cases quickly acknowledged the operation at issue is one of refurbishment, in contrast with their difficulty drawing the repair-reconstruction line. There was no serious disagreement over the existence of “refurbishment” for truck transmission restoration in Dana or over the decontamination of use inhalers in Mallinckrodt. The Chinese and Japanese judges also had no trouble recognizing the refurbishment nature of the case. Whatever threshold matrix courts use to define refurbishment, it appears uncontroversial.

Moreover, courts can develop a threshold test by looking to whether the starting material—the stock to be refurbished—lacks substantial noninfringing use. Specifically, a noninfringing use is substantial if such use provides more economic benefit than the savings obtained from refurbishment. This test of “substantial noninfringing use” should sound familiar because it is the mirror image of the well-established test defining contributory infringement liability in the United States. 224 Under 35 U.S.C. Section 271(c), a contributor of parts is liable for patent infringement if the part is especially adapted for use in a product covered by a patent and not a staple article suitable for substantial noninfringing use. Here, a refurbisher should not be liable for refurbishing parts that are adapted for use in the covered product. This convergence is not a coincidence. Both areas of law grapple with the problem of identifying when an incomplete piece is traceable to and identifiable with a patented product. In a recent article, Bernard Chao highlighted the connection between contributory infringement and patent exhaustion as doctrinal areas that implicate a “heart of the invention” test: “If a party replaces component(s) that can properly be considered the heart of a patented invention, that fact should weigh in favor of finding an impermissible reconstruction.” 225 In other words, the replacement of the heart of invention is more likely to coincide with a component that lacks a substantial noninfringing use. But the argument here can apply in the reverse as well—when the part lacking a noninfringing use is retained, that fact should

224. 35 U.S.C. § 271(c) states in full:

Whoever offers to sell or sells within the United States or imports into the United States a component of a patented machine, manufacture, combination, or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer.

weigh in favor of the refurbisher. Symmetry suggests that, if the patentee wants to hold the supplier of unpatented parts indirectly liable because it is identifiable with a finished infringing product, it is then fair to exempt from liability the refurbishment of a used product that is identifiable with an exhausted product.

The repair-reconstruction cases may be reinterpreted through the lens of “refurbishability” as defined through substantial noninfringing use. For example, spent ink cartridges or single-use cameras provides clear economic savings when refurbished into the patented ink cartridge or single-use camera but otherwise do not have any other substantial noninfringing use. Prohibition against their restoration promises to send these spent parts directly to the shredder—an economically less substantial use—and undermines conservationist public policies.

In contrast, an unpatented screw reclaimed from an old machine is capable of being used in infringing and noninfringing products and the use of that screw in the patented machine is no more economical than using a commodity screw. We need not afford any special treatment to an infringer who merely used reclaimed screws as a component of an infringing machine when the same sustainability goals could be achieved through non-infringing activities. The broken leather straps and metal buckles in *American Cotton Tie* are essentially scrap material and their use probably does not provide any saving over the construction of cotton ties from stock leather or commodity metal. Because the saving obtained from refurbishment is nearly nonexistent, any noninfringing use of the leather straps and metal ties will justify the refusal to permit refurbishment. Likewise, turning the broken drill bits in *Sandvik* back to a functioning bit is possibly no more economical than constructing a new drill from a piece of stock metal. Therefore, the reshaping of the drill bit for other noninfringing purposes will qualify as a substantial noninfringing use. These facts present situations that are not even refurbishment, in contrast with the reuse of single-use camera shells, ink cartridges, or liquor bottles. The subject repair-reconstruction test then transforms into an economic comparison between the relative savings afforded by infringing use and noninfringing use that takes into account the benefit of conservation.

**D. Avoid Injunctive Relief**

The above three proposals focus on the process of allocating the initial entitlement under a property rule. Another alternative shifts the remedy regime towards a liability-based rule. In other words, courts may reconsider the practice of granting injunctions in reconstruction cases and instead impose monetary damages to create a compulsory licensing scheme for refurbishers.

Recently, Ted Sichelman has argued that compensation based on a liability rule can be appropriate for a practicing patentee, such as when the patent is used

---

226. This discussion presumes that the prospect of being shredded into plastic pallets or paper pulp during a recycling process is not considered a substantial noninfringing use.
in a downstream product, when the cost of design around is high, or when a licensing transaction cost is high due to differing opinions over “whether a given patent is infringed, valid, or enforceable.” These three considerations apply with particular force here. When the infringing act is one of refurbishment in a developing country, the static deadweight inefficiency is compounded by the loss of valuable positive externalities in the form of technological access, jobs, sustainability, and capacity building. The aftermarket refurbishing industry is downstream of the primary market. Refurbishment restores the patented product and by definition does not “design around” the patent. Lastly, issues of repair and reconstruction, national exhaustion, and conditional sales are contentious issues subject to differing opinions. The high assessment costs, the inability to design around patent and the unwillingness of parties to bargain for a refurbishment license weigh in favor of a liability regime.

Courts can implement the liability remedy regime through their equitable power using existing rules, while sidestepping the quagmire involved in determining the initial entitlement to refurbish. The 2006 Supreme Court decision eBay v. MercExchange provides the standard for granting a permanent injunction for patent-infringement cases in the United States. It provides the point of departure for analyzing the propriety of issuing injunctions in refurbishment cases. The Court looked to four factors to determine whether to impose permanent injunction against a patent infringer, including:

1. that [the patentee] has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardship between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

The eBay decision reduced the likelihood of granting a permanent injunction to a nonpracticing patentee because a nonpracticing patentee and the infringer do not compete directly in the marketplace and because public policy favors continued access to innovative commercial products. But the factors can be used to justify the denial of injunctions in refurbishing situations.

Irreparable harm and inadequate remedies are usually present where the patentee and the infringers are direct competitors, and the patentee is losing market share to the infringer. This relationship exists between patentees and refurbishers, but their direct competition is only true up to a point. Refurbished products typically occupy a market segment that overlaps with, but is not identical to, the products offered by the patentee. As mentioned earlier, original

229. Id.
goods and refurbished goods are imperfect substitutes because consumers tend to perceive refurbished products as inferior to the original product.\(^{231}\) Moreover, unlike a direct infringer who is free to manufacturer as much product as possible subject to the market demand, the refurbisher is limited by the supply of original products available for refurbishment. Thus, while there is some irreparable loss of market share, the extent of loss is less than would be in the case of unfettered infringement between two competitors.

The balance of hardship is generally difficult for a refurbisher in two senses. First, the design around cost is infinitely high. Refurbishments by definition make use of the patented article; therefore, a refurbishing business naturally falls within the scope of the patent. Second, given the permissive tenor of the exhaustion doctrine and the state of legal confusion outlined in Section 0, refurbishers are in a poor position to determine what is legally permissible ex ante and may in many cases believe that they have a valid defense to patent infringement. It would be unduly harsh to impose an injunctive remedy against these refurbishers and foreclose their activities altogether.\(^{232}\)

The public-interest factor weighs heavily in favor of the refurbisher. Section 0 already identified technological, environmental, and welfare reasons why refurbishment serves important public-interest considerations. It is important to note that this balance goes beyond the dominant discourse of dynamic efficiencies (promoting innovation) versus static efficiencies (promoting access). Refurbishers serve as engineers for the industry base of tomorrow. The health of the environment portends consequences spanning generations. The availability of employment and cheap access to technology provide long-term stability to the poorest regions of the world. What is at stake is one form of dynamic efficiency (innovation through patent protection) versus other forms of dynamic efficiency (industry development, sustainability and economic stability).

Developing countries can similarly obtain this result through the jurisprudence of compulsory license and on-going royalty set in the context of environmental or pharmaceutical technology. For example, Chinese patent statutes do not detail the standard for imposing permanent injunctions but take into account the balance of private and public interests in a way not unlike the factors in eBay. In the landmark case Wuhan Jingyuan vs. Japanese Fujikashui and Huayang, the Supreme People’s Court emphasized the weight of environmental and economic factors against injunctions in patent cases. The case involved the infringement of a process patent covering the process of removing sulfur pollutants from industrial exhaust smoke. The trial court declined to impose a permanent injunction against the defendants (a power plant

\(^{231}\) Supra Section A.

operator in the Fujian province and its Japanese equipment supplier), instead opting for an ongoing royalty until patent expired. The judgment noted:

The installation of a flue gas desulphurization facility for thermal power plants accords with the basic national policy and national industrial policy of environmental protection, promotes the building of environment friendly society, provides good social benefits, and the power supply situation will directly affect the local economy and peoples’ livelihood.233

Although Wuhan Jingyuan vs. Japanese Fujikashui and Huayang involved the use of green technology in large-scale utility projects, the legal calculus is equally applicable to commercial refurbishing operations. They promote resource conservation, advance technological capability, and provide economic opportunity and their desirability is explicitly endorsed by national policy and legislation.234

CONCLUSION

This article has highlighted the ongoing tension between patent infringement doctrines and socially beneficial refurbishment activities. The United States espouses a strong repair defense, only to take it away from foreign refurbishers by imposing a strict national exhaustion doctrine. The patent regimes in United Kingdom and Japan take a more permissive view towards the geographical limits of exhaustion but narrowly construe the concept of “repair.” In China, the range of permissible repair is even narrower: Salvaging a patented product alone, without physical alteration, is sufficient to trigger infringement. The indeterminate repair-and-reconstruction doctrine, the inordinate burden of proving exhaustion, and the all-or-nothing rule of exclusivity all serve to hamper the refurbishing industry. In order to transcend this impasse and restore certainty to the refurbishment industry, this article proposes a reconfiguration of policy levers within the patent system to internalize the social cost of the waste problem through a change to the remedy regime.

Beyond the specific exhaustion-doctrine debate, the analysis presented here reveals a fundamental incongruity in the way patent narratives interface with the goals of sustainable development. The implementation of stronger patent rules in developing countries has been justified on a technocratic Cornucopian discourse. The way countries can counter a Malthusian demise, goes the argument, lies in the availability of better technologies that allow us to grow more food, generate more energy or purify more water to meet growing populations, and raise standards of living. A robust patent system can incentivize better technologies and promote the transfer of these technologies to developing countries. At the same time, however, a system of innovation based on physical things being made, used, sold, or moved around necessarily alters the patterns in which we utilize physical resources—sometimes leading to

234. See supra Section I.B.
wasteful allocations. The same sustainability concerns that were used to justify stronger patent law in developing countries have not been used to modify the contour of patent law when patent doctrines lead to waste. Now, in hindsight, stronger patent rules not only failed to promote significant technology transfer of cleaner, more efficient technology, but they also threatened to shut down the path towards industrial upgrade and environmental protection through refurbishment that was traditionally available to developing countries.\textsuperscript{235} This result is avoidable if the notion of sustainability is a design principle internal to patent law.

\footnote{235. \textit{Supra} note 14 and accompanying text.}
The National Historic Preservation Act: Preserving History, Impacting Foreign Relations?

Mark P. Nevitt*

INTRODUCTION ................................................................................................. 390

I. OVERVIEW OF THE NATIONAL HISTORIC PRESERVATION ACT AND THE WORLD HERITAGE CONVENTION.............................................................. 393
   A. American Historic Preservation Law: A Deliberate, Evolutionary Progression ............................................................. 394
      1. Section 106 Review Process and NHPA’s Relationship with the National Environmental Policy Act ................................. 398
      2. Section 101: The Evolution of the U.S. National Register ................................................................. 399
   C. The World Heritage Convention and the NHPA’s 1980 Implementing Amendment ................................................................. 403
   D. The Merger of the WHC and the NHPA: Implementing Statutory Language Within the NHPA Muddies the Waters ..................... 407

II. THE NHPA’S EXTRATERRITORIAL APPLICATION IN PRACTICE ................. 409
   B. Dugong v. Rumsfeld (Dugong I) ................................................................. 412
   C. Dugong v. Gates (Dugong II) ................................................................. 415

III. THE EXTRATERRITORIAL APPLICATION OF OTHER U.S.

* Mark Nevitt is a U.S. Navy Judge Advocate serving in the rank of commander. He obtained his LLM with distinction at the Georgetown University Law Center, his JD from Georgetown and his BSE from the Wharton School at the University of Pennsylvania. A former naval flight officer who writes in the area of environmental law and national security law, Commander Nevitt is currently assigned as the Regional Environmental Counsel (REC) for the Mid-Atlantic Region in Norfolk, VA. The positions and opinions in this Article are those of the author and do not necessarily represent the views of the U.S. Government, the Department of Defense, or the U.S. Navy. The author would like to thank Professor Paul Diller, his wife, Sara Zdeb, and the editors and staff at the Berkeley Journal of International Law for their help and assistance with this Article.
ENVIRONMENTAL STATUTES ............................................................................... 417

A. The NHPA and the NEPA Should Be Applied in a Similar Manner, Consistent with Existing Laws and Regulations. ............... 418

B. The MMPA and the ESA Protect the Dugong Domestically ........ 419
   1. The MMPA ...................................................................................... 419
   2. The ESA ...................................................................................... 420

C. Other U.S. Environmental Statutes’ Extraterritorial Application ... 423

IV. THE NHPA’S FUTURE EXTRATERRITORIAL APPLICATION AND THE POTENTIAL IMPACT ON FOREIGN RELATIONS ................................................................. 424

A. The NHPA: A Singular Environmental Statute in Jurisdiction and Scope .............................................................................. 424
   1. Jurisdiction: The NHPA Is a Singular U.S. Statute with Worldwide Jurisdiction That Can Protect the Environment ............. 425
   2. Scope: The NHPA’s Practical Application Now Remains Uncertain with Broader National Security Implications ................. 425

B. The NHPA Derives from Preservation Statutes Addressing Physical Properties and Has Gradually Evolved from Earlier American Historic Preservation Efforts .............................................. 426

C. The NHPA Should Be Applied in a Manner that Fully Takes into Account Prudential Foreign Relations Concerns ......................... 427
   1. The Alien Tort Statute, Kiobel, and “Weighty Concerns” ...... 428
   2. Comity and Act of State ................................................................. 429

D. The NHPA’s Practical Foreign Relations and National Security Consequences for Future Actions Overseas ................................................. 432
   1. The U.S. Military’s Pacific Re-Balancing ................................ 432
   2. Practical Examples: South Korea, Australia, and Afghanistan ............................................................................................... 434

V. CONGRESS SHOULD ACT TO CLARIFY THE NHPA’S JURISDICTION AND SCOPE ............................................................................................................... 436

A. The Definition of “Undertaking” Should Be Clarified to Properly Distinguish Domestic from Foreign Undertakings .......... 437

B. Congress Should Clarify the Terms “Foreign Historic Property,” “Equivalent of the National Register,” and “Eligible For” .......................................................... 438

C. The NHPA Should Have a National Security Exemption Provision, Similar to Existing Language in U.S. Environmental Statutes ........................................................................ 440

CONCLUSION .................................................................................................. 442
INTRODUCTION

Japanese Prime Minister Shinzo Abe, the highest political leader in Japan, shook his head in disbelief. His tenure as Prime Minister had been tense, partly due to the ongoing question of a replacement airfield for the U.S. Marines in Futenma. A predecessor, Yukio Hatoyama, also suffered political fallout stemming from his reversal of a public promise to find a replacement location for the U.S. Marine Corps Air Station. Prior to the Hatoyama administration, the Japanese government had selected a new location for the Marine Air Station, a remote area far removed from the busy city of Okinawa in Henoko. Moving to Henoko was intended to be a “win-win” for both Japan and the United States as it would alleviate the environmental concerns and urban encroachment that plagued the Futenma Air Station’s operations while complying with United States’ military operational requirements. Yet Japan will not be moving the Marines from Futenma to Henoko anytime soon. The National Historic Preservation Act (NHPA), enacted in 1966 with the goal of preserving the “cultural foundations of the [n]ation . . . in order to give a sense of orientation to the American people,” effectively stopped Japan’s proposed movement of the Marines to Henoko.

1. Uncertainty about the future of the Marine base continues to this day. See Travis Tritten, Lack of Solid Plan Holds Up Marines’ Move from Okinawa, Mc Cain Says, STARS AND STRIPES, Aug. 22, 2013. Prime Minister Shinzo Abe has been the Prime Minister of Japan since December 2012 and also served as Prime Minister from September 2006 to September 2007. See PRIME MINISTER OF JAPAN AND HIS CABINET, http://www.kantei.go.jp/foreign/96_abe/meibo/daijin/index_e.html. Junichiro Koizumi was Prime Minister from 2001–2006 when the Dugong litigation first began. Id. Prime Minister Abe recently backed the move of the Marines off Okinawa to a less crowded area; see Martin Fackler, Japan Leader Backs Move of U.S. Base on Okinawa, N.Y. TIMES, Mar. 22, 2013, at A4.

2. See, e.g., Tritten, supra note 1.

3. There were eight Prime Ministers of Japan since the beginning of the Dugong litigation. The question of “where to place the American Marines at Futenma?” has affected each Prime Minister in some capacity over the past ten years.

4. Dugong v. Gates (“Dugong II”), 543 F. Supp. 2d 1082, 1098 (N.D. Cal. 2008) (stating that the court “acknowledges that Japan has ultimate responsibility for selecting the location of the replacement facility, and that Japan’s site selection was driven by its own concerns for environmental, engineering, political and cost factors”) (emphasis added). Japan’s decision to move was made after intense negotiations with U.S. officials who sought assurances that the new location met its military operational requirements. A variety of United States-Japan groups have assisted in making recommendations on the location of military bases in Japan over the past twenty years. They include the bilateral Security Consultative Committee (SCC), the Special Action Committee on Okinawa (SACO), and the bilateral Futenma Implementations Group (FIG), a committee under the supervision of the SCC. See Dugong v. Rumsfeld (“Dugong I”), No. C 03-4350 MHP, 2005 U.S. Dist. LEXIS 3123, at *2–3 (N.D. Cal. Mar. 2, 2005). This case, decided in 2005, later changed the named Defendant from Donald Rumsfeld to Robert Gates to reflect the change in the Secretary of Defense. To avoid confusion, this Article will use the shorthand “Dugong I” to refer to the 2005 federal court decision, “Dugong II” to refer to the final 2008 decision, and “Dugong rulings” or “Dugong” litigation to refer to both decisions.

Many Japanese citizens and American environmentalists were incensed as the new Henoko location included the habitat for the dugong, a species of marine mammal listed as a protected “natural monument” on the Japanese Register of Cultural Properties. Lacking a judicial remedy in Japan, they turned to U.S. law with success—the NHPA.7 when used in conjunction with the Administrative Procedures Act (APA) authorizes a lawsuit against federal agencies to include the Department of Defense (DoD) in a U.S. federal court. Following several years of litigation, the court ruled in favor of the plaintiffs, requiring the DoD to account for the effect of the move on the dugong and effectively thwarting Japan’s decision to move the Marines to the new location at Henoko.9

In Dugong v. Rumsfeld (Dugong I) in 2005 and Dugong v. Gates (Dugong II) in 2008, a U.S. district court interpreted the NHPA to protect a wild animal outside the United States in another sovereign territory, calling into question Japan’s decision to move a U.S. military installation from one part of Japan to another. In the Dugong rulings, the court applied the litigants’ innovative use of the NHPA’s extraterritorial provision to protect foreign cultural and historical properties as defined by the foreign sovereign’s law. This application went beyond the traditional scope of the NHPA. While the precedent is limited to a single federal district, it downplays broader prudential foreign policy concerns that have traditionally constrained the judiciary in such areas, most recently reaffirmed in Kiobel v. Royal Dutch Petroleum Co. by the U.S. Supreme Court. The NHPA now no longer functions solely as a domestic preservation statute of limited scope and jurisdiction. In light of the Dugong

---


8. Id.

9. The Okinawa dugong was listed as one of the ten plaintiffs in the lawsuit. The other plaintiffs included three individual Japanese citizens and six American and Japanese environmental associations. While the court did not find standing for the Okinawa dugong, as it failed to meet the “person” definition under the Administrative Procedures Act, the case was decided with the Okinawa dugong as the named plaintiff. Id. at 1083. An animal was first recognized with standing to sue in Palila v. Hawaii Dept. of Land and Natural Resources, 639 F.2d 495 (9th Cir. 1981). But see Cetacean Community v. Bush, 386 F.3d 1169, 1178 (9th Cir. 2004) (declining to expand the definition of person to include animals such as whales, porpoises, and dolphins).


rulings, the NHPA impacts broader foreign relations and national security and must be addressed. Two novel issues are discussed in this Article.

First, this Article asserts the Dugong rulings were wrongly decided. The rulings ignore the NHPA’s scope, the larger context of American historic preservation law, and weighty foreign policy concerns most recently reaffirmed in Kiobel. The judicial branch should exercise caution in deciphering the NHPA’s application overseas as these federal actions impact sensitive foreign relations.

Relatedly, the NHPA may take on increased importance in environmental litigation overseas as the Dugong rulings apply the extraterritorial provision of the NHPA in contrast to judicial enforcement of other U.S. statutes protecting the environment. Courts have been reluctant to construe U.S. laws to provide environmental protections overseas. And the Supreme Court’s decision in Kiobel held that there is a presumption against extraterritorial application of the Alien Tort Statute (ATS) on claims stemming from wrongful corporate environmental practices.

Second, this Article argues that the choice for inclusion of the World Heritage Convention’s (WHC) treaty obligations within the NHPA in 1980 and the Dugong rulings together result in a potential magnification of the NHPA’s impact on overseas federal activities as the NHPA’s jurisdiction and scope are seemingly expanded. This legal expansion defies practical layperson expectations of the NHPA’s scope and raises the specter of further uncertain domestic legal rulings that broadly construe the NHPA and potentially affect foreign relations. For example, if an animal can be protected overseas via the NHPA, can such an interpretation of the NHPA be used to protect living animals domestically? If the NHPA is not solely a domestic preservation statute, then it is truly an exceptional U.S. environmental statute that applies within another sovereign’s jurisdiction.

18. This Article uses the term “environmental statutes” broadly to encompass the array of U.S. laws that provide for protection of the environment and its natural resources. These include, for example, the major environmental statutes (e.g. the Clean Water Act, 33 U.S.C. §§ 1251–1387, and the Clean Air Act, 42 U.S.C. §§ 7401–7626) and natural resource statutes (e.g. the Sikes Act, 16 U.S.C. § 670, and the Antiquities Act, 16 U.S.C. §§ 431–433).
Due to the uncertain outcomes of U.S. law and larger foreign relations concerns discussed in *Kiobel*, this Article contends that Congress should clarify the proper scope and jurisdiction of the NHPA. Congress should re-anchor the NHPA in its proper place as the statutory successor of the American historic preservation movement and it should be clarified to minimize any unforeseeable impacts on foreign relations overseas. How could this statute, associated with the protection of domestic physical historic properties, with origins in the larger U.S. historic preservation movement, be utilized to protect a wild animal in Japan? And what are the practical consequences of such a determination for the scope of the NHPA on future environmental enforcement matters both at home and overseas? These questions will be explored below.

Part I provides an overview of both the NHPA’s history and the 1972 WHC, an international convention that protects properties of cultural and natural heritage. Part II discusses the NHPA’s extraterritorial application by including an analysis of *Dugong I* and *Dugong II*. Part III addresses the extraterritorial application of the NHPA, contrasting the NHPA with the more limited reach of other environmental statutes as construed by the courts. Part IV addresses the broader foreign relations concerns of the NHPA’s extraterritorial application. Part V offers concrete recommendations for Congress to clarify the scope and jurisdiction of the NHPA.

I. OVERVIEW OF THE NATIONAL HISTORIC PRESERVATION ACT AND THE WORLD HERITAGE CONVENTION

The NHPA is primarily intended to preserve the historic physical properties within the United States. Since its inception, it has played a critical role in preserving numerous historical properties in the United States. Today, over 88,000 properties are on the U.S. National Historic Register, whose origins date from 1935. This section provides an overview of American preservation law leading to the passage of the NHPA and its 1980 WHC implementing amendments.

---

A. American Historic Preservation Law: A Deliberate, Evolutionary Progression

The NHPA was signed into law in 1966; it is “the key federal law that establishes a federal policy for the preservation of cultural and historic resources in the United States.” The NHPA is the statutory and evolutionary extension of earlier citizen-derived private and public historic preservation efforts. According to one scholar, Professor Carol Rose, there have been three phases of historic preservation: (1) preservation for “inspiration” where places, such as Civil War battlefields, convey a sense of community; (2) preservation for “architectural merit” which included the preservation of larger historic districts; and (3) preservation for community. The enactment of the NHPA falls within the third phase of America’s historic preservation movement.

The U.S. historic preservation movement’s origins are fondly associated with the efforts of a determined group of women to save George Washington’s home in Mount Vernon, Virginia in the face of governmental apathy. In the mid-nineteenth century, the group raised an extraordinary $200,000 in a grassroots fundraising campaign. Today, the Mount Vernon Ladies’ Association is the oldest national historic preservation organization in the United States and continues to own and operate Mount Vernon.

Interest in historic preservation increased following the Civil War when the United States Congress and local organizations acted to protect the sites of historic battlefields. For example, in the late nineteenth century, the federal government sought to condemn a property for the creation of a national battlefield monument at Gettysburg. Then, judicial protection of preservation...
efforts began in earnest. United States v. Gettysburg Electric Railway Co. was filed in response to an effort to block railway operations on the Gettysburg Battlefield. In ruling that a physical place—including its surroundings and landscape—may be protected by Congress, the Court held that the use of eminent domain for historic preservation is a public use. Gettysburg Electric marked the first time the Supreme Court upheld Congress’s powers to act to preserve an important historic site. In Gettysburg Electric, the Court stated:

Can it be that the government is without power to preserve the land, and properly mark out the various sites upon which this struggle took place? Can it not erect the monuments provided for by these acts of Congress, or even take possession of the field of battle, in the name and for the benefit of all the citizens of the country, for the present and for the future? Such a use seems necessarily not only a public use, but one so closely connected with the welfare of the republic itself as to be within the powers granted congress by the constitution for the purpose of protecting and preserving the whole country.

Thus began judicial efforts to promote preservation efforts on home soil.

Historic preservation efforts were further energized under President Theodore Roosevelt with the signing of the Antiquities Act in 1906. The Antiquities Act prohibits the excavation or destruction of antiquities from public lands without a permit from the Secretary of Interior and authorizes the President to declare lands owned or controlled by the federal government as “national monuments,” thereby preserving them for future generations. Like Gettysburg Electric, the Act focuses on the protection of physical, tangible structures and objects stating:

[j]he President of the United States is hereby authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments.

There are penalties for the appropriation of any “ruin,” “monument,” or “object of antiquity.” While these terms are not specifically defined within the

33. Id. at 680-83 (emphasis added).
38. See Gettysburg Elec., 160 U.S. at 682.
Antiquities Act, they are all physical properties. The Antiquities Act is a success story in its effective preservation of national treasures and is widely used by the President today for preservation efforts. Indeed, President Obama recently designated five new properties as national monuments pursuant to his authority under the Antiquities Act.\footnote{1}

Following the passage of the Antiquities Act, the National Park Service was founded in 1916\footnote{2} and the Historic Sites Act was signed into law in 1935.\footnote{3} These developments focus on the preservation of physical properties including sites, buildings, and objects like the Antiquities Act and \textit{Gettysburg Electric} before it.\footnote{4} The Historic Sites Act prefaces the NHPA’s modern National Register. The Act states, “it is hereby declared that it is a national policy to preserve for public use historic \textit{sites}, \textit{buildings}, and \textit{objects} of national significance for the inspiration and benefit of the people of the United States.”\footnote{5} Under the Historic Sites Act, the Secretary of the Interior, through the National Park Service, is authorized to “restore, reconstruct, rehabilitate, preserve, and maintain historic or prehistoric \textit{sites}, \textit{buildings}, \textit{objects}, and \textit{properties} of national historical or archaeological significance and, where deemed desirable, establish and maintain museums in connection therewith.”\footnote{6} Thus, early preservation efforts focused exclusively on tangible, physical properties.

Following World War II, President Truman signed the National Trust for Historic Preservation Act in 1949, establishing a corporation to facilitate public participation in the preservation of sites, buildings, and objects of national significance or interest, with the express purpose “to receive donations of \textit{sites}, \textit{buildings}, and \textit{objects} significant in American history and culture, to preserve and administer them for public benefit.”\footnote{7} Today, there are twenty-seven sites designated as National Trust Historic Sites—most are buildings of historical importance, including President Lincoln’s Cottage in Washington, D.C. and the Touro Synagogue in Newport, Rhode Island.\footnote{8} Eleven years later, President Eisenhower signed the Archaeological and Historic Preservation Act into law, which borrowed language from earlier historic preservation laws with the purpose of preserving “historic American sites, buildings, objects, and antiquities of national significance.”\footnote{9}

\footnote{2}{ See The National Park Service Organic Act, 16 U.S.C. § 1 (2012).}
\footnote{3}{ 16 U.S.C. §§ 461–67 (2012).}
\footnote{5}{ 16 U.S.C. § 461 (emphasis added).}
\footnote{6}{ 16 U.S.C. § 462(f) (emphasis added).}
\footnote{7}{ 16 U.S.C. § 468 (2012).}
\footnote{8}{ See NATIONAL TRUST FOR HISTORIC PRESERVATION, http://www.preservationnation.org/travel-and-sites/sites/ (last visited Mar. 8, 2014).}
\footnote{9}{ 16 U.S.C. § 469 (2012).}

The origin of the NHPA is traceable to the administration of President Lyndon Johnson and the beautification program administered by the First Lady, Lady Bird Johnson.50 This culminated with the passage of the NHPA in 1966. Additionally, a 1965 U.S. Conference of Mayors Report, With Heritage So Rich, focused on local and predominantly urban desires of major U.S. cities to preserve historic buildings within historic districts.51 Indeed, it was the destruction of physical places by the federal highway regime that spurred congressional action with the signing of the NHPA just one year after the publication of With Heritage So Rich. The report recommended the creation of a comprehensive national historic preservation program and, shortly thereafter, the NHPA was enacted into law.52

The NHPA’s purpose is to “give a sense of orientation to the American people,”53 reflecting preservationists’ desire not to feel lost within an urban environment and the importance of distinctive architectural qualities to afford a “sense of place.”54 The NHPA accomplished this, in part, by providing a public review and comment period prior to funding a federal activity that may impact property on or eligible for inclusion on the National Register.55 Executive Order 11,593 directs that the federal government “shall provide leadership in preserving, restoring and maintaining the historic and cultural environment of the Nation.”56

The NHPA has three major components that affect federal activities: (1) a “Section 106” procedural review to ensure federal agencies consider the effects of activities on historic properties; (2) the continuation of a National Register of Historic Places (derived from the earlier Historic Sites Act) that is routinely updated via the Secretary of Interior; and (3) a “Section 110” requirement for federal agencies to locate, inventory, and nominate properties that are within its control to the National Register.57
1. Section 106 Review Process and NHPA’s Relationship with the National Environmental Policy Act

First, the NHPA includes “National Environmental Policy Act (NEPA)-like” procedural requirements commonly known as the “Section 106” review process. This is similar to the detailed environmental impact statements and assessments required by NEPA. The Section 106 process is the regulatory heart of the NHPA and analogous to the NEPA’s procedural environmental impact statement (EIS) requirement whereby DoD, as a federal agency, must comply with NEPA’s requirements. Similarly, the NHPA requires federal agencies to take into account a project’s effects on historic properties listed in, or eligible for listing in, the National Register of Historic Places prior to funding, licensing, or otherwise proceeding with projects. It states:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.

These five classifications of properties (district, site, building, structure, or object) are repeated throughout the NHPA statutory scheme and are mirrored in the definition of “historic properties” within the NHPA. The NHPA builds upon the “sites, buildings, and objects” language found in the Historic Sites Act adding “district” and “structure” to its definition of historic properties. While property is not specifically defined in the NHPA, historic property or historic resource is defined as follows: “[h]istoric property or historic resource means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion on the National Register, including artifacts, records, and material remains related to such a property or resource.” The language of the NHPA continues to emphasize physical property.

This provision effectively directs all federal agencies, including the DoD to make an independent determination whether properties listed or eligible for

59. 16 U.S.C. § 470f. Section 106 refers to the relevant provision within the NHPA statutory construct. It does not have any relation to the actual statutory citation within Title 16 (i.e. Section 106 does not equate to 16 U.S.C. § 106).
61. MILLER, supra note 25, at 5.
63. Id. (emphasis added to show the five types of properties that the NHPA protects).
64. 16 U.S.C. § 470w(5).
65. 16 U.S.C. §§ 431–33 (2012). Arguably, it only added “district” to the historic preservation lexicon as “structure” was protected pursuant to The Antiquities Act.
66. 16 U.S.C. § 470w(5).
listing in the National Register will be adversely affected prior to the initiation of a federal “undertaking.”67 If a proposal appears to affect a property listed on the National Register, the Advisory Council on Historic Preservation—an independent federal agency—is given the opportunity to provide further comment.68

The NHPA is fundamentally procedural in nature. “While Section 106 is an effective tool in focusing attention on federal agency actions affecting historic resources, it does not prevent federal agencies from taking actions that ultimately harm historic resources.”69 The NHPA requires that the relevant federal agency identify historic resources and explore alternative measures to mitigate or avoid the harm the project would have on the buildings.70 But the NHPA does not ultimately prevent the demolition of a property on the National Register, though the federal agency must properly “take into account” the effect of this action on the historic property.71

2. Section 101: The Evolution of the U.S. National Register

Second, Section 101 of the NHPA authorizes the expansion and maintenance of the National Register of Historic Places.72 The National Register was established under the Historic Sites Act in 193573 and was effectively expanded by the passage of the NHPA.74 Similar to the Section 106 provision, the National Register designates the properties eligible for placement within the NHPA as, “districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, and culture.”75 The National Register is limited to five categories of historic properties (districts, sites, buildings, structures, or objects).76 The National Register authorizes the

---

67. MILLER, supra note 25, at 5. Undertaking is defined broadly in the NHPA: “Undertaking means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including—
   A. those carried out by or on behalf of the agency;
   B. those carried out with Federal financial assistance;
   C. those requiring a Federal permit license, or approval; and
   D. those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.” 16 U.S.C. § 470(w)(7).
68. MILLER, supra note 25, at 5.
69. Id. at 6 (emphasis added).
70. Id.
73. MILLER, supra note 25, at 2.
76. The regulation specifies eligible properties as follows:
   National Register criteria for evaluation. The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites,
Secretary of the Interior to add historic properties “and objects significant in
American history, architecture, archeology, engineering and culture.”

In assessing the five categories of historic properties (districts, sites,
buildings, structures, and objects), the National Register utilizes the following
definitions. A district is defined as a “geographically definable area, urban or
rural, possessing a significant concentration, linkage or continuity of sites,
buildings structures, or objects united by past events or aesthetically by plan or
physical development. A district may also comprise individual elements
separated geographically but linked by association or history.” An example is
the Georgetown Historic District in Washington, D.C.

A site is the “location of a significant event, a prehistoric or historic
occupation or activity, or a building or structure, whether standing, ruined, or
vanished, where the location itself maintains historical or archeological value
regardless of the value of the existing structure.” A regulatory example of sites
listed on the National Register is the Mud Springs Pony Express Station Site in
Dalton, Nebraska.

A building is defined as “a structure created to shelter any form of human
activity, such as a house, barn, church, hotel or similar structure. Building may
refer to a historically related complex such as a courthouse and jail or a house
and barn.” Examples of buildings on the National Register include the Molly
Brown House in Denver, Colorado and the Fairntosh Plantation in Durham,
North Carolina.

buildings, structures, and objects that possess integrity of location, design, setting,
materials, workmanship, feeling, and association, and

(a) that are associated with events that have made a significant
contribution to the broad patterns of our history; or
(b) that are associated with the lives of persons significant in our past; or
(c) that embody the distinctive characteristics of a type, period, or method
of construction, or that represent the work of a master, or that possess
high artistic values, or that represent a significant and distinguishable
entity whose components may lack individual distinction; or
(d) that have yielded, or may be likely to yield, information important in
prehistory or history.

Criteria considerations. Ordinarily cemeteries, birthplaces, or graves of historical
figures, properties owned by religious institutions or used for religious purposes,
structures that have been moved from their original locations, reconstructed historic
buildings, properties primarily commemorative in nature, and properties that have
achieved significance within the past 50 years shall not be considered eligible for the
National Register.

36 C.F.R. § 60.4 (2012).
77. 36 C.F.R. § 60.1.
78. 36 C.F.R. § 60.3(d).
79. Id.
80. 36 C.F.R. § 60.3(l).
81. Id.
82. 36 C.F.R. § 60.3(a).
83. Id.
A **structure** is defined as a “work made up of interdependent and interrelated parts of a definite pattern of organization. Constructed by man, it is often an engineering project large in scale.” 84 An example of a structure on the National Register is the Old Point Loma Lighthouse in San Diego, California. 85

Lastly, the regulatory definition of **object** is of particular significance as it took on central importance in the *Dugong* rulings. “Object,” too, is addressed in prior preservation statutes like the Antiquities Act and the Historic Sites Act. 86 Object is defined under NHPA regulations as a “material thing of functional, aesthetic, cultural, historical or scientific value that may be, by nature or design, movable yet related to a specific setting or environment.” 87 While an object may be movable and seemingly expands the traditional definition of properties, it still must be a “material thing.” 88 And the examples of protected “objects” within federal regulations are instructive: they are all of a physical nature. Indeed, the regulatory examples provided are the Adams Memorial in Rock Creek Cemetery in Washington, D.C., the Sumpter Gold Dredge in Oregon, and the Delta Queen Steamboat in Cincinnati, Ohio. 89

Clearly, there is a high degree of care in categorizing properties of historic value on the National Register. Today, more than 88,000 properties are currently on the National Register and it is continuously updated. 90 Nevertheless, the properties all share one commonality: they are all physical or tangible in nature. And living animals are completely absent from the U.S. National Register. This is perhaps not surprising, as animals and living organisms are afforded legal protections pursuant to the Marine Mammal Protection Act (MMPA) and the Endangered Species Act (ESA), as discussed in greater detail below.

### 3. Section 110: Historic Properties Within Federal Control

Lastly, the NHPA places special requirements on each federal agency regarding the management of historic properties within its ownership or control. 91 Each agency is required to utilize historic properties under its control

---

84. 36 C.F.R. § 60.3(p).
85. Id.
87. 36 C.F.R. § 60.3(j).
88. Id.
89. See id.
91. 16 U.S.C. § 470h-2(a)(1)–(2) (2008). This is commonly referred to as the Section 110 process. “The heads of all Federal agencies shall assume responsibility for the preservation of historic properties which are owned or controlled by such agency.” Id.
“to the maximum extent feasible”\textsuperscript{92} and identify, evaluate, and nominate potential properties to the National Register via the Secretary of Interior.\textsuperscript{93}

The table below demonstrates the gradual evolution of historic preservation law and its applicability.

\begin{itemize}
  \item Under the NHPA statutory construct, there are express exemption clauses that could apply to a DoD “undertaking.” For example, compliance with the NHPA may be waived in the event of a “major national disaster” or “imminent threat to the national security.” 16 U.S.C. § 470h-2(j). The full text reads, “The Secretary shall promulgate regulations under which the requirements of this section may be waived in whole or in part in the event of a major natural disaster or an imminent threat to the national security.” \textit{Id.} It appears that there has not been widespread use of these exemption clauses.
\end{itemize}

\textsuperscript{92} \textit{Id.}

\textsuperscript{93} \textit{Id.} Under the NHPA statutory construct, there are express exemption clauses that could apply to a DoD “undertaking.” For example, compliance with the NHPA may be waived in the event of a “major national disaster” or “imminent threat to the national security.” 16 U.S.C. § 470h-2(j). The full text reads, “The Secretary shall promulgate regulations under which the requirements of this section may be waived in whole or in part in the event of a major natural disaster or an imminent threat to the national security.” \textit{Id.} It appears that there has not been widespread use of these exemption clauses.
Table 1

<table>
<thead>
<tr>
<th>Statute/Case</th>
<th>Applicability</th>
<th>Extraterritorial Application?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gettysburg Electric (1896)</td>
<td>Monuments and lands (&quot;field of battle&quot;)[^94]</td>
<td>No</td>
</tr>
<tr>
<td>Antiquities Act (1906)</td>
<td>Historic landmarks, historic and prehistoric structures, and other objects</td>
<td>No</td>
</tr>
<tr>
<td>Historic Sites Act (1935)</td>
<td>Historic or prehistoric sites, buildings, objects, and properties of national historical or archaeological significance</td>
<td>No</td>
</tr>
<tr>
<td>National Trust for Historic Preservation Act (1949)</td>
<td>Sites, buildings and objects significant in American history and culture</td>
<td>No</td>
</tr>
<tr>
<td>NHPA—original text (1966)</td>
<td>District, site, building, structure, or object included in or eligible for inclusion in the National Register</td>
<td>No</td>
</tr>
<tr>
<td>NHPA—present day with 1980 amendments (discussed infra)</td>
<td>District, site, building, structure, or object included in or eligible for inclusion in the National Register and property on the applicable country’s equivalent of the National Register</td>
<td>Yes[^95]</td>
</tr>
</tbody>
</table>

The WHC’s purpose is to promote the “identification, protection, and preservation, of cultural and natural heritage around the world considered to be of outstanding value to humanity.” It provides that “certain natural and cultural sites can be designated as world heritages and conserved for future generations.” It does this primarily through the creation of the World Heritage List that provides for a variety of incentives and disincentives for individual nations to protect historical properties, a system referred to by one scholar as “compliance pull.” While the public may know, generally, that there are certain protections afforded to World Heritage Sites, the actual process and jurisdiction to regulate under the WHC is less well known. It is the responsibility of each state party to the WHC to identify properties situated in its territory for inclusion on the World Heritage List and then take steps to protect and report on the condition of protected properties.

The WHC protects properties of a “natural and cultural heritage.” The WHC defines cultural heritage in Article 1; it is similar to the NHPA’s focus on physical, tangible properties. It reads:

(a) monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;

(b) groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;

(c) sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.

Similar to other U.S. statutes, the WHC also protects natural heritage properties, once again not expressly including animals as part of its...
Natural heritage properties are defined in Article 2 with the following considered “natural heritage”:

(a) natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view;
(b) geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation;
(c) natural sites or precisely delineated areas of outstanding universal value from the point of view of science, conservation or natural beauty.

Article 2 protects features, formations, areas, and sites. While there is an acknowledgement that the habitat of “threatened species of animals and plants of outstanding universal value” are subject to WHC protection, the WHC does not protect animals as such. Indeed, while animals would be the unquestioned beneficiaries of having their habitats protected, the WHC does not specifically afford protections to living animals. For example, under Article 2, the WHC only protects the “geological and physiological formations” and “precisely delineated areas,” which constitute the habitat of threatened species of animals.

Animals are excluded under the WHC’s Operational Guidelines, which provide guidance on the WHC’s practical implementation; properties of a “moveable heritage” are not protected. Even properties that are immovable, but may eventually be movable will not be considered for protection under the WHC. Not surprisingly, as of this writing, the dugong is not on the World Heritage List and there are no living animals or objects currently on the World Heritage List. There are numerous natural sites that are protected by the WHC that include the habitats of animals of enormous interest. To use one example, the Great Barrier Reef is on the World Heritage List, and it includes the habitats of animals including the dugong and sea turtles. It also includes a great variety of coral, shellfish, and sea life. All of these natural characteristics are important factors in determining the Great Barrier Reef’s inclusion in

---

107. Id.
108. Id., art. 2 (emphasis added).
109. Id.
110. Id.
111. Id.
113. OPERATIONAL GUIDELINES, supra note 112, at 14.
114. Id.
accordance with the WHC and its Operational Guidelines. But the sea turtle and
dugong are not protected under the WHC wherever they exist and in Henoko
Bay. They merely benefit from its protections when inhabiting the Great Barrier
Reef and similarly protected natural properties.

Under Article 3 of the WHC, each party is to identify and delineate the
different properties meeting the definition of cultural and natural heritage. Article 4 provides that it is the duty of each state party “[to ensure] the
identification, protection, conservation, presentation, and transmission to future
generations of the cultural and natural heritage referred to in [A]rticles 1 and 2
and situated on its territory.”

Lastly, under Article 5, each state party “shall endeavor to take the
appropriate legal, scientific, technical, administrative and financial measures
necessary for the identification, protection, conservation, presentation and
rehabilitation of this heritage.” This language is particularly important, as it
highlights the WHC’s status as a non-self-executing treaty, requiring that
Congress adopt implementing language within federal law to formally
implement the WHC’s treaty requirements.

Similar to the NHPA, within the United States, the Secretary of Interior has
the special role of periodically nominating properties of international
significance for placement on the World Heritage List. Once a property is
identified as meeting the Article 1 and 2 definitions of cultural and natural
heritage, each party has obligations to protect that site, and the site can be
nominated to the World Heritage List. Scholars have argued that there are
certain political, tourism, and financial assistance benefits from the inclusion of
sites on the World Heritage List.

116. WHC, supra note 21, at art. 3.
117. Id., art. 4.
118. Id., art. 5(d). While there is a paucity of judicial opinions interpreting whether the general
obligations set forth in Articles 4 and 5 amount to a prescriptive legal obligation for states, at least
one national court in Australia has stated the Convention imposes a legal duty to protect sites on the
World Heritage List. See Weiss et al., supra note 101, at 1121 (quoting the majority opinion from
the Australian High Court in Australia v. The State of Tasmania upholding Australia’s legal duty to
protect the Western Tasmania Wilderness National Park, a site on the World Heritage List).
119. 16 U.S.C. § 470a-1(b) (2012). The full text of the provision reads as follows:
The Secretary of the Interior shall periodically nominate properties he determines are
of international significance to the World Heritage Committee on behalf of the United
States. No property may be so nominated unless it has previously been determined to
be of national significance. Each such nomination shall include evidence of such legal
protections as may be necessary to ensure preservation of the property and its
environment (including restrictive covenants, easements, or other forms of protection).
Before making any such nomination, the Secretary shall notify the Committee on
Natural Resources of the United States House of Representatives and the Committee
on Energy and Natural Resources of the United States Senate.

120. See Goodwin, supra note 102, at 163. The terms “World Heritage List” and “World
Heritage Site” are used synonymously.
121. See id. at 167–71.
Like the NHPA’s National Register, the WHC is a “living treaty” and properties are continually added to and deleted from the World Heritage List. As of this writing, there are 981 properties on the World Heritage List that are considered to have outstanding universal value in accordance with the WHC guidelines. This includes twenty-one World Heritage properties in the United States and seventeen in Japan. Of the 981 properties, 759 are classified as “cultural,” 193 are classified as “natural,” and twenty-nine are classified as “mixed cultural/natural.” For example, in the United States there are twenty-one World Heritage Sites including the Statue of Liberty and Yosemite National Park. Papahonaumokuakea National Monument in Hawaii is the most recent U.S. addition in 2010. As a living animal does not clearly fit into the definition of a property of cultural or natural heritage, none of the properties on the World Heritage List are wild animals.

There are seventeen protected World Heritage Sites in Japan. The seventeen sites include the Buddhist Monuments in Horyu-ji and the Ogasawara Islands. Absent from the World Heritage List are wild animals, and the dugong is not a World Heritage Site, nor is the dugong’s habitat on the World Heritage List.

D. The Merger of the WHC and the NHPA: Implementing Statutory Language Within the NHPA Muddies the Waters

In 1980, five years after the WHC entered into force, Congress amended U.S. law to address its treaty obligations, using the NHPA as its implementing statutory vehicle. By implementing language from the WHC into the NHPA, the NHPA is the only U.S. natural resource or environmental statute with a

---


123. Id.

124. Id. Of the twenty-one sites in the United States, eight are cultural properties (e.g. the Statue of Liberty), twelve are natural properties (e.g. Yosemite) and one is a mixed cultural/natural (Papahonaumokuakea National Monument).


126. Id. Of the seventeen Japanese World Heritage Sites, thirteen are cultural properties and four are natural properties. The natural properties do include the habitats of endangered species, but Henoko Bay is not a World Heritage Site. Id.

127. Id.

128. This Article uses the term “natural resource” or “environmental” here to reflect the numerous U.S. laws that could be construed to provide environmental protections. As such, it includes obvious environmental examples such as NEPA and the Clean Water Act, but also natural resource statutes to include the Sikes Act and the Antiquities Act. See Sikes Act, 16 U.S.C. §§ 670–670o (2012); Antiquities Act, 16 U.S.C. §§ 431–433 (2012).
jurisdictional provision construed by a federal court to apply in another sovereign nation.129 The WHC’s implementing amendment to the NHPA states:

[p]rior to the approval of any Federal undertaking outside the United States which may directly and adversely affect a property which is on the World Heritage List or on the applicable country’s equivalent of the National Register, the head of a Federal agency having direct or indirect jurisdiction over such undertaking shall take into account the effect of the undertaking on such property for purposes of avoiding or mitigating any adverse effects.130

This implementing language mirrors the NHPA’s domestic “NEPA-like” review process with the requirement that a federal agency must account for a proposed undertaking’s effects on properties on the World Heritage List or the applicable country’s equivalent National Register.131 Unfortunately, there is no substantive legislative history for this provision to discern Congress’s intent with respect to the true scope of this implementing provision.132 The key terms are “equivalent of the National Register” and “such property.” These terms require federal agencies to “take into account” the proposed undertakings effects on both the World Heritage List properties and the National Register equivalent law of the host nation.133 But there is little additional guidance on how, precisely, this extraterritorial provision should be construed and practically applied.134 Section 110 of the NHPA established federal agency responsibilities and Section 101(g) requires the Secretary of the Interior to promulgate guidelines for federal agency responsibilities under the Act. The Secretary of the Interior did so in 1998, but made clear that these guidelines, oddly, had “no regulatory effect” and were merely issued to meet the Section 110 requirements.135 Hence, there is an absence of clarifying legislative history or binding administrative regulations and guidance associated with these 1980 amendments. This extraterritorial provision of the NHPA was largely unnoticed

129. See Dugong II, 543 F. Supp. 2d 1082 (N.D. Cal. 2008). As discussed infra, Part III.B, the ESA and the MMPA have been interpreted to apply outside the United States to include the high seas, but neither has been interpreted to apply in another sovereign nation, thus invoking larger foreign policy concerns.
130. Id. at 1088 (emphasis added).
131. See id.
134. In 1998, eighteen years after the WHC implementing language was passed, the U.S. Secretary of the Interior provided additional guidance to federal agencies on how to apply the NHPA overseas that was of little assistance. This guidance stated, “the agency’s preservation program should ensure that, when carrying out work in other countries, the agency will consider the effects of such actions on historic properties, including World Heritage Sites and properties that are eligible for inclusion in the host country’s equivalent of the National Register.” The Secretary of the Interior’s Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act, 63 Fed. Reg. 20,496, 20,503 (Apr. 24, 1998) (noting that “[e]fforts to identify and consider effects on historic properties in other countries should be carried out in consultation with the host country’s historic preservation authorities, with affected communities and groups, and with relevant professional organizations”).
and effectively lay dormant for twenty-five years until a lawsuit was filed to protect the dugong.  

Table 2 summarizes the scope of the NHPA, the WHC, and the WHC’s implementing language within the NHPA, displaying surprising results.

<table>
<thead>
<tr>
<th>Statute or Treaty</th>
<th>Applicability</th>
<th>Provides Protection for Living Animals and Objects?</th>
</tr>
</thead>
<tbody>
<tr>
<td>NHPA (1966: pre-WHC and 1980 amendments)</td>
<td>District, site, building, structure, or object</td>
<td>No(^{137})</td>
</tr>
<tr>
<td>World Heritage Convention (ratified in 1975)</td>
<td>Monuments, groups of buildings, features, areas, formations and sites</td>
<td>No?(^{138})</td>
</tr>
<tr>
<td>NHPA (to include 1980 WHC amendments)</td>
<td>District, site, building, structure, or object and “the applicable country’s equivalent of the National Register”(^{139})</td>
<td>Yes?(^{140})</td>
</tr>
</tbody>
</table>

II. THE NHPA’S EXTRATERRITORIAL APPLICATION IN PRACTICE


The United States has a long history of military activities in Japan dating back to World War II.\(^{141}\) For example, the island of Okinawa, located 1,000

---

137. Not as practically applied. Living animals are absent from the National Register. But see King Decl. ¶¶ 9–10, Dugong I, No. C 03-4350 MHP, 2005 U.S. Dist. LEXIS 3123 (N.D. Cal. Mar. 2, 2005) (asserting that while living animals are not on the National Register this is not, by itself dispositive, and the NHPA could still protect living animals).
138. See WHC, supra note 21, at art. 2. While a WHC natural property does not include a wild animal under the definition of the WHC and its Operational Guidelines, the property may include the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation. Id. at art. 2(b).
140. See Dugong I, 2005 U.S. Dist. LEXIS 3123; Dugong II, 543 F. Supp. 2d 1082, 1084 (N.D. Cal. 2008), discussed infra part II.
141. For a good overview of the military background and issues discussed herein, see
miles southwest of Tokyo, was the site of a major military battle with over 200,000 casualties in World War II and is today home to thousands of American servicemen. The United States ceded administrative control of Okinawa to Japan in 1972 and Japan has full responsibility and authority today “for the exercise of any and all powers of administration, legislation, and jurisdiction [of Okinawa].”

Yet the DoD operates a number of military bases on Okinawa to this day, including the Marine Corps’ Futenma Air Station. This air station is completely surrounded by urban development. Japan faces the continual threat of North Korean provocations, including repeated missile launches in the Sea of Japan and nuclear tests.

To address several concerns related to the U.S. military presence in Okinawa, a joint United States-Japan Special Action Committee on Okinawa was created to explore alternative sites for Futenma. This was due, in part, to protests by Okinawan residents against the U.S. military presence. As part of the selection process, the United States would establish operational parameters for any replacement facility, but Japan would, “select the ultimate site of the [replacement air station] and fund and carry out its construction.”

While the DoD would oversee the construction to ensure that its operational requirements were met and operate the facility on a day-to-day basis once built, the new air station would be placed in the sovereign territory of Japan in a location ultimately selected by the Japanese government.

The United States and the central Japanese government focused on building a sea-based facility off the shores of Henoko, an area rich in marine ecology and the habitat of the dugong, a marine mammal protected under the Japanese Law

---

Takahashi, supra note 6.


143. See Dugong II, 543 F. Supp. 2d at 1085. Since the Dugong litigation, the national security situation with North Korea has been tense. Kim Jong-un, the new Supreme Leader of North Korea, has routinely conducted rocket tests within range of Japan and has been suspected of conducting nuclear tests. See, e.g., David Sanger and Choe Sang-Hun, North Korea Confirms it Conducted Third Nuclear Test, N.Y. Times, Feb. 12, 2013, at A1.

144. Dugong II, 543 F. Supp. 2d at 1085. This joint committee, entitled the Special Action Committee on Okinawa (SACO), issued a report in 1996 with recommendations to ease the burden on the people of Okinawa and thereby strengthen the Japan-United States alliance. It specifically recommended that the United States return twenty-one percent of its land back to Japan. One part of the land return was the Marine Corps’s Futenma Air Station located in central Okinawa.

145. See id. For a more detailed analysis, see SACO Final Report on Futenma Air Station, MINISTRY OF FOREIGN AFFAIRS OF JAPAN, http://www.mofa.go.jp/region/n-america/us/security/96saco2.html (Dec. 2, 1996) (providing an overview of the SACO’s recommendations to include a history of deliberations). This lengthy process of the United States and Japan working to find a solution for the replacement air station was politically and diplomatically sensitive.

146. Dugong II, 543 F. Supp. 2d at 1085.
on Cultural Property. The dugong has significant meaning in Japanese culture and small populations of dugongs inhabit the shallow waters of Henoko Bay. After several years of negotiations, a “Roadmap for Re-alignment Implementation” was signed between the United States and Japan, with the plan to move Futenma Air Station to Henoko Bay. Many local Okinawans welcomed the recommendation as the Futenma Air Station is a source of noise pollution and there is a constant threat of aircraft-related mishaps.

Japan’s Cultural Properties Protection Law (Bunkazai hogohō) is comprehensive and includes broad protections for a wide range of properties like wild animals. It includes both protections seen in U.S. domestic law within the ESA or the MMPA, and more expansive protections not contemplated by the MMPA, the ESA, or the NHPA. For example, the “monuments” definition of Japanese protected cultural properties within Japanese law includes a diverse mixture of property types including “man-made and natural sites as well as plants and animals.” The “monument” definition in the WHC—the underlying basis for the Dugong lawsuits—defines monument to include tangible, physical properties, among them architectural works, sculptures, and paintings. So, the Japanese definition of monument includes properties that are more expansive than what is found in the WHC. For other categories of protection (e.g. “intangible folk cultural properties”), there is simply no U.S. equivalent in any federal statute. In Japan, the dugong is protected as a “natural monument” and is listed on the Japanese Register of Cultural Properties.

147. Id. at 1084.
148. Id.
149. See Takahashi, supra note 6, at 187.
151. For example, the Japanese Cultural Properties Protection Law provides protections for intangible folk cultural properties.
152. Thornbury, supra note 150, at 212 n.2.
153. The full definition of “monument” under the WHC includes architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature inscriptions, cave dwellings and combinations of features, which are of outstanding value from the point of view of history, art or science. See WHC, supra note 21, at art. 1.
155. See The Antiquities Act, 16 U.S.C. §§ 431–433 (2012). The Antiquities Act does provide protections for national monuments, but this is limited to lands owned by the United States and has no applicability in the case of the dugong:

The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with proper care and management of the objects to be protected.
the WHC applies to cultural heritage properties without reference to wild animals.\textsuperscript{156} While the United States does list the dugong as an endangered species pursuant to the ESA, as discussed \textit{infra}, Part III.B, the ESA could not be used to protect the dugong in Japan.\textsuperscript{157} These differences between Japanese and U.S. domestic law highlight the inherent difficulty of applying the domestic law of one nation within another nation’s territory. This is only exacerbated when international treaty obligations overlap.

As the plans progressed to move the Marines away from Futenma, Japanese citizens were concerned about the impact of the move from Futenma to Henoko on the dugong. They turned to the Japanese courts for redress. However, Japanese litigants lacked standing to bring a suit in Japanese courts challenging the Japanese government’s decision to move the Marine Air Station to Henoko, as Japanese domestic environmental law provided no such legal remedy.\textsuperscript{158}

The lack of a judicial remedy available from Japanese environmental and administrative law made U.S. courts the last resort for judicial intervention by all concerned parties in both Japan and the United States.\textsuperscript{159} While the NHPA lacks a specific citizen suit provision within its statutory scheme, Japanese citizens were able to join with U.S. environmental groups to seek judicial review of the DoD’s “agency action” pursuant to the APA when the litigants—to include Japanese citizens—jointly filed suit in the U.S. District Court for the Northern District of California.\textsuperscript{160}

The Japanese litigants sought redress in a U.S. federal court, highlighting the power of the NHPA when used in conjunction with the APA for judicial redress.\textsuperscript{161} The district court issued two opinions in 2005 and 2008, both times addressing the challenge under the NHPA and the APA and embracing an expansive view of the NHPA’s extraterritorial application.\textsuperscript{162}

\textbf{B. Dugong v. Rumsfeld (Dugong I)}

In 2005, the court in \textit{Dugong I} rejected a motion to dismiss filed by the U.S. government.\textsuperscript{163} In \textit{Dugong I}, the court ruled the Futenma relocation...
qualified as a “federal undertaking” within the meaning of the NHPA, and it permitted the plaintiffs’ challenge to continue for three reasons.\textsuperscript{164}

First, the court ruled Japan’s Law for the Protection of Cultural Properties was the equivalent of the U.S. National Register within the meaning of Section 402 of the NHPA.\textsuperscript{165} In dismissing the government’s argument that the Japanese law was not the equivalent to the U.S. National Register, the court noted the presence of animals on the World Heritage List would have strongly indicated Congress’s intent to protect wild animals, but the absence of animals on the World Heritage List was not, by itself, dispositive.\textsuperscript{166} The court stated:

[An interpretation of [Section 402] requiring that the foreign list be identical to the American one would . . . contradict the international aspect of the section. To require that foreign lists include only those types of resources which are of cultural significance in the United States would defy the basic proposition that just as cultures vary, so too will their equivalent legislative efforts to preserve their culture.\textsuperscript{167}

The court dismissed the more limited approach that the NHPA applies to reasonably related or intersecting properties jointly protected by the U.S. and Japanese registers. Under Japanese law, there is some overlap with the types of properties covered under the NHPA. For example, both Japanese and American laws cover tangible structures, ancient sites, and traditional buildings. But the Japanese Law for the Protection of Cultural Properties’ Register—determined to be “equivalent of” the U.S. National Register—has a more expansive protection of properties including physical sites and locations (e.g. ancient sites and places of scenic beauty), intangible properties (e.g. music, manners and customs, and folk performing arts and techniques), as well as physical properties that are similar to what can be protected under the U.S. National Registry.\textsuperscript{168} The court effectively read the NHPA’s extraterritorial provision to protect all Japanese protected properties as defined by Japanese law, regardless of their overlap and nexus to U.S. properties.

Second, the court in \textit{Dugong I} specifically ruled that the dugong could be protected as a “property” within the NHPA statutory scheme.\textsuperscript{169} While noting that the dugong is a wild animal not within the traditional U.S. “property” definition as understood by the NHPA, the court stated that there is little precedent whether a “living thing can constitute a property eligible for the U.S. National Register.”\textsuperscript{170}

The court relied upon another district court case, \textit{Hatmaker v. Georgia Department of Transportation}, where the court held that an oak tree was at least

\textsuperscript{164}. \textit{Id.} at *40.
\textsuperscript{167}. \textit{Id.} at *22.
\textsuperscript{168}. Schoenbaum, \textit{supra} note 142.
\textsuperscript{169}. \textit{Dugong I}, 2005 U.S. Dist. LEXIS 3123, at *27.
\textsuperscript{170}. \textit{Id.} at *33.
potentially eligible for inclusion on the National Register.\textsuperscript{171} Hatmaker stands out as a unique case holding that the National Register could feasibly include protections for a living object.\textsuperscript{172} The court said the dugong, like an oak tree, may fall under the NHPA’s definition of object—a “material thing of functional, aesthetic, cultural, historical, or scientific value that may be, by nature of design, movable yet related to a specific setting or environment.”\textsuperscript{173} Yet objects have been protected in American preservation law since the Antiquities Act. While the NHPA added districts to its five protected property categories in 1966, objects have been identified as a protected property in three prior historic preservation statutes: The Antiquities Act, Historic Sites Act, and National Trust for Historic Preservation Act.

Third, the court addressed the government’s concerns related to broader foreign policy considerations found in the act of state doctrine.\textsuperscript{174} The act of state doctrine was first articulated in \textit{Underhill v. Hernandez} in 1897.\textsuperscript{175} In \textit{Underhill}, a U.S. citizen brought an action to recover damages against General Hernandez, a Venezuelan military officer, when Hernandez refused Underhill’s request to leave the country.\textsuperscript{176} Hernandez was a member of the “Crespo government,” the former government of Venezuela as recognized by the United States. In dismissing Underhill’s claim the Supreme Court famously stated, “[e]very sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of another, done within its own territory.”\textsuperscript{177} \textit{Underhill} signified the emergence of the act of state doctrine in American jurisprudence when deciphering whether the judiciary should rule upon another sovereign’s acts, a practice that has only been reaffirmed.\textsuperscript{178}

In modern jurisprudence, the act of state doctrine bars an action “only if: (1) there is an official act of a foreign sovereign performed within its own territory; and (2) the relief sought or the defense interposed [in the action would require] a court in the United States to declare invalid the [foreign sovereign’s] official act.”\textsuperscript{179} In making this argument in \textit{Dugong I}, the government asserted that the case should be dismissed on prudential grounds, as it would interfere with the conduct of foreign policy by the Executive and Congress.\textsuperscript{180}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{171} \textit{Id}.
\item \textsuperscript{172} \textit{Hatmaker v. Ga. Dep’t of Transp.}, 973 F. Supp. 1058, 1069–70 (1997).
\item \textsuperscript{173} \textit{Id.} (quoting 36 C.F.R. § 60.3(j)).
\item \textsuperscript{174} \textit{See Dugong I}, 2005 U.S. Dist. LEXIS 3123, at *62–68.
\item \textsuperscript{175} \textit{Underhill v. Hernandez}, 168 U.S. 250 (1897).
\item \textsuperscript{176} \textit{Id}.
\item \textsuperscript{177} \textit{Id.} at 252.
\item \textsuperscript{178} \textit{See, e.g.}, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (expanding the act of state doctrine to other sovereign acts of nations that likely violated international law).
\item \textsuperscript{179} \textit{Dugong I}, 2005 U.S. Dist. LEXIS 3123, at *65 (quoting Credit Suisse v. U.S. Dist. Court for Cent. Dist. of Cal., 130 F.3d 1342, 1346 (9th Cir. 1997)).
\item \textsuperscript{180} \textit{Id}.
\end{itemize}
\end{footnotesize}
The court disagreed: it ruled the government was not entitled to summary judgment as the act of state doctrine “relies on the conclusion that the challenged activities are exclusively those of foreign governmental bodies” and the record before the court did not currently describe an official act within the meaning of the act of state doctrine. The actual scope of the act of state doctrine as applied by the court would have to be left for the subsequent ruling in Dugong II.

C. Dugong v. Gates (Dugong II)

Three years later, in Dugong II, the court denied the government’s motion for summary judgment again, ruling that the DoD failed to comply with the requirements under the NHPA’s extraterritorial provision. The case is in abeyance until further information is provided to determine the effects of the Henoko move on the dugong. The federal district court’s rulings have not been appealed and there does not appear to be a clear roadmap for the Marines to leave Futenma. In doing so, the court reaffirmed the Japanese Cultural Registry as the equivalent to the U.S. National Register within the meaning of the 1980 NHPA amendment, thereby requiring the DoD to account for the impact of the federal undertaking, the movement of the base from Futenma to Henoko, on the dugong.

The most significant aspect of the court’s decision was its ruling dismissing broader foreign policy concerns. The court specifically dismissed the government’s contention that a federal court should not question the validity of a sovereign act taken by Japan pursuant to the act of state doctrine. It acknowledged Japan is ultimately responsible for selecting Futenma as the new location of the air base and stated, “Japan’s site selection was driven by its own concerns for environmental, engineering, political, and cost factors.”

In limiting the ruling to what it could rule upon, the court ignored larger prudential concerns that resonate from a narrow ruling focusing on an agency action. The court stated that it was not invalidating Japan’s decision to relocate the Marines; it was only requiring the DoD to comply with Section 402 of the NHPA and take into account its actions on the dugong pursuant to the APA and Section 402 of the NHPA.

The court dismissed the government’s contention that a federal court should not apply the NHPA overseas in a way that creates a “substantial

181. Id. at *67.
184. Id. at 1098. The court did limit its ruling to the federal agency action subject to the NHPA and APA. Id. at 1099.
185. Id. at 1112.
likelihood that treaty relations will be affected.”\textsuperscript{186} The government argued that requiring the DoD to take into account its action on the dugong would be inconsistent with Japan’s judgment on how to protect its own cultural resources, undermining the “carefully negotiated allocation of sovereign responsibilities.”\textsuperscript{187} Yet Japanese law did not protect the dugong, so it would be inconsistent with Japanese law to apply U.S. law to potentially protect the dugong.

The court did not truly address this important foreign relations argument in a straightforward manner. It noted that while these are “important and valid concerns” they only serve to “delineate and give contour to meaning and scope of the substantive requirement to take into account.”\textsuperscript{188} So, while acknowledging its importance, the court ultimately gave little deference to the act of state doctrine.\textsuperscript{189}

This opinion effectively stopped the planned move of the Marines from Futenma to Henoko in its tracks. The political fallout was intense and its effects are felt at Futenma to this day.\textsuperscript{190} While the court specifically asserted that it was not invalidating a sovereign act, the decision-making process was a complex one, and one where the government of Japan would select and fund the ultimate site.\textsuperscript{191} While it is difficult to measure the precise political impact on the court’s undoing of the Japanese decision, it is clear the political fallout from the failure to find a new location for the Marines was powerful, affecting both United States-Japanese relations and Japanese domestic politics.\textsuperscript{192} Further, litigation continues in the case today and the Marines are still at Futenma. The matter of the dugong and the Marines is far from resolved.

The Dugong plaintiffs may assert that the DoD should have followed the Section 402 process from the very beginning, carefully taking into account any future action on the dugong. But the statutes that do clearly protect the dugong domestically—the MMPA and the ESA—do not clearly apply within another

\textsuperscript{186} Id. at 1099. The court recognized that these are “valid and important concerns” but they only serve to “give contour to the meaning and scope of substantive obligations.” Id.

\textsuperscript{187} Id.

\textsuperscript{188} Id. at 1100.

\textsuperscript{189} Id.


\textsuperscript{191} \textit{Dugong II}, 543 F. Supp. 2d at 1085.

sovereign nation’s territory. Further, in light of the importance of this move, the DoD was careful to comply with all applicable Overseas Environmental Baseline Guidance Document (OEBGD) standards and overseas environmental standards. As a federal agency, the DoD complies with the NHPA’s substantive provisions. But the court’s opinion caught the DoD off guard as the NHPA has never been construed to apply to protect a wild animal, domestically, or extraterritorially. As the NHPA has never been construed to apply in such a manner in its forty years of existence and in the twenty-five years since the WHC amendments, it was not unreasonable for the DoD not to spend resources in complying with an unforeseen requirement.\(^{193}\) As the court failed to breathe life into the longstanding act of state doctrine in *Dugong* litigation, the state of the law and the NHPA’s scope and jurisdiction is increasingly unclear and unfastened from its original roots in the broader American historic preservation tradition.

The application of the amended NHPA led to an extraterritorial application of the NHPA, as perhaps contemplated by the statute, but with results for the state action of Japan. This is unlike any use of the NHPA to date, and the court’s interpretation in *Dugong* calls the amendments to the NHPA to the forefront as an anomaly in the application of U.S. law extraterritorially.

III.

**The Extraterritorial Application of Other U.S. Environmental Statutes**

A presumption exists against the extraterritorial application of U.S. statutes.\(^{194}\) This presumption serves an important purpose, “protect[ing] against unintended clashes between our laws and those of other nations which could result in international discord.”\(^{195}\) Courts have consistently held that most major U.S. environmental statutes, including the NEPA, the Clean Water Act, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and the Clean Air Act (CAA), do not apply extraterritorially within

---


194. EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991); *see also* Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949) (reiterating the long-standing principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States).

195. EEOC v. Arabian, 499 U.S. at 248; *see also* Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 454 (2007) (“United States law governs domestically but does not rule the world.”).
the sovereign territory of another nation. This is particularly significant for U.S. military activities overseas as the DoD is by far the largest federal agency with a foreign presence overseas.

A. The NHPA and the NEPA Should Be Applied in a Similar Manner, Consistent with Existing Laws and Regulations.

The NHPA and the NEPA share much in common: both are procedural environmental statutes that apply specifically to federal agency actions. The NEPA is the basic national charter for the protection of the natural environment and the NHPA is its rough equivalent for the protection of historic properties. The two work hand in hand. Federal NEPA regulations state that the act should be integrated “with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively.” The NHPA’s governing regulations mirror the same concept: federal agencies are “encouraged to coordinate compliance with Section 106 . . . with any steps taken to meet the requirements of the NEPA.”

Contrast, however, the NHPA and the NEPA litigation when applied extraterritorially. In NEPA Coalition of Japan v. Aspin, an environmental group asserted that the DoD must comply with NEPA obligations when drafting an environmental impact statement affecting military installation activities in Japan. In a tightly worded opinion, the D.C. District Court explicitly ruled that the NEPA did not apply to military activities abroad, focusing on the act of state concerns first articulated in Underhill. It focused on the potential impairment of another nation’s sovereignty and emphasized that “DoD operations in Japan are governed by complex and long standing treaty arrangements.” The court held that the U.S. installations do not exist in a “lawless vacuum” but instead operate under the agreements reached between the two sovereigns. While balancing the interests of U.S. foreign policy and preparing an EIS, the court in Aspin sided with U.S. foreign policy interests. In doing so, it relied upon Committee for Nuclear Responsibility v. Seaborg,

196. See, e.g., Arc Ecology v. United States Dep’t of the Air Force, 411 F.3d 1092 (9th Cir. 2005) (holding that the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) had no extraterritorial effect).
197. 40 C.F.R. § 1500.2(c) (2013).
200. Id. at 467.
201. Id.
202. Id.
203. Id. at 468.
stating, “NEPA requirements must give way when [the] government [makes] assertions of harm to national security and foreign policy.”\textsuperscript{204}

*Environmental Defense Fund v. Massey* also addressed the extraterritorial application of the NEPA.\textsuperscript{205} While *Environmental Defense Fund* did require an EIS outside the United States for a National Science Foundation (NSF) project in Antarctica, the court did not specifically address the extraterritorial application.\textsuperscript{206} The case is easily distinguishable from the *Dugong* rulings because the conduct sought to be regulated occurred primarily, if not exclusively, in the United States, and the alleged extraterritorial effect of the statute occurred in Antarctica, a continent without a true sovereign.\textsuperscript{207}

Yet, unlike the NEPA, the NHPA does have an express extraterritorial provision, although its precise scope and jurisdiction are unclear in the absence of affirmative Congressional intent. Further, prudential foreign relations concerns exist in regards to all statutes when determining how they function overseas. Despite such similarities, the court in the *Dugong* rulings treated the NHPA without the same level of deference to the United States’ broader foreign policy concerns.

**B. The MMPA and the ESA Protect the Dugong Domestically.**

The *Dugong* rulings did not discuss U.S. domestic statutes that do expressly apply to wild animals. Indeed, the NHPA has not been the statutory mechanism to protect the dugong within the United States,\textsuperscript{208} or does the WHC provide for an express protection of a living animal. Instead, the Convention on International Trade in Endangered Species (CITES) most clearly governs this area of domestic law as applied via treaty obligations.\textsuperscript{209}

1. *The MMPA*

The MMPA clearly prohibits the unlawful taking of the dugong within the United States; it expressly protects the dugong as well as seven other marine mammals.\textsuperscript{210} Under the statute, it is unlawful “for any person, vessel, or
conveyance subject to the jurisdiction of the United States to take any marine mammal on the high seas.”211 It is also unlawful “to take any marine mammal in waters or on lands under the jurisdiction of the United States.”212 Thus, the MMPA’s jurisdiction extends to the “high seas” and to “waters under the jurisdiction of the United States.”213 While the statute does not provide for an explicit definition of high seas, it has not been construed to apply in another nation’s sovereign territory.214 Consequently, the term “waters under the jurisdiction of the United States” is defined as: “(A) the territorial sea of the United States; (B) the waters included within a zone, contiguous to the territorial sea of the United States, of which the inner boundary is a line coterminous with the seaward boundary of each coastal State, and the other boundary is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured.”215

2. The ESA

The ESA, too, clearly prohibits the unlawful taking of the dugong as applied domestically. The dugong is currently on the endangered species list administered by the Fish and Wildlife Administration (FWS).216 The ESA was signed in 1973 with the finding that “various species of fish, wildlife, and plants in the United States have been rendered extinct as a result of economic growth and development not tempered by adequate concern and conservation.”217 The ESA’s purpose is to conserve endangered species and threatened species and the ecosystems upon which they depend.218 The international obligations under the MMPA, “take” means to harass, hunt, capture, collect, or kill, or attempt to harass, hunt, capture, collect, or kill any marine mammal, including, without limitation, any of the following: The collection of dead animals or parts thereof; the restraint or detention of a marine mammal, no matter how temporary; tagging a marine mammal; or the negligent or intentional operation of an aircraft or vessel, or the doing of any other negligent or intentional act which results in the disturbing or molesting of a marine mammal. Id.

211. 50 C.F.R. § 18.11(a).
212. 50 C.F.R. § 18.11(b).
213. 16 U.S.C. § 1372(a)(1). “It is unlawful for (1) for any person subject to the jurisdiction of the United States or any vessel or other conveyance subject to the jurisdiction of the United States to take any marine mammal on the high seas.” Id.
214. For a discussion of why “high seas” needs to be further defined by Congress in both the ESA and the MMPA, see generally Keith Gibel, Defined by the Law of the Sea, “High Seas” in the Marine Mammal Protection Act and the Endangered Species Act, 54 NAV. L. REV. 1 (2007).
215. 16 U.S.C. § 1362 (15)(A)–(B). There is also a provision that defines jurisdiction of the United States in reference to an agreement between the United States and the Soviet Union, but it is not relevant to our discussion here. See § 1362 (15)(C).
216. The scientific name is the *dugong dugon* and the common name is *dugong*. The U.S. Fish and Wildlife Service regularly updates the list of threatened and endangered species and description on the dugong can be found at http://ecos.fws.gov/speciesProfile/profile/speciesProfile.action?spcode=A033 (last visited Mar. 18, 2014).
218. 16 U.S.C. § 1531(b).
CITES treaty are implemented via the ESA.\(^{219}\) The ESA specifically protects listed “species,” defined as “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature”\(^{220}\) as well as “designated critical habitats.”\(^{221}\) Each federal agency, including the DoD, must ensure that agency action “does not jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary.”\(^{222}\)

Under Section 9 of the ESA, it is unlawful for any person subject to the jurisdiction of the United States to “take any such species within the United States or the territorial sea of the United States” or to “take any such species on the high seas.”\(^{223}\) Both “high seas” and “territorial sea” remain undefined within the ESA statutory construct.\(^{224}\) However, Congress made clear in its legislative history when discussing the ESA’s jurisdictional reach that it did not intend for the Section 9 “take” prohibitions to apply within another sovereign’s territory.\(^{225}\) It reiterated the same concern when amending the ESA in 1982, stating that “critical habitat provisions of the act only apply to areas within the jurisdiction of the United States and that the designation of critical habitat in foreign countries or on the high seas would be inappropriate.”\(^{226}\)

While the ESA has been interpreted to apply on the high seas\(^{227}\) and the MMPA\(^{228}\) has been interpreted to apply outside U.S. territory, neither statute


\(^{221}\) 50 C.F.R. §§ 17.94–17.96 (2012).


\(^{224}\) Nash, supra note 14, at 997-1005.

\(^{225}\) Gibel, supra note 214, at 24 (quoting the legislative House report that the ESA “did not make illegal such actions if performed entirely with [sic] one or more foreign countries”); H.R. Rep. No. 93-740 (1973), reprinted in 1973 U.S.C.C.A.N. 3001.


\(^{227}\) See Lujan v. Defenders of the Wildlife, 504 U.S. 555, 582 (1992). While the majority opinion did not specifically rule on the extraterritorial reach of the ESA, Justice Stevens agreed with the Government, relying upon the Foley doctrine that the ESA “does not apply to activities in foreign countries.” Id. at 585 (Stevens, J., concurring); see also Defenders of Wildlife v. Lujan, 911 F.2d 117, 123 (8th Cir. 1990). While the ESA discusses the “high seas” and likely applies outside of the United States, it does not reach into another sovereign nation’s territory. Although one court found extraterritorial application of the ESA when U.S. foreign actions have significant environmental impacts within the United States, the case was subsequently overturned for a lack of standing. See generally Gibel, supra note 214, at 54 (discussing the application of the ESA and the MMPA on the high seas).

\(^{228}\) 16 U.S.C. § 1372(a) (2012) (as amended). The MMPA defines “marine mammal” as any
has been construed to apply in the sovereign territory of another nation. Fundamentally, the NHPA applies to “historic preservation” while the ESA and the MMPA apply specifically to “endangered species” and “marine mammals” respectively. Further, the foundational question, “What statute could protect the dugong?”, was discussed in 2002 and prior to Dugong I and Dugong II when the United Nations issued an extensive 172-page report on the dugong’s threatened status in the world. The report specifically addressed the potential protections afforded by law, discussing the ESA and the NEPA as plausible statutory vehicles to protect the dugong, but did not mention the NHPA.\(^{229}\) In effect, the NHPA is creatively utilized to protect an animal clearly protected by both the ESA and the MMPA.\(^{230}\)

The following table synthesize the various protections afforded to the dugong in the United States and Japan based upon the four statutes introduced above. The surprising outcome is delineated below.

### Table 3

<table>
<thead>
<tr>
<th>Statute</th>
<th>Applies to Dugong in United States?</th>
<th>Applies to Dugong in Another Sovereign Nation?</th>
</tr>
</thead>
<tbody>
<tr>
<td>NEPA</td>
<td>Yes(^{231})</td>
<td>No(^{231})</td>
</tr>
<tr>
<td>ESA</td>
<td>Yes(^{232})</td>
<td>No(^{233})</td>
</tr>
<tr>
<td>MMPA</td>
<td>Yes(^{234})</td>
<td>No(^{235})</td>
</tr>
<tr>
<td>NHPA</td>
<td>No(^{236})</td>
<td>Yes?(^{237})</td>
</tr>
</tbody>
</table>

mammal that “is morphologically adapted to the marine environment,” such as manatees, whales and dugongs. Id. § 1362(6); see also Donald C. Baur, W. Robert Irvin & Darren R. Misenko, Symposium: Changing Tides in Ocean Management: Putting ‘Protection’ into Marine Protected Areas, 28 Vt. L. Rev. 497, 549 (2004).

\(^{229}\) Dugong Status Report, supra note 193, at 45.

\(^{230}\) For example, the ESA states, “the purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions.” 16 U.S.C. § 1351(b). The MMPA states that “marine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic, and it is the sense of the Congress that they should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem.” 16 U.S.C. § 1361(6).


\(^{234}\) “The term ‘marine mammal’ means any mammal morphologically adapted to the marine environment . . . [to include the dugong].” 16 U.S.C. § 1362(6); 50 C.F.R. § 18.3.

\(^{235}\) 16 U.S.C. § 1372(a)(1); United States v. Mitchell, 553 F.2d 996 (5th Cir. 1977).

\(^{236}\) The dugong is not listed on the U.S. National Register of Historic Places. Outside the


C. Other U.S. Environmental Statutes’ Extraterritorial Application

Other foundational American environmental laws, including the Clean Water Act, the Resource Conservation and Recovery Act (RCRA), and the Safe Drinking Water Act, have not been held to apply in another sovereign, but the NHPA is the only environmental law statute that has been held to apply within the territory of another sovereign nation.

The extraterritorial application of two additional environmental statutes, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Clean Air Act (CAA) have unique provisions affecting their jurisdictional reach and are discussed in greater detail below. CERCLA empowers foreign claimants to assert claims against monies in the CERCLA Superfund, but only if recovery is authorized by a “treaty or executive agreement between the United States and the foreign country involved, or if the Secretary of State, in consultation with the Attorney General and other appropriate officials, certifies that such country provides a comparable remedy for United States claimants.” However, CERCLA claims from foreign litigants in another nation’s territory have proven unsuccessful. For example, in *Arc Ecology v. United States Department of the Air Force* the court expressly rejected CERCLA’s application in a foreign nation, denying a claim by Filipino litigants seeking to apply CERCLA’s protections to two former U.S. military bases in the Philippines. In doing so, the court focused on the presumption against applying U.S. laws extraterritorially. It examined CERCLA’s purpose, legislative history, and scope to determine that Congress did not provide “clear evidence” to apply CERCLA extraterritorially.

Lastly, the CAA authorizes the Environmental Protection Agency Administrator to mitigate air pollution problems in a foreign nation caused by domestic U.S. emissions only if “the Administrator determines [the country] has given the United States essentially the same rights with respect to the prevention or control of air pollution occurring in that country as is given that country by this section.” Nonetheless, it appears that the United States has been reluctant

---


239. See Envtl. Def. Fund, Inc. v. Massey, 986 F.2d 528, 528 (D.C. Cir. 1993) (holding that NEPA was applied to a federal action in Antarctica). The court took pains to highlight the unique nature of Antarctica and its status as a non-sovereign entity. Id.


242. Id.

to pursue judicial obligations concerning the extraterritorial application of this provision, and no case has applied it in such a manner. 244

IV.

THE NHPA’S FUTURE EXTRATERRITORIAL APPLICATION AND THE POTENTIAL IMPACT ON FOREIGN RELATIONS

This brief analysis of the extraterritorial application of U.S. environmental laws demonstrates that the presumptions against extraterritoriality and broader foreign relations concerns have been critical considerations for judicial rulings limiting U.S. legal reach in a sovereign territory. Yet, the NHPA has an express extraterritorial provision that must be deciphered, albeit without any clear direction from Congress. Congressional legislation applies only within the territorial jurisdiction of the United States—this is commonly referred to as the “Foley doctrine.” 245 The Foley doctrine states that the judiciary is ill-equipped to resolve such complex political and foreign policy matters and that the court should not find an extraterritorial application in the absence of a clearly expressed congressional purpose. 246 While the NHPA clearly applies abroad via the 1980 WHC implementing amendments, minimal case law outside the Dugong litigation exists regarding proper construction of statutes that have clear extraterritorial provisions.

The judiciary’s historical reluctance to weigh in on matters implicating broader foreign relations concerns is further magnified by the weighty national security risks at issue in the Dugong litigation, considering that the DoD conducts the bulk of U.S. federal agency actions overseas. Absent clear evidence of Congressional intent behind the scope of the 1980 WHC implementing amendments to the NHPA, courts should exercise discretion consistent with the Foley doctrine and Kiobel, discussed below, and not hunt or infer congressional purpose and intent in how the NHPA applies overseas where none clearly exists.

A. The NHPA: A Singular Environmental Statute in Jurisdiction and Scope

The court’s interpretation of the NHPA provisions highlights the unsettled scope and jurisdiction of the 1980 WHC amendments to the NHPA. The uncertainty has potentially significant consequences for the planning of U.S. activities overseas. Indeed, the holding in the Dugong litigation creates further unpredictability regarding the practical scope and jurisdiction of the NHPA and illustrates the curious magnifying power of the NHPA when applied overseas.

244. See Nash, supra note 14.
246. Id.
1. Jurisdiction: The NHPA Is a Singular U.S. Statute with Worldwide Jurisdiction That Can Protect the Environment

Today, the NHPA stands out as the singular U.S. statute that affords worldwide environmental protections in another sovereign. While Executive Orders state that the U.S. military must abide by environmental obligations overseas, they do not independently allow for judicially enforceable causes of action in a U.S. court. The NHPA is truly a unique environmental statute in this regard. From a jurisdictional perspective, *Dugong II* interprets the 1980 amendments to the NHPA to include the allowance for a cause of action in another nation’s sovereign territory.

2. Scope: The NHPA’s Practical Application Now Remains Uncertain with Broader National Security Implications

Beyond the uncertain jurisdiction of the NHPA is the unpredictability regarding the substantive interpretations of the statute. This unpredictability could encompass an element of another nation’s equivalent National Register to include wild animals under the NHPA’s protections. The *Dugong* rulings’ broad interpretation of the NHPA’s “equivalent of the National Register” effectively widens the United States’ obligations prior to a federal agency undertaking a project abroad.

The *Dugong* rulings expanded the extraterritorial application of the National Register beyond both the NHPA’s traditional protection of strictly physical, tangible, historic properties and the underlying purpose of the NHPA. The holding also went beyond the WHC’s protection of natural and cultural properties. And the court interpreted the NHPA language as providing protections of “properties” that neither the NHPA nor the WHC could independently provide.

Practically, the World Heritage List and U.S. National Register have not been utilized to afford protections to living organisms. Indeed, culturally significant American animals that would appear to be logical candidates for inclusion on the National Register are absent. For example, neither the iconic American bald eagle nor Colorado bison is included on the National Register. Also absent are living objects, including the California Redwoods and the

247. As discussed earlier, this Article uses the general term “environmental statute” to include the broad array of environmental legislation (e.g., the Clean Water Act, the Clean Air Act and natural resources statutes (e.g., Sikes Act)). While *Blue Water Fishermen’s Ass’n v. Nat’l Marine Fisheries Servs.*, 158 F. Supp. 2d 118 (D. Mass 2001) did uphold the extraterritorial reach of the Magnuson-Stevens Act in federal waters beyond the United States 200 nautical mile Exclusive Economic Zone (EEZ), it did not specifically hold that the Magnuson-Stevens Fishery Conservation and Management Act applied in another nation’s sovereign territory.

General Sherman tree at Sequoia National Park. In total, the eighty-year old U.S. National Register contains over 88,000 properties. None are wild organisms or living objects.249

The WHC clearly protects natural features, such as geological and physical formations and natural sites or areas of outstanding universal value250 under its “natural heritage” provision. The statute does not clearly provide for the protection of wild animals. The WHC contains a definition of “monument” that could protect the habitats of living animals, but it is less expansive than Japan’s definition under the Law of Cultural Property. Overall, there are 981 properties on the World Heritage List; the dugong is not among them and none are wild animals.251

In sum, neither the NHPA nor the WHC has clear provisions that protect wild animals. Nor do they provide protections for the broad expanse of properties envisioned by individual nations’ cultural and historic domestic laws. Moreover, the courts have not broadened the interpretation and application of the statutes.252 Yet, somehow, the sum is greater than the individual parts. The combination of the WHC implementing provision via the NHPA adds up to a result—as construed by the Dugong rulings—more expansive than what each treaty or statute individually calls for.

B. The NHPA Derives from Preservation Statutes Addressing Physical Properties and Has Gradually Evolved from Earlier American Historic Preservation Efforts

As discussed in Part I, the NHPA and its 1980 amendments cannot be examined in a vacuum; their plain language is clearly derivative of earlier preservation efforts rooted in Gettysburg, the Antiquities Act, the Historic Sites Act, and the National Trust for Historic Preservation Act. Indeed, the NHPA’s modern National Register originated from the 1935 Historic Sites Act.253

Hence, the NHPA is properly viewed as the natural, gradual outgrowth that developed organically within larger historic preservation goals. While the scope of protected properties under U.S. historical preservation law has systematically expanded from singular sites, buildings, objects, and structures to encapsulate historic districts and historical landscapes, it is still rooted in specific, physical categories without including that which may be of historical or cultural value.254

250. WHC, supra note 21, at art. 2.
253. The Historic Sites Act registry became the National Historic Landmark program. This was integrated into the NHPA’s National Registry in 1966.
254. See Sherry Hutt, Caroline Meredith Blanco, Walter E. Stern & Stan N. Harris, CULTURAL PROPERTY LAW: A PRACTITIONER’S GUIDE TO THE MANAGEMENT, PROTECTION, AND
And none of the historic preservation statutes clearly provide for the protections of living animals. Moreover, the definition of historic property was not specifically expanded in 1980 to address additional properties. Accordingly, the NHPA is best seen nested within Professor Rose’s “third phase of [American] historic preservation” with the earlier phases having clear, traceable roots in efforts by the Mount Vernon Ladies Association and the Supreme Court’s opinion in Gettysburg.

Indeed, it is impossible to decouple the NHPA’s provisions addressing the protection of historic properties from the earlier historic preservation efforts and laws. The evolutionary sequencing is unmistakable: the Antiquities Act—the first comprehensive federal historic preservation act—preserved landmarks, structures, and objects. The Historic Sites Act preserved sites, buildings, and objects with a provision for physical structures. The National Register was established under the Historic Sites Act and later fully integrated into the NHPA. The NHPA built upon these prior statutes by merely adding districts to the maturing definition of historic properties. The WHC’s implementing language was added in 1980, fourteen years after the NHPA’s passage without further defining “foreign historic properties” or “foreign undertakings” in regulation or law.

When the NHPA was drafted in 1966, and during its subsequent amendments, there was no discussion or apparent thought to its impact on foreign relations. If additional courts were to follow the approach seen in Dugong I and II, we would now be entering a new “fourth phase” of historic preservation, in Professor Rose’s lexicon, whereby the NHPA has worldwide applicability to include the protection of wild animals and all the historic preservation laws of every state party to the WHC. If so, this phase would be brought forward by the judicial branch, unlike the other phases, which were legislated and initiated through both citizen activism and the legislative process. As the U.S. military is involved with innumerable, broadly defined federal “undertakings” every year, what are the practical foreign relations and national security consequences of such an expansive view? The answer is explored in detail below.

C. The NHPA Should Be Applied in a Manner that Fully Takes into Account Prudential Foreign Relations Concerns

While the ATS lacks an express extraterritorial provision, it shares commonalities with the NHPA and other environmental statutes as a plausible statutory vehicle to litigate environmental claims in sovereign nations. While it remains unclear whether the NHPA will be used extensively to litigate
environmental claims overseas, the Supreme Court’s decision in Kiobel v. Royal Dutch Petroleum Co. reinforces important foreign policy concerns that should apply to a case brought under the NHPA.

1. The Alien Tort Statute, Kiobel, and “Weighty Concerns”

The ATS has received much attention as a possible vehicle to address environmental claims overseas. The Supreme Court recently held that the presumption against extraterritoriality applies to claims under the ATS. Once again, it focused on important foreign policy concerns similar to those raised in resolving environmental litigation discussed in Part III. The statute, passed in 1789 as part of the Judiciary Act, provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”

Its utility as a potential vehicle to resolve environmental claims was renewed following Filartiga v. Pena-Irala. Filartiga opened U.S. courts to address human rights abuses, and it seemed plausible that the ATS could similarly be used to resolve environmental harms abroad. While the ATS had been invoked only twice in the 18th century and sparingly before Filartiga, its potential ability to address overseas environmental claims has increased in the past twenty-five years. Several environmental cases have been recently brought under the ATS, seeking redress for claims originating in other nations. However, despite a flurry of lawsuits, these claims have been largely unsuccessful, and the Supreme Court narrowed the statute’s application in Sosa v. Alvarez-Machain in 2004.

In Kiobel, Nigerian nationals filed suit in federal court alleging that non-U.S. corporations committed violations of the law of nations in Nigeria. Chief Justice Roberts, writing for the majority in Kiobel, rejected the assertion that the ATS applies extraterritorially, emphasizing the “weighty concerns” and “serious foreign policy consequences” underlying the presumption against extraterritoriality. The Court reinforced this longstanding presumption, guarding against serious foreign policy consequences and highlighting the

261. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).
264. See, e.g., Beanal, 197 F.3d at 161.
265. Id.
267. Kiobel, 133 S. Ct. at 1662.
268. Id. at 1668–69.
importance of judicial caution in such arenas. Applying U.S. law “does not typically impose the sovereign will of the United States onto conduct occurring within the territorial jurisdiction of another sovereign.”

Kiobel relied heavily upon EEOC v. Arabian Oil Co., a case holding that Title VII of the Civil Rights Act does not apply extraterritorially to regulate the employment practices of United States firms that employ American citizens abroad. The Court explained in Kiobel, “For us to run interference in... a delicate field of international relations there must be present the affirmative intention of Congress clearly expressed.”

However, unlike the ATS, the NHPA does have a clear provision that applies extraterritorially. Litigants may assert that the existence of an extraterritorial provision within the NHPA should obviate the need to address the weighty foreign policy concerns enunciated in Kiobel and similar cases limiting the reach of U.S. statutes abroad. Yet, the same prudential foreign policy concerns exist in determining how to properly interpret and apply the NHPA in another sovereign nation. Moreover, the NHPA lacks clear congressional “affirmative intention” in how to interpret the extraterritorial provision abroad. An expansive view of its application in another sovereign without further Congressional instruction would ignore such concerns.

2. Comity and Act of State

Kiobel’s concurring opinion, written by Justice Breyer, re-emphasized the importance of judicial comity when determining a U.S. statute’s impact on foreign relations. Comity is a principle of legal reciprocity that ensures courtesies and respect among political entities, such as nations, states, or courts of different jurisdictions. Justice Breyer was wary of adjudicating a case originating in Nigeria in light of the executive branch’s view of the case’s potential impact on foreign policy. He stated, “Adjudicating any such claim...
must, in my view, also be consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its own laws and its enforcement.” 277 Breyer desired to minimize international friction in the Court’s ruling, specifically restating his opinion in a prior ATS decision, *Sosa v. Alvarez-Machain*, 278 to find jurisdiction outside the United States only when “distinct American interests are at issue” with consideration to the “limiting principles such as exhaustion, *forum non conveniens*, and comity.” 279

Clearly, the NHPA’s extraterritorial provision applies within another sovereign. 280 Nevertheless, the important foreign relations concerns should not be dismissed by a U.S. court in considering the statute’s applicability and scope, particularly when another nation lacks a reciprocal judicial remedy. Accordingly, in light of the weighty foreign policy concerns addressed in *Kiobel*, future judicial applications of the NHPA’s extraterritorial provision should be limited and nuanced in scope, and courts should exercise appropriate caution when taking into account any decision of another sovereign. 281

The “act of state” doctrine prevents U.S. courts from questioning the validity of a foreign country’s acts within its borders, reflecting a strong sentiment that the judicial judgment on the validity of foreign acts may hinder the conduct of foreign affairs. 282 Diplomacy often involves complex, multifaceted negotiations between two sovereigns. This is particularly true with military operations and undertakings overseas in light of the political importance of such moves; seldom is such a decision made unilaterally by a nation. Moving the Marines from Futenma involved intense and lengthy negotiations between the United States and Japan. Japan made the ultimate decision, which was informed by U.S. “operational parameters.” 283 The consequences of *Dugong II* suggest that an act of another sovereign can be effectively invalidated if the United States is intimately involved in the decision-making process. *Kiobel* reinforces the importance of judicial restraint when such decisions impact foreign relations. 284

---

277. *Id.* at 1671 (Breyer, J., concurring) (emphasis added).


281. *See Kiobel*, 133 S. Ct. at 1661.

282. Under the modern interpretation of the act of state doctrine, it may be invoked only when there is an “official act of a foreign sovereign performed within its own territory,” and “the relief sought or the defense interposed [in the action would require] a court in the United States to declare invalid the [foreign sovereign’s] official act.” W. S. Kirkpatrick & Co., Inc. v. Envtl. Tectonics Corp., Int’l, 493 U.S. 400, 405 (1990).


In civil procedure, the doctrine of *forum non conveniens* (Latin for “inconvenient court”) states that a forum may be divested of jurisdiction if the action should be instituted in another forum where the action could originally have been brought. In tort law, American courts are perceived to be more generous to plaintiffs than the law in most foreign jurisdictions, making U.S. courts a preferred forum for foreign litigants in cases against U.S. companies. The common law doctrine of *forum non conveniens* ensures that the court is properly balancing convenience against the choice of forum. The court must first determine whether an alternative forum exists. In the *Dugong* decisions, *forum non conveniens* was not clearly implicated as Japan lacked a clear judicial forum to hear the litigants’ claims. Paradoxically, because Japanese law did not provide a legal remedy, the doctrine of *forum non conveniens* could not be invoked. Nevertheless, future judicial inquiries into the extraterritorial application of the NHPA should carefully examine other, competing forums for redress to ensure the U.S. court is the proper forum to hear such a claim.

The 1980 NHPA amendments as expressed in the *Dugong* decisions may have broader national security implications than the NHPA’s intended purpose. As discussed earlier, Japan’s domestic environmental laws are

---

287. The statute itself specifies the NHPA’s purpose as follows: Congress finds and declares that—

1. the spirit and direction of the Nation are founded upon and reflected in its historic heritage;
2. the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people;
3. historic properties significant to the Nation’s heritage are being lost or substantially altered, often inadvertently, with increasing frequency;
4. the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans;
5. in the face of ever-increasing extensions of urban centers, highways, and residential, commercial, and industrial developments, the present governmental and nongovernmental historic preservation programs and activities are inadequate to insure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation;
6. the increased knowledge of our historic resources, the establishment of better means of identifying and administering them, and the encouragement of their preservation will improve the planning and execution of Federal and federally assisted projects and will assist economic growth and development; and
7. although the major burdens of historic preservation have been borne and major efforts initiated by private agencies and individuals, and both should continue to play a vital role, it is nevertheless necessary and appropriate for the Federal Government to accelerate its historic preservation programs and activities, to give maximum encouragement to agencies and individuals undertaking preservation by
inadequate to protect the dugong since Japanese administrative rules do not allow for a citizen suit that would protect the dugong. Thus, the Japanese litigants were forced to join the U.S. environmental groups pursuant to U.S. law.288 Further, Japanese law does not allow for any judicially enforceable redress from its political leaders’ decision, and the Japanese plaintiffs lacked an avenue to bring a lawsuit.289 In the Dugong rulings, is the judiciary undermining Japan’s law and wishes, and the executive branch’s foreign affairs power in ruling in this area?290

Lastly, Japan and the United States signed a bilateral Status of Forces Agreement (SOFA) in 1960 that governs United States-Japanese military relations.291 The SOFA regulates the sending state’s (United States) military’s actions in the host nation (Japan).292 But outside the SOFA, the United States has not signed an additional international agreement outside the WHC or the SOFA to specifically abide by Japan’s Law on Cultural Property. And this has not been integrated into the existing SOFA framework.

D. The NHPA’s Practical Foreign Relations and National Security Consequences for Future Actions Overseas

Today, the NHPA stands alone as the only statute protecting historic properties, natural or cultural resources, or the human environment that has been held to apply in another sovereign’s territory. The outer bounds to what the NHPA can protect overseas and where it can protect it are unclear after the Dugong rulings. If U.S. courts determine that another nation’s historic or cultural property laws are the “equivalent of” the U.S. National Register, anything that the foreign nation deems to be of importance would be governed by the NHPA’s protections, even within the foreign nation’s sovereign territory.

1. The U.S. Military’s Pacific Re-Balancing

The U.S. DoD is the single largest employer in the world with 3.3 million people, operating hundreds of federal facilities within the United States and

---

288. Takahashi, supra note 6, at 197.
289. Id. at 190.
290. The present-day fallout from the failure to find a replacement location has incensed many local Okinawans. Okinawans have grown increasingly concerned about the future of the Marine base in their home city, with some Okinawans threatening secession due, in part, to the intransigence surrounding this issue. Martin Fackler, In Okinawa, Talk of Break from Japan Turns Serious, N.Y. TIMES, July 6, 2013, at A6.
292. Id.
across the world with U.S. military personnel in 150 countries. Military base openings and closures are fluid in nature, giving rise to numerous federal undertakings within the meaning of the NHPA, which are also reviewable agency actions within the meaning of the APA and therefore challengeable in federal court. Applying the court’s logic in the *Dugong II* ruling, a thorough understanding of each nation’s equivalent of the National Register and accompanying historic and cultural preservation laws is essential before any federal undertaking occurs overseas.

The U.S. National Register focuses on the protection of five types of “historic properties.” Yet, other nations’ cultural and historic preservation laws often include protections well beyond what was envisioned in the U.S. National Register, including archeological sites, landscapes, animals, plants, people, documents, and social institutions. Rather than applying the NHPA strictly in accordance with the U.S. law, the NHPA may now protect “properties” as they are independently defined by each nation’s historic preservation statute.

This is significant. Many nations’ National Registers go well beyond the five categories of property that are included in the U.S. National Register. Once it can be determined that an individual foreign nation’s Register is equivalent to the U.S. National Register, the legal key can now effectively “unlock the door” to the full menu of protections afforded by the foreign nation’s domestic statute. Once this door is opened, the NHPA can protect properties that it has not traditionally protected domestically.

This is particularly important as the United States military shifts forces to the Pacific theater in light of continuing national security threats from North Korea and a broader movement of forces from Afghanistan and the Middle East to Australia, among others. Such shifts will inevitably trigger requirements as innumerable federal undertakings within the meaning of the NHPA will be sure to follow. As the *Dugong* rulings are the only examples addressing the contours of what constitutes foreign undertaking under the NHPA, considerable uncertainty remains.

---


294. *See, e.g.,* Monteith, *supra* note 97, at 1034–39 (discussing the requisite laws and national registers in Egypt and France while noting that Canada, Denmark, and Australia have more expansive national registers).


296. Undertaking means “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.” 36 C.F.R. § 800.16(y) (2013). As discussed in Part I, the NHPA lacks specific guidance for a foreign undertaking. *Supra*, Part I.

297. *See, e.g.,* Dugong I, No. C 03-4350 MHP, 2005 U.S. Dist. LEXIS 3123, at *41 (N.D. Cal. Mar. 2, 2005). This raises several additional questions: How should the definition of undertaking be applied in another country? What is the “equivalent of the National Register” within these 150
At the time of this writing, the U.S. military is operating around the world with plans to withdraw from Afghanistan, establish a more permanent presence in Australia, and maintain a strong presence in South Korea.\textsuperscript{298} With a focus on the Pacific theater, the DoD will undertake many federal actions that could be litigated in the Ninth Circuit or California’s federal district courts (perhaps even the same court that ruled on the \textit{Dugong} litigation). Some of these nations have expansive National Registers that go well beyond the NHPA’s protections.\textsuperscript{299} The discussion below provides a snapshot of three nations’ historic and cultural preservation laws, demonstrating the spectrum of properties that \textit{could} be protected by the NHPA.

\section*{2. Practical Examples: South Korea, Australia, and Afghanistan}

The U.S. military has had a strong presence in South Korea since the conclusion of the Korean War. Today, over 30,000 U.S. military personnel in the country work at over forty active military sites.\textsuperscript{300} The military threat is real; North Korea has recently conducted three nuclear tests and routinely threatens South Korea and the United States with a preemptive attack.\textsuperscript{301} The Korean Cultural Heritage Protection Act is similar to the Japanese Law on Cultural Property in that it protects a broad category of cultural heritage, including tangible and intangible works, folklore resources, historic sites, plants, and animals.\textsuperscript{302} While Korean law shares similar goals with the NHPA, properties and works it protects are considerably larger than what the NHPA affords. For example, the Korean law protects plants, animals, and intangible cultural works including dance and music.\textsuperscript{303}

Consider a fact pattern similar to that in the \textit{Dugong} litigation, whereby the Korean government works closely with the U.S. government to transfer or relocate a U.S. base in Korea due to an emerging national security threat with North Korea. Perhaps not surprisingly, this involves intense diplomatic negotiations between the two countries. The United States does not conduct an NHPA federal undertaking analysis to encompass impacts on all Korean historic countries? What do these laws protect?


\textsuperscript{303} Id.
cultural properties, as this is not a specific legal requirement of the United States-Korean Mutual Defense Agreement and Revised Agreements. The United States does, however, otherwise fully comply with the Korean Cultural Protection Act. An outside group challenges the lack of impact analysis, pursuant to the NHPA and the APA. Despite challenges from the Department of Justice, a federal court hears the case in light of the Dugong ruling, delaying the relocation for several years and impacting United States-Korea foreign relations. Meanwhile, the threat from North Korea continues.

Critics may assert that the United States should simply take into account its actions with respect to the broadly defined Korean cultural heritage well prior to a federal undertaking. But there is no evidence that that is how Congress intended the NHPA to apply. To borrow Justice Breyer’s language in Kiobel, there is no “affirmative intention” concerning how this provision should be applied in Japan. Nor are there implementing regulations or guidance to this effect. The ATS and other environmental statutes have not been held to apply in sovereign territories, and Kiobel reiterated the importance of deferring such decisions to the political branches in the absence of clear direction.304 While the NHPA does implement the WHC treaty obligations, protecting each and every property within each nation’s historic preservation law is not contemplated by the WHC; only World Heritage listed properties are afforded concrete protections.

In the above example, not only are similar foreign policy “weighty concerns” present as those articulated in Kiobel, there are also additional national security problems that the NHPA could feasibly impact. In Korea, the United States has had forces in place for sixty years following the cessation of hostilities after the Korean War in 1953. Missile tests and the threat of military attack are a reality on the Korean Peninsula.

An additional example: the United States, as part of its broader “Pacific Pivot” strategy, is spending a significant amount of money and sending U.S. Marines to Australia.305 Inevitably, there will be significant U.S.-funded infrastructure changes that would constitute a federal undertaking, triggering the NHPA Section 106 process. And Australia’s “Register of the National Estate” covers both cultural and natural resources to include wildlife, recognizing that “cultural values are linked closely to plant and animal populations.”306 After the Dugong litigation, any undertaking must be careful to take into account its impact on Australia’s wildlife, which the WHC does not protect.

306. Borstrom, supra note 299, at 162–63 (stating that other countries, including Denmark and Canada, have National Registers that provide protection for animals).
Lastly, consider the potential and uncertain impact of the NHPA in present-day Afghanistan where the U.S. military is aggressively drawing down. Afghanistan does have a “Law on the Protection of Cultural and Historical Properties” although it is not so broadly defined as to include wild animals. 307 It does, however, provide for the protection of historical and cultural properties that are broadly defined to include any moveable or immovable product of mankind that has an outstanding historical, scientific, artistic, and cultural value. 308 Within the law, there is a procedure whereby the Afghanistan Institute of Archaeology registers protected properties as well as penalties for failing to comply with the law. And similar to Japanese law, Afghan law lacks procedural undertaking mechanisms analogous to the NHPA or the NEPA, whereby a governmental agency—from the United States or Afghanistan—is required to take into account its actions on the protected properties. And there is not a judicial redress provision within the Afghan law to challenge an agency action. Yet, after the Dugong litigation, the United States must be cognizant of actions during the drawdown that may trigger an undertaking within the meaning of the NHPA and affect Afghanistan cultural and historical property.

Korea, Australia, and Afghanistan are but three practical examples of how different nations that broadly provide domestic protections for historic and cultural properties could affect the way in which the NHPA applies extraterritorially. While it is beyond the scope of this Article to address each nation’s historic and cultural property laws, a proper understanding of each and every one may be required whenever a federal undertaking could feasibly take place.

V. CONGRESS SHOULD ACT TO CLARIFY THE NHPA’S JURISDICTION AND SCOPE

The Dugong rulings are the only court opinions that directly address the scope and jurisdiction of the 1980 WHC amendments. In light of the increased uncertainty and potential foreign policy and national security concerns as briefly outlined above, Congress should take proactive steps to clarify the Act’s scope and jurisdiction as applied overseas. Such action is particularly important as the DoD has numerous future undertakings throughout the world and a plausible venue will be the same Northern District of California federal district court that decided both Dugong I and II.

1. Any product of mankind, moveable or immovable, which has an outstanding historical, scientific, artistic and cultural value and is at least one hundred years old.
2. The objects which are less than one hundred years old, but which because of their scientific, artistic and cultural value, should be recognized as worthy of being protected.
308. Id.
In light of the weighty foreign policy concerns articulated in Kiobel and the lack of explicit Congressional intent, the 1980 NHPA amendments should be clarified. A Congressional amendment to the NHPA is preferable, although new federal regulations that refine the definition and applicability of “undertaking” and add a new definition of “foreign historic properties” would also suffice. This would serve to re-anchor the NHPA to its original purpose and intent within the broader U.S. historic preservation law tradition. Congress can and should do so while fully complying with the WHC’s treaty obligations. If it desires to protect living animals such as the dugong in another sovereign’s territory, it should do so via statutory clarification in the ESA\(^{309}\) or the MMPA\(^{310}\) the two statutes that unquestionably provide for the protection of living animals domestically. Doing so would successfully mirror and align the ESA’s and the MMPA’s extraterritorial scope and application with its domestic scope and application.

A. The Definition of “Undertaking” Should Be Clarified to Properly Distinguish Domestic from Foreign Undertakings

Much of the confusion stems from the definition of “historic properties” and “undertaking” when applied to federal activities abroad. As a baseline, the statutory and regulatory definitions for an undertaking do not neatly correspond and there is no definition of an “undertaking” outside the United States that would serve to clarify the scope of the 1980 WHC amendments.

“Undertaking” is defined within the NHPA as:

[A] project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including —

A. those carried out by or on behalf of the agency;
B. those carried out with Federal financial assistance;
C. those requiring a Federal permit license, or approval; and
D. those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.\(^{311}\)

Within federal regulations, undertaking is defined as: “a project, activity, or program, funded in whole or in part under the direct or indirect jurisdiction of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.”\(^{312}\)

The NHPA lists four examples of projects, activities, or programs that may qualify as an undertaking while regulations expand the list to include those “requiring a [f]ederal permit, license, or approval.”\(^{313}\) Textually, it appears that under both the statute and accompanying regulations, some funding “in whole or


\(^{312}\) 36 C.F.R. § 800.16(y) (2013).

\(^{313}\) Id.
in part314 is necessary to qualify as an undertaking. However, the federal regulations appear to raise the bar on what may qualify as an undertaking, limiting the definition to funded projects, activities, or programs requiring a “permit, license, or approval” under the jurisdiction of a federal agency.

This definitional misalignment has already been a source of domestic litigation.315 The problem is only exacerbated when applied overseas as the NHPA lacks a special provision or definition that applies to foreign undertakings. For example, what if a foreign nation has the ultimate approval authority of a federal project and administers the permits and licensing? Would this impact the “undertaking” analysis? A clear understanding of what is an “undertaking” is crucial to answer any questions regarding the applicability of the WHC provision of the NHPA.

Today, one plausible meaning of the term could mean any project requiring any federal financial assistance. As overseas military and federal activities are by their nature continually supported by federal assistance, this definition is ill suited to apply to activities overseas. In light of foreign relations concerns, there should be an additional definition of an “undertaking outside the United States.” This new definition would serve an important purpose in light of the weighty foreign relations concerns discussed earlier. It should address the unique nature of overseas activities, specifically delineating what role a host nation’s approval has in determining whether or not an undertaking has occurred within the meaning of the NHPA.

B. Congress Should Clarify the Terms “Foreign Historic Property,” “Equivalent of the National Register,” and “Eligible For”

There is virtually no legislative history surrounding the NHPA’s critical 1980 WHC implementing provision. Congress should take steps to amend the NHPA to clearly define “foreign historic property” and “equivalent of the National Register” to ensure that the legislation is properly implemented and understood. A new provision could be incorporated within the NHPA statutory scheme at 16 U.S.C. § 470a-2(1) to clarify the scope of the statute. Possible amended language could read:

Section 402 does not expand the definition of “property” or “historic property” as set forth in both the NHPA and World Heritage Convention. As such, when applying another nation’s domestic law, the definition of “property” should be interpreted to apply to “historic property” as set forth in the NHPA and “properties” as set forth in Articles 1 and 2 of the World Heritage Convention. This provision does not expand additional protections to properties not afforded protection by the World Heritage Convention or the NHPA.

314. Id.
315. See Nat’l Mining Ass’n v. Fowler, 324 F.3d 752 (D.C. Cir. 2003) (ruling that Congress intended to impose the Section 106 process on state-agency generated undertakings made pursuant to delegated federal authority).
This would have the practical effect of securing the NHPA to its rightful place nested within the larger historic preservation order. Further, establishing statutory bright lines will greatly facilitate future overseas planning by all U.S. agencies while fully respecting the prudential sovereignty considerations of other nations.

Alternatively, if Congress desires to specifically protect a broad array of properties, including wild animals within another sovereign’s territory, it should do so by refining the definition of “high seas” within the ESA and the MMPA or “waters under the jurisdiction of the United States” within the MMPA. Clearly, both the ESA and the MMPA could protect wild animals domestically. And the FWS already lists the dugong as an endangered species. But the MMPA’s and the ESA’s jurisdiction falls short of that provided by the NHPA.316 As such, there is a clear disconnect between the domestic and extraterritorial application of the NHPA, the ESA, and the MMPA as currently applied. Any protection of a wild animal overseas should be aligned with the domestic statute offering similar protections. And this protection of wild animals most properly resides within the ESA or the MMPA, not the NHPA.317

To clarify the jurisdictional scope and reach of the NHPA, Congress could follow what it did with the ESA: amend the Act to prohibit the designation of a critical habitat on any lands owned or controlled by the DoD.318 The DoD is still required to prevent the extinction and harm to endangered species, but there are no specific mandates under the ESA that affect DoD activities in foreign nations.319 In regards to the NHPA, a similar provision could be inserted to ensure that the DoD is required to meet the WHC’s obligations.

“Equivalent to” is another term not addressed within the NHPA or federal regulations—yet this term is also critical. If future interpretations follow the Dugong rulings, “equivalent to” could be read as a magnification of the scope of the NHPA and the WHC when applied abroad, thus protecting overseas properties that the NHPA has not protected domestically. In light of the foreign relations and national security concerns discussed above, Congress or the Interior Department should address the precise limits and applicability of the “equivalent to” phrase.

Section 106 requires federal agencies to take into account the effect of the undertaking on any property that is included in or is eligible for inclusion in the

317.  Unfortunately, this is unlikely to occur. The ESA and the MMPA mark their fortieth anniversary next year, and their jurisdictional reach has not yet been expanded to apply within another nation’s territory. The ESA currently protects the dugong within the “high seas” and the “territorial seas” of the United States, but the definitions of these key jurisdictional terms have not yet been expanded to another nation’s territory.
319.  Id. § 1533(3)(B)(iii); Schoenbaum, supra note 142, at 465.
Clarifying this language would have the additional benefit of ensuring that the overseas application of Section 402 does not exceedingly impact the NHPA’s domestic application. There are far more places that have been considered eligible for the purposes of Section 106 review than there are places listed on the Register. When reconciling Section 106 with Section 402, some commentators have asserted that a wild animal residing in the United States could be a contributing element to a habitat’s cultural significance and would “likely be protected by virtue of the National Register eligibility of the habitat.” The extraterritorial application of the NHPA may influence its domestic application, but the NHPA’s origins are as a domestic historic preservation statute. Congress should clarify exactly what properties are “eligible for” inclusion domestically, which should define the overarching scope of the NHPA, at home and abroad.

Lastly, the federal regulations implementing the NHPA provide for specified National Register criteria for evaluation that are difficult to translate overseas, including the following: “The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association . . .” This criterion is designed specifically to modify the five tangible resources (districts, sites, buildings, structures, and objects) that may not exist or have minimal correlation to another nation’s National Register. These guidelines effectively set forth two prongs—significance and integrity—that serve as the baseline for evaluating the importance of the five potential properties. Unfortunately, we are only left with dictionary definitions of these two terms, as “significance” and “integrity” are not defined in any relevant statute or regulation. The problem is exacerbated when attempting to translate the U.S. criteria in a foreign nation. Moreover the process is inherently subjective: what has enormous integrity and significance in the United States may have very little in another nation. And the inquiry is culturally and contextually dependent. Congress should act to address this incongruity and provide clear direction.

C. The NHPA Should Have a National Security Exemption Provision, Similar to Existing Language in U.S. Environmental Statutes

While many environmental statutes have a national security exemption embedded within the statutory scheme, the NHPA does not. Federal

322. Id. ¶ 10.
323. 36 C.F.R. § 60.4 (2013).
324. For example, exemptions for activities in the “paramount interest of the United States,” including national security, are provided in the Clean Air Act (42 U.S.C. § 7418(b)), the Clean Water Act (33 U.S.C. §1323(a)), the Noise Control Act (42 U.S.C. § 4903), the Solid Waste Act.
regulations implementing the NHPA allow the Secretary of the Interior to promulgate regulations “in the event of a major natural disaster or an imminent threat to the national security.”

Yet, these responsibilities are limited to waiving the Section 110 requirements and do not affect the Section 106 federal undertaking process. NHPA regulations also allow for federal agency officials to develop procedures “for taking historic properties into account during operations which respond to a disaster or emergency . . . or which respond to other immediate threats to life or property.” But these procedures are designed for domestic emergencies (e.g. natural disasters) without any clear applicability to the NHPA’s overseas application. The President, too, lacks the authority to declare an emergency in another sovereign nation.

In light of the uncertainty surrounding the NHPA’s future application overseas, Congress should follow the model of major environmental statutes, such as the Clean Water Act and Clean Air Act, and provide an express national security exemption provision. The ESA authorizes a special committee to grant an exemption in the interest of national security. And the Clean Water Act authorizes the President to “exempt any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such requirement if he determines it to be in the paramount interest of the United States to do so.” Yet, the Clean Water Act and Clean Air Act have been largely limited in their application domestically, with constrained foreign relations and national security concerns. The NHPA has the potential for a worldwide jurisdiction that applies to federal undertakings in sovereign nations. As the NHPA has already impacted foreign relations, a built-in national security exemption provision would be a prudent step to mitigate any potential national security impacts affecting federal undertakings overseas.

Critics may assert that there are already too many built-in exemptions to environmental and natural resource laws and Congress should not restrict

---

325. 36 C.F.R. § 78.1.
326. Id. The full text reads:
Section 110 of the National Historic Preservation Act of 1966, as amended (“Act”), sets forth certain responsibilities of Federal agencies in carrying out the purposes of the National Historic Preservation Act of 1966. Sub section 110(j) authorizes the Secretary of the Interior to promulgate regulations under which the requirements in section 110 may be waived in whole or in part in the event of a major natural disaster or an imminent threat to the national security. Waiver of responsibilities under section 110 does not affect an agency’s section 106 responsibilities for taking into account the effects of emergency activities on properties included in or eligible for the National Register of Historic Places and for affording the Advisory Council on Historic Preservation an opportunity to comment on such activities.

327. 36 C.F.R. § 800.12(a).
328. 33 U.S.C. § 1323(a) (2012) (allowing for an exemption when it is in the “paramount interest” of the United States).
compliance with them. 331 Yet, the exemption process should be at the highest levels of government and be time limited. Existing exemptions within environmental statutes are not often granted. 332 It merely provides a clear process and executive branch flexibility. One scholar in analyzing national security exemptions, has found that the exemption under the RCRA has been granted only once and there has never been an exemption under the CERCLA. 333 Indeed, simply because an exemption is available, it will not necessarily be widely granted or sought. It does, however, provide for flexibility by communicating Congress’s intent, allowing the executive branch to weigh in, and creating a procedure that may alleviate the need for judicial intervention. The NHPA should mirror its sister environmental statutes and have this built-in flexibility.

CONCLUSION

In 2010, Prime Minister Hotoyama resigned from his position as Prime Minister of Japan after serving less than a year. Not surprisingly, the question of “What to do with the Marines at Futenma?” plagued his administration from the onset. This issue has only exacerbated tensions between the United States and Japan that continue to this day, and there is no clear resolution in sight. In addition, as of this writing, a group of vocal Okinawans has urged secession from mainland Japan due, in part, to the intransigence over the Marine base at Futenma. 334

The NHPA’s jurisdictional reach and substantive application have transformed from its earlier beginnings based in the larger American historic preservation movement. With the Dugong rulings, the NHPA can no longer be safely classified as a historic preservation statute that protects physical properties within the United States. While it is unclear what this court’s ruling will mean for future military operations and its impact on foreign affairs, the statute is now effectively adrift and no longer anchored to its roots in American historic preservation law. As the United States undertakes activities in Korea, Japan, Australia, and elsewhere, it must be keenly aware of the NHPA’s extraterritorial application and potential practical application.

In effect, the court’s interpretation of the NHPA has amplified the power of this statute well beyond its stated purpose and intent, creating uncertainty about its future application overseas. Congress should take steps to clarify the NHPA

332. See David Bearden, CONG. RESEARCH SERV. (CRS), RS22149, Exemptions From Environmental Law for the Department of Defense: Background and Issues For Congress (updated May 15, 2007).
application and re-anchor the statute. Absent Congressional intervention, the NHPA must be viewed as not merely a historic preservation statute but one that also impacts foreign relations.
Review of *Food Crises and the WTO* by Baris Karapinar and Christian Häberli (eds.)

Kathryn Bowen*

**INTRODUCTION**

The 2007–2008 food crisis was characterized by a sharp increase in world prices for major agricultural commodities, including wheat, rice, maize, and oilseed crops.1 Prices for staple commodities reached their highest point in nearly three decades, leading to riots and political protests in more than thirty countries.2 Increases in food prices up to the first quarter of 2008 pushed an additional 100 million people into poverty and eliminated almost seven years of progress in long-term poverty reduction.3

Compiled in 2010, *Food Crises and the WTO* provides a comprehensive account of the 2008 crisis, including an analysis of the event’s causes, consequences, and potential responses. The work focuses specifically on the relationship between food price shocks and the multilateral trading system in the context of economic development, trade regulation, technology policy, and environmental sustainability. Edited by Baris Karapinar and Christian Häberli, *Food Crises* is divided into two thematic sections. The first section is composed of five chapters concerning the structural and cyclical causes of the 2008 crisis as well as its impact on food security and poverty. Section one also provides a comparative analysis of the 2008 spike and those occurring in years past. The second section addresses the role of international trade and the World Trade Organization (WTO) in regulating and responding to the 2008 crisis, the empirical impact of the multilateral trading system on agricultural markets, and the trading system’s potential for improving food access. Section two also offers an initial assessment of the Doha Development Agenda (DDA) in light of the results of the WTO Ministerial Conference, covers applicable WTO doctrine

* University of California, Berkeley, School of Law, JD Candidate, 2016. The author worked as a consultant at the United Nations Food and Agriculture Organization from 2011 to 2013.

1. For the purposes of this review, the 2007–2008 food crisis will be referred to as the “2008 crisis.”


and case law, and provides an account of relevant agricultural legislation in the European Union and the United States.

In their conclusion, Karapinar and Häberli build on the distinct arguments of each contributing author and offer a wide range of policy recommendations to address price volatility and food insecurity. The editors’ “global policy agenda” provides areas ripe for reform from a practitioner perspective along with a useful starting point for the research agenda in trade. The editors could nonetheless increase the utility of their recommendations by specifying methods for implementation and identifying “low-hanging fruit,” including, for example, the establishment of ex ante safety-net programs. In addition, clearer linkages between the causes of and solutions to food scarcity could better expose the mutually constitutive nature of international trade and food security. The following summary of Food Crises therefore adopts a thematic approach to the contributing authors’ explanations of the general causes, consequences, and possible responses to the 2008 crisis.

I. SUMMARY

A. Causes of the 2008 Crisis

1. Classifying the Causes

In general, the contributing authors classify the demand- and supply-side pressures precipitating the 2008 crisis into “seasonal and cyclical,” “speculative,” and “structural” trends.4 As elaborated by Wayne Jones, Armelle Elasri, and Susan Prowse, “seasonal and cyclical” factors contributing to the 2008 crisis included adverse weather conditions, a declining U.S. dollar, and low agricultural stocks. “Speculative” factors, including excessive pricing bubbles and raised expectations, resulted in hoarding, uncertainty, and instability in agricultural markets. “Structural” factors, like climate change, energy policies, rising incomes, and dietary changes, have gradually increased food demand, lowered supply, and elevated commodity prices over time.5 In chapter six, Josef Schmidhuber and Ira Matuschke attribute the 2008 price spike primarily to acute seasonal, cyclical, and speculative factors, and the longer-term upward shift in agriculture prices to more gradual, structural factors.6

5. Id.
2. Causes in Comparative Perspective

In chapter three, Eugenio Díaz-Bonilla places the 2008 crisis and its precipitating factors in comparative perspective, examining specifically the 2008 crisis relative to the 1973–1974 price spike. He notes that agricultural price spikes are associated with strong growth, expansionary monetary policies, and a weak dollar. These macroeconomic features have empirically led agricultural demand to outstrip supply and reduced agricultural stocks to “crisis” levels when coupled with adverse weather conditions. He finds conversely that slow growth, tight monetary policies, and an appreciating dollar have led to rapid declines in agricultural prices by abruptly increasing supply or deflating demand.

Díaz-Bonilla explains that these macroeconomic trends produced both the 1973–1974 and the 2008 shocks. In 2007, adverse weather conditions, an abrupt increase in demand, and low publicly available stocks compounded the negative price effects of expansionary monetary policies and a depreciating U.S. dollar. The author cites several developments in the mid-1990s and early 2000s that contributed to increased liquidity and a global “tilt” towards expansion, including a more active Chinese labor market, the emergence of parallel banking and financial structures, and a downward pressure on developing countries’ interest rates. Expansionary policies and a devaluation of the U.S. dollar led to the upward pressure on commodity prices that precipitated the crisis, and speculative activity compounded volatility as investors began to turn to commodities as “inflation hedges.” Similarly, Jones and Elasri argue that a weak U.S. dollar favored an “artificial” rise in world wheat prices over 2007–2008 and that structural factors, including low stocks in grains and oils, urbanization, economic growth, and an expanding population, were also at play in 1970s crisis.

3. What Is Different?

An unprecedented increase in the demand for grain and oilseed for use as biofuels may represent the most significant factor distinguishing the food price spike of 2008 from past crises. Jones and Elasri largely attribute the recent upward shift in food prices to this fast-growing demand. In chapter six,
Schmidhuber and Matuschke proffer that the rapid expansion of biofuel production may subsequently upend the general principle that demand-related pressures are largely unrelated to price shocks. Schmidhuber and Matuschke describe this increase in demand as “sudden and massive” and as marking a “clear departure” from the patterns of gradual growth in demand for food and feed that have historically been driven by structural population and income trends. For example, approximately twelve percent of all maize produced was used to manufacture ethanol in 2007. In chapter four, Akinwumi Adesina attributes increased demand and its attendant price effects in Africa to generous biofuel support policies in the United States and EU.

Schmidhuber and Matuschke distinguish the 2008 shock in terms of the prominent role that commodity speculation played in precipitating the crisis. They explain that speculators and large institutional investors became increasingly interested in agricultural commodities on futures markets as global equity and property markets became less attractive. Between 2005 and 2008, non-commercial traders almost doubled their share in open interests in corn, wheat, and soybean futures markets. Diaz-Bonilla similarly argues in chapter three that traders aggravated market volatility in 2007 when they turned to agricultural commodities as inflation hedges in the absence of profitable alternative investments.

Finally, Schmidhuber and Matuschke suggest that the dramatic increase in oil prices beginning in 2003 contributed significantly to the food price shock. The abrupt increase in oil prices impacted agriculture in two ways. First, average input prices for agriculture doubled as prices of some fertilizers increased by 160% relative to prices in the first quarter of 2007. Second, the oil price shock reverberated through the transportation sector, massively increasing average freight rates and effectively “re-regionalizing” agricultural markets. The fragmentation of transportation disabled the safety valve effect of international trade on agricultural prices, preventing local surpluses from compensating local deficits.

Analyzing the causes of the 2008 crisis provides important insights into future crises. First, economists and policymakers seem to agree on the dominant cyclical and structural factors that contributed to the 2008 price spike. Jones and

15. Schmidhuber & Matuschke, supra note 6, at 142.
16. Id.
17. Id. at 143 (citing a 2008 study by the Food and Agriculture Organization of the United Nations).
19. Schmidhuber & Matuschke, supra note 6, at 144.
20. Id.
22. Schmidhuber & Matuschke, supra note 6, at 141.
23. Id.
Elasri argue that the leading factors of the crisis, including expansionary monetary policies, the decline of the dollar, low stocks, and adverse weather conditions, did not appear to come as a surprise to food security experts, who seemed to have anticipated an upward shift in commodity prices given longer-term structural changes in dietary preferences and population trends. Conversely, more recent developments, including increased demand for biofuels, market speculation, and oil price volatility, seem to have taken policymakers in developed and developing countries by surprise. Supply shortages sparked abrupt and largely counterproductive policy responses, including export restrictions and price controls on commodities, that further aggravated market volatility. Novel contributing causes, and their effects, may therefore change the context of future food crises. The consequences of the 2008 crisis should further illuminate the changing landscape of food security.

B. Short-Term Consequences of the 2008 Crisis

The 2008 crisis saw huge increases in the number of hungry persons. Price increases “profoundly affected” the “bottom billion,” pushing an additional seventy-five million persons below the hunger threshold. Jones and Elasri explain that the food price crisis disproportionately affected developing countries, which accounted for approximately three-quarters of the rise in the global Consumer Price Index. The urban poor in developing countries were the hardest hit due to a lack of land access and an absence in food self-sufficiency. In addition, the crisis further reduced the likelihood that the Millennium Development Goals will be achieved by 2015.

Using an impressive empirical analysis in chapter two, Will Martin and Maros Ivanic demonstrate that the 2008 crisis will bear negatively on international efforts to reduce poverty. The authors use price increases for seven staple commodities in nine low-income countries to study the effects of the 2008 crisis on the poor, an inquiry that incorporates information on household consumption patterns and the production of major agricultural commodities. Martin and Ivanic connect poor households’ high expenditure on staple foods with the massive increase in poverty caused by the crisis. Their finding that small producers are often net purchasers of staple commodities contravenes the

27. Id.
29. Martin & Ivanic, supra note 3, at 26 (examining price trends for maize, wheat, dairy products, rice, sugar, beef, and chicken in Bolivia, Cambodia, Madagascar, Malawi, Nicaragua, Pakistan, Peru, Vietnam, and Zambia).
30. Id.
conventional wisdom that price increases benefit poor farmers in developing countries.31

Michael Hermann and Ralf Peters’ analysis squares with Martin and Ivanic’s argument. Hermann and Peters argue that commodity exporters on the whole have failed to reap the benefits of higher prices. The authors find that the majority of poor households in developing countries will experience short-term losses, despite some gains in the medium- and long-term. These losses in turn may seriously impact progress towards the poverty-related Millennium Development Goals.32

In addition, increases in hunger and poverty have had far-reaching political implications.33 Protests and riots in the developing world contributed to national instability in low-income food-deficit countries, including regime change in Haiti.34 Jones and Elasri moreover suggest that higher food prices may undermine confidence in international mechanisms for ensuring food security in the longer term.35 They argue that a subsequent turn away from agricultural trade liberalization could correspond with a return to domestic strategies for increased production. The resulting Balkanization of commodity markets could further exacerbate food insecurity and global agricultural growth.36

Some nonetheless argue that a return to higher prices could provide relief to farmers from the decades-long decline in real food prices.37 Jones and Elasri note that higher prices and improved profitability could increase the ease with which developing countries attract public and private investment to their agricultural sectors.38 However, the authors caution that such benefits must be examined in the context of the severely negative effect of price spikes on the urban poor, a demographic that has suffered disproportionately from price increases.

C. Long- and Medium-Term Prospects for Food Security

The medium- and long-term effects of the 2008 crisis are similarly profound. In chapter five, Jones and Elasri describe recent price trends and future projections of stock-to-use ratios, predicting that prices will remain high vis-à-vis comparable prices over the past decade but below 2008 peak levels.39

31. Id. at 44 (attributing such findings to studies that incorporate financial linkages through increases in total employment).
32. Michael Hermann & Ralf H. Peters, Impact of the Food Crisis on Developing Countries and Implications for Agricultural Trade Policy, in FOOD CRISIS AND THE WTO, supra note 2, at 242, 244.
33. Schmidhuber & Matuschke, supra note 6, at 137.
34. Karapinar, supra note 2, at 1.
36. Id.
37. Id. at 133.
38. Id.
39. Id. at 115 (assuming stable weather, policy and economic conditions, average real
They predict that prices should stabilize in the medium-term due to the largely transitory nature of seasonal, cyclical, and speculative factors. At the same time, the authors explain that the structural factors underpinning elevated prices, including climate, population, and dietary changes, will remain constant or grow. Jones and Elasri use a compelling counterfactual to argue that the demand for biofuels represents one factor that will bear heavily on price effects over the medium-term, with production anticipated to double over the next ten years. The authors show that coarse grain prices would be twelve percent lower, and vegetable oil prices fifteen percent lower, in the absence of biofuel demand increases. Jones and Elasri therefore predict that prices will remain on average thirty-five percent to sixty percent higher than the past decade. A price decline in real terms may occur over the longer-term, however, with productivity gains and increasing trade competition eventually overtaking demand. The authors conclude that the food crisis will have strongly negative repercussions on overall levels of hunger and poverty as the urban poor in major food-importing developing countries will be forced to spend an increasing share of their income on food.

Over the longer-term, food price trends will depend largely on growth in the developing world and interactions between agriculture and energy markets. The linkages between potential energy sources and agricultural markets are complex. In comparative perspective, the issues posed by climate change and energy will complicate recovery from the 2008 crisis. In the 1970s, energy markets impacted agricultural prices only in relation to the production, processing, and transportation of agricultural products. Diaz-Bonilla explains that new sources of oil supply and production are not as readily available as they once were given climate constraints. He accordingly argues that new sources of sustainable energy will be integral to the alleviation of poverty and hunger in the future. Schmidhuber and Matuschke anticipate that the longer-term downward trend in real prices will be halted by increased demand for food as fuel.

In addition, climate change will impact all four dimensions of food security: availability, stability, utilization, and access to food. The average rise
in temperatures will directly alter food production by changing growing conditions and increasing the severity and frequency of weather-related price shocks. The majority of studies conclude that climate change will increase the number of persons at risk of hunger and malnutrition, ranging anywhere from a five percent to twenty-six percent increase in the number of undernourished people in 2080, although the extent of the increase will depend largely on parallel socioeconomic developments.49

Climate change may hit Sub-Saharan Africa the hardest, particularly in terms of increased weather variability and food production. The Sahel, home to 75 to 250 million people, will become drier and at risk for droughts more severe than those that crippled the region in the 1970s.50 In addition, an increase in climate-induced flooding has the potential to wipe out entire communities and large swaths of productive land across Southern Africa.51 The total economic impact of climate change in Africa could consequently be as high as 133 billion USD, with agriculture experiencing an estimated loss of 132 billion USD.52 While parallel socioeconomic developments may contribute even more significantly to the worsening food security situation in Africa, responses to climate change will need to be fully integrated into national planning strategies.53

D. Solutions

Strategies to reduce the propensity for future food crises are complex and likely contentious. In the immediate wake of the 2008 price spike, governments around the world intervened quickly to stem the most adverse impacts of price increases. Export restrictions and price controls were imposed by almost one quarter of developing countries monitored by the World Bank in 2008.54 Martin and Ivanic caution against price-insulating policies that, while providing some degree of short-term relief to consumers, contribute to greater volatility in world agricultural markets.55 Prowse also cites export bans as one example which, if widely adopted, would contract global supply, push prices upward, and aggravate global food insecurity.56 Martin and Ivanic caution that such ad hoc measures threaten to balkanize agricultural markets, reducing confidence in external markets and causing countries to turn inwards to ensure their access to needed commodities.57

49. Id. at 156.
50. See Adesina, supra note 18, at 104.
51. Id.
52. Id.
53. See Schmidhuber & Matuschke, supra note 6, at 156. See also Adesina, supra note 18, at 104.
55. Martin & Ivanic, supra note 3, at 45.
56. Prowse, supra note 4, at 279.
57. Martin & Ivanic, supra note 3, at 45.
Martin, Ivanic, and Prowse highlight the potential of safety net measures and food aid in responding to acute crises and as alternatives to risky trade measures. The three authors agree that safety-net measures and food-distribution programs target those in need without aggravating market volatility and creating negative production incentives by lowering domestic prices. At the same time, Prowse notes that such programs need be established ex ante, or prior to the emergence of future crises, in order to effectively address supply issues. In addition, Prowse argues that existing mechanisms for the distribution of food aid must be improved. Moves toward medium-term agricultural investment notwithstanding, she finds that future food price volatility will create even greater demand for potentially destructive short-term policy responses. She argues in particular for a cash-based, ex ante-determined international support facility that would be de-linked from agricultural trade liberalization and that could respond to exogenous shocks in prices of global food staples. Her argument that food aid should be provided in cash, as opposed to in-kind contributions, is premised on the widespread criticism that the latter reduces food access in times of scarcity by undercutting small producers in developing countries.

In the medium- and long-term, efforts toward market liberalization by both developed and developing countries could reduce agricultural volatility and improve food security. In particular, OECD countries must reduce levels of farm support. While the United States and EU have made substantial reforms since the late 1990s, David Orden explains in chapter nine that subsidies tied to prices and production still overwhelmingly distort global agricultural markets. Citing OECD analysis, Jones and Elasri indicate that the United States has spent 11 billion USD annually on biofuel support policies, a figure that is anticipated to increase to 25 billion USD by 2017. Massive spending to increase biofuel production has created major supply and demand imbalances in cereals and vegetable oils. Jones and Elasri argue counterfactually that the use of feedstock commodities, and grains in particular, would be substantially lower in the absence of such subsidies. Moreover, prices for coarse grains would be five percent to seven percent lower than baseline assumptions in the absence of such subsidies, and prices for vegetable oils would be on average sixteen percent lower.

58. See id.; Prowse, supra note 4, at 293.
59. Id.
60. Prowse, supra note 4, at 281.
61. Id. at 293.
64. Jones & Elasri, supra note 14, at 132.
65. Id.
66. Id.
lower. In examining the impact of food crises on developing countries, Herrman and Peters argue that the current state of high commodity prices may offer a window of opportunity by increasing agricultural producers’ incomes in industrialized countries. Notwithstanding, Orden’s findings suggest that the decision to introduce and maintain subsidies is overwhelmingly political, and commodity price fluctuations are unlikely to change agricultural support policies.

With regard to market reforms to be undertaken by developing countries, some criticize the WTO’s provision of flexible rules for developing-country exports as distorting agricultural markets. Examining agricultural policies under the DDA in chapter seven, Kym Anderson attributes global market volatility in part to the WTO’s “special products” exception and the Special Safeguard Mechanism. He proposes instead that developing countries be encouraged to open their markets to international competition and rely on domestic policy measures like taxation to raise revenue.

Many believe that a new WTO agreement in agriculture could provide a forum both to negotiate reductions in farm supports by developed countries and to encourage liberalization by developing countries. At the same time, high prices have been couched as a reason to forgo further liberalization, as it could push prices further upward. A new agreement, however, would likely have favorable effects on prices and food security. Martin and Ivanic explain that current proposals, including those tabled at Doha, involve significant liberalization of agriculture in industrialized countries and very limited liberalization in developing countries. The authors explain that this balance increases opportunities for the latter to export non-staple agricultural products, which could contribute to poverty reduction and global price stability.

Notwithstanding, Orden contends in chapter nine that the prospects appear slim for reaching such an agreement. Orden argues that even in a high price environment, like that of mid-2008, any significant adjustments to farm support legislation would be politically impossible. Many of Doha’s provisions face tough resistance from domestic farm lobbies in the United States, which have had a string of recent successes in lobbying for higher payments. For example, proposals to include ethanol subsidies in “notified agricultural support” under...
Doha would create compliance problems by the United States, given its creation of massive price supports coupled to ethanol production.76

One area in which there seems to be substantial consensus is the need for increased investments in agricultural research and development, institutions, and infrastructure. Even assuming successful trade reforms, constraints on farm productivity and capacity could disable developing countries from fully exploiting the potential gains from market liberalization.77 Low levels of agricultural productivity correspond with low levels of agricultural output, which is also to blame for vulnerability to food insecurity.78 Hermann and Peters cite a study sampling 171 countries, finding that at least twenty-four (of which nineteen are least-developed countries) have “strong but underutilized agricultural potential.”79 Such countries are food insecure despite their large share of agriculture in GDP, agricultural labor forces, and agricultural land.

In chapter four, Adesina explains that this brand of agricultural underdevelopment is especially problematic for Africa, where underinvestment in rural infrastructure, research and development, agricultural extension, and market support systems has inhibited growth and contributed to food insecurity.80 In order to improve agricultural investment, Adesina and others argue that developing country governments will have to become creative in securing capital. High prices again may be beneficial toward this end, creating increased revenue to be reinvested in government initiatives.81 Moreover, government-led taxing initiatives, public-private partnerships, and overseas development assistance are proffered by Adesina, Hermann and Peters, and Karapinar and Häberli as potential means to direct new funds towards agricultural investment.82 Adesina in particular calls for a “Green Revolution” in Africa to assist countries in raising agricultural productivity, and he cites a corresponding need for stakeholders to focus on policies expanding value-added processing, developing rural input markets, and scaling-up innovative financing to leverage commercial banks to support agriculture.

II.

DISCUSSION

*Food Crises and the WTO* provides a range of economic, institutional, and environmental perspectives on the 2008 price spike’s implications in historical

76. *Id.* at 238.
77. *Prowse,* supra note 4, at 290.
79. *Id.*
80. Adesina, *supra* note 18, at 83.
context. The book examines potential causes of and solutions to the longer-term, structural issues of food insecurity and malnutrition. In the concluding chapter, Karapinar and Häberli propose a “global policy agenda” with twenty specific recommendations to alleviate both current and future food crises. The recommendations, ranging from calls for increased investment in agricultural research and development to reformation of the WTO rules on agriculture, provide a useful starting point for scholars and policymakers in identifying areas for reform.

The central findings of Food Crises have been re-confirmed since its publication. Scholars maintain that the 2008 spike exposed for the first time the intersecting trends of increased food demand, low levels of public stocks, extreme weather conditions, speculative investment, and biofuel support policies. Moreover, the 2008 crisis revealed the deeply integrated nature of commodity and energy markets and the necessity of market regulation in the context of globalization and increased food scarcity. While some argue that recent price spikes may only be a result of transient factors, most food security experts agree that the 2008 crisis ushered in a new norm of “high and volatile prices, low food supplies and structural deficits.” In either case, uncertainty remains the primary feature of the new food price environment. In summer 2012, prices of several agricultural commodity prices surged. This run-up of prices represented the third such price increase in the past five years. Moreover, prices remain high relative to historical trends.

Recent analysis has underscored the negative effects of high food prices on net food purchasers. The Food and Agriculture Organization’s (FAO) 2012 State of Food Insecurity measurement index suggests that elevated prices have increased the number of undernourished persons, reduced diet quality, and undermined the ability of poor consumers to spend on health care and education. Price volatility has been further aggravated by increases in biofuel consumption between 2007 and 2011, and new disciplines on related support policies appear unlikely.

83. Karapinar & Häberli, supra note 82, at 323.
85. Id. at 38.
87. Id. at 19.
88. Id. at 16.
89. Id.
90. Id.
91. Id.
92. Id.
93. Id. at 19; Jean-Christophe Bureau & Sébastien Jean, Do Yesterday’s Disciplines Fit...
The 2008 crisis in large part complicated already difficult WTO negotiations on agriculture by breeding a general distrust of the multilateral trade agenda’s ability to facilitate food access in times of scarcity.94 The effects of the crisis linger on while agricultural protectionism has been on the rise. As of June 2012, The Global Trade Alert Database reported approximately 1340 non-tariff measures that “almost certainly worsened the treatment of some foreign commercial interest[s]” implemented since November 2008, with discriminatory measures disproportionately targeting agricultural commodities.95 In contrast, only 553 reported measures had neutral or positive effects on foreign commercial interests. WTO data also suggests that agricultural products remain disproportionately targeted by technical barriers to trade, which have seen marked increases.96 Real support has also increased within emerging countries, with support to farmers in China doubling between 2007 and 2010.97 Finally, the increasing frequency of export restrictions, coupled with developing countries’ recent push to include food sovereignty proposals in the work program of the 2012 UN Committee on World Food Security, demonstrate a definite distrust of the multilateral trading system in ensuring food access.98

Trends in developed countries are equally troublesome. By replacing decoupled support with shallow loss, countercyclical and insurance payments, the most recent U.S. Farm Bill will cause “significant” trade distortions and further isolate U.S. producers from any potential decline in world prices.99 WTO domestic support provisions are unlikely to be responsive as they lack specific disciplines on biofuel support policies. These developments bode poorly for a new round of successful DDA negotiations, particularly in light of calls by the WTO Director-General for the United States to play a “leadership role” in getting Doha back on track.100

Nevertheless, one positive effect of the 2008 crisis has been to redouble interest and investment in agricultural research and development.101 The World Bank recently reiterated the need for increased investment in agriculture, and the FAO recommended “massive aggregate production increases” accompanied by measures to improve food access for the poor, reduce waste, and implement
social safety nets.102 Also, and in spite of the prevailing price uncertainty, a “Bali package” was successfully concluded in early 2014 at the World Trade Organization’s Ninth Ministerial Conference.103 The Bali package included agreements on a number of issues relating to agriculture and development, including arrangements for tariff quota administrations, a political commitment to keep export subsidies low, a statement committing WTO members to improve market access for the cotton products of least-developed countries (LDCs), and an agreement to negotiate a work program by the end of 2014 for conclusion of the Doha Round.104 While these agreements represent progress in multilateral talks over agriculture, Bali unfortunately left unresolved the extent of subsidy cuts and tariff reductions to be undertaken by WTO members as part of the DDA negotiations, which have been stalled since 2008.105

In order to facilitate the difficult work of the practitioner community, Food Crises could more explicitly connect the pervasive, structural causes of food crises with specific solutions. The issue of agricultural lobbies provides one example. Orden explains that resistance by powerful domestic agricultural interests will likely block future multilateral efforts to reduce agricultural price supports or initiate wide-ranging reforms to the WTO’s rules on agriculture.106 Häberli points out that these interests are also likely responsible for the U.S. policy of providing food aid in-kind as opposed to in-cash.107 Prowse suggests that such policies contribute to U.S. agricultural commodities being dumped globally, which debilitates small producers in emerging markets and creates local price volatility.108 Moreover, increasing support to biofuels will frustrate price support reforms where they likely will be needed most.109 U.S. agricultural interests therefore represent a structural cause of market volatility by contributing to food dumping, opposition to cash-based food aid, and U.S. resistance to the DDA. The ability of such interests to influence domestic and global decisions on agriculture must be addressed before meaningful progress towards achieving global food security can be made. From a practitioner perspective, specific solutions would be of great use in resolving this underlying cause of food insecurity. While the authors articulate the need to “reduce developed country domestic support” and “reconsider biofuels support policies”

102. Id.
105. Id.; Meyer & Schmidhuber, supra note 86.
106. See Orden, supra note 63, at 235–36.
108. Prowse, supra note 4, at 277.
109. Id.
in their recommendations, they do not go so far as to provide a specific means by which to do so.\footnote{Karapinar & Häberli, supra note 82, at 333–34 and 336–37.}

Similarly, \textit{Food Crises} would benefit from greater precision in its discussion of solutions to the parallel problems of acute food crisis and structural food insecurity. While addressing both the short- and long-term dynamics of agricultural markets is essential, the drivers of each may be distinct. For example, reducing the frequency of export bans would reduce market volatility in times of low availability of public stocks but would do little to create long-term self-sufficiency and food access by net food-importing countries. On the other hand, greater investment in agricultural research and development would improve food access in the future but would be unlikely to mitigate the severity of price spikes in the short to medium-term. Similarly, increasing the prevalence of measures to provide cash-based food aid on a “best endeavor” basis would help to prevent starvation in the next crisis, but what may really be needed in the long-term is an \textit{ex ante} mechanism of international support policies that is de-linked from trade liberalization and instead automatically responds to exogenous price shocks in staple goods.\footnote{Prowse, supra note 4, at 293.} The authors therefore need to take care in differentiating each of these issues and their corresponding recommendations. In this regard, \textit{Food Crises} might have been better served by sequencing its recommendations in terms of short- and longer-term policy goals or distinguishing low-hanging fruit from higher-level objectives. For example, investing in small farms or climate adaptation technology may be more easily achieved than unblocking Doha negotiations. Similarly, “invest[ing] in global public goods” seems to be a much greater undertaking in terms of temporal and financial costs relative to “provid[ing] food aid” as a short-term response.

Ultimately, \textit{Food Crises} provides a wide-ranging and comprehensive account of the 2008 crisis, including its causes, consequences, and responses. The book offers scholars and policymakers a wide breadth of information regarding the 2008 spike and a variety of thematic and empirical perspectives from which to analyze the crisis. Moving forward, the editors’ “global policy agenda” can provide a useful starting point for developing a dual-pronged approach to the research agenda for trade.\footnote{Seth Meyer & Joseph Schmidhuber, supra note 86.} Scholars have increasingly called for a shift in focus to practical solutions that would (i) “ensure that trade policy measures protect consumers from the negative impacts of higher and more volatile prices” on the one hand; and (ii) “enable small producers in developing countries to harness the benefits of higher prices” on the other.\footnote{Id.} Practical proposals are therefore needed to better protect consumers from the impacts of supply controls, export restrictions, and taxes on commodities. At the same time, improving the ability of small farmers to access infrastructure and inputs,
manage their production risks, and better preserve their resource base would greatly benefit producers.\textsuperscript{114}

\textsuperscript{114} Id.
Review of *Human Rights in the Constitutional Law of the United States* by Michael J. Perry

Anuthara Hegoda*

**INTRODUCTION**

Over the past century, human rights discourse has developed into an international dialogue focused on countries across the world. Often, nations that pride themselves in upholding fundamental international human rights within their legal system allow laws that directly contradict such rights. Such is the case with the United States and the fundamental rights it believes to be embedded in its Constitution. However, the constitutionality of the death penalty, restrictions on same-sex marriage, and the criminalization of abortion continue to be the subject of much debate. Michael J. Perry offers an insightful, fresh look at this issue in his discussion of these rights through the idea of the constitutional morality of the United States.1

In examining international human rights and the constitutional morality of the United States, Perry looks at three main areas of discussion—the death penalty, same-sex marriage, and abortion—and considers them each in conjunction with internationally recognized rights that are entrenched in the Constitution: (1) the right not to be subjected to cruel and unusual punishment, (2) the right to moral equality, and (3) the right to religious and moral freedom. Perry discusses the internationalization of human rights and its normative grounding and then pursues an analysis of why the death penalty, the exclusion of same-sex couples from civil marriage, and bans on abortion cannot exist in harmony with those internationally recognized rights entrenched in the Constitution. Perry’s additional focus on the role of judicial review in upholding the constitutional morality of the United States also contributes to his detailed analysis of the issues and to the value of his overall work in shedding a new light on human rights discourse, especially with regard to the constitutional law of the United States.

---

* University of California, Berkeley, School of Law, JD Candidate, 2016.


DOI: https://doi.org/10.15779/Z387362
Perry specializes in the areas of constitutional law, human rights, and law and religion, and he has written previously on the same topics that come up in this book. Perry’s noteworthy publications and his impressive teaching credentials demonstrate his expertise and interest in this area of work and serve as reason to value his opinions and analysis. Perry’s principal argument—that certain laws in the United States directly conflict with specific rights entrenched in the Constitution—is not only well supported and insightful, but also applicable on a wider level in looking at human rights from a global standpoint.

I. SUMMARY

Perry’s detailed and analytical work provides a basic understanding of the morality of human rights and offers a novel perspective on the constitutional morality of the United States.

Perry spends the first half of the book setting out a definition of the morality of human rights by focusing on the internationalization of human rights, considering what a “human right” is, and explaining the normative ground of human rights. Perry then goes on to pursue three inquiries: first, whether punishing a criminal by killing him or her violates the right not to be subjected to cruel and unusual punishment; second, whether excluding same-sex couples from civil marriage violates the right to moral equality or the right to religious and moral freedom; and third, whether criminalizing abortion violates the right to moral equality or the right to religious and moral freedom. While addressing these key questions, Perry also conducts an analysis of judicial deference and the Supreme Court’s role in upholding the constitutional morality of the United States.

To gain an understanding of the constitutional morality of the United States, it is necessary to first understand the morality of human rights—“a set of moral convictions and commitments about what laws to enact . . . what policies to pursue, and the like” on an international level. “Some of the morality of human rights is entrenched—more precisely, some of the rights internationally recognized as human rights are entrenched—in the constitutional law of the United States.” Perry refers to that set of entrenched internationally recognized human rights as “the constitutional morality of the United States.”

Human rights have become increasingly internationalized since the Second World War, as reflected in the development of international charters and treaties.

3. Perry serves as the Robert W. Woodruff University Chair at Emory University, the Howard J. Trienens Chair in Law at Northwestern University, the University Distinguished Chair in Law at Wake Forest University, and as a Visiting Professor at several law schools.
4. PERRY, HUMAN RIGHTS, supra note 1, at 1.
5. Id.
6. Id.
setting out fundamental human rights that should be protected by governments around the world. Under the first such document, the Charter of the United Nations, a “fundamental freedom” is one kind of “human right.”

In his evaluation of how certain rights have come to be recognized internationally as human rights, Perry uses a discussion of major international human rights documents to ensure that the reader understands which countries signed onto these various agreements and which countries either abstained or refused to sign on. The internationalization of human rights is a reflection of how the world has shifted from nationalism to internationalism in enumerating universal human rights standards that act as a check on governments worldwide (thereby depriving the sovereign nation State of the unlimited power it once had). The continuing internationalization of human rights with treaties such as the International Covenant on Civil and Political Rights (ICCPR), the (First) Optional Protocol to the ICCPR, and the International Covenant on Economic, Social and Cultural Rights, combined with the existence of four transnational human rights systems, provide an apt depiction of the wide global recognition of human rights. Governments’ attempts to protect those rights are highlighted by the “human rights . . . enshrined in the constitutions of virtually every [country].”

In the context of the internationalization of human rights, Perry confronts two questions. First, what does it mean to say that a right is a “human right”? Second, is that human right legal or moral in nature? Perry first concludes that a right is a “human right” if “the fundamental rationale for establishing and protecting the right . . . is that conduct that violates the right violates the imperative to ‘act towards all human beings in a spirit of brotherhood.’” Therefore, by describing government actors as duty-bearers and human beings as rights-holders, Perry convincingly suggests that the government has the duty to protect the rights of its citizens in acting towards them in a spirit of brotherhood. Perry further concludes that while every human right is a moral right, a human right is a legal right in a particular country only if that right is generally enforceable in that country; therefore, the importance of specific rights varies from country to country.

Having highlighted the importance of human rights in a global setting, Perry narrows his focus down to address the relevance of human rights to his
specific topic of interest—the constitutional morality of the United States. The importance of the internationalization of human rights is explained in terms of the normative grounding of human rights and how that normative grounding brings about the question of governmental responsibility to protect the rights of citizens. Article 1 of the Universal Declaration of Human Rights says that all human beings should act towards one another in a spirit of brotherhood. This imperative is the normative ground of human rights, since “a right is a human right if the fundamental rationale for establishing and protecting the right is that conduct that violates the right violates the ‘act towards all human beings in a spirit of brotherhood’ imperative.” Perry considers the desire to have every government act towards all human beings in this spirit of brotherhood in terms of three different responses: (1) inherent dignity and inviolability, (2) the altruistic perspective, and (3) with regards to self-interest. The inherent dignity and inviolability approach is based on the idea that each and every born human being has equal inherent dignity and is inviolable. The altruistic perspective stands on the notion that all humans are strongly linked to each other through a shared humanity and are therefore inclined to look out for each other. Self-interest is described as a concern for one’s own well-being but also for the well-being of others one cares for, such as family and friends.

By exploring the reasons behind “our common concern that no government abuse its citizens or others with whom it deals” through three differing perspectives, Perry provides a balanced, comprehensive overview of the normative grounding of human rights, which in turn allows the reader an opportunity to consider which approach, if any, they agree with. Through such an inclusive analysis, Perry ensures clarity and simplicity for his reader in exploring the ideas and concepts in the book.

Going on to address the constitutional morality of the United States, Perry focuses on three constitutionally entrenched, internationally recognized human rights—(1) the right not to be subjected to cruel and unusual punishment, (2) the right to moral equality, and (3) the right to religious and moral freedom. A right is “constitutionally entrenched” if constitutional enactors established that right in the constitutional law of the United States (and if other later enactors did not establish a different right that supersedes the former right) or if the right is a

16. PERRY, HUMAN RIGHTS, supra note 1, at 28.
17. Id. at 29.
18. Id. at 39.
19. Id. at 43.
20. Id. at 30.
21. Id. at 41.
22. Id. at 43.
23. Id. at 45.
bedrock feature of the constitutional law of the United States. To be considered a bedrock feature, the right must have become so embedded in the life of the nation, so accepted by the society, so fundamental to the private and public expectations of individuals and institutions that the Supreme Court should, and almost certainly will, continue to deem that right constitutionally authoritative, even if it is open to serious question whether enactors entrenched it in the constitutional law of the United States.

The right not to be subjected to cruel and unusual punishment is enumerated in the Eighth Amendment of the United States Constitution and encompasses the right not to be subjected to cruel, inhuman, or degrading punishment, which is an internationally recognized human right. Perry rightly points out that the words “cruel,” “inhuman,” and “degrading” are interchangeable terms that refer to whether a punishment fails to treat the criminal in a spirit of brotherhood. Many reasons exist to oppose the death penalty, some of which are unrelated to its cruelty per se. However, Perry’s concern with the death penalty lies in one particular reason: “[c]apital punishment imposed on anyone, including a mentally competent adult who, after a fair trial, has been found guilty of having committed a depraved crime, is cruel.”

According to Perry, capital punishment cannot be defended against the charge of cruelty on the basis of incapacitation, retribution, deterrence, or rehabilitation. If the imposition of a punishment amounts to a failure by a government to treat a criminal in the spirit of brotherhood, that punishment crosses the threshold of cruelty. The cruelty of the death penalty has been increasingly recognized on an international level; however, Perry is wise to point out that the United States is party to neither the Second Optional Protocol to the ICCPR nor the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, both of which provide for the abolition of capital punishment. The Supreme Court has used the Eighth Amendment to prevent a state from imposing the death penalty in certain cases, and the question arises from this whether the cruel and unusual punishment clause of the Eighth Amendment prevents the imposition of capital punishment on any person, regardless of the crime committed. To answer such a question, the meaning of “cruel” and “unusual” as the enactors understood them must be considered, and Perry does just this. Giving “unusual” its common meaning of “uncommon; infrequent; rare,” Perry puts forward that it is safe to say that capital

---

24. Id. at 57.
25. Id. at 58.
26. Id. at 61.
27. Id. at 65.
28. Id. at 66–68.
29. Id. at 67.
30. Id. at 70–72.
31. Id. at 73.
punishment, in a global sense, is unusual.\textsuperscript{32} Before concluding that the Supreme Court should rule that capital punishment violates the right not to be subjected to cruel and unusual punishment, Perry first gives attention to the notion of judicial deference.

A consideration of judicial deference understandably involves an analysis of the role of the U.S. Supreme Court in protecting the constitutional morality of the United States. Perry discusses both strong form\textsuperscript{33} and weak form\textsuperscript{34} judicial review in analyzing the importance and relevance of the Court. While strong form judicial review endows the Court with absolute power in ruling a law unconstitutional, weak form judicial review limits the Court’s power by making Court rulings subject to ordinary legislation. Perry lends further attention to the question of whether, in exercising strong form judicial review, the Supreme Court should consider in its own view whether a law is unconstitutional or whether the Court should give deference\textsuperscript{35} to lawmakers’ judgment that the law is constitutional. While the answer to this question remains unclear, Perry suggests that even with deference given to lawmakers, the Supreme Court should rule capital punishment unconstitutional.\textsuperscript{36}

Perry goes on to cover the constitutionally entrenched right to moral equality as encompassed in the Equal Protection Clause of the Fourteenth Amendment. The right to moral equality—the right not to be treated as morally inferior and thereby be disadvantaged—follows naturally from the normative ground of human rights, and equates with the right to equal protection of the law.\textsuperscript{37} It has become “constitutional bedrock” that the right to moral equality is a right under both federal and state governments.\textsuperscript{38}

The right to religious and moral freedom, as set out in the First Amendment, comes next in Perry’s efforts to analyze and clarify the constitutionally entrenched rights that are threatened by exclusion of same-sex marriage and the criminalization of abortion. The right to religious and moral freedom is not limited to practices linked to religious or moral obligations, but also includes practices that are animated by a person’s “‘core or meaning-giving beliefs and commitments’ as distinct from those that are animated by ‘the legitimate but less fundamental preferences we display as individuals.’”\textsuperscript{39} In terms of practicality, this right is not unconditional because governments are forced to balance their important duties of protecting public morals with

\begin{itemize}
  \item \textsuperscript{32} Id. at 81.
  \item \textsuperscript{33} Strong form judicial review is understood as judicial ultimacy, where the court has the last word. \textit{Id.} at 96.
  \item \textsuperscript{34} Weak form judicial review is understood as judicial penultimacy, where the court has penultimate word in that it can rule that a law is unconstitutional, but this decision can be nullified by means of ordinary legislation. \textit{Id.} at 96.
  \item \textsuperscript{35} Giving deference to the lawmakers’ judgment is termed “Thayerian deference.” \textit{Id.} at 102.
  \item \textsuperscript{36} \textit{Id.} at 103.
  \item \textsuperscript{37} \textit{Id.} at 106.
  \item \textsuperscript{38} \textit{Id.} at 111.
  \item \textsuperscript{39} \textit{Id.} at 120.
\end{itemize}
protecting sectarian morals. 40 Therefore, a government can enforce limits on a practice protected by this right if each of three conditions—legitimacy, least burdensome alternative, and proportionality—is satisfied. 41 To satisfy the legitimacy condition, the policy must serve a legitimate government objective; to satisfy the least burdensome alternative condition, the policy must be necessary to serve that legitimate government objective; and finally, to satisfy the proportionality condition, the policy must achieve enough “good” to justify the burden imposed on those whose actions are restricted by the policy. 42

Free exercise of religion is a constitutionally entrenched right and, accordingly, the government’s lack of authority to prohibit the free exercise of religion has become entrenched in the constitutional law of the United States. 43 Since the constitutionally entrenched right to free exercise of religion is, if correctly interpreted, consistent with the right to religious and moral freedom, it follows that the right to religious and moral freedom, as it is understood in an international human rights context, is also entrenched in the constitutional law of the United States. 44

With a clear idea of what the right to moral equality and the right to religious and moral freedom entails, it is worth considering which of these rights is threatened by the exclusion of same-sex couples from civil marriage. Perry puts forward that there are two different conceptions of what marriage constitutes, one that excludes same-sex couples and one that does not. 45 While excluding same-sex couples from civil marriage disadvantages gays and lesbians, this does not equate to a violation of their right to moral equality because it is not based on the premise that gays and lesbians are morally inferior human beings. 46 This is not to say that certain exclusionary policies may indeed violate this right, but it cannot be declared that every law or policy that disadvantages gays and lesbians violates their right to moral equality. 47 The idea behind exclusionary policies—that same-sex sexual conduct is immoral—does not presuppose that those who engage in such conduct are morally inferior human beings, and thus cannot be viewed as violating the right to moral equality. 48 On the other hand, Perry notes that the exclusion policy can be seen to violate the right to religious and moral freedom, because the government’s objective of not legitimizing immoral conduct by allowing same-sex couples to

40. Id. at 121–22.  
41. Id. at 122.  
42. Id. at 122.  
43. Id. at 128.  
44. Id. at 131.  
45. Id. at 137.  
46. Id. at 142.  
47. Id.  
48. Id.
marry does not constitute a legitimate government objective that would justify
the impediment to the right to religious and moral freedom.\textsuperscript{49}

The same two constitutionally entrenched rights—the right to moral
equality and the right to religious and moral freedom—are relevant to the
criminalization of abortion, and Perry extends his analysis to this issue area as
well. In the previously-referenced spirit of brotherhood imperative, the reference
to “all human beings” in the context of international human rights instruments is
widely understood to mean all born human beings, and the question arises as to
whether the law should provide that all unborn human beings have a right to
life.\textsuperscript{50} Perry addresses this question once again through the different
perspectives on the normative ground of human rights—inherent dignity and
inviolability, self-interest, and the altruistic perspective—and concludes that the
answer to that question depends on one’s specific perspective on the normative
ground of human rights.\textsuperscript{51} A ban on abortion is analyzed through a
consideration of government objectives in terms of legitimacy, least burdensome
alternative, and proportionality—the first two of which are considered by Perry
to be satisfied, the third of which is considered contested.\textsuperscript{52} Perry uses two
abortion cases, \textit{Roe v. Wade} and \textit{Doe v. Bolton}, to look into different types of
abortion bans. In \textit{Roe v. Wade}, the Supreme Court invalidated a Texas law that
banned all abortions except those necessary to save the life of the mother.\textsuperscript{53} In
\textit{Doe v. Bolton}, the Court invalidated a more permissive Georgia law that banned
abortions except those necessary to preserve the health of the mother, those in
which the fetus would likely be born with physical or mental defects, and those
involving pregnancies resulting from rape.\textsuperscript{54} Perry’s analysis of these two very
differing cases leads to his conclusion that a relatively permissive ban on
abortion might be justified by legitimate government objectives; however, an
extreme ban, such as that in question in \textit{Roe v. Wade}, does violate both the right
to moral equality and the right to religious and moral freedom.\textsuperscript{55}

\section{Discussion}

As outlined above, Perry offers a concise yet in-depth analysis of the
constitutional morality of the United States with regard to three internationally
recognized human rights.\textsuperscript{56} At each stage of his analysis, Perry identifies and

\begin{footnotes}
\footnotetext[49]{Id. at 146.}
\footnotetext[50]{Id. at 159.}
\footnotetext[51]{Id. at 162.}
\footnotetext[52]{Id. at 165–66.}
\footnotetext[53]{Id. at 163.}
\footnotetext[54]{Id.}
\footnotetext[55]{Id. at 173.}
\footnotetext[56]{The three internationally recognized human rights are as follows: (1) The right not to be
subjected to cruel and unusual punishment, (2) the right to moral equality, and (3) the right to
religious and moral freedom. Id. at 2.}
\end{footnotes}
responds to new questions and thereby leaves the reader with a thorough understanding of his arguments. Perry’s focus on language and the meanings of specific words offers a certain degree of intelligibility on the controversial and often complex topics of his discussion.57 He writes succinctly but effectively engages the reader with his strong analysis of every concept, addressing conflicting views every step of the way. In an area of discourse that can often be vague and ambiguous, Perry offers some clarity that is valuable in allowing his readers, whether scholars or otherwise, to use the content of this work to guide themselves in reaching their own conclusions.

The focus in the first part of the book is vital to understanding the constitutional morality of the United States discussed in the second part, and also allows the reader to gain a basic yet solid grasp of the meaning of human rights as well as the development of human rights in international law. By focusing on human rights as a concept in the first part, Perry offers readers new to the subject area, such as general readers and law students, a valuable foundation through which they can build their understanding about this area of law. For other readers, such as legal scholars, Perry’s analysis of judicial deference and his choice of analyzing international human rights in the context of national constitutional law could potentially serve as platforms of discussion in the wider academic debate. Additionally, the key notions of the normative ground of human rights and the spirit of brotherhood come up throughout the book at all relevant instances, reflecting Perry’s consistent and comprehensive analysis of the issues at hand.

In addressing controversial issues such as capital punishment as well as bans on same-sex marriage and abortion through the concept of morality, Perry seems to introduce a new perspective to the ongoing discussion of these topics in combining an analysis of constitutional law in the United States with international human rights law, bringing to the reader’s attention the link between the two. His notions of international morality and constitutional morality are novel and powerful concepts that could be used more generally in the international human rights discourse.

Notwithstanding the value of his clear and erudite analysis, Perry fails to offer substantive policy recommendations in his concluding note. This is somewhat understandable, taking into consideration that international human rights law is notoriously difficult to regulate, mostly due to its far-reaching nature and lack of effective regulatory bodies. This notoriety, however, deserves some attention so as to illuminate for the reader the paradoxical relationship between the internationalization of human rights and the minimal international regulation of those rights. Although such lack of regulation is implicit in Perry’s analysis of how internationally recognized rights are not fully protected despite being enumerated in the United States Constitution, Perry sidesteps a complete discussion of the ongoing tension between the growing recognition of human

57. For example, Perry devotes significant attention to the meanings of “cruel” and “unusual” in the context of “cruel and unusual punishment.” Id. at 74–85.
rights and the recurrent failure to protect those rights. In juxtaposing an international level of recognition with a domestic failure to regulate, however, Perry’s analysis does reflect a diminishing faith in the power and utility of international law. Still, without further analysis, his stance on this issue is unclear. Does Perry suggest that international human rights law is ineffective and therefore futile? Alternatively, does he suggest that international human rights law can be effective but only by way of better implementation? Or does he suggest that the success of international human rights law depends on the cooperation of the sovereign nation-state? Whatever stance put forth, an inevitable question follows from Perry’s inquiry into human rights in the constitutional law of the United States: how could the international community, and the United Nations in particular, facilitate better implementation of international human rights law within individual countries? Without addressing concerns such as these, Perry’s conclusion places the reader at risk of being left wary of international human rights law and possibly even confused as to the significance of the internationalization of human rights in the first place.

Enforcement of the protection of internationally recognized human rights essentially comes down to individual countries and their domestic laws. Perry effectively portrays the importance of domestic law within the discipline of international law, while also reminding the reader that “developed” nations such as the United States do not always succeed in their efforts to protect basic rights. Although Perry sets out a good background of how human rights are represented and recognized in various international treaties and oftentimes makes clear that the actions of the United States do not always reflect those of its counterparts in the United Nations, he neither offers an explanation of why the United States makes such decisions nor does he offer any possible means through which the United States might be compelled to act differently in the future. Thus, although Perry presents an international perspective on human rights that highlights the power of human rights in transcending the nation-state’s sovereignty, throughout the book the reader is constantly informed of the fact that nation-state sovereignty often prevails, but without a thorough explanation as to why. Perry could have attempted such an explanation through a discussion of the existing political reality, especially with regard to specific powerful nations such as the United States and the consequent limitations of a universal system of human rights. Doing so would have perfectly complemented his well-structured analysis of human rights in the constitutional law of the United States, and could have avoided the possibility of leaving the reader with unresolved final questions, by providing a truly in-depth exploration of the issues at hand.

While Perry’s focus on the relationship between domestic principles and international human rights is refreshing, it still begs the question of practicality and administrability. For example, it seems unfeasible to imagine that internationally recognized rights could be effectively protected within a country without any intrusion from external forces. In addition, Perry’s emphasis on the United States Supreme Court’s role in striking down the discussed laws as unconstitutional, and thereby advancing the recognition and protection of
international human rights, is a further reminder that the protection of human rights often comes down to one powerful institution that will not necessarily follow in other countries’ footsteps in recognizing certain rights. The Supreme Court has yet to strike down the discussed laws as unconstitutional, and it is too hopeful to imagine that they will do so sometime soon.

The conclusions that Perry does reach, however, present important and thought-provoking arguments about international human rights, morality, and their relationship to constitutional law, rendering *Human Rights in the Constitutional Law of the United States* a valuable contribution to a variety of disciplines, especially the fields of international and constitutional law.
Review of *International Commercial Tax* by Peter Harris and David Oliver

Colby Mangels*

INTRODUCTION

Commercial transactions increasingly span multiple jurisdictions, responding to the needs of multinational corporations operating in the globalized environment of the post–Cold War economic reality. In response, tax laws both within and among leading commercial jurisdictions have added layers of complexity in recent decades, while also attempting to deal with highly specialized commercial structures and transactions. The result is the body of current international tax law that is renowned for its complexity and intricacy, often serving as the longest statute in many jurisdictions’ commercial regulatory structures.¹ While tax law is an attempt at pragmatic solutions to the contemporary system of economic incentives, taxation statutes often represent the political, historical, and economic interests of the jurisdictions in which they operate. This amalgam of factors adds a further layer of miscomprehension to the current regime, where bilateral tax treaties, multinational model agreements, and supranational judicial structures (e.g. the European Court of Justice, or ECJ) all shape critical principles of how internationally active corporations and individuals navigate their transactional decisions.

Because tax laws ultimately serve the real world interests of private enterprises and individuals, it is necessary for tax practitioners, students, and individuals engaged in transnational business to understand the framework in which these rules operate. Given that over 2,500 double tax treaties are currently in effect worldwide, international taxation issues are often complicated as much by the interplay of rules between a jurisdiction’s agreements with other countries as the rules active within its own borders.² These tax treaties attempt to prevent double taxation of individuals and businesses that operate in multiple jurisdictions, often by either exempting or crediting taxes paid in the country where the income is derived (i.e. the source country) to taxes that are nominally

---

* University of California, Berkeley, School of Law, JD Candidate, 2015.
2. *Id.* at 17.
due in the entity’s home jurisdictions (i.e. the residence country).\(^3\) The Organisation for Economic Co-operation and Development’s (OECD) Model Convention on Income and Capital (the OECD Model Tax Convention), which has been updated multiple times since it was first published in 1963, has served as the underlying framework for the majority of the existing tax treaties among developed countries.\(^4\) However, despite this underlying Model Tax Convention, bilateral tax treaties are far from uniform, with jurisdictions noting significant divergences on critical issues such as payment characterization, asset transfer pricing, and depreciation schedules.\(^5\) Furthermore, the rigidity of these bilateral treaties is viewed as restricting progress on international taxation principles, considering that many countries have upwards of fifty different treaties.\(^6\) Many bilateral treaties were conceived at the turn of the twentieth century and are based on outdated schedule systems. In addition, the ECJ adds complexity to the twenty-eight jurisdictions that are European Union member states, as it retains authority to rule on EU member states’ compliance with the four fundamental freedoms of the EU.\(^7\)

Peter Harris and David Oliver’s book *International Commercial Tax* provides a framework for understanding the origins of existing complexities in tax law and how they interact in practice.\(^8\) While the OECD Model Tax Convention has historically provided the main foundation for international treaties, the law of the European Union is increasingly important for tackling cross-border tax problems within EU member state jurisdictions. EU law also stands as a template for how supranational solutions to international taxation issues may one day be implemented. Within these competing spheres of jurisprudence, Harris and Oliver’s book provides comparisons of the OECD Model Tax Convention with EU law as a method of instructing the reader on a variety of complex yet realistic scenarios in international commercial income tax.

For Harris and Oliver, the inspiration for the book arose from their jointly instructed postgraduate course series at the University of Cambridge, which they held over the past decade. Peter Harris is a Reader at the Faculty of Law at the University of Cambridge and is the author of numerous books and publications on commercial taxation. David Oliver was, until his recent retirement, an international tax partner at the London office of PricewaterhouseCoopers. With their combined backgrounds from academia and the professional tax services sector, the authors bring a considerable depth of knowledge and experience, which aids in boiling down many of the complexities of international taxation regimes. The authors’ mixed perspective provides a rich analysis of

---

3. *Id.* at 18.
4. *Id.* at 17–18.
5. *Id.* at 19.
6. *Id.* at 18.
7. *Id.* at 26–27.
8. *Id.* at 2.
contemporary international taxation issues while remaining accessible to both students of law and practitioners who have little background in fiscal matters.

I.

SUMMARY

Harris and Oliver offer a simplified framework for processing the innate complexity of international commercial income tax rules. The authors first provide an introduction to the fundamentals of income tax, permitting students and practitioners who have minimal taxation background to approach the materials. The authors then introduce a base case, developing a sample case scenario to demonstrate many of the issues faced in international taxation when at least two different tax systems interact. The authors continue to revert back to this simplified prism throughout the course of the book to demonstrate issues arising from taxation in the source state (i.e. where the rents are created) and in the residence state (i.e. where the party receiving the payments resides).

In identifying the basic features of international tax law, the authors describe four characteristics of payments that make up parts of administration for any international taxation issue: allocation, quantification, timing, and characterization. Tax characterization is subject to additional complexity due to a split between traditional scheduler systems, a structure followed by a majority of countries, where taxation rates are calculated separately for different types of assets, and a global system, where income is theoretically calculated under a unified method. Finally, an important characterization is the difference between personal taxation, generally adjusted according to personal circumstances of the taxpayer, versus in rem taxation, where the focus for calculation of the tax is on a particular tangible item.

The purposes and interplays between domestic and international tax laws illustrate some of the issues faced when engaging in international transactions. Domestic laws of jurisdictions provide the background over which other sources of international tax laws are built, acting as the default laws applicable to a transaction. Tax treaties attempt to coordinate the unilateral, and often rigid, exercise of sovereignty found in domestic laws by bilaterally reducing threats to double taxation of cross-border commerce. Understanding the role tax treaties play is important given that currently over 2,500 double tax treaties are in effect worldwide. Tax treaties’ bilateral nature has often slowed progress on international tax reform efforts. Many states have over one hundred bilateral treaties, each of which would have to be realigned if the international tax laws

9. Id. at 4.
10. Id. at 11–12.
11. Id.
12. Id. at 13.
13. Id. at 15.
14. Id. at 16.
were changed. Finally, tax treaties are important given that the OECD Model Tax Convention is followed by the majority of developed countries, adding power to its ability to alter the international landscape. This is in contrast to the UN Model Double Taxation Convention, which was proposed as a counterweight by developing countries and remains less influential. When jurisdictions attempt to support their positions in international taxation litigation efforts, they will often look to OECD commentaries to support their positions, as OECD commentaries are persuasive and given the most weight. Yet despite its relative importance, the authors make a point to note that the UN Model Double Taxation Convention is not itself a treaty, meaning that domestic courts are likely to emphasize the importance of those provisions within the OECD Model Tax Convention or commentaries which support the existing tax code of the court’s own jurisdiction.

A. Residence

After laying this groundwork, the authors discuss which country will be found to have preference in taxing a certain transaction or entity. To determine which jurisdiction’s tax regime will apply to either the personal or in rem entity under taxation, the relevant tax administrations will first look to whether an appropriate economic connection to the jurisdiction exists to justify taxation. Residence, the authors explain, is essentially a question of domestic law, with tests typically for personal residence including family and social ties, income-producing activities, bank accounts, citizenship, domicile, and physical presence in the country. These factors are often then weighed together to determine the residency of an individual. Conversely, two main tests are used for determining residency for artificial persons (i.e. corporations). The first test is based on the place of incorporation, registration, or the primary seat of the corporation. An alternate test for artificial persons looks to the place of management or the principal office of the business. The authors note that this second test essentially asks where high-level managerial decisions are made; this question has arguably been rendered out of date by electronic communications and the abilities of corporations to establish “special purpose vehicles” (i.e.,

15. Id. at 17–18.
17. Following the OECD Model Tax Convention’s development throughout the 1960’s and 1970’s, an international consensus developed in an attempt to conclude more tax treaties both between developing countries, and between developed and developing countries. The result of this movement was the UN Model Double Tax Convention of 1980. See United Nations Model Double Taxation Convention Between Developed and Developing Countries, UN Sales No. E.80.XVI.3 (1980) [hereinafter UN Model Double Taxation Convention]; HARRIS & OLIVER, supra note 1, at 17.
18. HARRIS & OLIVER, supra note 1, at 37.
19. Id. at 58.
Wood v. Holden). Special purpose vehicles are corporate legal entities often used during acquisition or merger transactions to limit a parent corporation’s asset or bankruptcy liability. Finally, the authors also note the additional problem facing persons with dual residencies. Under the OECD Model Tax Convention’s tiebreaker rules of Article 4(2) and (3), the Model Tax Convention attempts to provide a method for solving residency under the tax treaty in question. The Article 4(2) test for persons is based on a series of sequential steps (i.e. asking about the location of the individual’s vital interest, habitual abode, nationality, or any mutual agreement of the tax authorities). The Article 4(3) test for artificial persons is based on the “place of effective management,” which may differ among jurisdictions, but the authors note that in the UK this means the location of the managing, finance, and sales directors, a definition providing domestic tax authorities with wide discretion.

Under the existing tests for taxation, a person may simultaneously be resident of more than one country. A dual residence status gives rise to the problem of double taxation. The authors note that although the OECD Model Tax Convention contains non-discrimination provisions, which are charged with mitigating instances of double taxation, the OECD Model Tax Convention’s provisions are particularly narrow and often open to a variety of interpretations. Additionally, the authors note the stark contrast between the OECD Model Tax Convention’s anti-discrimination provisions and EU law’s requirements under the four fundamental freedoms of the Treaty on the Functioning of the European Union (FEU Treaty). The ECJ is likely to find that a member state has violated the FEU Treaty if there is any discriminatory behavior between dual residents who are EU citizens. However the ECJ has not provided a “cut and dry” policy, as it has permitted tax measures that violate one of the four freedoms to still be upheld if the ECJ finds they are justified, as per the court’s holding in Marks & Spencer. This difference in the amount of

---

20. Id. at 61. Here, the authors note that the establishment of a special purpose vehicle is very common in international transactions. In this case, the court noted that when dealing with a special purpose vehicle, the acts of central control and management matter very little compared with non-special purpose vehicle transactions. Wood v. Holden, [2006] EWCA (Civ) ¶ 27.

21. OECD Model Tax Convention, supra note 16, at articles 4(2) and (3).

22. HARRIS & OLIVER, supra note 1, at 66.

23. Id. at 66–67.

24. Id. at 86.

25. Id. at 92.

26. The FEU defines the four fundamental freedoms as (1) the Free Movement of Goods; (2) Freedom of Movement for Workers; (3) the Right of Establishment and Freedom to Provide Services; and (4) the Free Movement of Capital. Treaty on the Functioning of the European Union articles 26(2) and 101(1), Oct. 26, 2012, 2012 O.J. (C 326); see HARRIS AND OLIVER, supra note 1, at 96.

27. HARRIS AND OLIVER, supra note 1, at 97.

28. Id. at 100–101. In Marks & Spencer, the ECJ held that discrimination might be justifiable based on the following factors: (1) symmetry, profits and losses must be treated similarly in the same tax system (regarding jurisdiction) to protect a balanced allocation of taxing rights; (2) the possibility
discrimination tolerated distinguishes EU law from that of traditional OECD Model Tax Convention treaties. However, the approach debated above is not the only means of taxing foreigners’ income under the OECD Model Tax Convention. A further option for governments is to tax foreigners based on the activities arising within a certain jurisdiction. The items subject to taxation would only include income derived or incurred in connection with the income-earning activity in the jurisdiction.\footnote{HARRIS & OLIVER, supra note 1, at 71.}

The complexity of these overlapping jurisdictional layers becomes apparent with the author’s discussion of source country taxation. The amount of taxation payable in the jurisdiction where expenses and income are derived (i.e. the source country) is determined by the type of income generated and the jurisdiction’s designated treatment of that type of income. The authors begin by analyzing the OECD Model Tax Convention’s scheduler approach, which is similarly represented throughout the majority of the bilateral tax treaty network. Despite the fact that many jurisdictions adopt scheduler approaches, the definitions of schedules within each jurisdiction are often imprecise and can vary substantially, thereby rendering cross-jurisdiction comparisons hazardous.\footnote{Id. at 119–20.}

\subsection*{B. Defining Income}

Given the imprecision surrounding the interpretations of the OECD Model Tax Convention in the international context, the authors focus on the OECD Model Tax Convention’s Article 21, which provides the default or residual definition of income.\footnote{Id. at 121–22.} In practice, many treaties do not include an article that defines this catch-all phrase for “other income” when it is not specifically covered in the treaty. Hence, if taxpayers are not careful to fit their income into pre-defined categories, their income is often deemed to fall outside the scope of the bilateral tax treaty used by the source state to determine the taxpayer’s burden.\footnote{Id. at 123.}

Article 6 of the OECD Model Tax Convention grants full taxing rights to the source state for income from immovable property situated therein.\footnote{See OECD Model Tax Convention, supra note 16, at article 6.} Whether property is “immovable” and what counts as the “income therefrom” are...
therefore essential questions for the taxpayer.\textsuperscript{34} The OECD Model Tax Convention primarily allows “immovable property” to be defined by the domestic states in question. This approach raises a number of issues given that definitions among many countries differ widely, or alternatively, “immovable property” may not even exist as a scheduler category.\textsuperscript{35} Domestic jurisdictions often expand the scope of property under other schedules, resulting in “immovable property” being taxed at the source. In addition to requiring domestic tax codes to define “immovable property,” Article 6 of the OECD Model Tax Convention requires that there be income from the property before taxation can take place.\textsuperscript{36} Whether this “income” from immovable property includes capital gains is likely to depend, per Article 3(2) of the OECD Model Tax Convention, on the applicable law of the domestic jurisdiction or on Article 13 of the OECD Model Tax Convention, which refers to gains from the “alienation” of immovable property.\textsuperscript{37} Any income from immovable property can then typically be taxed on a gross basis if the domestic law does not provide a right to be taxed on a net basis and the resulting gross taxation does not violate the non-discrimination rules under Article 24(1) of the OECD Model Tax Convention.\textsuperscript{38}

Turning to the issue of taxing business profits, the authors note that source country taxation becomes quite controversial insofar as it deals with business subsidiaries.\textsuperscript{39} Assuming that all the activities of the subsidiary are conducted in the source country, that jurisdiction has the exclusive right to tax the business profits of the subsidiary under Article 7(1) of the OECD Model Tax Convention.\textsuperscript{40} However, where a holding company remains active in the ownership and management of the subsidiary, application of the Article 24(5) non-discrimination rule under the OECD Model Tax Convention becomes possible. Additionally, given that the source country only has exclusive rights over the “profits” of the enterprise (under Article 7(1)), a residence country of the holding company may dispute the taxation at the source, and a debate as to the definition of “profit” will ensue between the states and, perhaps, the taxpayer.\textsuperscript{41}

Taxation of business profits is similar to taxation for a “permanent establishment” (PE), defined under Article 5 of the OECD Model Tax Convention, where the source and residence country share rights to taxation of

\begin{itemize}
\item\textsuperscript{34} Id.
\item\textsuperscript{35} HARRIS & OLIVER, supra note \textsuperscript{1}, at \textsuperscript{124}.
\item\textsuperscript{36} Id. at \textsuperscript{126} (with authors referring to Article 6 of the OECD Model Tax Convention).
\item\textsuperscript{37} Id. at \textsuperscript{127} (with authors referring to Articles 3(2) and 13 of the OECD Model Tax Convention).
\item\textsuperscript{38} Id. at \textsuperscript{128}.
\item\textsuperscript{39} Id. at \textsuperscript{129}.
\item\textsuperscript{40} Id. at \textsuperscript{134} (referencing Article 7(1) of the OECD Model Convention).
\item\textsuperscript{41} Id. (referencing Articles 7(1) and 24(5) of the OECD Model Convention).
\end{itemize}
the PE’s profits. Per Article 5, a PE is “a fixed place of business through which the business of an enterprise is wholly or partly carried on.” This definition raises the question of what threshold must be met for a business to be “permanent.” The authors note that the OECD commentaries are not necessarily helpful as precise measures, but rather act as broad guidelines. Their adaptation to domestic law is often found in the jurisprudence of domestic courts. Under Article 5, a PE can also be created through a “personal presence,” which does not require a fixed place of business, but rather a fiduciary relationship. This relationship often falls under the domain of agency law, where the PE is defined as an agent who acts for the principal within the source country. This conceptual application again poses a number of definitional issues given that an agency relationship can be recognized on the basis of a variety of principles which differ among jurisdictions, not to mention between common law versus civil law systems.

Due to the complexity surrounding its definition, the PE concept acts as both a de minimis and a substantive limitation on taxing business profits. Once identified as a PE, the most difficult calculation is the intra-enterprise provision of services, where the question revolves around whether the type of activity is one which would, by its nature, normally be provided to an independent third party. The approach under EU law differs from the OECD Model Tax Convention, given that within the EU a PE can be defined as the exercise of a right of establishment under Article 49 of the FEU Treaty. This differs from the OECD Model Tax Convention, which defines PE as a class based on the foreign ownership or control. The result is an approach in the EU that stresses parity of tax treatment of PEs operating in multiple member states.

C. Qualifying Income

Although definitions of taxation structures are important, quantifying the price of transactions often determines how associated parties can undermine the domestic tax authorities. Because group subsidiaries may be subject to divergent tax rates, the multinational groups that engage in transfers among jurisdictions may have incentives to over- and under-report income in different jurisdictions.
so as to reduce their tax bases. Articles 7(2) and 9(1) of the OECD Model Tax Convention deal with transfer pricing issues. The OECD Model Tax Convention treats subunits of an economic group separately, presuming that they act independently of each other. Article 9(1) authorizes adjustment by attributing additional profits directly to the disallowance of expenses. Whether pricing is arm’s length, such as those transactions that would take place between independent parties at an arm’s length distance, is determined through five comparability factors: (1) a cost-plus reference to sales of similar products made between unrelated persons in similar circumstances; (2) the resale price method looking at the difference between reported costs and profits; (3) the cost-plus method which uses an average manufacturing cost to gauge appropriate profits. The final two factors are considered last resorts: (4) the transaction net margin method compares the reported profits of a company with similar companies’ profits, and (5) the profit split method allocates the worldwide profits of a multinational among its members in proportion to their contribution.

The focus on quantification leads to a discussion on one of the hottest topics in international corporate taxation: transfer pricing issues. These issues arise when competing quantification methods, such as the independent enterprise versus arm’s length pricing, are relied on for calculating cross-border payments. Intellectual property (IP) issues are particularly difficult to value because of their unique nature. The OECD Model Tax Convention looks to past profits generated in similar instances to determine pricing for IP assets in particular. Within EU law, the fundamental freedoms have played a major role where the ECJ ruled that divergent or punitive capitalization requirements across member states are in violation of the freedom of establishment. In an attempt to facilitate trans-European business, the EU has proposed its own guidelines through the Joint Transfer Pricing Forum, a committee of EU appointees studying transfer pricing tax issues in order to better advise the EU in its policy approach.

51. Harris & Oliver, supra note 1, at 228–29.
52. Id. at 232; see OECD Model Tax Convention, supra note 16, at article 7(2) and article 9(1).
53. Harris & Oliver, supra note 1, at 232; see OECD Model Tax Convention, supra note 16, at article 9(1).
54. Harris & Oliver, supra note 1, at 236–39.
55. See id. at 235 (citing R. Vann, Tax Treaties: The Secret Agent’s Secrets, BRITISH TAX REVIEW 345–82 (2006) (“This approach attempts to apply a functional analysis to identify the functions undertaken by various entities in the relevant corporate group in light of the assets used and risks assumed by each of them. The pricing of transactions is subsequently undertaken based on this analysis . . . .”)).
56. Id. at 239–42.
57. Id.
58. Id. at 243; see Case C-324/00 Lankhorst-Hohorst GmbH v. Finanzamt Steinfurt, 2002 E.C.R. 1-11779.
59. Harris & Oliver, supra note 1, at 243–46.
D. Characterizing Income

Linked to quantification of transfer pricing are issues of characterization of assets, which focuses on the fungible nature of income types. The OECD Model Tax Convention highlights the differences between dividends, interest, and royalties, and the authors note that the OECD Model Tax Convention’s definition of “dividends” is outdated under article 10(3). Similarly, the concept of “royalties,” which are defined under article 12(2) as “payment of any kind received as a consideration for use of or right to use any copyright,” renders it difficult to tell what is being paid for when a royalty is characterized as a payment. While the UN Model Double Taxation Convention takes a similar approach to defining royalties, it includes more items than under the OECD Model Tax Convention’s definition. In particular, the UN Model Double Taxation Convention’s definition contains wording to define types of rent payable for the use of tangible property.

A major element within characterization issues deals with thin capitalization rules. “Thin” capitalization is characterized by a subsidiary which is excessively debt financed by its parent corporation, even though the subsidiary might just as easily finance itself through equity financing, but is instead motivated by the lower tax treatment of parent-corporation financing. Harris and Oliver point out that this treatment results in tax base erosion in the source country, as the debt can be deducted while payment of dividends would generally not be deductible were the company financed through equity markets. To counter this trend, domestic tax codes of individual countries often adopt a safe haven approach where, if a company’s debt to equity exceeds a certain ratio, the interest on the excessive debt is not deductible. Other approaches to counter this problem of “thin” capitalization include denying deductions for interest to the extent that it exceeds a certain percentage of income net of financing costs, or allowing deductions on debt interest only to the extent that it is paid on debt that could be borrowed from an independent party. While the OECD Model Tax Convention allows individual states to use safe haven or earning-stripping approaches as measured against the arm’s length standard, the thin capitalization rules must apply in both a domestic and international context to avoid violating the Model Convention’s Article 24(4) anti-discrimination provision.

60. Id. at 246.
61. Id. at 247.
62. Id. at 250.
63. Id.
64. Id. at 253.
65. Id.
66. Id.
67. Id. at 256; see OECD Model Tax Convention, supra note 16, at article 24(4).
E. Residence Country Taxation

The counterpart to problems faced in source country taxation is residence country taxation. Given that most countries impose taxes based on residence, problems exist for residents of one country who carry out business in another jurisdiction, since they could be subjected to double taxation. Domestic law often provides unilateral solutions to the double-taxation issue. For instance, deduction methods may be used where foreign taxes may not qualify for more comprehensive relief. While exemption methods (which simply exclude the foreign income from consideration) seem straightforward, the authors note that they are often subject to strict requirements and qualifications. The authors also observe that credit methods are complex methods of foreign tax relief and are often subject to limitations that can differ between countries.

Under the OECD Model Tax Convention, Article 23 allows for foreign tax relief through international tax treaties, differing from the domestic methods described above. Article 23A(1) requires residence countries to provide exemptions where the source country has a taxing right under a bilateral treaty. Harris and Oliver note that, realistically, the residence country is obliged to provide relief if the source state has interpreted the provision according to any bilateral treaty and residually to its own domestic law. Article 23A(2) also provides for a credit provision, subject to article 23B, which allows domestic law to limit foreign tax credits. The authors point out that corporations face special problems under double taxation given the difficulties of allocating different levels of corporate tax rates among the branches of a multinational corporation that enjoys both foreign and domestic income.

F. Challenges of the Current System

Because bilateral tax treaties are in effect for most jurisdictions, the limitations of these treaties can have serious implications for determining international taxation. A key problem refers to mismatches between source and residence countries where key definitions such as the word “income” can differ vastly from treaty and international law contexts. Recognition of certain artificial entities treated by one country as a tax subject, but not by the other (i.e. hybrid entities), also results in different taxation. Distortions are also caused

68. HARRIS & OLIVER, supra note 1, at 265.
69. Id. at 267–69.
70. Id. at 269–70.
71. Id. at 275; see OECD Model Tax Convention, supra note 16, at article 23.
72. HARRIS & OLIVER, supra note 1, at 277.
73. Id. at 279; see OECD Model Tax Convention, supra note 16, at article 23A(2) and article 23B.
74. HARRIS & OLIVER, supra note 1, at 283.
75. Id. at 343.
76. Id. at 347.
by differences in income from employment versus independent services, with this distinction emphasizing certain biases to calculating applicable taxation rates which are based on individual transactions, as well as allocating expenses between domestic and foreign income.77

Beyond bilateral issues, the authors discuss how the rigid nature of international tax treaties stands in the way of progress. Bilateral tax treaties typically deal with obvious tax barriers across countries. Such treaties therefore shape international dialogue, pointing countries to these issues as a means of reform. But the major limitation of tax treaties is related to what they do not cover. For instance, by placing an intermediary holding company in the midst of a transaction, companies can change the location of an income’s source and the residence of the entity deriving the income.78 The authors note that the goal in establishing an intermediary is often to reduce source country taxation as well as to obtain taxation relief in the residence country for expenses and any foreign taxes imposed.79

The authors conclude the book by reiterating the structural problems underlining the existing international tax treaty network.80 They contrast this to the EU, where the multilateral basis of the treaty provides uniformity and consistency. However, the authors note, EU law remains undeveloped, with jurisprudence at the ECJ level lacking since cases are brought on an ad hoc basis to the ECJ and the ECJ is ultimately a political institution.81 The authors propose that one way forward might be non-binding international standards that states could tailor to their own legal systems, such as those the OECD already operates for the purposes of information exchange and budgetary transparency.82 But ultimately, the authors stress that the point of the book is to show how the international tax framework can be analyzed in a coherent manner in spite of its complexities.

II.
ANALYSIS

Harris and Oliver succeed in sketching out an overview of both the relevant concepts and complexities in the interconnections of international tax law. Through a thoughtful introduction, the authors provide unaccustomed readers with a review of basic concepts in both general income taxation as well as the more complicated concepts which are directly relevant to international commercial taxation issues. The richness of the book is enhanced through its comparative angle: by contrasting the OECD Model Tax Convention, EU law,
and strategically relevant domestic legal systems (e.g. the United Kingdom, United States, or Singapore), the authors demonstrate both the synergies and gaps existing in international tax. This comparative analysis efficiently demonstrates both the shortcomings of the outdated OECD Model Tax Convention and the often under-developed regime in the EU. For example, the authors’ discussion of asset pricing transfers demonstrates that the OECD’s approach toward taxation based on the aggregate value of similar products is quite inefficient when compared to EU approaches, which allow for shared taxation between the source and residence countries, even when the approaches are predicated on the four fundamental freedoms of the FEU.83 In addition to the comparative nature of the work, the authors provide great depth to their analysis of individual countries through discussions of the historical development of relevant case law. Their citation to relevant judicial decisions demonstrates not only the methods used by authorities in deducing international tax principles from treaties (thereby providing a roadmap toward possible future developments in the field) but also the origins of how and why international taxation systems remain divergent.84 Ultimately, the authors use their repeated demonstration of divergences in taxation methods to show how international taxation systems can coexist with fundamental differences while still giving hope for convergence in important areas.

While the topic of international taxation may set off immediate alarm bells of complexity, the authors have strived to make their book accessible to non-experts (including graduate-level students) while still providing significant added value to the analysis of professionals working in the field of international taxation. Through the author’s base case scenario, readers are introduced to the subject of international taxation with an approachable series of examples relating to the ways that simple office lease agreements can pose significant international taxation issues. While relying on such a simplified example may seem lacking in substance, the authors use it as a jumping-off point for discussing some of the most complex issues in international taxation. Given this approach, the book works well as a self-study, or as a teaching manual, providing constant aid for orientation. This framework is then mixed with the authors’ collective knowledge of the subject, allowing for an analysis rich in both practical advice and knowledge behind some of the most important decisions for international taxation. While this framework proves ultimately to be highly effective at conveying the necessary information, practitioners with experience in the field might find the repeated examples and guidance heavy-handed. The authors’ apparent intention was to divide between a practitioner’s manual and an academic piece, but it appears that the result favors more the

83. See id. at 227 (discussing quantification and characterization issues); see also FEU Treaty, supra note 26 (explaining the relevance of the EU internal market to international taxation issues).

84. The authors make use of cases from Australia, Canada, France, India, Italy, South Africa, the United Kingdom, and the United States. In addition, the authors cite a significant number of cases from the ECJ, considering the legal ramifications it poses across the entirety of EU member states. See HARRIS & OLIVER, supra note 1, at xiv–xxii.
latter than the former. Of course, at the same time, the book is very well cited and organized, allowing practitioners to easily reference relevant sections.

The authors’ discussion on the existing challenges within the current tax regime nicely summarizes many of the key points referenced earlier in the book, but it could further benefit from a broadened comparative scope. The continued reference to the EU, the United States, and the United Kingdom provides a limited context in which to view the way these challenges are playing out. While a comprehensive list of countries relevant to international taxation issues is undoubtedly beyond the scope of the work, the authors’ analysis could focus on approaches taken in developing countries, or even rival proposals to the OECD’s international framework. The existing definition leaves the reader feeling biased toward the “North” within the “North-South divide,” potentially missing out on important topics within the changing geopolitical scene of international taxation.

In addition, the book could benefit from a further discussion of issues surrounding tax evasion and offshore jurisdictions. The OECD’s Centre for Tax Policy and Administration has been a driving force in pushing countries to harmonize their information-sharing agreements on taxation issues. This in turn has forced countries with previously strict banking secrecy rules to embrace information-sharing agreements on non-resident account holders.85 A description by the authors about how these developments are shaping taxation reform efforts on the international scene could provide more depth to their work.

While the authors’ analysis of international taxation regimes is sound, some readers may have problems with the scope of the work. Given that the book likely recommends itself as a tool for instructors rather than practitioners, some may find it lacking in its discussion of proper policy directions in the future. In this sense, the book is perhaps best thought of as a self-contained manual, more geared toward large university courses attempting to explain the functioning of international tax law than to smaller seminars interested in the policy-driving and policy-solving aspects of international and comparative tax law. Yet striking a balance between the two is arguably impossible within a work of this size and subject.

Review of *Rough Justice: The International Criminal Court in a World of Power Politics* by David Bosco

Anna Mathew*

**INTRODUCTION**

The International Criminal Court (ICC) came into existence almost twelve years ago as the world’s first permanent court for the prosecution of international crimes. Its creation was the direct culmination of a decade-long resurgence of international criminal law and, more broadly, of a process that had begun sixty years previously at Nuremberg. The project of an international criminal court was the subject of extensive academic scrutiny long before the current ICC took shape. As the Rome Statute came into being in 1998, and the court opened its doors in 2002, this scrutiny deepened, spawning an extensive and ever-expanding literature on the court from diverse commentators. The literature has been based both in international law, assessing the legal instruments, decisions, and first judgments of the court, and in international relations theory, assessing the court as an institution—both object and subject—in the world of international politics.

David Bosco’s new book, *Rough Justice: The International Criminal Court in a World of Power Politics*, provides additional perspective to the conversation. As the book’s subtitle suggests, *Rough Justice* fits into the second of those schools of commentary, focused on the court as an institution, albeit with a good understanding of the legal significance of the developments it analyzes. Bosco’s background as a qualified lawyer and political analyst enables him to tell the “international law” and “international relations” stories of the ICC in a united narrative. In particular, his depth of knowledge on the UN Security Council is displayed in his nuanced elucidation of the intricacies of the permanent members’ (P5) maneuvering in relation to the ICC. Bosco also

---

* University of California, Berkeley, School of Law, LLM Candidate, 2014; and University of Cambridge, BA (Hons) in Law, 2012.

1. David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* 2–3 (2014) (noting the post-Nazi era Nuremberg trials, which are widely regarded as the first modern emphasis on prosecution of crimes against humanity).

2. See David Bosco, *Five to Rule Them All: The UN Security Council and the*
brings his dual roles as academic and blogger to bear on this book, creating a rigorously researched and credible piece of work with the readability and up-to-date feeling of a blog, making a compelling case for the continued importance of in-depth work for a broad readership, and its potential style, in an age of 24/7 international criminal law (ICL) commentary across various media and social media platforms.

The book’s “theoretical ambition is modest,” using existing concepts to provide a chronological analysis of the court’s first eleven years. It draws on a variety of documentary sources, from official court and state records to NGO reports and previous scholarship. However, its foundation is the author’s frank personal interviews with key court actors and diplomats, such as former Chief Prosecutor Luis Moreno-Ocampo, as well as ICC Judges Philippe Kirsch and Hans-Peter Kaul. Bosco uses these sources as evidence for the conceptual framework he sets up of potential patterns of behavior by major-power states and the ICC Prosecutor, a framework which he explicitly revisits in the book’s conclusion. However, the bulk of the book provides a “narrative and historical” account that gently suggests to the reader, rather than telling her outright, where different events might be located within that conceptual framework. Bosco makes his overarching argument clear from the start: “the interaction of major-power and prosecutorial behavior has resulted in mutual accommodation” of each other’s interests. It is a deceptively simple argument, the complex bases of which are revealed to the reader in the sprawling, twisted history of the court that then unfolds.

I. SUMMARY

Before introducing the conceptual framework in chapter one and gradually drawing the reader through the chronology of the ICC, Bosco begins the book in the middle of the court’s story, with ICC Chief Prosecutor Luis Moreno-Ocampo’s announcement of charges against Muammar Gaddafi in the midst of the violence in Libya in May 2011. Within paragraphs, the seeming importance of this moment’s “reject[ion of] the idea that power or political influence should influence the course of justice” is undercut by reference to the concurrent NATO intervention and its clash with ICC aims in Libya. With a brief sketch of that moment in the court’s history, its central conflicts—between international

3. Bosco, supra note 1, at 8.
4. Id. at 9.
5. Id. at 12, tbl.1.1.
6. Id. at 20, tbl.1.2.
7. Id. at 8.
8. Id. at 20.
9. Id. at 1.
justice and power politics, and between abstract support for ICL and concrete limitations—are set up. Bosco frequently uses this technique, setting up one apparent legal truth only to add a political lens through which the nature of that truth is skewed. This unsettles the reader, who is left unable to take refuge in either a purely legalist \(^{10}\) or realist \(^{11}\) perspective while reading this account of an “independent and interdependent” ICC. \(^{12}\)

The technique also reflects a tension running throughout the book, and left unresolved at its end. On the one hand, there is a grand narrative of the inexorable progress of international justice, as reflected in chapter titles from “Origins” to a “Phantom Court” to “Caution and Consensus” and even “Breakthrough,” all the while accompanied by a pressing weight of moral authority. On the other hand stands the troubling idea, also introduced early on, that the progress of ICL has from its origins essentially been “accomplish[ed] by fiat,” \(^{13}\) by luck, “bizarre” coincidence, and combinations of events. \(^{14}\) As the book’s chronology moves towards the present day, the sense of a coherent narrative breaks down. The final chapter, titled “Power Plays,” considers events too recent for the author to authoritatively state that they draw the moral arc of ICL in one direction or the other. To his credit, Bosco neither adopts a simplistic moral narrative nor dismisses strong evidence of the peculiarly strong moral momentum of ICL, choosing instead to inhabit the midst of that tension and thus force his reader into that space with him.

In addition to these central tensions, the introduction highlights the book’s other main theme, tied to its analysis of power-state behavior—the shifting position of great powers in the international landscape \(^{15}\)—and a specific focus within that theme on the relationship between the court and the United States. \(^{16}\)

\textit{A. Framework}

Having introduced the main themes, the book goes on to set up the conceptual framework for their analysis. \(^{17}\) First, Bosco considers potential behavior patterns of major-power states towards the ICC, dividing them into three alternative strategies: (1) marginalization (active or passive), (2) control, and (3) acceptance. \(^{18}\) Marginalization entails states working to keep the ICC weak and irrelevant, and could be the strategy of member states of the ICC as well as non-members. Control, on the other hand, covers efforts to keep the court within its mandate and to stop it from interfering with important political

\begin{itemize}
  \item \(^{10}\) \textit{Id.} at 3–4.
  \item \(^{11}\) \textit{Id.} at 11.
  \item \(^{12}\) \textit{Id.} at 4 (emphasis added).
  \item \(^{13}\) \textit{Id.} at 27.
  \item \(^{14}\) \textit{Id.} at 44.
  \item \(^{15}\) \textit{Id.} at 5.
  \item \(^{16}\) \textit{Id.} at 9.
  \item \(^{17}\) \textit{Id.} at 11–22.
  \item \(^{18}\) \textit{Id.} at 12, tbl.1.1.
\end{itemize}
or diplomatic concerns of states. Acceptance suggests embracing the court, and could be prompted by a range of factors, from a cost-benefit analysis to the influence of the “norm cascade” underway in ICL. Each of these potential behaviors, if observable from the empirical evidence, has implications for theory and policy. Marginalization and control behaviors would vindicate a realist view of international law and put the viability of the ICC as an independent and effective institution in doubt. Evidence of acceptance would support effectiveness and suggest that the realist model does not fully explain the facts.

The analysis then moves on to the second, and most original, part of the conceptual framework, shifting focus to the behavior of the court. Bosco points to the fact that international relations scholars have generally not analyzed international organizations’ behavior as having any meaningful impact. He departs from this general trend to scrutinize the behavior of the court’s officials and their potential ability to set the court’s course even in opposition to the desires of states. Within the wider institution of the ICC, Bosco focuses specifically on the Office of the Prosecutor (OTP) as the court’s key discretionary authority, given its power to open investigations and request arrest warrants. This area of prosecutorial discretion is also identified as under-studied in international relations scholarship.

The framework of potential prosecutorial behavior set out here is a sliding scale of four different approaches. First, the apolitical prosecutor only considers politics where it directly concerns the law she is applying, such as in establishing genocidal intent in a given case. Second, the pragmatic prosecutor looks to assess the likelihood of state support prior to launching investigations, since such support is necessary for a feasible investigation to occur. Third, the strategic prosecutor seeks to actively build support among major-power states, albeit doing so in order to meet an “ultimate goal” of gathering enough support for the court that it could “eventually pursue its mandate independently” of political considerations. Lastly, the captured prosecutor is effectively controlled entirely by major-power states, either directly or indirectly.

Bosco then suggests that the combined interaction of major-power states and prosecutor has led to “mutual accommodation” through a “dynamic and interactive” approach. A conciliatory use of prosecutorial discretion has apparently undermined early marginalization strategies against the court, positioning it as an institution that will avoid possible tensions with major powers and can thus be tolerated and even supported by them. This support will

19. Id. at 15.
20. Id. at 13–16.
21. Id. at 17.
22. Id. at 18.
23. Id. at 20–22, tbl.1.2, fig.1.1.
24. Id. at 18–19.
25. Id. at 20–22, fig.1.1.
be especially evident where ostensible support for some investigations (through Security Council referrals) can double as a guide away from other, less politically desirable ones. Having constructed the framework, Bosco sets out in broad terms which of the potential behaviors will be observed in the subsequent account: control on the part of the states, and a strategic approach on the part of the prosecutor. He is especially careful to state that the prosecutor, while working in a “broadly conciliatory framework,” has not been “captured.”

B. History

Chapter two tells the story of the “origins” of ICL in a historical and conceptual sense. On the face of it, the chapter provides a historical account of developments at Nuremberg and beyond; embedded within this account are various quotations that point to the conceptual origins of many present-day issues in ICL. It begins with Hitler, celebrating his last birthday in the infamous bunker, and then moves on to Justice Jackson’s arrival in Nuremberg months later to begin the seminal trials. The chapter moves through Nuremberg, then Tokyo, recounting the post-World War failure to build a permanent international criminal court. It then skips forward naturally to the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda, then to the details of the Rome Conference on the establishment of the ICC, ending with the celebrations at the birth of the ICC’s Rome Statute in July 1998. On the bare factual details of these events, it offers little that is new. However, the value in this chapter lies not in the plain facts themselves, but in the way the author positions them so as to trigger reflection on recurring themes and issues in ICL. Also significant is his rich and informed perspective on the activities of the UN Security Council, which allows him to provide a clear and detailed account of the various intricacies of P5 members’ shifting stances on ICL courts over a period of years. The chapter also sets up some interesting comparisons between the Rome Conference process and later years at the court. For example, at the Rome Conference, NGOs directed diplomats on the correct course to take while drafting, which was a highly unusual procedure since diplomats normally took the lead on such occasions as the designated representatives of their states. But once the court was up and running, it was the diplomats who were, strangely, arranging personal meetings to provide guidance for the (ostensibly apolitical) court.

Where chapter two traces a broad history of fifty years, chapter three zooms in on the four years between the signature of the Rome Statute and the creation, with sufficient ratifications, of the institution of the court. It traces how the political and diplomatic support for the court, the structures and details of

26. Id. at 20–22.
27. Id. at 46.
28. Id. at 92.
which were left vague by the Rome Statute,29 began to develop, and the concurrent US efforts to stymie the idea of the court (not as yet a concrete institution). The court’s Assembly of States Parties (ASP) entered the scene as the conduit for the ICC’s political power and authority.30 Ratifications proceeded at a pace far quicker than that expected.31 With its marginalization strategy threatened, the United States also sought to carry out control strategies from the early meetings of the ICC’s Preparatory Committee onwards.32

Moving away from specific administrative issues with the Rome Statute, the book considers the wider context of other developments in transitional justice at that time. The Pinochet incident, also in 1998, helped to entrench US opposition to the ICC as an institution which would be bent on eroding state sovereignty.33 Meanwhile, direct challenges by ICTY Prosecutor Louise Arbour to the moral failures of states began to reap rewards in terms of the number of arrests of persons wanted by the ICTY.34 In addition, the NATO bombing of Kosovo and the capture and transfer of Milošević to the ICTY took place.35 In the book, this coupled ICL process and Western allied military campaign becomes part of a continuous series of similar events in history, preceded by the Allies in Nuremberg and followed (as outlined in the introduction) by joint NATO intervention and UN Security Council ICC referral in Libya.

In 2000, President Clinton signed the Rome Statute just before he left office, while other major-power signatories ratified the Statute and regional divergences led to high rates of ratification in Latin American and African countries particularly.36 Using the leverage afforded by this step, Clinton asserted the United States’ “tradition of moral leadership” while gaining access to meetings and deliberations that would allow the extension of a control strategy.37 However, with the change of administration and the events of September 2001, a U.S. marginalization strategy re-emerged.38 The United States initially tried to marginalize the court’s moral legitimacy, pointing to the potentially unfettered discretion the ICC Prosecutor would have, and asserting state sovereignty as essential since governments should be able to choose between prosecution and national reconciliation. This moral argument failed

29. Id. at 56.
30. Id. at 54.
31. Id. at 56.
32. Id. at 60.
33. Id. at 61.
34. Id. at 63.
35. Id. at 64.
36. Id. at 69–70. President Clinton apparently only signed the Rome Statute because a government staffer interested in human rights happened to find that the President had scribbled “I suppose there’s nothing we can do about this?” in a news article on the ICC, and then worked to persuade the president that signing was still possible. This detail is another little piece in the account of ICL as a series of “bizarre” coincidences, rather than an inevitable narrative.
37. Id. at 70–71.
38. Id. at 72–73.
mostly for hypocrisy, given the strong U.S. precedent of humanitarian intervention throughout the 1990s and the United States’ participation in setting up tribunals in the former Yugoslavia and Rwanda that did not allow states to choose their own methods. Coupled with the rhetorical attacks, the United States advanced a strategy of bilateral immunity agreements; but this, too, met obstacles from states whose support was by then necessary in the emerging “war on terror.” While it largely won the immunity agreements it wanted, even with states that were parties to the ICC, the United States lost the “battle of ideas,” and its allies kept joining the court.39

C. Development

Having drawn in detail the historical backdrop and immediate lead-up to the establishment of the ICC as a permanent institution, the book goes on in chapters four through six to outline the trajectory of the court in its first eleven years of operation, detailing various developments which illuminate the evolving relationship of the ICC and major-power states in that time. The court began its work in a post-9/11 world of increased Western military intervention and, conversely, a decrease of violence in the world’s weakest states.40 As the personnel of the institution began to be chosen, the first election of judges took place41 and the search for the court’s first prosecutor began. While the United States apparently sat out the negotiations of this latter choice, all those involved acknowledged that prior U.S. approval of the eventual candidate, Luis Moreno-Ocampo, “played very much in his favor.”42

That prior approval appeared well placed when Moreno-Ocampo took up his position shortly after the outbreak of the Iraq War. The ICC’s first Chief Prosecutor made his disinterest in investigating Iraq (and thus the United States and other major powers) felt as widely as he could, even before officially beginning his job.43 In the conceptual framework, Moreno-Ocampo began as a “pragmatic,” potentially even “captured,” Prosecutor in his behavior towards states. He was joined in this signaling effort towards the United States by other key figures, such as the court’s first Registrar.44 With his subsequent announcement of the Congo as his first area of investigation, Moreno-Ocampo set into place the pattern of OTP discretion in initiating investigations: a focus on “internal violence in a part of the world where these [major] powers had few direct interests and where the United Nations was already heavily engaged.”45

39. Id. at 73–75.
40. Id. at 80–81.
41. Id. at 82–83, tbl.4.1 (showing how seven out of nine key ICC funders—that is, the major-power states actively participating in the process—managed to elect judges in the first round).
42. Id. at 85.
43. Id. at 87.
44. Id. at 90.
45. Id. at 91.
Importantly, the book draws attention to a key, but little-mentioned, part of the OTP in which this pattern of discretion is carried out: the Jurisdiction, Complementarity, and Cooperation Division (JCCD). JCCD’s function of openly reviewing the political context of potential investigations incurred suspicion from the outset from those within the OTP who viewed it as an essentially political organ in a legal office. This structure of a political office within a legal one mirrored the blurred legal and political relationship OTP officials were trying to establish with states: working in partnership, constructively, but not too closely, while insisting that their investigation decisions all resulted from purely legal assessments of the locations of the gravest crimes. The office strove for an outwardly apolitical appearance even though this was out of step with the reality even prior to the office’s official establishment. By 2005, a compliant and docile ICC working in step with American interests had paved the way for a U.S. change of heart from prior Bush-era marginalization.

From 2005 to 2008, the ICC experienced a conceptual breakthrough in its relations with the United States in the abstract, but this was not matched by concrete support in specific situations. Having domestically condemned the situation in Darfur as genocide, the United States was trapped by its own moral rhetoric when the possibility of referring the situation to the ICC through the UN Security Council was raised. Some U.S. actors openly highlighted the possible benefits in the form of increased control over the ICC’s investigations that might accrue to the United States through such a referral. Indeed, the P5 went on to tailor-make a Sudan referral that set limits on the scope of investigation and its funding. U.S. and ICC personnel began to meet publicly, and not unhappily. While the battle deaths increased in the U.S. battlefields of Iraq and Afghanistan, the OTP steadfastly focused on the Democratic Republic of the Congo and Uganda, and the United States continued to warm to the ICC.

At this point in time, the first instances of harsh OTP rhetoric against major-power states took place. Facing a lack of state support to pursue the state(s)-initiated investigation in Sudan, the Prosecutor spoke out strongly against the possibility of political compromise and accused states that did not actively support the ICC of actively undermining it. He repeated this rhetoric at the UN. Importantly, he was speaking against all states, not differentiating between members and non-members, because the reality by this point was that

46. Id. at 94.
47. Id. at 95.
48. Id. at 98.
49. Id. at 101.
50. Id. at 107.
51. Id. at 110–14.
52. Id. at 122–23.
53. Id. at 131.
54. Id. at 137.
support for the ICC was accruing on an ad hoc basis, rather than along membership lines, enabled by the flexibility and weakness of cooperation obligations in the Rome Statute. By 2008, the court had established itself as an institution, shored up a level of support, and even cultivated an open relationship with the United States; but its actual ability to influence the behavior of major-power states remained unclear, at best, and minimal, at worst.

For the final part of the book, covering 2008 to 2013, that hazy picture of court-state power dynamics drawn by Bosco’s narrative persists. Major-power states accommodated the court’s existing operations, but the full effect of this accommodation on the court’s independence is not known. Those five years entrenched earlier patterns of a largely deferential OTP, but power plays between various actors complicated the picture. The arrests of progressively more powerful actors provided a series of incremental successes for the ICC. Moreno-Ocampo’s determination to issue an arrest warrant against Omar Al-Bashir, President of Sudan, despite all major-power states advising against this, was an outward shift further away from “captured” to “pragmatic” prosecutorial behavior, and his harnessing of moral weight to effect support for the arrest warrant was an encouraging example of the rhetorical moral authority of the ICC being brought to bear on a concrete situation. Meanwhile, however, the established deferential prosecutorial trend continued, as Bosco shows through a comparison of Russia-Georgia, Gaza, and Kenya. Only the last of these three situations received ICC scrutiny and then the first ever proprio motu investigation (that is, an investigation instigated by the Prosecutor, rather than by the state party under investigation or through the UN Security Council), despite similar crimes, timelines, and death tolls in all three. Meanwhile, the all-African docket and the transparency of political motivations behind investigation decisions, while supported by major-power states, had begun to catalyze large regional dissatisfaction with the ICC, most sharply from the African Union.

Being pragmatic towards some states ensured results that would deeply anger others, and when the major-power states refused to accommodate the OTP as it had accommodated them, the Prosecutor finally publicly expressed frustration and directed it at specific major-power states. This expression of frustration did not yield results in Sudan, and the pattern of events was set to

55. Id. at 136.
56. Id. at 137–38.
57. Id. at 139.
58. Id. at 141.
59. Id. at 142–48.
60. Id. at 148–51.
61. Id. at 151.
62. Id. at 156 (chiding the United Kingdom’s “complex agenda” in Sudan).
63. Id. at 158, tbl.6.2 (showing President Al-Bashir’s travels abroad after the ICC issued its arrest warrant).
repeat itself again from 2011 onwards, this time in relation to Libya. Bosco returns, at the end of his narrative, to the place where it began and the ICC’s brief moment as a key part of the strategy in Libya, which was quickly overshadowed by NATO’s military and political involvement in the country.\footnote{Id. at 171.} In the meantime, a new Chief Prosecutor was appointed, Fatou Bensouda, who cleaved to the deferential strategy of her predecessor, whose deputy she had been for many years.\footnote{Id. at 174.} Going into 2013, the Libya and Sudan investigations remained stalled, without major-power interest in enforcing arrest warrants. Meanwhile, the United States willingly handed over Bosco Ntaganda of the Democratic Republic of the Congo, yet another defendant who safely fit the deferential prosecutorial blueprint established ten years previously, to the ICC.\footnote{Id. at 175.} The book concludes its narrative inconclusively; as physical ground is broken for the ICC’s headquarters, its alterations to the political landscape appear “less clear.”

\section*{II.
DISCUSSION

\subsection*{A. Bosco’s Conceptual Framework}

The conceptual framework is simple enough to be understood by the casual reader while yielding a lot of insight for all readers into how best to understand the actions of states and the ICC. While Bosco makes clear his answers as to where states and the ICC currently fall within that framework, there is a debate to be had both on whether the concepts as defined are sufficiently distinct and on whether the facts fit the framework in the way Bosco argues they do. On the model for states’ behavior towards the ICC, the line drawn between “marginalization” behavior and “control” behavior blurs when applied to empirical examples. Bosco states that Security Council referrals with P5 consent are an example of control behavior, particularly of the United States’ shift from marginalization to control during the eleven years of the court’s existence thus far. However, such referrals could equally be drawn as marginalization techniques on Bosco’s own definition of the term.\footnote{“Actively work[ing] against the institution, seeking to limit its reach and delegitimize it through formal and informal means.” Id. at 13.} By creating these referrals but then failing to fund them, drawing them more narrowly than the court’s mandate should extend, and standing by while the court fails to apprehend any of the suspects, P5 states like the United States could be said to be actively marginalizing the court, making it appear weak, toothless, and ineffective as a tool for international justice while also attempting to control it.

In addition, Bosco does not go too deeply into what the third option, “acceptance,” could mean. Unlike marginalization or control, there is not much

\begin{figure}
\centering
\includegraphics[width=\textwidth]{figure.png}
\caption{Example Figure Description}
\end{figure}
evidence of it in practice in the first eleven years of the state relations with the ICC, although increasing “acceptance” for the court would seem to be vital to its viability as an independent legal institution. Just as marginalization and control can be difficult to distinguish, acceptance appears to overlap with control behavior, at least in terms of what is empirically observable. In most situations, how can acceptance on the part of states, either due to norm-acceptance or a favorable cost-benefit analysis, be distinguished from the sort of control behavior that appears outwardly pro-ICC but is actually carried out with the intent to control the court? Bosco is often able to distinguish these behaviors because of his access to high-level interviewees. Such interviews are invaluable in constructing a historical account of the ICC. However, it would most likely not be possible to elicit similarly frank analysis from key figures closer in time to events. This means that it will be difficult to build on Bosco’s work by analyzing future events within his conceptual framework as they occur, since stated or apparent motives for actions at the time of events may differ greatly from motives revealed in hindsight.

When analyzing the Prosecutor’s behavior towards states, Bosco says that the Prosecutor is strategic, not captured, within the fourfold definition of potential prosecutorial behavior. Whether this is the best description of the Prosecutor’s position is highly debatable. None of the events in the book really explain why the Prosecutor is not captured. The first Prosecutor seemed, even prior to his tenure, to have been “self”-captured and then caught up by the captured patterns he had established. To make the argument for the strategic prosecutor, Bosco distinguishes between the Prosecutor’s relative deference at the “initiation” of prosecution stage, for example in not protesting the limited terms of the UN Security Council’s referral of Sudan to the ICC,68 and relative independence at the “investigation” of prosecution stage, such as the Prosecutor’s behavior later in the Sudanese investigation in pressing for an arrest warrant against Sudanese President Al-Bashir despite P5 resistance.69 However, if the deference or constraint at the initiation stage is so great as to effectively amount to the Prosecutor’s capture, how meaningful, if it all, is his transition to a more strategic role in the investigation phase? The strategic role taken by the Prosecutor in the investigation phase has such a narrow scope of independent action, since all he can do is push against the specific terms of the capture at the initiation stage, that it does not seem worthwhile to describe the Prosecutor as not-captured. If Bosco wishes to show that there is something more than capture to be seen in the Prosecutor’s behavior towards states, stronger evidence would be desirable.

68. Id. at 112–13.
69. Id. at 163.
B. Chronology and Individual Figures in Bosco’s Narrative

The chronological structure of the book, following a narrative of ICL rather than specific case studies, works very well in the first four chapters. Bosco makes clever use of this structure. For example, chapter two, a very good introduction to the origins of ICL for those new to the field, may feel like a retread of familiar history for experienced readers, but it actually sets the reader up to reflect on how the same themes have endured throughout the story of ICL. As Bosco says, he is highlighting the “twists” in the overarching narrative. Some examples of such “twists” merit highlighting, although the entire chapter is interwoven with various other parallels between ICL at its inception and ICL now. In the account of Nuremberg, the severe destruction wrought by the Allied forces is listed before the book turns to the account of the prosecution of German and Japanese citizens and the complete absence of trials of Allied forces. Thus, Bosco subtly structures his narrative to keep the reality of victors’ justice at the inception of modern ICL foremost in the minds of the reader.

A few pages on in chapter two, US Secretary of War Henry Stimson is quoted as advocating for trials as part of the advance of civilization, as a truth-recording exercise, and as a present and future deterrent to such actions. Later in the book, and fifty-to-sixty years on, these same rationales would be raised by various people as the central goals and benefits of ICL. Regarding the ICTY’s first suspect, Duško Tadić, it is said that “pursuing the case was almost perverse” given the defendant’s minor role, but the Prosecutor “was desperate to show that the tribunal was in motion.” Without mentioning the ICC’s first defendant Thomas Lubanga specifically, the book vividly echoes the criticisms that his trial would later face.

While the narrative structure works well for most of the book, it becomes increasingly strained through chapters five and six. As the story develops and the court’s mandate and number of cases expands, the narrative becomes more complex. The story of the court’s early years could be told succinctly, narrowly focused as it was on just Uganda and the Democratic Republic of the Congo at that time. By chapter five, the book has to trace the facts of a growing number of situations and the related maneuvers of ICC and state actors, leading to a narrative that moves from one facet of one case to a discrete part of another in sometimes seemingly unconnected ways. To his credit, Bosco is able to keep the plotting tight and the story compelling for almost the entire book despite having to cover a disparate set of persons and events from around the world. However, chapter six, in particular, suffers from a discernibly less coherent narrative than the preceding chapters.

70. Id. at 23.
71. Id. at 22.
72. Id. at 25.
73. Id. at 37.
Of Bosco’s disparate cast of characters, some become vivid and individualized to the reader over the course of the book, while others remain shadowy figures, not easily separable from their institutions. This is because many of the author interviews, which are the key source utilized by the book, are anonymized. Bosco presumably does this to encourage people to speak candidly, but it leads to an unevenness in the narrative. The reader develops a clear sense of the individual aims, personal commitment to the project of ICL, and level of influence carried by people like Luis Moreno-Ocampo and John Bolton, but is less sure about the force of what, for example, “a senior UN official”74 has to say, since that official’s background and biases are unknown.

More worryingly, where Bosco’s interview subjects are named, the reader may question whether Bosco’s methodology has at times made him beholden to narrating their version of events. This is an important question to consider when debating whether the Prosecutor is really strategic rather than captured, as discussed above, but it is actually in a separate part of the analysis that evidence of Bosco’s potential personal bias leads him to strike the one emphatically wrong note in his book. In a section entitled “The Prosecutor and His Critics,” Bosco discusses, amongst other “criticisms,” the fact that Luis Moreno-Ocampo was accused of rape at one point in his tenure as Prosecutor.75 Disappointingly, Bosco follows the common journalistic tactic of reporting rape allegations as salacious news, introducing the incident as “a hint of scandal” which, he goes on to describe, “roil[ed] the court.”76 Furthermore, when describing Moreno-Ocampo’s strenuous opposition to an independent prosecutorial oversight mechanism just ten pages later, Bosco fails to mention the role that the rape allegations might have played in Moreno-Ocampo’s position on the issue.77 While this section does not overshadow the importance and value of this book, it is jarring to the reader and demands explanation.

III. CONCLUSION

Rough Justice is an excellent work on the recent history of the ICC, succinct and subtle in its analysis of the court’s first eleven years and the preceding half-century that led to its creation. Bosco’s narrative uses the framework of international relations theory to structure a compelling analysis of the various legal and political developments in the court’s first decade of work. Its innovative focus on the role, motivations, and political influence of the Prosecutor yields valuable insights. The account of US-ICC relations provides much-needed nuance, going past the usual characterization of the United States

74. Id. at 91.
75. Id. at 152–53.
76. Id. at 152.
77. Id. at 163.
as a staunch opponent of the court and showing how it has moved gradually from marginalization tactics towards greater engagement with the court.

*Rough Justice* is rich with analysis for future scholarship to both build on and counter. Using Bosco’s analytical framework, a counter-narrative of the ICC’s history, which places major-power states and the Prosecutor in a relationship other than “mutual accommodation,” could be presented. New or alternative frameworks could be developed for analysis of the ICC and its Prosecutor as subjects in international relations theory and used to show the court’s development in yet another light. The ICC is often viewed and analyzed in historical accounts of ICL as the culmination of the past events at Nuremberg and the ad hoc tribunals. Bosco has paved the way for analysis of the court as a present institution in its own right, one meriting rigorous analysis of its history thus far, a treatment which in turn elucidates its viable policy options going forward. For future authors writing on the history and politics of the ICC, *Rough Justice* sets the bar high.
Review of *Intellectual Property and Human Development: Current Trends and Future Scenarios* by Tzen Wong and Graham Dutfield (eds.)

Sorin G. Zaharia*

**INTRODUCTION**

Intellectual property (IP), a “bundle of rights” to creative inventions of the mind, has long been justified in terms of utilitarian economics as a system that incentivizes creators and leads to maximum societal net benefit. *Intellectual Property and Human Development* confronts this oft-repeated economic argument head on, by encouraging the reader to take a broader perspective and to look beyond raw product output to other indicia of social well-being, including distributional inequalities of such output, and the unequal playing field between developed and developing countries. Ultimately, *Intellectual Property and Human Development* urges readers to ascertain how IP rights in the current framework further fundamental human rights in our globalized, twenty-first century world.

The book weaves a common theme of the interplay between IP rights (IPRs) and human development throughout its nine topical chapters, which deal with the relationship between IPRs and various facets of human development. Together, the chapters cover a wide range of significant and engaging topics: from access to life-saving medicines to farmers’ ability to replant seeds; from indigenous people’s rights to their traditional medicines and cultural expressions to the impact of copyright in education in developing countries; from increased access to information to the interplay between IP and contemporary art.

The book emerged as a result of a comprehensive research study under the aegis of the Public Interest Intellectual Property Advisors (PIIPA), funded by the Ford Foundation. The more than a dozen authors hail from a number of countries and continents and have a broad range of expertise. One of the editors of the book and the managing editor of the study, Tzen Wong, is a researcher

* University of California, Berkeley, School of Law, JD Candidate, 2016.

with PIIPA and has a background in law, economics, and sociology. The other authors also have diverse backgrounds ranging from public policy research to law professors, economists, social scientists, public-interest lawyers, IP consultants, and museologists.

The main theme of the book is that there is more to intellectual property than its utilitarian dimension: intellectual property rights have to be put into the context of human development, and one cannot take for granted that the IP law framework as now structured (and as it has been driven policy-wise mostly by rich nations) is optimally supporting human welfare. The book looks at the social dimension of intellectual property laws and regulations, especially as seen through the conflicting lens of the relationship between developing and developed countries and their sometimes-disjointed priorities. For developed countries, IP rights are seen as an engine of economic growth, whose existence and enforcement leads to incentives to create more output. The book argues that this policy is not always in line with the interests of developing nations. According to the authors, the main problem with the utilitarian approach on which modern intellectual property rights are based is that it is not interested in the distribution of the products within the society, just the total output or cumulative effect.2

The nine chapters of the book comprehensively analyze the interplay between IPRs and critical issues for human development and welfare. The analysis is thorough, based on many past research articles, policy papers, and other scholarly output. It is performed through the lens of several international agreements of varying complexity, inclusiveness, and compulsoriness, especially agreements related to United Nations bodies and protocols related to the World Trade Organization (WTO). For each topic, the analysis ferrets out several pertinent points in how IP rights affect the lives of people around the world through globalization and its impact. Each chapter of the book also looks beyond past research in an attempt to explore new ideas and stimulate further thought.

A novel, refreshing, and important feature of the book is the inclusion of future scenarios in many of the topical chapters. These scenarios investigate possible outcomes under a wide variety of inputs (underlying assumptions), and are a very useful tool for research, better understanding, and policy action. Unlike forecasts or prognoses, such scenarios exhibit a bewildering diversity based on which assumptions are prioritized, and are likely to be a useful tool in the arsenal of the stakeholders and others involved in policy reform.

Intellectual Property and Human Development takes the reader on an epic journey through the multi-dimensional interaction between IP rights and a myriad of social policy interests. Significant emphasis is placed not only on the impact that the spread of new technologies has had on this interaction and its potential for empowering people and helping local communities, but also on its

---

2. Tzen Wong, Intellectual Property Through the Lens of Human Development, in INTELLECTUAL PROPERTY AND HUMAN DEVELOPMENT, supra note 1, at 1, 24.
drawbacks in how it can negatively affect, for example, the proprietary interest of indigenous people in their traditional knowledge and cultural expressions. Each chapter is devoted to a comprehensive analysis of such a relationship. While the chapters are written by different experts in the field, the book has a strong thematic cohesiveness.

I. SUMMARY

The first chapter is a bird’s-eye view of intellectual property through the perspective of its effect on human development and human welfare, especially in developing and least-developed countries (LDCs). This chapter provides the “glue” that ties the subsequent topical chapters together. After a brief primer on intellectual property and the ever-expanding different types of IP (patents, copyright, trademarks, trade secrets, utility models, geographical indications), the author starts exploring the major assumption in modern intellectual property, the utilitarian rationale for its existence. Utilitarianism posits that by giving the creator property rights and thus allowing him or her to “fence off” his or her intellectual property for a limited period of time, the assured exclusivity and potential financial benefits are strong incentives for innovation, and societal benefit and public welfare will be maximized in the long run. In utilitarian theory, what matters is the overall or aggregate effect summed over all members of society.

One problem with this assumption is that utilitarianism does not take into account potentially unequal distribution of benefits, both within a nation and also among different nations at different levels of development. A secondary critique points out that the extent of incentivization is sometimes less than clear, and there is a debate as to how much recognizing strong intellectual property rights ensures maximum benefits. Furthermore, the author points out that economic macro indicators (e.g. gross domestic product, GDP) do not necessarily translate into quality of life or other criteria that people associate with fulfilling, productive lives, such as food security or access to education and health care.

The author introduces the “capability approach,” a philosophical concept that contrasts with utilitarianism and looks at the “multidimensional aspects of well-being.” While used in other arenas, the capabilities approach is relatively new to the IP realm. Application of the capabilities approach can help

3. *Id.* at 6–8.
4. *Id.* at 18.
5. *Id.* at 25–26.
6. See *id.* at 23.
7. *Id.* at 27–28.
8. *Id.* at 27.
policymakers determine the proper boundaries for IPRs\textsuperscript{9} and can also inform a rights-based approach to human development.\textsuperscript{10} The chapter concludes with restating the need for a multidisciplinary approach to study the impact of IP on human development.

Chapter two addresses the interaction between intellectual property and health issues worldwide, particularly focusing on patent rights in the pharmaceutical industry and how they affect access to medicines and the fight against resurgent and neglected diseases in developing countries. This is one of the most sensitive and urgent issues in IP policy because of the internationally recognized fundamental right to health.\textsuperscript{11} The authors frame the discussion against the background of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),\textsuperscript{12} an international agreement under the WTO that was negotiated in 1994 and mandates minimum standards in intellectual property protection for all signatories.\textsuperscript{13}

As the TRIPS Agreement seems to have “straightjacketed” several developing nations into unrealistic deadlines for adhering to recognition of full IP rights in medical patents, it was amended in the health sphere by the later Doha Declaration\textsuperscript{14} (adopted in 2001), which extended many of the deadlines.\textsuperscript{15} Yet it is unclear that even with the extension, which gives LDCs until 2016 to be ready to recognize full IPRs, countries will be in a position to comply with the agreement. A related problem is that many nations in fact go beyond what TRIPS requires by agreeing to stricter terms in bilateral agreements with developed nations, terms that many times are not in the LDCs’ best interests. Developing nations also face a challenge from certain resurgent and/or neglected diseases that, because they are not present in the rich world, do not pose an important incentive for pharmaceutical companies to invest in research to address them.

Chapter two addresses several solutions to the problem of access to medications and medical technology, including compulsory licensing by governments (allowed under TRIPS), public-private partnerships, and efforts within the World Health Organization (WHO) for addressing this issue. The authors advise using all the relief mechanisms provided for in the TRIPS agreement—including licensing, generic manufacturing in cases of national

\begin{enumerate}
\item Id. at 32.
\item See id. at 34–35.
\item See Claudia Chamas, Ben Prickril & Joshua D. Sarnoff, Intellectual Property and Medicine: Towards Global Health Equity, in INTELLECTUAL PROPERTY AND HUMAN DEVELOPMENT, supra note 1, at 60, 61–62.
\item Chamas et al., supra note 11, at 62.
\item World Trade Organization (WTO), Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/W/1, available at http://www.wto.org/English/thewto_e/minist_e/min01_e/mind_ecl_e.htm.
\item Chamas et al., supra note 11, at 63–64.
\end{enumerate}
emergencies, price control, and negotiation—as well as resisting pressures to enforce IP rights beyond the minimum required by the agreement. The chapter concludes with several future scenarios, ranging from extreme control of patent rights held by corporations (“Market Rules”) to a significant relaxing of IPRs and (perhaps very unlikely) total abolition of patents in the pharmaceutical industry by 2025.16

Chapter three analyzes intellectual property rights in agriculture, with an emphasis on food security in the context of plant patents and plant variety protection. It also explores the challenges experienced by farmers and other licensees of biological products (seeds) under licenses that prevent their re-use of the biological material from the crops grown. The discussion has as background food security and the right to food as a fundamental human right, first enshrined in the 1948 Universal Declaration of Human Rights.17 Since then, food security and eradication of hunger in the world have been constantly recognized as prime priorities by various international bodies.18

The authors describe in detail the intellectual property rights in the agricultural context, primarily patents and plant variety protection (PVP), as well as the interplay between patent holders, mostly large agribusiness, and individual farmers. While significant technological advances in plant genetic manipulation have led to strong increases in intensive agricultural productivity, all IPRs, and especially patents, applied to genetic resources are having restrictive effects in many places. First, the control of genetic resources by IPRs held by large agribusiness is subjecting farmers to increased cost pressures.19 Second, while in the short term the productivity increases are spectacular, in the long term assertion of IPRs in genetic resources by only a few players limits biodiversity and local variation in crops—both of which are important for sustainable agriculture.20

The authors urge stakeholders, especially in developing nations, to take advantage of the flexibilities in the TRIPS Agreement to maximize their benefits and at the same time to resist pressures from developed countries to tighten those standards.21 The chapter then describes the detrimental trend of enclosure of the commons in the area of property rights over genetic material (seeds) and some international reactions to it, including the 1992 Convention on Biological Diversity (CBD).22 It ends with a discussion of options available to developing countries for using genetic resources, such as focused national policies on

16. Id. at 88.
18. Haugen et al., supra note 17, at 108–112.
20. See id. at 113.
21. Id. at 128–29.
22. Id. at 124; Convention on Biological Diversity, 5 June 1992, 1760 U.N.T.S. 79.
targeted research efforts and attempts to combine modern and traditional agricultural knowledge and habits.

The next two chapters address the related concepts of traditional knowledge (TK) and traditional cultural expressions. Chapter four analyzes TK, such as natural plant compounds known for centuries by indigenous people and their exploitation by the pharmaceutical industry. The chapter begins with a description of main concepts in TK as well as the availability and challenges in securing IP protection in this realm. The authors point out that this area is one in which traditional IPRs might be ill-suited to offer the protection required to deter threats to TK, including misappropriation, and facilitate the integration of TK with other cultural issues of indigenous people. The chapter advocates a fairer apportionment of profits through access and benefit sharing, and describes a suite of possible legal instruments to protect TK, with several case examples involving traditional medicinal knowledge. The highly particular features of local communities and customs makes it likely that there is no one-size-fits-all device to address this issue universally—rather, the tools to be employed will be unique (sui generis) to a particular aspect of TK and a particular region. The authors envision that scenario planning will be helpful in bringing out the challenges and potential solutions in this area full of uncertainties.23

Focusing on the expression of tradition rather than knowledge, chapter five describes intellectual property rights in the context of traditional cultural expressions (TCEs). TCEs comprise a wide variety of expressions: verbal (including stories, poetry, and legends), musical, performative (dancing and plays), and tangible (arts and handicrafts).24 The authors of the chapter then analyze the commodification of TCEs through intellectual property rights, and present its drawbacks as well as its advantages.25 A drawback is the possible misappropriation and dilution of such expressions through commodification and circulation. On the other hand, one cannot neglect the real possibility of intellectual property rights improving the livelihood of indigenous peoples, for example through marketing of their arts and crafts. The chapter then describes several options and limitations of IPR protection of TCEs, including through copyright, design rights, and labels denoting geographical origin. A limitation of existing frameworks is that new forms of expressions are protectable, while old ones might not be.26 Significant focus is placed on how the advent of the Internet, greatly facilitating the dissemination of TCEs, has exacerbated these problems.27 Finally, the chapter looks at sui generis ways of protecting TCEs, with several case examples from different world regions. Such sui generis ways

23. Charles McManis and Yolanda Terán, Trends and Scenarios in the Legal Protection of Traditional Knowledge, in INTELLECTUAL PROPERTY AND HUMAN DEVELOPMENT, supra note 1, at 139, 166.
24. Tzen Wong and Claudia Fernandini, Traditional Cultural Expressions: Preservation and Innovation, in INTELLECTUAL PROPERTY AND HUMAN DEVELOPMENT, supra note 1, at 175, 176.
25. Id. at 178.
26. Id. at 187.
27. Id. at 209.
formulas differ from traditional copyright, for example by not requiring fixation in a “tangible medium” or by being perpetual and non-transferrable.28

Chapter six analyzes copyright within the framework of education. As opposed to the “top-down approach” in which rich nations decide intellectual rights policy, it proposes an approach to IP “from below,” in which considerations of distributive justice and human development play a significant part in ensuring access to educational material, especially hard copy textbooks, in the developing world. Article 10(2) of the Berne Convention for the Protection of Literary and Artistic Works29 plays a central role in this concept, as it allows “free uses” of such works for limited purposes, including educational use.30 The author points out the great discrepancy in pricing of educational books, still an appropriate and useful technology, compared to income in developing versus developed nations. In the “from below” approach, national exemptions to copyright would exist for certain educational materials, helping to alleviate the lack of access to such basic educational materials. The “from below” approach places emphasis on human development as the main goal in setting IP rights, but at the same time makes an economic argument that there can be no market without a vibrant effort to ensure literacy and education.31

Chapter seven analyzes the impact of new technologies in access to knowledge and education, by examining the new opportunities that information and communication technologies (ICTs) have brought to the table and how IPRs, in particular copyright restrictions, interact with these opportunities. The analysis somewhat mirrors the concerns in chapter six about textbooks and copyright. The authors find that ICTs have the potential to provide a real decrease in the knowledge gap between countries by greatly facilitating the access to knowledge and education.32 Yet dissemination of information is hampered by copyright policies that seem to become more and more restrictive, including in the educational arena, and more and more often coupled with the specter of criminal sanctions. Here the authors mention the Anti-Counterfeiting Trade Agreement,33 a recent major driver in increasing copyright enforcement.34 Another concurrent trend the authors point out is the increased reliance on the part of rights owners on Digital Rights Management systems.

28. Id. at 202.
31. Id. at 237.
32. Dalindyebo Shabalala, Knowledge and Education: Pro-Access Implications of New Technologies, in INTELLECTUAL PROPERTY AND HUMAN DEVELOPMENT, supra note 1, at 250–52.
34. Shabalala, supra note 32 at 264.
The authors look at how new technologies have changed access to information products and their impact on the behavior of individuals and entities along the chain, from creators to producers, distributors, and finally to end users. They emphasize that true access to knowledge is not just having the information, but transforming the information into knowledge. In this context, besides geopolitical inequalities, there are also inequalities based on gender, social class, and ethnic group.\footnote{See id. at 251.} The author advocates for increased access to knowledge, unimpeded by stifling copyright regulations, including through the open source model, digitization of works, and open e-journals. The author also recommends minimum exemptions from copyright at the international level.\footnote{See id. at 271–72.} It places these exhortations on a human rights foundation based on international agreements: the right to access educational materials, the right to impart and receive knowledge (related to the freedom of expression), and finally the right to enjoy the benefits of scientific progress.\footnote{Id. at 251.}

Chapter eight analyzes modern challenges to copyright laws with respect to art and cultural expressions. It begins by trying to determine how much of an incentive copyright law provides for fostering creativity in the artistic realm. The conclusion is mixed. The authors find that the incentive effect is very much dependent on the type of art, the world region, and several other factors. In some areas, such as contemporary and performing arts, one finds that creativity continues to flourish without significant copyright protection, suggesting other incentive mechanisms at work.\footnote{Tzen Wong, Molly Torsen and Claudia Fernandini, Cultural Diversity and the Arts: Contemporary Challenges for Copyright Law, in INTELLECTUAL PROPERTY AND HUMAN DEVELOPMENT, supra note 1, at 279, 319–20.} Another pertinent observation is that in modern society there is a blurred line between producer and consumer of cultural creations, as technology allows easy modification and “remixing” of such creations.\footnote{Id. at 310–11.}

The authors also point out that in the art distribution chain from creator to consumer, intermediaries such as publishers are often the ones who profit the most due to contractual relinquishing of the creators’ copyright to corporations.\footnote{Id. at 289–90.} This also casts doubt on the value of copyright as an economic incentive for the creators.\footnote{Id.} The chapter presents a case study for the interplay between contemporary art and intellectual property rights, specifically copyright, in Appendix E. The authors conclude with several scenarios for the future, from “business as usual” (not much change) to a society where copying is so prevalent that “original” and “copy” have lost their distinctive meaning. The main thrust of the chapter is exhortatory, inviting everyone to judge copyright protection based on how well it fosters creativity, cultural diversity,
broader participation in and consumption of culture, and overall better human experience and human development.

Finally, chapter nine concludes the book with a broad discussion of scenario planning in the context of intellectual property and issues involving human welfare. Scenario planning is again portrayed as an innovative and very important tool for planning processes. Rather than a prediction or forecast, which would be forestalled by the many variables and unknowns in this arena, scenario planning looks into multiple possible “alternative futures.” Such outcomes can be wildly different and arise due to different assumptions in the input. As such, it points out certain features that could result if a certain present policy or direction is followed or rejected. The authors describe in significant detail the scenario planning “Intellectual Property in the Year 2025” undertaken by the European Patent Office, arguably the most ambitious and comprehensive such planning to date. The project led to four widely disparate scenarios based on the controlling factor underlying each of them: Market Rules (driven by business market forces, in a world of stricter IP rights), Whose Game (driven by geopolitical changes), Trees of Knowledge (where civil society leads to erosion of IP rights) and Blue Skies (fast technology drivers that do not depend too much on patents). Efforts by other entities are mentioned as well. Then, the focus of the chapter shifts to the way scenario planning unfolds regarding two domains: the future of the public domain, and the implications of the advent of new technologies. Finally, scenario planning is advertised to policy makers and stakeholders as a new approach that could lead to sometimes surprising, but always-useful outcomes for helping those in charge of policy reform.

II. DISCUSSION

*Intellectual Property and Human Development* impresses through its comprehensiveness in looking at virtually all public-interest aspects of intellectual property rights. Each topical chapter is a full-fledged research paper, complete with exhaustive bibliography for readers interested in delving further into the particular area addressed. The book’s great strength is that it thus provides both the big picture but also the micro details, bolstered by the tools to delve into thorny and intricate issues such as how to address the scarce availability of medicine for neglected diseases of the least developed countries, or how to protect traditional knowledge of indigenous people while at the same time recognizing its potential for empowering them and bettering their lives.

---

43. Id. at 330.
44. Id. at 332–34.
45. Id. at 336.
Many of the topics addressed in specific chapters relate to other chapters as well, and the introductory and concluding chapters do a good job at further cementing everything together. Probably the biggest challenge in putting together a book of this scope through topical chapters authored by different scholars is achieving cohesiveness. Where many other efforts fail, leading to disjointed collections of papers reminiscent of conference proceedings, this book succeeds, no doubt a credit to the editors’ painstaking effort.

The book is both informative and thought provoking in bringing to the fore, especially through the analysis of future scenarios, pertinent issues of public policy in areas that are bewilderingly heterogeneous and complex. As such, Intellectual Property and Human Development will surely appeal to a wide swath of individuals, including students, researchers, decision makers, and other stakeholders, as well as more generally creators and users of intellectual property.

The scenario analysis, a clear strength of the book, is a novel and refreshing concept that promises significant utility. Scenarios are not forecasts, and the book makes this clear. In fact, the complexity of the problem would probably preempt any attempt at realistic prediction. The issue is one of truly international dimensions, and the interplay between the different factors coupled with the huge number of variables makes attempts at accurate prediction futile. Scenarios are potential outcomes that could result in various future incarnations of “virtual realities” in which certain considerations and assumptions have prevailed. In fact, perhaps the most useful for policy analysis are the “extreme” scenarios. In spite of the fact that they are probably not realizable per se, they provide much more assistance in understanding the effect of different factors than scenarios of the type “business as usual.” By concentrating on and magnifying certain impacts of an assumption to a future outcome, a scenario stresses the effect of a particular policy, trend, or activity spurred for example by an international agreement, and provides stakeholders and policy makers with a tool to adjust course by “tweaking” the system with certain levers at their disposal, including national policies, use of international agreement exemptions, and innovative public-private partnerships to foster the pertinent societal interests.

If this excellent book lacks something, it has to do perhaps with its apparent bias in highlighting only the problems with intellectual property rights as they exist now. The book points out the negative aspects of the market-emphasis approach with strong IPRs observed by the developed world. It also points out the gap between North and South, along with the fact that the interests of the developed and the developing nations might not coincide. Some readers might find that the book does not cover the other side of the coin—the utilitarian incentive of IP rights—to an extent sufficient to frame the argument as strongly as possible. This is seen in a dual way. First, perhaps the book is indeed too quick to discount the weight placed in western nations on the incentive impact of IP as well as on economic utilitarianism. Western nations are presented as being interested to a disproportionate degree only in economic growth and cumulative income at the expense of true human development. The book clearly
focuses on IPRs as they are framed today as a tool of the rich world to ensure dominance of their interests, and emphasizes at times how rich countries press the developing nations into agreeing to terms that are not necessarily to their advantage and go beyond minimum requirements in IP rights enforcement through the use of bilateral agreements. Perhaps the gap between North and South has stayed the same in recent years, but the book does not tackle evidence that the developing world is quickly moving forward. China, India, and Brazil, among other countries, have made tremendous gains in recent decades in all areas of development, and it can be argued that this has happened not necessarily because they resisted globalization of the markets and its impact, but to a great extent because they embraced it. Thus, while the dimension of how IPRs deleteriously affect human development is certainly one that merits public attention, and although this book does a marvelous job in showcasing it, the other side gets perhaps too little notice.

While it is clear that macroeconomic progress does not necessarily translate into proportional gains for individual members, both at national and international levels, it is incontrovertible, for example, that many of the new medicines that have saved many lives everywhere in the world (and thus led to gains for everybody) have been researched in the laboratories of the developed world. While restricted access to novel medicines because of pricing is obviously an issue that needs to be tackled, the cost of researching these medicines is in the billions of dollars. Because they function mostly on economic factors, and because it takes many failed tries to develop a successful drug, it is unclear that the companies that have put forward medicines that provide life-saving retroviral therapy stopping HIV/AIDS in its tracks around the world would have invested the enormous resources into the research of those drugs in the absence of substantial economic benefits guaranteed by IPRs.

Along the same lines, a related criticism would be that the book does not address the impact of IPRs in developed countries to the same extent. More focus could have been placed on tackling several questions that the book only touches upon tangentially. For example, some of the very pertinent questions as we go into the future will be how to make sure that our intellectual property system is set up to deal with rapid advances in biotechnology as well as information and communication technology. Should companies be able to patent screening methods for cancer? Should we place more emphasis on curing current patients at the (potential) expense of not having a better cure possibly developed in the future? How do we assure that the best national policies are being followed in a market economy where economic incentive is king, and where big players and international corporations can and do exert enormous clout on decision makers, as seen for example in recent changes in U.S. law that have made IPRs stricter through extension of copyrights?

The book, however, does an excellent job of bringing forward many of the broader concerns in the application of intellectual property frameworks within different locales, despite the minor points above. It puts forward the message that there is no unique solution to the problem because of the wide heterogeneity
of the contexts in which these concepts are being applied. At 397 pages, the book probably tackles as much as it realistically can within its assigned scope.

In summary, *Intellectual Property and Human Development: Current Trends and Future Scenarios* is a thorough account of the international interaction between intellectual property legal infrastructure and a myriad of broader concerns related to human welfare, going well beyond traditional economic indicators, gross domestic product, and industrial output. It is a book that should be on the shelf of everyone interested in intellectual property or international law, especially those interested in the confluence of legal and social policy, politics, and international relations.