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ARTICLES:

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"INTERNATIONAL" EUROPEAN GEOGRAPHICAL INDICATIONS
ALESSANDRA MORONI

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**NEW GENERATION OF FREE TRADE AGREEMENTS:
TOWARDS “INTERNATIONAL” EUROPEAN GEOGRAPHICAL
INDICATIONS**

*Alessandra Moroni**

I. INTRODUCTION

Prosciutto di Parma from Italy, Champagne from France, Feta from Greece, Basmati Rice from India, Café de Antigua from Guatemala, and Tequila from Mexico: all are examples of geographical indications (GIs). GIs are “indications which identify a good as originating in the territory of a [country], or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.”¹ Prosciutto di Parma is, for instance, produced using the meats of a specific family of pigs living in Northern-Central Italy, following certain salting techniques, and leaving to stand for certain periods of time.² As such, GIs represent a crucial tool to redefine trade flows in modern globalized markets, and to achieve a variety of public policy goals,³ including agricultural development, rural development, environmental protection, and cultural preservation. The economic and social potential of GIs is particularly evident in the European Union (EU), where GIs have been traditionally seen as a means to secure the quality and diversity of European agricultural production,⁴ ensure the availability of traditional products,⁵ and enable effective communication between producers and consumers.⁶ Since the early ‘90s, the EU has included GIs in some

* Teaching Assistant at Bocconi University (Milan, Italy), former Editor in Chief of Bocconi Legal Papers. LL.B./M.Sc. in Law (Bocconi University), Themis Joint Certificate in International & Business Law. Email: alessandra.moroni@unibocconi.it.

¹ Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 22(1), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994). [hereinafter TRIPs].

² Niki Achitoff-Gray, *Pork, Salt, Air, and Time: The Long Road to Prosciutto di Parma*, <http://www.seriousseats.com/2015/12/labor-of-love-the-long-road-to-prosciutto-di-parma.html> (last visited July 9, 2017).

³ See, e.g., Delphine Marie-Vivien, *The Role of the State in the Protection of Geographical Indications: From Disengagement in France/Europe to Significant Involvement in India*, 13 THE J. OF WORLD INTELL. PROP., no. 2, 2010, at 121.

⁴ Regulation (EU) 1151/2012 of the European Parliament and of the Council, Nov. 21, 2012, 2012 O.J. (L 343/1) Recital 1 [hereinafter GI Regulation].

⁵ *Id.* at Recital 2.

⁶ See Gian Carlo Moschini, Luisa Menapace & Daniel Pick, *Geographical Indications and the Competitive in Provisions of Quality in Agriculture Markets*, 90(3) AM. J. OF AGRIC. ECON. 794, 794 (2008); Carsten Fink & Keith Maskus, *The Debate on Geographical Indications in the WTO*, in R. NEWFARMER (ED.), TRADE, DOHA, AND DEVELOPMENT: A WINDOW INTO THE ISSUES, at 202 (Washington: World Bank Publications, 2005); Michael Maher, *On Vino Veritas? Clarifying the Use of Geographical References on American Wine Labels*, 89 CAL. L. REV. 1881, 18885 (2001).

regulatory provisions of a *sui generis* nature,⁷ ensuring that this category of intellectual property (IP) rights could substantially contribute to the realization of a “smart, sustainable and inclusive growth [for] a competitive economy.”⁸ Yet, far from being a common, accepted instrument of trade policy, GIs constitute one of the most contentious issues heating up the current international trade debate.

The controversial nature of GIs is primarily reflected in the complex history of their international protection. Various agreements and conventions have attempted to design an effective framework for GI protection, without achieving fully satisfying results. Even the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement or TRIPs), negotiated under the World Trade Organization (WTO)⁹ and regarded as the most comprehensive legal source in the field, makes no exception of this cobweb of ineffective provisions.¹⁰ In particular, the TRIPs Agreement provides for certain GI standards of protection, including both standards of a general nature (applicable to all GIs regardless of the type of connected products),¹¹ and additional standards of an “absolute” (or “objective”) nature (limited to GIs for wines and spirits, and implying that GI misuses are repressed regardless of the public being misled as to the provenance of the products in question).¹² However, the TRIPs Agreement does not specify the means by which WTO members should implement its requirements for GI protection.¹³ Consequently, on the one hand, protection remains strictly dependent on the principle of territoriality;¹⁴ on the other hand, the implementing instruments, deemed to be compliant with the provisions of the TRIPs Agreement, are the most diverse.¹⁵ Therefore, whereas the TRIPs recognition of GIs as an independent category of IP represents a major step towards the global

⁷ The above-referred GI Regulation, indeed, repeals former Council Regulation (EC) No. 510/2006 of 20 March 2006, 2006 O.J. (L 93/12), which itself recasted Regulation (EEC) No. 2081/92 of 14 July 1992, 1992 O.J. (L 208/1). *Regulation (EU) No 1151/2012 of the European Parliament and of the Council* Dec. 14, 2012 <http://eurlex.europa.eu/legalcontent/EN/TXT/?uri=CELEX%3A32012R1151>.

⁸ GI Regulation, *supra* note 4, at Recital 5; See Communication from the Commission, EUROPE 2020: A STRATEGY FOR SMART, SUSTAINABLE AND INCLUSIVE GROWTH, at 3 (Mar. 3, 2010).

⁹ See ANTONY TAUBMAN, HANNU WAGER & JAYASHREE WATAL, A HANDBOOK ON THE WTO TRIPs AGREEMENT, at xix (Cambridge: Cambridge University Press, 2012).

¹⁰ Peter K. Yu, *TRIPs and Its Achilles' Heel*, 18 J. INTELL. PROP. L. 479, 482-83 (2011).

¹¹ TRIPs, *supra* note 1, at art. 22.

¹² *Id.* at art. 23.

¹³ *Id.* at art. 1(1).

¹⁴ For a definition of the principle of “territoriality” see, e.g., JAN KLABBERS, INTERNATIONAL LAW 92 (2013).

¹⁵ See, for an overview of distinct GI schemes, Irina Kireeva & Bernard O'Connor, *Geographical Indications and the TRIPs Agreement: What Protection is Provided to Geographical Indications in WTO Members?*, 13 THE J. OF WORLD INTELL. PROP., no. 2, 2010, at 276.

acknowledgement of such product identifiers, the TRIPs Agreement fails to set out a clear, harmonized GI framework.¹⁶

The major reason underlying such weak multilateral regulation appears to be the difficulty in combining the different legal traditions utilized across the world. While few adhere to the EU position and embrace GIs as a stand-alone type of IP, many include GIs in the wider category of trademarks, creating a misalignment between the treatments of GIs by different nations. This misalignment creates confusion as to who is entitled to use such product identifiers, and the scope of the protection granted to such title-holders. Adopting the viewpoint of the EU with its strong tradition on GIs, this article investigates whether and how a compromise can be successfully reached between promoters and opponents of GIs. Therefore, Section two will provide an overview of the various tools the EU has used to promote GI recognition internationally. Section three will specifically focus on the recent free trade agreements (FTAs) the EU has concluded with key trade partners. In Section three, this article will also attempt to infer the specific adjustments that the EU has negotiated to secure the desired protection of European GIs without altering the prerogatives existing in the legal orders of its various commercial partners through an analysis of the FTAs' major provisions on GIs. Lastly, Section four will comment on the compromise reached between the uniqueness of the European GIs and the different (if not opposing) instances and legal traditions of the trade partners. It being generally accepted that GIs for wines and spirits already enjoy a stronger protection internationally,¹⁷ this article will focus attention on GIs for agricultural products and foodstuffs.

II. THE EU EXTERNAL TRADE ACTION ON GIS

Due to the ineffectiveness of the current international instruments for monitoring and preventing misuses and imitations of European GIs, throughout the last decades the EU has been resorting to a variety of policy tools in order to promote GI recognition internationally.¹⁸ These tools include GI-specific agreements with neighboring countries,¹⁹ partnership

¹⁶ Massimo Vittori, *The International Debate on Geographical Indications (GIs): The Point of View of the Global Coalition of GI Producers—oriGIn*, 13 THE J. OF WORLD INTELL. PROP., no. 2, 2010, at 308.

¹⁷ TRIPs, *supra* note 1, at art. 23.

¹⁸ Advisory Group International Aspect of Agriculture, DG AGRI WORKING DOCUMENT ON INTERNATIONAL PROTECTION OF EU GEOGRAPHICAL INDICATION: OBJECTIVES, OUTCOME AND CHALLENGES, at 7-8 (June 25, 2012).

¹⁹ Specific agreements with neighboring countries for the protection of GIs for agricultural and foodstuffs are, *inter alia*, those with the Swiss Confederation of 16 November 2011, as subsequently amended; with the Republic of Moldova of 15 May 2012; and with Georgia of 30 May 2012. Additionally, there is the '10 Plus 10 Project' with China: see European Commission, EU-CHINA GEOGRAPHICAL INDICATIONS – '10 PLUS 10' PROJECT IS NOW COMPLETE (2012), http://europa.eu/rapid/press-release_IP-12-1297_en.htm (last visited 4 July, 2016); see also European Commission, QUALITY PRODUCTS: CHINA-EU COOPERATION ON GEOGRAPHICAL INDICATIONS MOVES FORWARD,

agreements envisaging GI cooperation,²⁰ GI stand-alone agreements,²¹ GI provisions as part of the European Neighborhood Policy (ENP),²² and, lastly and more significantly, FTAs. Among such a diversity of tools, in fact, FTAs have been playing a pivotal role in the external policy of the EU with regard to GIs, which is evidenced by the large number of preferential and bilateral agreements that have been (and continue to be) negotiated and concluded by the EU institutions.²³ The preference for FTAs over other instruments may find justification in either the allegedly greater bargaining power that the EU enjoys in the context of FTA negotiations as opposed to that in more hostile multilateral venues. The preference may also be justified by the increased legitimacy of the EU when it encourages the international adoption of certain standards after it agrees on these global measures on a bilateral basis.²⁴ Such trend has been defined as the reflection of a “never-ending cycle of multilateral standard setting which leads to increased standards via bilateralism/regionalism followed by consolidation in the form of multilateralism.”²⁵

The first efforts of the EU to strengthen international GI protection on a bilateral basis are evident in the so-called “old generation” FTAs, concluded with key wine and spirits-producing nations.²⁶ These agreements

http://ec.europa.eu/agriculture/newsroom/26_en.htm (last visited 4 July, 2016).

²⁰ European partnerships agreements have been concluded with the Caribbean (CARIFORUM), the Pacific (only Papua New Guinea) and East and South Africa regions. See European Commission, Andean Community, <http://ec.europa.eu/trade/policy/countries-and-regions/regions/andean-community/> (last updated 24 Feb, 2017).

²¹ See e.g. European Commission, GEOGRAPHICAL INDICATIONS, <http://ec.europa.eu/trade/policy/accessing-markets/intellectual-property/geographical-indications/> (last updated Jun. 28, 2013).

²² The agreements concluded as part of a wider European integration process tend to require partners to align their GI systems with the European *acquis*. See, *inter alia*, the agreements with the Republic of Serbia of 2013; with the Republic of Montenegro of 2010; with Bosnia and Herzegovina of 2008; and with the Republic of Albania of 2009. See generally, *The European Neighbourhood Policy: A Framework for Modernisation?* (Marise Cremona & Gabriella Meloni, eds., European University Institute, Working Paper No. 21, 2007).

²³ See European Commission, OVERVIEW OF FTA AND OTHER TRADE NEGOTIATIONS (2016), http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf (last visited July 4, 2016).

²⁴ See Billy A. Melo Araujo, *Intellectual Property and the EU's Deep Trade Agenda*, 63 J. INT. ECON. L. 439 (2013).

²⁵ Bryan Mercurio, *TRIPs-Plus Provisions in FTAs: Recent Trends*, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 215-237 (Lorand Bartels & Federico Ortino eds., Oxford University Press 2006).

²⁶ See Agreement between the Eur. Community and Austl. on trade in wine, 1994 O.J. (L28/3), 30 January 2009, as subsequently recasted; Agreement between the Eur. Community and the United Mex. States on the mutual recognition and protection of designations for spirit drinks, 1997 O.J. (L 152/16); Agreement establishing an association between the Eur. Community and the Rep. of Chile, 2002 O.J. (L 352/3); Agreement between the Eur. Community and the Rep. of S. Afr., 2002 O.J. (L 28/4); Agreement between the Eur. Community and the Rep. of S. Afr. on trade in spirits, 2002 O.J. (L 28/113); Agreement between the Eur. Community and Canada on trade in wines and spirit drinks, 2004 O.J. (L

were devoted to the protection of wines and spirits, encompassing many matters (*e.g.*, oenological practices, protection of traditional terms, labeling and presentation, certification, cooperation between parties)²⁷ and including *ad hoc* GI provisions. The trend for concluding old generation FTAs lasted until around 2007, when the EU started to negotiate agreements now referred to as “new generation” FTAs. Indeed, due to the previously-mentioned unsuccessful outcomes reached in WTO negotiations,²⁸ and the consequent need to protect EU prerogatives more decisively, the EU trade policy eventually shifted to a more comprehensive, prescriptive approach.²⁹ This new approach was meant to “build upon WTO rules and its framework for negotiations by going further and faster in promoting openness and integration.”³⁰ This policy shift must be viewed in the context of the EU’s so-called “deep trade agenda,” which attempts to inject portions of EU domestic regulatory disciplines in the sphere of international trade law.³¹ Thus, the goal of the “prescriptive” approach is that “[i]n negotiating FTAs, the IP [rights] clauses should as far as possible offer identical levels of IP [rights] protection to that existing in the EU.”³²

In light of the foregoing, the twofold novelty of the EU “new generation” FTAs may be restated. On the one side, they are “broader-designed”³³ agreements, in that they also include GIs for products other than wines and spirits. On the other side, they attempt to export some key aspects of EU internal legislation.³⁴ Consequently, and in line with the declared ultimate objective of this article, the following Section will investigate the GI provisions contained in the “new generation” FTAs recently negotiated by the EU institutions.

35/3); Agreement between the Eur. Community and the United States of America on trade in wine, 2006 O.J. (L 87/2).

²⁷ See Advisory Group International Aspect of Agriculture, *DG AGRI working document on international protection of EU Geographical Indications: objectives, outcome and challenges*, EC Europa (25 June, 2012).

²⁸ See Global Agenda Council on Global Trade and FDI, *FOREIGN DIRECT INVESTMENT AS A KEY DRIVER FOR TRADE, GROWTH AND PROSPERITY: THE CASE FOR A MULTILATERAL AGREEMENT ON INVESTMENT*, World Econ. Forum (2013).

²⁹ Araujo, *supra* note 24.

³⁰ Communication from the Commission, *GLOBAL EUROPE: COMPETING IN THE WORLD*, COM 567, 4 Oct. 2006.

³¹ See Meir Perez Pugatch, *A Transatlantic Divide? The US and EU’s Approach to the International Regulation of Intellectual Property Trade-Related Agreements*, 19 (European Centre for International Political Economy, Working Paper No. 02, 2007).

³² European Commission, *A SINGLE MARKET FOR INTELLECTUAL PROPERTY RIGHTS BOOSTING CREATIVITY AND INNOVATION TO PROVIDE ECONOMIC GROWTH, HIGH QUALITY JOBS AND FIRST CLASS PRODUCTS AND SERVICES IN EUROPE*, 287 Final, 24 May, 2011, at 21, ¶ 3.6.2.

³³ See Tim Engelhardt, *Geographical Indications Under Recent EU Trade Agreements*, 46 INT’L REV. OF INTELL. PROP. AND COMPETITION L. 781, 782 (2015).

³⁴ Araujo, *supra* note 24, at 440, 450.

III. NEW GENERATION OF FREE TRADE AGREEMENTS OF THE EUROPEAN UNION

Hereunder, the analysis will focus on the specific FTAs concluded with South Korea,³⁵ Peru and Colombia,³⁶ Central America,³⁷ Singapore,³⁸ Canada,³⁹ and Vietnam.⁴⁰ The detailed analysis of these specific agreements will be preceded by a short commentary on the very first bilateral GI protection initiative of the EU, namely, the partnership agreement concluded by the EU with the Caribbean Forum (CARIFORUM) states.⁴¹ The overall assessment will aim not only at identifying the mechanisms negotiated to secure strong IP protection, but also at detecting how the EU has succeeded in negotiating GI provisions with trade partners potentially unfamiliar with (if not, reluctant to embrace) the legal notion of GIs.

A. The Economic Partnership Agreement with CARIFORUM States

CARIFORUM states include: Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, Saint Kitts and Nevis, Surinam, Trinidad, Tobago and the Dominican Republic.⁴² The trade and development partnership between these countries and the EU stretches back several

³⁵ Council Decision of 1 October 2015 on the conclusion of the Free Trade Agreement between the Eur. Union and its Member States, of the one part, and the Rep. of Kor., of the other part, 2015 O.J. (L 307/2).

³⁶ Council Decision of 31 May 2012 on the signing, on behalf of the Eur. Union, and provisional application of the Free Trade Agreement between Eur. Union and its Member States, of the one part, and Colom. and Peru, of the other part, 2012 O.J. (L 354/1).

³⁷ Council Decision of 25 June 2012 on the signing, on behalf of the Eur. Union, of the Agreement establishing an Association between the Eur. Union and its Member States, of the one hand, and Cent. Am., of the other hand, and provisional application of Part IV thereof concerning trade matter, 2012 O.J. (L 734/1).

³⁸ See European Commission, EU-SINGAPORE FREE TRADE AGREEMENT. AUTHENTIC TEXT AS OF MAY 2015

<http://trade.ec.europa.eu/doclib/press/index.cfm?id=961> (last update 29 June, 2015) [hereinafter EU and Singapore Trade Agreement].

³⁹ The negotiations for the Comprehensive Economic and Trade Agreement between the European Union, and its Member States, and Canada were concluded in August 2014. The negotiated text (still to be ratified) is available at http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf (last visited 10 August 2016).

⁴⁰ The negotiations for the Free Trade Agreement between the European Union, and its Member States, and Vietnam were concluded in January 2016. The negotiated text (still to be ratified) is available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437> (last visited 10 August 2016).

⁴¹ Council Decision of 15 July 2008 on the signature and provisional application of the Economic Partnership Agreement between the CARIFORUM States, of the one part, and the Eur. Cmty. and its Member States, of the other part, 2008 O.J. (L 289/1) [hereinafter CARIFORUM-EU Agreement].

⁴² *Id.*

years, whilst a comprehensive partnership agreement was only signed in 2008.⁴³ As previously-explained, the EU-CARIFORUM Agreement pre-dates the wave of “new generation” FTAs. Nevertheless, it is probably the first bilateral agreement where the EU managed to secure a quite robust GI protection. For this reason, the EU-CARIFORUM Agreement will be considered here as the predecessor of the GI sections developed in the latest FTAs. In particular, the EU-CARIFORUM Agreement devotes not an entire chapter or section to GIs, but a single provision, Article 145, which is, nonetheless, broken down into several parts.⁴⁴

First, the scope of protection emerging from paragraph B(3) of Article 145 is quite extensive.⁴⁵ On the one hand, rights holders would receive protection in cases of misleading or unfair practices “regardless of the class of product” affected.⁴⁶ On the other hand, GIs appear to benefit from the above-defined absolute protection, even for products other than wines and spirits. Indeed, illegitimate GI uses would need to be repressed even where “(i) the true origin of the good is indicated; (ii) the geographical indication in question is used in translation; (iii) the name is accompanied by terms such as ‘kind’, ‘type’, ‘style’, ‘imitation’, ‘method’ or other expressions of the sort.”⁴⁷ Despite being limited to “names for the same class of products,” this second commitment could be said to represent the first example of the EU success in extending the higher standards of protection (which the TRIPs Agreement refers to GIs exclusively for wines and spirits)⁴⁸ to agricultural products and foodstuffs. Such wide protection has few exceptions, primarily related to generic terms, plant varieties, animal breeds, and homonymous GIs.⁴⁹

Second, the EU-CARIFORUM Agreement explicitly deals with the relationship between GIs and trademarks, thus directly addressing one of the most controversial issues in the field of GIs. In this respect, GIs tend to be granted precedence in circumstances where the two categories of signs conflict,⁵⁰ except where “in light of a trademark’s *reputation* and *renown* and the *length of time* it has been used, registration [of a GI] is liable to *mislead* consumers as to the true identity of the product.”⁵¹ Yet, the EU-CARIFORUM Agreement goes further and proposes certain criteria to enable the co-existence of a conflicting GI and related trademark, even

⁴³ CARIFORUM-EU Agreement, *supra* note 41.

⁴⁴ *Id.* at art. 145.

⁴⁵ *Id.* at art. 145 (B)(3).

⁴⁶ *Id.* at art. 145(B)(3)(a).

⁴⁷ CARIFORUM-EU Agreement, *supra* note 41, art. 145(B)(3)(b).

⁴⁸ *See* TRIPs, *supra* note 1, at art. 23.

⁴⁹ CARIFORUM-EU Agreement, *supra* note 41, at art. 145 (C)(3). Noteworthy, Article 145(C)(3) on homonymous GIs enables concurrent use of the terms in question, provided that there is “sufficient distinction in practice.”

⁵⁰ *Id.* at art 145 (D)(2), reads: “[...] the registration of a trademark which is identical with, similar to or containing a geographical indication [...] and relating to the same class of products shall be refused [...]”

⁵¹ *Id.* at art. 145 (D)(1).

where the latter is not a well-known trademark.⁵² Such criteria would refer to the protection of a trademark being granted in the signatory state either before the date of application of the WTO obligations in the relevant jurisdiction, or before the date of application for GI protection in that same territory.⁵³ In such circumstances, and provided that the good faith requirement is fulfilled, the trademark in question “may continue to be used notwithstanding the registration of the GI.”⁵⁴

Third and last, Article 145(A)(2) stipulates that “the signatory CARIFORUM States shall establish a system of protection of GIs in their respective territories,” but does not provide any further details.⁵⁵ Consequently, it may be inferred that, notwithstanding the attempt of the EU to ensure that the other contracting parties would secure GI protection through appropriate means, the EU did not succeed in imposing its *sui generis* system. While it has been noted how the reference to “product specifications” in Article 145(B)(2) suggests that a registration system, much like the European one, should be established by the signatory parties,⁵⁶ no Caribbean country had a functioning GI system in place before the negotiation of the EU-CARIFORUM Agreement. The role of the European cooperation in supporting the development of GIs in the CARIFORUM territories could thus facilitate the adoption, by the latter, of a system shaped similar to that of the EU.⁵⁷

B. *The Free Trade Agreement with South Korea*

The cascade of “new generation” FTAs sprang from the negotiations of the EU-South Korea Agreement started in 2007 and successfully concluded in 2011.⁵⁸ Indeed, this Agreement goes further than any previous ones in lifting trade barriers to the benefit of both parties’ economies.⁵⁹ Animated by the desire to go beyond WTO commitments, and to consolidate and promote the parties’ standards of protection, Chapter 10 of this Agreement is specifically devoted to IP to “achieve an adequate and

⁵² As already seen, well-known trademarks would be granted higher protection pursuant to Article 145(D)(1). CARIFORUM-EU Agreement, *supra* note 41, art. 145 (D)(1).

⁵³ *Id.* at 145 (D)(4).

⁵⁴ *Id.*

⁵⁵ *Id.* at art 145 (A)(2).

⁵⁶ Bernard O’Connor & Laura Richardson, *The Legal Protection of Geographical Indications in the EU’s Bilateral Trade Agreements: Moving Beyond TRIPs*, 4 RIVISTA DI DIRITTO ALIMENTARE 1, 8-9 (2012).

⁵⁷ CARIFORUM-EU Agreement, *supra* note 41, at art. 145 (A)(2); art 164 (2)(c).

⁵⁸ The related negotiations started in 2007. The Agreement was then provisionally applied from 1 July 2011 and finally perfected in 2015.

⁵⁹ See European Commission, *Trade Boosted by Five Years of EU-Korea Free Trade Agreement*, EUROPEAN COMMISSION (July 1, 2016), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1521> (last visited June 2017); see also Eur. Commission, Report from the Commission to the European Parliament and the Council: Annual Report on the Implementation of the EU-Korea Free Trade Agreement, SWD (2016) 162 Final (June 30, 2016).

effective level of protection and enforcement of intellectual property rights.”⁶⁰ Sub-Section C of Section B of Chapter 10 lays down the discipline for GIs, provides procedures for GI recognition,⁶¹ the right to use GIs and the related protection standards,⁶² and the establishment of a joint working group on GIs tasked with exchanging information on GIs and developing related legislation.⁶³

Quite interestingly, Article 10(18) makes direct reference to the contracting parties’ internal acts on GIs.⁶⁴ While European GIs are addressed in specific regulations that mandate absolute protection of registered designations,⁶⁵ few words could be spent on the Korean internal system. Following its accession to the WTO, in fact, South Korea incorporated the regulation of GIs into several laws, to comply with the obligations laid down in the TRIPs Agreement.⁶⁶ Furthermore, a GI registration system is envisaged in the Agricultural Products Quality Control Act (APQCA),⁶⁷ and GIs have also been incorporated, as part of the collective marks, into the Korean Trademark Act (Trademark Act).⁶⁸ The APQCA and the Trademark Act differ from each other in terms of, *inter alia*, purpose of legislation, products that can be registered, procedures, and

⁶⁰ Free Trade Agreement between the European Union and Its Member States, of the One Part, and the Republic of Korea of the Other Part art. 10.1(b), Sep. 16, 2010, 2011 O.J. (L 127) 1, 43 [hereinafter EU and South Korea Trade Agreement].

⁶¹ See EU and South Korea Trade Agreement, *supra* note 60, at arts. 10.18-10.19, 10.24, (on the recognition of specific GIs for various class products).

⁶² See EU and South Korea Trade Agreement, *supra* note 60, at arts. 10.20 (on the right to use); 10.21 (on the scope of protection); 10.22 (on the enforcement of protection); 10.23 (on the relationship with trademarks).

⁶³ See EU and South Korea Trade Agreement, *supra* note 60, at art. 10.25 (on working group on GIs, recalling art. 15.3.1 – the latter listing the working groups to be established under the FTAs (including – *inter alia*, and as specified at 15.3.1(g) – the Working Group on GIs)).

⁶⁴ EU and South Korea Trade Agreement, *supra* note 60, at art. 10.18.

⁶⁵ With specific regard to GIs for agricultural products and foodstuffs, *see id.*

⁶⁶ *E.g.*, Trademark Act, Act No. 71, Nov. 28, 1949, *as amended up to* Act No. 11113, Dec. 2, 2011, art. 2(3-2) (S. Kor.) [hereinafter Trademark Act]; Unfair Competition Prevention and Trade Secret Protection Act, Act No. 911, Dec. 30, 1961, *as amended up to* Act No. 11113, Dec. 2, 2011, art. 3(3-2) (S. Kor.); Agricultural Products Quality Control Act, Act No. 5667, Jan. 21, 1999, *as amended up to* Act No. 10932, July 25, 2011, art. 2(7)-(9) (S.Kor.) [hereinafter APQCA];, Act on Investigation of Unfair International Trade Practices and Remedy Against Injury to Industry, Act No. 6417, Feb. 3, 2001, *as amended up to* Act No. 10230, Apr. 5, 2010, art. 4(1)(1); and Liquor Tax Act (Italian Trade Commission, Protection of Geographical Indications in the Republic of Korea, at 98 (Apr. 2010), [http://www.confindustria.vicenza.it/video/videosp.nsf/e906ee704d466c14c12576e20042fb08/d17c5f1c7a815ceac125790d0055558e/\\$FILE/Protection%20of%20GIs%20in%20the%20ROK.pdf](http://www.confindustria.vicenza.it/video/videosp.nsf/e906ee704d466c14c12576e20042fb08/d17c5f1c7a815ceac125790d0055558e/$FILE/Protection%20of%20GIs%20in%20the%20ROK.pdf) (discussing National Tax Service Notification No. 2000-33 concerning the Liquor Tax Act, with a stated purpose of “prevent[ing] use of a GI identifying wines/spirits not originating in the place indicated by the GI.”)) [hereinafter Italian Trade Commission Report].

⁶⁷ See generally APQCA, *supra* note 66, at art. 8.

⁶⁸ Trademark Act, *supra* note 66, at art. 6.

effects of registration;⁶⁹ only the APQCA is addressed in Article 10(18)(1) of the EU-South Korea Agreement.⁷⁰

In any event, regardless their respective internal GI protection schemes, the EU and South Korea have agreed on some common elements for the registration and control of GIs. Notably, the wording of section (b) of Article 10(18)(6) is substantially similar to that of Article 22 of the TRIPs Agreement, in that it requires the verification that GIs “identify a good as originating in a territory, region or locality of either [p]arty, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.”⁷¹ It is thus suggested that the FTA aims at securing the contracting parties’ assent to TRIPs’ minimum requirement of what is to be considered a GI. Moreover, Article 10.18(6)(f) of the EU-South Korea Agreement requires an objection procedure for holders of pre-existing rights.⁷² Interestingly, such a procedure would refer to “the country of origin of the GIs at play but not to the other Party where protection under the FTA is sought.”⁷³ Nonetheless, the apparent disregard of the rights existing in the jurisdiction of the trade partner should be warded off by the fact that, while negotiating and forming the GI lists attached to the FTA, both the EU and South Korea carried out opposition procedures.⁷⁴ Indeed, from the wording of the various provisions, it is clear contracting parties would be bound, not to a general obligation to protect GIs according to the provisions of the FTA, but to protect only those GIs that are included in the attached lists (*i.e.*, Annex 10-A for GIs related to agricultural products and foodstuffs; Annex 10-B for specific GIs related to wines, aromatized wines and spirits).⁷⁵ In particular, it has been stressed how, on the one hand, under the EU-South Korean Agreement, commercially important European GIs will be offered a high level of protection.⁷⁶ On the other hand, the EU appears also to have succeeded in “clawing back” (*i.e.*, in granting protection as GIs) terms otherwise deemed to have become “generic” in other markets.⁷⁷ By way of additional

⁶⁹ A complete review of such acts and of their implications on GI protection within the Korean jurisdiction is outside the scope of this curtailed work. For some related insights, see Italian Trade Commission Report, at 10.

⁷⁰ EU and South Korea Trade Agreement, *supra* note 60, at art. 10.18(1).

⁷¹ EU and South Korea Trade Agreement, *supra* note 60, at art. 10.18 (6)(b); TRIPs, *supra* note 1, at art. 22.

⁷² EU and South Korea Trade Agreement, *supra* note 60, at art. 10-18(6)(f).

⁷³ Engelhardt, *supra* note 33, at 798.

⁷⁴ For an illustration of these, see *id.*, at 794-795.

⁷⁵ Indeed, EU and South Korea Trade Agreement, *supra* note 60, at art. 10.21 (on the scope of GI protection) starts by restricting such *scope* to the GIs referred to in Articles 10(18) and 10(19), which, in turn, refer to the named Annexes and the therein-listed GIs.

⁷⁶ European Commission, *EU-South Korea Free Trade Agreement: 10 Key Benefits for the European Union*, EUROPEAN COMMISSION (June 2011), http://trade.ec.europa.eu/doclib/docs/2010/october/tradoc_146695.pdf (last visited June 19, 2017).

⁷⁷ *E.g.*, Feta, Roquefort, Asiago, Parmigiano Reggiano, Port, and Sherry. See Crina Viju, May T. Yeung, W.A. Kerr, *Geographical Indications, Barriers to Market Access and*

annotation, the annexed GI lists retain some margin of flexibility and may be adjusted by adding, removing or modifying the reported names.⁷⁸

Lastly, the scope of protection granted to GIs is quite broad, which is consistent with the FTA's general approach in favor of GIs. Article 10(21), sections (a) and (c), resemble Article 22(2) of the TRIPs Agreement,⁷⁹ in that they prevent misleading uses of protected names and unfair practices pursuant to Article 10*bis* of the Paris Convention.⁸⁰ Conversely, Article 10(21)(1)(b) reflects the higher standards of protection of Article 23 of the TRIPs Agreement, but extends them to all protected GIs in connection to "like goods" (*i.e.*, goods from the same generic product category).⁸¹ The only allowed exceptions relate to personal names,⁸² plant varieties and animal breeds,⁸³ as well as homonymous names (which can be concurrently used provided that practical conditions to differentiate them are put into place).⁸⁴ As to trademarks, these appear to be required to always give way to GI superiority,⁸⁵ even though co-existence of protected GIs and prior trademarks would be allowed pursuant to Article 10(21)(5).⁸⁶ Overall, the European requests of South Korea would thus appear to have been satisfied in the EU-South Korean Agreement.

C. *The Trade Agreement with Colombia and Peru*

Of the four countries forming the Andean Community (Bolivia, Colombia, Ecuador and Peru), only Colombia and Peru signed the Trade Agreement (TA) with the EU on June 26, 2012.⁸⁷ While, in 2014, Ecuador and the EU eventually negotiated the accession of Ecuador to the existing

Preferential Trade Agreements, CAN. AGRIC. TRADE POLICY AND COMPETITIVENESS RESEARCH NETWORK, Commissioned Paper No. 01, 2012, at 18.

⁷⁸ See EU and South Korea Trade Agreement, *supra* note 60, at arts. 10.24, 10.25(3)(a)-(b); *see also* n. 58 to art. 10.25(b).

⁷⁹ See EU and South Korea Trade Agreement, *supra* note 60, at art. 10.21(a)(c); TRIPs, *supra* note 1, at art. 22(2).

⁸⁰ Paris Convention for the Protection of Industrial Property, art. 10*bis*, Mar. 20, 1883 (as revised at Stockholm, July 14, 1967), 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention].

⁸¹ EU and South Korea Trade Agreement, *supra* note 60, at art. 10.21(1)(b); TRIPs, *supra* note 1, at art. 23.

⁸² EU and South Korea Trade Agreement, *supra* note 60, at art. 10.21(2).

⁸³ *Id.* at 10.24(3).

⁸⁴ *Id.* at 10.21(3).

⁸⁵ It needs to be, once again, stressed that opposition procedures took place in the context of the FTA negotiations, so that, presumably, problematic names have been left out of the final GI lists.

⁸⁶ EU and South Korea Trade Agreement, *supra* note 60, at art. 10.21(5).

⁸⁷ In 2007, negotiations started with all four countries, but Bolivia and Ecuador then decided not to proceed. Therefore, the EU, Colombia and Peru began bilateral negotiations in 2009, which led to the conclusion of the FTA herein discussed. *EU and Ecuador Publish Text of Trade Agreement*, EU COMMISSION (Sep. 24, 2014), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1156>.

TA, that accession protocol has yet to be signed.⁸⁸ As with all EU FTAs, the TA is deemed to have a beneficial impact on the economic and business relations between the EU and the trade partners concerned,⁸⁹ and includes an entire section on GIs.⁹⁰

By way of initial annotation, it is worth pointing out that the TA with Colombia and Peru does not contain detailed indications on how the contracting parties' respective internal systems should be designed.⁹¹ This silence is likely due to the fact that all signatories have robust domestic GI protection schemes, so that no additional specification in this respect was needed.⁹² This also explains the reference to a possible internal "system for authorizing the use" of GIs.⁹³ While conflicting with the EU's objective to secure GI protection directly through the TA and without any further requirements, such wording attempts to compromise the provisions applicable in the Andean Community which already prescribe a formal authorization procedure for GI users.⁹⁴

Conversely, the TA's scope extends to GIs for "products *other* than agricultural products, foodstuffs, wines, spirit drinks or aromatized wines."⁹⁵ The inclusion of "other products" appears to be justified in light of the fact that industrial products and handicrafts are protected within the jurisdictions of the Andean Community.⁹⁶ However, the kind of protection that these GIs receive is narrower than the rest of the protected geographical names, since they are meant to be protected solely "according to the laws and regulations applicable in each Party,"⁹⁷ and thus do not conform to the

⁸⁸ See *EU and Ecuador Publish Text of Trade Agreement*, *supra* note 87.

⁸⁹ *Highlights of the Trade Agreement between Colombia, Peru and the European Union*, EU COMMISSION (June 20, 2012), http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149598.pdf.

⁹⁰ Trade Agreement Between the European Union and its Member States, of the One Part, and Colombia and Peru of the Other Part arts. 207-14, June 26, 2012, O.J. (L 354) 3 [hereinafter EU, Colombia, and Peru Trade Agreement], *available at* http://trade.ec.europa.eu/doclib/docs/2011/march/tradoc_147704.pdf

⁹¹ Compare EU, Colombia, and Peru Trade Agreement, *supra* note 90, at art. 207-14 to EU and South Korea Agreement, *supra* note 60, at art. 10(18)(6).

⁹² As to the Andean Community, the relevant legal text would be the Decision No. 486 Establishing the Common Industrial Property Regime (especially Title XII on GIs). Decision 486: Common Intellectual Property Regime (Sept. 14, 2000), *available at* http://www.wipo.int/wipolex/en/text.jsp?file_id=223718 (last visited Aug. 10, 2016) [hereinafter Decision 486]. Furthermore, both Colombia and Peru have implemented legislations directly addressing GIs. See CODIGO DE COMERCIO, L. 410, marzo 27, 1971, art. 583(7), Diario Oficial [D.O.] (Colom.), *available at* <http://www.wipo.int/wipolex/en/details.jsp?id=8295>; Resolution approving the Complementary Provisions to Decision No. 486 of the Andean Community Commission establishing the Common Regime on Industrial Property, L.D. 1075, arts. 70 & 80, June 27, 2008, (Peru), *available at* www.wipo.int/edocs/lexdocs/laws/en/pe/pe034en.pdf.

⁹³ EU, Colombia, and Peru Trade Agreement, *supra* note 90, at art. 207(f).

⁹⁴ Decision 486, *supra* note 92, at art. 207-11.

⁹⁵ EU, Colombia, and Peru Trade Agreement, *supra* note 90, at art. 207(d).

⁹⁶ Decision 486, *supra* note 93, at art. 212.

⁹⁷ EU, Colombia, and Peru Trade Agreement, *supra* note 90, at art. 207(d).

TA provisions. Consequently, the level of protection enjoyed by a certain GI would vary depending upon whether it refers to agricultural products or foodstuffs, wines, spirit drinks or aromatized wines (listed in Appendix 1 of Annex XIII), or to “other products” (listed in Appendix 2 of Annex XIII), as well as whether the geographical name in question is included, or not, in one of the mentioned lists.⁹⁸ Indeed, with regard to the latter point, Article 207(e) binds signatories to the general obligation to not allow the use of *any* GI for products not coming from the relevant geographical areas of the other party.⁹⁹ As that is the lowest threshold, the listed GIs benefit from higher standards of protection specified in the TA itself.

In light of the foregoing, this analysis focuses on the GIs listed in Appendix 1 of Annex XIII (once the objection procedure pursuant to Article 208 is completed).¹⁰⁰ In particular, Article 210 outlines the scope of protection to be granted to these GIs and eventually channels the various types of infringements in a final catch-all clause: “any practice liable to mislead the consumer as to the true origin of the product.”¹⁰¹ Moreover, Article 211 deals with the always contentious relationship between GIs and trademarks.¹⁰² Whereas paragraph 1 of the Article 211 provides for the refusal to register, or the invalidation of, trademarks conflicting with GIs related to “identical or like products, provided an application to register the trademark is submitted after the date of application for protection of the geographical indication,” its paragraph 2 states,

no Party shall have the *obligation to protect* a geographical indication where, in the light of a reputed or well-known trademark, protection is liable to mislead consumers as to the true identity of the product.¹⁰³

In light of such wording, it can be inferred that, in case of well-known or reputed trademarks, or if consumers are not misled, GIs and trademarks could *at least* co-exist, thereby responding to the EU desire to thoroughly protect GIs notwithstanding prior uses of similar terms in its commercial partners' markets.

D. The Association Agreement with Central America

On June 29, 2012, the EU concluded a new Association Agreement (AA) with the Central American region, comprised of Panama, Guatemala,

⁹⁸ EU, Columbia, and Peru Trade Agreement, *supra* note 90, at art. 207(d).

⁹⁹ Article 207(e) refers to a specific “locality or region” of the parties, not to the territory of the whole country in general. Footnote 66, regarding article 207(e), defines “use” of GIs as “the production, and/or processing and/or preparation of the product identified by the geographical indication.” *Id.* at art. 207(e).

¹⁰⁰ *Id.* at Annex XIII, Appendix 1, available at http://trade.ec.europa.eu/doclib/docs/2011/march/tradoc_147725.pdf.

¹⁰¹ *Id.* at art. 210(e).

¹⁰² *Id.* at art. 211.

¹⁰³ EU, Columbia, and Peru Trade Agreement, *supra* note 90, at art. 211.

Costa Rica, El Salvador, Honduras and Nicaragua.¹⁰⁴ The AA consists of three pillars (political dialogue, cooperation and trade)¹⁰⁵ and is meant to open up markets, as well as reinforce regional economic integration.¹⁰⁶ Among the trade issue provisions, Section C of Title VI in Part IV of the AA is devoted to GIs.¹⁰⁷

The liaison with the TRIPs Agreement is made clear by the GI definition provided in Article 242(2) of the AA, which strictly follows the wording of Article 22(1) of TRIPs, and by Article 243(1), which states that “[t]he Parties reaffirm the rights and obligations established in Part II, Section 3, of the TRIPs Agreement.”¹⁰⁸ Interestingly, however, paragraph 2 of Article 243 appears to be modeled after Article 24(9) of the TRIPs Agreement.¹⁰⁹ Consistently with the TRIPs provision, indeed, Article 243(2) requires that, in order to benefit from the protection stemming from the previous paragraph, the GI in question needs to be also protected in its country of origin.¹¹⁰ Yet, Article 243(2) of the AA adds the requirement that the GI is “recognized and declared as such” in its country of origin, thereby adding a further formal requirement which is absent in the TRIPs Agreement.¹¹¹ The latter, in fact, does not require any formal recognition or declaration of GIs, but is neutral as to the means of protection implemented by each country, provided that “stricter,” domestic provisions neither impair, nor diminish, the substantial protection to be granted to GIs.¹¹²

Always with regard to relevant formal profiles, Article 244 lays down the major features of the GI system that each country is supposed to respect. These encompass the establishment of a register, reliance on approved specifications, administrative procedures, and control provisions to secure the authenticity of GI products, as well as procedures to take into

¹⁰⁴The Central America and EU Association Agreement follows a series of other agreements connecting the two economic areas in question, including: The Framework Cooperation Agreement signed in 1993 and entered into force on March 1, 1999, and the Political Dialogue and Cooperation Agreement signed on December 15, 2003. *See* Agreement Establishing an Association Between Central America, on the One Hand, and the European Union and its Member States, on the Other, June 29, 2012, O.J. (L 346) [hereinafter Central America and EU Association Agreement].

¹⁰⁵ The Central America and EU Association Agreement trade pillar has been provisionally applied since 1 August 2013 with Honduras, Nicaragua and Panama; since 1 October 2013 with Costa Rica and El Salvador; and since 1 December 2013 with Guatemala. *Id.*; European Commission Memo, The Commission, Comprehensive Association Agreement between Central America and the European Union (June 29, 2012).

¹⁰⁶ *Id.*

¹⁰⁷ Central America and EU Association Agreement, *supra* note 104, at Part IV, arts. 242-250.

¹⁰⁸ *See Id.* at Part IV, art. 242(2), 243(1); *see also* TRIPs, *supra* note 1, at art. 22.

¹⁰⁹ Central America and EU Association Agreement, *supra* note 104, at Part IV, art. 243(2); TRIPs, *supra* note 1, at art. 24(9).

¹¹⁰ Central America and EU Association Agreement, *supra* note 104, at Part IV, art. 243(2).

¹¹¹ *Id.*

¹¹² TRIPs, *supra* note 1, at art. 24(9).

account the legitimate interests of third parties.¹¹³ In this respect, the AA closely resembles the EU-South Korea FTA.¹¹⁴

Coming to the substantive content of the AA, the AA also includes lists of GIs to be protected.¹¹⁵ However, the lists differ from the GI lists previously discussed, since the EU-Central America AA contains two lists: first, the “List of Names to be Applied for Protection as Geographical Indications in the Territory of the Parties” and, second, the list for “Protected Geographical Indications.”¹¹⁶ Only the terms contained in the latter will be effectively protected. The geographical terms contained in the first list will be transposed in the second following the decision of the Association Councils,¹¹⁷ and insofar as the concerned GIs have succeeded in the opposition and examination procedures of the relevant signatory party.¹¹⁸ The scope of protection to be granted to “Protected Geographical Indications” is then outlined in Article 246 of the AA.¹¹⁹ While the considerations made in the context of the analysis of, primarily, the EU-South Korea FTA would apply,¹²⁰ the last paragraph of Article 246 of the AA is worth highlighting. Indeed, pursuant to Article 246(4), contracting states may tolerate the “continued and similar use of a particular geographical indication of the other Party” with respect to products other than wines and spirits, insofar as such use has been occurring “in good faith and in a continuous manner with regard to the same of related goods [...] before the date of entry into force of [the AA].”¹²¹ Such “tolerance” could limit the success of the EU’s efforts aimed at phasing out prior uses of names originating in the EU.

The prior use of names originating in the EU requires examination of Article 248 and the relationship between GIs and trademarks in the AA. Paragraph 1 of Article 248 mandates the refusal of trademarks conflicting with protected GIs, similar to the wording of Article 211(1) of the EU-Colombia and Peru TA.¹²² However, while in the TA the conflict would exist with respect to GIs and trademarks used for identical or even mere *like* products, the EU-Central America AA restricts such conflicts to instances

¹¹³ Central America and EU Association Agreement, *supra* note 104, at Part IV, art. 244(2).

¹¹⁴ Compare Central America and EU Association Agreement, *supra* note 104, at art. 422 with TRIPs, *supra* note 1.

¹¹⁵ Central America and EU Association Agreement, *supra* note 104, at Part IV, art. 245.

¹¹⁶ EU, Columbia, and Peru Trade Agreement, *supra* note 90, at Annex XIII, Appendix 1.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at Annex XVIII, part B.

¹¹⁹ Central America and EU Association Agreement, *supra* note 104, at Part IV, art. 246.

¹²⁰ See, e.g., EU and South Korea Trade Agreement, *supra* note 60, at art. 10(21)(1); see also Section 2.2 *supra*.

¹²¹ Central America and EU Association Agreement, *supra* note 104, Part IV, art. 246(4).

¹²² See Section 2.3 *supra*; Central America and EU Association Agreement, *supra* note 104, Part IV, art. 248(1); European Union, *Council Decision (EU) 2012/241/1*, Official F. of Euro. Union (May 31, 2012).

related to “identical or confusingly similar” products.¹²³ In light of the different notions of *identical* products and *like* products usually applied in international trade,¹²⁴ this would appear to narrow down the scope of the provision. Nevertheless, the registration of the trademark would be prevented if submitted after the “date of application for registration of the geographical indication in the territory concerned.”¹²⁵ Nothing specific being said with regard to GIs originating from Central America, footnote 37 to Article 248 of the AA clarifies that for the EU the “date of application” would be the date of the entry into force of the Agreement with regard to names listed in Annex XVII; for all signatories, instead, such date would correspond to “the date of the transmission of a request to the other Party to protect a geographical indication”¹²⁶ in respect of the new GIs added pursuant to Article 247. Lastly, as with the EU-Colombia and Peru TA, the possibility of co-existence between GIs and trademarks also exists under Article 248(2) of the EU-Central America AA,¹²⁷ thereby leading to a fairly satisfying GI protection.

E. The Free Trade Agreement with Singapore

The EU and Singapore completed the negotiations for a comprehensive free trade agreement on October 17, 2014.¹²⁸ Spanning various trade-related matters, Chapter 11 of the FTA between the EU and Singapore (EUSFTA) is entirely dedicated to IP; there, GIs, which proved to be a “key sticking point” in negotiations,¹²⁹ are specifically dealt with in Sub-Section C of Chapter 11.¹³⁰

¹²³ Central America and EU Association Agreement, *supra* note 104, Part IV, art. 248(1) n. 36.

¹²⁴ In WTO case law, *like* products encompass a broader *ensemble* of goods, not limited to products of the same type and kind (*i.e.*, identical). The focus would be on the competitiveness and/or substitutability of products in the marketplace. “[A] determination of *likeness* [...] is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products.” Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 99, WTO Doc. WT/DS135/AB/R (adopted 12 March 2001).

¹²⁵ Central America and EU Association Agreement, *supra* note 104, at Part IV, art. 248(1).

¹²⁶ *Id.* at art. 247(2).

¹²⁷ Article 248(2) of the AA, in fact, reflects – quite literally – Article 211(2) of the EU-Colombia and Peru TA. Compare Central America and EU Associate Agreement, *supra* note 104, at art. 248(2) with EU, Columbia, and Peru Trade Agreement, *supra* note 90, at art. 211(2).

¹²⁸ *Singapore*, EUROPEAN COMMISSION, <http://ec.europa.eu/trade/policy/countries-and-regions/countries/singapore/> (last visited June 25, 2017).

¹²⁹ See Natasha Brereton-Fukui, *EU, Singapore Agree on FTA*, THE WALL STREET JOURNAL (December 16, 2012), <http://online.wsj.com/article/SB10001424127887324407504578184061043113852.html>.

¹³⁰ EU and Singapore Trade Agreement, *supra* note 38, at ch. 11, sub-section C.

GI provisions number from Article 11(16) to Article 11(23).¹³¹ The scope of the Agreement's application is confined to GIs related to wines, spirits, agricultural products, and foodstuffs.¹³² The definition of GI adopted by the EUSFTA (and reported in footnote 14 to the title of Sub-Section C) is modeled according to the wording of Article 22 of the TRIPs Agreement.¹³³ The GI regime mandated by the TRIPs Agreement is also reflected in the scope of protection granted to GIs under the EUSFTA.¹³⁴ Nonetheless, there are two major differences from TRIPs. First, Article 11(16)(2) mandates the formal requirement of GIs being "recognized and declared as geographical indications in their country of origin."¹³⁵ Second, Article 11(19)(3) extends absolute protection to GIs for agricultural products and foodstuffs in respect of "like goods" (*i.e.*, goods falling within the same category of good).¹³⁶

The reinforced GI protection, however, clashes with a quite remarkable number of exceptions. These include, *inter alia*, continued and similar uses of geographical names;¹³⁷ prior uses of GIs;¹³⁸ generic terms;¹³⁹ names conflicting with plant varieties or animal breeds;¹⁴⁰ or persons' names.¹⁴¹ With regard to geographical names allegedly considered as terms "customary in common language," it may be worth noting that Singapore conducted a consultation in relation to the GIs submitted by the EU for protection in its jurisdiction, so as to assess the perception that local consumers had of the potentially-protected names.¹⁴² In particular, where a GI would result to be perceived by purchasers as "generic in Singapore (*i.e.*, a term that is used as the common name for the relevant good in Singapore), the generic term w[ould] be still available for use by third parties."¹⁴³ This

¹³¹ EU and Singapore Trade Agreement, *supra* note 38, at art. 11(16)-(23).

¹³² *Id.* at art. 11(16)(1). Noteworthy, similarly to the approach adopted in the EU-Colombia and Peru TA, also the EUSFTA resorts to two lists: Annex 11-A on submitted GIs; Annex 11-B – as amendable pursuant to Article 11(18) – on GIs that, having completed the applicable procedures, are materially protected under the EUSFTA GI provisions.

¹³³ EU and Singapore Trade Agreement, *supra* note 38, at n. 14.

¹³⁴ Compare EU and Singapore Trade Agreement, *supra* note 38, at art. 11(19)(1), ¶ 2-3 with TRIPs, *supra* note 1, art. 22(2), 23(1).

¹³⁵ See EU and Singapore Trade Agreement, *supra* note 38, at art. 11(16)(2); see also Central America and EU Association Agreement, *supra* note 104, art. 243(2) (containing the same formal requirement).

¹³⁶ EU and Singapore Trade Agreement, *supra* note 38, at art. 11(19)(3), n. 16; see Section I *supra*.

¹³⁷ EU and Singapore Trade Agreement, *supra* note 38, at art. 11(22)(2)(a)-(b) (such "continued and similar use" of a geographical name, nonetheless, needs to respect some time requirements: namely, it needs to have been occurred "(a) for at least 10 years preceding 1 January 2004; or (b) in good faith preceding that date.").

¹³⁸ See *Id.* at art.11.22, ¶ 3-4.

¹³⁹ See *id.* at ¶ 5-7.

¹⁴⁰ See *id.* at ¶ 8.

¹⁴¹ See *id.* at ¶ 10.

¹⁴² *Id.* at ¶ 5-7.

¹⁴³ *Geographical Indications Consultation Paper: List of Terms in Relation to 196 Products*, Ministry of Trade and Industry, Ministry of Law, Intellectual Property Office of Singapore ¶ 3 (Jan. 21, 2013),

issue strictly relates (and, potentially, impairs) the EU “battle” against its GIs falling into “genericide” and its claw-back efforts.

Conversely, the relationship between GIs and trademarks appears to be quite favorably dealt with in Article 11(21) of the EUSFTA.¹⁴⁴ There, on the one hand, paragraph 1 mandates the prevalence of GIs over conflicting trademarks.¹⁴⁵ On the other hand, the subsequent paragraphs appear to be open to the possibility of providing for the co-existence of these two categories of signs.¹⁴⁶ Indeed, the relevant text reads: “the existence of a prior conflicting trademark [...] *would not* completely *preclude* the registration of a subsequent geographical indication;”¹⁴⁷ implementing measures “*shall not prejudice* the eligibility for or the validity of the registration of a trademark” insofar as the good faith requirement is fulfilled;¹⁴⁸ and, lastly, “[p]arties *shall have no obligation* to protect a geographical indication [...] in light of a reputed or well-known trademark.”¹⁴⁹ The therein-inferable co-existence of the two IP objects appears to be further supported by the wording of Article 11(22)(4).¹⁵⁰ Notwithstanding the apparent alignment of these provisions to the EU requests, their effectiveness could be significantly impaired in practice. Indeed, the only European GIs to benefit from the above-outlined standards of protection are those that will be included, following an additional domestic objection procedure, in an *ad hoc* register which Singapore will establish after the implementation of the EUSFTA.¹⁵¹

In any event, it cannot be denied that, compared to the other treaties discussed so far, the express and implicit emphasis on trademarks in the EUSFTA is significant. It suffices here to mention how the EUSFTA makes protection of a GI in Singapore conditional upon the *consent* of existing trademark rights holders,¹⁵² and reserves the right to use a GI to a *person*, expression that calls into mind a (private) trademark holder.¹⁵³ The last consideration is how an effective protection would be compromised in case of failure by the GI holder to “renew registration[,] or maintain

<https://www.ipos.gov.sg/Portals/0/Geographical%20Indications%20Consultation%20Paper.pdf>

¹⁴⁴ EU and Singapore Trade Agreement, *supra* note 38, at art. 11.21.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at ¶ 2-4.

¹⁴⁷ *See Id.* at art. 11.21, ¶ 2 (emphasis added).

¹⁴⁸ *See id.* at ¶ 3 (emphasis added).

¹⁴⁹ *See* EU and Singapore Trade Agreement, *supra* note 38, at art. 11.21 ¶ 4 (emphasis added); *see also* the comments made with regard to Central America and EU Association Agreement, *supra* at note 104 at art. 211.1-2 which has a very similar wording.

¹⁵⁰ In light of the wording of EU and Singapore Trade Agreement, *supra* note 38, at art. 11.22 ¶ 4, it is not excluded that such *prior use* may concern the use of a trademark.

¹⁵¹ *Id.* at art. 11.17 ¶ 2 (a-d).

¹⁵² *Id.* at art. 11.21 ¶ 2, n. 19.

¹⁵³ *Id.* at art. 11.20. This is, in fact, different from the wording used in the other treaties. *See e.g.*, Central America and EU Association Agreement, *supra* at note 104, at art. 249 where the term “users” is employed.

minimal commercial activity,”¹⁵⁴ wording that resembles that of trademark systems.¹⁵⁵ The wording of this last requirement can be explained by the fact that, traditionally, Singapore has protected geographical names under its Trademark Act (Chapter 332).¹⁵⁶ Although Singapore also adopted a Geographical Indications Act (Chapter 117B) in 1998,¹⁵⁷ such Act merely reproduces the GI provisions of TRIPs,¹⁵⁸ which is not surprising given that it was enacted when Singapore joined the WTO.

Considering the Singaporean “background” for GIs (much distant from the *sui generis* GI system of the EU), the content of the EUSFTA is still quite surprising and proves the bargaining power that the EU has, overall, managed to exercise. Indeed, notwithstanding GIs being distant from the Singaporean legal tradition, the EU has managed to “export” certain provisions setting higher standards of protection than the TRIPs. The European success is further emphasized by the fact that, in order to comply with the signed EUSFTA, Singapore drafted a new Geographical Indications Act in 2014, establishing a GI registry and, most importantly, enhancing the level of protection for GIs related to agricultural products and foodstuffs.¹⁵⁹

F. *The Comprehensive Economic and Trade Agreement with Canada*

The negotiations for a Comprehensive Economic and Trade Agreement between the EU and Canada (CETA) were concluded in August

¹⁵⁴ EU and Singapore Trade Agreement, *supra* note 38, at art. 11.19 ¶ 4.

¹⁵⁵ Indeed, Singapore Trademark Act chap. 332 art. 19-20 (Sing.) provides for the renewal of the trademark registration, whilst its art. 22 (especially at ¶ 1, points (a) and (b)) mandates the revocation of the trademark registration in case of non-use of the mark, *available at* <http://statutes.agc.gov.sg/aol/search/display/view.w3p;ident=dea13f0f-1173-4c5e-af2c-ec597a42b40e;page=0;query=DocId%3A%22eda8ae51-9095-4ada-b5e4-0407c03ca714%22%20Status%3Ainforce%20Depth%3A0;rec=0#legis>. Analogously, Council Regulation (EC), No. 207/2009 art. 15, 51(1)(a) (Feb. 26, 2009) require the registered trademark to be used by its holder, whereas art. 46-47 deal with the renewal of the trademark registration.

¹⁵⁶ In particular, geographical names could be protected as collective marks or certification marks: *see* Singapore Trade Act, *supra* note 155, at art. 60-61.

¹⁵⁷ Geographical Indications Act (promulgated by the Parliament of Singapore, Oct. 13, 1998, effective Jan. 15, 1999), *available at* <http://statutes.agc.gov.sg/aol/search/display/view.w3p;page=0;query=DocId%3Afdc740d5-f8b3-4d7e-8fdcbecb3bf81ea9%20Depth%3A0%20ValidTime%3A30%2F12%2F1999%20TransactionTime%3A30%2F12%2F1999%20Status%3Ainforce;rec=0;whole=yes> (last visited 12 July 2016).

¹⁵⁸ *See supra* pages 2-3; *see also id.*

¹⁵⁹ For a summary of the key characteristics of the new Singapore Geographical Indication Act of 2014, *see* Lau Kok Keng and Cherrin Wong, *An Enhanced Regime for the Protection of Geographical Indications in Singapore*, <http://www.lawgazette.com.sg/2014-07/1085.htm> (last visited 15 July 2016). Noteworthy, the new Act is not yet applicable since its entry into force is subject to the ratification, by both parties, of the EUSFTA, which is still pending.

2014.¹⁶⁰ Although not devoid of criticisms, CETA has significant potential to reinforce and enhance the trade relations between the two signatory parties, and to “create more of a level playing field in IP rights between Canada and the EU.”¹⁶¹ With specific regard to GIs, the EU has managed to make Canada agree on protecting some of its most renowned geographical names, like Prosciutto di Parma, Roquefort and Grana Padano. By successfully securing the reputation for quality or authenticity of its products, which it sees as intimately linked to geographical origin, the EU would be capable of better protecting its exported goods in the Canadian market.¹⁶²

Nevertheless, the negotiated text was not easily achieved since Canada lacks any GI tradition of its own, but has included—at least until now—geographical names in the scope of its Trademark Act,¹⁶³ especially in the form of certification mark.¹⁶⁴ The delicacy of the compromise is, to some extent, evidenced by the emphasis put on describing CETA’s commitments as being aligned with the international obligations already binding upon both contracting parties,¹⁶⁵ as well as on allowing both parties the discretion to choose the most appropriate means of implementing such commitments.¹⁶⁶ Despite this, the provisions on GIs can be considered a success from a European perspective.

¹⁶⁰ Elfriede Bierbrauer, Negotiations on the EU-Canada Comprehensive Economic and Trade Agreement (CETA) concluded, European Parliament Directorate-General for External Policies (October 2014), http://www.europarl.europa.eu/RegData/etudes/IDAN/2014/536410/EXPO_IDA%282014%29536410_EN.pdf.

¹⁶¹ European Commission, *CETA – An EU Free Trade Deal Fit for the 21st Century* (July 5, 2016), http://europa.eu/rapid/press-release_MEMO-16-2372_en.htm.

¹⁶² European Commission, *The EU’s Free Trade Agreement with Canada and Its Intellectual Property Rights Provisions*, (Oct. 18, 2013), http://trade.ec.europa.eu/doclib/docs/2012/august/tradoc_149866.pdf.

¹⁶³ Trade-marks Act, R.S.C. 1985, c. T-13.

¹⁶⁴ Certification marks are defined in Article 2 of the Canada Trademark Act and included in the broader category of (ordinary) trademarks. Article 11(12)(1) of the Canada Trademark Act names GIs, *strictu sensu*, only with regard to wines and spirits, so as to comply with the standards mandated by Article 23 of the TRIPs Agreement to which Canada is bound. Noteworthy, GIs may find some protection also under Article 7 of the Canada Trademark Act on unfair competition. For some related comments, see Amrita V. Singh, *Changing the Trademark Law Landscape, One Geographical Indication at a Time: The Canadian-European Union Comprehensive and Economic Trade Agreement*, Toronto Law Journal, March 2014, [http://www.bereskinparr.com/files/file/docs/Mar_2014%20-%20EU-](http://www.bereskinparr.com/files/file/docs/Mar_2014%20-%20EU-Canada_Trade_Agreement.pdf)

Canada_Trade_Agreement.pdf; see also Marine Stipanac, *Brie or not to Brie: Geographical Indications in Canada*, Perlaw Reporter, December 2013, http://www.perlaw.ca/media/Lawyer_Articles_PDF/Perlaw_Report_December_2013.pdf.

¹⁶⁵ See European Commission, the Comprehensive and Economic Trade Agreement between the EU and Canada art. 20(2)(1), Oct. 30, 2016 [hereinafter CETA].

¹⁶⁶ See *id.* at art. 20(2)(2). Only Article 20(19)(4), on the one side, suggests the availability of administrative procedures finalized to GI protection. On the other side, Article 20(43) of Section D on border measures lays down the obligation to implement border measures to contrast the so-called ‘counterfeited’ GIs.

First, pursuant to Article 20(16), GIs are defined only in relation to agricultural products and foodstuffs; wines and spirits are out of the scope of CETA.¹⁶⁷ Second, the CETA list system is uniquely characterized, on the one hand, by the possibility to amend the GI list by adding or removing relevant names,¹⁶⁸ and, on the other hand, by a restriction on that possibility.¹⁶⁹ Indeed, a GI “shall not in principle be added [...] if it is a name that on the date of the signing of this Agreement is listed in the relevant Register of the European Union with a status of ‘Register’ [...]”¹⁷⁰ That provision closes the door to any addition of any already-existing GIs that the EU was not able to negotiate into being included in the Annex of CETA. Nevertheless, the possibility to be added to CETA’s list might be still feasible for geographical names gaining reputation and becoming eligible as GIs in the future. A related, additional feature, unique to CETA, is the presence of not one GI list, but of up to three lists: one on GIs that identifies products originating from either the EU or Canada;¹⁷¹ another carving out some terms that, regardless of their similarity to certain protected GIs, can nonetheless be used by both parties;¹⁷² and a last one that lists all the accepted product classes to which GIs may relate.¹⁷³ In this respect, GIs that have been included in the relevant annexed list should be protected in accordance with what is provided for in Article 20(19).¹⁷⁴ In general, the provision resembles the TRIPs Agreement, especially at paragraphs 2(b)¹⁷⁵ and 2(c).¹⁷⁶ Differently from the TRIPs Agreement, however, Article 20(19)(2)(a) stresses the need to respect the regulations of the country of origin in question, both as to the authenticity of the provenience of the goods,¹⁷⁷ and as to the related rules on production and manufacturing.¹⁷⁸ Additionally (and in line with the EU’s objective to include TRIPs-Plus Provisions in the FTA), Article 20(19)(3) extends the

¹⁶⁷ Indeed, wines and spirits are already regulated by an *ad hoc* Agreement between the European Community and Canada on Trade in Wines and Spirit Drinks, Eu-Can., June 2, 2004, O.J. 2004, L 35/3.

¹⁶⁸ See CETA, *supra* note 165, at art. 20(20) especially ¶ 1.

¹⁶⁹ See *id.* at Article 20(22)(2).

¹⁷⁰ *Id.*

¹⁷¹ Part A of Annex 20-A lists EU GIs, whereas Part B of the same Annex concerns Canada’s GIs. Both lists specify (i) the relevant geographical name; (ii) the related product class; and (iii) the place of origin, were it a territory, a region, or a locality. Noteworthy, this distinction is affirmed and clarified in Article 20(18). *Id.*

¹⁷² For instance, pursuant to the named Annex 20-B, the terms *Parmesan* or *Valencia Orange/Orange Valencia/Valencia* could continue to be used, notwithstanding that the names *Parmigiano Reggiano* and *Citricos Valenciano/Citrics Valencians* would qualify as protected GI. *Id.*

¹⁷³ Annex 20-C identifies up to 21 product classes (e.g., dry-cured meats, cheeses, pasta, etc.). *Id.*

¹⁷⁴ CETA, *supra* note 165, at art. 20(19).

¹⁷⁵ Article 20(19)(2)(b) concerns misleading uses of GIs. *Id.*

¹⁷⁶ Article 20(19)(2)(c) concerns unfair practices as defined in Article 10bis of the Paris Convention. Article 20(19)(2)(b) concerns misleading uses of GIs. *Id.*

¹⁷⁷ *Id.* at art. 20(19)(2)(a)(i).

¹⁷⁸ *Id.* at art. 20.19.2(a)(ii).

so-called *absolute* protection also to agricultural products and foodstuffs.¹⁷⁹ However, the scope of protection is, quite predictably, limited by the exceptions already seen with reference to the previously-discussed FTAs.¹⁸⁰

Notably, CETA does not contain any provisions expressly addressing the interaction of GIs with trademarks, as some of other FTAs do.¹⁸¹ However, and in light of Canada's approach favoring trademarks over other signs, the current legal regime could be derived from a variety of provisions: in fact, being one of the most delicate issues in respect to GI protection, a series of articulated exceptions and *ad hoc* adjustments have been agreed upon. First, Article 20(19)(6) reiterates the common provision on the refusal or invalidation of the registration of a later trademark that may infringe on a GI.¹⁸² The provision applies only to trademarks that "contain or consist of a geographical indication," which thus restricts the range of marks whose registration would be prevented.¹⁸³ But the provision also adds a further requirement, which entails that the submitted trademark application does not originate in the place of origin specified in Annex 20-A.¹⁸⁴ Conversely, previously-registered trademarks would prevent future addition of geographical names in the GI list attached to CETA.¹⁸⁵ Second, some "creative" mechanisms have been elaborated to deal with certain geographical names proposed by the EU, but which conflict with names already used in Canada. Such compromising mechanisms are outlined in paragraphs from 1 to 4 of Article 20(19), together with Annex 20-B on "allowed terms."¹⁸⁶ The compromises reached are as follows:

1. Five well-known cheeses (Asiago, Gorgonzola, Feta, Fontina, and Munster), previously not protected in Canada, shall be protected as GIs, but with an exception made for their grandfathered use in respect of products already present on the Canadian market, as well as for their use by new entrants to the Canadian market accompanied by indications such as 'style', 'type', 'kind', or 'imitation'.¹⁸⁷
2. Three EU GIs (Nürnberger Bratwürste, Jambon de Bayonne, and Beaufort) shall either be grandfathered (for certain existing

¹⁷⁹ CETA, *supra* note 165, at art. 20.16 and 20.19(3).

¹⁸⁰ See CETA, *supra* note 165, at arts. 20.21(7), 20.21(8), 20.21(10).

¹⁸¹ E.g., EU, Columbia, and Peru Trade Agreement, *supra* note 90, at art. 211; Central America and EU Association Agreement, *supra* note 104, at art. 248; EU and Singapore Trade Agreement, *supra* note 38, at art. 11.21.

¹⁸² The affected product classes are listed in Comprehensive Economic and Trade Agreement, at Annex 20-C. This is different from the other FTAs where generally *identical* or *like* products are evoked. See CETA, *supra* note 165, at Annex 20-C.

¹⁸³ See *id.* at art. 20.19(6).

¹⁸⁴ Some regard such requirement as a quite problematic interpretation. See Engelhardt, *supra* note 33, at 815.

¹⁸⁵ See CETA, *supra* note 165, at art. 20.22(3)(a).

¹⁸⁶ *Id.* at art. 20.19(1)-(4), Annex 20-B.

¹⁸⁷ *Id.* at art. 20.19(1)-(2).

producers who have used the names in question for a certain number of years prior a specified cut-off date), or phased-out (for all other manufacturers);¹⁸⁸

3. The English or French translations of certain protected GIs shall be allowed, provided that consumers are not misled;¹⁸⁹

4. Similarly, few terms, despite qualifying as protected GIs, shall continue to be used in association with certain product classes when referring to specific places.¹⁹⁰

These mechanisms represent that the EU and Canada have managed to reach a remarkable equilibrium, despite needing to harmonize their otherwise opposing legal traditions. Outstandingly, the envisioned co-existence of certain European GIs with (conflicting) prior Canadian trademarks would represent the first time that a common law country like Canada deviated from the “first in time first in right” principle, which is at the heart of any trademark system.¹⁹¹

In conclusion, during the negotiations of CETA, the EU appears to have succeeded—at least partially—in satisfying its request to extend GI protection in Canada beyond wines and spirits. The agreed tailor-made solutions seem to secure higher standards of protection as desired by the EU, whilst preserving, to some extent, the rights and benefits enjoyed by Canadian GI users.

G. *The Free Trade Agreement with Vietnam*

The text of the EU-Vietnam Agreement (VFTA) has been made public for informational purposes and is now subject to legal revision and subsequent ratification by the parties.¹⁹² Linked to the Partnership and Cooperation Agreement between the EU and Vietnam signed in 2012, the VFTA is part of the series of the trade agreements that the EU aims to conclude with each ASEAN country, in view of a final comprehensive

¹⁸⁸ CETA, *supra* note 165, at art. 20.19(3)-(4).

¹⁸⁹ The terms listed in Part A of Annex 20-B, as also referred to in Article 20(19)(11), are: (i) Valencia Orange, Orange Valencia, Valencia; (ii) Black Forest Ham, *Jambon Forêt Noire*; (iii) Tiroler Bacon, *Bacon Tiroler*; (iv) Parmesan; (v) Bavarian Beer, *Bière Bavaroise*; (vi) Munich Beer, *Bière Bavaroise*; (vii) St. George Cheese, *Fromage St. George*. *Id.* at art. 20.19(11), Annex 20-B.

¹⁹⁰ The terms listed in Part B of Annex 20-B, as also referred to in Article 20(19)(12), are: (i) *comté* when used for food products from *Comté du Prince-Edouard*, Prince Edward County, *Comté de Prescott-Russell* and Prescott-Russell County; (ii) *Beaufort* when used for cheese products coming from Beaufort range, Vancouver Island and British Columbia. CETA, *supra* note 165, at art. 20.19(12).

¹⁹¹ See European Commission, CETA – Summary of the Final Negotiating Results (Feb. 2016), available at http://trade.ec.europa.eu/doclib/docs/2014/december/tradoc_152982.pdf.

¹⁹² See European Commission, EU-Vietnam Free Trade Agreement: Agreed Text as of January 2016 (2016), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437> (last visited Jun. 24 2017) [hereinafter EU-Vietnam Trade Agreement].

regional agreement.¹⁹³ Among the various subjects covered by VFTA, there are, of course, also designations of origin.¹⁹⁴ Born out of the desire to cooperate and reach an agreement regarding GI regulation,¹⁹⁵ the VFTA framework is explicit and comprehensively designed.

Some provisions are modeled on those of the other FTAs described above: for instance, Article 6(3) refers to GIs that have been through the relevant objection procedure, relate to wines, spirits, agricultural products or foodstuffs,¹⁹⁶ and are enclosed in the lists in the Annexes to the FTA.¹⁹⁷ Although the lists can be amended, Article 6.(2), similarly to CETA, restricts amendment to those geographical names that, on the date of signing of VFTA, do not enjoy the status of “Registered” in the relevant home jurisdiction.¹⁹⁸ Furthermore, VFTA binds signatory parties to put in place a system for the registration and protection of GIs.¹⁹⁹ The consequent scope of protection, applicable to listed GIs, would resemble that afforded to GIs under CETA.²⁰⁰ Paragraphs (b) and (c) of Article 6.5(1) read like Section 3, Article 22 of the TRIPs Agreement, and Article 6.5(2) extends absolute protection to products other than wines and spirits.²⁰¹ However, paragraph (a)(ii) of Article 6.5(1) repeats the wording of Article 20.19(2)(a)(ii) of CETA in that it requires compliance with the laws of the country of origin.²⁰² In any event, by stating that “Parties may, but shall not be obliged to, provide domestic legislation more extensive protection than is required by this Agreement [...],” Article 6.2(2) opens up the possibility to further enhance protection at the national level.²⁰³

An additional feature that makes VFTA closely resemble CETA is the mechanisms for constructing exceptions. Apart from the “common”

¹⁹³ See European Commission, Countries and regions: Vietnam, <http://ec.europa.eu/trade/policy/countries-and-regions/countries/vietnam/> (last updated 16 Mar. 2017).

¹⁹⁴ EU-Vietnam Trade Agreement, *supra* note 192, at chap. 12, art. 6.5.

¹⁹⁵ As reflected in Article 6(10) on cooperation and transparency and in Article 6(11) establishing the Working Group on IP rights including GIs. *See id.* at arts. 6.10; 6.11.

¹⁹⁶ *See id.* at art. 6.3.

¹⁹⁷ *See* EU-Vietnam Trade Agreement, *supra* note 192, at ch. 12 (Annex GI – I, Part A, dedicated to European GIs; Annex GI – I, Part B, dedicated to GIs originating from Vietnam).

¹⁹⁸ *See supra* Section 3.6; *cf.* EU-Vietnam Trade Agreement, *supra* note 192, at ch. 12, art. 6.4(2).

¹⁹⁹ *See id.* at ch. 12 (Article 6.2(1) names the following components of the internal system to be established: (a) a register; (b) an administrative process; (c) objection procedures; and (d) procedures to account for stakeholders’ interests. Additionally, Art. 6.8 refers to administrative actions for the enforcement of GI-related rights and Article 6.9 to the need to provide for product specifications).

²⁰⁰ *See* discussion *supra* Section 3.6.

²⁰¹ *See* EU-Vietnam Trade Agreement, *supra* note 192, at ch. 12, art. 6.5; *cf.* TRIPs *supra* note 1, at § 3, arts. 22; 23.

²⁰² *Compare* EU-Vietnam Trade Agreement, *supra* note 192, at ch. 12, art. 6.5 *with* CETA, *supra* note 165, at art. 20.19.

²⁰³ EU-Vietnam Trade Agreement, *supra* note 192, at ch. 12, art. 6.2(2).

ones,²⁰⁴ the first paragraphs of Article 6.5a reflect the *ad hoc* adjustments first proposed in CETA,²⁰⁵ and possibly indicate a new negotiation technique that the EU has adopted. Consistently, paragraphs (1), (2) and (3) of Article 6.5a identify and grandfather certain GIs whose users began to use them before a determined cut-off date.²⁰⁶ Conversely, the relationship between GIs and trademarks is dealt with in a very different fashion from CETA. Article 6.7 reads:

(1) Where a trademark has been applied for or registered in good faith, or where rights to a trademark have been acquired through use in good faith, in a Party before the applicable date set out in paragraph 2, measures adopted to implement this Article 6 in that Party *shall not prejudice eligibility for or the validity* of the trademark, or the right to use the trademark, on the basis that the trademark is *identical with, or similar to* a [GI]. (2) [...] (3) Such trademark *may continue* to be protected, used and renewed *notwithstanding* the protection of the geographical indication, provided that no grounds for the trademark's invalidity or revocation exist in the legislation on trademarks of the Parties.²⁰⁷

This provision appears to be an explicit and quite broad recognition of the principle of co-existence between different categories of signs—namely between GIs and trademarks.

By way of a last annotation, the negotiations of the above-described GI provisions included in the VFTA have been facilitated by the circumstance that Vietnam is—to a certain extent—already familiar with the IP concept at hand. Indeed, as far back as 1995 the notion of “appellation of origin” was known to the Vietnamese.²⁰⁸ The concept then developed into the internationally known category of GIs on occasion of Vietnam's accession to membership in the WTO in 2007.²⁰⁹ Such context has certainly made it possible for the EU to frame a more favorable GI regime for itself.

²⁰⁴ See EU-Vietnam Trade Agreement, *supra* note 192, at ch. 12, art. 6. Article 6.5(5) encompasses plant varieties and animal breeds and Article 6.5a(5) refers the names of persons.

²⁰⁵ See generally *id.* at ch. 12, art. 6.5a; see also *supra* text accompanying, at n. 182-83.

²⁰⁶ See EU-Vietnam Trade Agreement, *supra* note 192, at ch. 12, art. 6.5a. The GIs concerned are *Asiago*, *Fontina*, *Gorgonzola* and *Feta* for cheeses; *Champagne* for wines.

²⁰⁷ *Id.* at ch. 12, art. 6.7 (emphasis added); cf. *supra* Section 3.6.

²⁰⁸ Barbra Pick, Geographical Indications at the Crossroads of Trade, Development, and Culture: Focus on Asia-Pacific 312 (Irene Calboli & Wee Loon Ng-Loy eds., 2017).

²⁰⁹ See World Trade Organization, *Viet Nam and the WTO*, WTO.ORG, https://www.wto.org/english/thewto_e/acc_e/a1_vietnam_e.htm.

IV. CONCLUSION

The objective of the foregoing investigation has been to assess whether the international standstill affecting multilateral GI negotiations could be overcome by compromising the diverging prerogatives distinguishing those countries in favor of GIs from those economies opposing their recognition. In particular, the case of the EU, with its long-standing tradition on GIs, has been discussed in order to infer and elaborate possible adjustments that could help design such a compromise. Efforts have thus been made to identify what features of the European GI scheme and approach are reflected in the negotiated texts of the latest European FTAs, as well as the mechanisms that have been devised to meld the EU regime with the (potentially different) systems already existing in the respective trade partners' jurisdictions.

First, it was noted that all negotiated FTAs include lists of key European GIs including wines and spirits, as well as agricultural products and foodstuffs, which the EU seeks to protect. In particular, the European institutions appear to pursue some common objectives,²¹⁰ including, *inter alia*, the reinforcement of the standards for GI protection and GI prevalence over other trade signs. All FTAs extend the scope of the "absolute" standards of protection to all relevant GI products, thereby satisfying the European desire for more cogent GI protection. Additionally, the EU appears (to a certain extent) to have succeeded in influencing the legal framework governing GIs within the counterparts' jurisdictions by requiring the domestic implementation of certain structural features. Nonetheless, the "supremacy" of GIs over different product identifiers (and, primary, over trademarks) results to be designed in such a fashion so as not to disregard prior uses of similar marks in the commercial partners' jurisdictions, but open to the possible co-existence of allegedly conflicting signs.

Indeed, the most intriguing profile of the whole analysis is the detection of the mechanisms used to secure the protection of European GIs, while preserving the rights and obligations already existing in the legal orders of the various commercial partners. Certainly, such mechanisms (and the consequent adjustments) vary significantly depending upon the different legal traditions of each commercial partner. The EU has been more or less successful in expanding GI protection depending on the degree of the trade partners' familiarity with GIs. Consistently, the European position in jurisdictions tending to enclose GI within ordinary trademark regimes appears fairly weak. With respect to the agreement with Singapore, for instance, it was noted that "[a]s a city-state with no GIs of its own to protect, there was little incentive for Singapore to acquiesce to the EU's list of core GIs for protection in the FTA negotiations, least of all when this contrasted with the trademark system for GI protection in place in

²¹⁰ See Advisory Group International Aspect of Agriculture, *supra* note 18, at 8-9 (summarizing examples of such common objectives).

Singapore based on first in right first in time principle.”²¹¹ Therefore, while the EU failed to grant EU GIs automatic protection directly through the negotiated FTA, the final compromise solution has been to have Singapore set up its own GI register to evaluate applications for protection of GIs according to a procedure and criteria agreed upon by the signatory states.

In contrast, the agreements entered into with countries that traditionally favor strong protection of designations of origin, such as Colombia and Peru, contain much more thorough GI provisions. Ironically, the purported protection by these countries goes beyond that of the EU itself, since the former have historically used GIs to protect and promote designations of origin also in respect of handicrafts and industrial products, which still remains outside the scope of GIs in the EU.²¹² Nevertheless, the most interesting approach is that adopted with Canada, where—besides the exceptions included in all negotiated agreements—the EU resorted to a mixture of other tools to better combine the different legal frameworks of the trade partners. Such “tools” comprise, *inter alia*, grandfathering clauses and acceptance of certain uses of geographical names accompanied by clear indications of the true origin of the products concerned, phase-out strategies, and recognition of the opportunity to let certain GIs and trademarks co-exist. The opportunity to resort to tailor-made adjustments has been re-proposed with Vietnam,²¹³ proving it to be the latest EU strategy to invite commercial partners to embrace European internal standards, and, quite remarkably, to claw back some reputed names.²¹⁴

In conclusion, the EU “places a high priority on gaining international support and recognition for its GI system as well as its lists of GI products [...] [a]ll trade agreements signed by the EU to date have recognized its GIs.”²¹⁵ And, notwithstanding the different (and, sometimes, opposing) legal perspectives of the various trade partners as to the preferable kind of protection to reserve for designations of origin, the EU institutions appear to have succeeded in developing a variety of flexible policy instruments to allow an effective compromise of the legal systems in question for the mutual benefit of all the trade partners. By leveraging on co-existence mechanisms and related adjustments, it here hoped that not only the EU, but all major trade actors could manage to unlock WTO multilateral negotiations and finally clarify the discipline of GIs, thereby

²¹¹ Maria Garcia, *Squaring the Circle? Approaches to Intellectual Property Rights and the TTIP* 9 (Sept. 1-3, 2014) (unpublished draft), *available at* http://www.uaces.org/archive/papers/abstract.php?paper_id=879.

²¹² See discussion *supra* Section 3.3.

²¹³ See discussion *supra* Section 3.7.

²¹⁴ See Der-Chin Horng, *Reshaping the EU's FTA Policy in a Globalizing Economy: The Case of the EU-Korea FTA*, *J. World Trade* 301, 315-17 (2012).

²¹⁵ Alexandre Gauthier & Michael Holden, *Canada-European Union Trade Negotiations 8. Intellectual Property Protection 1* (International Affairs, Trade and Finance Division, Parliamentary Information and Research Service, Library of Parliament, Ottawa: Parliament of Canada, Publication No. 2020-59E, 2010), *available at* <https://lop.parl.ca/Content/LOP/ResearchPublications/2010-59-e.pdf>.

preventing any risks of trade diversion for the benefit not only of the EU, but of the international community and global trade as a whole.

THE PUBLIC INTEREST CASE FOR AMERICAN MORAL RIGHTS: A RESPONSE TO THE SYMPOSIUM “AUTHORS, ATTRIBUTION, AND INTEGRITY: EXAMINING MORAL RIGHTS IN THE UNITED STATES”

*Mira T. Sundara Rajan**

“The Legislature hereby finds and declares that there is a public interest in preserving the integrity of cultural and artistic creations.” – California Art Preservation Act, 1979¹

From an author’s point of view, the benefits of moral rights seem obvious.² Moral rights empower authors to claim the right to be acknowledged as the creators of their own works,³ and to oppose the distortion, mutilation, or modification of their work.⁴ In certain cases, an

* D.Phil. (Oxon.); Visiting Scholar, Stanford Law School and Professor of Intellectual Property Law at the University of Glasgow. Honorary Member of Magdalen College, Oxford, from 2009-15, and formerly the Canada Research Chair in IP Law at the University of British Columbia in Vancouver, Canada. I am greatly indebted to Professor Paul Goldstein of Stanford Law School for his insightful comments on this article.

¹ CAL. CIV. CODE § 989(a) (West 2017).

² *But see* Pierre Recht’s 1969 work where he argues that the importance of moral rights is overstated in French law, stating that “. . . the property right of the author, in particular, includes monetary and moral prerogatives that are indissolubly united and cannot be separated. The so-called moral right is an unreal creation, which, for a century, we have attempted in vain to define in a manner that is petty and perfectly superfluous.” PIERRE RECHT, *LE DROIT D’AUTEUR, UNE NOUVELLE FORME DE PROPRIÉTÉ: HISTOIRE ET THÉORIE* (Mira T. Sundara Rajan trans.), 274 (1969). Recht makes the point that the non-waivable character of moral rights under French law reflects a paternalistic attitude towards authors, and deprives them of the right to make reasonable choices about their own work. *Id.* at 274-75 This perspective is somewhat unusual in the French context, where moral rights have historically been viewed in a positive and protective light. *See* Jane C. Ginsburg, *A Tale of Two Copyrights*, 64 TUL. L.REV. 991, 993 (1990). On the other hand, as Jane Ginsburg has shown, the French approach to authorship is one of strong individualism, *id.*, and thus the French moral rights should be understood in this context. But Recht’s view, that the author should be the ultimate decision-maker on all aspects of the life of the work, including the right to relinquish one’s own authorial prerogatives over it, could also be seen as another, extreme manifestation of French individualism in copyright law. For a detailed discussion of this background, *see* MIRA T. SUNDARA RAJAN, *MORAL RIGHTS: PRINCIPLES, PRACTICE AND NEW TECHNOLOGY*, 46-49 (2011) [hereinafter *PRINCIPLES, PRACTICE AND NEW TECHNOLOGY*].

³ The right of attribution, also known, historically, as the paternity right (*droit à la paternité*), though this terminology is outdated. *See* *PRINCIPLES, PRACTICE AND NEW TECHNOLOGY*, *supra* note 2, at 33-34.

⁴ This right is usually known as the right of integrity, although it is also referred to as a right of “respect” (France) or, occasionally, “reputation” (Russia). *Id.* at 34-35.

author may also seek a remedy for the outright destruction of a work, though this point remains curiously unsettled in international laws.⁵

As the symposium publication has highlighted, moral rights typically have certain characteristic legal features. These features distinguish them from other aspects of copyright law—and often have astonishing practical and legal consequences. Traditionally, moral rights could not be waived; and this continues to be the case in some jurisdictions, though waiver has also been used as a deliberate tool of public policy, both discretely and liberally, in many common-law jurisdictions.⁶ Whenever waiver is restricted, to whatever extent, we are potentially left with the amazing situation that someone who owns a work of art may still not be entitled to make use of it in exactly the way that he or she might want to do so. Authorship trumps property rights.

In some legal systems, moral rights are protected “in perpetuity”—a logical consequence of the ostensibly “permanent” nature of the relationship between an author and his or her creation. A work is supposed to ensure an author’s “immortality,” and perpetual protection also makes sense from this perspective. At the same time, many, if not most, jurisdictions also limit the duration of moral rights to the same time frame as the other aspects of copyright law. In so doing, they draw upon the theory known, in the German tradition, as “monism.” Monism is beautifully described by the distinguished German scholar, Adolph Dietz, as “...an integrated or unitary or synthetic concept of copyright...” that treats both economic and moral rights as emerging from a single vision of authorship rights.⁷

Even this brief overview of some of the key features of moral rights reveals their complexity. For once, it seems clear that this level of nuance has little to do with issues of legal interpretation *per se*—though courts have made occasional attempts at sleight of hand with the legislated

⁵ In the Berne Convention, which has provided the international template for the integrity right since 1928, the integrity right involves a two-step process: the author must show, first, “distortion, mutilation or other modification of, or other derogatory action in relation to, the said work,” and, secondly, demonstrate that this treatment of the work “would be prejudicial to his honor or reputation.” Berne Convention for the Protection of Literary and Artistic Works art. 6*bis*, Sept. 9, 1886, 25 U.S.T. 1341, 828 U.N.T.S. 221, http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=283693 [hereinafter Berne Convention]. The integrity right therefore serves two objectives: its goal is not only to protect the “integrity” of the work, but also, and perhaps even predominantly, it seeks to protect the author’s “honor or reputation.” *Id.* According to a certain school of thought, destruction is not covered by the integrity right because, in the absence of the work, there can be no damage to an author’s reputation. *See, e.g.*, SILKE VON LEWINSKI, INTERNATIONAL COPYRIGHT LAW & POLICY 134, ¶ 5.99 (2008).

⁶ *See, e.g.*, Copyright Act, R.S.C. 1985, c. C-42, art. 14.1(2) (Can.); *see also* Copyright, Designs and Patents Act 1988, c. 48, § 78 (Eng.).

⁷ Adolf Dietz, *The Moral Right of the Author: Moral Rights and the Civil Law Countries*, 19 COLUM. J.L. & ARTS 199, 207 (1995).

language of moral rights.⁸ Rather, it is the theory itself that is complex. No amount of interpretive skill or degree of subtlety in legislative framing has so far been able to simplify the underlying theory to any significant degree.

The theory of moral rights is a product of historical forces, and its complexity is born out of the fact that moral rights reflect a great variety of cultural interests. The modern law of moral rights had its genesis in the interpretation of French judges in cases that came before their courts in the early nineteenth century;⁹ even earlier, the great English judge, Lord Mansfield, articulated a theory of moral rights of authorship in the important case of *Millar v. Taylor*.¹⁰ When the idea of moral rights emerged in France, German jurists became fascinated by it, and attempted to explain it. The great moral rights scholar, Stig Strömholm, explains the richness and diversity of German jurists theorizing around moral rights in his multi-volume work on the subject, *Le droit moral*—a Scandinavian writing in French about German legal jurisprudence—and it is clear that no path was left unexplored, with nearly every imaginable justification for moral rights

⁸ See e.g. *Delves-Broughton v. House of Harlot Ltd.*, [2012] EWPC 29 (PCC), where a UK court interpreted the provision on the integrity right in the Copyright, Designs and Patents Act 1988, *supra* note 6, as an open-ended right of integrity that did not require proof of damage to the author's reputation, but could be satisfied by showing damage to the work alone, *id.* at [24]. This would mean that UK legislation effectively transcended Article 6*bis* of the Berne Convention, the model on which § 80 was based when it was enacted in 1988. See, e.g., W.R. Cornish, *Moral Rights Under The 1988 Act*, 11 EUR. INTEL. PROP. REV. 449, 450 (1989). Could this historically incorrect interpretation of the Act still be correct by virtue of the general operation of principles of statutory interpretation? In this author's view, that argument is not tenable because of High Court dicta in an earlier UK case that explicitly contradicts it: see *Confetti Records v. Warner Music UK Ltd.*, [2003] EWHC 1274 (Ch) at [150]. But the legal daring involved is admirable, and the case raises the intriguing question of whether, in some future scenario, UK moral rights will indeed transcend the limits of their origins and offer a broader kind of protection to authors.

⁹ Stig Strömholm, *Droit Moral—The International and Comparative Scene from a Scandinavian Viewpoint*, 42 SCANDINAVIAN STUD. L. 217, 224-25 (2002). Strömholm refers to this process as the synthesis of “French practical solutions” with “German theorizing.” *Id.* at 225.

¹⁰ Lord Mansfield's discussion of the nature of authorship reads like a classic statement of moral rights doctrine:

He is no more master of the use of his own name. He has no control over the correctness of his own work. He cannot prevent additions. He can not retract errors. He cannot amend; or cancel a faulty edition. Any one may print, pirate, and perpetuate the imperfections, to the disgrace and against the will of the author; may propagate sentiments under his name, which he disapproves, repents and is ashamed of. He can exercise no discretion as to the manner in which, or the persons by whom his work shall be published.

Millar v. Taylor, [1769] 98 Eng. Rep. 201 at [2398].

examined by these creative jurists.¹¹ Moral rights were “innate” rights, “natural” rights, personality rights¹²—and even, invalid as rights.¹³

At no time could this diversity of interests ever be simplified or reconciled. But the various perspectives could be formally balanced against one another, in different ways, of course, according to the choices of different legislators. These different threads had emerged organically from a comprehensive [pervasive] legal phenomenon, and all of them were valid explanations of, and foundations for, moral rights. Indeed, this analysis is more generally applicable to copyright as a whole. What Carla Hesse calls an “impure and unstable legal synthesis” at the origins of copyright law,¹⁴ ultimately led to the attempt to serve potentially conflicting interests, those of individual rights and the public, through copyright, itself. Some two centuries later, this diversity of policy goals remains characteristic of modern copyright law. The fundamental tension between the different objectives of public policy underlying copyright law was arguably inevitable, not for legal reasons or even historical ones, but because cultural works, the fundamental subject-matter of copyright law, themselves serve multiple goals, social needs, and aspirations.

This brings us full circle to our starting point. Works, the subject-matter of copyright, including moral rights, are important to authors, the public, those connected with the “creative industries,” and others; and they matter in different ways to each one of these implicated constituencies. To invert the usual relationship, it is worth considering moral rights for a moment, not in their relation to authors, but in their relationship to the work. If moral rights have implications for works, the rights will affect authors; but it is equally true that if they affect works, they will affect the public. Generally speaking, it seems clear that moral rights, in some form or another, are good for authors; but how, if at all, do they help the public?

There can be no doubt that a successful program of moral rights reform in the twenty-first century must be able to offer a satisfactory response to this question. There are at least two important reasons why a discussion of moral rights in the United States should focus on the relationship between moral rights and the public interest. The first reason relates to the specific context of the symposium: an exploration of the

¹¹ See generally Stig Strömholm, *Le Droit Moral de L’auteur en Droit Allemand, Français et Scandinave Avec un Aperçu de L’évolution Internationale—Etude de Droit Comparé*, (P.A. Norstedt & Söners Förlag eds., 1967).

¹² The current German term is *persönlichkeitsrecht*, personality rights. See Urheberrechtsgesetz [UrhG][Copyright Act], Sept. 9, 1965, BGBL. I at 1273, §§ 12-14, last amended by Gesetz [G], Dec. 20, 2016 BGBL. I at 3037, art. 1 (Ger.), <https://www.gesetze-im-internet.de/urhg/BJNR012730965.html#BJNR012730965BJNG000701377>, translated in Ute Reusch, at https://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html#p0052.

¹³ Strömholm discusses the concept of innate rights. See Strömholm, *supra* note 11, at 244.

¹⁴ Carla Hesse, *Enlightenment Epistemology and the Laws of Authorship in Revolutionary France, 1777–1793*, 30 REPRESENTATIONS 109, 130 (1990).

opportunities for copyright reform related to moral rights in the United States. U.S. copyright law is derived from a Constitutional provision that emphasizes the public interest.¹⁵ How does this provision shape perceptions of the public interest in copyright law in the United States? How has it influenced the development of attitudes towards moral rights among U.S. legislators?

Concerns about the public interest dimension of moral rights are far from unique to the United States. On the contrary, countries that are already dealing with generalized moral rights in their copyright laws uniformly recognize the extraordinary power of these rights and their potentially significant impact on society. They affect both the lives and legacies of authors, and the cultural heritage of the public. A consideration of how different countries approach this crucial problem can help to inform the U.S. experience. Notwithstanding the unique legal culture in the United States, and without underestimating the special cultural sensitivities and concerns of different international jurisdictions, it is evident that the public, worldwide, shares common concerns about cultural heritage.

In the environment of digital technology, these concerns are heightened. While technology has created wonderful and unprecedented opportunities for culture to be created and communicated worldwide, it also has tremendous implications for the attribution and integrity of works. Technology, and the vast databases of works that are now available through online services—iTunes and Amazon, for example—makes it virtually impossible to conceal authorship;¹⁶ at the same time, works are easily subject to modification, and, once information disappears, subsequent, altered versions of that work can be disseminated so widely that the “original” may ultimately be lost. Above all, technology, to the extent that it engages with culture, remains unconstrained by borders. In this

¹⁵ See U.S. CONST. art. I, § 8, cl. 8.

¹⁶ See Mark Singer, *Fantasia for Piano: Joyce Hatto's Incredible Career*, THE NEW YORKER (Sept. 17, 2007), <http://www.newyorker.com/magazine/2007/09/17/fantasia-for-piano>. Joyce Hatto was a concert pianist who had retired from performing due to ill health. Suddenly, a series of recordings of her work emerged, which appeared to support the story of an unbelievable comeback by an artist who had long been forgotten by the musical public. The recordings received high praise from experts and connoisseurs, but they were ultimately discovered to be forgeries. The case generated much soul-searching in the classical music community. See also Denis Dutton, *Shoot the Piano Player*, *The Opinion Pages*, N.Y. TIMES (Feb. 26, 2007), <http://www.nytimes.com/2007/02/26/opinion/26dutton.html>. For details of how the discovery was made, see Rod Williams, *Joyce Hatto: The Great Piano Swindle*, Sept. 2007; with a postscript; available at <http://www.moreintelligentlife.com/story/joyce-hatto-the-great-piano-swindle> (last visited Nov. 16, 2016). Rod Williams narrates the key to this fascinating and disturbing parable for the digital age, as follows, in the Economist's Intelligent Life magazine online: But in February this year, when Distler loaded Hatto's CD of Liszt's , was indistinguishable from a recording by a Japanese pianist called Minoru Nojima. What is more, the performance had been speeded up, but digitally manipulated to remain at the same pitch. “That rang alarm bells,” Rose told me. “When you speed up recordings, you change the pitch—unless you have set out deliberately to mislead.” *Id.*

environment, discussion of the public interest in cultural heritage should not fail to convey the broad and universalistic dimension of the issues involved.

Creative works are also cultural works—they matter, not only to their authors, but also, to the public. What the author views as his or her own creative product, important for both earnings and reputation—livelihood and life—is eventually interwoven into the cultural fabric of a country.¹⁷ Ultimately, it becomes part of the cultural heritage. As time passes, and the author dies, and the author’s heirs and successors pass away, if the work survives, its importance will grow, and its place in cultural heritage may even grow to become mythic. At some point, if the work lasts, it will probably become as important to the public as it could be to anyone personally connected with the author.¹⁸ This is clearly what Victor Hugo must have meant when he asserted that an author’s “true heir” is the public domain.¹⁹ He understood the reality, both poetically and practically, that authors pass away while their works remain. Accordingly, just as there are two perspectives on the importance of a work—authorial and public—there are at least two important ways of measuring the value of moral rights: their importance for authors, and their broader importance for the public.

I. THE PUBLIC INTEREST IN MORAL RIGHTS: A CONSTITUTIONAL PERSPECTIVE

The question of constitutionality is a valuable legal preamble to any discussion of copyright reform in the United States. Moral rights are no exception. Indeed, previous commentary, when considering the question of

¹⁷ For ease of reference, the term “country” is used, but, where cultural products are concerned, it is equally relevant to talk about cities, towns, villages, particular communities, and so on. This point is nicely illustrated by another area of intellectual property rights, the protection of geographical indications, where the products protected can sometimes be drawn from incredibly specific geographical areas to which they have intimate cultural ties. India, which has one of the most developed rosters of products listed as protected geographical indications in the world, is a good example. Few outsiders might know of “Kondapalli Bommallu,” wooden handicrafts from South India, or “Thanjavur Paintings,” from the ancient town of Thanjavur in the Cauvery Delta area, but these products are well known enough to merit these appellations as official GIs in India. See *Registration Details of Geographical Indications*, INTELLECTUAL PROP. INDIA, http://www.ipindia.nic.in/writereaddata/Portal/Images/pdf/Registered_GI_Dec2016.pdf (last visited Apr. 10, 2017).

¹⁸ In another case personally known to this author, the personal heir of the writer in question recognized this principle directly, by seeking to bequeath the inherited copyright to the public upon her own death. See Mira T. Sundara Rajan, *Moral Rights in the Public Domain: Copyright Matters in the Poetical Works of Indian National Poet C. Subramania Bharati*, SING. J. LEG. STUD. 161 (2001).

¹⁹ See Victor Hugo, Speech at the Opening Ceremony of the Congress of Literary, Industrial, and Artistic Property (June 17, 1878) in 25 ANNALES DE LA PROPRIÉTÉ INDUSTRIELLE ARTISTIQUE ET LITTÉRAIRE 13, 13-18 (Jules Pataille ed., 1880) (Fr.). In his speech to the Congress of Literary, Industrial and Artistic Property in Paris, in 1878, Hugo argued, “The book, as a book, belongs to the author, but the thought belongs—the word is not too grand—to the human race.” *Id.* at 15.

moral rights at all, has expressed some skepticism about the viability of this doctrine under U.S. law.²⁰ Constitutional objections are in the forefront of these concerns.²¹

A closer consideration of the famed constitutional clause shows that these objections are not well-founded. In fact, nothing in the clause prohibits, or even impedes, moral rights; at the same time, the clause reflects a public interest approach that is in fact deeply in harmony with the public interests served by moral rights protection. The potential contribution of this public interest dimension to the broader exploration of the public interest policies furthered by moral rights is of primary interest here.

At first glance, it is fascinating to note that the public interest identified by Section One, Clause Eight, Subsection Eight of the U.S. Constitution is not directly concerned with copyright law at all.²² Rather, it identifies a public interest in “promot[ing] the Progress of Science and useful Arts.”²³ Copyright follows; it is the legal means by which the interest

²⁰ See, e.g., John T. Cross, *Reconciling the “Moral Rights” of Authors with the First Amendment Right of Free Speech*, 1 AKRON INTELL. PROP. J. 185, 187 (2007). The author’s focus is on the relationship between moral rights and the First Amendment, an area that is beyond the scope of the present paper, but discusses scholarship on the constitutionality of moral rights legislation, reviewing a number of authors who write against it, *id.* at 187 n.12, and a few who argue in favor, *id.* at 187 n.14. See also Eric E. Bensen, *The Visual Artists’ Rights Act of 1990: Why Moral Rights Cannot Be Protected Under the United States Constitution*, 24 HOFSTRA L. REV. 1127, 1130 (1996). The author presents a determined argument against the constitutionality of moral rights but the main target of the article is properly about VARA rather than moral rights *per se*. See *id.* 1130-31. This article argues that moral rights for artists in VARA may violate the Constitution. See *id.*

²¹ Cross, *supra* note 20, at 187. Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 70-71 (1985), represents the work of a scholar of long standing in the field of U.S. moral rights scholarship. Kwall argues for a broader interpretation of moral rights doctrine derived from the experience of the doctrine in its traditional jurisdictions, outside the United States, rather than assuming limitations on the scope of the doctrine based on current U.S. copyright practice. See *id.* at 70-72. In this respect, it is also worth mentioning California’s attempt to enact a quasi-moral, or hybrid, right: an artist’s resale royalty right, which would require artists to be compensated with a small percentage of proceeds from the sale of their work after the first sale when the work is sold in California or sold by a California resident. See Nithin Kumar, *Constitutional Hazard: The California Resale Royalty Act and the Futility of State-Level Implementation of Droit de Suite Legislation*, 37 COLUM. J.L. & ARTS 443, 444 (2014). The right reflects the reality that an artist’s work generally appreciates over time, sometimes growing exponentially in value. *Id.* at 445. The right is an economic right, concerned with financial compensation to artists, *id.* at 446, but it is properly considered a hybrid right because it has an important “moral” dimension: inalienability, *id.* at 446-47 n.31. Only the artist, personally, can benefit from the right. See *id.* The Californian right faced a constitutional challenge on the specific grounds of extraterritoriality: the application of the statute to subsequent sales of a work outside California violated the Constitution. *Id.* at 444. The issue has since been taken up by the U.S. Copyright Office, as Kumar notes: “On the other hand, all hope is not lost for an American *droit de suite*. *Id.* Perhaps recognizing the futility of state-level legislation, the Copyright Office recently retreated from its prior disapproval of federal *droit de suite* legislation. Kumar notes that the Copyright Office now, “‘believe[s] that Congress may want to consider a resale royalty,’ and has issued a comprehensive report.” *Id.*

²² See U.S. CONST. art. I § 8, cl. 8.

²³ *Id.*

in “Progress” is to be protected, “by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”²⁴

When moral rights are discussed in the United States, this provision is frequently invoked as an argument against the implementation of these rights in the United States.²⁵ A closer analysis of the words of the Constitution shows the inaccuracy of this view. Instead, the constitutional provision actually lays a positive foundation for the recognition of moral rights. It also specifies, in no uncertain terms, the legislative limitations of moral rights in the U.S. context. What kind of guidance does the constitutional clause offer to legislators on the public interest implications of copyright law and how to promote them? The underlying vision encompasses three key elements.

First, the “Progress” of knowledge—“Science and useful Arts”—is seen as crucial to the public interest. The idea of facilitating, if not “incentivizing,” creative production and expression is favored because the constitutional clause identifies this as the chosen means of promoting the public interest in “progress.”²⁶ This public interest issue is easily understood: the concern is one of public education and the widespread dissemination of ideas to an educated public. These values were fundamentally important to the full functioning of a burgeoning democratic

²⁴ In its entirety, the Clause reads: “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.” *Id.* See generally M.C. Miller, *Copyrighting the “Useful Art” of Couture: Expanding Intellectual Property Protection for Fashion Designs*, 55 WM. & MARY L. REV. 1617 (2014), for an interesting, related discussion of fashion as a “useful Art.”

²⁵ Kwall, *supra* note 21, at 69-70.

²⁶ See Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution*, 2 J. INTEL. PROP. L. 1, 34 (1994), who provides an excellent historical overview of the genesis of the clause, see generally *id.* For a discussion of the 18th century idea of progress, see generally Malla Pollack, *What is Congress Supposed to Promote?: Defining “Progress” in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing The Progress Clause*, 80 NEB. L. REV. 754 (2001). See also Ned Snow, *The Meaning of Science in the Copyright Clause*, 2013 BYU L. REV. 259 (2013), for a useful discussion of “Science.” Excellent research on the meaning of “Science” in the U.S. Constitution is also offered by Jeanne C. Fromer. See generally Jeanne C. Fromer, *The Intellectual Property Clause’s External Limitations*, 61 DUKE L.J. 1329 (2012). Fromer argues that the structure of the Clause means copyright is the *only* permissible means of promoting the public interest in “progress.” *Id.* at 1368. Finally, see D. Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress’s Intellectual Property Power*, 94 GEO. L.J. 1771, 1778 (2006), for a helpful historical overview in which the author points out that these words are not “a non-binding preamble,” as some scholars have held, and notes the relationship of the clause to education. In particular, he argues that any reticence the founders had in using this clause to establish federal universities would plausibly be overcome in the present climate due to protections established since that time, including the first amendment. *Id.* at 1821.

state, as the United States then was.²⁷ Based on a consideration of the surrounding historical discussions,²⁸ this clause arguably suggests social and political progress, as well as the cultural progress that the phrase invokes on its face.

Secondly, promotion of the public interest—“Progress in Science and useful Arts”—is to be pursued through a specific means: the enactment of exclusive rights that are to be given “to Authors.”²⁹ From a moral rights perspective, this point could hardly be more significant. The very idea of a moral right is based upon the recognition of the author;³⁰ without an author, there can be no discussion of moral rights at all. In this respect, it is evident that the clause and the idea of moral rights are clearly, and profoundly, compatible. Indeed, the clause is wonderfully unambiguous in supporting *authors’* rights in their own work. In keeping with the logic of the clause, the moral rights of authors, if they are to be included within the scope of copyright protection, must serve the greater goal of “progress.”

The clause also provides us with a relatively clear indication of how the framers believed that progress should be achieved, but it does so in a somewhat oblique formula. The reservation of “exclusive rights” to authors is to facilitate progress, but the clause does not explain *how* or *why* the framers thought so. The answer to this question is implicit in the clause: exclusive rights must somehow be believed to encourage authors either to create or to disseminate their works to the public, or both. Both acts generate progress. To make a crude division, it is possible to say that the time limitation ultimately favors greater dissemination, while the provision

²⁷ Justice Oliver Wendell Holmes famously referred to “free trade in ideas,” in his dissenting opinion in *Abrams v. United States*. See 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

²⁸ See *supra* note 26 and accompanying text.

²⁹ Walterscheid, *supra* note 26, at 32. Walterscheid points out that the uniqueness of the clause, relative to other constitutional grants of powers, lies in this factor: it is the only clause to specify a method by which the powers in question are to be exercised. *Id.* See *id.* at 32-54, for a fascinating further analysis.

³⁰ According to the moral rights doctrine, no one but the author can ever be invested with a moral right. See *id.* at 32. Given that this idea is the foundation of moral rights theory, it is astonishing to note that this “rule” of the doctrine has actually been broken in practice. See PRINCIPLES, PRACTICE AND NEW TECHNOLOGY, *supra* note 2, at 184-85. Japan, *id.* at 185, as well as South Korea, *id.* at 185 n. 251, allow moral rights to vest in corporations in certain circumstances, but this “choice,” which is completely heterodox from the point of view of moral rights theory, should receive deep and thorough consideration before it is made. In the case of India, the definitions section of the Copyright Act, § 2(d)(v), defines the author of a film as its “producer.” Copyright Act, No. 14 of 1957. Section 57 of the Act goes on to grant “authors” moral rights. *Id.* at § 57. Since a producer can be a corporate entity, the possibility that a corporate producer of a film may be eligible for a moral right is left open under Indian law, as well. The up to date version of the Indian Copyright Act, *id.*, is not yet available online, but the amendment history and each of the relevant amendment acts are available at http://www.wipo.int/wipolex/en/results.jsp?countries=IN&cat_id=11; for moral rights, the latest amendment act, of 2012, is available at http://www.wipo.int/wipolex/en/text.jsp?file_id=304385. The text of the Indian Copyright Act, updated to 1999, is also available at http://www.wipo.int/wipolex/en/text.jsp?file_id=128098.

of exclusive rights to authors favors creation. But this distinction is clearly a porous one. The provision of exclusive rights is also intended to favor the dissemination of works by encouraging authors to publish. For an interesting point of comparison, we can look to the right of publication in Europe, which allows the publisher of a newly-discovered work from the past—one that is no longer within the term of copyright protection—to benefit from an exclusive right of publication for a period of twenty-five years.³¹ Accordingly, the twin elements of creation and dissemination, the eternal balancing of opposites at play on the “seesaw” of copyright policy, underlie the terms of the constitutional clause.

In this light, a strong argument could be made that moral rights accomplish the goal of “progress” *more successfully* than the economic rights within copyright law. Moral rights, the doctrine tells us, are always linked to authors; no other party is rightfully entitled to benefit from them. Accordingly, moral rights serve the goal of “progress” with greater precision and focus than economic rights. In a striking contrast to the authorial imperative underlying moral rights and infusing the doctrine in its entirety, economic rights are extensively enjoyed by third parties. Of course, the ceding of privileges to third parties, notably publishers, in exchange for some measure of payment and publicity, is invariably justified as a reasonable exercise of the author’s exclusive right over his or her own work. Whatever the quality of the relationship between authors and their publishers, the publisher often represents their interest in copyright as not only shared, but, for all practical purposes, identical with that of the author.

It is justified, but is it justifiable? The theory and practice of contract law raise fascinating and deeply problematic questions around this issue. Inequality of bargaining power between authors and their publishers is a well-known problem.³² At least two European jurisdictions, Germany and the Netherlands, have now enacted legislation “on the inequality of bargaining power in copyright contracts,” seeking to treat authors more

³¹ See Council Directive 93/98/EEC art. 4, 1993 O.J. (L 290), <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31993L0098&from=EN>.

Any person who, after the expiry of copyright protection, for the first time lawfully publishes or lawfully communicates to the public a previously unpublished work, shall benefit from a protection equivalent to the economic rights of the author. The term of protection of such rights shall be 25 years from the time when the work was first lawfully published or lawfully communicated to the public.

Id.

³² See *A Publishing Contract Should Not Be Forever*, THE AUTHORS GUILD (July 28, 2015), <https://www.authorsguild.org/industry-advocacy/a-publishing-contract-should-not-be-forever/>. See also *A Schroeder Music Publishing Co. Ltd. v. Macaulay*, [1974] 3 All ER 616 (HL) 623 (Diplock, L., concurring), a classic English case dealing with unconscionability in the case of a contract signed by an unknown 21-year old musician, affecting the future use of his songs; Lord Diplock, in his concurring opinion, offered a classic statement of the problem: “. . . the protection of those whose bargaining power is weak against being forced by those whose bargaining power is stronger to enter into bargains that are unconscionable.” *Id.*

equitably.³³ But these issues do not arise in relation to moral rights, which, by definition, cannot become a bargaining tool in the relationship between authors and publishers. The terms on which moral rights are exercised cannot be negotiated.³⁴ In any jurisdiction where moral rights are recognized by law, the author, and only the author, can exercise them. The ability to waive moral rights threatens their role in mitigating inequality of bargaining power in copyright contracts, and this is what makes waiver such a contentious issue in jurisdictions that wish to establish a reasonable level of support for authorship. Even if waiver is allowed, the right to waive moral rights belongs to the author alone. The doctrine remains the sole province of the author. In parallel, it is crucial to note that the constitutional clause promotes exclusive rights secured *to authors*, and, by definition, this is exactly what moral rights are.

In this light, it is also worth noting that no proper interpretation of moral rights theory can lead to a situation where someone other than the “author,” the actual creator of the work, might be entitled to moral rights.³⁵ While the extension of moral rights to individuals or groups who do not meet the usual definitions of authorship has been proposed, it has only occurred in the most extreme and special circumstances. Notably, it has been suggested that indigenous groups should be granted moral rights protection in their traditional cultural expressions.³⁶ However, extending the rights to indigenous groups depends on being able to justify this innovation

³³ See Jane C. Ginsburg and Pierre Sirinelli, *Private International Law Aspects of Authors' Contracts*, 39 COLUM. J.L. & ARTS 171, 174-75 (2015). Ginsburg and Sirinelli also point to certain “limitations on the scope of authors' contracts” in the French Intellectual Property Code. *Id.* at 175-76. The Dutch law is available at Wet auteurscontractenrecht [Copyright Contract Act of June 30, 2015] Stb. 2015, 257, <http://www.ipmc.nl/en/topics/new-copyright-contract-law-netherlands> [<http://perma.cc/6F72-37PD>] (Visser Schapp & Kreijger trans.) (amending the Dutch Copyright Act of 1912); the German law is the Gesetz zur Stärkung der vertraglichen Stellung von Urhebern und ausübenden Künstlern vom 22. März 2002, BGBl. I S. 1155 [Law to Strengthen the Contractual Position of Authors and Performing Artists of March 22, 2002, amending the Copyright Law of Sept. 9, 1965, as last amended by Article 16 of the Law of Dec. 13, 2001.], available at <http://www.wipo.int/wipolex/en/details.jsp?id=1048>.

³⁴ Indeed, it is established with certainty that moral rights cannot be assigned. In this regard, a provision in Canadian law is noteworthy. See Copyright Act, R.S.C. 1985, c C-42, art. 14.1(4) (Can.). The Act provides that, when an author waives his or her moral rights in favor of an owner or licensee of the copyright, any third party that acquires the rights to use the work from the copyright-holder is allowed to benefit from that waiver. *Id.* This could, in fact, be considered a quasi-alienation of moral rights.

³⁵ This is why the allowance of moral rights to corporations in Japan, Korea, and, by implication, India is anomalous. See *supra* note 30.

³⁶ See, e.g., Jane Anderson, *The Politics of Indigenous Knowledge: Australia's Proposed Communal Moral Rights Bill*, 27 U.N.S.W. L.J. 585, 587 (2004). For an overview of the process surrounding Australia's Indigenous Communal Moral Rights Bill, which was ultimately rejected, see PRINCIPLES, PRACTICE AND NEW TECHNOLOGY, *supra* note 2, at 151-57. Additionally, for a more theoretical consideration of the links between moral rights and indigenous cultures, see generally MIRA T. SUNDARA RAJAN, INTELLECTUAL PROPERTY AND ABORIGINAL PEOPLES: CONFLICT OR COMPROMISE? (2008), http://scow-archive.libraries.coop/library/documents/Intellectual_Property_Rights_Paper.pdf.

by applying rationales that closely resemble the logic behind moral rights of authorship. The groups benefiting from moral rights would have to be able to make a meaningful claim to be recognized as the “creators” of the cultural expressions in question, and indigenous moral rights would have to emerge from a conscious recognition of the importance of the bond between an indigenous community and its own cultural expressions.³⁷ In good copyright tradition, an indigenous or cultural moral right would have to be “analogous” to the moral rights based on the creative effort of individual authors in the modern sense.³⁸ On the other hand, seeking to recognize moral rights as a result of the ownership of works, rather than authorship, by giving them, for example, to corporations who employ creative workers—or, indeed, to support any principle other than the bond arising from *creation of the work* through moral rights protection—would entirely destroy the integrity of the underlying theory. In view of these considerations, it would probably be more accurate to call moral rights something akin to “human rights of creativity,” rather than using a term as nebulous and uncertain, at least in the English language, as “moral rights.”

The possibility of moral rights has been previously recognized, on just such an apparently supra-legislative basis, by a United States court. In the case of *Shostakovich v. Twentieth-Century Fox*, Justice Koch of the New York Supreme Court raised this possibility, as follows: “[c]onceivably, under the doctrine of moral right the court could in a proper case, prevent the use of a composition or work, in the public domain, in such a manner as would be violative of the author's rights.”³⁹

While the decision comes from a lower-level state court and, therefore, has limited precedential value, it is nevertheless an interesting example of how moral rights might be welcomed in an American judicial, if not legislative, context. What is especially striking about the court’s view in *Shostakovich* is its potential willingness not only to recognize the doctrine of moral rights, but also, to do so *in relation to public domain works*.⁴⁰ This approach could not be more radical: it toys with the idea of recognizing restrictions in a public domain that has traditionally been given the broadest latitude under American law, and would reach works beyond the typical time limits observed in copyright law. Given the framework of the

³⁷ See PRINCIPLES, PRACTICE AND NEW TECHNOLOGY, *supra* note 2, at 151-57

³⁸ Analogy is, of course, the method by which copyright has historically developed; the extension of copyright law to new subject-matter has always depended on drawing an analogy between that subject-matter and previously accepted copyright works, particularly literature. *Id.* at 247.

³⁹ *Shostakovich v. Twentieth-Century Fox*, 80 N.Y.S.2d 575, 578 (N.Y. Sup. Ct. 1948). A similar point had been made, as early as 1938, by Stephen Ladas’ copyright treatise, as noted by Sonya G. Bonneau. See Sonya G. Bonneau, *Honor and Destruction: The Conflicted Object in Moral Rights Law*, 87 SAINT JOHN’S L. REV. 47, 55 (2013) (quoting STEPHEN P. LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY 1 (1938) (“[t]he maintenance and preservation of a work of art is invested with the public interest in culture and the development of the arts.”)).

⁴⁰ See *Shostakovich*, 80 N.Y.S.2d at 578.

constitutional clause, this would certainly present a legal challenge; at first glance, as discussed above, this simply seems wrong.⁴¹ In his discussion, however, Judge Koch engages in an insightful discussion of the wider themes underlying moral rights doctrine. His comments allow him to formulate a number of the key concerns of American jurists about the doctrine, while also explaining how moral rights might potentially make sense to an American audience. He notes:

The application of the doctrine presents much difficulty however. With reference to that which is in the public domain there arises a conflict between the moral right and the well-established rights of others to use such works (*Clemens v. Belford, Clark & Co., supra*). So, too, there arises the question of the norm by which the use of such work is to be tested to determine whether or not the author's moral right as an author has been violated. Is the standard to be good taste, artistic worth, political beliefs, moral concepts or what is it to be? In the present state of our law the very existence of the right is not clear, the relative position of the rights thereunder with reference to the rights of others is not defined nor has the nature of the proper remedy been determined. Quite obviously therefore, in the absence of any clear showing of the infliction of a willful injury or of any invasion of a moral right, this court should not consider granting the drastic relief asked on either theory.⁴²

It is essential to realize that the doctrine of moral rights, while raising the possibility of protection without limitation in time, does not, by any means, compel it. This key issue in American law owes itself, once again, to the framers of the Constitution. They identified the progress of science as their goal. The limited term of protection for copyright, as an author's exclusive right for that duration only "limited Times" was their chosen means of promoting this goal. Accordingly, a moral right without limitation in time would clearly violate this provision.

⁴¹ However, it is worth mentioning that moral rights in the American context might also be seen as a separate and distinct area of law unconnected with copyright. Given the broad theoretical justifications underlying the doctrine, as noted above, this new doctrinal approach seems possible. However, interpreting *Shostakovich* in this way makes little sense: the litigation was brought on behalf of authors—composers whose works had been used in the film that was the subject of litigation in this case— and the initial approach invokes copyright law. *See id.* at 576-77. An interesting parallel may be drawn with the seminal Indian case of *Sehgal v. Union of India*, (2005) 3 PTC 253 [hereinafter *Sehgal*]. The *Sehgal* case drew upon an area outside copyright law, cultural heritage law, to justify and interpret moral rights, even as they were framed within the Indian Copyright Act. *Id. See* However, the court in *Shostakovich* does not suggest any such sources of law or interpretation. *See Shostakovich*, 80 N.Y.S.2d at 578-79.

⁴² *Shostakovich*, 80 N.Y.S.2d at 578-79.

However, the doctrine of moral rights need not imply a perpetual right. The issue was resolved in early German theory by the “monist” approach to copyright law, which unified economic and moral rights under the rubric of authorship, and granted an exclusive, but limited-term, protection for both.⁴³ Over the course of the twentieth century, countless jurisdictions have enacted moral rights for a limited term of protection under this theory.⁴⁴ Nothing would prevent U.S. implementation of the rights on an identical basis.⁴⁵

II. THE PUBLIC INTEREST IN CULTURAL HERITAGE: AN INTER-JURISDICTIONAL PERSPECTIVE

Some of the most powerful arguments in favor of authors’ and artists’ moral rights can be explored by considering their implications for cultural heritage. As noted above, all works of value, including though not limited to those created by individual authors, ultimately become a part of

⁴³ Dietz, *supra* note 7, at 206-07. Indeed, recent case law in France offers a very interesting perspective, suggesting that even protection that is said to be perpetual in the language of the statute may, nevertheless, end up being time-limited in effect. The case was *Hugo v. Société Plon, Hugo c. Societe Plon*, Arrêt n° 125 du 30 janvier 2007, Cass. Civ. Ire, *available at* http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/arret_no_9850.html. The great-great-grandson of Victor Hugo brought suit, alleging that a proposed sequel to Hugo’s masterwork, *Les Misérables*, would violate the moral rights of the author. *Id.* As evidence, the plaintiff offered Hugo’s own words: the author had apparently stated that “there could be no sequel” to his novel. *Id.* As noted by Ginsburg, *supra* note 2, at 993, French copyright law is now considered to be highly individualistic, in the sense of being author-focused, and evidence of the author’s opposition should technically constitute sufficient evidence to support an integrity claim. However, the court in the Hugo case undertook a “balancing” exercise, weighing the author’s prerogative against the right of future authors to use their work for creative purposes. In doing so, it found in favor of the defendant. One of the court’s rationales was that the perpetual duration of the French moral right compelled such a balancing approach – that, otherwise, the moral right would become excessively restrictive of the freedom of future creators. *Id.* This rationale is familiar from a common-law perspective; but it does not reflect the traditional approach to moral rights under French law. It leads to the interesting question of how meaningful a permanent moral right can be, when it is subject to such practical limitation by the courts.

⁴⁴ UK law restricts the time frames for moral rights protection even further, providing that at least one moral right—the right against false attribution—receives protection for a mere twenty years after the author’s death. Copyright, Designs and Patents Act 1988, c. 48, § 86(2) (Eng.). This is another reason why Cornish aptly classifies the British version of moral rights as an “extreme...dualis[t]” view. Cornish, *supra* note 8, at 449. But recent interpretation of the legislation in Britain has been curiously expansive, though not in relation to duration, and it is now difficult to say with certainty where Britain stands on the spectrum of protection for moral rights. *See* Delves-Broughton, [2012] EWPCC 29 (PCC).

⁴⁵ The argument has been made, though unsuccessfully, that current terms are so long that they would violate the Constitution even if they are, technically, limited. *See* Eldred v. Ashcroft, 537 U.S. 186, 194 (2003). The same point is argued here, asserting that copyright term should be shortened to conform to the constitutional requirement. *See* Derek Khanna, *Guarding Against Abuse: Restoring Constitutional Copyright*, R STREET (Apr. 30, 2014), <http://www.rstreet.org/policy-study/guarding-against-abuse-restoring-constitutional-copyright/>. But this point should be assessed against the needs of “progress,” the stated goal of the constitutional clause giving authority to legislate on copyright.

cultural heritage. The inevitability of this process is absolute: eventually, and always, the links between works and the descendants of their creators will become tenuous. If the work has value, it will last; but for whom does it last? For the public, and for the public alone.⁴⁶ The public of a given country, region, or locale ultimately receives it. What care is then taken of the work depends entirely upon them. If the public were to disregard the work, or neglect it, it would, like its creator, disappear into eternity. But who, then, would be impoverished as a result? Certainly not the author; no longer, but perhaps his or her descendants. The public loses, and the loss is, simply, an impoverishment of the cultural heritage “owned”—entrusted to and abiding in the public.

There are many cases of important works that were in danger of being lost forever, finding themselves, instead, rescued from oblivion by well-wishers. The cultural significance of some of these examples is staggering. Johann Sebastian Bach’s music would perhaps have been lost, if it were not for the efforts of a small but influential group of music enthusiasts in the nineteenth century, including the composer Felix Mendelssohn and his friends, such as Robert Schumann.⁴⁷ Bach died in 1750; Mendelssohn’s famous revival concert of his *St. Matthew Passion* was performed on March 11, 1829, seventy-nine years later.⁴⁸ The work was, of course, in the public domain, and the beneficiaries of Mendelssohn’s rescue efforts were the public. But there were other beneficiaries, too. It is no overstatement to argue that, without the foundation provided by Bach’s extremely sophisticated development of contrapuntal style, virtually no music could have been written by Schumann or, indeed, Johannes Brahms.⁴⁹ For the listener who is alert and aware,

⁴⁶ In a similar vein, F. Scott Fitzgerald commented, “An author ought to write for the youth of his own generation, the critics of the next, and the schoolmaster of ever afterwards.” See Kirk Curnutt, *Age Consciousness and the Rise of American Youth Culture*, in *THE CAMBRIDGE COMPANION TO SCOTT FITZGERALD* 43 (Ruth Prigozy, ed., 2002). As Curnutt notes, the quote originally appeared in *Author’s Apology*, in *F. SCOTT FITZGERALD ON AUTHORSHIP* 35 (Matthew J. Bruccoli, ed., with Judith S. Baughman, 1996), 35; the quote actually appears at p. 34, in an “interview with himself,” penned as a young writer, and unpublished for nearly forty years. The story is recounted by Bruccoli and Bauman the head of the interview. *Id.* at 33.

⁴⁷ If Mendelssohn “rediscovered” Bach, perhaps no Romantic composer was more deeply influenced by Bach than Robert Schumann in his compositions. For a fascinating essay on this topic, see Michelle Rasmussen, *Robert and Clara Schumann, and Their Teacher, J.S. Bach*, 37 *EIR CULTURE* 38, 39-40 (2010), schillerinstitut.dk/drupal/system/files/eir%20with%20Schumann%20article.pdf. Rasmussen also describes how Schumann championed Bach’s *St. John Passion*, as Mendelssohn had previously revived the *St. Matthew Passion*, as well as his writings on Bach in the musical journal that he edited, the *Zeitschrift für Musik*. See *id.* at 53-55.

⁴⁸ Celia Applegate describes the astonishing experience that Mendelssohn and his associates, including his sister Fanny, were to undergo in the course of this revival. See CELIA APPLGATE, *BACH IN BERLIN: NATION AND CULTURE IN MENDELSSOHN’S REVIVAL OF THE ST. MATTHEW PASSION* 19-44 (2005).

⁴⁹ Once again, on Bach as Schumann’s “teacher,” see Rasmussen, *supra* note 47, at 39.

listening to Schumann's music now is a form of time travel into the past—not at one remove, to the Romanticism of the nineteenth century when Schumann lived and died, but through his eyes, or rather ears, to the previous century, directly to the music of Bach.

In relation to the written word, the story of Shakespeare is among the most fascinating of literary histories. Shakespeare, like Bach, enjoyed excellent recognition during his lifetime, but, at the point of his death, his works had not been published in their entirety. The compilation of the "First Folio," containing all of Shakespeare's plays now known in a single volume, with eighteen of them appearing in print for the first time, alone ensured the survival of this benchmark literature.⁵⁰ No manuscripts exist.⁵¹ The difficulty of discovering the facts at a remove of four hundred years has led to theories of all kinds about Shakespeare and his works—some skeptics have even tried to argue, largely unsuccessfully, that Shakespeare was not actually the author of these plays.⁵² With the passage of time, the works have endured, and their significance has grown through the eras like the ripples that spread outward from pebbles cast into a pond. The man has become a myth. His legacy endures, but, given his works' astonishing history, certain kinds of questions continue to haunt, confound, and obsess Shakespeare scholars about his work.⁵³ Notably, the integrity of the text of Shakespeare's works remains a fertile source of inquiry.⁵⁴ Are the words that we know today the words that the Bard actually wrote? And why does it matter so much, some four hundred years later, what words an English dramatist chose to express the inner conflict of a Danish prince?

For the purposes of this article, it is enough to point out that it does matter, and that concern about the integrity of the written word is a question of the moral right of integrity. Indeed, the purpose of the moral right of

⁵⁰ Andrea Mays has written a popular book on this subject. See Andrea Mays & James L. Swanson, *Shakespeare Died a Nobody, Then Got Famous By Accident*, NEW YORK POST (Apr. 20, 2016, 8:32 PM), <http://nypost.com/2016/04/20/how-shakespeares-works-were-nearly-lost-to-us/>.

⁵¹ The history of reconstituting Shakespeare's texts is briefly described on the website of the famed Shakespeare publisher, Folger. See *Publishing Shakespeare*, FOLGER, <http://www.folger.edu/publishing-shakespeare> (last visited Apr. 22, 2017).

⁵² For a summary of alternative options, see *Shakespeare: The Conspiracy Theories*, THE TELEGRAPH (July 21, 2015, 5:17 PM), <http://www.telegraph.co.uk/theatre/playwrights/shakespeare-the-conspiracy-theories/>; see also *About Us*, SHAKESPEARE AUTHORSHIP ROUNDTABLE, <http://www.shakespeareauthorship.org/sar/aboutus.html> (last visited Apr. 22, 2017). What is perhaps striking about the extensive materials available online, and the fact that the issue even inspired a sensationalist feature film, is the extent to which such a seemingly arcane question about a man who lived four hundred years ago can so captivate the public imagination. In a more scholarly vein, a conference featuring a number of leading Shakespeare experts, on the theme of "Shakespeare and the Problem of Biography" was held at the Folger Institute in 2014. See *Shakespeare and The Problem Of Biography (Conference)*, FOLGERPEDIA, [http://folgerpedia.folger.edu/Shakespeare_and_the_Problem_of_Biography_\(conference\)](http://folgerpedia.folger.edu/Shakespeare_and_the_Problem_of_Biography_(conference)) (last modified Mar. 4, 2015, 9:16 AM).

⁵³ See *Publishing Shakespeare*, *supra* note 51.

⁵⁴ See *id.*

integrity is to protect a work from harm—to avoid damage, mutilation, mistreatment, or abuse of the work. The author is the person who is entitled to make a claim against the violation of the integrity right. However, this is, above all, a practical matter. The author is arguably in a better position than anyone to intervene on behalf of the work when an ambiguous or dangerous situation arises. Who else has as much at stake as the author, or knows as much about the work as the author does?

This discussion raises a number of interesting points about who should be empowered to act on behalf of a work of cultural importance, and why. From a public interest point of view, it is necessary to remember the nature of the public interest in cultural heritage and, accordingly, the purpose of the right of integrity. Clearly, the public has an interest in the preservation of works; moreover, it is even possible to say that the public has such an exceptionally strong interest in preservation that, if it were to recognize the stakes, it would almost always prefer to preserve a work rather than let it be damaged or destroyed. This is because there is a major element of risk in the valuation of works. The true worth of a work may often not become known until a significant amount of time has passed after its creation.⁵⁵ Indeed, it may only be long past the author's lifetime when the true stature of a work comes to be recognized. What if Van Gogh's paintings had been damaged or destroyed during his lifetime?⁵⁶ Clearly, once again, the public would ultimately suffer significant and profound losses in such a scenario.

The fact that the author is empowered to act on behalf of the work should not blind us to the reality that he or she, while acting in his or her own interest in the immediate, relative short term of his or her own lifetime, is also ultimately acting in the public interest. When the work is damaged,

⁵⁵ Once again, this is the principle underlying the artist's resale royalty: after the first sale of a work, the value of subsequent sales are likely to increase, often exponentially. Kumar, *supra* note 21, at 445. For a detailed assessment of the rationales underlying the resale royalty and its relevance in the U.S. context, see OFFICE OF THE REGISTER OF COPYRIGHTS, *RESALE ROYALTIES: AN UPDATED ANALYSIS* 12 (2013), www.copyright.gov/docs/resaleroyalty/usco-resaleroyalty.pdf. Previous consideration of the issue in the United States is also summarized in this report. *See id.* at 10.

⁵⁶ Indeed, Van Gogh destroyed some of his own works, sometimes to reuse the materials, but at other times, because he was dissatisfied with their quality. In a letter to his friend and fellow painter, Emile Bernard, he wrote: "I mercilessly destroyed an important canvas — a Christ with the angel in Gethsemane — as well as another one depicting the poet with a starry sky — because the form hadn't been studied from the model beforehand, necessary in such cases — despite the fact that the colour was right." (notes omitted) *See* Van Gogh Museum Questions & Answers #105/125, <https://www.vangoghmuseum.nl/en/125-questions/questions-and-answers/question-105-of-125>; the original Letter to Emile Bernard. Arles, on or about Friday, 5 October 1888, is available at <http://vangoghletters.org/vg/letters/let698/letter.html>. The question of whether an artist should be empowered to destroy his or her own work is much more complex than the general case against destruction, potentially pitting the artist's will directly against the public interest in the preservation of cultural works. At the same time, should the public expect or desire to be bequeathed works that are, in the artist' opinion, of inferior quality? *See also* the discussion *infra* notes 87-92 and accompanying text.

the author is the immediate sufferer of the harm associated with that damage; in the long term, the family of the author suffers, and in the much longer term, the public suffers the harm. The harm is permanent. Once harmed, the damage to the work may be beyond correction—a situation that seems most obvious in relation to works of visual art, but one that could also conceivably apply where the passage of time affects the preservation of other kinds of works, as in the case of Bach or Shakespeare. The manipulation of data in the digital environment also creates a situation where a certain loss of authenticity can occur. For example, if incorrect versions of a literary work are circulating widely online, how will the correct version be distinguished and preserved?⁵⁷ Situations could arise where doubts are created about authenticity, or alternately, where the original, due to a lack of exposure, simply disappears.

After an author's death, his or her descendants are empowered to act on behalf of the author.⁵⁸ After their time, if the moral right of integrity still endures, who will undertake the protection and preservation of the work, which has become cultural heritage? This is a fascinating question. Among possible answers, one should be given priority: the possibility that a cultural institution, such as a museum, art gallery, or library, which might have a work in its possession, would be empowered to act on behalf of that work. Otherwise, the work would have no one to intervene on its behalf, leaving valuable cultural heritage vulnerable to damage. Once again, the loss would be primarily experienced by the public, to whom, in a sense that transcends the purely legal or practical meaning of the term, that artwork truly "belongs."

In fact, such a measure was instituted in the California Art Preservation Act (CAPA),⁵⁹ and is one among very few such provisions in the world.⁶⁰ In relation to visual arts, CAPA specifies: "An organization

⁵⁷ For a discussion of the interesting example of different versions of a musical recording, a thought-provoking illustration of the issues involved in a typical digital-age scenario, see Mira T. Sundara Rajan, *Glenn Gould and the Case for Moral Rights in Sound Recordings*, THE IPKAT (Oct. 4, 2016), <http://ipkitten.blogspot.com/2015/10/glenn-gould-and-case-for-moral-rights.html>.

⁵⁸ 17 U.S.C. § 304(a)(1)(C).

⁵⁹ CAL. CIV. CODE §§ 980-89 (West 2017).

⁶⁰ Interestingly, Russia also provides for "other interested parties" to act on behalf of the work, and a similar provision from the earlier copyright law apparently served as the basis for a case involving a museum claim for moral rights in Moscow. See MIRA T. SUNDARA RAJAN, *COPYRIGHT AND CREATIVE FREEDOM* 202-203 (Routledge 2006). For the current provision on "the protection of authorship, name, and inviolability after the author's death," see GRAZHDANSKI KODEKS ROSSIISKOI FEDERATSII, [GK RF] [Civil Code] art. 1267(2). See also *id.* at art. 1266(2), for the provisions on the protection of inviolability. It is a striking irony that a repressive country like Russia includes detailed provisions on moral rights, but they undoubtedly reflect the richness of Russian cultural tradition, and are at odds with its political climate.

acting in the public interest may commence an action for injunctive relief to preserve or restore the integrity of a work of fine art . . .”⁶¹

The prototype for the modern understanding of the integrity right is to be found in the Berne Convention for the Protection of Literary and Artistic Works. Article 6*bis* tells us that an author has the right “...to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work,” if that treatment of his or her work “would be prejudicial to...his honor or reputation.”⁶²

But in fact, this section protects two distinct interests: the author’s reputation and the integrity of the work. Berne builds a bridge between them through the use of the language of “prejudic[e] ... to honor or reputation.”⁶³ This clause means that an author must marshal sufficient proof, not only of harm to the work, but also, of *harm to the author’s reputation*, in order to prove a violation of the integrity right.⁶⁴ Nevertheless, these are separate interests – nor is there any logical or practical necessity compelling them to be linked. Some jurisdictions, with France being an often-cited example, eliminate this link, preferring to recognize any treatment of a work that attracts an author’s censure as a potential violation of integrity, and shifting the burden of proof to the defendant to show that his or her treatment of the work should be allowed.⁶⁵ Berne limits the author’s ability to claim against treatment of the work to only those cases where the author’s reputation or honor are demonstrably affected.⁶⁶ But this approach arguably goes against the public interest. It allows potential harm to the work to occur, wherever and for whatever reason the author is unable to show damage to his or her reputation, although the author is the only person who is likely to be able to intervene effectively on behalf of a work that is endangered. In circumstances such as

⁶¹ CAL. CIV. CODE § 989(c). This section of the code concludes, “from acts prohibited by subdivision (c) of Section 987.” *Id.* Section 987 states, “No person, except an artist who owns and possesses a work of fine art which the artist has created, shall intentionally commit, or authorize the intentional commission of, any physical defacement, mutilation, alteration, or destruction of a work of fine art.” *Id.* at § 987.

⁶² Berne Convention, *supra* note 5, at art. 6*bis*.

⁶³ Berne Convention, *supra* note 5, at art. 6*bis*.

⁶⁴ *Id.*

⁶⁵ See French *Code de la propriété intellectuelle* [Intellectual Property Code], Art. L121-1, which sets out the author’s moral rights in the simplest of language: “An author shall enjoy the right to respect for his name, his authorship and his work.” A translation is available here, https://www.legifrance.gouv.fr/content/download/1959/13723/version/3/.../Code_35.pdf, and the original and up to date French language version is available at https://www.legifrance.gouv.fr/affichCode.do;jsessionid=BA31C81723519EC8B3FA11EAA55F56A4.tpdila09v_1?idSectionTA=LEGISCTA000006161636&cidTexte=LEGITEXT000006069414&dateTexte=20161014. See also the interesting comparison chart of European countries offered by MARJUT SALOKANNEL & ALAIN STROWEL, STUDY CONTRACT CONCERNING MORAL RIGHTS IN THE CONTEXT OF THE EXPLOITATION OF WORKS THROUGH DIGITAL TECHNOLOGY 16 (2000), http://ec.europa.eu/internal_market/copyright/docs/studies/etd1999b53000e28_en.pdf, at 154-84 (France is at page 156), though certain details would benefit from further clarification.

⁶⁶ Berne Convention, *supra* note 5, at art. 6*bis*.

these, the author suffers the initial loss, but after his or her time, a damaged, lost, or destroyed work becomes the loss of the public.

A further issue arises in relation to destruction of a work of art. Berne does not comment explicitly on this issue. Is destruction implicitly prevented by the moral right of integrity in the Berne Convention? Legal commentators have argued both sides of this issue, and Berne leaves itself open to interpretation precisely because of its emphasis on authorial reputation. If a work is destroyed, so the argument goes, there is no longer any question of harm to the author's reputation: the work is gone.⁶⁷ Once again, however, from a public interest perspective, this answer to the question is clearly problematic. The destruction of a work, either an actual or a potential part of the cultural heritage belonging to the public, would amount to a terrible loss for the public. This point was recognized in a seminal Indian case, *Amar Nath Sehgal v. Union of India*,⁶⁸ which relied upon this author's previous arguments affirming the value of an author's "creative corpus,"⁶⁹ for both the author and for society at large, to uphold the principle that destruction of a work must be recognized as a violation of the right of integrity. The Indian court then went a step further in its rationalization of the issue from a public interest point of view, using India's membership in United Nations conventions on cultural property⁷⁰ to argue that provisions on moral rights in the Copyright Act must be read in conjunction with the country's obligations under those instruments of international law.⁷¹ The leap in legal reasoning is astonishing; no precedent

⁶⁷ For a discussion of the approach to destruction of an artwork in international copyright law, see SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986* 470 (1987). For a consideration of the debate surrounding the issue of whether or not destruction of a work is prohibited by the moral right of integrity, see PRINCIPLES, PRACTICE AND NEW TECHNOLOGY, *supra* note 2, at 45-46. See also VON LEWINSKI, note 5, at 135-36.

⁶⁸ *Sehgal*, (2005) 3 PTC 253.

⁶⁹ *Id.* at ¶¶ 31, 41; see also Mira T. Sundara Rajan, *Moral Rights and the Protection of Cultural Heritage: Amar Nath Sehgal v. Union of India*, 10 INT'L J. CULTURAL PROP. 79, 83 (2001). The idea of the author's "creative corpus" is raised in the discussion of the right against destruction. *Id.* at 82-83.

⁷⁰ The conventions cited by the court were the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of ownership of Cultural Property, adopted by 102 countries on November 14, 1970, and the International Covenant on Economic, Social and Cultural Rights; UNESCO, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231, <https://treaties.un.org/doc/Publication/UNTS/Volume%20823/volume-823-I-11806-English.pdf>; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>.

⁷¹ See *Sehgal*, (2005) 3 PTC 253, at ¶ 56 ("There would therefore be urgent need to interpret Section 57 of the Copyright Act, 1957 in its wider amplitude to include destruction of a work of art, being the extreme form of mutilation, since by reducing the volume of the authors creative corpus it affects his reputation prejudicially as being actionable under said section. Further, in relation to the work of an author, subject to the work attaining the status of a modern national treasure, the right would include an action to protect the integrity of the work in relation to the cultural heritage of the nation.").

for it exists in Indian law, or, apparently, elsewhere. The factor that made it possible was the idea of preserving cultural heritage for the benefit of the public. On the facts of *Sehgal*, the work was created by an author who was still living; but the stature attained by both work and artist suggested to the court that the work had crossed the boundary from private creation of the artist to cultural heritage enriching the public.⁷² “National treasure[s],” the court said, have to be protected in expansive terms.⁷³

On the issue of destruction, too, California has been a pioneer. CAPA clarifies the legal position on this issue in unambiguous terms.⁷⁴ Although the United States was not yet a member of Berne in 1985, it was nevertheless engaged in international copyright negotiations leading towards membership,⁷⁵ and CAPA, in effect, deals with the Berne provision by simply defining alteration or destruction of fine art as “detrimental to the artist’s reputation.”⁷⁶ But, crucially, CAPA then goes on to offer a corresponding public interest rationale for the integrity right, and in particular, protection from destruction:

The Legislature hereby finds and declares that the physical alteration or destruction of fine art, which is an expression of the artist's personality, is detrimental to the artist's reputation, and artists therefore have an interest in protecting their works of fine art against any alteration or destruction; and *that there is also a public interest in preserving the integrity of cultural and artistic creations.*⁷⁷

Finally, there is another dimension to cultural heritage that should not be neglected: its continuing need to evolve. Laws that support the public interest in cultural heritage must simultaneously accomplish not one, but two goals. The first, as discussed above, is the preservation of cultural heritage that already exists. The examples cited above are drawn primarily from the world of the visual arts, but similar principles are readily applicable to any and every kind of artistic endeavor—literature, music, film, for example—which can as well attain the status of cultural treasures as works of visual art.⁷⁸

⁷² *Sehgal*, (2005) 3 PTC 253, at ¶ 38.

⁷³ *See id.* at ¶ 56.

⁷⁴ CAL. CIV. CODE § 987 (West 2017).

⁷⁵ For a useful overview of the process of negotiation in the period preceding the creation of the WTO and U.S. accession to Berne, *see* Anne Moebes, *Negotiating International Copyright Protection*:

The United States and European Community Positions, 14 LOY. L.A. INT'L & COMP. L. REV. 301, 314-16 (1992).

⁷⁶ CAL. CIV. CODE § 987(a).

⁷⁷ *Id.* at (a) (emphasis added).

⁷⁸ The preservation of selected films in the national film registry provides an interesting example of recognition for “culturally, historically or aesthetically significant films.” *See* NATIONAL FILM PRESERVATION BOARD, *Mission*,

The second aspect of the public interest in cultural heritage is, quite simply, the public interest in a vital and dynamic cultural domain. This means that law should favor the continued enjoyment and use of cultural works. Moreover, it is a key insight to understand that the more a work circulates, preferably in its authentic and unadulterated form, the greater its assurance of being preserved.⁷⁹ An “unused” work—unread, unseen, unheard—is essentially a work that has disappeared. Preserving the dynamic qualities of the cultural domain must implicate every means by which cultural work continues to endure—including, of course, the desire of current authors and artists to refer to, or “use,” works from the past in their own, new and “original” work.

Here, common wisdom holds that copyright law is a major impediment to the use of works by the next generation of creators.⁸⁰ However, if copyright inhibits creativity—and if it does so to a greater extent than it supports it—it is questionable whether this occurs because of the ungenerous manipulation of copyright by authors and their heirs. Some examples can be found—some of the descendants of Wagner and Faulkner being possible illustrations from music and literature. Even in these cases, Wagner’s descendants are divided on how to deal with their ancestor’s important legacy,⁸¹ while Faulkner’s descendants receive aggressive legal representation.⁸² Paul Summers, Faulkner’s grandson, states, “I think my

<https://www.loc.gov/programs/national-film-preservation-board/about-this-program/mission/>. It should be noted, though, that damage to a work of visual art has always been a particularly sensitive issue, because, typically, only one “original” work exists. Once that work is damaged, the harm that has occurred, in this sense, is beyond correction or compensation. It is interesting to note that a comparable situation may be engendered, paradoxically, by the proliferation of copies and communication in relation to literary and musical works in the digital environment. The potential adulteration of heritage in the digital environment is an important issue. See PRINCIPLES, PRACTICE AND NEW TECHNOLOGY, *supra* note 2, at 439, 449-53.

⁷⁹ See Péter Mezei, *The Painter, the one Horn Cow and Ole Hank Wilson's Back Lot –The Future of Library Digitization in the European Union and Hungary*, in THE CAMBRIDGE RESEARCH HANDBOOK ON IP LAW AND POLICY IN CENTRAL AND EASTERN EUROPE (Mira T. Sundara Rajan, ed.) (forthcoming 2018).

⁸⁰ E.g., LAWRENCE LESSIG, FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY 188-89 (The Penguin Press 2004), <http://www.free-culture.cc/freeculture.pdf>. Lessig is considered the prototypical proponent of this view.

⁸¹ For an interesting overview of the difficulties surrounding Wagner and his legacy, see Andrea Stone, *Richard Wagner Family Feuds Over Hitler Letters*, HUFF. POST, Aug. 1, 2012, http://www.huffingtonpost.com/2012/07/31/richard-wagner-hitler-letters_n_1725562.html. It should be noted that the issues described here, though well-summarized, are extremely complex; for a marvelous treatment of Wagner’s anti-Semitism and the odious association between Nazism and Wagner’s music—of course, due entirely to events after the composer’s death. See generally Nathan Shields, *Wagner and the Jews*, MOSAIC, Jan. 15, 2015, <http://mosaicmagazine.com/essay/2015/01/wagner-and-the-jews/>.

⁸² See Stefanie Cohen, *William Faulkner's Heirs Aim to Preserve His Legacy and Profit From It: Effort to Capitalize on Faulkner's Estate Raises Questions About What Happens to Works After Writers Die*, WALL ST. J., Jul. 26, 2013, <http://www.wsj.com/articles/SB10001424127887324328904578621821045072476>.

grandfather would come back to haunt me in my dreams if he felt what we were doing was out of place.”⁸³

Indeed, there are also families who have made extraordinary sacrifices for the survival of works—for the preservation of their ancestors’ legacies.⁸⁴ More often, the problem is one of conflict between corporate right-holders and the public. Copyright is used by the holders of economic rights in corporate creations to make decisions about how those works are to be used by the current generation of creators.⁸⁵

This is not to say, however, that authors, or those who act on authors’ behalf, will, or should, agree to any particular use or reuse of a work after the author’s death. On the contrary, an important balancing interest is involved here: the desire to use the work versus the desire to preserve its integrity and, through the work, the reputation of the author. When literary or artistic works become important to the public through the generations, it becomes important to preserve their authenticity. Indeed, this is at least one key element of what the preservation of cultural heritage means: to preserve the work in as close to its “original” state as possible, so that future generations can continue to enjoy the work at the peak of its beauty and originality. This is why the public still cares, and should care, about the words that Shakespeare wrote. At the same time, that interest cannot be absolute: it must be balanced effectively against the desire to use works, without which, in a sense, works would be deprived of an important dimension to their continued vitality and viability. The goal of moral rights would be to encourage the continued production, adaptation, and exploration of Shakespeare’s plays by modern artists, while, at the same time, ensuring the preservation of the authenticity of the original works.

This discussion in no way intends to gloss over the incredible complexity of these issues. What is a truly “authentic” work of art, and who is to be the best judge of its integrity and quality—the author, his or her descendants, experts who emerge over time, or the general public? When a modern creator wishes to use a work, if his or her treatment is irreverent, does it constitute an abuse of the work, or a violation of the right of integrity? What about the artist’s important role in exercising freedom of speech, and perhaps, in challenging the conventionality of received ideas? Protections for the creators of parodies and satire are standard features in

⁸³ Cohen, *supra* note 82.

⁸⁴ The example of Indian National Poet, C. Subramania Bharati, is well-known to this author. See generally Mira T. Sundara Rajan, *Moral Rights in the Public Domain: Copyright Matters in the Poetical Works of Indian National Poet C. Subramania Bharati*, SINGAPORE J. LEG. STUD. 161-95 (2001).

⁸⁵ For an interesting discussion of the issues, see Timothy B. Lee, *15 years ago, Congress kept Mickey Mouse out of the public domain. Will they do it again?*, WASH. POST, Oct. 25, 2013, <https://www.washingtonpost.com/news/the-switch/wp/2013/10/25/15-years-ago-congress-kept-mickey-mouse-out-of-the-public-domain-will-they-do-it-again/>.

copyright laws around the world,⁸⁶ and the United States offers particularly strong recognition to these types of works—a possible solution to detrimental applications of moral rights in relation to these kinds of creative activities.

Even if we accept the authorial vision of his or her own work as “authoritative,” can the author’s judgment be trusted? California’s art preservation statute, even as it prohibits the destruction of a work of art by any member of the public, implicitly allows an author to destroy his or her own work.⁸⁷ But if the artist were to destroy an important or valuable work out of a misjudgment about its quality or significance, the public would still be the ultimate loser in the equation, just as it would be if any person other than the artist were to destroy the work. The work would be affected, and it ultimately “belongs” to the public. Should the artist’s judgment be preeminent in cases such as these? If the work is of poor quality, the artist may indeed be serving the public interest to the best of his or her ability, helping the public to avoid the burden of caring for an inferior work.⁸⁸

What is to be done about a major writer like Kafka, whose works would have disappeared if his friend, Max Brod, had followed his instructions to destroy them?⁸⁹ Johannes Brahms is known to have destroyed many of his own works, including both musical compositions and personal letters.⁹⁰ Curiously, Lior Jacob Strahilevitz argues that, “greater deference to owners’ destructive wishes often serves important welfare and expressive interests.”⁹¹ Among the most striking of the arguments raised by

⁸⁶ The UK parody exception, adopted in 2014, makes no reference to moral rights – an unfortunate omission. This leaves open the possibility that a parody might violate the author’s moral right of integrity, protected in § 80 of the UK Copyright Designs and Patents Act 1988, *supra* note 6, without offering any guidance on how the parody exception is to be balanced against the moral right of integrity. Some insight is provided by the Court of Justice of the European Union (CJEU) in the case of *Deckmyn v. Vandersteen*, where the use of a work for discriminatory purposes or hate speech, was identified as a violation of the “legitimate interests” of the author. Case C-201/13, *Deckmyn v. Vandersteen*, 2014 Celex No. 613CJ0201, <http://curia.europa.eu/juris/liste.jsf?num=C-201/13>. Among other legitimate interests, the author’s moral right of integrity would seem to be directly relevant to the case—a perspective that has been noted by many commentators and bloggers. See e.g. Eleonora Rosati, *Has the CJEU in Deckmyn de facto Harmonised Moral Rights?*, THE IPKAT, (Sept. 8, 2014), <http://ipkitten.blogspot.com/2014/09/has-cjeu-in-deckmyn-de-facto-harmonised.html>. Given the British vote to separate from the EU on June 23, 2016, the future status of *Deckmyn* and other CJEU jurisprudence in the UK is uncertain.

⁸⁷ See CAL. CIV. CODE § 987(c) (West 2016).

⁸⁸ See the discussion at *supra* note 57, and accompanying text.

⁸⁹ For a fascinating blog post on this issue, see Daniel Solove, *Franz Kafka’s Last Wishes and the Kafka Myths*, CONCURRING OPINIONS, https://concurringopinions.com/archives/2008/09/franz_kafkas_la.html (last visited Mar. 30, 2017).

⁹⁰ See e.g. Edward Rothstein, *Composing Himself*, N.Y. TIMES, Feb. 8, 1988, at BR14, <http://www.nytimes.com/1998/02/08/books/composing-himself.html>. Rothstein notes that “Brahms’s music seems to renounce the satisfaction of desire... again and again.”

⁹¹ Lior Jacob Strahilevitz, abstract, *The Right to Destroy*, 114 YALE L.J. 781, 785 (2005). For a discussion on the right to destroy one’s own creation, see *id.* at 830-35.

Strahilevitz is the idea that destruction plays a role in an artist's own development by making way for new creation. If destruction lies at the core of an artist's own creative process, does the public truly benefit by intervening? On the contrary, the public will ultimately be impoverished, because the creation of future works will be inhibited. But what happens if the artist dies before fulfilling that hidden promise?

And if an artist creates one version of the work, and then revises and changes it in a future edition, which version of that work should the public accept as truly authentic? What if the first version is, in some sense, the more successful of the two?⁹²

As the expression goes, "hard cases make bad law," and nowhere is this more apparent than in the consideration of the issues involved in the destruction of works by their own creators. If we limit ourselves to the more obvious case, where the work faces damage at the hands of someone other than the author, as provided in CAPA,⁹³ this scenario clearly invokes a public interest in cultural heritage—in preventing the destruction of works by persons *other than* the creator. This, too, is a question of social priorities—which is more important to society: the individual rights of property owners, or the rights of the public in cultural heritage?⁹⁴ Arguably, the case should be made for the preeminence of the public interest in culture, which is an abiding interest that necessarily transcends private property interests, because of the enduring nature of the public itself. This is sufficient reason to support the view that a moral right of integrity does support the of the public in the preservation of its own cultural heritage. It remains true that the right would have to reflect the different balance of

⁹² For example, D.H. Lawrence wrote two versions of a brilliant and original short story called "Sun." The second version was, presumably, an "improvement" on the first; it bears the strong imprint of Lawrence's ideological development over time. The first version, on the other hand, might be considered a fresher and more authentic representation of his artistic vision by at least some readers. Which version should stand? Or, should both be accepted and continue to circulate to the public? The two versions of the story, and the copyright aspects involved in Lawrence's own dealings with them, are discussed by N.H. Reeve, *Liberty in a Tantrum: D.H. Lawrence's Sun*, XXIV(3) CAMBRIDGE QUARTERLY, 209-20 (1995), <https://academic.oup.com/camqtly/issue/XXIV/3>.

⁹³ CAL. CIV. CODE § 987(c)(1).

⁹⁴ This question arose recently in the interesting example of a Picasso mural decorating the lobby of the old Four Seasons Hotel in New York, which the hotel's owner, Aby Rosen, wanted to remove. Removal of the mural was likely to destroy it. The New York Art Conservancy intervened—not with a successful legal case, but through a vigorous public information campaign that ended with the safe removal of the mural by a team of experts. The mural was then relocated to the premises of the New York Historical Society. See *Picasso's "Le Tricorne"* N.Y. HIST. SOC'Y MUSEUM & LIB., May 29, 2015, <http://www.nyhistory.org/exhibitions/picassos-le-tricorne>; see also Suzanna Andrews, *Showdown at the Four Seasons*, VANITY FAIR, Oct. 2014, <http://www.vanityfair.com/style/society/2014/10/picasso-curtain-four-seasons-restaurant>. The case is considered specifically from a moral rights perspective in Mira T. Sundara Rajan, *Picasso and Potato Chips*, 1709 BLOG (May 22, 2014), <http://the1709blog.blogspot.com/2014/05/picasso-and-potato-chips.html> [hereinafter and collectively *Le Tricorne*].

interests involved in a work of art. But this is the universal challenge of brilliant lawmaking: few rights are absolute, and the moral right of integrity is no exception.

III. MORAL RIGHTS AS HUMAN RIGHTS: THE PUBLIC INTEREST IN DEMOCRATIC VALUES

The public interest in cultural heritage is, above all, a practical interest underlying the moral right of integrity. But there is also an idealistic element in moral rights, and it is a form of democratic idealism. The moral rights of authors should be protected because they aim, in essence, to protect the human rights of creative individuals. As such, they are a form of protection for individual human rights of speech, thought, and creativity.

This idea already has a legal pedigree: the protection of authors' moral rights is present in instruments of international human rights, including, notably, the Universal Declaration of Human Rights.⁹⁵ The Declaration affirms that the protection of authors' "moral and material interests" is a human right.⁹⁶ Unfortunately, however, exploration of this issue at the United Nations has not provided a great deal of clarity on how to realize the human rights dimension of authors' moral rights.⁹⁷ The area is even less developed in relation to authors' economic rights in their work. We are therefore left with the anomaly that authors' rights, ostensibly human rights according to the international definition, are nevertheless protected by means of private and commercial law instruments: copyright statutes.

The idea of a human rights justification for moral rights may be traced back to the very origins of the doctrine, in the German writings described by Strömholm.⁹⁸ The question then arises: what is special about authorship that it should be accorded this particular form protection? In other words, why is a generalized right of free speech not sufficient to protect authorship?

The answer to this question may be found by an examination of authorship itself. By definition, the work of authors is special in nature: it is creative work. The creative "function,"⁹⁹ so to speak, involves certain

⁹⁵ Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948), <http://www.refworld.org/docid/3ae6b3712c.html>.

⁹⁶ *Id.* at art. 27(2).

⁹⁷ *See, e.g.*, Special Rapporteur, U.N. Human Rights Comm., Ann. Repts. (2010-2017), <http://www.ohchr.org/EN/Issues/CulturalRights/Pages/AnnualReports.aspx> (last visited Apr. 2, 2017).

⁹⁸ *See* Strömholm, *supra* note 9 at 225.

⁹⁹ This echoes Foucault's phrase, but is a deliberately different definition. *See* Michel Foucault, *What is an Author?*, in *LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS*, 124-127 (Donald Bouchard and Sherry Simon trans.,

special characteristics. Let us consider the particular example of literature, which also happens to be the creative prototype underlying copyright law. The special nature of a writer's creative function is, perhaps, especially apparent for those writers engaged in writing fiction and poetry—though it is true, to some extent, of all writers. The essence of this form of expression is a peculiar one: it involves the exercise of the imagination, to create people, events, and even places,¹⁰⁰ which may be drawn from reality but are not, however, “real.” In the process of imagining, writers are, in a sense, creating an alternate reality. This act of imagination allows the reader, too, to explore the possibilities of an alternate reality and, through it, to test his or her understanding of the world that we live in. Good writing has often been subversive—not only under oppressive governments, but also in democratic societies, where it helps to preserve diversity and the ability of individuals to think critically through a different and, therefore, broader perspective about the circumstances in which they live. All of this is made possible through the exercise of freedom of the imagination, freedom of creativity, particularly as it is exercised by authors in the course of their profession—often at considerable cost to themselves.

But these justifications for recognizing authorship as a human rights interest focus on the social role of freedom of the imagination. This is not just a social issue. The act of imagination is something so deeply ingrained in human civilization that it can be traced back to the very origins of humanity.¹⁰¹ To the extent that human rights depend on an understanding of human “nature,” freedom of the imagination arguably lies at the core of humanity's mental landscape. There is, therefore, a deep-seated and perhaps even species-level reason¹⁰² why an author's claim that harming the work, or taking away the right to be acknowledged as its author, causes personal harm to the individual who created it. Importantly, this explanation of the social, political, and humanitarian rationales underlying moral rights may help to explain why the rights have proven to be so popular in such diverse

Donald Bouchard, eds., N.Y. Cornell Univ. Press 1977), <http://faculty.georgetown.edu/irvinem/theory/Foucault-AuthorFunction.html>.

¹⁰⁰ Not only the worlds of science fiction and fantasy, but also, those of the most traditional fictional narratives may be created. *See, e.g.*, Thomas Hardy's “Wessex” novels.

¹⁰¹ The oldest known “artistic” creations are ancient cave paintings found in France, Spain, and Indonesia; these date to more than 35,000 years ago. *See* Jo Marchant, *A Journey to the Oldest Cave Paintings in the World: The discovery in a remote part of Indonesia has scholars rethinking the origins of art—and of humanity*, SMITHSONIAN MAGAZINE, Jan. 2016, <http://www.smithsonianmag.com/history/journey-oldest-cave-paintings-world-180957685/>.

African rock art and other potentially art-related artefacts are described by the Trust for African Rock Art, <http://africanrockart.org/rock-art-in-africa/periods-and-styles/>. These themes receive a fascinating and provocative treatment in ELLEN DISSANAYAKE, *HOMO AESTHETICUS: WHERE ART COMES FROM AND WHY* (N.Y. Free Press, 1992).

¹⁰² Ellen Dissanayake uses the term “species-centrism.” *Id.* at xvii, xx. This term seems preferable to alternatives, such as “evolutionary,” which is sometimes used to stand for stereotypical but often superficial concepts of evolutionary advantage. Dissanayake's work, even many years after first publication, demonstrates a high degree of originality and a convincing universalist perspective on the question of culture and its “value” to humanity.

societies.¹⁰³ In contrast, copyright, as a whole, has been received with relative reluctance around the world.

IV. A PLEA FOR EQUALITY: THE CONTRIBUTIONS OF U.S. AUTHORS ARE NO LESS IMPORTANT THAN THOSE OF AUTHORS FROM OTHER COUNTRIES

Finally, this discussion considers an important public interest justification for moral rights that is also unique to the United States.

As noted above, virtually every country in the world now includes some form of protection for moral rights in its copyright legislation. This is true even of countries of common-law heritage that have historically rejected moral rights. Notably, the United Kingdom, which had long argued that it offered adequate protection to moral rights to meet its Berne Convention obligations through alternate legal methods, such as torts,¹⁰⁴ changed its position in the late 1980s.¹⁰⁵ This reinterpretation of British law led to the adoption of the first UK provisions on moral rights in the Copyright, Designs and Patents Act of 1988.¹⁰⁶ While the provisions are complex and restrictive, they have nevertheless given birth to a lively, if not abundant, jurisprudence on moral rights.¹⁰⁷ In the ultimate coup against the initial hesitancy of legislators,¹⁰⁸ some judges have now interpreted the

¹⁰³ See the discussion in Sundara Rajan, *supra* note 18, at 118-19.

¹⁰⁴ This was the conclusion of the Gregory Committee, which completed its initial review of UK copyright law and its conformity with the Berne Convention, and stated its conclusions on moral rights, in its 1952 report. See REPORT OF THE COPYRIGHT COMMITTEE, 1952, Cmd. 8662, ¶¶ 219-226. For a brief but helpful analysis, see Gerald Dworkin, *The Moral Right of the Author: Moral Rights and the Common Law Countries*, 19 COLUM.-VLA J.L. & ARTS 229, 237-38 (1995).

¹⁰⁵ As noted by Dworkin, *id.*, review of the same provisions by the Whitford Committee in 1986 led to the opposite conclusion: the UK needed to enact moral rights to comply with its Berne obligations. See COMMITTEE TO CONSIDER THE LAW ON COPYRIGHT AND DESIGNS, COPYRIGHT AND DESIGNS LAW, 1986, Cmnd. 9712.

¹⁰⁶ Copyright, Designs and Patents Act 1988, c. 48.

¹⁰⁷ See, e.g., *Tidy v. Trustees of the Natural History Museum*, [1996] 39 IPR 501. The case is unreported, but the transcript is available at <https://docs.google.com/viewer?a=v&pid=sites&srcid=ZGVmYXVsdGRvbWFpbmwxNzA5YmxvZ3xneDoyNDYxYmJlYjRmN2ZmMjY5>. Further examples include *Confetti Records v. Warner Music UK Ltd.*, [2003] EWHC 1274 (Ch), and, controversially, *Delves-Broughton*, [2012] EWPC 29 (PCC). It should be noted that, given the nature of moral rights, it is questionable whether abundant jurisprudence on moral rights is to be expected. Barring those who are exceptionally well known, many authors and artists may not be in a position to litigate their moral rights claims. This has certainly been the case in India, and it explains why Mr. Amar Nath Sehgal's case was so important: he had the ability to pursue a claim for more than three decades through the Indian court system, and, in a sense, he was representing not only his own interests but also, the concerns of artists throughout India. The victory symbolized the support of the Indian judiciary for the artistic community in that country. It affirmed that even the government would not be able to escape the responsibilities that it owed to artists and, through them, to the public for the protection of its cultural heritage. See Sehgal, (2005) 3 PTC 253.

¹⁰⁸ At the time, William Cornish referred to the "pressures of interest" that determined, and ultimately limited, the shape of British moral rights. See W.R. Cornish, *Moral Rights Under the 1988 Act*, 11(12) EUR. INTEL. PROP. REV. 449, 449 (1989).

British rights to extend a higher level of protection to the author's moral right of integrity than the Berne Convention itself.¹⁰⁹

The impetus behind the adoption of moral rights in the United Kingdom was not membership in the Berne Convention—Britain was, of course, among its founding members.¹¹⁰ Rather, the 1980s were a period of reexamination with respect to international copyright law. With the progress of the Uruguay Round of trade discussions at the GATT, the inception of a new order in international copyright law was apparent. This process finally culminated in the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs), adopted as one of the founding agreements of the WTO in 1994.¹¹¹ But the TRIPs system, rather than superseding the Berne Convention, adopted a brilliant and efficient strategy: it required member countries of the WTO to implement the substantive provisions of Berne.¹¹² Moral rights were not exactly excluded from this system, but they were treated differentially. In contrast to every other aspect of copyright law, they were not to be enforceable by the dispute settlement arrangements at the WTO.¹¹³

It is interesting, and a bit surprising, to note that, in spite of the apparently lesser status accorded to moral rights in these international arrangements, those countries which did not previously recognize moral rights in their copyright laws uniformly chose to enact them around the time that TRIPs was concluded.¹¹⁴

In the United States, the issue was, in a sense, much more straightforward: the country joined the Berne Convention in 1989, and was

¹⁰⁹ Delves-Broughton, [2012] EWPC 29, suggests that a plaintiff need not show damage to reputation to support an integrity claim—significantly expanding the scope of the UK law beyond Berne. This interpretation was made possible by the formula in which the British integrity right was expressed, which the court in *Confetti Records*, [2003] EWHC 1274 (Ch), called the “compressed drafting style” of the British legislature. *Id.* at 150. Apparently, it is possible to be too concise.

¹¹⁰ The UK ratified the Convention the following year. See *Treaties and Contracting Parties*, WIPO, http://www.wipo.int/treaties/en/remarks.jsp?cnty_id=1043C (last visited Nov. 14, 2016).

¹¹¹ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, https://www.wto.org/english/docs_e/legal_e/27-trips.pdf.

¹¹² *Id.* at art. 9.1.

¹¹³ *Id.*

¹¹⁴ The UK, Australia, Ireland, and New Zealand are examples of countries that illustrate this trend. See UK Copyright Designs and Patents Act, *supra* note 6, at Ch. IV; Copyright Amendment (Moral Rights) Act 2000 (Austl.), <https://www.legislation.gov.au/Details/C2004A00752>; Copyright and Related Rights Act 2000 (Act No. 28/2000) (Ir.), <http://www.irishstatutebook.ie/eli/2000/act/28/enacted/en/html>; Copyright Act 1994, pt. 4 (N.Z.), <http://www.legislation.govt.nz/act/public/1994/0143/latest/DLM345634.html>. For a helpful summary of key features of the New Zealand Act, including the introduction of moral rights, see, *See* Appendix 3 – Key Features of New Zealand Copyright Law 63, <https://www.ict.govt.nz/assets/Uploads/Documents/NZGOAL%20Appendix%203.pdf>.

therefore confronted with the immediate and direct problem of what to do about the absence of moral rights from U.S. copyright legislation. This led to a period of interest and inquiry, culminating in the adoption of the Visual Artist Rights Act of 1990 (VARA),¹¹⁵ which, as readers of the symposium papers will well know, implemented limited moral rights in the U.S. Copyright Act, for visual artists alone.

However, it would probably be more accurate to characterize VARA, not so much as an act implementing Berne moral rights, but as an attempt at updating federal legislation to reflect state-level protections for works of visual art. The California law for the protection of art was the first and most notable of its kind.¹¹⁶ Indeed, individual states potentially remain an important source of protection for authors' personal rights and can offer the protections of state-level legislation. Of even greater interest, perhaps, is the broader universe of state common law, which brings deep tradition and interpretive subtlety to the attempt to accommodate the needs of authors.¹¹⁷ While both state statutory and common law would be subject to preemption by federal legislation, the protections of VARA are sufficiently limited that this has not been an issue, for example, in relation to CAPA provisions for the protection of art.¹¹⁸

But, the argument that state law could entirely replace federally-legislated moral rights is probably flawed. It seems likely that this approach would not satisfy the Berne requirement of adequate protection within the territory of a member state—not part, or even most, of the country in question. The problem lies, above all, in the unevenness of protection that

¹¹⁵ Visual Artists Rights Act 1990, 17 U.S.C. § 106A (1990).

¹¹⁶ CAL. CIV. CODE §§ 980-89 (West 2017). The history of the Code, and its subsequent influence in other U.S. states, is described by a group of authors who contributed to its creation, in John Henry Merrymen, Albert Edward Elsen, and Stephen K. Urice, *LAW, ETHICS AND THE VISUAL ARTS*, 5th Edition, Kluwer Law International, 444 (2007). The states that enacted legislation of their own include (in alphabetical order) Connecticut, Illinois, Louisiana, Maine, Massachusetts, New Jersey, New Mexico, New York, Pennsylvania, and Rhode Island. New York enacted its law in 1983, and Massachusetts in 1985; Boyle, O'Connor, and Nazzaro also mention Nevada, South Dakota, Montana, and Utah. See Melissa Boyle, et al., *Moral Rights Protection for the Visual Arts*, C. OF THE HOLY CROSS, DEPT. OF ECON. FAC. RES. SERIES, Paper No. 08-09 (Aug. 2008), web.holycross.edu/RePEc/hcx/HC0809-Boyle-OConnor-Nazzaro_MoralRights.pdf. See also Sophia Davis, *State Moral Rights and the Federal Copyright System*, 4 CARDOZO ARTS & ENT. L.J. 233, 233 (1985). It is also worth noting that VARA protections fell short of the state legislation in some respects, so California law in this area continues to exceed federal-level protections for artists' moral rights. See CAL. CIV. CODE §§ 980-89.

¹¹⁷ See e.g. Carolyn Davenport, *Judicial Creation of the Prima Facie Tort of Plagiarism in Furtherance of American Protection of Moral Rights*, 29 CAS. W. RES. L. REV. 735, 740 (1979), <http://scholarlycommons.law.case.edu/caselrev/vol29/iss3/10>. For some general insight into the issue, though not directly related to intellectual property and moral rights, see Matthew Morrison and Bryan Stockton, *What's Old Is New Again: State Common-Law Tort Actions Elude Clean Air Act Preemption*, 45 ENVTL. L. REP. 10282, 10284 (2015), <http://www.lawmbg.com/pdf/WhatsOld.pdf>.

¹¹⁸ Given the limited nature of federal protections, particularly VARA, this is not a difficult standard to meet.

reliance on state law implies, and the consequent lack of harmonization—not internationally, but internally within the United States as a Berne member country—for the protection of Americans.

Justin Hughes has made a powerful case that the Berne Convention should be interpreted as allowing for flexibility in the implementation of moral rights, and that this flexibility should reflect the prevailing legal culture of the member state concerned.¹¹⁹ This argument makes sense, especially when considering that the true meaning of “harmonization” is not sameness, but instead, difference—differences that work effectively and pleasingly together.¹²⁰ Hughes also makes the point that the decision among many common law countries to legislate on moral rights is not a compelling reason why Berne should be interpreted as mandating such legislative action. But, once again, the problem with the United States “patchwork”¹²¹ is not so much that the sources of law are diverse; rather, it is that they are not harmonized. In other words, they do not work together effectively to exploit their differences for the achievement of a common goal—the adequate protection of the “moral” interests of American authors and artists across the country.

Nevertheless, state law can make an important contribution to the development of moral rights in the United States, and this potential contribution should not be overlooked. To some extent, this point is illustrated by VARA, which clearly stands on the shoulders of the earlier, state-level legislation on authors’ rights in California—legislation that inspired subsequent legislative efforts in New York and other states.

VARA is not an ideal illustration of the principle because it is arguably an incomplete and restrictive reinterpretation of CAPA rather than a true embodiment of its ideals. However, that is, in a sense, to be expected: CAPA was, and is, in the vanguard, and the “harmonization” of state law at the federal level will tend towards compromise, much as the Berne Convention itself represents an international compromise rather than French, German, or continental versions of the law. Moreover, VARA does not represent the harmonization of legislative approaches alone; it also represents cultural harmonization across states with different perspectives, which have found common ground at the federal level.

It is also an important insight to note that the progression from common law to national legislation is the historical pathway by which moral rights have always, and universally, developed. Hughes rightly draws attention to the relatively late codification of moral rights even in strong

¹¹⁹ Justin Hughes, *American Moral Rights and Fixing the Dastar ‘Gap,’* 2007 UTAH L. REV. 659, 703-14 (2007).

¹²⁰ SUNDARA RAJAN, COPYRIGHT AND CREATIVE FREEDOM, *supra* note 60, at 10–11. The point was emphasized in a statement by Professor Colin Tapper, Magdalen College, Oxford. (Personal communication with the author, 2006).

¹²¹ Hughes, *supra* note 119.

moral rights jurisdictions—France only wrote them into its Code in 1957¹²²—and it is fascinating to note that French *judges* were the first to recognize moral rights in that country,¹²³ beginning with jurisprudence arising early in the nineteenth century.¹²⁴

Even in the United Kingdom, which claims to have no tradition of moral rights protection, something akin to moral rights was, in fact, articulated by an English judge long before the Copyright, Designs and Patents Act 1988 was even dreamt of—as early as 1769!¹²⁵ In state law, then, the United States may find useful legal precedents for the recognition of authors’ “moral” interests, and through the development of state law, the United States may also have lived through a period of acculturation which will support the acceptance of these rights. Drawing upon this history may make it more likely that the movement towards legislative realization of moral rights will ultimately occur in U.S. federal law as it has elsewhere in the world.

At the time of U.S. accession to Berne, the newfound interest in moral rights among federal legislators unleashed a flood of strong feeling about artistic integrity in the hearts of U.S. creators. Nowhere was this more apparent than in the rapidly developing, technologically attuned, and controversial area of film. New technologies were affecting the treatment of movies, and, in particular, the colorization of black and white films had become a highly contentious issue. Director Woody Allen published an op-ed piece in the *New York Times* arguing in favor of moral rights for directors, and against colorization.¹²⁶ At the same time, one of the most famous moral rights cases in history was brewing: Anjelica Huston, the daughter of director John Huston, and Ben Maddow, the screenwriter of the film *The Asphalt Jungle*, successfully argued that John Huston’s moral right of integrity was violated by the colorization of his black and white classic.¹²⁷ What was perhaps most interesting about the case was the fact that it was brought in France—not in the United States. The reasoning of the French court, which relied upon well-accepted principles in the Berne

¹²² Hughes, *supra* note 119, at 708-09.

¹²³ See PRINCIPLES, PRACTICE AND NEW TECHNOLOGY, *supra* note 2, at 57.

¹²⁴ Russell J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists’ Rights in France and the United States*, 28 BULL. COPYRIGHT SOC’Y U.S.A. 1, 8-9 (1980-1981).

¹²⁵ Lord Mansfield discussed authors’ interests in their work, in terms closely akin to modern moral rights language, in *Millar v. Taylor*, [1769] 98 Eng. Rep. 201 at [2398]. See PRINCIPLES, PRACTICE AND NEW TECHNOLOGY, *supra* note 2, at 95-99.

¹²⁶ Woody Allen, *The Colorization of Films Insults Artists and Society*, N.Y. TIMES, June 28, 1987, at E25.

¹²⁷ *Turner Entm’t Co. v. Huston*, *Cour de cassation* [Cass.] [supreme court for judicial matters] 1e civ., July 6, 1983, Bull. Civ. I, No. 172, <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007026649>. An English language version of the final judgment, by the Versailles Court of Appeal on remand, as translated in Ent. L. Rep., Mar. 1995, at 3, is available at http://www.peteryu.com/intip_msu/turner.pdf (last visited Apr. 1, 2016). [hereinafter *Huston*].

Convention to apply French copyright law to Huston's case,¹²⁸ took a classically French approach to the litigation. It made use of Huston's own words, definitively against the colorization of his black and white work,¹²⁹ as sufficient evidence to find a violation of the moral right of integrity.¹³⁰ Broadcast of the colorized version of the film would not be permitted in France.¹³¹

This case could not have succeeded in the United States, simply because there was no legal basis on which to pursue such a claim.¹³² In other words, an affront to the integrity of a valuable American work, made by a great American film director, could be recognized and remedied in a foreign country, but *not in the United States of America*. In fact, American authors and artists enjoyed *more rights*, and *better protection abroad*, than they did in their own country. The *Huston* case was decided in 1991. More than a quarter-century later, nothing has changed. Where moral rights are concerned, U.S. authors continue to enjoy better protection for their rights abroad than they do in their own country. The interest of the American public in its cultural heritage is, at least in this respect, better protected abroad than it is in the United States.

¹²⁸ In fact, this issue accounted for the difference of opinion between the court of first instance deciding in favor of Huston's heirs, in 1988, on the basis that French law must be applicable to the parties in the case; while the case was reversed on appeal in 1989, on the grounds that U.S. law must apply to copyright questions involving a work originating in the United States. On final appeal to the Supreme Court of France (*Cour de cassation*), this position was reversed, and the court affirmed the principle that French law would apply to the case despite the American provenance of the film. *Id.* The issue turns on the interpretative approach to Article 5 of the Berne Convention, *supra* note 5. The position of the *Cour de cassation* in *Huston* was recently affirmed in a case involving the moral rights of an American photographer working in France for an American media company: *Cour de cassation* [Cass.] [supreme court for judicial matters] 1e civ., Dec. 15, 2010, Bull. Civ. I, No. 68, <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEX T000027303750&fastReqId=752968854&fastPos=1>.

¹²⁹ In *Huston*, the court quotes Huston as saying "I wanted to shoot it in black and white like a sculptor chooses to work in clay, to pour his work in bronze, to sculpt in marble." *Huston*, *supra* note 127 at ¶ 9. It considered these words dispositive of the case.

¹³⁰ Indeed, it is noteworthy that French law does not require proof of damage to reputation: see Article L121-1 of the Code de la propriété intellectuelle, which states simply, "L'auteur jouit du droit au respect de son nom, de sa qualité et de son oeuvre." Code de la propriété intellectuelle, *supra* note 65 (Fr.). https://www.legifrance.gouv.fr/affichCode.do?sessionId=01EBF59BDAAE01B7A40B12EB9349CC3C.tpdila23v_2?idSectionTA=LEGISCTA000006161636&cidTexte=LEGITEXT000006069414&dateTexte=20161115 (last visited Nov. 14, 2016). This is translated as, "An author shall enjoy the right to respect for his name, his authorship and his work," *translated at* https://www.legifrance.gouv.fr/content/download/1959/13723/version/3/.../Code_35.pdf (last visited Nov. 14, 2016).

¹³¹ A brief summary of the case, including its legislative history, may be found in Alan Riding, *Film Makers are Victors in a Lawsuit on Coloring*, N.Y. TIMES, Aug. 25, 1991, <http://www.nytimes.com/1991/08/25/movies/film-makers-are-victors-in-a-lawsuit-on-coloring.html>.

¹³² It may be worth noting, notwithstanding its lack of stature, that even the *Shostakovich* case, which offered some glimmerings of hope about the status of the moral rights doctrine in U.S. law, would have been no useful precedent; Judge Koch limited his reasoning in that case to public domain works. *See Shostakovich*, 80 N.Y.S.2d 575

This situation is potentially disheartening for American creators; it also does a disservice to the American public, which deserves measures in place that at least reflect, if not surpass, the minimum standards of protection for culture accepted by the international community of “civilized nations.”¹³³ American authors deserve the recognition that is due to them; the American public deserves to have its cultural heritage adequately valued. How can either party be satisfied when protection of their moral rights lags behind the norms universally accepted by other countries, placing them in a position of permanent disadvantage where the treatment of their work is concerned? What does this approach imply for the future of cultural heritage in the United States? Why should America’s valuable cultural heritage ultimately fall to be protected, as in the case of the Picasso mural in New York,¹³⁴ in the court of public opinion—potentially powerful, but with inherent limitations—while courts of law remain closed to them?

V. CONCLUSION

The public interest rationales for the protection of authors’ moral rights are both powerful and persuasive. Moral rights support the preservation of cultural heritage, and they also encourage the dissemination of culture in an authentic and integral form. They represent a humane attitude towards authors, whose creative engagement helps to preserve and celebrate, not only freedom of speech, but also freedom of thought, freedom of creativity, and, above all, freedom of the imagination.

The protection of moral rights encourages us to reflect upon the responsibilities, as well as the rights and prerogatives, of artists. The purpose of moral rights is to create an environment in which creative people are respected, and in which their work is valued, not only or primarily for its economic significance, but also, fundamentally, for its role in affirming and celebrating the core qualities of human civilization. By supporting creativity, the doctrine of moral rights supports the inherent desire, and right, to exercise and enjoy creative freedom in our own development as individuals. At some level, it can be said that we are all “authors.”¹³⁵ Moral rights also help to affirm our shared commitment to democracy by demonstrating our commitment to culture.

¹³³ See Davis, *supra* note 116, at 253-54 (making a number of excellent points about the public interest elements of moral rights).

¹³⁴ *Le Tricorne*, *supra* note 94.

¹³⁵ In Indian culture, this is conceptualized as the relationship between author and public, mediated by the work; in a sense, the person who truly enjoys the work, the *rasika*, must be as gifted as the author. The term, *rasika*, “he or she who enjoys,” is derived from the important Sanskrit word, “*rasa*”; it is described by Indian poet Subramania Bharati as “the key word of Indian culture.” See SUBRAMANIA BHARATI, *RASA – THE KEYWORD OF INDIAN CULTURE*, reprinted in *AGNI AND OTHER POEMS AND TRANSLATIONS, AND ESSAYS AND OTHER PROSE FRAGMENTS* (C. Viswanatha Ayyar, ed., A. Natarajan, Madras, 1980). This work is forthcoming in a new edition, Mira T. Sundara Rajan & S. Vijaya Bharati, eds.

In the final analysis, the absence of moral rights from American law devalues and disadvantages American culture. Without moral rights, American lawmakers fail to respect American authors and artists, denying them basic rights of attribution and integrity enjoyed by creative individuals in every other country in the world. American authors deserve better; so, too, does the American public.

**PIRATES OF THE SOUTHERN OCEAN: SEA SHEPHERD,
GREENPEACE AND THE IMPLICATIONS OF THE NINTH
CIRCUIT DECISION**

*Anna W. Gleysteen**

I. INTRODUCTION

Several hundred miles from shore in the middle of the Southern Ocean five or six large ships maneuver extremely close together. They are surrounded only by empty ocean. Suddenly, one of the ships accelerates to ram the others. The ships scramble to get out of the way, sometimes successful and sometimes not. This scene, and others told from the heart-pounding perspective of some of the ships' crews, will be familiar to anyone who has watched any of the five seasons of *Whale Wars* on Animal Planet.¹ A "documentary-style reality" television show, *Whale Wars* follows volunteers with the non-profit environmental group Sea Shepherd Conservation Society ("Sea Shepherd") as they harass and try to stop Japanese whalers in the Southern Ocean.² Sometimes the "victim" ship belongs to Sea Shepherd, sometimes it belongs to the whalers.³

For most people in the West, the word "pirates" probably brings to mind something along the lines of Spanish galleons, sunken treasure chests filled with gold coins, Johnny Depp as Captain Jack Sparrow, or *The Princess Bride*. Throughout its thirty-odd years of existence, legal scholars have wondered whether Sea Shepherd's actions could be classified as piracy.⁴ Notwithstanding Sea Shepherd's embrace of the label (its logo is a riff on a skull and crossbones, with the "crossbones" comprising a shepherd's staff and pitchfork, and a "victory list" of ships permanently stopped from whaling is displayed on the side of its ships),⁵ most scholars

* George Mason University School of Law, Juris Doctor, May 2017. Thank you to Alex Jensen for his comments during the drafting process, and to Krista Hughes for suggesting this topic.

¹ *Whale Wars* aired on Animal Planet from 2008 to 2015. See *Whale Wars*, IMDB, <http://www.imdb.com/title/tt1195419/> (last visited Apr. 23, 2017).

² *Whale Wars: Plot Summary*, IMDB, <http://www.imdb.com/title/tt1195419/plotsummary> (last visited Apr. 23, 2017). Sea Shepherd also engages in "defense campaigns" for other marine species such as dolphins and sea turtles, but is best known for its aggressive opposition to whaling. See *Campaigns*, SEA SHEPHERD GLOBAL, <https://www.seashepherdglobal.org/campaigns/campaigns.html> (last visited Apr. 23, 2017).

³ *Compare Tensions High as Protest Boat, Whalers Collide in Antarctic Sea*, CBC NEWS (Feb. 6, 2009, 5:37 AM), <http://www.cbc.ca/news/world/tensions-high-as-protest-boat-whalers-collide-in-antarctic-sea-1.810667>, with Andrew Darby, *Japanese Ship Destroys Whale Protest Boat Ady Gil*, SYDNEY MORNING HERALD (Jan. 6, 2010), <http://www.smh.com.au/environment/whale-watch/japanese-ship-destroys-whale-protest-boat-ady-gil-20100106-ltp4.html>.

⁴ See *infra* notes 21, 30-31, 71, 89 and accompanying text.

⁵ See *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, 725 F.3d 940, 948 (9th Cir. 2013).

had concluded that Sea Shepherd's actions were outside the international definition of piracy.⁶ In 2013 however, their questions were answered when the Court of Appeals for the Ninth Circuit declared that Sea Shepherd's actions did qualify as piracy under the law.⁷

The international definition of piracy includes a requirement that the violence on the sea be committed for "private ends."⁸ Applying the plain meaning rule, the Ninth Circuit concluded that "private" simply meant the opposite of "public," and therefore Sea Shepherd's interventions constituted piracy.⁹ However, there is extrinsic evidence apparently not considered by the Court that the original drafters of the definition intended "private ends" to distinguish piracy from privateering (state-sponsored piracy), and that they intended an exception for politically motivated actions. The Court's overly broad understanding of "private ends" means that actors who do not derive a direct or personal benefit from their actions may be found to be pirates.

While the Court may have applied a plain meaning rule in terms of dictionary definitions, its interpretation is out-of-sync with the general understanding of what piracy means. Furthermore, applying other existing laws, specifically the maritime anti-terrorism treaty (Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, or SUA) and or navigational regulations (COLREGS), to ecoterrorism produces a more consistent result in different situations and does not necessitate contorting the elements of piracy.

This Note will first provide background about Sea Shepherd, Greenpeace, the International Whaling Commission, and the whaling moratorium. It will also review the current status of international law regarding piracy and maritime terrorism, including the historical underpinnings of both crimes. Second, this Note will establish that the Ninth Circuit fundamentally misinterpreted "private ends" in the definition of piracy, and explore the legal ramifications of permitting tort suits for piracy, which has not occurred before in the United States, including the options for enforcement. Finally, this Note will argue that the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation is a more effective legal tool for pursuing aggressive environmental protest groups.

II. BACKGROUND

This section provides context for explaining the clash between Sea Shepherd and Japanese whalers. It begins by explaining how Sea Shepherd

⁶ See generally *infra* notes 30-31, 89.

⁷ See *Inst. of Cetacean Research*, 725 F.3d at 944.

⁸ *Id.* at 943.

⁹ See *id.* at 943-44.

“spun off” from Greenpeace due to activists’ desires for an organization that would take more direct physical action, although Greenpeace also engages in actions that may be considered piracy. It explains the historical foundations of piracy law and universal jurisdiction, the modern definition of piracy as used in current treaties, and other possible legal avenues that could be used to pursue Sea Shepherd, namely the maritime terrorism treaty known as SUA, and flag state regulations called COLREGS. It then provides a detailed briefing of the Ninth Circuit decision. Finally, it concludes with explaining the handful of international cases that have dealt with environmental activism as piracy, and the legitimacy of the Japanese scientific whaling program.

A. *Sea Shepherd & Greenpeace*

Greenpeace was founded in 1971 and works “to expose global environmental problems and promote solutions.”¹⁰ Its catchy name and its memorable methods (non-violent direct action and so-called “creative communication”¹¹) have led it to become one of the largest and best-known non-governmental organizations and environmental advocacy groups.¹² It has 2.8 million members worldwide, 250,000 of whom live in the United States,¹³ and considers itself politically independent.¹⁴ While most of its protests are considered peaceful demonstrations, such as handing out flyers in city centers,¹⁵ Greenpeace activists also take more invasive direct action, such as scaling drilling rigs in the ocean.¹⁶

Paul Watson was an influential early member of Greenpeace.¹⁷ Watson and Greenpeace parted ways when Greenpeace felt Watson’s ideas were too aggressive and radical, and would jeopardize public goodwill and therefore Greenpeace’s ability to raise funds.¹⁸ Watson wanted an

¹⁰ See *About*, GREENPEACE, <http://www.greenpeace.org/usa/about/> (last visited Apr. 23, 2017) [hereinafter GREENPEACE].

¹¹ *Id.*

¹² *Resources – Environmental Organizations*, *Bill Moyers Reports: Earth on Edge*, PBS, <http://www.pbs.org/earthonedge/resources2.html> (last visited Apr. 23, 2017).

¹³ GREENPEACE, *supra* note 10.

¹⁴ “Greenpeace does not solicit contributions from governments or corporations” and does not “endorse political candidates.” *Id.*

¹⁵ Kristian Buus, *Sharks Protest Princes Fishing Methods*, GREENPEACE (Feb. 21, 2011), <http://www.greenpeace.org/international/en/multimedia/photos/Greenpeace-Targets-Princes-over-Tuna-Fishing-Methods/>.

¹⁶ See Ryan Schleeter, *As It Happened: Seattle Kayaktivists Blockade Shell’s Alaska-Bound Oil Rig*, GREENPEACE (June 15, 2015), <http://www.greenpeace.org/usa/breaking-seattle-kayaktivists-blockade-shells-alaska-bound-oil-rig/>; Evan Simon, *Activists Who Scaled Shell’s Arctic-Bound Oil Rig Refuse to Leave Despite Legal Threats*, ABC NEWS (Apr. 10, 2015, 9:27 PM), <http://abcnews.go.com/US/activists-scaled-shells-arctic-bound-oil-rig-refuse/story?id=30227746>.

¹⁷ See *Our History: The History of Sea Shepherd*, SEA SHEPHERD CONSERVATION SOC’Y, <http://www.seashepherd.org/who-we-are/our-history.html> (last visited Apr. 23, 2017).

¹⁸ Raffi Khatchadourian, *Neptune’s Navy*, NEW YORKER, Nov. 5, 2007, <http://www.newyorker.com/magazine/2007/11/05/neptunes-navy>.

organization willing to use more aggressive tactics to “enforce” maritime law, rather than merely protest.¹⁹ The result was the founding of Sea Shepherd in 1981, with the self-described purpose of “us[ing] innovative direct-action tactics to investigate, document, and take action when necessary to expose and confront illegal activities on the high seas.”²⁰

Sea Shepherd’s first “highlight” came in 1979 (before the formal founding of the current organization), when Watson and his fellow activists used their ship (named *Sea Shepherd*) to ram the *Sierra*, a “notorious” whaling ship²¹ described as “the worst offender in a dirty business.”²² (While the present moratorium on whaling was not yet in place, there was already significant opposition to commercial whaling.²³) The *Sea Shepherd* ship was a 250-foot converted trawler, and Watson had reinforced the bow with concrete.²⁴ After first striking a glancing blow as a warning, the *Sea Shepherd* returned for a knockout that tore a six-foot hole in the ship and stove in forty-five feet of the hull.²⁵ Although the *Sierra* managed to escape the *Sea Shepherd*’s clutches, the *Sierra* was badly damaged.²⁶ The *Sierra*’s insurer, Lloyds of London, declined to pay out insurance because it was registered illegally, and Lloyds cancelled the policies of other whaling ships.²⁷

Buoyed by this initial victory, Watson and his fellow activists targeted other whaling fleets. Sea Shepherd boasts of sinking ten whaling ships using similar tactics, and says it has been responsible for “[s]hutting down half of the Spanish whaling fleet,” “[s]cuttling half of the Icelandic whaling fleet and whale processing station,” “[s]cuttling [] the Norwegian

¹⁹ See Khatchadourian, *supra* note 18.

²⁰ *Who We Are*, SEA SHEPHERD CONSERVATION SOC’Y, <http://www.seashepherd.org/who-we-are/> (last visited Apr. 23, 2017).

²¹ Gerry Nagtzaam, *Gaia’s Navy: The Sea Shepherd Conservation Society’s Battle to Stay Afloat and International Law*, 38 WM. & MARY ENVTL. L. & POL’Y REV. 613, 638 (2014).

²² *Id.* at 638 n.196. The *Sierra*’s “worst offender” crown came not only from its violations of international conventions on whaling and fishing, but from its reputation for not paying its bills for fuel and provisions at ports. *Id.* Despite its reputation, neither the International Whaling Commission nor other government bodies took steps against it. *Id.*

²³ IWC announced the moratorium on commercial in 1982, and it went into effect during the 1985-86 whaling season. *Commercial Whaling*, INT’L WHALING COMM’N, <https://iwc.int/commercial> (last visited Apr. 23, 2017). It remains in place to this day. *Id.* Norway and Iceland continue to whale in their exclusive economic zones under objection and reservation to the moratorium. *Id.* Countries bound by the moratorium may issue special permits to whale under a scientific exception clause. *Special Permit Whaling*, INT’L WHALING COMM’N, <https://iwc.int/permits> (last visited Apr. 23, 2017). Canada also continued whaling after leaving the ICW in 1982 in protest of the moratorium. See 3.9 *Commercial Whale Hunting*, GREEN PARTY OF CAN., <http://www.greenparty.ca/en/policy/vision-green/environment/whale-hunting> (last visited Apr. 23, 2017). Canada has since implemented a national ban, but has not rejoined the IWC. *Id.*

²⁴ Nagtzaam, *supra* note 21, at 638.

²⁵ *Id.* at 639.

²⁶ *Id.*

²⁷ *Id.* at 641.

whaling vessels *Nybraena* and *Senet*,” and “[c]onfronting and opposing Japan’s illegal whaling in Antarctica.”²⁸ Since the implementation of the whaling moratorium in the mid-1980s,²⁹ Sea Shepherd has focused its efforts on the Japanese whaling fleet, which takes whales under the so-called “scientific exception” to the moratorium.³⁰ Under the terms of the special permits, any whales caught must be processed, which means that whale meat is available for purchase³¹ in fish markets and restaurants in Japan.³²

Sea Shepherd’s methods for confronting whaling ships are purposely sensational and destructive.³³ They are so dramatic that they make for good reality TV.³⁴ In addition to ramming vessels at sea, Sea Shepherd has sunk ships in harbors, navigated extremely close to whaling ships, thrown butyric acid (rancid butter) to spoil whale meat,³⁵ thrown smoke bombs,³⁶ thrown safety flares to burn through the whaling ships nets,³⁷ pointed lasers to disorient the crew of the whaling ships, and thrown prop foulers to disable the ships.³⁸ Sea Shepherd crewmembers have also boarded whaling ships in attempts to disrupt their activities.³⁹

In response, according to evidence presented to the District Court, the Japanese whaling fleet has hung nets above and alongside the decks of the ships to catch projectiles,⁴⁰ shot water canons at Sea Shepherd boats, and employed concussion grenades and grappling hooks, long-range

²⁸ *The Whales’ Navy*, SEA SHEPHERD CONSERVATION SOC’Y, <http://www.seashepherd.org/campaigns/whales.html> (last visited Apr. 23, 2017).

²⁹ *Id.* See generally International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72.

³⁰ Joseph Elliot Roeschke, *Eco-Terrorism and Piracy on the High Seas: Japanese Whaling and the Rights of Private Groups to Enforce International Conservation Law in Neutral Waters*, 20 VILL. ENVTL. L.J. 99, 104 (2009).

³¹ Andrew Hoek, *Sea Shepherd Conservation Society v. Japanese Whalers, the Showdown: Who is the Real Villain?*, 3 STAN. J. ANIMAL L. & POL’Y 159, 170 (2010).

³² Whale meat cannot be sold internationally under United Nations Convention on International Trade in Endangered Species because whales are endangered species, or species that may become endangered. See Convention on International Trade in Endangered Species of Wild Fauna and Flora, arts. III-IV, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243.

³³ “Ramming is his signature tactic, and it is what he and his crew intended to do to the Japanese fleet, if they could find it.” Khatchadourian, *supra* note 18.

³⁴ *Whale Wars*, *supra* note 1.

³⁵ Nagtzaam, *supra* note 21, at 615.

³⁶ *Id.* at 648 n.297.

³⁷ *Id.* at 635.

³⁸ *Id.* at 615. Prop foulers are instruments designed to get tangled in the propellers of a ship, thereby rendering the propeller inoperative. See *Prop Fouler*, ANIMAL PLANET, <http://www.animalplanet.com/tv-shows/whale-wars/videos/prop-fouler/> (last visited Apr. 23, 2017). Vessels with non-working propellers are unable to steer and are at the mercy of the sea because they cannot steer into waves to avoid capsizing. See *id.*

³⁹ Justin McCurry, *Sea Shepherd Supporters Held on Japanese Whaling Vessel*, GUARDIAN (Jan. 9, 2012), <http://www.theguardian.com/environment/2012/jan/09/sea-shepherd-supporters-held-whaling>.

⁴⁰ *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc’y*, 860 F. Supp. 2d 1216, 1223 (W.D. Wash. 2012), *rev’d*, 725 F.3d 940 (9th Cir. 2013).

acoustic devices (which produce a loud sound that disables humans within a certain range).⁴¹ The whaling fleet even has one vessel devoted solely to resisting Sea Shepherd's tactics.⁴² The District Court credited claims that no one has been injured by any of the interactions,⁴³ although on appeal, the Ninth Circuit observed that "a dangerous act, if committed often enough, will inevitably lead to harm"⁴⁴

Sea Shepherd is registered in several countries. Its global headquarters is in the Netherlands,⁴⁵ and its U.S. and Australian entities are not-for-profit organizations.⁴⁶ The group is staffed by unpaid volunteers and a small number of paid staff.⁴⁷ In 2007 it had a budget of approximately \$14 million and was funded by Watson's paid lectures, and corporate and private donations.⁴⁸ Sea Shepherd has attracted a raft of celebrity donors, including Pierce Brosnan, Martin Sheen, Christian Bale, Bob Barker, Brigitte Bardot, and the founder of Patagonia.⁴⁹ The various Sea Shepherd entities currently operate eight different ships, eight accompanying small boats, six smaller vessels and several drones.⁵⁰ The ships are variously registered in the Netherlands, the U.S., the UK and Australia.⁵¹ Sea Shepherd's logo is a skull and crossbones, which consist of a shepherd's hook crossing a pitchfork so as to look like the traditional Jolly Roger pirate symbol.⁵²

Sea Shepherd claims it is enforcing international law in preventing whaling, and cites the U.N. Charter for Nature as authorizing its activities.⁵³ Its website states: "Sea Shepherd's primary mandate is to assume a law

⁴¹ Inst. of Cetacean Research, 725 F.3d at 1224.

⁴² *Id.* at 1222.

⁴³ *See id.* at 1223-1224.

⁴⁴ *Id.* at 946.

⁴⁵ *Opening of Sea Shepherd Global Headquarters and Store*, SEA SHEPHERD CONSERVATION SOCIETY (Oct. 15, 2014), <https://www.seashepherdglobal.org/news-and-commentary/news/opening-of-sea-shepherd-global-headquarters-store.html>.

⁴⁶ *Who We Are*, *supra* note 20; *Who We Are*, SEA SHEPHERD AUSTRALIA, <http://www.seashepherd.org.au/who-we-are/about-us/who-we-are.html> (last visited Jan. 8, 2016) [hereinafter SEA SHEPHERD AUSTRALIA]; The Australian entity, which was not party to the action in the Ninth Circuit now runs the Southern Ocean campaigns. *The Whale's Navy*, *supra* note 28. The U.S. website stresses that the Australian entity is separate. *Id.* However, their websites use the same design and same Sea Shepherd "pirate" logo. *Compare Who We Are*, *supra* note 20, with SEA SHEPHERD AUSTRALIA, *supra* note 46.

⁴⁷ Khatchadourian, *supra* note 18.

⁴⁸ *Id.*

⁴⁹ Nagtzaam, *supra* note 21, at 628; *Sea Shepherd Welcomes the Farley Mowat and the Jules Verne to its Fleet*, SEA SHEPHERD CONSERVATION SOCIETY (June 1, 2015), <http://www.seashepherd.org/news-and-media/2015/06/01/sea-shepherd-welcomes-the-farley-mowat-and-the-jules-verne-to-its-fleet-1697> [hereinafter *Sea Shepherd Welcomes*].

⁵⁰ *See Sea Shepherd Welcomes*, *supra* note 49.

⁵¹ *See id.*

⁵² *See, e.g., Sea Shepherd Conservation Society*, SEA SHEPHERD CONSERVATION SOCIETY, <http://www.seashepherd.org/> (last visited Apr. 23, 2017).

⁵³ *See International Laws and Charters*, SEA SHEPHERD CONSERVATION SOCIETY, <http://www.seashepherd.org/who-we-are/laws-and-charters.html> (last visited Apr. 23, 2017).

enforcement role as provided by the United Nations World Charter for Nature.”⁵⁴ Section 21 of the Charter says international organizations, individuals and groups, along with member states and other public authorities, may “implement the applicable international legal provisions for the conservation of nature and the protection of the environment.”⁵⁵ Sea Shepherd claims its interpretation of the law was “upheld” in 1995 when Watson, charged in Canadian court with felony mischief for interfering with drag trawlers in Canadian waters, cited the Charter and was acquitted by the court.⁵⁶

B. *Historical Development of Piracy Law*

This section explains the historical differences between piracy and its state-sanctioned counterpart, privateering. It goes on to explain the origins of universal jurisdiction for piracy, and the current definition of piracy, as defined in two treaties.

i. *Historical Definitions of Piracy and Privateering*

It is often stated that, historically, pirates were *hosti humani generis* (enemies of all mankind).⁵⁷ While definitions did vary, it was commonly described as “unlicensed robbery on the high seas.”⁵⁸ Under the law, if not in practice, piracy was distinct from privateering.⁵⁹ In the early part of the modern era, European governments employed pirates as privateers.⁶⁰ Privateers were pirates blessed with letters of marque, or commissions, from a government endorsing the attack of another country’s ships.⁶¹ Privateers functioned as tools and proxies during conflicts, such as Sir Francis Drake’s raids on the Spanish-controlled South American coastline during the Elizabethan era.⁶²

Privateers were early government contractors, and their use allowed nations to maintain much smaller standing navies.⁶³ Letters of marque were so important that granting letters is one of the enumerated

⁵⁴ *Mandate*, SEA SHEPHERD CONSERVATION SOC’Y, <http://www.seashepherd.org/who-we-are/mandate.html> (last visited Apr. 23, 2017).

⁵⁵ G.A. Res. 37/7, World Charter for Nature, ¶ 21(c) (Oct. 28, 1982), <http://www.un.org/documents/ga/res/37/a37r007.htm>. See also *id.* at ¶¶ 21-23.

⁵⁶ *Mandate*, *supra* note 54.

⁵⁷ Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation*, 45 HARV. INT’L L.J. 183, 202 (2004).

⁵⁸ *Id.* at 191.

⁵⁹ See *Harmony v. United States (The Brig Malek Adhel)*, 43 U.S. 210, 232 (1844) (holding that conduct, not motive, defines piracy).

⁶⁰ See Kontorovich, *supra* note 57, at 210.

⁶¹ See *id.* at 211.

⁶² See, e.g., *Francis Drake*, BIOGRAPHY, <http://www.biography.com/people/francis-drake-9278809> (last visited Apr. 24, 2017).

⁶³ Kontorovich, *supra* note 57, at 213.

powers given to Congress in the U.S. Constitution.⁶⁴ While the penalty for piracy was death, privateers who were caught were not considered criminals.⁶⁵ In the first example of universal jurisdiction, the law of nations allowed any country that caught a pirate to try and summarily execute him, regardless of his nationality or where he was apprehended.⁶⁶ Meanwhile a privateer's status was something akin to a prisoner of war (even if war had not been formally declared), and privateers were repatriated to their home state.⁶⁷

The line between piracy and privateering could be blurry. Privateers encountering lucrative ships beyond the scope of their commissions would often take the prize anyway, thereby simultaneously being pirates and privateers.⁶⁸ Both privateers and pirates acted for private gain; the difference between them was whether or not they agreed to some form of regulation by a state in return for that state's protection.⁶⁹ Piracy and privateering coexisted within the Western legal system, with sailors' legal statuses sometimes alternating between the two.⁷⁰

ii. *The Origins of Universal Jurisdiction*

Tolerance for piracy began to decline in the later part of the seventeenth century. In 1700 England defined "piracy" by statute more precisely when Parliament passed a law titled "An Act for the more effectuall Suppressions of Piracy."⁷¹ Piracy was explicitly defined as maritime robbery and made a capital crime, as robbery on land was.⁷² While the jurisdiction of that law was limited to foreigners acting against British subjects and property and Britons acting under the colors of other states, other European countries soon passed similar laws.⁷³ Piracy affected all of the European powers, whose mercantilist economies depended heavily on maritime exchanges with their colonies.⁷⁴ Suppression of piracy was

⁶⁴ U.S. CONST. art. I, § 8, cl. 11. "To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." *Id.*

⁶⁵ Kontorovich, *supra* note 57, at 210.

⁶⁶ *Id.* at 190.

⁶⁷ *See id.* at 210.

⁶⁸ *See id.* at 216.

⁶⁹ *Id.* at 217.

⁷⁰ *See id.* at 210.

⁷¹ Whitney Magnuson, *Marine Conservation Campaigners as Pirates: The Consequences of Sea Shepherd*, 44 ENVTL. L. 923, 940 (2014). *See* An Act for the More Effectuall Suppressions of Piracy 1700, 11 Will. 3, c.7.

⁷² ". . . it is enacted that Treasons Felonies Robberies Murthers and Confederacies committed on the Sea shall be enquired of tryed and determined according to the common Course of the Laws of this Land used for such Offences upon the Land within this Realme . . ." *William III, 1698-9: An Act for the More effectuall Suppressions of Piracy*, BRITISH HISTORY ONLINE, <http://www.british-history.ac.uk/statutes-realm/vol7/pp590-594> (last visited June 25, 2017).

⁷³ *See* Magnuson, *supra* note 71.

⁷⁴ *See* Simon Barker, *International Maritime Piracy: And Old Profession That Is Capable of New Tricks, But Change Is Possible*, 46 CASE W. RES. J. INT'L L. 387, 389 (2013).

considered the duty of all sea-faring nations, rather than a right.⁷⁵ Fifty-five nations (although not the United States)⁷⁶ ratified the 1856 Paris Declaration, which banned all forms of piracy, including privateering.⁷⁷ Piracy thus became the first crime subject to what is now called universal jurisdiction.⁷⁸ Universal jurisdiction meant that “[the pirate] is no longer a national, but a *hostis humani generis* and as such he is justiciable by any State anywhere” because “a person guilty of such piracy has placed himself beyond the protection of any State.”⁷⁹

iii. The Modern “Definition” of Piracy

Although piracy was considered a scourge by most nations, it was not until after World War I that an international definition of piracy was proposed.⁸⁰ While it was “deemed to be of insufficient interest” and dropped from the League of Nations conference, which had originally proposed discussing it, an independent research committee at Harvard published a treatise in 1932 known as the Harvard Research in International Law Draft Convention Piracy (“Harvard Draft”).⁸¹ The Harvard Draft was the basis for the definition of piracy in the 1958 Convention on the High Seas (“High Seas”).⁸² That convention, which has sixty-three signatories including the United States, is one of two international agreements addressing piracy, both of which are modeled off of the Harvard Draft’s definition of piracy.⁸³ The second agreement is the 1982 United Nations Convention on the Law of the Sea (UNCLOS).⁸⁴

⁷⁵ See Barker, *supra* note 74, at 389.

⁷⁶ Declaration Respecting Maritime Law: Paris, 16 April 1856, INT’L COMM. OF THE CROSS, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=105 (last visited Apr. 24, 2017). The United States was keen to retain privateering, which continued well into the Civil War era. See, e.g., *United States v. Steinmetz*, 973 F.2d 212, 219 (3d Cir. 1992) (summarizing the legal implications of Union and Confederate privateering when captured by the other side).

⁷⁷ See Declaration Respecting Maritime Law art. 1, Apr. 16, 1856, <https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=473FCB0F41DCC63BC12563CD0051492D>. “Privateering is, and remains, abolished.” *Id.* The treaty does not define privateering. See *id.*

⁷⁸ See DANIEL HELLER-ROAZEN, THE ENEMY OF ALL: PIRACY AND THE LAW OF NATIONS 91 (2009).

⁷⁹ *In re Piracy Jure Gentium* [1934] A.C. 586 (PC).

⁸⁰ See Magnuson, *supra* note 71, at 940-41. The United States was one of the last countries to give up endorsement of privateering. See *supra* note 76. While no letters of marque have been issued since the War of 1812, Congressman Ron Paul suggested that the government revive letters of marque and issue them against terrorists. See, e.g., Erika Lovely, *Ron Paul’s Plan to Fend Off Pirates*, POLITICO (Apr. 15, 2009, 4:16 AM), <http://www.politico.com/story/2009/04/ron-pauls-plan-to-fend-off-pirates-021245>.

⁸¹ Magnuson, *supra* note 71, at 940-41.

⁸² *Id.* at 941.

⁸³ Compare Convention on the High Seas art. 15, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 11 [hereinafter High Seas], and United Nations Convention on the Law of the Sea art. 101, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS], with Joseph W. Bingham,

The definition of piracy in both treaties is:

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).⁸⁵

UNCLOS goes on to add that “every State may seize a pirate ship . . . and arrest the persons and seize the property on board,”⁸⁶ and the seizure “may be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.”⁸⁷

UNCLOS re-used the High Seas piracy definition despite the fact that a number of problems had already been identified with the definition.⁸⁸ There are three main gaps in the High Seas/UNCLOS definition, as identified by maritime law experts: (1) the jurisdictional requirement of being on the high seas (as opposed to territorial waters); (2) the two-ship requirement; and (3) the difficulty of interpreting “private ends.”⁸⁹

According to contemporary evidence and drafting notes from the Harvard Draft, the term “private ends” appears to have been used to differentiate piracy from acts committed for political ends, such as terrorism.⁹⁰ The draft observed that “[t]he traditional idea of a pirate is a

Draft Convention and Comment, Codification of International Law: Part VI: Piracy, 26 AM. J. INT'L L. SUPP. 739, 743 (1932) [hereinafter Harvard Draft].

⁸⁴ The United States is not a signatory to UNCLOS, although U.S. courts have accepted it as customary international law. *See United States v. Hasan*, 747 F. Supp. 2d 599, 619 (E.D. Va. 2010).

⁸⁵ UNCLOS, *supra* note 83; High Seas, *supra* note 83.

⁸⁶ UNCLOS, *supra* note 83, at art. 105.

⁸⁷ *Id.* at art. 107.

⁸⁸ Barker, *supra* note 74, at 393.

⁸⁹ Michael Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations*, 40 VAND. J. TRANSNAT'L L. 1, 17 (2007).

⁹⁰ Barry Hart Dubner & Claudia Pastorius, *On the Ninth Circuit's New Definition of Piracy: Japanese Whalers v. the Sea Shepherd – Who are the Real “Pirates” (i.e. Phunderers)?*, 45 J. MAR. L. & COM. 415, 427 (2014).

bold and definite one. It pictures a professional robber who sails the sea in a pirate ship to attack and plunder other ships or communities.”⁹¹ A pirate was further described as “belong[ing] to no state or organized political society, or by the nature of his act he has shown his intention and his power to reject the authority of that to which he is properly subject.”⁹² In the minds of the Harvard drafters, piracy was closely linked to robbery, murder, plundering and kidnapping, none of which are Sea Shepherd’s aims.⁹³

C. Other Possible Grounds for Prosecution

This section explains other legal avenues for pursuing Sea Shepherd. It starts by explaining the maritime terrorism treaty that was intended to close gaps left by piracy’s “narrow” definition. It then explains the duties of flag states (the home nations where ships are registered) and their obligations under international law.

i. Maritime Terrorism Treaty

The limitations of the High Seas and UNCLOS agreements were put in stark relief after the hijacking of the cruise liner *MS Achille Lauro*. The treaties did not cover the hijackers’ actions because the hijackers did not use a boat to reach the cruise ship, and therefore did not meet the two-ship requirement.⁹⁴ In consequence, the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (“SUA”) was drafted specifically to cover acts of terrorism at sea that may not be covered by existing piracy laws.⁹⁵ It consolidated previous anti-terrorism conventions developed for air travel⁹⁶ and applied them to maritime law by establishing extraditable offenses for the direct involvement in intentionally threatening, attempting or actually endangering the safe navigation of a ship.⁹⁷ Adopted in 1985, SUA presently has 163 state signatories, including the United States, Australia, Japan and the Netherlands.⁹⁸ SUA is intended

⁹¹ Harvard Draft, *supra* note 83, at 769.

⁹² *Id.* at 771.

⁹³ See Dubner & Pastorius, *supra* note 90, at 424.

⁹⁴ Helmut Tuerk, *Combating Terrorism At Sea -- The Suppression Of Unlawful Acts Against The Safety Of Maritime Navigation*, 15 U. MIAMI INT’L & COMP. L. REV. 337, 343 (2014). The ship was hijacked and taken hostage by Palestinian terrorists while sailing from Alexandria to Port Said. *Id.* at 338. In addition to not meeting the two-ship requirement, it was unclear if the ship was on the high seas or in Egyptian waters when it was hijacked. *Id.* The Egyptian government also argued that the hijackers did not meet the “private ends” requirement. *Id.* at 343.

⁹⁵ See *id.* at 344-45.

⁹⁶ See *id.* at 344-45.

⁹⁷ See *id.* at 349.

⁹⁸ See INT’L MAR. ORG., STATUS OF MULTILATERAL CONVENTIONS AND INSTRUMENTS IN RESPECT OF WHICH THE INTERNATIONAL MARITIME ORGANIZATION OR ITS SECRETARY-GENERAL PERFORMS DEPOSITORY OR OTHER FUNCTIONS, 13-16,

<http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202017.pdf> (last visited Apr. 24, 2017).

to aid the apprehension, conviction, and punishment of terrorists.⁹⁹ Despite the presence of “suppression” in its title, SUA is not focused on preventing terrorism.¹⁰⁰ The treaty states:

Any person commits an offence if that person unlawfully and intentionally:

...

(b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or

(c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship . . .¹⁰¹

SUA does not define terrorism, and rather refers only to “unlawful acts.”¹⁰²

Like other anti-terrorism conventions, SUA requires signatories who find an alleged terrorist in their territory to either extradite or prosecute the person.¹⁰³ However, the requirement is weakened by an exception for political offenses.¹⁰⁴ SUA also contains a provision stating that it may be considered a legal basis for extradition requests with respect to maritime terrorism offenses.¹⁰⁵ However, nations have been reluctant to extradite to other nations with which they do not have separate, free-standing extradition treaties.¹⁰⁶ Possibly because of these factors, SUA has been comparatively little used in the fight against terrorism.¹⁰⁷

⁹⁹ See Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221, pmb. [hereinafter SUA].

¹⁰⁰ Tuerk, *supra* note 94, at 349.

¹⁰¹ SUA, *supra* note 99, at art. 3, cls. 1(b)-(c).

¹⁰² *See id.*

¹⁰³ *Id.* at art. 10.

¹⁰⁴ *See id.* at art. 10, cl. 2. The 2005 amendments to SUA narrowed the exception by requiring that refusals to extradite based on political offenses have an additional, supporting legal ground. *See* Adoption of the Final Act and Any Instruments, Recommendations and Resolutions Resulting From the Work of the Conference: Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 11*bis*, IMO Doc. LEG/CONF.15/21 (Nov. 1, 2005), https://www.unode.org/tldb/pdf/Protocol_2005_Convention_Maritime_navigation.pdf.

¹⁰⁵ *Id.* at art. 11, cl. 2. “If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, the requested State Party may, at its option, consider this Convention as a legal basis for extradition . . .” *Id.*

¹⁰⁶ Amanda M. Caprari, *Lovable Pirates? The Legal Implications of the Battle Between Environmentalists and Whalers in the Southern Ocean*, 42 CONN. L. REV. 1493, 1518 (2010).

¹⁰⁷ *See id.*; *see also* Tuerk, *supra* note 94, at 366.

ii. COLREGs and Obligations of Flag States

As a means of control, large vessels are required to register with a country, often referred to as a flag state.¹⁰⁸ A ship is subject to the laws of its flag state.¹⁰⁹ The international regulations for operation of vessels at sea (known as “COLREGS”)¹¹⁰ are the rules that all vessels flagged under member states must follow, and are supposed to be vigorously enforced.¹¹¹ COLREGS obligate the ship’s master to observe the rules and apply the collision regulations.¹¹² Separately, UNCLOS requires that states “take any steps necessary” upon any violation of international law, which includes COLREGS.¹¹³

Of course it is possible for vessels to sail without registering with a flag state. Sailing without registration does not make a ship a pirate ship by default, but it does mean that the ship has no legal status under international law.¹¹⁴ UNCLOS allows warships on the high seas to board ships reasonably believed to be sailing without a nationality.¹¹⁵

¹⁰⁸ INT’L MAR. ORG., *Convention on the International Regulations for Preventing Collisions at Sea*, 1972 (COLREGs), <http://www.imo.org/en/About/conventions/listofconventions/pages/colreg.aspx> (last visited Apr. 25, 2017).

¹⁰⁹ *See, e.g.,* McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21 (1963).

¹¹⁰ *See also* U.S. DEPARTMENT OF HOMELAND SECURITY: UNITED STATES COAST GUARD, NAVIGATION RULES: INTERNATIONAL-INLAND iv (1999), <https://www.navcen.uscg.gov/pdf/navRules/navrules.pdf>; *see generally* Convention on the International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 28 U.S.T. 3459, 1050 U.N.T.S. 16 [hereinafter COLREGS].

¹¹¹ Robert P. McCleskey, Jr. & Jeremy A. Herschaft, *Unique Features of Maritime Collision Law*, 79 TUL. L. REV. 1403, 1409-10 (2005).

¹¹² *See* COLREGS, *supra* note 109, at r.2.

¹¹³ *See* UNCLOS, *supra* note 83, at art. 94, cl. 5.

¹¹⁴ Hoek, *supra* note 31, at 185.

¹¹⁵ UNCLOS, *supra* note 83, at art. 110, cl. 1(d).

D. Judicial Developments

This section reviews the current case law relating to piracy and direct action environmental activism. It explains the only two cases to date in which direct action by environmental activists has been defined as piracy: *Castle John*, decided by a Belgian court in 1986, and *ICR v. Sea Shepherd*, decided by the Ninth Circuit in 2013. It reviews two legal cases that support Sea Shepherd's contention that Japan's whaling program is illegal: a 2008 case in which an Australian court ordered Japanese whalers to cease operations in the Australian Whale Sanctuary, and a 2014 decision from the International Court of Justice holding that Japan was violating the whaling moratorium. It also summarizes two recent cases in Russia and Alaska in which Greenpeace activists climbed aboard drilling rigs.

i. Greenpeace and Castle John

Prior to the Ninth Circuit decision in 2013, there was only one other court decision that held an act of aggressive environmental activism to be piracy.¹¹⁶ In *Castle John*, a Belgian court held in 1986 that Greenpeace activists had committed piracy when the activists boarded two boats they believed to be improperly discharging waste at sea, tied themselves to the boats and refused requests to leave.¹¹⁷ The activists intended to highlight the harmful effects of the discharge.¹¹⁸ While the reasoning in the opinion is sparse, it concluded their means amounted to piracy.¹¹⁹ While taking pains to note that it lauded their objectives, the court concluded the activists had acted for private ends because they were motivated by personal desires reflecting a political perspective, rather than "in the interest or to the detriment of a State or State system."¹²⁰ The *Castle John* decision was not cited as precedent by any courts until 2013, when it was given "considerable weight" by the Ninth Circuit.¹²¹ Until 2013 it had been written off as an outlier by most observers because no other courts had followed its precedent.

¹¹⁶ See *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, 725 F.3d 940, 944 (9th Cir. 2013).

¹¹⁷ Samuel Pyeatt Menefee, *The Case of the Castle John, or Greenbeard the Pirate?: Environmentalism, Piracy and the Development of International Law*, 24 CAL. W. INT'L L.J. 1, 10-11 (1993).

¹¹⁸ See *id.*

¹¹⁹ *Id.* at 14.

¹²⁰ *Id.*

¹²¹ *Inst. of Cetacean Research*, 725 F.3d at 944.

ii. *International Cases: Australia v. Japan*

The Ninth Circuit's decision referred to a 2008 Australian case ordering¹²² the Institute's ships to cease operations in the Australian Whale Sanctuary.¹²³ It declared that Japan was violating Australia's environmental protection act and issued an injunction against Japanese whaling ships.¹²⁴ The presiding judge recognized the ruling would have little effect because the whalers had no assets under Australian jurisdiction, and much of the Australian sanctuary is in Australian Antarctic Territory, which is a claim recognized by only four countries.¹²⁵ But the court issued the injunction anyway "to mark the disapproval of the Court of conduct which the Parliament has proscribed, or to discourage others from acting in a similar way, can be seen as also having an educative element."¹²⁶ The Institute did not participate in the case because the Japanese government refused to accept service on their behalf.¹²⁷

In 2010 Australia brought an action against Japan in the International Court of Justice (ICJ) alleging that Japan had flagrantly disregarded the whaling moratorium.¹²⁸ In 2014, the ICJ ruled that while the Japanese program could in theory be considered scientific research, its design and implementation were not reasonable in light of its stated goals.¹²⁹ "The Court concludes that the special permits granted by Japan for the killing, taking and treating of whales in connection with JARPA II [the whale research project] are not 'for purposes of scientific research' pursuant to [the ICW convention]."¹³⁰ The ICJ ordered Japan to "revoke any extant authorization, permit or licence to kill, take or treat whales in relation to JARPA II, and refrain from granting any further permits."¹³¹

Japan initially said that it would comply with the ICJ's ruling and

¹²² Ruth Davis, *Update: Japanese Whaling Litigation*, 26 UNIV. TAS. L. REV. 90, 90 (2009).

¹²³ The Australian Whale Sanctuary is a sanctuary designed to protect dolphins and whales. See Australian Whale Sanctuary, AUSTL GOV'T: DEP'T OF THE ENV'T, <https://www.environment.gov.au/marine/marine-species/cetaceans/australian-whale-sanctuary> (last visited May. 8, 2017). It includes all of Australia's Exclusive Economic Zone, which is recognized in international law, as well as the Australian Antarctic Territory, which is not widely recognized by other countries. *Id.*

¹²⁴ Davis, *supra* note 122.

¹²⁵ *Id.* at 92-93.

¹²⁶ *Id.* at 93.

¹²⁷ *Humane Soc'y Int'l v. Kyodo Senpaku Kaisha Ltd.* [2005] FCA 664, ¶ 29, <http://www.austlii.edu.au/au/cases/cth/FCA/2005/664.html>.

¹²⁸ See Whaling in the Antarctic (Austl. v. Japan), Application Instituting Proceedings, (May 31, 2010), <http://www.icj-cij.org/docket/files/148/15951.pdf>.

¹²⁹ Judgment, Whaling in the Antarctic (Austl. v. Japan: N.Z. intervening) 2014 I.C.J. 226 (Mar. 31).

¹³⁰ *Id.* at ¶ 227.

¹³¹ *Id.* at ¶ 245.

canceled its 2014-2015 whaling season.¹³² However, Japan announced in 2015¹³³ that it would resume its whale hunt for the 2015-2016 season under a revised scientific program.¹³⁴ Japan also notified the United Nations that it would no longer recognize ICJ jurisdiction over “any dispute arising out of, concerning, or relating to research on, or conservation, management or exploitation of, living resources of the sea.”¹³⁵ The Japanese whaling fleet duly left port to begin whaling in December 2015.¹³⁶

Sea Shepherd publicly condemned Japan’s resumption of whaling.¹³⁷ One of Sea Shepherd’s captains told the media that

[w]e are ready to find, document, report on and where possible intervene against poaching operations that threaten the precious balance of life in the Southern Ocean . . . if Sea Shepherd comes across criminal activity, then our history speaks for itself. We will, as always, directly intervene to prevent that crime from taking place[.]¹³⁸

The decision to resume whaling appeared to catch Sea Shepherd by surprise, as two of its ships equipped to navigate the Southern Ocean were in the Northern Hemisphere for other environmental campaigns and were not able to navigate to the Southern Ocean before the whaling season ended.¹³⁹ With only one ship available for its 2015-2016 anti-whaling campaign, Sea Shepherd was unable to locate the Japanese whaling fleet.¹⁴⁰

¹³² Agence France-Presse, *Japan confirms cancellation of annual whale hunt in response to court ruling*, GUARDIAN, Apr. 3, 2014, <http://www.theguardian.com/environment/2014/apr/03/japan-confirms-cancellation-annual-whale-hunt>.

¹³³ *Australia slams Japan’s decision to resume Antarctic whaling*, GUARDIAN, Nov. 28, 2015, <http://www.theguardian.com/environment/2015/nov/29/australia-slams-japans-decision-to-resume-antarctic-whaling>.

¹³⁴ The scientific body that advises the IWC concluded in a non-binding opinion that the revised plan, like the original plan considered by the ICJ, did not demonstrate a scientific need for lethal sampling of whales. Virginia Morell, *Japan says it will hunt whales despite science panel’s opposition*, SCIENCE, Apr. 16, 2015, <http://news.sciencemag.org/asiapacific/2015/04/japan-says-it-will-hunt-whales-despite-science-panel-s-opposition>.

¹³⁵ Jim Salzman, *Japan Removes Whaling from ICJ Jurisdiction*, LEGAL PLANET (Oct. 27, 2015), <http://legal-planet.org/2015/10/27/japan-removes-whaling-from-icj-jurisdiction/>.

¹³⁶ *Japanese whaling ships depart for Antarctic hunt*, BBC NEWS, Dec. 1, 2015, <http://www.bbc.com/news/world-asia-34971637>.

¹³⁷ *Sea Shepherd warns Japan against resuming whaling*, JAPAN TIMES, Nov. 29, 2015, <http://www.japantimes.co.jp/news/2015/11/29/national/sea-shepherd-warns-japan-resuming-whaling/>.

¹³⁸ *Sea Shepherd Blasts Japan’s Plan to Slaughter 4,000 Minke Whales*, COMMON DREAMS (Nov. 29, 2015), <http://www.commondreams.org/news/2015/11/29/sea-shepherd-blasts-japans-plan-slaughter-4000-minke-whales>.

¹³⁹ *Japanese Hunters Evade Sea Shepherd, Kills Hundreds of Whales*, TAKE PARK (Feb. 17, 2016), <http://www.takepart.com/article/2016/02/17/japanese-whalers-evade-sea-shepherd-southern-ocean>.

¹⁴⁰ *Id.*

The Institute subsequently announced that it killed 333 minke whales during the 2015-2016 season.¹⁴¹ For the 2016-2017 whaling season, Sea Shepherd has a new, fully-customized ship.¹⁴² Sea Shepherd has named this year's campaign "Operation Nemesis" and says the goal is to "intercept the Japanese fleet" to "stop" the fleet from whaling.¹⁴³

iii. *Greenpeace Arctic Drilling Cases*

In addition to the *Castle John* case, anti-piracy laws have also been used, or threatened, against Greenpeace more recently. In September 2013, Greenpeace activists attempted to scale a drilling platform in Russia's exclusive economic zone near the Arctic.¹⁴⁴ Russian authorities detained all thirty members of the activists' boat (named *Arctic Sunrise* and registered in the Netherlands) for about two months; the protestors were, to international opprobrium, initially charged with piracy but the charges were eventually downgraded to hooliganism before being dropped entirely.¹⁴⁵ Because the drilling platform was fixed to the ocean floor, the incident did not meet the two-ship requirement of piracy.¹⁴⁶

In June 2015, Shell filed suit against Greenpeace in connection with Greenpeace's boarding of its drilling rigs in the Alaskan Arctic.¹⁴⁷ Shell claimed "existing dangerous and unlawful interference with, and the ongoing imminent threat of continuing and additional interference with and irreparable harm to, Shell's 2015 Arctic exploration drilling program and support vessels."¹⁴⁸ Shell's complaint referred to both COLREGS and SUA,

¹⁴¹ *Japan Kills 200 Pregnant Minke Whales*, NAT'L GEOGRAPHIC WILDLIFE WATCH (Mar. 25, 2016), <http://news.nationalgeographic.com/2016/03/160325-Japan-whaling-minke-whales-Antarctica/>.

¹⁴² *About Operation Nemesis 2016-2017*, SEA SHEPHERD GLOBAL, <http://www.seashepherdglobal.org/nemesis/about-operation-nemesis.html> (last visited Jan. 6, 2017).

¹⁴³ *Id.*

¹⁴⁴ *Compare Warning shots fired as Russia detains Greenpeace activists at Arctic oil rig*, RT, Sept. 18, 2013, <http://www.rt.com/news/greenpeace-arctic-platform-shots-034/> (stating that the *Arctic Sunrise* had entered the Northern Sea Route without permission from Russian authorities), with Harriet Alexander, *Netherlands asks UN court to force Russia to release Greenpeace activists*, TELEGRAPH, Nov. 6, 2013, <http://www.telegraph.co.uk/news/worldnews/europe/russia/10429669/Netherlands-asks-UN-court-to-force-Russia-to-release-Greenpeace-activists.html> (quoting a Dutch government that the activists had been in Russia's exclusive economic zone, not its territorial waters, and therefore had surpassed its legal rights in detaining them).

¹⁴⁵ *See Russia charges all Arctic Sunrise Greenpeace activists with piracy over oil rig protest*, RT, Oct. 3, 2013, <http://www.rt.com/news/greenpeace-charged-piracy-russia-701/>; *Russia drops first Greenpeace Arctic 30 case*, BBC NEWS, Dec. 24, 2013, <http://www.bbc.com/news/world-europe-25504016>.

¹⁴⁶ Kathy Lally & Will Englund, *U.S. Greenpeace captain is jailed in Russia*, WASH. POST, Sept. 27, 2013, https://www.washingtonpost.com/world/europe/us-greenpeace-captain-jailed-in-russia/2013/09/27/5e4f6968-2788-11e3-9372-92606241ae9c_story.html

¹⁴⁷ Verified Complaint at 1, *Shell Offshore, Inc. v. Greenpeace, Inc.*, No. 3:15-cv-00054-SLG (D. Alaska Apr. 7, 2015).

¹⁴⁸ *Id.*

but made no piracy claim under UNCLOS.¹⁴⁹ This action is presumably moot now that Shell has decided to discontinue its Alaska Arctic drilling program.¹⁵⁰

iv. *The Ninth Circuit Ruling: Institute of Cetacean Research v. Sea Shepherd Conservation Society*

In December 2011, the Institute of Cetacean Research (“Institute”), the research body of the Japanese whaling industry, sued Sea Shepherd in U.S. District Court.¹⁵¹ The Institute sought injunctive and declaratory relief under the Alien Tort Statute (ATS), and stated claims under piracy law, anti-terrorism law and admiralty law.¹⁵² The District Court denied the Institute’s request for a preliminary injunction, but was later reversed on appeal.¹⁵³

ATS was passed in 1789 as part of the Judiciary Act, and states 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.”¹⁵⁴ Invoked only three times before 1980, the Supreme Court has since held that the First Congress intended ATS to provide jurisdictions for three specific offenses recognized at the time as against the law of nations: piracy, violations of safe conduct, and infringements on the rights of ambassadors.¹⁵⁵ Congress may have contemplated individual civil actions arising from piracy and prize captures, however there is little historical evidence of such actions for damages.¹⁵⁶ While the Supreme Court recently limited the extraterritorial reach of ATS in *Kiobel v. Royal Dutch Shell*,¹⁵⁷ the Court’s reasoning suggests that ATS is still valid for piracy because “pirates may well be a category unto themselves” as to jurisdiction and extraterritorial reach.¹⁵⁸

¹⁴⁹ Verified Complaint at 1, *Shell Offshore, Inc. v. Greenpeace, Inc.*, *supra* note 149, at 22-23.

¹⁵⁰ See Antonia Juhasz, *Shell is Reeling After Pulling Out of the Arctic*, NEWSWEEK, Oct. 13, 2015, <http://www.newsweek.com/2015/10/23/shell-reeling-after-pulling-out-arctic-382551.html>.

¹⁵¹ *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc’y*, 860 F. Supp. 2d 1216, 1225 (2012), *rev’d* 725 F.3d 940, 948 (2013).

¹⁵² *Inst. of Cetacean Research*, 725 F.3d at 942. *Inst. of Cetacean Research*, 860 F. Supp. 2d at 1226. The Institute also claimed civil conspiracy under state law, but did not pursue this claim on appeal.

¹⁵³ *Inst. of Cetacean Research*, 860 F. Supp. 2d at 1220.

¹⁵⁴ 28 U.S.C. § 1350.

¹⁵⁵ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 720 (2004). See also *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1666 (2013).

¹⁵⁶ Eugene Kontorovich, *A Tort Statute, With Aliens and Pirates*, 107 N.W. U. L. REV. COLLOQUOY 100, 107 (2012).

¹⁵⁷ *Sosa*, 133 S. Ct. 1659.

¹⁵⁸ *Id.* at 1667.

The trial court's dismissal of the piracy claims was based on the interpretation of "private ends" and "violence" in UNCLOS.¹⁵⁹ Legal scholars had previously identified "private ends" as a possible reason why piracy law could not be applied to Sea Shepherd.¹⁶⁰ Not only was the exact meaning of "private ends" unclear, but Sea Shepherd considers itself to be working for the benefit of humanity in general, and therefore not for private gain.

Judge Kozinski, writing for the court, applied the plain meaning rule to the "private ends" phrase in the definition of piracy. The court concluded that "private ends" means the opposite of "public ends," or anything endorsed by the state, and did not have to be related to personal financial enrichment.¹⁶¹ "The term is normally used as an antonym to 'public' . . . and often refers to matters of a personal nature that are not necessarily connected to finance" ¹⁶² Citing *Castle John*, the court concluded that "'private ends' include those pursued on personal, moral or philosophical grounds, such as Sea Shepherd's professed environmental goals. That the perpetrators believe themselves to be serving the public good does not render their ends public."¹⁶³ The decision went on to describe Sea Shepherd as having "engage[d] in clear instances of violent acts for private ends, the very embodiment of piracy."¹⁶⁴

The *ICR v. Sea Shepherd* opinion also reversed the District Court's finding that Sea Shepherd was not violating SUA because Sea Shepherd had not yet disabled any of the Institute's ships. The appellate court found that the actual language of SUA merely requires "creat[ion] of dangerous conditions, regardless of whether the harmful consequences ever come about."¹⁶⁵ It also found that the lower court had failed to recognize that Sea Shepherd's goal was to endanger the navigation of the Institute's ships.¹⁶⁶ According to the court, any attempted (as opposed to accidental) endangerment of another ship is sufficient to invoke SUA.¹⁶⁷

The Ninth Circuit sustained the District Court finding that the Institute was likely to succeed on its claims that Sea Shepherd violated COLREGS.¹⁶⁸ However, it reversed the lower court on the likelihood of irreparable harm, concluding that "[a] dangerous act, committed often enough, will inevitably lead to harm, which could easily be irreparable"

¹⁵⁹ *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, 725 F.3d 940, 943 (2013).

¹⁶⁰ Hoek, *supra* note 31, at 185.

¹⁶¹ *Inst. of Cetacean Research*, 725 F.3d at 943.

¹⁶² *Id.*

¹⁶³ *Id.* at 944.

¹⁶⁴ *Id.* at 943.

¹⁶⁵ *Id.* at 944.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

because Sea Shepherd's tactics could immobilize the Institute's vessels in dangerous Arctic waters.¹⁶⁹

Finally, the Ninth Circuit also sustained the lower court in finding that the balance of equities favored the Institute.¹⁷⁰ The Institute's activities were covered by permits under the scientific exception to the moratorium, "and thus are consistent with congressional policy as to the marine ecosystem."¹⁷¹ The court also considered the public interest in safe navigation on the high seas, and the interest in keeping U.S. courts out of international political controversies about whaling.¹⁷² Noting a joint statement issued by the U.S., the Netherlands, Australia, and New Zealand condemning dangerous activity in the Southern Ocean, the court stated that "enjoining piracy sends no message about whaling; it sends the message that we will not tolerate piracy . . . Refusing the injunction sends the far more troublesome message that we condone violent vigilantism by U.S. nationals in international waters."¹⁷³ Finally, the court found that the lower court should not have credited an Australian default decision against the Institute because it included Australian claims to Antarctic waters that are not recognized by the United States.¹⁷⁴

The Ninth Circuit reversed the lower court decision, and granted the preliminary injunction and reinstated the piracy claims.¹⁷⁵ Sea Shepherd did not appeal the Ninth Circuit's decision.¹⁷⁶

III. ANALYSIS

First, this part examines the appellate court's conclusion in *ICR v. Sea Shepherd* and concludes the court was mistaken in finding that Sea Shepherd engaged in acts of piracy. Second, it reviews the implications of treating piracy as a tort rather than a crime. Third, it analyzes the public interest aspect of Sea Shepherd's actions and its legal implications. Finally, it concludes that SUA is therefore a more appropriate legal mechanism for resolving conflicts between them, rather than piracy law, because it produces a more consistent result across different types of environmental activism.

¹⁶⁹ *Inst. of Cetacean Research*, 725 F.3d at 944.

¹⁷⁰ *Id.* at 945.

¹⁷¹ *Id.* at 946.

¹⁷² *Id.*

¹⁷³ *Id.* (internal citations omitted)

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 947.

¹⁷⁶ Sea Shepherd did appeal a later decision from the Ninth Circuit holding it in contempt for violating the injunction, and the Supreme Court denied certiorari on the appeal in June 2015. *See Sea Shepherd Conservation Soc'y v. Inst. of Cetacean Research*, 135 S. Ct. 2816 (2015).

A. *Analysis of the ICR v. Sea Shepherd Decision*

This section concludes that the Ninth Circuit incorrectly determined that Sea Shepherd's actions constituted piracy. First, it asserts that the court misinterpreted the phrase "private ends" in the definition of piracy. Second, it concludes that the court overlooked extrinsic evidence of an intended exception for acts committed for political ends. Finally, it argues that the court's interpretation puts the law out of line with the lay person's conception of "piracy."

i. *Applying the Plain Meaning Rule*

The Ninth Circuit arrived at its conclusion that Sea Shepherd was acting as a pirate by applying the "plain meaning" rule to the "private ends" phrase in UNCLOS. This was a mistake for several reasons. In its section on interpretation of treaties, the Vienna Convention of the Law of Treaties states that terms should be understood "... in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose ..." but then goes on to add that "[a] special meaning shall be given to a term if it is established that the parties so intended," and that the "preparatory work" of a treaty may be used to confirm the meaning of terms when ambiguous.¹⁷⁷

The *ICR v. Sea Shepherd* opinion cites the 1939 edition of Webster's New International Dictionary definition of "private" ("[b]elonging to, or concerning, an individual person, company, or interest") in arriving at the conclusion that "private ends" in UNCLOS did not refer to the pursuit of financial enrichment, but rather *anything* of a personal nature.¹⁷⁸ However, in the case of the High Seas and UNCLOS treaties, there is evidence indicating that the drafters did intend for "private ends" to mean financial enrichment.¹⁷⁹ The opinion does not address this extrinsic evidence at all. The Harvard Draft states:

Piracy includes any of the following acts, committed outside of the territorial jurisdiction of any state: any act of violence or depredation committed with intent to rob, rape, wound, enslave, imprison, or kill a person or with intent to steal or destroy property, for private ends without any bona fide purpose, of ascertaining a claim of right provided the act is connected with an attack on or from the sea or in the air.¹⁸⁰

Sea Shepherd's actions do not fit into the mold of the Harvard Draft. No one has suggested that Sea Shepherd has any intent to "to rob,

¹⁷⁷ Vienna Convention on the Law of Treaties, arts. 31-32, May 23, 1969, 1155 U.N.T.S. 331.

¹⁷⁸ *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, 725 F.3d 940, 943 (2013).

¹⁷⁹ Dubner, *supra* note 90, at 428.

¹⁸⁰ Harvard Draft, *supra* note 83, at 769.

rape, wound, enslave, imprison, or kill a person or with intent to steal” property. While Sea Shepherd may on occasion attempt to destroy property (such as when it attempts to ruin whale meat with rancid butter to prevent it from going to market), it is a means to their end, rather than the intended goal. The Harvard drafters were presumably imagining the pillaging of towns and wanton destruction, rather than the targeted elimination of a specific product. Such a meaning seems clear when “or destroy property” is read in the context of the other previously listed crimes. The drafters also used a report from the League of Nations stating that “[t]he pirate attacks merchant ships of any and every nation without making distinction . . .”¹⁸¹ In contrast, Sea Shepherd’s actions are highly targeted and not directed at the ships of any and every nation. Viewed together, the notes for the Harvard draft clearly indicate that to the writers of the Harvard Draft, piracy meant “a crime involving murder, mayhem, hijacking, kidnapping for ransom and plunder,” which Sea Shepherd does not engage in.¹⁸² In this respect, analyzing the legal context around Sea Shepherd’s actions illustrates one of the major divisions in jurisprudence: does intent control whether a law is applicable, or merely whether the elements of the law are factually met?

Given the strong external evidence that the drafters conceived of piracy as robbery on the sea, the phrase “private ends” makes sense in historical context of the subjective distinction between privateering and piracy. Letters of marque were still being issued in the late nineteenth century, not that far off from the lifetimes of the lawyers who worked on the Harvard Draft in the early 1930s. It seems likely that “private ends” was meant to distinguish piracy from privateering, which as a state-sponsored activity cannot be construed as being for private ends.

In that context “private ends” still implies some kind of personal benefit to the pirate, financial or otherwise. It is this personal reward element that is lacking from Sea Shepherd’s actions.

Trying to divine whether the Harvard drafters would have considered Sea Shepherd’s actions to be piracy within their definition is tricky. Notably, despite the commentary referring to *animus furandi*,¹⁸³ the definition itself does not require intent to plunder. Using historical sources to reason by analogy about something (environmental interests) that did not exist in 1932 is a shaky proposition at best.¹⁸⁴ However, attempts to do so reflect an intuitive feeling that Sea Shepherd’s activities are different from, say, Blackbeard’s, and should therefore be classified separately.

¹⁸¹ Harvard Draft, *supra* note 83, at 807.

¹⁸² *Id.* at 790.

¹⁸³ *Id.* at 782.

¹⁸⁴ Douglas Guilfoyle, *Political Motivation and Piracy: What History Doesn’t Teach Us About Law*, EJIL: TALK! (June 17, 2013), <http://www.ejiltalk.org/political-motivation-and-piracy-what-history-doesnt-teach-us-about-law/>.

ii. Exception for Political Ends

The historical evidence also suggests that High Seas and UNCLOS contain exceptions for activities conducted for political ends, and that such activities are therefore not considered piracy. The Ninth Circuit appears to have overlooked this exception, as it explicitly acknowledged that Sea Shepherd is acting for political ends.¹⁸⁵ The League of Nations, sponsor of the Harvard drafting convention, noted that “when the acts in question are committed from purely political motives, it is hardly possible to regard them as acts of piracy.”¹⁸⁶ The commentary for Article 3 of the Harvard draft states explicitly that “[t]he draft convention excludes from its definition of piracy all cases of wrongful attacks on persons or property for political ends ...”¹⁸⁷

The drafters of the High Seas and UNCLOS relied heavily on the Harvard Draft commentaries and used the Harvard Draft definition. Therefore, the implicit exception for political ends should have carried over into the current treaty agreements. This political ends exception was in fact explicitly noted by the rapporteur for the reporter for the High Seas.¹⁸⁸ As the Ninth Circuit observed, environmental activists act for political ends. Their goal is to stop the whaling or drilling for oil, not physically harm or rob the whalers or oil workers. Whether or not one gives substantial weight to Sea Shepherd’s political goals in determining “private ends,” the Ninth Circuit should have at least considered the political ends exception.

iii. Common Understanding of Piracy

While there are some crimes that the average person without a legal background is unlikely to understand, such as trespass on the case, piracy is not one of them. The average person’s understanding of modern day piracy, whether or not he agrees with Sea Shepherd’s tactics and goals, is more likely to lead to thoughts of Captain Phillips off the Horn of Africa than Sea Shepherd. Definitions that do not comport with the average understanding of the word cannot be described as “plain meaning.”

First, the Ninth Circuit’s understanding of piracy was not a gradual change in interpretation. Rather, it was a wholesale change made without notice. Sea Shepherd has been employing the same tactics for nearly thirty years. Sudden changes in legal definitions are generally avoided because

¹⁸⁵ *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc’y*, 725 F.3d 940, 943 (2013).

¹⁸⁶ *Report of the Sub. Comm. of the Comm. of Experts for the Progressive Codification of Int’l Law*, League of Nations Doc. C. 196.M.70.1927.V 117 (1927), reprinted in HELLER-ROAZEN, *supra* note 66.

¹⁸⁷ Harvard Draft, *supra* note 83, at 786.

¹⁸⁸ Magnuson, *supra* note 71, at 949.

they do not give putative defendants notice that their actions run afoul of the statute.¹⁸⁹

Second, it is conceptually uncomfortable to categorize Sea Shepherd with weapon-wielding thieves and plunderers. The pirates off the coast of Africa hijack vessels and demand multi-million dollar ransoms.¹⁹⁰ They have increased international shipping costs (because of rising insurance costs), and brought about a coordinated international naval response.¹⁹¹ The actions of such pirates and Sea Shepherd are on completely different scales.

Meanwhile, Sea Shepherd's anti-whaling campaign, and Greenpeace's anti-Arctic drilling campaign are similar. Both groups physically intervene to interrupt and disrupt commercial actions they believe to be harmful to the environment. Because they are conceptually similar, they should be dealt with using similar laws. SUA, and possibly COLREGs, can consistently be applied in both instances. However, piracy law cannot. Drilling rigs are fixed platforms and as such do not meet the two-ship requirement for piracy. Similarly, the emergence of drone technology will even further complicate the application of piracy law, since they can be used to remotely harass a subject.¹⁹² (Indeed, Sea Shepherd's fleet already includes drones.)¹⁹³

Applying and enforcing other laws, rather than trying to manipulate the elements of piracy, produces a more consistent and predictable result in different situations.

Finally, branding Sea Shepherd in such a theoretically uncomfortable manner merely generates more publicity and sympathy for Sea Shepherd. Paul Watson himself has attributed the lack of criminal allegations against his organization partly to the fact that Western governments do not wish to draw attention to their own environmental crimes.¹⁹⁴

¹⁸⁹ This canon of interpretation is known as the rule of lenity. While the rule of lenity is normally applied to criminal statutes, it is appropriate to apply it here because piracy is also normally a crime.

¹⁹⁰ Faith Karimi, *African pirates use millions of dollars in ransom on drugs, real estate, prostitutes*, CNN, Nov. 2, 2013, <http://www.cnn.com/2013/11/02/world/africa/horn-of-africa-piracy-loot/>.

¹⁹¹ Nick Hopkins, *Somali pirates struggle against international crackdown*, GUARDIAN, Jan. 13, 2012, <http://www.theguardian.com/world/2012/jan/13/somali-pirates-thwarted-international-crackdown>.

¹⁹² While UNCLOS does also refer to aircraft (which drones are classified as), drone technology and drone law are emerging, and there may be jurisdictional or border issues if the drone and the operator are not in the same jurisdiction.

¹⁹³ *Sea Shepherd Intercepts Japanese Whaling Fleet with Drones*, SEA SHEPHERD (Dec. 24, 2011), <http://www.seashepherd.org/news-and-commentary/news/archive/sea-shepherd-intercepts-the-japanese-whaling-fleet-with-drones.html>.

¹⁹⁴ Paul Watson, *EARTHFORCE: AN EARTH WARRIOR'S GUIDE TO STRATEGY 91* (1993).

B. Piracy as a Tort, Not a Crime

Piracy has traditionally been a crime punished by the state. It was robbery on the sea, and in many countries it was punishable by death until the twentieth century.¹⁹⁵ By allowing the Institute's claims under the Alien Tort Act to proceed, the Ninth Circuit effectively expanded piracy to be a tort, seemingly without noticing it was doing so. While the expanded definition may have some benefits for society at large, it is a major change that should not be made lightly.

i. Enforcement

One of the biggest challenges of defining piracy as a tort is the question of enforcement. A state has many ways, including using its navy, to enforce criminal anti-piracy laws. But as the post-Ninth Circuit actions of Sea Shepherd have shown, enforcement of a civil action can be a challenge. The Institute obtained an injunction against the U.S. entity of Sea Shepherd. Sea Shepherd's other international entities were not parties to the suit and were not enjoined. Sea Shepherd therefore simply transferred its Southern Ocean whaling operations to its Australian entity, and carried on more or less as before.¹⁹⁶ While board members of the American Sea Shepherd have been held in contempt of court for violating the injunction issued by the Ninth Circuit, and Sea Shepherd eventually agreed to pay \$2.55 million to clear the civil contempt charges, the injunction had no physical impact on Sea Shepherd's anti-whaling campaign.¹⁹⁷ Sea Shepherd's physical intervention in the Japanese whaling campaign after the Ninth Circuit decision was captured in season six of the *Whale Wars* TV show.¹⁹⁸

Sea Shepherd has accepted the jurisdiction and authority of U.S. courts. While it has been found in contempt of court, it has participated in the legal process.¹⁹⁹ Whether or not its actions are tortious, it is not an

¹⁹⁵ See generally EUGENE KONTOROVICH, *THE PENALTIES FOR PIRACY* (Oceans Beyond Piracy, 2012), http://oceansbeyondpiracy.org/sites/default/files/obp_penalties_for_piracy_final.pdf.

¹⁹⁶ There was one significant consequence of the injunction resulting from *ICR v. Sea Shepherd*: Watson had previously captained one of the boats taking part in the annual anti-whaling campaign. However, because he was personally party to the injunction, he stepped down from his captaincy to avoid being found in contempt. Another Sea Shepherd activist filled his place. See Ann Oldenburg, *Whale Wars returns without captain Paul Watson*, USA TODAY, Dec. 13, 2013, <https://www.usatoday.com/story/life/tv/2013/12/13/whale-wars-returns-without-captain-paul-watson/4002587/>.

¹⁹⁷ See *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, 774 F.3d 935 (9th Cir. 2014); <http://www.theguardian.com/environment/2015/jun/10/sea-shepherd-payment-japanese-whalers-breaching-injunction>

¹⁹⁸ *Whale Wars: A Commander Rises* (Animal Planet television broadcast 2013).

¹⁹⁹ Sea Shepherd is now suing the Institute and accusing it of piracy. *Operation Ultimate Justice*, SEA SHEPHERD, <http://www.seashepherd.org/justice/campaign/operation-ultimate-justice.html> (last visited Jan. 8, 2016).

outlaw in the sense used by the Harvard drafters – outside the bounds of society and showing his rejection of proper authority through his actions.²⁰⁰

ii. *Piracy and the Alien Tort Statute*

ICR v. Sea Shepherd was a matter of first impression before the District Court.²⁰¹ While the First Congress did specifically envision piracy in passing the Alien Tort Statute,²⁰² it has not historically been used for that purpose.²⁰³ Laws that are applicable to the situation should be used regardless of their age. But in this instance, it is, at best, unclear whether Sea Shepherd's actions fit the definition of piracy. If they do not, then ATS does not apply. In *Kiobel*, the Supreme Court effectively limited ATS to specific offenses against the law of nations recognized by Blackstone.²⁰⁴ It is not clear whether Blackstone and members of the First Congress, like the Harvard drafters, would have recognized acts taken for reasons other than personal enrichment as being piracy.

In 1844 when Supreme Court held that conduct, not intention, defines piracy, it also added that “[i]n short, it means that the act belongs to the class of offences which pirates are in the habit of perpetrating, whether they do it for purposes of plunder, or for purposes of hatred, revenge, or wanton abuse of power.”²⁰⁵ While some of Sea Shepherd's actions may in practice be similar to those of pirates, in that they involve boarding and endanger navigation, those “piratical” actions are incidental to the intended goal, rather than the goal itself. Similarly, referring to ATS in 2004 the Court stated that “we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.”²⁰⁶

C. *Public Interest*

Interpreting Sea Shepherd's actions requires judging not only the organization's means, but also its ends. It requires balancing the Institute's scientific research claims against the interests of the marine life that Sea Shepherd claims to be protecting. This requires value and policy judgments.

²⁰⁰ Harvard Draft, *supra* note 83, at 770.

²⁰¹ *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, 860 F. Supp. 2d 1216, 1231 (2012), *rev'd* 725 F.3d 940, 948 (2013).

²⁰² *Sosa v. Alvarez-Machain*, 542 U.S. 723, 724 (2004).

²⁰³ For a list of published opinions in which the plaintiff asserted jurisdiction under ATS (prior to the law's “resurrection” in 1980, after which it became much more commonly relied upon in a large variety of contexts), see Kenneth C. Randall, *Federal Jurisdiction Over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 4, n.15 (1985).

²⁰⁴ See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1666, 1669 (2013).

²⁰⁵ See *Harmony v. United States (The Brig Malek Adhel)*, 43 U.S. 210, 232 (1844).

²⁰⁶ *Sosa*, 542 U.S. at 725.

ICR v. Sea Shepherd took the Institute's claims that its whale catches were for scientific purposes at face value without giving any weight to the value of Sea Shepherd's goals to the public. In contrast, the Australian case gave weight to the interests of marine mammals. The judge observed that "as living creatures of intelligence and of great importance not only for the animal world, but for humankind . . . to slaughter them . . . is deeply wrong."²⁰⁷ In the eyes of the Australian court, environmental activists working against the Institute were engaging in a form of civil disobedience.

Conversely, the Ninth Circuit gave greater weight to the interests of the Institute. The Ninth Circuit did not question the activities of the Institute at all, instead dismissing objections with a cursory reference to the special permits being in line with Congressional intentions.²⁰⁸ This assumption of Congressional approval is misplaced. While the permit system may have been approved by Congress, there is nothing to indicate its approval of the specific issuance of permits by individual countries. If anything, current evidence suggests Congressional disapproval of commercial whaling by any country, including through the permit system.²⁰⁹

An appellate court of the United States may not be an appropriate venue to adjudicate claims regarding the validity of permits issued under the Whaling Convention. However, the failure to even consider whether or not Sea Shepherd's actions had any value to the public results in reasoning that is biased and lopsided. This type of one-sided reasoning with no inquiry into legitimacy favors parties who can obtain state sanction for their activities, even if the activity is questionable.

Additionally, Sea Shepherd's objectives are shared by a relatively large number of people, which makes them arguably a public goal.²¹⁰ The Australian case treated the whalers as a public nuisance, which is probably how most Americans also view them.²¹¹ While the success of *Whale Wars* is likely not due to a single factor, a desire to see the "good guys" win has likely been part of the show's success.²¹² Courts do not, and should not, use

²⁰⁷ *Humane Soc'y Int'l v. Kyodo Senpaku Kaisha Ltd.* [2005] FCA 664, ¶ 29, <http://www.austlii.edu.au/au/cases/cth/FCA/2005/664.html>.

²⁰⁸ *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, 725 F.3d 940, 946 (2013).

²⁰⁹ *See, e.g.*, Expressing the sense of the Congress that the United States, through the International Whaling Commission, should use all appropriate measures to end commercial whaling in all of its forms, including scientific and other special permit whaling, coastal whaling, and community-based whaling, and seek to strengthen the conservation and management measures to facilitate the conservation of whale species, and for other purposes. H.R. Con. Res. 350, 110th Cong. (2008).

²¹⁰ Magnuson, *supra* note 71, at 952.

²¹¹ Dr. Fukuzo Nagasaki, *Pro- and Anti- Whaling Attitudes as Revealed in Public Opinion Polls* (2004), http://luna.pos.to/whale/icr_pub_poll.html.

²¹² Andy Dehnart, *Not Their Whale War Anymore: How Animal Planet Was Forced to Step Down*, WIRE (Dec. 12, 2013), <http://www.thewire.com/entertainment/2013/12/not-their-whale-war-anymore-how-animal-planet-was-forced-step-down/356026/>.

public opinion to guide their holdings. However, law ultimately remains relevant only when it is respected and followed by the people. Opinions that are significantly out-of-step with public opinion risk being overturned in some fashion.

Sea Shepherd has significant tacit support. The group received an 8.3 million euro donation from the Dutch postcode lottery in January 2015; it used the money to “to lift [its] conservation efforts to protect the Southern Ocean from illegal exploitation to the next level”²¹³ with a fully-customized boat, *Ocean Warrior*.²¹⁴ More significantly, none of the countries Sea Shepherd’s ships are registered with has taken steps to reduce Sea Shepherd’s activities, or even to simply cool the conflict with Japan.²¹⁵

Similarly, the Netherlands, as the flag state for many of Sea Shepherd’s ships, has consistently declined to take action against Sea Shepherd despite repeated requests from the Japanese. In 2009 the Dutch transport minister announced she was moving to have Sea Shepherd’s ships struck from the Dutch registry.²¹⁶ However as of 2017, that has not occurred.²¹⁷ Indeed, in 2014 Sea Shepherd described the Netherlands as its “safe haven” and described it as a “model state” for its failure to succumb to Japanese diplomatic pressure to deregister Sea Shepherd’s ships.²¹⁸ This is despite the fact that Sea Shepherd’s actions almost certainly violate COLREGS, as the Ninth Circuit concluded and flag states are obligated to de-register such ships under UNCLOS.²¹⁹ Sea Shepherd is therefore receiving certain protections from the governments of its flag states that it does not deserve. If the flag countries were to revoke Sea Shepherd’s listings, the ships would become stateless and could be boarded at any time on the high seas by any warships, including ones from the Japanese Maritime Self-Defense Force.

The natural inference from the lack of action against Sea Shepherd despite significant Japanese lobbying is that Western nations silently

²¹³ Melissa Davey, *Sea Shepherd to spend \$12m award on 'dream ship' to patrol Southern Ocean*, GUARDIAN, Jan. 26, 2015, <http://www.theguardian.com/environment/2015/jan/27/sea-shepherd-to-spend-12m-award-on-dream-ship-to-patrol-southern-ocean>.

²¹⁴ *About Operation Nemesis 2016-2017*, SEA SHEPHERD GLOBAL, <http://www.seashepherdglobal.org/nemesis/about-operation-nemesis.html> (last visited Jan. 6, 2017).

²¹⁵ For example, Sea Shepherd ships regularly dock in Australia on their way to and from the Southern Ocean. See Paul Watson, *The Final Assault on the Cetacean Death Star*, SEA SHEPHERD, Feb. 2, 2010, <http://www.seashepherd.org/commentary-and-editorials/2010/02/02/the-final-assault-on-the-cetacean-death-star-120>. Allowing violators of international law to seek safe harbor is a clear violation of SUA.

²¹⁶ *Sea Shepherd could lose Dutch Flag*, RNW MEDIA, Feb. 6, 2009, <https://www.rnw.org/archive/sea-shepherd-could-lose-dutch-flag>.

²¹⁷ *Sea Shepherd Welcomes the Farley Mowat and the Jules Verne to its Fleet*, SEA SHEPHERD (Jun 1, 2015), <http://www.seashepherd.org/news-and-media/2015/06/01/sea-shepherd-welcomes-the-farley-mowat-and-the-jules-verne-to-its-fleet-1697>.

²¹⁸ SEA SHEPHERD AUSTL, *supra* note 46.

²¹⁹ See Caprari, *supra* note 106, at 1520.

support Sea Shepherd's activities. Actions speak louder than words, and the failure to take action against Sea Shepherd, even when there are clearly grounds for it, suggests that the countries do not actually disapprove of what Sea Shepherd is doing.

The ICJ decision finding that the Japanese whaling program lacked scientific merit, and therefore was not a valid reason to provide permits, was handed down after *ICR v. Sea Shepherd* was decided. However, its sweeping findings that Japan has been flagrantly flouting the moratorium add moral and legal weight to Sea Shepherd's argument that it is acting for the public good. The ICJ case suggests that any future public interest analysis in a piracy-ecoterrorism context should include some consideration of whether there was any merit to the actions being attacked as piracy. No court wants to weigh the pros and cons of every development project that environmentalists say is harmful. But Japan's "scientific" whaling program was patently unscientific to observers long before the ICJ decision, as Sea Shepherd's pleadings repeatedly pointed out and the District Court acknowledged.²²⁰

Additionally, both the Ninth Circuit and *Castle John* decisions suffer from the same philosophical problem, which is perhaps the reason why more courts did not follow *Castle John*'s reasoning in the intervening years. If private is the opposite of public, then official state action is required to show that something is not "a personal point of view," as *Castle John* described it.²²¹ Taken to the logical extreme, this means that every nongovernmental act resembling violence and meeting the two-ship requirement could be classified as piracy.²²²

D. SUA Provides More Appropriate Grounds for Relief

Should any nation decide to take action against Sea Shepherd, or another direct action group operating at sea, SUA is a far more appropriate ground for doing so than international piracy law. Sea Shepherd's actions do not quite fit into the definition of piracy in UNCLOS. SUA was adopted specifically to close gaps in UNCLOS, and is therefore a more appropriate and legally stable ground for relief against Sea Shepherd. Pursuing Sea Shepherd under SUA provides nearly the same remedies as UNCLOS but without the conceptual baggage of labeling the group as pirates.

Offenses under SUA include acts of violence that are "likely to endanger the safe navigation of that ship" or "causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship ..."²²³

²²⁰ *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, 860 F. Supp. 2d 1216, 1221 (2012), *rev'd* 725 F.3d 940, 948 (2013).

²²¹ *Magnuson*, *supra* note 71, at 956.

²²² *Id.*

²²³ SUA, *supra* note 99, at art. 3(a)-(c).

Sea Shepherd has rammed ships and dropped prop foulers, both of which clearly endanger the navigation of the ship. Sea Shepherd's activities clearly and neatly fit into the SUA definition.

Additionally, using SUA to prosecute Sea Shepherd means all ecoterrorist activities can be prosecuted under a single statute. Sea Shepherd's whaling interventions and Greenpeace's protests in the Arctic (and similar protests) are conceptually similar because they share the same philosophical motivation, although Sea Shepherd's means are more extreme. It therefore makes sense from a policy perspective to prosecute them in the same legal category. However, piracy law could not have been used against Greenpeace's activities in the Arctic. Those protests fell into two of the "gaps" in piracy law identified by scholars: the drilling rigs were in coastal waters (not the high seas), and did not involve two ships (drilling rigs are fixed to the ocean floor).²²⁴

SUA does not provide for universal jurisdiction as piracy law does. However it is unclear what benefits plaintiffs derive from having universal jurisdiction in a civil action for piracy. Activation of SUA does create grounds for extradition. However, as with all treaties, SUA is only as strong as the signatories that enforce it. In addition to relying on the good faith of domestic courts,²²⁵ it also contains an exception for political offenses.²²⁶ If the country requesting extradition and the extraditing country have different perspectives on the underlying offense, as Japan and Australia clearly do about Sea Shepherd's actions, then SUA will not be effective. SUA has been little used as a treaty in general, and Australia in particular has resisted Japan's pleas to indict Sea Shepherd in its domestic courts.²²⁷

IV. CONCLUSION

Sea Shepherd's aggressive tactics on behalf of marine life have won it both enemies and admirers. Calling Sea Shepherd a pirate is more colorful and attention-grabbing than accusing it of tortious interference under a maritime terrorism treaty. However, the Ninth Circuit's conclusion that Sea Shepherd's actions constitute piracy was a poorly-reasoned finding that required twisting the meaning of piracy into something unrecognizable to the lay person. Rather than trying to alter the meaning of piracy, courts should apply and enforce other applicable laws, such as SUA, which result in a consistent outcome across a variety of maritime ecoterrorist situations.

²²⁴ Lally & Englund, *supra* note 146.

²²⁵ See Caprari, *supra* note 106, at 1519.

²²⁶ See *supra*, Section III.B.

²²⁷ See Caprari, *supra* note 106, at 1519.

**BILATERAL INSOLVENCY AGREEMENTS: A TWO-SIDED
SOLUTION FOR RECIPROCITY IN CROSS-BORDER
INSOLVENCY**

*Ethan Meredith**

I. INTRODUCTION

The structure and dynamics of commercial relations have evolved dramatically over the past thirty years as a stronger emphasis on international trade and technological advancements has expanded the capabilities of global financial markets. To keep up with the changing times, investors and enterprises have sought out companies that are pioneering into new locations and modernizing their corporate structures to maximize profits. Not all of these ventures have gone swimmingly however, leading to corporate insolvencies that span across many nations with significantly varying bankruptcy regimes.

To resolve the issue of inconsistent insolvency regimes, the United Nations Commission on International Trade Law (UNCITRAL) convened to draft the first modern, multilateral Model Law on Cross-Border Insolvency (the “Model Law”).¹ Generally speaking, the Model Law allows foreign creditors to open secondary cases in the courts of their home country, and from which their rulings may be presented to the debtor’s “main” court for recognition and enforcement.² The Model Law entered to a booming introduction in 1997 with high hopes and expectations of answering the world’s call for a globally accepted bankruptcy regime.³ The first years of the Model Law experienced general success, and the U.S.’s adoption of the Model Law through Chapter 15 of the U.S. Bankruptcy Code (the “Code”) in 2005 was expected to firmly mark the beginning of a new era of “universalist” bankruptcy.⁴ But then it didn’t.

* George Mason School of Law, J.D. International Business Law Concentration, 2016; University of Tennessee, B.A. Political Science, cum laude, 2013. I would like to thank Taylor, my parents, and all of my friends and family that have provided overwhelming support in helping me fulfill my dreams.

¹ André J. Berends, *The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview*, 6 TUL. J. INT’L & COMP. L. 309, 312 (1998).

² *Id.* at 312-13.

³ Megan R. O’Flynn, *The Scorecard So Far: Emerging Issues in Cross-Border Insolvencies Under Chapter 15 of the U.S. Bankruptcy Code*, 32 NW. J. INT’L L. & BUS. 391, 395-96 (2012).

⁴ *Id.* at 392.

The U.S. may have embraced the Model Law, but many of its top trade partners refused to adopt it.⁵ Most important for this Comment, France, one of the U.S.'s closest ally nations and its eighth-largest trade partner, has firmly abstained from adopting the Model Law.⁶ The lack of a uniform insolvency regime—though only a portion of the more impending necessity for investment agreements as a whole—offers an easily-remedied problem that could pave the way for expedited investment interests between such powerful and lucrative allies.

This Comment examines the factors that have led many nations to reject the Model Law, and discusses how bilateral insolvency agreements with primary trade partners, such as France, can ensure the U.S.'s maximum realization of Chapter 15's benefits. The Model Law and Chapter 15's principles have proven themselves as the optimal solution to cross-border insolvency, but the principles require full cooperation by all parties to succeed. Until non-adopting nations are given less ambiguity and more predictability through tailored bilateral insolvency agreements, multinational companies will continue to receive an inefficient, unpromising chance of reorganization.

Part I of this Comment explores the history of cross-border insolvency: its slow beginning, the sudden rise to global recognition, and the Model Law's peculiar rejection by most of the international community. Part I also discusses the means by which the U.S. and the EU have attempted to address cross-border insolvencies while increasingly promoting the globalization of their companies. Part II first considers the competing interests that advocates of universalism and territorialism face in finding a mutual solution to harmonize foreign proceedings. Part II then delves deeper into the complexities of Chapter 15 and attempts to resolve the most prevalent problems. Finally, Part III focuses on France to explain why its bankruptcy culture complements that of the U.S. and presents the ideal opportunity for bilateral insolvency agreements as a means by which the nations could overcome the Model Law's shortcomings.

⁵ See *Status: UNCITRAL Model Law on Cross-Border Insolvency*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html (last visited May 11, 2017).

⁶ *Top Trading Partners*, U.S. CENSUS BUREAU: FOREIGN TRADE (Apr. 2017), <https://www.census.gov/foreign-trade/statistics/highlights/top/top1704yr.html> (ranking measured by year-to-date total exports and imports, as of April 2017).

II. BACKGROUND

A. *The Universalism Versus Territorialism Debate*

The battle between universalism and territorialism dates back to the beginning of the rule of law. Universalism, the weightier concept, posits that a “home” jurisdiction’s laws reach beyond borders and govern all domestic *and* foreign parties to a suit.⁷ On the other hand, territorialism argues for exclusive jurisdiction within a nation’s borders and over all those who enter them.⁸ With benefits and consequences to both sides, the staunch opposition between the two concepts has proven the ultimate obstacle of the Model Law in its current form.

The most basic and purest practice of universalism in bankruptcy would be to appoint the entirety of a bankruptcy proceeding—any and all claims from domestic and foreign creditors alike—to one bankruptcy court in one jurisdiction to apply one bankruptcy law.⁹ While the Model Law does not wholly abide by this “pure” form, universalist ideals have created the foundation on which cross-border insolvencies are conducted. As an ideological concept generally, bankruptcy practitioners and scholars alike praise the benefits of universalism.¹⁰

First, universalism bases itself squarely in efficiency. Although the Model Law does not fully conduct its proceedings through one court, the debtor’s assets are disbursed evenly amongst all creditors, both domestic and international, in an efficient allocation of assets that promotes the most inherent principles of bankruptcy.¹¹ Instead of each nation’s creditors only having rights to the debtor’s fragmented assets *within* that nation’s borders, creditors operating under a universalist system will receive their pro rata share of *all* of the debtor’s assets, domestic and foreign.¹² In addition to the primary benefits of efficiency, universalism showcases a more cost-effective means by which parties may coordinate the bankruptcy

⁷ Harvard Law Review Ass’n, *Chapter 15 and Cross-Border Bankruptcy*, 124 HARV. L. REV. 1292, 1294-95 (2011).

⁸ *Id.* at 1295.

⁹ *Id.* at 1294.

¹⁰ Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 MICH. L. REV. 2216-17 (2000).

¹¹ Fernando Locatelli, *International Trade and Insolvency Law: Is the UNCITRAL Model Law on Cross-Border Insolvency an Answer for Brazil? (An Economic Analysis of Its Benefits on International Trade)*, 14 LAW & BUS. REV. AMERICAS 313, 326 (2008).

¹² *Id.* at 317.

proceedings.¹³ Ultimately, a debtor's assets should be going to its creditors, not to travel expenses and litigation fees across multiple nations.

On the other hand, territorialism proponents regard universalism with a staunch detestation rarely reciprocated by their universalism counterparts.¹⁴ First and foremost, money and efficiency pale in comparison to one's sovereignty in the eyes of territorialists.¹⁵ Territorialism stems from what its most vocal supporters characterize as the "default rule in every substantive area of law," namely, that each nation has the exclusive right to govern within its borders.¹⁶ Territorialists thus contend that bankruptcy courts should have jurisdiction only over the assets of companies within their borders, and they accordingly call for proceedings to be initiated in each nation where a debtor has assets.¹⁷ While territorialism does protect nations' sovereignty, its criticisms perfectly mirror universalism's benefits: inefficient, expensive, and significantly reduces debtors' chances of a successful reorganization.¹⁸ Still, many opponents of universalism preach the realistic dangers of forum shopping, the practice by which debtors hand-select their "home nation" based on the most favorable bankruptcy laws for debtors.¹⁹

Nonetheless, universalism has ultimately championed the "modified universalism"²⁰ foundation of the Model Law, albeit with plenty of give-and-take. In creating the Model Law, the drafters were forced to acknowledge the limitations on their idealistic universalism model:

The ineffectiveness of this principle resides in the fact that all countries involved should cooperate efficiently and apply the same procedures in perfect harmony, giving all parties the same rights. Universalism can only be applied efficiently if other countries recognize this principle through full cooperation. But the harmonization of laws has been difficult to achieve, as every country is reluctant to give up its autonomy to regulate its own insolvency proceedings.²¹

¹³ Harvard Law Review Ass'n, *supra* note 7, at 1294-95.

¹⁴ See LoPucki, *supra* note 10, at Part II.

¹⁵ See *id.* at 2218.

¹⁶ LoPucki, *supra* note 10, at 2218.

¹⁷ *Id.*

¹⁸ Harvard Law Review Ass'n, *supra* note 7, at 1295.

¹⁹ LoPucki, *supra* note 10, at 2241-42.

²⁰ *Id.* at 2221.

²¹ Locatelli, *supra* note 11, at 318.

Thus, while universalism's substantive benefits clearly and wholly outweigh territorialism's theoretical protection of sovereignty, the full potential may never be realized without full cooperation of all parties involved—a feat unlikely to be achieved in the foreseeable future.

B. Development of Model Law

Until the 1990s, few financial instruments and international agreements had ever dealt with cross-border insolvency.²² With the rapid expansion of global trade, the unacceptable absence of rules in the field led UNCITRAL and the International Association of Restructuring, Insolvency, and Bankruptcy Professionals (INSOL) to meet four times between November 1995 and January 1997 to draft model rules on cross-border insolvency.²³ However, determining the scope of the rules did not prove an easy task. Bankruptcy cultures differ quite significantly between nations, and attempting to develop a fully unified process threatened to result in unpredictable and costly proceedings.²⁴

Nonetheless, global trade continued to progress, and action was necessary.²⁵ With the obstacles identified, UNCITRAL and INSOL directed their focus onto a more manageable objective of providing procedural rules designed to facilitate the efficient coordination of cross-border insolvency involving:

- (i) assistance and cooperation between foreign courts (nationals courts will be empowered to communicate directly with foreign courts and representatives);
- (ii) coordination of concurrent proceedings as a way to speed up the administration of diverse and simultaneous proceedings in different states so that better liquidation and restructuring procedures can reduce the chance of asset dissipation and debtor fraud;
- (iii) automatic recognition of foreign proceedings by ensuring that international decisions can be enforced without the requirement of reciprocity and delays originated by the discrepancies in procedures existing between civil law and common law traditions; and
- (iv) granting to the representative expressly designated by the

²² Berends, *supra* note 1, at 312-13.

²³ Berends, *supra* note 1, at 318.

²⁴ See generally O'Flynn, *supra* note 3.

²⁵ O'Flynn, *supra* note 3, at 394.

foreign proceeding the right to direct access to the courts of the enacting State.²⁶

With these manageable rules finalized, UNCITRAL officially adopted the Model Law in May 1997.²⁷

C. U.S. Adoption of Model Law

On April 20, 2005, President George W. Bush signed into law the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), a substantial overhaul of the U.S. Bankruptcy Code (the “Code”).²⁸ BAPCPA’s primary purpose focused on “improv[ing] bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensur[ing] that the system is fair for both debtors and creditors.”²⁹ BAPCPA’s scope affected practically every section of the Code, but—most relevant to this Comment—BAPCPA created Chapter 15,³⁰ a new chapter dedicated to the filing of a petition for recognition of a foreign proceeding.³¹

Chapter 15, based substantially—if not completely—on the Model Law, served as the U.S.’s formal adoption of the Model Law. Although the U.S. did not officially adopt the Model Law until BAPCPA in 2005, the U.S. played an integral role in the drafting of the Model Law, and had been advocating for its acceptance since its introduction in 1997.³² In fact, the U.S. National Bankruptcy Review Commission (NBRC) presented a glowing report to President Clinton, Chief Justice Rehnquist, and Congress in October 1997 that advocated for the adoption of the “groundbreaking development” in international insolvency.³³ The NBRC’s report continued to note that the most important effect of the U.S.’s adoption lay in its anticipated influence on foreign jurisdictions, since “early adoption by the United States [was] likely to influence other countries to adopt [the Model

²⁶ Locatelli, *supra* note 11, at 211-212.

²⁷ Status: *UNCITRAL Model Law on Cross-Border Insolvency*, *supra* note 5.

²⁸ O’Flynn, *supra* note 3, at 392.

²⁹ H.R. REP. NO. 109-31(I), at 2 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 89.

³⁰ Chapter 15 was created as a replacement of the repealed Section 304 of the Code. O’Flynn, *supra* note 3, at 393.

³¹ O’Flynn, *supra* note 3, at 392-93; *see also* Bankruptcy Abuse Prevention and Consumer Protection Act, 11 U.S.C. § 1501.

³² O’Flynn, *supra* note 3, at 395-96.

³³ *See* NAT’L BANKR. REV. COMM’N, BANKRUPTCY: THE NEXT TWENTY YEARS, 363 (1997), <http://govinfo.library.unt.edu/nbrcreport/10transn.pdf>.

Law] and to spur international organizations to encourage countries to do so.”³⁴

Despite the U.S.’s failure to adopt it until 2005, some nations wasted no time in adopting the Model Law either completely or partially. In fact, eight nations adopted the Model Law before 2005: Mexico (the U.S.’s third-largest trading partner³⁵), Japan (fourth-largest³⁶), Montenegro, Poland, Romania, Serbia, South Africa, and the British Virgin Islands.³⁷ Still, the U.S.’s adoption was to signify the beginning of the Model Law’s global recognition.³⁸

Subsequent to the U.S. adoption in 2005, Canada, the U.S.’s top trade partner,³⁹ also adopted the Model Law.⁴⁰ From there, over thirty more nations adopted the Model Law, with major U.S. trade partners including the UK (#7⁴¹), South Korea (#6⁴²), Australia, Colombia, and Chile.⁴³

D. The Lehman Brothers Crisis Exhibited the Full Danger of Cross-Border Insolvency

The possibility of and protection against cross-border insolvency goes unaddressed for many aspiring companies in their pursuit for globalization. Out of sight, out of mind. However, when insolvency inevitably strikes unprepared multinational companies, the detriment is staggering. In 2008, Lehman Brothers Holdings Inc. (“Lehman Brothers”), a global financial services firm and the fourth-largest investment bank in the U.S. at the time, filed for Chapter 11 bankruptcy, beginning “the largest and most complex [bankruptcy] in history.”⁴⁴ Lehman Brothers’ bankruptcy

³⁴ NAT’L BANKR. REV. COMM’N, BANKRUPTCY: THE NEXT TWENTY YEARS, *supra* note 33, at 361.

³⁵ *Top Trading Partners*, *supra* note 6.

³⁶ *Id.*

³⁷ *Status: UNCITRAL Model Law on Cross-Border Insolvency*, *supra* note 5.

³⁸ See NAT’L BANKR. REV. COMM’N, *supra* note 33, at 361.

³⁹ *Top Trading Partners*, *supra* note 6.

⁴⁰ *Status: UNCITRAL Model Law on Cross-Border Insolvency*, *supra* note 5.

⁴¹ *Top Trading Partners*, *supra* note 6.

⁴² *Id.*

⁴³ *Status: UNCITRAL Model Law on Cross-Border Insolvency*, *supra* note 5.

⁴⁴ Press Release, Lehman Bros. Holdings Inc., Lehman Group of Companies Signs Cross-Border Insolvency Protocol (May 26, 2009).

covered an astounding \$613 billion in debts, smashing the record for the U.S.'s largest bankruptcy by over \$500 billion.⁴⁵

In all, Lehman Brothers consisted of roughly seven thousand separate entities in forty nations.⁴⁶ With the inapplicability of the Model Law to many of the involved nations, seventy-five separate bankruptcy proceedings were commenced in practically every corner of the world.⁴⁷ The absence of the Model Law's guidance and coordination posed serious threats to Lehman Brothers' future and the volatile claims of its creditors. Left alone, Lehman Brothers would have been devastated—stripped of its assets and rendered inoperable as a shell of its former self.

Ultimately, Lehman Brothers was forced to find a solution by creating a private Model Law-esque agreement⁴⁸ but—as will be discussed later in this Comment—the costs of this process significantly outweighed the marginal benefits.⁴⁹ Lehman Brothers never recovered from its bankruptcy, and the global economy still experiences the aftershock years later.⁵⁰ Uniform proceedings would not have prevented the catastrophic demise, but the principles promoted through the Model Law could have softened the blow and given Lehman Brothers a fair shot at reorganization much more efficiently and effectively.

E. U.S. Options towards Foreign and Insolvency Protections

As global trade and investment has continued to grow, the U.S. has sought out ways to protect its investors abroad. In particular, the U.S. uses two types of agreements: Bilateral Investment Treaties (BITs) and Free Trade Agreements (FTAs).⁵¹ BITs serve as a means between two nations to afford investors of one nation privity to the BIT the same benefits that the

⁴⁵ Sam Mamudi, *Lehman Folds With Record \$613 Billion Debt*, MARKETWATCH (Sept. 15, 2008, 10:11 AM), <http://www.marketwatch.com/story/lehman-folds-with-record-613-billion-debt>.

⁴⁶ Press release, Lehman Bros. Holdings Inc., *supra* note 44.

⁴⁷ *Id.*

⁴⁸ These private agreements, or “cooperation protocols,” are discussed in much more depth in Section II. See *infra* Section II(a)(iv).

⁴⁹ See *id.*

⁵⁰ Adam Shell, *Lehman Bros. Collapse Triggered Economic Turmoil*, ABC NEWS, <http://abcnews.go.com/Business/lehman-bros-collapse-triggered-economic-turmoil/story?id=8543352> (last visited May 11, 2017).

⁵¹ Jonathan T. Stoel & Michael Jacobson, *U.S. Free Trade Agreements and Bilateral Investment Treaties: How Does Ratification Differ?* KLUWER ARBITRATION BLOG (Oct. 28, 2014), <http://kluwerarbitrationblog.com/2014/10/28/u-s-free-trade-agreements-and-bilateral-investment-treaties-how-does-ratification-differ/>.

other nation affords to its own investors.⁵² Thus, among many benefits, BITs abolish heightened foreign investment regulations and provide for expedient transferability of investment funds at market-favorable rates.⁵³ Of a similar vein, FTAs are enacted between two or more nations to reduce trade barriers on exports and protect interests competing abroad.⁵⁴ FTA benefits offer a “more stable and transparent trading and investment environment”⁵⁵ that naturally promotes companies to venture into foreign markets covered under the FTA.

Nonetheless, the potential that FTAs and BITs exhibit to serve as more substantial trade and investment relationships between nations remain underutilized as the clear majority of the U.S.’s current FTAs and BITs bind the U.S. with smaller nations with whom the U.S. does comparatively little trade.⁵⁶ This is not to say, however, that more significant FTAs and BITs have not been proposed. In the past decade, two massive trade and investment “partnerships”—essentially a collaboration of an FTA and a BIT—have been proposed in the United States: the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP). First, the twelve nations of the Pacific Rim began negotiations in 2008 on the TPP, which aimed to promote “economic integration to liberalize trade and investment.”⁵⁷ The twelve nations concluded negotiations on October 5, 2015 and signed the TPP on February 4, 2016.⁵⁸ Many critics of the TPP condemned it as “unconstitutional”⁵⁹ and heavily

⁵² Calvin A. Hamilton & Paula I. Rochwerger, *Trade and Investment: Foreign Direct Investment Through Bilateral and Multilateral Treaties*, 18 N.Y. INT’L L. REV. 1, 14-15 (2005).

⁵³ *Id.* at 8.

⁵⁴ *U.S. Free Trade Agreements*, EXPORT.GOV, <http://2016.export.gov/FTA/> (last updated Jan. 24, 2017).

⁵⁵ *U.S. Free Trade Agreements*, *supra* note 54.

⁵⁶ See *Bilateral Investment Treaties Currently in Force*, OFFICE OF TRADE AGREEMENTS AND COMPLIANCE, http://tcc.export.gov/Trade_Agreements/Bilateral_Investment_Treaties/index.asp (last visited May 11, 2017).

⁵⁷ *Trans-Pacific Partnership*, OFF. U.S. TRADE REPRESENTATIVE, [pmb1, https://ustr.gov/sites/default/files/TPP-Final-Text-Preamble.pdf](https://ustr.gov/sites/default/files/TPP-Final-Text-Preamble.pdf); *SICE: Trade Policy Developments: Trans-Pacific Partnership Agreement*, ORG. OF AMERICAN STATES, http://www.sice.oas.org/TPD/TPP/TPP_e.ASP (last visited May 11, 2017).

⁵⁸ Press Statement, John Kerry, Sec’y of State, U.S. Dept. of State, Successful Conclusion of Trans-Pacific Partnership (TPP) Negotiations (Oct. 5, 2015); Press Release, Office of the U.S. Trade Representative, Trans-Pacific Partnership Ministers’ Statement (Feb. 4, 2016).

⁵⁹ See e.g., Alan Morrison, *Is the Trans-Pacific Partnership Unconstitutional?*, THE ATLANTIC (June 23, 2015), <https://www.theatlantic.com/politics/archive/2015/06/tppisdsconstitution/396389/>.

targeted the partnership during the 2016 presidential election race.⁶⁰ Upon his inauguration in January 2017, President Donald Trump quickly withdrew the U.S. from the TPP within his first three weeks in office.⁶¹

On the other side of the globe, the TTIP—a partnership between the U.S. and EU—has encountered a plethora of obstacles in negotiations, ranging from inconsistent health, safety, and environmental standards to a stubborn reluctance to concede *any* sovereignty.⁶² However, actors on both sides have dedicated themselves to pushing forward in pursuit of the evasive agreement that would see a fusion of 60 percent of global GDP—effectively creating the largest FTA in history.⁶³ The attractiveness of such a new global economic superpower clearly resonates, but the domestic interests within the U.S. and EU borders alone are enough to fight for a solution. Annually, the U.S. invests roughly three times the capital in the EU as it does in the whole of Asia⁶⁴ and, in return, the EU invests more capital in the U.S. than it does in China and India combined.⁶⁵ Still, the future of TTIP is bleak. According to Washington D.C.'s Cato Institute, an agreement is nowhere in sight and even determining an initial level-ground point to advance negotiations will require “enormous amount of effort, political will, and flexibility to deviate from script.”⁶⁶ Despite the staggering level of economic investment already fostered between the U.S. and EU, further negotiations remain at an impasse, as the EU has elected to turn its

⁶⁰ See Dan Merica & Eric Bradner, *Hillary Clinton Comes Out Against TPP Trade Deal*, CNN, <http://www.cnn.com/2015/10/07/politics/hillary-clinton-opposes-tpp/> (last updated Oct. 7, 2015, 5:24 PM).

⁶¹ Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement, 82 Fed. Reg. 8497 (Jan. 25, 2017).

⁶² See Emily Sherwin, *Tripping Over TTIP: Obstacles Overshadow EU-US Trade Pact*, DW (Feb. 13, 2014), <http://www.dw.com/en/tripping-over-ttip-obstacles-overshadow-eu-us-trade-pact/a-17426907>; see also *About TTIP*, EUROPEAN COMM'N, <http://ec.europa.eu/trade/policy/in-focus/ttip/about-ttip/> (last updated Apr. 12, 2015).

⁶³ See INT'L MONETARY FUND, WORLD ECONOMIC OUTLOOK 139 (2013).

⁶⁴ See U.S. DIRECT INVESTMENT ABROAD: COUNTRY AND INDUSTRY DETAIL FOR FINANCIAL TRANSACTIONS, 2016, U.S. BUREAU OF ECON. ANALYSIS, <https://www.bea.gov/international/di1usdbal.htm> (last visited May 12, 2017) (click 1994:1-2016:IV under “Quarterly Data (by selected country and by selected industry)”).

⁶⁵ See *Foreign Direct Investment Statistics*, EUROSTAT: STATISTICS EXPLAINED (Apr. 2017), http://ec.europa.eu/eurostat/statistics-explained/index.php/Foreign_direct_investment_statistics.

⁶⁶ Daniel J. Ikenson, *How Will TTIP Affect Developing Countries and the Multilateral Trading System?*, CATO INST.: CATO AT LIBERTY (Oct. 14, 2015, 5:03 PM), <http://www.cato.org/blog/how-would-mammoth-transatlantic-trade-deal-affect-developing-countries>.

focus internally and the Trump Administration's rhetoric remains protectionist.⁶⁷

Glaring absences present themselves across the globe with crucial trade partners in Europe, Asia, and South America declining to adopt the Model Law.⁶⁸ While TTIP's future is in doubt, proponents of the deal evince a particularly strengthening push for investors and companies to expand their operations between the U.S. and EU. At the end of the day, TTIP would promote investment and provides for some protections, but it fails to address the procedures for when these protections falter.⁶⁹ Through this experimental age of expansion, not all companies that follow the global growth trend will experience a smooth ride. When some companies inevitably fail, bailing out investors while allowing the companies themselves to be stripped of their chances to save their businesses runs contrary to the very nature of U.S. bankruptcy culture. Though both the U.S. and EU would benefit from uniform cross-border insolvency procedures, the EU—at least for now—seems much more focused on strengthening from within.⁷⁰

On September 30, 2015, the European Commissioner for Finance, Jonathan Hill, announced the publication of the EU Action Plan on the Capital Markets Union (the "Action Plan").⁷¹ The primary purposes of the Action Plan, as Commissioner Hill laid out in his speech, were: unlocking investment, connecting and stabilizing financial systems, and deepening economic integration across Europe.⁷² While the Action Plan boasts long-term initiatives of strengthening the EU economy on a global scale, the immediate focus has shifted towards domestic interests.⁷³ As of 2016, the

⁶⁷ See Jonathan Hill, Comm'r, European Comm'n, Introductory Remarks at the Launch of the Capital Markets Union Action Plan (Sept. 30, 2016) (transcript available at http://europa.eu/rapid/press-release_SPEECH-15-5749_en.htm); see also, Philip Blenkinsop, *Trump victory could spell defeat for EU-U.S. trade deal*, REUTERS (Nov. 9, 2016), <http://www.reuters.com/article/us-usa-election-trade-eu-idUSKBN1342TF>; Anthony Gardner, *How to revive TTIP*, POLITICO (May 9, 2017), <http://www.politico.eu/article/opinion-how-to-revive-ttip/>.

⁶⁸ See generally Status: *UNCITRAL Model Law on Cross-Border Insolvency*, *supra* note 5.

⁶⁹ See e.g., *Transatlantic Trade and Investment Partnership: Trade in Services, Investment, and E-Commerce*, http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf (EU's proposed text for negotiation).

⁷⁰ See Hill, *supra* note 67.

⁷¹ *Id.*

⁷² Press Release, European Commission Press Release MEMO/15/5732, Questions and Answers on the Action Plan on building a Capital Market Union (Sep. 30, 2015).

⁷³ Hill, *supra* note 67.

Action Plan provided that the EU would bring forward legislation to reform and align cross-border insolvency proceedings across the continent.⁷⁴ However, these reforms will only affect insolvencies *within* the EU, and proceedings outside of the EU will face the same issues and complications as before.⁷⁵

With a larger insolvency treaty with the EU seemingly implausible, the U.S. must instead focus its efforts towards the primary foreign trade partners with which investors most often interact. The prime candidate is France—a “Top 8” trade partner⁷⁶ with a similar bankruptcy culture to that of the U.S. France’s Rescue Procedure, the equivalent of the U.S.’s Chapter 11 Bankruptcy and the primary focus of cross-border insolvencies, concerns reorganization of insolvent companies.⁷⁷ With similar, debtor-friendly laws regarding the bankruptcy’s primary objective,⁷⁸ procedure,⁷⁹ and exit routes,⁸⁰ France offers a strongly consistent and complementary bankruptcy culture with which the U.S. could easily negotiate an agreement.

II. ANALYSIS

The Model Law recognizes its limitations: Nations scoff at the thought of compromising their substantive bankruptcy laws. For most nations, retaining sovereignty far outweighs saving failed multinational companies. Instead, the Model Law addressed the necessary issues that, at least on their face, offered efficient solutions to the coordination and cooperation between all nations involved in cross-border insolvency proceedings. While the solutions were undeniable, the lack of formal adoption of the Model Law clearly evidenced more fundamental problems. The U.S.’s adoption and subsequent interpretations of the Model Law through Chapter 15 of the U.S. Bankruptcy Code has exhibited many of the expected benefits but, more importantly, many of the inherent risks as well.

⁷⁴ Hill, *supra* note 67.

⁷⁵ *Id.*

⁷⁶ *Top Trading Partners*, *supra* note 6.

⁷⁷ JONES DAY, COMPARISON OF CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE 22 (2007), <http://www.jonesday.com/newsknowledge/Publications.aspx> (search keywords “Rescue Procedure” and follow “August 2007 Comparison of International Insolvency Laws”).

⁷⁸ *Id.* (“The objective of both Chapter 11 and the Rescue Procedure is the creation of a breathing space during which the debtor company is given time to formulate plans for reorganization.”).

⁷⁹ *Id.* at 23-24.

⁸⁰ *Id.* at 32.

A. *The Model Law, Chapter 15 of the Code, and their Interpretation*

Application of the Model Law's "modified universalism" allows foreign courts outside the debtor's main court to open secondary cases, which may then be recognized at the main court's discretion.⁸¹ As one may easily imagine, the potential unpredictability of the main court's recognition raises a huge red flag to all territorialism advocates, and rightly so. If a secondary court rules that its creditor is entitled to full recovery of its claim following lengthy litigation, no creditor wants to then fall at the ultimate mercy of the main court's discretion. Thus, the Model Law and Chapter 15 of the Code rely heavily on principles of comity, or good faith.⁸² While comity comes inherently with other Model Law-adopting nations, non-adopting nations are wary to place their full faith in, essentially, a trust-based system. The severity levels of the Model Law's weaknesses vary: ambiguity (tedious, but manageable), unpredictability (many territorialists' primary criticism), and requiring too much blind trust (an inherent flaw of universalism).⁸³

i. *Ambiguity of the "Center of Main Interests"*

A Chapter 15 bankruptcy case commences when a foreign representative⁸⁴ files for recognition of a foreign proceeding.⁸⁵ Adopted verbatim from the Model Law, Chapter 15 distinguishes two types of foreign proceedings: "main" and "nonmain."⁸⁶ First, a "foreign *main* proceeding" is defined as one "pending in the country where the debtor has the *center of its main interests*."⁸⁷ Then, a "foreign *nonmain* proceeding" is defined as a "proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment."⁸⁸

One must first recognize that the only means by which creditors may obtain relief derives from recognition of main and nonmain proceedings.⁸⁹ Moreover, any bankruptcy case may have only one main

⁸¹ See Samuel L. Bufford, *Global Venue Controls Are Coming: A Reply to Professor LoPucki*, 79 AM. BANKR. L.J. 105, 108-09 (2005).

⁸² See Bufford, *supra* note 81, at 120-21.

⁸³ See *id.* at 109.

⁸⁴ 11 U.S.C. § 1509.

⁸⁵ 11 U.S.C. § 1504.

⁸⁶ 11 U.S.C. § 1502.

⁸⁷ 11 U.S.C. § 1502(4) (emphasis added).

⁸⁸ 11 U.S.C. § 1502(5) (emphasis added).

⁸⁹ O'Flynn, *supra* note 3, at 403.

proceeding, which must be recognized before any nonmain proceeding.⁹⁰ Simple enough, right? Not quite. The debtor's "center of its main interests" ("COMI") does not have a definition in Chapter 15, the entire Code, or even the Model Law itself.⁹¹ Similar ambiguities run rampant throughout the Model Law, partly by design, but the ambiguity is largely justified by promoting principles of comity. However, courts have expressly abolished comity from holding any influence in determining recognition.⁹²

The U.S. debate over determining a debtor's COMI has, however, provided a rebuttable presumption that a debtor's COMI is located in the nation of its registered office.⁹³ Still, the lack of a firm definition with more precision opens the door for the forum-shopping problem so feared by proponents of territorialism: a company fearing insolvency may relocate to a debtor-friendly jurisdiction and set up its main proceedings there. The EU, concerned with such a problem, recently introduced Regulation 2015/848⁹⁴ to remedy the long-contested COMI through more rigid statutory language:

The New Regulation aims to resolve these issues with the following provisions: (i) a statutory definition of COMI is introduced which, in line with European case law, provides that COMI shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties; (ii) there is a specification that a debtor's COMI should be determined when the request for the opening of insolvency proceedings is made; and (iii) by the combination of certain presumptions as to relocation of registered office or principal place of business, the New Regulation seeks to establish safeguards against "bankruptcy tourism". Further changes include (iv) a requirement for courts presented with a request to open insolvency proceedings to examine whether they have jurisdiction and not to take it for granted per se; and (v) a right for debtors and creditors to challenge the decision to

⁹⁰ Berends, *supra* note 1, at 388.

⁹¹ O'Flynn, *supra* note 3, at 403.

⁹² *In re Ran*, 390 B.R. 257, 292 (Bankr. S. D. Tex. 2008) ("Comity is not an element of recognition; it is rather a consideration once recognition is granted.").

⁹³ *In re SPhinX, Ltd.*, 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006), *aff'd* 371 B.R. 10 (S.D.N.Y. 2007).

⁹⁴ Council Regulation 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, 2015/848, 2015 O.J. (L141) [hereinafter Council Regulation 2015/848].

open main insolvency proceedings on the grounds of international jurisdiction.⁹⁵

Although a strong, promising guideline, its implementation only applies within the EU's borders, affording no benefit to the U.S. or other foreign nations outside the EU. Still, the regulation's enactment evidences guidelines with which future cross-border insolvency agreements may be founded.

ii. *The Public Policy Exception*

Generally speaking, U.S. courts have uniformly recognized foreign main and nonmain proceedings with little exception.⁹⁶ Nonetheless, Chapter 15 necessarily affords courts the ability to reject foreign proceedings through the "Public Policy Exception," which states, "[n]othing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States."⁹⁷ The public policy exception largely embodies the fears professed by universalism's opponents: unpredictability and the unavoidable threat of non-recognition. Long regarded as a means by which the judiciary may dance around undesirable decisions to come to a more favorable outcome, such a malleable law has no benefit for foreign creditors.

Chapter 15, still in its infancy, leads most to believe that the general lack of case law on relevant issues of public policy in the U.S. continues to provide far from a comprehensive overview of the exception's application.⁹⁸ However, the public policy exception "has been narrowly interpreted on a consistent basis in courts around the world,"⁹⁹ and the U.S. has substantially followed suit.¹⁰⁰ Non-adopting nations have every right to question the consistency of the public policy exception's application on a multilateral level—one's trust in the hands of too many presents plenty of danger. Nonetheless, the U.S.'s consistently narrow interpretation provides

⁹⁵ Jasna Zwitter-Tehovnik, *The Revised EC Regulation on Insolvency Proceedings Seeks to Resolve Practical Concerns*, DLA PIPER (Oct. 6, 2015), <https://www.dlapiper.com/insights/publications/2015/10/global-insight-15/the-revised-ec-regulation-on-insolvency/>.

⁹⁶ *In re Qimonda AG Bankr. Litig.*, 433 B.R. 547, 568 (E.D. Va. 2010).

⁹⁷ 11 U.S.C. § 1506.

⁹⁸ O'Flynn, *supra* note 3, at 412-13.

⁹⁹ H.R. Rep. No. 109-31(I), reprinted in 2005 U.S.C.C.A.N. 88, 172.

¹⁰⁰ O'Flynn, *supra* note 3, at 412-13.

more predictability for foreign creditors, especially those in allied nations.¹⁰¹

iii. Comity

Further, most scholars point towards Chapter 15's increased focus on principles of comity—essentially the good faith acceptance of and cooperation with foreign proceedings—as the reason for U.S. courts' limited discretion on granting or refusing relief.¹⁰² This view is bolstered by the emphasis on comity in Section 1507(b) of the Code, where its placement in the introductory language was “to make it clear that it is the central concept to be addressed.”¹⁰³ In Section 1507(b), principles of comity reign as the ultimate standard with only secondary factors of:

- (1) just treatment of all holders of claims against or interests in the debtor's property;
- (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
- (3) prevention of preferential or fraudulent dispositions of property of the debtor;
- (4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and
- (5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.¹⁰⁴

While morally sound in preaching values of comity and good faith towards foreign proceedings, these factors forget the most important concern of all: reciprocity. Chapter 15's emphasis on comity reassures other nations that the U.S. will cooperate in good faith, but those outgoing promises of comity open the door for a greater danger: “Chapter 15 foolishly commits U.S. courts to defer to foreign bankruptcy law in some

¹⁰¹ O'Flynn, *supra* note 3, at 412-13.

¹⁰² *Id.* at 412.

¹⁰³ H.R. Rep. No. 109-31, at 109 (2005).

¹⁰⁴ 11 U.S.C. § 1507(b).

instances without a reciprocal commitment from foreign courts to defer to U.S. bankruptcy law in others.”¹⁰⁵

iv. Cooperation Protocols

Chapter 15’s shortcomings become painfully apparent when considering the lack of a reciprocity requirement and the threats its absence may present. If a certain nation’s foreign representative files a foreign ruling, the U.S.—bound by Chapter 15—will apply the principles of comity and act in good faith to approve the foreign ruling.¹⁰⁶ In the alternative, nations that have not adopted the Model Law have no obligation to approve U.S. foreign rulings, regardless of the U.S.’s previous enforcement of that nation’s foreign proceedings.

Recognizing this reciprocity problem, Section 1527 of the Code allows for various means by which reciprocity, or cooperation, may be obtained.¹⁰⁷ Most importantly, Chapter 15 allows, and even *encourages*, the “approval or implementation of agreements concerning the coordination of proceedings.”¹⁰⁸ For many debtors, these agreements have been implemented through case-specific, “cross-border insolvency cooperation protocols.”¹⁰⁹ In light of the Model Law’s failure to catch on globally, multinational debtors have had to pursue these individual protocols to give themselves a chance at restructuring. In essence, a protocol is a bilateral or multilateral agreement between the debtor and each foreign creditor to coordinate the foreign proceedings in accordance with Chapter 15 and, thus, the Model Law.¹¹⁰

Constructing and finalizing protocols is a time-consuming, costly task, but for many multinational companies facing bankruptcy, protocols offer the only hope of a successful reorganization. In fact, Lehman Brothers¹¹¹ took this exact route to coordinate over seventy-five distinct proceedings in the “first-ever multilateral cross-border insolvency protocol.”¹¹² Approved on June 17, 2009, the protocol addressed cooperation, coordination, and asset preservation, and it effectively laid out

¹⁰⁵ Harvard Law Review Ass’n, *supra* note 7, at 1293.

¹⁰⁶ O’Flynn, *supra* note 3, at 412.

¹⁰⁷ 11 U.S.C. § 1527.

¹⁰⁸ 11 U.S.C. § 1527(4).

¹⁰⁹ See Evan D. Flaschen & Ronald J. Silverman, *Cross-Border Insolvency Cooperation Protocols*, 33 TEX. INT’L L.J. 587, 589-90 (1998).

¹¹⁰ Harvard Law Review Ass’n, *supra* note 7, at 1293.

¹¹¹ *In re Lehman Bros. Holdings Inc.*, 422 B.R. 407, 423 (Bankr. S.D.N.Y. 2010).

¹¹² Harvard Law Review Ass’n, *supra* note 7, at 1302.

the principles and guidelines set forth in the Model Law and Chapter 15.¹¹³ However, the Lehman Brothers' protocol—as with all protocols—did not come without its share of difficulties, nor did it even guarantee effectiveness.

First and foremost, ad-hoc cooperation protocols hold incredible significance in both debtors' and creditors' eyes. Courts desire the possibility of unifying adopting and non-adopting nations alike in a cross-border insolvency proceeding, and protocols do just that. In enacting the protocols, the parties agree to act in good faith in coordinating the foreign proceeding.¹¹⁴ But there's a catch: these protocols are not legally enforceable and are, thus, "largely aspirational."¹¹⁵ That is, cooperation protocols lack an enforcement mechanism to bind foreign parties to their promises of good faith cooperation and coordination.¹¹⁶

Without any form of enforcement mechanism and only a reliance on promises of good faith, courts have no actual authority over foreign courts to recognize their rulings, and Lehman Brothers experienced this exact problem:

[A]fter a court in another Model Law jurisdiction had validated a contractual provision implicating [a Lehman] subsidiary's priority over certain collateral, a U.S. bankruptcy court declared the provision unenforceable while recognizing that its "decision place[d] the [defendant] in a difficult position in light of the [earlier] contrary determination."¹¹⁷

The lack of an enforcement mechanism deals a significant blow to the theoretical attractiveness of protocols, but any assurance of cooperation still offers value to debtors and creditors alike.

III. BILATERAL INSOLVENCY AGREEMENTS

The costs of privately negotiating with each individual party further conflicts with the most fundamental principles of bankruptcy:

¹¹³ See generally Cross-Border Insolvency Protocol for the Lehman Brothers Group of Companies (May 12, 2009), <https://www.insol.org/Fellowship%202010/Session%209/Lehman%20protocol%20executed.pdf>.

¹¹⁴ Flaschen, *supra* note 104, at 597.

¹¹⁵ Harvard Law Review Ass'n, *supra* note 7, at 1302.

¹¹⁶ *Id.* at 1302-03.

¹¹⁷ *Id.*

equality of distribution and maximization of repayment.¹¹⁸ Yes, protocols may still be necessary in a “spend money to make money” sense, but insolvent debtors are far from the least cost avoiders. On a national level, nations could enter into similar protocols, or bilateral insolvency agreements for a one-time expense, after which debtors and creditors could realize the benefits of Model Law procedures without the cost of travel and attorney fees that quickly amass in negotiating private protocols.

Despite its inapplicability to the U.S., Regulation 2015/848¹¹⁹ leads to two important insights. First, the implementation of a cross-border insolvency regulation that only applies between EU member states suggests a general disinterest in pursuing similar regulations abroad. When considering the totality of the circumstances alongside the inward-focused Action Plan and contentious TTIP negotiations, aspirations for a uniform cross-border insolvency agreement between the U.S. and EU fade beyond the foreseeable future. Secondly, however, Regulation 2015/848 shows that EU member states’ refusal to adopt the Model Law revolves less around a dispute over the substantive provisions of the Model Law and more around a general wariness or hesitancy to subject domestic creditors to the will of foreign bankruptcy proceedings. As Regulation 2015/848 largely reflects the language of the Model Law, the scope of its applicability seems to be the primary dispute that holds a larger agreement back.¹²⁰ When contemplating a multilateral agreement such as the Model Law with numerous other nations, this general reluctance makes total sense. But why could a deal not be struck between fewer, like-minded nations?

A. Comparison of French and American Cross-Border Insolvencies

While a larger insolvency treaty with the EU seems currently unlikely, the U.S. stands to gain nothing by sitting idly on the sideline. Instead, honing further onto EU member states with which the U.S. has close ties would offer significant short-term and long-term advantages for all nations involved until a larger multilateral agreement is agreed to in the future. France stands out as an optimal partner with whom to enter a new BIA, as it is the U.S.’s eighth-largest trade partner¹²¹ and a close ally.

¹¹⁸ Commission to Study the Reform of Chapter 11, *Final Report and Recommendations*, AM. BANKR. INST. (2014), <https://abiworld.app.box.com/s/vvircv5xv83aav14dp4h>.

¹¹⁹ See generally Council Regulation 2015/848, *supra* note 94.

¹²⁰ Council Regulation 2015/848, *supra* note 94.

¹²¹ *Top Trading Partners*, *supra* note 6.

Debtors and creditors from both nations could soon realize the full insolvency protections that each experience domestically.

In fact, a BIA between France and the U.S. would not even be France's first. France is a party to bilateral insolvency treaties with Belgium, Italy, Monaco, and Austria.¹²² These treaties facilitate reciprocity of foreign proceedings by providing jurisdiction to the courts of the state in which the debtor is domiciled.¹²³ While each contracting state will recognize a bankruptcy order from another state, parties must obtain an exequatur to enforce it.¹²⁴

While France's BIAs with other EU member states may now be rendered unnecessary in light of the EU Insolvency Regulation, their existence shows both (1) a willingness to enter into BIAs, and (2) an additional preference for cross-border insolvency laws and regulations complementary to those of the Model Law and Chapter 15.

Despite France's complementary laws, however, they only afford reciprocity to other EU nations:

Foreign creditors are entitled to claim in the French bankruptcy and they will be treated in the same manner as French creditors by the French courts. If there are multiple bankruptcies including French proceedings, principles of strict territoriality will apply. The foreign bankruptcy will not affect French assets that are the exclusive domain of the French bankruptcy proceedings and will be restricted to French creditors.¹²⁵

Without a private protocol or BIA in place, foreign representatives have limited recognition and authority in France, rendering foreign representatives such as those from the U.S. largely ineffective.

B. The Benefits of a BIA with France

With the common issues that many nations share regarding their interpretations of the Model Law, it has become clear that a truly universal cross-border insolvency agreement will be unlikely catch on at a global

¹²² See *Cross Border Insolvency: France*, INSOL INT'L 108 http://www.insol.org/pdf/cross_pdfs/France.pdf.

¹²³ *Id.* A company is domiciled in the state where it is registered. *Id.*

¹²⁴ *Id.*

¹²⁵ *Cross Border Insolvency: France*, *supra* note 122, at 109; See also, CODE DE PROCÉDURE CIVILE [C.P.C.] [CIVIL PROCEDURE CODE] art. 509.

level. Instead, the U.S. must take matters into its own hands in ensuring adequate protection of its companies and creditors abroad. In light of the disinterested reception that the Model Law received, large-scale multilateral agreements have exhibited their shortcomings, and tailored BIAs may prove to be the preferred alternative. However, the Lehman Brothers' method of securing protocols with goals comparable to BIAs—by negotiating on a case-by-case basis—fails to offer adequate protections and requires significant transactional costs.

Naturally, the U.S. must anticipate that France will not simply enter a BIA that adopts Chapter 15 of the Code verbatim. A successful BIA will require both parties to make compromises. Some may worry that compromises could undermine Chapter 15 itself,¹²⁶ but the few changes that may be necessary would supplement—if not improve—the current language.

For example, Regulation 2015/848, as addressed above, unveiled a simple and excellent solution to Chapter 15's ambiguity through a more structured statutory definition of COMI.¹²⁷ A BIA with France would allow the U.S. to test new language on a limited scale, effectively remedying the problems posed by its current ambiguity. In addition, France would probably accept this language as it reflects the language of both its current BIAs¹²⁸ and the EU's Regulation,¹²⁹ to which it is also a party.

More importantly, a BIA with France, simply through the enactment itself, would structure a foundational enforcement mechanism that private cooperation protocols lack.¹³⁰ Chapter 15 expressly grants precedence to “any obligation of the United States arising out of any treaty or other form of agreement to which it is a party,” by which a treaty or a BIA's language would prevail over the Code.¹³¹ Right off the bat, a BIA would thus cure the primary criticism of private protocols by assuring the parties and the courts alike that their work and decisions will be given full faith and credit within the foreign main proceedings.

A third benefit of a BIA shows that parties may no longer be affected by the unpredictability that deterred nations from adopting the universalist, multilateral Model Law that has thus far monopolized cross-

¹²⁶ Harvard Law Review Ass'n, *supra* note 7.

¹²⁷ Zwitter-Tehovnik, *supra* note 95.

¹²⁸ *Cross Border Insolvency: France*, *supra* note 122.

¹²⁹ Council Regulation 2015/848, *supra* note 94.

¹³⁰ Harvard Law Review Ass'n, *supra* note 7.

¹³¹ 11 U.S.C. § 1503.

border insolvency. The U.S. and France could retain their sovereign right to refuse each other's rulings if necessary under fraud or the public policy exception, but the BIA would offer the ability to bring these standards of interpretation into harmony. Ultimately, predictability promotes good faith behavior and a clear conscience in place of the "every-man-for-himself" attitude too often experienced in contentious cross-border insolvencies.

Lastly, the abundance of benefits offered by BIAs' extended reach into non-adopting nations ultimately prioritizes one thing: the money. Yes, a successful reorganization is debatably of equal importance, but only because a healthy company leads to satisfied creditors. Without BIAs, companies must follow in the footsteps of Lehman Brothers and incur significant transactional costs that will eventually take away from the debtor's available assets for creditors.

IV. CONCLUSION

For some time, the lack of uniform rules on insolvency proceedings was a mere afterthought for legislators and businessmen alike. However, corporations continue to globalize, and cross-border insolvencies will inevitably follow. International trade has evolved and nations must show a willingness to update their insolvency regimes to encourage continued growth within their borders. The Model Law's universality foundation has exhibited its unrivaled solutions for cooperation and coordination of foreign proceedings, but its inherently unavoidable flaws have proven too much for all but a handful of adopting nations. Nonetheless, international trade and globalization will not slow down for a failed system.

The private cooperation protocols established in Chapter 15 and introduced in the Lehman Brothers' blockbuster bankruptcy serve as a temporary fix, but more long-term answers are required. Just as the EU introduced its Action Plan in 2015,¹³² the U.S. must move on from the aspirations of a multilateral success and instead work to protect its domestic debtors and creditors alike. American investors will continue to explore lucrative business and investment possibilities with or without the added protections that a uniform cross-border insolvency regime would provide.

The U.S. trade relationship with France opens the door for an exceptional opportunity to create a more tailored BIA that grants both nations the clarity, predictability, and efficiency that before only existed through

¹³² See Hill, *supra* note 67.

unenforceable promises. If successful, BIAs may attract other nations as well. Some nations may choose to not join, but many others may. For every nation that elects to enter BIAs in interest of their debtors and creditors, one fewer must be pursued privately each and every time that a cross-border case occurs. Globalization is exciting and lucrative, but every success yields many other failures.

**SPACE ROCKS!: A PERSPECTIVE ON LARGELY
UNREGULATED ASTEROID MINING**

*Nick Smith**

I. INTRODUCTION

“Ah, but a man’s reach should exceed his grasp,
Or what’s a heaven for?”

-Robert Browning, *Andrea Del Sarto*¹

If you will pardon the interruption to your day, I’ll ask you to take a moment to stop and reflect on where exactly you are. Honestly, set down your coffee, stop twiddling with the pen in your hand, and think about the place you currently occupy. At this precise moment, the Earth is hurtling through space at tens of thousands of miles per hour (and that just relative to the sun), tracing an enormous path past other planets and objects, to maintain an orbit around a giant ball of flaming nuclear fusion. As a species, we easily forget that we are just a small speck, a little dot of life dancing through a vast, lifeless expanse. This is because it is easy to put out of our minds the things we do not understand, to forget about them and return to the comfort of mundane problems. That is, however, going to change; the era of space exploration has only just begun, and in the coming decades human ingenuity will allow us to mine asteroids for resources, and take our collective next step into the universe.² Soon, it will be impossible to forget.

Asteroid mining may sound like the topic of a poorly written science fiction novel, but the last few decades of technological advancement have shown it to be not only feasible, but probable.³ Realistically, human beings will likely begin to utilize asteroids for their resources sometime within the next two to three decades.⁴ Estimates vary based on technological changes, but generally hold to the late first half of the twenty-first century.⁵ Space is incomprehensibly large, and the amount of resources available from asteroids is commensurate with scale of that playing field. A single asteroid could hold enormous value, potentially containing trillions of

* J.D. 2017, George Mason University School of Law.

¹ ROBERT BROWNING, *Andrea Del Sarto*, in 42 THE HARVARD CLASSICS: ENGLISH POETRY III: FROM TENNYSON TO WHITMAN 1130, 1133 (Charles William Eliot ed., 1910).

² See *Asteroid Mining: A Possible New Future Alternative To Land Mining*, MASS. INST. OF TECH., <http://web.mit.edu/12.000/www/m2016/finalwebsite/solutions/asteroids.html> (last visited May 8, 2017) [hereinafter *Asteroid Mining*].

³ See *id.*

⁴ See *id.*; see generally JOHN BROPHY ET AL., ASTEROID RETRIEVAL FEASIBILITY STUDY (Apr. 2, 2012), http://kiss.caltech.edu/study/asteroid/asteroid_final_report.pdf [hereinafter Keck Report].

⁵ See *Asteroid Mining*, *supra* note 2.

dollars of useful metals, such as cobalt or iron, or even mass quantities of ice (which, under the right conditions, could be used to create fuel without having to ship it up from the Earth.)⁶ The next steps seem natural enough; private companies that have invested in space resource exploitation will begin to reap the rewards, and humanity will gradually expand as it ever has. However, those companies are being slowed from their target due to the indecision of investors who face the ambiguity of space law.

The primary international treaty regulating the use of space resources is the Outer Space Treaty,⁷ a relic of the cold war space race that is intentionally ambiguous, and which has far outlived its usefulness on the question of privatization in space. The Outer Space Treaty limits signatories by not allowing them to have sovereign control over “celestial bodies,”⁸ but allows private, non-governmental entities to take control of those bodies if their host state allows it.⁹ While those aspects are not exactly horrendous, the treaty also allows for any member to withdraw with just a year’s notice, raising the question for the prospective mining investor of the potential state of space law, should asteroid mining suddenly begin to turn a profit.¹⁰ For people to invest their money into this field, an understanding of the legal landscape in space is necessary. Who on Earth would invest in a high stakes venture when the laws relating to it are ambiguous, outdated, and may be changed as soon as you begin to make a return on your investment?

This paper will review the nature of asteroids, the history of the Outer Space Treaty, and technological advancements related to space resources, as well as some prominent theoretical models that are often associated with space law and asteroid mining discussions. The primary problems facing this industry is the uncertain state of pertinent laws, and the need for any future regulation to take into account the complexity of this unique, new type of marketplace. The proposed theory that will follow takes these factors into account, and entails a free enterprise system, absent any direct regulations on production or property law, and bound only by a strict series of basic, internationally agreed-upon safety requirements to avoid serious accidents. The focus of this paper, is to propose a theoretical international regulatory model that maximizes the incentives and efficiency of private corporations, while providing an acceptable level of safety.

⁶ See *Asteroid Database and Mining Rankings*, ASTERANK, <http://www.asterank.com> (last visited May 8, 2017) (describing in detail the positions, compositions, and approximate values of over six hundred thousand asteroids, as well as analyzing their cost effectiveness) [hereinafter ASTERANK]; see also Clara Moskovitz, ‘Wet’ Asteroid Could Be a Space Gas Station, SPACE.COM (May 4, 2010, 4:46 PM), <http://www.space.com/8339-wet-asteroid-space-gas-station.html>; see also Keck Report, *supra* note 4, at 9-10.

⁷ See generally Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205 [hereinafter Outer Space Treaty].

⁸ *Id.* at art. I.

⁹ *Id.* at art. VI.

¹⁰ *Id.* at art. XVI.

II. INFORMATION ABOUT ASTEROIDS

Before analyzing the different possible international treaty schemes, or the economic effects of regulation, it is necessary to first address what an asteroid is, and what properties the various classes of asteroids possess. Without understanding what kinds of resources asteroid mining could bring within the reach of humanity, the entire question of regulatory plans for the activity seems tediously academic. An asteroid is “a small rocky body orbiting the sun.”¹¹ In truth, it is that and a great deal more.

Asteroids are composed of many different elements, usually involving some degree of either metal, minerals, or ice which act to bind the asteroid together, allowing it to maintain a cohesive shape.¹² The Tholen classification system is a common way to divide up asteroids by their compositions and characteristics, which it does by placing them into one of fourteen specific categories, which in turn fit within three broad groups.¹³ While all of the Tholen categories are significant, most theoretical asteroid mining ventures choose to focus on three specific classes of asteroids: C, S, and M.¹⁴

C class asteroids are carbonaceous, being largely made up of water and carbon.¹⁵ These asteroids are extremely plentiful in the outer area of the main asteroid belt.¹⁶ S class examples, found in the inner area of the main asteroid belt, are siliceous, containing less water than C class asteroids, but comprising greater deposits of rare metals like platinum, as well as nickel, and iron.¹⁷ S class asteroids are a broad, common grouping, and are usually stony in their composition.¹⁸ Finally, M class asteroids, found in the middle area of the main asteroid belt, are metallic in nature, containing

¹¹ *Asteroid*, OXFORD UNIV. PRESS, http://www.oxforddictionaries.com/us/definition/american_english/asteroid (last visited May 8, 2017).

¹² See Moskovitz, *supra* note 6.

¹³ David Darling, *Asteroid Spectral Types*, http://www.daviddarling.info/encyclopedia/A/asteroid_spectral_types.html (last visited May 9, 2017); Charles Q. Choi, *Asteroids: Fun Facts and Information about Asteroids*, SPACE.COM (Mar. 16, 2017, 9:38 PM), <http://www.space.com/51-asteroids-formation-discovery-and-exploration.html>; Stephen Shaw, *M-Type Asteroids* (Aug. 21, 2012), <http://www.astronomysource.com/tag/m-type-asteroids/>.

¹⁴ See Stephen Shaw, *supra* note 13.

¹⁵ See Darling, *supra* note 13; see also Stephen Shaw, *supra* note 13.

¹⁶ Darling, *supra* note 13; Stephen Shaw, *supra* note 13.

¹⁷ Darling, *supra* note 13; Stephen Shaw, *supra* note 13; Philip Metzger, *The Type of Asteroid to Mine, Part 3* (May 20, 2003), <http://www.philipmetzger.com/blog/type-of-asteroid-to-mine-part-3/>.

¹⁸ See Darling, *supra* note 13; see also Stephen Shaw, *supra* note 13.

enormous amounts of nickel and iron.¹⁹ M classes are far less common than S or C classes, and contain a significant amount of iron and nickel.²⁰

The asteroids in our solar system were likely formed alongside the planets, billions of years ago.²¹ As the solar system coalesced into a cloud made up of enormous quantities of dust, gravitational effects began to emerge, accelerating clumped-up groups of like particles, causing them to grow in size.²² Eventually, this process layered together planets and asteroids, which in turn adopted orbits.²³ By acting as an enormous centrifuge, our newborn solar system grouped elements by mass, explaining the rarity of certain metals in the Earth's crust (which were grouped into distant asteroids, and deposited into the crust later by striking the planet.)²⁴ As a result, asteroids (especially the metallic M class variations) offer humans the chance to gather enormous quantities of metals that are naturally rare, and valued for many industrial uses, on Earth.²⁵ Hundreds of thousands of asteroids are known (and, to a degree, tracked), and it is not uncommon for the estimated value of large metallic specimens to be in the range of billions or trillions of U.S. dollars.²⁶

Generally speaking, M class asteroids are excellent targets for mining because of their comparatively large content of metals.²⁷ Many different types of asteroids have been observed for the purpose of classification, the analysis of which has largely been accomplished through the use of spectroscopy, grouping asteroids from a distance based on their chemical composition.²⁸ Given that, and accepting that almost any venture to mine an asteroid will require a significant financial investment, it is

¹⁹ Darling, *supra* note 13; Stephen Shaw, *supra* note 13.

²⁰ See Charles Q. Choi, *Asteroids: Fun Facts and Information About Asteroids*, SPACE.COM (Mar. 16, 2017 9:38 PM) <http://www.space.com/51-asteroids-formation-discovery-and-exploration.html>; see also Darling, *supra* note 13; Stephen Shaw, *supra* note 13.

²¹ See *How Asteroids and Comets Formed*, SCI. CLARIFIED, <http://www.scienceclarified.com/scitech/Comets-and-Asteroids/How-Asteroids-and-Comets-Formed.html> (last visited May 9, 2017); see also *Geologists Point to Outer Space as Source of the Earth's Mineral Riches*, SCI. DAILY (Oct. 19, 2009), <http://www.sciencedaily.com/releases/2009/10/091018141608.htm>.

²² See *How Asteroids and Comets Formed*, *supra* note 21.

²³ See *id.*

²⁴ See *Geologists Point to Outer Space as Source of the Earth's Mineral Riches*, *supra* note 21; see also Matthias Willbold et al., *The Tungsten Isotopic Composition of the Earth's Mantle Before the Terminal Bombardment*, 477 NATURE 195, 195 (2011).

²⁵ See Stephen Shaw, *supra* note 13; see also Martin Creamer, *The Uses of Platinum Group Metals*, MINING WEEKLY (Nov. 10, 2006), <http://www.miningweekly.com/article/the-uses-of-platinumgroup-metals-2006-11-10>.

²⁶ See generally ASTERANK, *supra* note 6.

²⁷ See Stephen Shaw, *supra* note 13.

²⁸ See Stephen Harris, *Your Questions Answered: Asteroid Mining*, THE ENGINEER (Apr. 8, 2013, 9:00 AM), <http://www.theengineer.co.uk/aerospace/in-depth/your-questions-answered-asteroid-mining/1015966.article>.

natural to consider M class as a primary target to increase the potential for a good return on investment.²⁹

All of this is not to say that C and S class asteroids are not valuable, however; they absolutely offer potential for profit, just in very different ways. C class specimens, as previously mentioned, are typically full of frozen water and carbon; while frozen space dust may not sound like an exotic and saleable commodity, the value of it increases exponentially because of its location.³⁰

One of the most significant problems with moving supplies from Earth into space is the prohibitive cost of escaping our planet's gravity.³¹ The most efficient way of doing this is with rockets that use a chemical reaction as a propellant, blasting their payload to escape velocity.³² However, there is a hard limit to the amount that can be lifted with chemical propellants.³³ This physical limitation forces increasingly large ratios of propellant to payload, and makes sending high-mass objects into space very expensive. This presents a serious impediment to activity in space, as things like water, fuel, and building materials tend to be heavy in useful quantities.³⁴ C class asteroids offer a potential solution to these problems, because of their composition.³⁵ If these resources were mined and utilized in space, the ice could be harvested and used to offer potable water for astronauts, and, through a process known as electrolysis, could be separated into hydrogen and oxygen.³⁶ Hydrogen and oxygen are useful components for fuel production, and could be repurposed for drinking water and replenishing breathable gases in space.³⁷

C class asteroids also offer a serious potential value, in the form of high carbon.³⁸ Carbon is difficult to bring into space in bulk, but their presence there is exciting because of the prospect of agricultural applications.³⁹ Growing plants in extreme environments has been made possible thanks to hydroponics and inventive botany, but no amount of ingenuity is likely to change the fact that plants require nutrients to function

²⁹ See Caitlin O'Keefe, *How We Choose Our Near-Earth Asteroid Targets*, PLANETARY RES. (Aug. 28, 2015), <https://www.planetaryresources.com/2015/08/how-we-choose-our-asteroid-targets/>.

³⁰ *Id.*; see also Darling, *supra* note 13; Stephen Shaw, *supra* note 13.

³¹ See Don Pettit, *The Tyranny of the Rocket Equation*, NAT'L AERONAUTICS & SPACE ADMIN. (May 1, 2012), http://www.nasa.gov/mission_pages/station/expeditions/expedition30/tryanny.html.

³² *Id.*

³³ *Id.*

³⁴ *See id.*

³⁵ See Darling, *supra* note 13; see also Stephen Shaw, *supra* note 13.

³⁶ Moskowitz, *supra* note 6.

³⁷ *Id.*

³⁸ Darling, *supra* note 13; Stephen Shaw, *supra* note 13.

³⁹ See Michael Slezak, *Asteroid Soil Could Fertilise Farms in Space*, NEW SCIENTIST (Dec. 16, 2014), <https://www.newscientist.com/article/mg22430004-900-asteroid-soil-could-fertilise-farms-in-space/>. See also Pettit, *supra* note 31.

and grow.⁴⁰ If the necessary fuel for plant growth can be gathered without requiring a trip from the surface of Earth, it would lower the overall cost for spaceflight, and present opportunities for large-scale experimentation and production.⁴¹

S class asteroids have an obvious value in the form of precious metals and rare earth elements, which if mined could be returned to Earth.⁴² S class rocks possess a high iron and nickel content, two metals which are not at all rare on Earth, but which could be used heavily in space fabrication.⁴³ Building space-based facilities is currently a game of inches, with large installations like the International Space Station (Station) requiring a decade and a half to finish, and costing well over one hundred billion dollars.⁴⁴ A very significant portion of the time and costs can be attributed to the method of reaching space: "Because each of the aluminum-can shaped components of the Station has to be lifted into orbit, minimizing weight is crucial. Lightweight aluminum, rather than steel, comprises most of the outer shell for the modules."⁴⁵ Similarly, many of the design requirements that space agencies work with are due to the lightweight material having to withstand significant bombardment in space, a situation which high strength and high density metals could improve.⁴⁶

Asteroids are easy to picture as boring hunks of stone, floating through the void of space, but nothing could be further from the truth. Even the simplest of asteroids holds the potential to feed astronauts in space or provide fuel for ships, and the more advanced specimens could provide riches and allow for large-scale space fabrication.⁴⁷ These rocks could be the secret to humanity taking its next collective step into the solar system, and whatever that future may bring.

III. HISTORY OF INTERNATIONAL SPACE TREATIES

International treaties dealing specifically with space are rare, most likely because the exploration and commercialization of anything beyond the Earth's atmosphere is a comparatively new concept. Some international treaties are in effect, however, and while they are few, it is worth examining

⁴⁰ See Slezak, *supra* note 39.

⁴¹ See Pettit, *supra* note 31.

⁴² See Darling, *supra* note 13; see also Stephen Shaw, *supra* note 13; see generally ASTERANK, *supra* note 6.

⁴³ Stephen Shaw, *supra* note 13; see O'Keefe, *supra* note 29.

⁴⁴ Denise Chow, *After 13 Years, International Space Station Has All Its NASA Rooms*, SPACE.COM (Mar. 9, 2011, 9:46 AM), <http://www.space.com/11078-space-station-complete.html>.

⁴⁵ *Home, Space Home*, NAT'L AERONAUTICS & SPACE ADMIN. (Mar. 14, 2001), http://science.nasa.gov/science-news/science-at-nasa/2001/ast14mar_1/.

⁴⁶ See *id.*

⁴⁷ See Darling, *supra* note 13; Stephen Shaw, *supra* note 13; Moskovitz, *supra* note 6; Slezak, *supra* note 39.

them for two reasons. The first is, simply, that they already exist.⁴⁸ Carving out an entirely new international treaty will be a complex procedure, and the weight and effects of previous treaties can serve to inform the creation of a new one. Compared to international agreements, national-level regulations on space commercialization are an ineffective way to create law throughout the spacefaring countries, as they would likely lead to a tragedy of the commons.⁴⁹ If some nations declare an independent intent to follow rules, the remaining nations will have an incentive to not regulate, so as to lower their own costs. The second reason international regulation is preferable is that it offers an opportunity for the spacefaring nations to agree to a basic level of regulation, and to expect that there will be ramifications for breaking that agreement in the form of international sanctions and refusal of partnership from the broader scientific and industrial communities.

There are currently five major international treaties relating to space, but only two of them are relevant to utilization of space resources.⁵⁰ The others deal with the placement of objects into geosynchronous orbit, and liability for space damage.⁵¹ The two primary treaties on the subject of space privatization are the Outer Space Treaty from 1967, and the Moon Treaty from 1979, both of which focus specifically on the question of sovereign ownership of celestial real estate.⁵²

Both treaties reflect on the nature of extraterrestrial property, holding that space is the cultural heritage of all mankind, an idealistic final frontier deserving of protection from the rampant political one-upmanship of humanity.⁵³ Of the two, the Moon Treaty is more recent and more radical. It establishes that the moon, celestial bodies, and space itself are not available for ownership by either nations or private parties, and goes so far as to mandate that all space exploration be open to international control.⁵⁴ The Moon Treaty is also, however, largely unsigned and ignored by the

⁴⁸ See generally Outer Space Treaty, *supra* note 7; Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, Dec. 5, 1979, 18 I.L.M. 1434, 1363 U.N.T.S. 3. [hereinafter Moon Treaty]. For a full list of space law treaties, see *Space Law Treaties and Principles*, U.N., <http://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties.html> (last visited May 9, 2017) [hereinafter Space Law Treaties].

⁴⁹ See generally Garrett Hardin, *The Tragedy of the Commons*, 168 Sci. 1243 (1968).

⁵⁰ See, e.g., Space Law Treaties, *supra* note 48.

⁵¹ See, e.g., *id.*; see generally Convention on International Liability for Damage Caused by Space Objects, March 29, 1972, 24 U.S.T. 2389, T.I.A.S. 7762, 10 I.L.M. 965. This treaty exclusively contemplates damage caused by one country's launched objects to a citizen or launched object of another country. See generally *id.* While it contemplates serious, large scale damage from activity in space, it does not apply to property in space which was not launched by a signatory, so it likely could not be used to settle asteroid claim jumping. See *id.* at art. I.

⁵² See generally Outer Space Treaty, *supra* note 7; see also Moon Treaty, *supra* note 48.

⁵³ See Moon Treaty, *supra* note 48, at art. 4; see also Outer Space Treaty, *supra* note 7, at art. I.

⁵⁴ Moon Treaty, *supra* note 48, at art. 4.

scientifically-advanced international community.⁵⁵ In fact, it has not been signed by a single nation with spacefaring capability.⁵⁶

The Outer Space Treaty, on the other hand, has been signed by most of the international community (including all major spacefaring nations), cementing its position as the aged bedrock of current international space regulation.⁵⁷ The problem with this treaty is not its applicability, but the reach it possesses. A product of the Cold War Space Race, the treaty was signed in an era where the future scope of space exploration was hard to predict, and it reflects that in its masterfully limited wording.⁵⁸ While nations are prohibited from claiming celestial bodies, Amendment VI of the treaty requires that: “[t]he activities of non-governmental entities in outer space, including the Moon and other celestial bodies, shall require authorization and continuing supervision by the appropriate State Party to the Treaty.”⁵⁹ The treaty even promises international liability to parties for the actions of non-governmental entities in space,⁶⁰ a threat that is notably limited by the ability of any party to withdraw from the treaty with a year’s notice.⁶¹ This treaty prohibited nations from claiming celestial bodies at a time when the possibility of reaching the moon was highly political,⁶² but had the foresight to limit any boundaries on private parties within the signing countries,⁶³ and to provide a ripcord to get out of the treaty if circumstances changed.⁶⁴

The marked difference between the Moon Treaty and the Outer Space Treaty illustrates the complex web of interests negotiated in an extraterrestrial treaty. The Outer Space Treaty was limited in scope to prevent a race to claim celestial bodies, and there was obvious consideration of the potential scope of future space development.⁶⁵ Only twelve years later, however, the vast majority of nations refused to sign on to the more

⁵⁵ See *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*, U.N. OFFICE OF DISARMAMENT AFFAIRS, <http://disarmament.un.org/treaties/t/moon> (last visited May 11, 2017) [hereinafter U.N. OFFICE OF DISARMAMENT AFFAIRS].

⁵⁶ Kyle A. Jacobsen, *From Interstate to Interstellar Commerce: Incorporating the Private Sector Into International Aerospace Law*, 87 TEMP. L. REV. 159, 169 (2014).

⁵⁷ *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*, U.S. DEP’T OF STATE, <https://www.state.gov/t/isn/5181.htm> (follow “signatories”) (last visited May 11, 2017).

⁵⁸ See Amy Shira Teitel, *The 1967 Outer Space Treaty’s Legacy: Non-Aggressive Exploration of Space*, POPULAR SCI. (Oct. 10, 2013), <http://www.popsci.com/blog-network/vintage-space/1967-outer-space-treatys-legacy-non-aggressive-exploration-space>; see generally Outer Space Treaty, *supra* note 7.

⁵⁹ Outer Space Treaty, *supra* note 7, at art. VI.

⁶⁰ *Id.* at art. VI.

⁶¹ See *id.* at art. XVI.

⁶² See *id.* at arts. I-V.

⁶³ See generally *id.*

⁶⁴ *Id.* at art. XIV.

⁶⁵ See Teitel, *supra* note 58.

draconian Moon Treaty.⁶⁶ The same concerns that hamstrung the Outer Space Treaty removed any chance of widespread support for the Moon Treaty; by 1979 spacefaring countries were increasingly sure of the future commercial value of space, and refused the heavier regulations.⁶⁷

The creation of an international treaty that has meaningful regulation on any private activity in space is likely to be an extremely fine balancing act. What was science fiction decades ago is the very real possibility of profit today; the potential for industrial expansion is strong motivation for governments to not bind themselves.⁶⁸ This creates a precarious situation: the Outer Space Treaty is still controlling, but any attempt to modify it to restrict private entities any more than it does may spark an exodus of the party nations. Similarly, any significant nation abandoning the treaty could easily lead others to follow for fear of falling behind in a new colonial age. Any treaty that stands a chance of acceptance must bind countries on the sparest of terms, and offer serious repercussions to those who violate it.

IV. FUTURE TECHNOLOGICAL EXPECTATIONS

Future interest in human space exploration is likely to be boosted, at least in part, by space becoming a lucrative environment to exploit for its resources.⁶⁹ Over the course of the next several decades, commercial spaceflight is expected to become significantly more common, and industrial space applications will likely begin to thrive.⁷⁰ Mining asteroids is the logical next step in commercial expansion into space, and private companies have already begun to prepare for it.⁷¹ Deep Space Industries and Planetary Resources are just two of the companies at the forefront of asteroid mining technology; the former has announced its intention to have rudimentary mining underway by around 2023.⁷² The latter keeps a running timeline of its advancements, partnerships, and launches, made for the purpose of future prospecting.⁷³ While not popularly branded or largely

⁶⁶ See U.N. OFFICE OF DISARMAMENT AFFAIRS, *supra* note 55.

⁶⁷ See U.N. OFFICE OF DISARMAMENT AFFAIRS, *supra* note 55; *see also* Teitel, *supra* note 58.

⁶⁸ See ASTERANK, *supra* note 6.

⁶⁹ See Lee Valentine, *A Space Roadmap: Mine the Sky, Defend the Earth, Settle the Universe*, SPACE STUDIES INST. (2002), <http://ssi.org/reading/papers/space-studies-institute-roadmap/>.

⁷⁰ See *Asteroid Mining*, *supra* note 2.

⁷¹ See Mike Wall, *Asteroid-Mining Project Aims for Deep-Space Colonies*, SPACE.COM (Jan. 22, 2013, 12:01 AM), <http://www.space.com/19368-asteroid-mining-deep-space-industries.html>; *see also* *Asteroids*, PLANETARY RES., <http://www.planetaryresources.com/asteroids/#roadmap-asteroid-prospecting> (last visited May 11, 2017); *see also* O'Keefe, *supra* note 30.

⁷² See Wall, *supra* note 71.

⁷³ *See Investor Timeline*, PLANETARY RES., <http://www.planetaryresources.com/company/timeline/#investor-timeline> (last visited May 11, 2017).

discussed beyond science fiction, asteroid mining has quietly become serious business.

Possibly the best indication of how seriously these companies take this subject is the amount of money that they, and their investors, have put into their ventures.⁷⁴ Planetary Resources is funded by a collection of individuals and state partners, and it has been estimated that their project will require billions to even begin rudimentary mining operations.⁷⁵ At the forefront of space exploration, the Keck Institute, working in conjunction with numerous NASA scientists, estimated that the cost of “retrieving” a medium-sized asteroid would be \$2.6 billion.⁷⁶ Given the costs, the willingness of investors to back these companies indicates how strongly they believe in the viability of asteroid mining.

While there are many potential models for the actual mining process, they fall thematically within two categories, which for the sake of simplicity will be called “the harvesters” and “the retrievers.” Harvesters are unmanned spacecraft which are directed to a target asteroid, scoop or drill apart the surface, and gather up raw ore for a return trip to Earth, possibly after separating it for value.⁷⁷ The benefit of this approach would be that one could be more selective about what resources were taken, possibly even gathering from more than one source in a trip, as water can be used to provide fuel to the harvester ship.⁷⁸ Retrievers are significantly less complicated (and thus cheaper) than harvesters; very simply, retrievers fly to a target asteroid, envelop it in a net or cage of some kind, and proceed to drag it back to Earth.⁷⁹ The downside to grabbing an entire asteroid, of course, is that one cannot be entirely sure of what has been retrieved until after the effort to bring it back has already been expended. Both methods plan to return their prize to either Earth orbit, or potentially an orbit around the moon, for refinement and ultimately sale or use.⁸⁰

Both models offer advantages and disadvantages, but they also offer the real possibility of returning resources to a place where humans can make use of them. Technological advancements will allow humanity to move beyond our original sphere of power, and into our cosmic neighborhood.

⁷⁴ *Investor Timeline*, *supra* note 73.

⁷⁵ *Asteroid Mining*, *supra* note 2.

⁷⁶ Keck Report, *supra* note 4, at 6.

⁷⁷ *Asteroid Mining: An Unlimited Future For All Mankind*, DEEP SPACE INDUS., <https://deepspaceindustries.com/mining/> (last visited May 11, 2017) [hereinafter DEEP SPACE INDUS.].

⁷⁸ *Id.*

⁷⁹ Keck Report, *supra* note 4, at 33-35.

⁸⁰ Keck Report, *supra* note 4, at 36-38; *Asteroid Mining*, *supra* note 2.

V. POTENTIAL REGULATORY MODELS AND THEIR EFFECTS

There are several different possible models for international regulation of the commercialization of space, most focusing in great depth upon the general ineffectiveness of the Outer Space Treaty, and dedicating a lot of thought to space-based property rights.⁸¹ While these theories are not optimal for promoting a necessary degree of safety without disincentivizing industrial expansion into space, their elements deserve consideration. No two proposals are ever exactly alike, but the theories surrounding international regulation can, broadly, be divided into four categories based on the presence of integral arguments.

A. Immediate Regulation Through Entirely New Entities and Law

One of the more popular classes, these theories extoll a strict regulatory body (on either the national or international level), with nearly total control over the allowance of property or regulations in space.⁸² Strict control under these systems would be given to either a controlling government or executive agency (for the national level examples of this theory), or to an international agency chartered to deal with space-based issues on behalf of humanity.⁸³

Some argue that the national level regulatory schemes could be used to avoid extensive international regulation entirely, incentivizing exploitation of space.⁸⁴ The unfortunate downside to this is that any national regulatory scheme would become a target for lawmakers to alter in the pursuit of either revenue or political achievement, which could hamper progress in the long term. Additionally, if space regulation is to be confined to the national level, it will incentivize the complete deregulation of some countries to attract companies, creating safety concerns and making national regulation of almost any level inefficient and unattractive.

The international versions of this class generally suggest that an agency (like the UN's Committee On the Peaceful Uses of Outer Space, or COPUOS) be established to deal with the management of space resources, granting claims or leases to companies for specific uses, all subject to

⁸¹ See e.g. Lauren E. Shaw, note, *Asteroids, The New Western Frontier: Applying Principles Of The General Mining Law Of 1872 To Incentivize Asteroid Mining*, 78 J. AIR L. & COM. 121, 137-38 (2013).

⁸² See, e.g., Lawrence L. Risley, *An Examination of the Need to Amend Space Law to Protect the Private Explorer in Outer Space*, 26 W. ST. U. L. REV. 47, 59-60 (1997/1998) (describing property and legal regimes done on a national level); Davin Widgerow, *Boldly Going Where no Realtor has gone Before: the Law of outer Space and a Proposal for a new Interplanetary Property Law System*, 28 WIS. INT'L L. L. J. 490, 516 (2010) (describing the creation of an international agency to control space law.); Paul Tobias, *Opening the Pandora's Box of Space Law*, 28 Hastings Int'l & Comp. L. Rev. 299, 312 (2005).

⁸³ Risley, *supra* note 82, at 66; Widgerow, *supra* note 82 at 515-16; Tobias, *supra* note 82, at 315-16.

⁸⁴ See Risley, *supra* note 82, at 62.

regulations and inspections to assure compliance.⁸⁵ The downside of these theories (beyond it being virtually impossible to compel the international community to agree to give up that level of power, as the Moon Treaty has eloquently established)⁸⁶ is that they are monstrously disincentivizing. Strict regulation over the use of space resources could harm the bottom line of an already high-risk investment, potentially pushing off the industrialization of space in favor of protecting an idealistic dream of the final frontier being the pristine cultural heritage of mankind.⁸⁷

While these theories do offer an advantage in the form of an extremely high level of security (with the international variants), they ultimately fall short of the mark. Any sufficient model for the regulation of space will focus on maintaining a necessary modicum of planetary safety, but not overregulating to the point that it is either extremely difficult or impossible for companies to be able to rely on profiting from their ventures.

B. Immediate Regulation Through Existing Laws

These theories take current or archaic laws governing roughly analogous fields of industry and apply them to space law in hopes of finding an acceptably functional, inheritable legal structure.⁸⁸ Most of these theories focus on areas of law that control either a remote internationally-regulated location, such as Antarctica or the open seas, or else look to the history of legislation surrounding a similar industry, like mining.⁸⁹

The alluring draw of these theories is that they represent a known quantity; it is easy to justify this, as a pedigree often signals usefulness to the industry.⁹⁰ While comfortable to fall back into and often well thought out,⁹¹ this class of theories is the comfort food of international regulatory models: it may be appealing, but it isn't likely to be healthy.

⁸⁵ Widgerow, *supra* note 82; Tobias, *supra* note 82; *Committee on the Peaceful Uses of Outer Space*, U.N. OFFICE FOR OUTER SPACE AFFAIRS, <http://www.unoosa.org/oosa/en/ourwork/copuos/index.html> (last visited Oct. 15, 2015) [hereinafter COPUOS] COPUOS is a United Nations committee dedicated to improving peaceful use of outer space, and has been the primary drafting body for the major international space treaties. *Id.* They meet once a year to discuss ways to improve general use of space, as well as the potential for legal, and scientific or technical, regulatory alterations. *Id.*

⁸⁶ Moon Treaty, *supra* note 48.

⁸⁷ See Moon Treaty, *supra* note 48, at art. 4; Widgerow, *supra* note 82, at 494.

⁸⁸ See, e.g., Claudia Pastorius, *Law and Policy in the Global Space Industry's Liftoff*, 19 BARRY L. REV. 201 (2013); Lauren E. Shaw, *supra* note 81, at 123-34; Widgerow, *supra* note 82, at 516 (describing the creation of an international agency to control space law).

⁸⁹ Pastorius, *supra* note 88, at 239; Lauren E. Shaw, *supra* note 81, at 122-23; Widgerow, *supra* note 82, at 505.

⁹⁰ Pastorius, *supra* note 88, at 239.

⁹¹ See generally Pastorius, *supra* note 88; Widgerow, *supra* note 82.

Space is, quite simply, full of unknown quantities.⁹² Whether they are technological, competitive, or naturally occurring, there will certainly be roadblocks and unforeseen issues that arise in the path of asteroid mining. Newborn industries have to work out their wrinkles over time, and the fact that most of the activity in this industry will occur in space complicates the matter. Applying a regulatory scheme meant for terrestrial mining a century ago will mean tying an industry that has not yet established a baseline understanding of its nuances to bedrock law which might not fit it very well, potentially stymieing expansion and advancement.⁹³ A theoretical model for international regulation of space must accept that the issues that industry will face can be neither easily predictable, nor well-met through the application of law meant for different scenarios.

C. *Purely Unregulated*

Theories that fall along this line rely on two ideas. The first is that absolute deregulation is the only option worth considering because it optimizes profit.⁹⁴ The second is that human expansion into space will mark the end of any real law off of each planet, by making it impossible to really regulate.⁹⁵

A world (or solar system) without regulation would offer the optimal environment for companies to bring industry to space if the single, overriding concern were to ensure efficiency.⁹⁶ However, there is simply no way to avoid basic safety regulations in asteroid mining. If regulations to this effect do not exist, the risk of an accident that impacts the Earth will increase, likely with catastrophic results.⁹⁷ Or, to frame it differently, it would probably be bad for business if someone rammed a planet-killing ballistic missile into the only world humans currently populate, where all the prospective clients live.

The second facet of this type of theory (that human expansion into space will inevitably sever the authority of governments on Earth to

⁹² See *How Asteroids and Comets Formed*, *supra* note 21. We are not even perfectly sure what the full makeup of an asteroid might be as most of our information is derived from spectroscopy, a technique that measures how light is emitted and absorbed by materials. Don Wiggins, *Spectroscopy*, NAT'L AERONAUTICS & SPACE ADMIN: SOLAR SYSTEM EXPLORATION, <https://solarsystem.nasa.gov/deepimpact/science/spectroscopy.cfm> (last visited May 28, 2017); *Asteroid Mining*, *supra* note 2 (indicating that practicable asteroid mining will require technological expansion and innovation).

⁹³ *Cf.* Lauren E. Shaw, *supra* note 81, at 165-68.

⁹⁴ See, Austin C. Murnane, *The Prospector's Guide to the Galaxy*, 37 *FORDHAM INT'L L.J.* 235, 259 & n.148 (2013).

⁹⁵ *Id.* at 276-77.

⁹⁶ *But cf.* Timothy B. Lee, *The Coase Theorem is Widely Cited in Economics. Ronald Coase Hated It*, *WASH. POST* (Sept. 4, 2013) <http://www.washingtonpost.com/news/wonkblog/wp/2013/09/04/the-coase-theorem-is-widely-cited-in-economics-ronald-coase-hated-it/>.

⁹⁷ See Steven J. Ostro & Carl Sagan, *Cosmic Collisions and the Longevity of Non-spacefaring Galactic Civilizations* 5 (1998), <https://trs.jpl.nasa.gov/handle/2014/19498>.

legislate over those in space) may or may not end up being valid, but it is certainly horribly defeatist.⁹⁸ With continuous expansion through space, legal regimes may change. The time when humanity moves to colonize other planets or spreads throughout the solar system is still far away, however, and in the meantime some laws might prove very useful.⁹⁹ Ultimately, any sufficient theoretical model for international regulation of space needs to focus on current concerns, such as safety measures.

D. Regulated, But Not Immediately

This theory holds that, if given time, humans exploiting a new environment will find the most efficient series of informal laws and rules for their purpose, and adopt it as culture.¹⁰⁰ This leads some to suggest that, like with the California gold rush of the nineteenth century (where groups and individuals in a legal vacuum created cultural and industrial standards), the unofficial rules by which the industry governs itself are the most efficient form of law possible.¹⁰¹

This theory offers the advantage of malleability. When an industry is left alone to police itself in an utterly unregulated environment, the companies involved tend to create mutually beneficial agreements with each other to prevent unnecessary expenditures.¹⁰² Ultimately, companies and individuals are better able to look out for their own specific interests than any legislature.

The unfortunate downside to this type of theory, however, is that it prescribes predictive regulation at the outset, and then adoption of new laws to combat issues that arise.¹⁰³ This theory flounders by attempting to regulate proactively in a field that is unpredictable, and by pushing to create bedrock law for issues that arise.¹⁰⁴ The industry would no longer be free to rapidly respond to changes, and effectively locks the standards of the legislature at the time of enactment into place (if any of the actors were likely to obey them anyway, which is not a given.) Regulation for the purpose of having a law is counterproductive.¹⁰⁵

⁹⁸ See Murnane, *supra* note 94, at 102.

⁹⁹ See Al Globus, *Space Settlement Basics*, <http://settlement.arc.nasa.gov/Basics/wwwwh.html> (last visited Apr. 24, 2017) (describing NASA's assumption that colonies which only orbit Earth are likely a half century away).

¹⁰⁰ See, e.g., Matthew Feinman, *Mining the Final Frontier: Keeping Earth's Asteroid Ventures from Becoming the Next Gold Rush*, 114 PITT. J. TECH. L. & POL'Y 202, 213-14 (2014).

¹⁰¹ See *id.*

¹⁰² See Lauren E. Shaw, *supra* note 81, at 144 n.113.

¹⁰³ See Feinman, *supra* note 100, at 214.

¹⁰⁴ See *id.* at 234-35.

¹⁰⁵ MERCATUS CTR. AT GEO. MASON UNIV., DO MORE REGULATIONS EQUAL LESS SAFETY? (Nov. 30, 2011), <http://mercatus.org/sites/default/files/publication/More-Regulations-Less-Safety.pdf>.

VI. PROPOSED MODEL FOR INTERNATIONAL SPACE RESOURCE REGULATION

In deciding a potential theory for international regulation, writers often look well beyond the realm of what is absolutely necessary, crafting elaborate and beautifully intricate models which address every conceivable angle of an issue.¹⁰⁶ The unfortunate reality, however, is that the international community is very rarely willing to allow the losses of autonomy that such comprehensive models generally require.¹⁰⁷ This proposal argues for the very simplest of regulations, the ones which are likely to be most widely accepted as necessary, so as to create a model which is actually enact-able. In other words, theories that are works of fine art are far too elaborate, but the legal equivalent of crayon stick figures might make the cut.

Following from that, the necessary must come first, and in any discussion about space commercialization, the question of safety is necessary.¹⁰⁸ Humans are a fledgling species, just beginning to step out into our solar system, and obviously not yet aware of the scope of possible repercussions and problems in space.¹⁰⁹ That transition will, likely, come with its own share of hiccups.¹¹⁰

An asteroid being transported through space by an unmanned ship is a potential ballistic weapon.¹¹¹ A large enough asteroid could bring about an extinction-level event if it were to strike Earth.¹¹² Such an impact would expel enormous quantities of dust and water vapor into the atmosphere.¹¹³ The expulsion would lead to an “impact winter”; a period when the light, heat, and radiation of the Sun would be heavily occluded, dropping temperatures globally to potentially ruinous levels.¹¹⁴ Carl Sagan predicted that moving asteroids about from their current orbits could lead to some very serious potential problems, not all of which could be adequately predicted.¹¹⁵ The question, then, is what level of risk is acceptable. To an international community considering the potential of industrialization of

¹⁰⁶ See, e.g., Lauren E. Shaw, *supra* note 81, at 154.

¹⁰⁷ See, e.g., Moon Treaty, *supra* note 48; see also U.N. OFFICE OF DISARMAMENT AFFAIRS, *supra* note 55.

¹⁰⁸ See Murnane, *supra* note 94, at 237.

¹⁰⁹ *Asteroid Mining*, *supra* note 2.

¹¹⁰ *Id.*; Mark Sonter, *Asteroid Mining: Key to the Economy*, NAT'L SPACE SOC'Y (Feb. 2006), <http://www.nss.org/settlement/asteroids/key.html>.

¹¹¹ Marshall Brain, *What If and Asteroid Hit Earth?*, HOWSTUFFWORKS, <http://science.howstuffworks.com/nature/natural-disasters/asteroid-hits-earth.htm> (last visited Sept. 24, 2015).

¹¹² Clark R. Chapman & David Morrison, *Impacts on the Earth by Asteroids and Comets: Assessing the Hazard*, NATURE, at 33-34, <http://schillerlab.bio-toolkit.com/media/pdfs/2010/03/16/367033a0.pdf>.

¹¹³ *Id.*

¹¹⁴ Chapman & Morrison, *supra* note 112, at 33-34.

¹¹⁵ Ostro & Sagan, *supra* note 97, at 3.

space, there is not likely to be strong support for excessive safety measures.¹¹⁶ The most basic common ground, however, is the desire to protect the Earth.

Deciding a baseline of safety for the world is a divisive subject. There will likely to be groups who argue that any increased risk, of any amount, for an asteroid strike on Earth is too much. Understandably, even those who believe wholeheartedly in scientific expansion view a blind and unregulated approach to handling asteroids as a dangerous concept.¹¹⁷ However, as the Moon Treaty demonstrates, the extreme positions that some (non-spacefaring) nations may adopt are unlikely to find support amongst the international community.¹¹⁸

Even if a decision could be reached avoid risk when it comes to exploring asteroid mining, there would still be the problem of incentives. Similar to the issue of national regulation creating a sort of “race to the bottom,” excessively strong regulation would have the same effect as non-regulation.¹¹⁹ In the case of either extreme, a small nation with a comparatively small economy would have a strong incentive to refuse any international treaties, and completely deregulate its space industry in an attempt to attract businesses in a race to the bottom. In fact, as the equator is the ideal place to launch a shuttle into space, a relatively low-income equatorial country would be in a perfect position to profit from such deregulation.¹²⁰

Functionally, this creates a problem very similar to the so-called “prisoner’s dilemma.”¹²¹ It would seem that either high regulation or no regulation would still present the nations involved with the prospect of acting to further their own interests by disregarding regulations because they expect that other nations will ultimately expose the entire world to the same risk anyway. Either heavy regulation or no regulation will lead to the same level of risk, but a small level of regulation which is agreed upon by a large number of countries might provide a stopgap incentive for nations to cooperate. The only way this agreement would function would be to give it

¹¹⁶ See Moon Treaty, *supra* note 48; The Moon Treaty has consistently failed to attract real support, its articles being too extreme for the international community. See U.N. OFFICE OF DISARMAMENT AFFAIRS, *supra* note 55.

¹¹⁷ See Sagan, *supra* note 21; *Asteroid Mining*, *supra* note 2.

¹¹⁸ See Moon Treaty, *supra* note 48; see also U.N. OFFICE OF DISARMAMENT AFFAIRS, *supra* note 55.

¹¹⁹ “Race to the bottom” occurs when “parties compete for a desired result by making increasingly larger concessions.” *Race to the Bottom*, USLEGAL, <http://definitions.uslegal.com/r/race-to-the-bottom/> (last visited May. 4, 2017).

¹²⁰ Launching a shuttle at the equator, east with the Earth’s rotation, requires less fuel. Eric Hammer, *Shuttle Countdown and Launch FAQ* (Jan. 26, 1999), https://web.archive.org/web/20140609050907/http://www.quest.nasa.gov/qna/questions/FAQ_Shuttle_Launch.htm#Why_is_it_easier.

¹²¹ See *Prisoner’s Dilemma*, STAN. ENCYCLOPEDIA OF PHIL. (Aug. 29, 2014), <http://plato.stanford.edu/entries/prisoner-dilemma/>.

real consequences; if nations face meaningful sanctions from the international community for their citizens being noncompliant (even if they are operating in another country), it could provide much needed balance. At the very least, the option of low-level regulation represents a far better chance for success than either extremely high or nonexistent regulatory schemes would offer.

With that in mind, this theory proposes that the international community, possibly through a body like COPUOS, decide on a minimum safe zone around Earth into which asteroids cannot be sent, and in which refineries cannot be built.¹²² The Keck Institute, considering the same problem, has recommended the moon as a good place to leave an asteroid in orbit. It would be close enough for comparatively easy access, but far enough away to lower the chance of catastrophic accidents.¹²³ While certainly not foolproof, this offers an acceptable degree of short-term security that would otherwise not exist. Whether it would be wise to consider a size limit on asteroids left in lunar orbit would be a complex issue that the agency would have to decide, but it is secondary to the requirements of immediate security.¹²⁴

Moving on to regulation beyond basic safety measures, however, any proposal still faces the problem of international cooperation. Any regulation that would have an actual effect upon the activities of private individuals in space is unlikely to be accepted, while regulation promulgated by an international body is likely to be broadly written or ambiguous.¹²⁵ Furthermore, the concept of unregulated industries figuring out their own most effective outcomes is compelling, if only from an efficiency standpoint.¹²⁶ The model requires modification to put into effect the minimum safety regulations previously discussed, and to address a stance on property rights.

A popular idea for property rights in space (when those rights are not completely delegated to an agency of some kind), is to treat asteroids as if they are capture resources.¹²⁷ While certainly thematically fulfilling, given the easy comparison between asteroids and capture resources like oil or game animals, applying a standard capture resource rule to asteroids could prove problematic.

Traditionally, the rule of capture holds that a resource becomes the property of the seizing party after it has actually retrieved it.¹²⁸ For example,

¹²² COPUOS *supra* note 85.

¹²³ See Keck Report, *supra* note 4, at 15.

¹²⁴ Which is not to downplay the significance of the moon to global safety, but a large asteroid strike on the moon is less immediately severe than one on Earth.

¹²⁵ See generally Outer Space Treaty, *supra* note 7; Moon Treaty, *supra* note 48.

¹²⁶ See Feinman, *supra* note 100, at 213-14; see also Murnane, *supra* note 94.

¹²⁷ Feinman, *supra* note 100 at 223; Murnane, *supra* note 94 at 275-77.

¹²⁸ *Rule of Capture Law & Legal Definition*, USLEGAL, <http://definitions.uslegal.com/r/rule-of-capture/> (last visited May 16, 2017).

pulling oil out of a large underground deposit would meet the necessary seizing quality of a capture resource.¹²⁹ In space, however, resources are significantly different in both scale and distance.¹³⁰ An extremely large M class asteroid could be miles across and contain enormous metal resources.¹³¹ If a party that landed a probe on an asteroid captured it, companies would have an incentive to launch a plethora of drones as quickly as possible, as a way of staking claims on all the premium resources.¹³² This would delay the exploitation of the resources, drive up the cost of buying a “claim” from a company possessing one, and possibly lead to arguments over which company reached a target or filed a claim first.

Similarly, a modified rule for capture resources requiring some amount of utilization of the resource would make the problem more complex.¹³³ Problematically, a rule based on actual use of the resource would require guidelines indicating how much work needed to be done to keep the claim. A company attaching hundreds of drones to asteroids and extracting some small amount of resources for testing is certainly utilizing them, but in a way that would have the same result that the traditional rule of capture would.¹³⁴ Alternatively, requiring a high level of utilization before the resource were considered captured would incentivize companies to wait for an error on the part of one of their peers (or perhaps even bring one about), halting utilization before the requirement was met.

This proposal believes the answer lies in a combination of the second and fourth types of theories discussed previously.¹³⁵ Looking to historical legal structures for applicability to the field of space law has inherent flaws, but looking to those events for their economic and legal history is still useful.¹³⁶ The California Gold Rush is an excellent historical example for the present topic: a rush in an unrestricted environment to acquire high-value resources, which created a cultural standard amongst the actors involved.¹³⁷ As Feinman noted, this “lawful lawlessness” allowed

¹²⁹ *Id.*

¹³⁰ ASTERANK, *supra* note 6; Noreen Malone, *At the End of the Earth: The Longest, Deepest Oil Wells in the World*, POPULAR SCI. (Aug. 1, 2011), <http://www.popsci.com/technology/article/2011-06/end-earth-longest-deepest-oil-wells-world> (discussing depths and distances for the deepest oil well in the world).

¹³¹ ASTERANK, *supra* note 6.

¹³² *See* Pastorius, *supra* note 88.

¹³³ Laura E. Shaw, *supra* note 81, at 157-58.

¹³⁴ This hypothetical is based off of Deep Space Industries’ business plan. *See* DEEP SPACE INDUS. *supra* note 77.

¹³⁵ *See supra* Section VI

¹³⁶ *Id.*

¹³⁷ Karen Clay & Gavin Wright, *Order Without Law: Property Rights During the California Gold Rush*, EXPLORATIONS IN ECON. HISTORY 155, 160-61 (2005).

commercial actors to find their own most efficient routes.¹³⁸ Over time, rational self-interested actions worked to develop an industry standard.¹³⁹

In this case, allowing an industry standard to develop is the best course of action. In doing so, the actors, like the prospectors of the Gold Rush, will decide amongst themselves what the most efficient standards are for property rights for asteroids.¹⁴⁰ Moreover, they will settle any number of other issues that may arise in the process of expansion, with the same degree of effectiveness and self-interest.¹⁴¹ Critically, this theory relies not upon idealistic interpretations of what human expansion into space should look like, but on industrial actors behaving rationally by creating rules which find a perfect balance between security and profit.

Companies involved in an industry are well suited to solving the problems that arise within their course of business because they are interested in their own profit and able to gain information easily.¹⁴² Further, developing bedrock law to address changes in the industry can only lead to harm when those standards are no longer the most efficient option, especially given the difficulty of applying them at an extreme distance. For that reason, this theory does not recommend adopting further regulation to address problems as they arise.¹⁴³ Some industry standards might remain static, but there will likely always be a necessity for change. An international regulatory model which binds itself to a standard that will become outdated is both inefficient and unlikely to gain support.

The United States Congress passed the U.S. Commercial Space Launch Competitiveness Act on November 25, 2015.¹⁴⁴ While purporting to stay within the boundaries of international treaties already governing space exploration, the Act aims to incentivize space commercialization by private entities in the United States.¹⁴⁵ The Secretary of Transportation has the power to license and regulate space launches, reentries, and enforce violations of the regulations, and the federal court system has jurisdiction over any claims of liability deriving from the actions of the licensed parties.¹⁴⁶ Perhaps most significantly, the Act declared that individuals or companies “engaged in commercial recovery of an asteroid or a space resource” could use or sell it as they wished, subject only to “applicable

¹³⁸ Feinman, *supra* note 100, at 214.

¹³⁹ *Id.* at 212-13.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 213.

¹⁴² *The Role of Self-Interest and Competition in a Market Economy – The Economic Lowdown Podcast Series, Episode 3*, FED. RES. BANK OF ST. LOUIS, <https://www.stlouisfed.org/education/economic-lowdown-podcast-series/episode-3-the-role-of-self-interest-and-competition-in-a-market-economy> (last visited Feb. 15, 2017).

¹⁴³ Feinman, *supra* note 100, at 234-35.

¹⁴⁴ U.S. Commercial Space Launch Competitiveness Act, Pub. L. No. 114-90, 129 Stat. 703 (2015).

¹⁴⁵ 51 U.S.C. §§ 50901, 50919 (2015).

¹⁴⁶ §§ 50903-06, 50919.

law, including the international obligations of the United States.”¹⁴⁷ This section, almost certainly introduced to grant individuals commercial access otherwise prohibited by the Outer Space Treaty, casually extends an enormous amount of potential control into an otherwise untouched industry.¹⁴⁸ The extent of the “applicable law” will almost certainly be decided in the court system.¹⁴⁹

Far from encouraging commercial spaceflight based in the United States, these regulations will likely encourage U.S.-based space companies to set their launches from a country better suited for it both geographically and statutorily, and it appears that there may be several such countries.¹⁵⁰ Historically, countries have favored a strong licensing scheme as a measure of “support” for a growing industry, but the world has never seen an industry beginning to rise that will grow beyond the boundaries of the planet itself.¹⁵¹ The idea of mega-corporations involved in space is a common trope of science fiction, but it is a logical conclusion to reach, given humanity’s tendencies to expand and seek profit, and the financial resources required.¹⁵²

By driving corporations away from U.S. regulatory control, other countries gain an opportunity to profit, and the companies involved move closer to creating an economy that will eventually stand on its own and likely operate outside of any real Earthly regulatory scheme. To preserve planetary safety and control over the parties involved, national-level governments should avoid regulation where feasible, while doing everything possible to ensure widespread adoption of minimal safety guidelines through international agreement. Doing otherwise will incentivize a possibly catastrophic race to the bottom; the international community must stand together in minimal regulations, both nationally and internationally, or risk the complete dissolution of safety measures at any level.

¹⁴⁷ § 51303.

¹⁴⁸ *Id.*; Outer Space Treaty, *supra* note 7.

¹⁴⁹ 51 U.S.C. §§ 50903-06, 50919 (2015); see Rob Davies, *Asteroid mining could be space’s new frontier: the problem is doing it legally*, THE GUARDIAN (Feb. 6, 2016), <https://www.theguardian.com/business/2016/feb/06/asteroid-mining-space-minerals-legal-issues>.

¹⁵⁰ See, e.g., Hammer, *supra* note 120 (explaining why launching at the equator is fuel-efficient). Also consider, Luxembourg, which has adopted a law ensuring that private companies have ownership rights to certain resources extracted from outer space. *Luxembourg’s New Space Law Guarantees Private Companies the Right to Resources Harvested in Outer Space in Accordance with International Law*, LUX. MINISTRY OF THE ECON. (Nov. 11, 2016) <http://www.gouvernement.lu/6481433/11-presentation-spaceresources>.

¹⁵¹ In fact, consider what a patent essentially is: a legitimization of an activity based on state support to exclude others. See *Reasons For Patenting Your Invention*, WIPO, http://www.wipo.int/sme/en/ip_business/importance/reasons.htm (last visited Feb. 12, 2017).

¹⁵² See *Mega Corp.*, TV TROPES, <http://tvtropes.org/pmwiki/pmwiki.php/Main/MegaCorp> (last visited Feb. 12, 2017).

This proposal holds that, as a baseline, the international community must decide to enact minimum safe distance requirements to keep potentially destructive activities away from the Earth. Beyond that, however, any attempt to regulate the property rights or industry standards of space resource utilization is unlikely to be particularly effective at incentivizing expansion, likely to garner political support, or possibly even enforceable in the long run. This industry is very, very new. It will face unknown quantities at every turn as it expands, and binding the hands of the actors involved is not conducive to either technological or industrial advancement.¹⁵³ So long as the Earth has an acceptable level of protection, the activities of industrial actors will be unlikely to have any catastrophic results, and may very well bring enormous benefit to all of humanity.

VII. CONCLUSION

To survive and thrive, humanity will eventually need to spread beyond the Earth, and accept a larger role in our solar neighborhood.¹⁵⁴ The first step in that journey is reaching out to the resources near us and utilizing them, learning along the way how we can coexist and still compete to improve ourselves. As has been the case throughout human history, the drive to compete in a free system will allow for effective choices, but only if regulation does not choke us. In the interest of preserving life, safety regulations must be considered. Beyond that, however, regulations that stymie resource exploitation partially or completely will ultimately harm all of humanity by slowing or stopping the rate of technological advancement. Impeding advancement is far more dangerous today than it has been before; an overzealous regulatory scheme will only increase the likelihood that a burgeoning space-based economy separates from terrestrial control. Our species has never shied away from taking risks to secure rewards: regulation buys a little control for the short term, but only encouraging innovation can unite us in the long term.

¹⁵³ *Asteroid Mining*, *supra* note 2.

¹⁵⁴ See Priyank D. Doshi, *Regulating the Final Frontier: Asteroid Mining and the Need For a New Regulatory Regime*, 6 *Noter Dame. J. of Int'l & Comparative Law* 189, 197-99 (2016).