Lost in Translation: Discerning the International Equivalent of the National Register of Historic Places

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LOST IN TRANSLATION: DISCERNING THE INTERNATIONAL EQUIVALENT OF THE NATIONAL REGISTER OF HISTORIC PLACES

INTRODUCTION

Congress passed the National Historic Preservation Act (NHPA) in 1966 to encourage the preservation of nationally significant historic and cultural resources. The NHPA established the National Register of Historic Places, which lists resources significant in American history, architecture, archaeology, engineering, and culture. In 1980, Congress amended the NHPA to add § 402, which implements the United States' responsibilities under the 1972 United Nations Educational, Scientific, and Cultural Organization (UNESCO) Convention concerning the Protection of the World Cultural and Natural Heritage by extending procedural protections to cultural resources listed in a foreign country's "equivalent of the National Register."¹

This Comment focuses on a critical ambiguity in § 402: the issue of what a foreign historic preservation law or system must consist of to qualify as "equivalent of the National Register." The ambiguity of this "equivalency" standard may inhibit the initial identification of cultural resources that are entitled to the procedural protection of § 402, thereby reducing the likelihood that the resources in question will actually receive the benefits of § 402.

II. BACKGROUND TO THE EXTRATERRITORIAL EXPANSION OF THE NHPA

This Part reviews the background to § 402 of the NHPA by providing a brief overview of the NHPA and its establishment of the National Register of Historic Places, as well as the regulations that define and delineate the eligibility process for listing properties on the National Register.² It then examines the text of § 402 and the circumstances surrounding its addition to the NHPA in 1980, focusing on the World Heritage Convention and the internationalism that led up to the NHPA Amendments of 1980.³ Finally, it discusses Dugong v.

² See infra notes 5–34 and accompanying text.
³ See infra notes 35–54 and accompanying text.
*Rumsfeld* and *Okinawa Dugong v. Gates*, the only cases to interpret the requirements of NHPA § 402.4

A. The National Historic Preservation Act

The United States enacted the first legislative protections for the preservation of historical and cultural resources over a century ago.5 The Antiquities Act, passed in 1906, prohibited the unlicensed appropriation, excavation, injury, or destruction of any historic or prehistoric ruin, monument, or object of antiquity.6 In 1935, Congress enacted the Historic Sites Act, which declared for the first time that historic preservation was a national priority.7 The Act provided the federal government with a limited ability to preserve buildings and historic sites of national significance.8 In 1966, Congress passed the NHPA.9 Of all the preservation laws currently in force, the NHPA provides the most extensive system of protection for cultural and historic resources.10

The NHPA was established pursuant to a belief that “the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people.”11 Along with many other measures for historic preservation, the NHPA established both the National Register of Historic Places, which lists resources “significant in American history, architecture, archaeology, engineering, and culture,”12 and also the process codified in § 106, which requires federal

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4. See infra notes 55–87 and accompanying text.
8. Id.
agencies to take such resources into account prior to approving any federal undertaking that may adversely affect them.\footnote{13. See 16 U.S.C. § 470f.}

\section{The Procedural Protections of the NHPA}

The NHPA implements its policies domestically through the procedural protections of § 106 and internationally through § 402.\footnote{14. \textit{Id.}} Section 106 was original to the 1966 Act\footnote{15. Congress amended § 106 in 1976 in order to extend the “take into account” requirement to properties \textit{eligible} for listing in the National Register of Historic Places; the original language limited the requirement to properties actually listed in the National Register. \textit{See} Advisory Council on Historic Preservation, Alternatives for Implementing Section 106 of NHPA: An Assessment, http://www.achp.gov/alternatives.html (last visited Apr. 2, 2009).} and is the domestic counterpart, predecessor, and textual model for § 402.\footnote{16. In 1974, the Advisory Council on Historic Preservation enacted the first regulations that implemented § 106. \textit{See} Okinawa Dugong v. Gates, 543 F. Supp. 2d 1082, 1089 (N.D. Cal. 2008).} Section 106 provides that

\begin{quote}
[t]he head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State . . . shall, prior to the approval of the expenditure of any Federal funds on the undertaking . . . take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under part B of this subchapter a reasonable opportunity to comment with regard to such undertaking.\footnote{17. 16 U.S.C. § 470f.}
\end{quote}

Federal regulations implementing § 106 specify in detail both the procedural and the consultative requirements with which an agency must comply in order to meet its § 106 obligations.\footnote{18. \textit{See generally} 36 C.F.R. § 800 (2008).} First, federal agencies are required to identify historic properties that may be impacted by a federal or federally funded undertaking.\footnote{19. \textit{Id.}} Next, the agency must identify and give notice of the initiation of the undertaking to parties with whom the agency is required to consult, including the public at large.\footnote{20. \textit{Id.}} Third, after consultation, the agency must assess whether the project will adversely affect the historic property.\footnote{21. \textit{Id.}} Fourth, if the assessment reveals that the agency believes that the undertaking will not adversely affect the property, the agency must notify the consulting parties of the no-adverse-impact finding and provide an opportunity
for the consulting parties to respond to the finding. Finally, the agency is required to continue to consult with the public and the other consulting parties to "develop and evaluate alternatives or modifications to the undertaking that could avoid or mitigate the adverse effects." Federal agencies have further responsibilities under § 110 of the NHPA and Executive Order 11593. The Executive Order required federal agencies to identify, inventory, and nominate properties under their control to the National Register by 1973, and § 110 requires agencies to establish a preservation program continuing these processes into the future. Section 110 also requires agencies to ensure that "the preservation of properties not under the jurisdiction or control of the agency, but subject to be potentially affected by agency actions are given full consideration in planning."

2. The National Register

The National Register of Historic Places is intended to be a "planning tool" for identifying properties that are considered significant enough to warrant consideration in federal decision making. The National Register is composed of "districts, sites, buildings, structures, and objects significant in American history, architecture, archaeology, engineering, and culture." The process for identifying eligible properties and listing them on the National Register is governed by federal regulations, which define and provide examples of the types of properties that are eligible for listing by reference to American properties that are considered to fall within each of the statutory categories—buildings, structures, objects, sites, and districts. The Na-

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22. Id.
25. Id.
27. 16 U.S.C. § 470h-2(a)(2)(C); see also Colo. River Indian Tribes v. Marsh, 605 F. Supp. 1425, 1435 (C.D. Cal. 1985) ("[T]he federal agency must exercise caution to assure the physical integrity of those properties that appear to qualify for inclusion on the National Register.").
29. See generally id. § 60.3. The regulations define a "district" as a "geographically definable area, urban or rural, possessing a significant concentration, linkage, or continuity of sites, buildings, structures, or objects united by past events or aesthetically by plan or physical development." Districts may include sites that are not geographically connected, but rather "linked by association or history." Id. § 60.3(d). A "site" is defined as "the location of a significant event, a prehistoric or historic occupation or activity, or a building or structure, whether standing, ruined, or vanished, where the location itself maintains historical or archeological value regardless of the
tional Register regulations provide three examples of an “object”: the Delta Queen steamboat of Cincinnati, Ohio; the Adams Memorial in Rock Creek Cemetery, Washington, D.C.; and the Sumpter Valley Gold Dredge of Sumpter, Oregon. The regulation also lists examples of “sites,” including a battlefield, a prehistoric cemetery mound, and the site of a former Pony Express station.

In addition to qualifying as property as defined by the National Register regulations, a property eligible for listing on the National Register must also bear some significance for the American people that elevates it above comparable properties and renders it deserving of special federal protection. This eligibility requirement has been described as an inquiry into whether the property has “inherent historical and cultural significance.” Federal regulations explain in a little more detail the criteria by which eligible properties are evaluated for this special significance:

The quality of significance in American history, architecture, archaeology, engineering, and culture is present in [the properties] that possess integrity of location, design, setting, materials, workmanship, feeling, and association and . . . that are associated with events that have made a significant contribution to the broad patterns of our history; or . . . that are associated with the lives of persons significant in our past; or . . . that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or . . . that have yielded, or may be likely to yield, information important in prehistory or history.

B. The World Heritage Convention

Shortly after the passage of the NHPA, the United States became active in developing a rule of law for cultural resources conservation on an international level. In the early 1970s, the United States initiated the development of the 1972 UNESCO Convention concerning
the Protection of the World Cultural and Natural Heritage (World Heritage Convention), and the United States became its first ratifying state in 1973.\footnote{Lois McHUGH, CONG. RESEARCH SERV., WORLD HERITAGE CONVENTION AND U.S. NATIONAL PARKS CRS-2 (Apr. 24, 2001).} The World Heritage Convention promotes the "identification, protection and preservation of cultural and natural heritage around the world considered to be of outstanding value to humanity" by encouraging state parties to the Convention to identify and create management plans for cultural and natural heritage sites within their own territories, by encouraging local population participation in the preservation of their cultural and natural heritage, and by encouraging international cooperation in the conservation of other state parties' natural and cultural heritage.\footnote{United Nations Educational, Scientific, and Cultural Organizations (UNESCO), World Heritage Convention, About World Heritage, http://whc.unesco.org/en/about/ (last visited Feb. 10, 2009).} “Cultural heritage” under Article I of the Convention consists of monuments, groups of buildings, and sites,\footnote{Convention Concerning the Protection of the World Cultural and Natural Heritage art. I, opened for signature Nov. 23, 1972, 27 U.S.T. 37 [hereinafter World Heritage Convention]. “Monuments” are “architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science”; “groups of buildings” are “groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science”; and “sites” are “works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view.” \textit{Id}.} “natural heritage” is grouped into natural features, geological and physiographical formations, and natural sites.\footnote{World Heritage Convention, supra note 37, art. II. The Convention further defines “natural features” as “consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view”; “geological and physiographical formations” as “precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation”; and “natural sites” as “precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.” \textit{Id}.} Article IV of the Convention affirms that each member state has the
primary responsibility to identify and protect the cultural and natural heritage within its territory.\footnote{41}{World Heritage Convention, supra note 37, art. IV.}

Parties to the Convention nominate properties located within their territories for inclusion in the UNESCO\footnote{42}{UNESCO, founded in 1945, is a specialized agency of the United Nations with the broad mission of promoting “international co-operation among its . . . Member States and six Associate Members in the fields of education, science, culture and communication.” United Nations Educational, Scientific, and Cultural Organizations, About UNESCO, http://portal.unesco.org/en/ev.php-URLID=3328&URLDO=DO_TOPIC&URLSECTION=201.html (last visited Feb. 10, 2009).} World Heritage List,\footnote{43}{16 U.S.C. § 470a(a)(2)(D) (2006).} which is comprised of properties “forming part of the cultural and natural heritage [that] the World Heritage Committee considers as having outstanding universal value.”\footnote{44}{World Heritage Centre, World Heritage List, http://whc.unesco.org/en/listU (last visited Feb. 14, 2009).} In addition to having outstanding universal value, a cultural property on the World Heritage List must meet at least one of six criteria that assess the significance of the property to the human cultural or historical experience.\footnote{45}{A property may be listed for its \textit{cultural} significance if it (1) “represent[s] a masterpiece of human creative genius”; (2) “exhibit[s] an important interchange of human values, over a span of time or within a cultural area of the world, on developments in architecture or technology, monumental arts, town-planning or landscape design”; (3) “bear[s] a unique or . . . exceptional testimony to a cultural tradition or to a civilization which is living or which has disappeared”; (4) serves as “an outstanding example of a type of building, architectural or technological ensemble or landscape which illustrates (a) significant stage(s) in human history”; (5) serves as “an outstanding example of a traditional human settlement, land-use, or sea-use which is representative of a culture (or cultures), or human interaction with the environment . . .”; or (6) is “directly or tangibly associated with events or living traditions, with ideas, or with beliefs, with artistic and literary works of outstanding universal significance.” World Heritage Centre, The Criteria for Selection, http://whc.unesco.org/en/criteria (last visited Feb. 8, 2010). Natural—as opposed to cultural—properties must meet one of four distinct criteria to merit inclusion on the World Heritage List. \textit{Id.}}

\section*{C. The 1980 Amendments to the National Historic Preservation Act}

In 1980, Congress amended the NHPA to implement the United States' responsibilities under the World Heritage Convention.\footnote{46}{See McHugh, supra note 35, at CRS-2.} The NHPA Amendments of 1980 authorize the Secretary of the Interior to coordinate U.S. activities under the Convention, including nominating properties to the World Heritage List.\footnote{47}{16 U.S.C. § 470a (2006).} Furthermore, as a matter of policy, the 1980 Act affirmed, for the first time, that the public benefit to American citizens imparted by historic preservation laws can also derive from the preservation of international cultural resources:
It shall be the policy of the Federal Government, in cooperation with other nations and in partnerships with the States, local governments, Indian tribes, and private organizations and individuals to provide leadership in the preservation of the prehistoric and historic resources of the United States and of the international community of nations.\footnote{16 U.S.C. § 470a-1(2); Panel Report, supra note 10, at 1 (emphasis added).}

In order to implement this policy and the values of the World Heritage Convention, Congress added § 402 to the NHPA to extend procedural protections to cultural resources listed on the World Heritage List or appearing in a foreign country’s “equivalent of the National Register.”\footnote{16 U.S.C. § 470a-2.} Section 402 declares,

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

By its terms, the NHPA is distinct from most other domestic preservation and conservation statutes in that it is clearly intended to apply extraterritorially.\footnote{H.R. REP. NO. 96–1457, supra note 5, sec. 401, at 11 (1996); see also Martha E. Candiello, The Extraterritorial Reach of Environmental Laws, 70 TEMPLE L. REV. 1235, 1236 (1997) (noting that recent cases refusing to apply the Resource Conservation and Recovery Act have found no evidence of legislative intent to apply the Statute to exported hazardous waste materials).}

Unlike § 106, its domestic counterpart, § 402 is not implemented by binding federal regulations. However, § 110 of the NHPA, which largely pertains to the requirement that federal agencies identify and submit candidate properties to the National Register, also grants the Secretary of the Interior the power to develop non-regulatory guidelines to assist federal agencies in complying with § 402, and the Secretary did so in 1998.\footnote{The Secretary of the Interior’s Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act, 63 Fed. Reg. 20,496, 20,496–508 (Apr. 24, 1998).} The advisory guidelines emphasize that those responsible for implementing § 402, including agency officials and contractors, should consult “with the host country’s historic preservation authorities, with affected communities and groups, and with relevant professional organizations.”\footnote{Id. at 20,496–504 (Standard 4, Guideline (o)).} The guidelines also emphasized that a federal agency must give historic properties full consideration
when planning or considering approval of any action that might affect such properties.\textsuperscript{54}

\textbf{D. Applying the NHPA in the International Context: The Dugong Cases}

The leading judicial interpretation of § 402's requirements arose out of a controversy over the planned construction of a United States military airfield in Okinawa, Japan on the habitat of an endangered species of marine mammal known as the Okinawa dugong.\textsuperscript{55} In \textit{Dugong v. Rumsfeld}, the first phase of the litigation, the District Court for the Northern District of California held that § 402 applied the NHPA to federal agency undertakings overseas and found that Japan's register of historic sites was equivalent to the U.S. National Register under § 402.\textsuperscript{56} In \textit{Okinawa Dugong v. Gates}, a subsequent phase of the litigation, the district court applied the language of § 402 to the activities of the U.S. Department of Defense and held that the government's involvement in the planning process for the location of the airfield constituted a federal undertaking\textsuperscript{57} that may "directly and adversely affect" the dugong. The court then held that the government had failed to adequately take into account the effect of the planned installation on the dugong as required by § 402 of the NHPA.\textsuperscript{58} The litigation is currently in abeyance, pending the government's compliance with an order to generate and take into account information regarding the adverse effects that the planned airfield would have on the dugong.\textsuperscript{59}

\textsuperscript{54} \textit{Id.} at 20,507.


\textsuperscript{56} \textit{Rumsfeld}, 2005 WL 522106, at *12.


\textsuperscript{58} \textit{Gates}, 543 F. Supp. 2d at 1111. Through an examination of the plain language and legislative history of the NHPA Amendments of 1980, the court determined that the "take into account" requirement of § 402 was the same as in § 106, requiring at a minimum the

\begin{itemize}
  \item (1) identification of protected property,
  \item (2) generation, collection, consideration, and weighing of information pertaining to how the undertaking will affect the historic property,
  \item (3) a determination as to whether there will be adverse effects or no adverse effects, and
  \item (4) if necessary, development and evaluation of alternatives or modifications to the undertaking that could avoid or mitigate the adverse effects.
\end{itemize}

\textit{Id.} at 1104-05. The court derived the minimum requirements of § 402 compliance from the § 106 regulations, amended as of July 1, 1980. \textit{See generally} 36 C.F.R. § 800 (2009).

\textsuperscript{59} \textit{Gates}, 543 F. Supp. 2d at 1112.
The events leading up to the litigation began in the mid-1990s when a committee serving as an official forum for the discussion of treaty and security issues between the United States and Japan approved a preliminary plan to return a U.S. military facility, the Futenma Marine Corps Air Station, to Japanese control after the construction of a replacement facility.60 In 1997, the United States approved a plan to build the Futenma replacement as a sea-based facility, and the Department of Defense developed non-discretionary operational requirements that designated Henoko Bay—"the area serving as the most important remaining habitat for the Okinawa [d]ugong,"61—as the general location for the replacement sea-based facility.62 In 2002, the Japanese government determined that the new base should be constructed over a coral reef in the bay that was adjacent to Camp Schwab, a location that met the Department of Defense's operational requirements.63

A group of Japanese and American citizens opposed to the project, including a conservation advocacy group, filed suit in the Northern District of California claiming that the Department of Defense had violated § 402 of the NHPA.64 They asserted that because the Okinawa dugong was listed on Japan's Register of Historic Places, Places of Scenic Beauty and/or Natural Monuments—a list maintained under the authority of the Japanese Law for the Protection of Cultural Properties—the Department of Defense was required to take into account the impact of the facility construction on the dugong.65 In response, the U.S. government contended that § 402 did not apply because the Japanese Law was not the equivalent of the U.S. National Register, as required by the terms of § 402.66 The government's claim hinged on the nature of the dugong as an animal: Because the U.S. National Register did not permit the listing of animals as animate "properties" while the Japanese Law permitted the listing of both animate and inanimate things, the Japanese Law could not be equivalent to the National Register.67

The district court denied the U.S. government's motion for summary judgment and held, as matter of law, that the Japanese Law was

60. Rumsfeld, 2005 WL 522106, at *1.
63. Id.
64. First Amended Complaint for Declaratory and Injunctive Relief, supra note 61, at 39.
65. Id. at 36, 37.
67. Id. at *6.
the equivalent of the U.S. National Register within the meaning of § 402.68 Characterizing the issue as whether the Japanese Law for the Protection of Cultural Properties was "equivalent" to the National Register, the court compared the effect and function of the Japanese authorizing statute on the NHPA.69 The court noted that the Japanese Law was motivated by an understanding that "the cultural properties of the country are indispensable to the correct understanding of its history, culture, etc. . . .," similar to the underlying purpose of the NHPA.70 A commonality between the legislative role of the Japanese Law and the NHPA was also present: (1) the Japanese Law is the only law for the protection of culturally significant property in Japan, (2) it exists independent of other types of conservation laws—such as those protecting animals for their ecological value—just as the NHPA is the primary American law governing historically and culturally significant property, and (3) it exists independent of environmental conservation statutes.71 In addition, similar to the expansive scope of the NHPA, the Japanese Law covers a broad range of property types, including "historic buildings, works of art, archeological sites, gardens, places of scenic beauty, and other 'natural monuments.'"72 Accordingly, the court concluded, "The National Register and the Law for the Protection of Cultural Properties thus reflect similar motives, share similar goals, and generally pertain to similar types of property."73

Next, the court examined the dictionary definition of "equivalent"74 and determined that the Japanese Law need not be identical to the National Register, but rather its counterpart, or "corresponding or virtually identical especially in effect or function."75 Comparing each country's register of cultural property, the court found that both the Japanese and American registers have corresponding effects—the designation of the nation's cultural and historical heritage for special protections—and identical functions—the use of a cultural protection register.76 The court then discussed parallel statutory roles of each register's authorizing statute: each focuses primarily on cultural protection and exist apart from other statutes that regulate endangered

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68. Id. at *8.
69. Id. at *6.
70. Id.
71. Id.
72. Id.
73. Id. (emphasis added).
74. The court referred to Webster's Third New International Dictionary, which was in effect at the time that Congress drafted § 402. See Rumsfeld, 2005 WL 522106, at *6 n.2.
76. Id.
species; each has evolved in a similar direction towards greater inclusiveness of natural, as well as cultural, places and things; and each demonstrates an equivalent "commitment to protecting significant bridges between human culture and history, on the one hand, and wildlife, on the other." 77

The court rejected the government's argument that the type of property at issue—here, an animal—should restrict the equivalency of the National Register to foreign laws that only protect the types of property that are eligible for protection under the NHPA. The court noted that such an interpretation would contradict the international aspect of § 402 and contravene its express language requiring a law to be equivalent, not identical, in its scope. 78 Although the dugong, as a living animal, is not directly equivalent to an "object" that is eligible for listing on the National Register, the Japanese register listed it for protection based on its cultural and historical significance to the Okinawan people, similar to the National Register's protection of sites accommodating populations of animals that are culturally significant to Native American peoples. Although different in approach, the ultimate effect of both laws is to protect culturally significant animals. 79 The court held that in light of these many similarities between the lists generated according to each country's respective authorizing statute, the Japanese Law for the Protection of Cultural Properties was "equivalent of the National Register" within the meaning of § 402. 80

Having so held, the court noted that its inquiry could be limited to the above analysis, particularly in light of the fact that the dugong is protected under the Japanese Law. 81 However, it proceeded to address the government's proposition that, even if the two laws are found to be "equivalent," the property in question must also qualify as "property" as understood under the NHPA. 82 The NHPA does not define "property," but it does define "historic property," the term used in § 402's domestic counterpart, § 106. Therefore, a question exists as to whether the property must also qualify as a "historic property" under the NHPA definition. 83 Noting that the definition of "historic property" expressly requires that the property be significant to American history, the court considered that exporting the specifi-

77. Id.
78. Id. at *6.
79. Id. at *7.
80. Id. at *8.
81. Id.
82. Id.
83. Id.
cally domestic criteria directly to the international context would con-
travene § 402's explicit reference to foreign legislation and the World
Heritage List. The court thus concluded, "[T]he focus is on the prop-
erty's actual inclusion on a foreign list, rather than whether a particu-
lar property would be eligible under National Register criteria."\textsuperscript{84} Distilling the inquiry down to what § 402 means by "property," then,
removes the need to focus on properties that are significant to Ameri-
can values and requires only that the listed property consist of a "dis-

III. Analysis

As identified by the district court in \textit{Dugong v. Rumsfeld}, the
NHPA's § 402 equivalency standard appears to implicate two issues:
the legal role that the foreign cultural property legislation plays as
compared to the role of the National Register, and the nature of the
property that may be threatened by the federal undertaking.\textsuperscript{88} The
\textit{Dugong} cases are, at the present time, the only judicial interpretation
of § 402, and as such, the court's analysis provides a useful reference
point from which to begin an explication of the equivalency stan-
dard.\textsuperscript{89} Section A of this Part examines what role a foreign cultural
property legislation must fulfill in the country's legal system in order
to meet the equivalency requirement of § 402.\textsuperscript{90} Section B discusses
whether the nature of the property listed for protection under a for-

\begin{footnotes}
\footnote{84. \textit{Id.} at *9.}
\footnote{85. \textit{Id.}}
\footnote{86. \textit{Id.}}
\footnote{87. \textit{Id.} at *12.}
\footnote{88. \textit{Rumsfeld}, 2005 WL 522106, at *6.}
\footnote{89. \textit{See supra} note 55 and accompanying text.}
\footnote{90. \textit{See infra} notes 93–194 and accompanying text.}
\footnote{91. \textit{See infra} notes 201–208 and accompanying text.}
\footnote{92. \textit{See infra} notes 210–219 and accompanying text.}
\end{footnotes}
A. The Effect or Function of the Law

Measures protecting cultural resources exist in a variety of forms and mechanisms, each unique to the legal and social framework in which it operates. At the national level, many countries have enacted laws to extend some degree of government protection to culturally significant resources that are found within domestic borders. The UNESCO Cultural Heritage Laws Database contains entries for over 170 countries that have submitted their domestic laws pertaining to the protection of cultural and natural heritage. As one might expect, each domestic protection law is uniquely fashioned to fit within the type of legal system in which it functions. Some of these laws take the form of national ownership laws, vesting varying degrees of ownership or control of culturally significant resources in the national government. Others operate as part of a comprehensive civil code, detailing legal measures for a broad range of cultural concerns beyond domestic conservation and protection measures.

Cultural resource protection also exists at the international level. The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (Hague Convention), which has been described as the foundation of international cultural property law for the modern era, states that damage to any cultural property is "damage to the cultural heritage of all mankind." The Hague Convention defines cultural property as "moveable or immovable property of great importance to the cultural heritage of every people," including buildings that preserve or exhibit cultural property.

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94. See, e.g., Greek Law 3028 (2002) (on file with author) (vesting a right of ownership in the national government and a limited right to physical possession of cultural property—distinguished from legal ownership—in private individuals).
96. International cultural property law developed out of the rules of war identified as early as the first century BCE, when the Roman orator Cicero drew a normative line between acceptable (spolia) and unacceptable (spoliatio) war booty, including in the latter category the excessive removal of art and architectural decoration from a conquered territory. See Margaret M. Miles, Cicero's Prosecution of Gaius Verres: A Roman View of the Ethics of Acquisition of Art, 11 INT'L J. CULTURAL PROP. 28, 30–31 (2002).
99. See Hague Convention, supra note 97, pmbl.
100. See Hague Convention, supra note 97, art. 1.
and it obligates state parties to safeguard their own cultural property in times of peace and in times of armed conflict.\textsuperscript{101} The Hague Convention currently has 122 state parties, including the United States.\textsuperscript{102}

The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention) specifically addresses the illicit cross-border trade in cultural resources and provides a more expansive definition of cultural property than does the Hague Convention.\textsuperscript{103} In 1995, the International Institute for the Unification of Private Law adopted the Convention on Stolen or Illegally Exported Cultural Objects (UNIDROIT Convention) in order to remedy some of the stumbling blocks—caused by a public-private law distinction in civil law systems—that delayed the ratification of the 1970 UNESCO Convention.\textsuperscript{104} The 1970 UNESCO Convention has since been ratified by seventy states,\textsuperscript{105} and the UNIDROIT Convention by twenty-nine states.\textsuperscript{106}

The particular challenge for U.S. federal agencies facing this disparate set of cultural resource protection laws and treaties is how to recognize “equivalent” legislation when they see it. The \textit{Dugong} court interpreted “equivalency” in the context of § 402 to mean “corresponding or virtually identical especially in effect or function.”\textsuperscript{107} Specifically, the court found that the Japanese Law met the equivalency standard because, like the National Register, its effect is to designate the nation’s culturally and historically significant resources for protection, and it functions as the primary legislation for cultural resource protection, uses the mechanism of a cultural protection register, and lists a broad range of resources based on their cul-

\textsuperscript{101} See Hague Convention, supra note 97, art. 3.


\textsuperscript{106} International Institute for the Unification of Private Law, Status of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, \texttt{http://www.unidroit.org/english/implement/i-95.pdf} (last visited Apr. 2, 2009).

tural and historical connection to the nation. This finding appears to emphasize the aggregate effect of these similarities rather than any one particular commonality between the Japanese law and the National Register. The essential question in light of the Dugong decision, then, is what baseline legal role a foreign law must fulfill in order to qualify as equivalent to the National Register. First, however, an ambiguity raised by the language of § 402 requires consideration: must equivalency be analyzed in terms of a comparison between the National Register and the foreign country's register, or between the National Register and the country's underlying cultural patrimony law?

1. Does § 402 Pertain to Laws or Registers?

By its own terms, the protections of § 402 apply to a country's "equivalent of the National Register." This rather ambiguous phrase does not definitively indicate whether the equivalency comparison must be taken between the National Register and a country's cultural patrimony law, or between the National Register and the applicable country's own "register" of cultural properties. Although there are other ambiguous terms in § 402, guidance for the definitions of those terms can be found elsewhere in the statute, whereas guidance for the definition of "equivalency" is absent.

The reasoning used by the Dugong court to reach its determination of equivalency does not resolve the question. The Dugong court formulated the issue as "whether the Japanese law which designates [the dugong] for preservation, the Law for the Protection of Cultural Properties, is Japan's 'equivalent' of the National Register," and it held that "[i]n light of the many similarities between the lists generated by the Law for the Protection of Cultural Properties and by the NHPA, the Japanese law is an 'equivalent of the National Register' . . . ." The care with which the court took to name the law that it determined to be the equivalent entity suggests that it interpreted "equivalent of the National Register" to pertain to the applicable country's underlying cultural patrimony law. Evidence that the court

108. Id. at *6–8.
109. For the purposes of this Comment, "cultural patrimony law" refers to primary legislation on the topic of cultural resource protection, as distinct from "national ownership law," which vests some degree of ownership of cultural properties in a government entity. A national ownership law would be one type of cultural patrimony law; the NHPA, which does not vest ownership of cultural property in the U.S. government, is also a cultural patrimony law.
111. Rumsfeld, 2005 WL 522106, at *6 (emphasis added).
112. Id. at *8 (emphasis added).
at times distinguished between this statute and the Japanese register of cultural properties lends credence to this reading.\textsuperscript{113}

Unfortunately, a close reading of the court’s full treatment of the equivalency question muddies the waters. In its analysis, the court made a series three comparisons. First, it compared the Japanese Law to the NHPA, finding similarities in motivation, significance, and scope.\textsuperscript{114} Next, it compared the Japanese Register\textsuperscript{115} to the National Register,\textsuperscript{116} finding each had corresponding effects ("to designate the cultural and historical heritage of the nation for special protections")\textsuperscript{117} and the same function ("using the mechanism of a cultural protection register").\textsuperscript{118} Finally, the court once again compared the Japanese Law to the NHPA, finding that each served parallel roles in their respective statutory schemes.\textsuperscript{119}

In terms of supplying a definitive answer to the question of whether § 402 requires register-to-register or law-to-register equivalency, the \textit{Dugong} decision is unsatisfying. Although the court’s actual holding appears to favor an interpretation that the answer is the equivalent "law," in light of the approach used by the court to analyze the equivalency question, the answer may well be that § 402 requires an equivalent "list," or even, perhaps, some equivalency on both levels.\textsuperscript{120} Since the \textit{Dugong} court never tackled this question head-on, a legal interpretation of this ambiguity through regulations or case law remains entirely for the future.\textsuperscript{121} However, because the \textit{Dugong} case serves as a reference point for this Comment’s discussion of "equivalent of the National Register," the remainder of the discussion

\textsuperscript{113} For example, the court once cites to the Japanese register by name—the “Japanese Register of Historic Places, Places of Scenic Beauty and/or Natural Monuments”—when establishing that the dugong is a protected “natural monument” as defined by the Japanese Law, which is distinct from the register. \textit{Id.} at *3. Furthermore, the court’s holding uses both the term "list" and the term "law," and the context in which they are used suggests that the court views them as distinct from one another. It compares the lists generated by the Japanese Law and the National Register, and it then holds that the Japanese Law—not the list—was equivalent of the National Register. \textit{See id.} at *8.

\textsuperscript{114} \textit{See id.} at *6.

\textsuperscript{115} The decision refers to the Japanese register alternately as the “Japanese Register of Historic Places, Places of Scenic Beauty and/or Natural Monuments,” the “Japanese Register,” and the “Japanese list.” \textit{Id.} at *3, *8.

\textsuperscript{116} \textit{Id.} at *6-7.

\textsuperscript{117} \textit{Id.} at *7.

\textsuperscript{118} \textit{Id.}

\textsuperscript{119} \textit{Id.}

\textsuperscript{120} Although the court directly compared both lists only once, it did so at the heart of its analysis: it is the registers that the court found to meet the necessary criteria for equivalency under § 402 by having corresponding effects and the same function. \textit{Id.}

on equivalency will proceed with reference to the language in Dugong's actual holding: that it is the law which must be equivalent.\textsuperscript{122}

2. What Is the Baseline Requirement for "Equivalency" Under § 402?

Although every country's legal protections for cultural resources differ in some way from every other, two types of laws predominate: those that utilize a register system to denote particular, individually identified cultural properties for protection,\textsuperscript{123} and those that extend protection to an entire class of properties, which may or may not be individually identified.\textsuperscript{124}

a. Laws That Individually Identify Protected Property

The National Register itself consists of a broadly inclusive inventory of properties maintained by the National Park Service that meet the eligibility requirements of significance and property type.\textsuperscript{125} Historic preservation officers at the state, tribal, and sometimes local government levels conduct research to identify and nominate properties to the National Register based on the criteria set forth in the NHPA and its regulations.\textsuperscript{126} The Dugong court determined that the Japanese Law met the equivalency requirement at least in part based on its mechanism as a register that lists properties eligible for special protection because of their cultural and historical significance to the Japanese people.\textsuperscript{127} Several countries use a similar mechanism to protect culturally significant resources.

The French \textit{Code du patrimoine} is an example of a register-based system.\textsuperscript{128} The \textit{Code} is a comprehensive collection of laws that consists of seven \textit{livres} dealing with core areas of cultural heritage preser-

\textsuperscript{122} Approaching the equivalency issue from this assumption has the added advantage of broadening the discussion of which types of outlying systems may serve as counterparts to the National Register. While laws may differ considerably among different countries, the differences among lists will most likely be at least somewhat less drastic, if for no other reason than that the country's use of a list eradicates any difference from the National Register in the type of mechanism used.

\textsuperscript{123} See infra notes 125–141 and accompanying text.

\textsuperscript{124} See infra notes 144–158 and accompanying text.

\textsuperscript{125} ADVISORY COUNCIL ON HISTORIC PRESERVATION, REPORT TO THE PRESIDENT AND THE CONGRESS OF THE UNITED STATES: TWENTY YEARS OF THE NATIONAL HISTORIC PRESERVATION ACT 72–73 (1986) [hereinafter ADVISORY COUNCIL]. The properties' significance need not even be national; the Secretary of the Interior is authorized by the NHPA to expand the Register to include properties that are significant to states and smaller regions. \textit{Id.}

\textsuperscript{126} \textit{Id.} at 72, 78.

\textsuperscript{127} Rumsfeld, 2005 WL 522106, at *7.

\textsuperscript{128} C. PAT. (Fr.).
vation, including the regulation of the cross-border movement of cultural property, public museums and archives, archaeological excavations, and the zoning of historical districts.129 The Code defines “patrimoine,” or cultural property, as all property, movable or immovable, under public or private ownership, that demonstrate historical, artistic, archaeological, aesthetic, scientific, or technical significance.130 “Historical monuments” are a class of cultural property for which artistic, historical, scientific, or technical reasons, the state has identified a public interest in designating for preservation.131 Historical monuments are either immovable, such as buildings or prehistoric sites,132 or movable, such as furniture or fixtures.133 Historical monuments, which may be privately or publicly owned, are designated as such by the appropriate administrative authority134 and are thereafter subject to legal conditions, such as the obligation to maintain a historical building in good condition and restrictions on activities that might alter, degrade, or destroy the monument.135 In addition to protections for historical monuments, the Code requires each French department to maintain a register of natural monuments and sites that are significant for artistic, historical, scientific, legendary, or picturesque reasons, and activities that may affect a property on the register are subject to restrictions and permission from the Minister or local official who is responsible for natural monuments and sites.136

Cultural patrimony laws that call for the registration of individually significant monuments and sites are the types of laws that most apparently meet the equivalency requirement of § 402. Under the Dugong criteria for equivalency,137 the Code du patrimoine, like the Japanese Law, appears to be equivalent to the National Register in both effect and function. Although the Code does not contain an express statement of legislative purpose, the Code itself is a comprehensive set of rules detailing restrictions on activities that might threaten the preservation of a wide variety of properties that are deemed significant to the French for reasons similar to the criteria for significance under the National Register, and the effect of the law is to designate these signif-

129. Id. The Code also details civil and criminal penalties for violation of each of its titles. Id.
130. C. pat. art. L1 (translated by the author).
131. C. pat. arts. L621-1, L622-1.
132. C. pat. art. L621-1 (translated by the author).
133. C. pat. art. L621-2 (translated by the author).
134. C. pat. art. L621-25.
135. C. pat. art. L621-1 to 33.
137. See supra notes 107-108 and accompanying text.
significant properties for protection.\textsuperscript{138} In addition, the Code is a functional analogue of the National Register's authorizing statute, the NHPA, because it utilizes statutory criteria to designate a broad range of properties for listing on a register that entitles a property to special considerations and protections that are backed by civil and criminal penalties.\textsuperscript{139} Although the Code covers a much broader array of cultural resource issues than the NHPA, the type of mechanism used is the same as the National Register—a register of individually identified properties.\textsuperscript{140} The Dugong court's emphasis on the Japanese Law's use of a register mechanism suggests that how a law protects its cultural patrimony mattered more to the court than the scope of the law's coverage. However, the court's discussion of equivalency in terms of the function of the Japanese Law may not have depended upon its nature as a register; the court also considered its role as the primary legislation addressing cultural resource protection and the law's expansive scope of properties protected for their cultural and historical significance.\textsuperscript{141}

Not every country is equipped or driven to develop such a register-based system, and setting the baseline requirement for equivalency at the utilization of a register that lists individually identifiable properties would exclude many countries that employ different systems for preserving their cultural resources. The internationalism that motivated the United States' implementation of the World Heritage Convention\textsuperscript{142} and the later drafting of §402 with the term "equivalent," rather than "identical,"\textsuperscript{143} indicates that the question is at least open as to whether equivalency should be read narrowly so as to restrict equivalency to register-based laws, or broadly so as to enable more countries to gain the benefits of §402's process.

b. Laws That Categorically Designate Protected Property

Many states have enacted cultural patrimony laws that accord the government an ownership or possessory interest in cultural resources. Frequently, these national ownership laws share many of the characteristics of a register-based system, such as the documentation and recording of identified cultural property on a government-maintained register. However, these laws go further by extending government

\begin{itemize}
\item \textsuperscript{138} See C. PAT. art. L1.
\item \textsuperscript{139} See C. PAT. art. L621-1 to 33.
\item \textsuperscript{140} See C. PAT. art. L341-1 to 22.
\item \textsuperscript{142} See supra notes 46-49 and accompanying text.
\item \textsuperscript{143} See 16 U.S.C. § 470a-2.
\end{itemize}
control over cultural property that is not yet individually identified on a list. Egyptian Law 117 is a national ownership law that exhibits many of the common characteristics of this type of cultural resource preservation scheme.\textsuperscript{144}

Law 117 defines “antiquities” as immovable and movable objects (real estate and chattel) of human creation that are over one hundred years old and that have historical or archaeological importance as the creation of Egyptian civilizations or that bear a historical relationship to the land.\textsuperscript{145} The law provides that all Egyptian antiquities are owned by the state as public property\textsuperscript{146} and requires the Egyptian Antiquities Authority to register both movable and immovable antiquities once they are discovered.\textsuperscript{147} Any person who finds an unregistered immovable or movable antiquity is required to notify the Egyptian Antiquities Authority of the discovery.\textsuperscript{148} The land on which the immovable antiquity is located is subject to expropriation by the government, and the physical possession of movable antiquities is relinquished to the government for storage in museums and warehouses.\textsuperscript{149} Furthermore, even privately owned land may be expropriated by the government if there is a possibility that it may have archaeological importance.\textsuperscript{150}

Once an immovable property is registered or an archaeological area is designated, no alterations to the object or the land on which the immovable antiquity is situated can be made without a license from the head of the Antiquities Authority, which is issued only after a hearing by a standing committee, even if the real property remains privately owned.\textsuperscript{151} No licenses can be granted for construction on archaeological lands, and any other activities that might alter the character of the land—such as planting trees or removing soil—may proceed only pursuant to a license from the Antiquities Authority.\textsuperscript{152}

\textsuperscript{144} Egyptian Law No. 117 Concerning Antiquities Protection (1983), available at www. unesco.org/culture/natlaws/media/pdf/egypt_cg_lawprotectantiquities1983_engtno.pdf (translation by UNESCO) [hereinafter Law 117]. As this Comment went to print, Egypt was preparing to approve a new cultural patrimony law that would provide for stricter control over national antiquities, including a complete prohibition on antiquities trading. See Nevine El-Aref, No More Trafficking, AL-AHRAM WEEKLY ON-LINE, Feb. 4-10, 2010, available at http://weekly. ahram.org.eg/2010/984/cg3.htm.
\textsuperscript{145} Id. art. 1 (translation by UNESCO).
\textsuperscript{146} Id. art. 6.
\textsuperscript{147} Id. art. 26.
\textsuperscript{148} Id. arts. 23–24.
\textsuperscript{149} Id. arts. 23–24, 28.
\textsuperscript{150} Id. art. 18.
\textsuperscript{151} Id. art. 13.
\textsuperscript{152} Id. art. 20.
These restrictions may also apply, at the discretion of the government, to land outside the boundaries of the designated area, even where the land is privately owned. Law 117 prescribes criminal penalties for, among other things, hiding an unregistered antiquity from the government; intentionally damaging or changing the “distinguishing features of an antiquity or a historical building”; removing from or adding soil or sand to an archaeological site or land; and even accidentally damaging a movable or immovable antiquity.

Egyptian Law 117 shares with the National Register and the Japanese Law the use of a registration system for identifying and tracking cultural resources, but unlike those laws, it extends legal protection to all properties that qualify as antiquities even before they have been identified and listed for protection by the Egyptian Antiquities Authority. Law 117 broadly designates properties as antiquities that were created more than one hundred years ago and have some significance to Egyptian culture or history, and it establishes criminal penalties for concealing an unregistered antiquity from the government. The nature of this categorical and automatic designation indicates that Law 117 functions to extend its preservation protections to all antiquities, movable and immovable, even if they are not inscribed on the antiquities registry. It follows, therefore, that Law 117 and similar national ownership laws have an effect that is at least as protective of historically and culturally significant resources as the National Register. In fact, Law 117 is probably far more expansive in its scope of protection than the National Register because it captures not only unregistered antiquities, but potentially also both movable and immovable antiquities without restrictions on subtypes of those categories, such as tangible and intangible property, or animate and inanimate objects. The true distinction between national ownership laws like Law 117 and the National Register seems to lie in the different kind of

153. Id. art. 20.
154. Id. arts. 42–47 (translation by UNESCO) (emphasis added).
155. The NHPA also extends legal protection to properties not listed on the National Register. Section 106 of the NHPA protects domestic cultural and historic properties “eligible for inclusion” on the National Register, in addition to those already listed. 16 U.S.C. § 470f (2006). However, unlike Law 117, the NHPA may not protect all eligible properties in all circumstances. The interpretation of equivalency under § 402—that is, as pertaining to the equivalency of a country's register to the National Register, rather than its underlying law—would impact the ability of § 402 to protect properties not actually listed on a foreign register.
156. Law 117, supra note 144, arts. 1, 42–47.
157. See id. arts. 6, 26.
158. However, the general protections of Law 117 and the penalties incurred for violation of the law indicate that it is intended to protect primarily, if not exclusively, tangible, inanimate objects. See generally Law 117, supra note 144.
function that each serves in its respective legal system. Although in practical terms it may often happen that national ownership laws are accompanied by a register that lists individual properties as they become known to the government, it is not necessarily true that this must always be the case.

c. Drawing the Baseline for Equivalency

Can a national ownership law serve as an equivalent of the National Register if the sole means of identifying properties comes from the broad designation of certain categories of properties as protected? Take, for example, a hypothetical Law 117 that remains intact, save for the requirement that the government register and take physical possession of identified antiquities. In this hypothetical, the designation of “antiquity”—for those properties that are one-hundred-year-old-plus, movable and immovable, and historically or culturally significant—remains intact, as does the declaration that antiquities constitute public property that belongs to the government. The government can still regulate activities and possessory rights that might affect the physical integrity of antiquities or interfere with the government’s right of ownership, and it could still impose penalties for violating the law’s proscriptions (although, in the absence of a list of such properties, this may occur less regularly).

In this hypothetical, the designation of an object as an “antiquity” under Law 117 loses no meaning when a register is removed from the equation. Government enforcement of its historic preservation law may become more difficult, and compliance with the law may become more onerous for those who are seeking to conduct activities in the country, but properties that meet the criteria of type, significance, and age still legally qualify for government protection, even if they may not receive it as much as they would if a comprehensive list identified those properties by name. However, § 402 does not require that a law provide a more or less efficient preservation mechanism than the National Register. It requires only that the law be equivalent to the National Register. As interpreted by the Dugong court, that would mean equivalent in terms of effect or function. The hypothetical

159. This is true of Law 117. See id. art. 26.
160. See id. art. 1.
161. See id. art. 6.
162. See id. arts. 13, 20.
163. See id. arts. 42–47.
164. See supra notes 156–157 and accompanying text.
166. See id.
Law 117 still has the effect of designating antiquities for protection,\textsuperscript{167} and it still functions as the primary legislation in Egypt for cultural heritage protection, applying its provisions to a broad range of resources that have cultural or historical significance to the Egyptian nation.\textsuperscript{168} Therefore, the absence of a register that individually identifies properties for protection in this hypothetical has not impacted either the law’s effect or the law’s function.

This reading is not inconsistent with the historical development of the domestic process for compliance with the NHPA. As far as it is relevant in the context of a § 402 equivalency analysis, the National Register functions primarily as an authoritative guide for federal agencies that are required to comply with § 106’s process.\textsuperscript{169} Although the terms of § 402 only require agencies operating internationally to consider the impact of their undertakings on properties that are “on the applicable country’s equivalent of the National Register,”\textsuperscript{170} agencies operating in the United States are required to identify and consider properties listed on the National Register and properties eligible for listing on the National Register, based on the agency’s application of the regulatory criteria and consultation with appropriate authorities.\textsuperscript{171} If an agency that operates domestically identifies neither category of property, the agency can proceed with its planned activities.\textsuperscript{172}

Initially, however, the language of § 106 required only that federal agencies take into account the effect of their undertaking on “any district, site, building, structure, or object that is included in the National Register”—the words “eligible for inclusion” were not added until the NHPA was amended in 1976.\textsuperscript{174} Furthermore, the “eligible for inclusion” language has been read liberally by the courts to include properties that are not only officially determined to be eligible for inclusion by a state or federal agency, but that also qualify on the basis of literal eligibility under the National Register criteria.\textsuperscript{175} In \textit{Colorado River Indian Tribes v. Marsh}, a leading case on the interpretation

\textsuperscript{167} See supra notes 156–157 and accompanying text.
\textsuperscript{168} See Law 117, supra note 144, art. 1.
\textsuperscript{169} See 36 C.F.R. § 60.2 (2009); ADVISORY COUNCIL, supra note 125, at 34–35.
\textsuperscript{170} 16 U.S.C. § 470a-2 (emphasis added).
\textsuperscript{171} ADVISORY COUNCIL, supra note 125, at 34–35.
\textsuperscript{172} Id.
\textsuperscript{174} ADVISORY COUNCIL, supra note 125, at 23 (emphasis added).
\textsuperscript{175} Boyd v. Roland, 789 F.2d 347, 349 (5th Cir. 1986). The regulations in force at the time of Boyd defined eligible property as property “that meets the National Register criteria.” 36 C.F.R. § 800.2(f) (1985). Prior to 1979, the regulations defined eligible property as any property “which the Secretary of the Interior determines is likely to meet the National Register criteria.” 36
of § 106, the court stated that “[w]hat is an eligible property for purposes of NHPA turns upon the inherent historical and cultural significance of the property and not the opinion of its worth by the Secretary of the Interior.”176

By extension, an argument can be made that the Dugong court’s interpretation of the equivalency standard need not be limited by the language of § 402. Where a foreign state does not require that cultural property be individually identified in order to qualify for protection under its historic preservation statute, the statutory criteria by which property is determined to be eligible for protection—in the case of Law 117, the property’s type, age, and historical and archaeological connection to Egyptian civilizations or land177—fulfill the same role as the National Register’s eligibility criteria: marking a property for special protection. This role is fulfilled regardless of whether the property is actually registered as cultural property.178 As a result of the special protections afforded even to unregistered antiquities under Law 117, one might conclude that all antiquities as defined by the statute should be considered “on” Law 117.179

Although such an interpretation of the equivalency standard would effectively extend the same degree of protection to foreign cultural property as § 106 does to domestic cultural property, the text and context of § 402 indicate that Congress most likely did not intend to stretch the concept of equivalency so far as to reach pure national ownership laws. The clearest indication of this is the fact that § 402 simply does not incorporate the language “eligible for inclusion” as

177. Law 117, supra note 144, art. 1.
178. For example, Law 117 protects unregistered properties by establishing criminal penalties for concealing unregistered antiquities from the government. See id. arts. 42-47. It also penalizes activities that have the potential to harm antiquities that have not yet been discovered. See, e.g., id. art. 18 (providing that the government may expropriate land if there exists the potential that it may have archaeological significance). See supra notes 145-154 and accompanying text (discussing relevant provisions of Law 117).
179. The United States has actually adopted a purely categorical approach to regulating the illicit import of other countries’ cultural property. Under the Convention on Cultural Property Act, 19 U.S.C. § 2601 (2006), which implements the 1970 UNESCO Convention, the State Department is authorized to enter into agreements with other state parties to the Convention in order to restrict the import of cultural property that has been illegally exported from the other country. The agreement prohibits the import into the United States of certain categories of archaeological or ethnological material. An image database on the State Department website identifies individual properties that fit within the categories, but those images of individual objects are only intended as illustrative examples of the categories. For more information and a link to the CPIA image database, see U.S. State Department, International Cultural Property Protection, http://culturalheritage.state.gov/index.html (last visited June 12, 2009).
part of the requirement to mitigate adverse effects on property that is listed on "the applicable country's equivalent of the National Register." \textsuperscript{180} Section 402 was part of the 1980 amendments to the NHPA, whereas the "eligible for inclusion" language of § 106 had been added four years prior, as part of the 1976 amendments. \textsuperscript{181} Therefore, the "eligible for inclusion" language had been available to Congress for four years. Furthermore, the concept had existed for at least nine years, since an Executive Order in 1971 directed federal agencies to inventory and exercise caution around properties that "appear to qualify for listing" on the National Register. \textsuperscript{182}

This reading of the text of § 402 is bolstered by the fact that a substantial portion of § 402's language mirrors that of § 106. Both sections of the NHPA apply generally to the same group—federal agencies \textsuperscript{183}—and to the same type of activities—federal undertakings. \textsuperscript{184} Both use identical language, "take into account," in order to indicate that a specific type of action is required. \textsuperscript{185} Both indicate that the National Register is the reference point for determining when that action is required and when it is not. \textsuperscript{186} The language of § 402 indicates that Congress's choice of words was deliberate, and that Congress probably intended the matching terms to carry a similar meaning. Thus, Congress's omission of the "or eligible" language in § 402 implies that Congress did not intend § 402 to extend to property

\textsuperscript{180} Compare 16 U.S.C. § 470f (the federal agency shall "take into account the effect of the undertaking on any [property] that is included in or eligible for inclusion in the National Register"), with § 470a-2 (the federal agency shall take into account the effect of the undertaking on "property which is . . . on the applicable country's equivalent of the National Register").

\textsuperscript{181} ADVISORY COUNCIL, supra note 125, at 23.

\textsuperscript{182} Executive Order No. 11,593 required the heads of federal agencies to "locate, inventory, and nominate to the Secretary of the Interior all sites, buildings, districts, and objects under their jurisdiction or control that appear to qualify for listing on the National Register of Historic Places," and to exercise caution when engaging in undertakings that might alter, damage, or transfer control of those properties until the Secretary of the Interior had the opportunity to render an opinion regarding the property's eligibility for inclusion in the National Register. Thus, the "eligible for inclusion" language brought the requirements of Executive Order No. 11,593 directly into the NHPA. Exec. Order No. 11,593, 3 C.F.R. 559, reprinted in 16 U.S.C. § 470.

\textsuperscript{183} Compare 16 U.S.C. § 470f ("head of any Federal agency" and "head of any such Federal agency"), with § 470a-2 ("head of a Federal agency").

\textsuperscript{184} Compare 16 U.S.C. § 470f ("proposed Federal or federally assisted undertaking in any State"), with § 470a-2 ("Federal undertaking outside the United States").

\textsuperscript{185} Compare 16 U.S.C. § 470f ("take into account the effect of the undertaking"), with § 470a-2 ("take into account the effect of the undertaking").

\textsuperscript{186} Compare 16 U.S.C. § 470f ("shall . . . take into account the effect of the undertaking on any [property] that is included in or eligible for inclusion in the National Register"), with § 470a-2 ("Prior to the approval of any Federal undertaking outside the United States which may directly and adversely affect a property which is . . . on the applicable country's equivalent of the National Register").
that *could be* considered eligible for protection but that is not *actually* listed on the equivalent to a National Register.

Furthermore, the purpose of the 1980 amendments to the NHPA, of which § 402 is a part, was in part to implement the United States' participation in the World Heritage Convention. To that end, § 402 requires that federal agencies also mitigate the adverse effects of their actions on property that is "on the World Heritage List." The World Heritage List was known to Congress since at least 1973, the year that Congress deposited the United States instrument of ratification for the World Heritage Convention. Clearly, the method of cultural property preservation most familiar to Congress at the time that it developed § 402 was a register-based method that individually lists individual culturally or historically significant properties for protection. The most reasonable conclusion with respect to the equivalency standard, therefore, is that Congress simply did not intend to extend the protections of § 402 to property that is not actually "on," in the clearest sense, a register or list.

d. The Need for a Register

The determination that Congress most likely intended that some sort of register must feature in a country’s cultural resource protection scheme suggests an answer to the question raised at the outset of this analysis: Must equivalency now be analyzed in terms of a comparison between the National Register and the foreign country’s register, or between the National Register and the register’s authorizing cultural patrimony law?

Without resolving the question, or even raising it, the *Dugong* court’s equivalency analysis suggests that the comparison does not need to take place solely at a register-to-register level. In finding that the Japanese and American registers had a corresponding “effect or function,” the court effectively said that they were equivalent simply because they *were both lists*. In other words, they both individually designated, or listed, properties that were deemed historically or culturally significant under the standards of their authorizing statutes (and in the case of the National Register, implementing regulations),

187. See McHugh, supra note 35, at CRS-2.
189. See McHugh, supra note 35, at CRS-2.
190. See supra notes 110–122 and accompanying text.
and they thus had corresponding effects; likewise, because they were both lists, they had the same function.\textsuperscript{191}

The significance of the register-statute distinction arises again when considered against the potential that § 402's "take into account" requirement could apply to cultural properties that are fully protected under a cultural patrimony law but that are not designated by name on a corresponding register. If Congress intended that a foreign law utilize a register, as appears to be the case,\textsuperscript{192} asking whether the law or the register is equivalent to the National Register is a distinction without a difference—whether the bottom-line point of comparison is made at the register or authorizing statute level, a register is required. If a country has a system like Egypt's, designating broad categories of property for protection and also listing specific property on a register, the law has the same effect and function as the National Register—"to designate the cultural and historical heritage of the nation for special protections . . . [by] using the mechanism of a cultural protection register."\textsuperscript{193} Because the language of § 402 does not require that federal agencies take into account the impact of their actions on properties that are eligible for listing on another country's equivalent register, the agency must only take care with respect to listed properties, as was the case in the United States until 1971.\textsuperscript{194}

\section*{B. The Nature of the Protected Property}

Just as the nature of historic preservation legislation varies considerably from country to country, so too does the value that different cultures place on the preservation of objects, scenery, knowledge, and expression. While some nations restrict statutory cultural resource protection to tangible properties, others extend preservation efforts and protection to intangible cultural properties, such as traditional music and dance or folkloric manners and customs.\textsuperscript{195} Some recognize living creatures such as animals as cultural property requiring legislative protection, whereas others do not.\textsuperscript{196} Even those countries

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{191} Okinawa Dugong v. Rumsfeld, No. C 03-4350 MHP, 2005 WL 522106, at *7 (N.D. Cal. Mar. 2, 2005).
\item \textsuperscript{192} See supra notes 180–189 and accompanying text.
\item \textsuperscript{193} Id.
\item \textsuperscript{194} See 16 U.S.C. § 470a-2 (emphasis added).
\item \textsuperscript{195} See, e.g., Protection of Cultural Properties Act, art. 2(1)(2), 2(1)(4) (1950) (last amended 2002) (Republic of Korea), available at www.unesco.org/culture/natlaws/media/pdf/republicitofkorea/kp_actprotecultproprieties_engtno.pdf [hereinafter Cultural Properties Act (Korea)].
\item \textsuperscript{196} Compare id. art. 2(1)(3)(c) (expressly designating "animals" as a protectable category of cultural property), with 36 C.F.R. § 60.3(j) (2009) (providing only inanimate examples of protectable "objects").
\end{enumerate}
\end{footnotesize}
that emphasize the conservation of tangible, inanimate properties vary in the degree to which they extend legislative protection to both immovable and movable properties. As the Dugong court noted, the language of § 402 may present a question as to whether § 402's protections extend to properties that differ in nature from those that the NHPA protects, either to negate the equivalency of a law that is otherwise equivalent to the National Register in effect or function, or to bar application of § 402 to those properties even when they are protected under a foreign law that fully qualifies as equivalent of the National Register.

An argument using the nature of property protected under a foreign national historic preservation scheme as a basis for challenging the application of § 402 might proceed in one of two ways. First, one might read the equivalency requirement as standing for the premise that because the foreign nation's law protects classes of property that are not recognized by the National Register (i.e., it is a class of property that would not fit under the definition of a "district, site, building, structure, or object"), the entire law cannot be the "equivalent" of the National Register. Second, one might interpret the language of § 402 as allowing a foreign law to be equivalent to the National Register regardless of the way in which it classifies property for protection, but negating the applicability of § 402 where the actual property at issue is not a type that is protected under the NHPA. The first interpretation is a challenge to the equivalency of the law, and the second is a selective application of § 402 to an otherwise equivalent law. The Dugong court addressed both possible interpretations, beginning with the first.

1. Nature of the Property As Negating Equivalency

The Department of Defense in Dugong v. Gates presented an interpretation of § 402 suggesting that because the dugong listed for protection under the Japanese Law was an animate creature, a classification of property not recognized by the National Register, the Japanese Law could not be the equivalent of the National Register.
under § 402. This interpretation of the equivalency standard takes on a greater significance if § 402 is read to require that the equivalency exist between the National Register and the other country’s register, as opposed to its underlying cultural patrimony law. In that case, because the two registers would be inherently identical in form—each a list of cultural properties—the distinctions between the two registers would be found primarily or exclusively in the type of properties that formed the list. Equivalency between the two registers would then necessarily depend either upon the complete absence of an inequivalent category of property from the foreign country’s register, or upon a preponderance of the types—or actual number—of properties that are listed on the foreign register and that constitute the same type of property as those eligible for listing on the National Register.

The Dugong court did not find that theory persuasive. The court found the commonalities between the two laws to be more significant than the differences, and it reasoned that allowing the nature of the property at issue to serve as the primary factor to overcome the equivalency of the two historic preservation schemes would contradict the entire purpose of § 402’s extension of domestic protections to nations that are culturally distinct from the United States. The court emphasized that the Japanese Law’s basis for listing the dugong—its cultural and historical importance to the Okinawan people of Japan—was the significant factor.

Although a property-based equivalency standard would probably significantly benefit federal agencies by rendering § 402-eligible property consistent across borders and more readily identifiable, the Dugong court’s interpretation of the relationship between the type of property and the equivalency of the foreign law has better support in the legislative purpose of § 402. Congress enacted § 402 to fulfill the United States’ commitments under the World Heritage Convention, which, in the view of Congress, “leaves it to each participating nation to identify and delineate the meritorious heritage properties situated

202. See the discussion of the register-or-law distinction supra notes 190–194 and accompanying text.
203. Under this interpretation, the converse could be true as well: a property-oriented interpretation of the equivalency standard might recognize as “equivalent” all foreign historic preservation laws, regardless of their effect or function, when the nature of the property at issue is equivalent to a type of property that is protected in the United States by its inscription in the National Register.
205. Id.
206. Id. at *7.
within its own territory." This is a particularly informative statement in light of the fact that the United States was the primary architect of the Convention, as well as its first ratifying state. Therefore, it is unlikely that Congress intended a property-based interpretation of the equivalency standard to prevail, considering that § 402 would most likely apply only to countries with a decidedly Western concept of the value of property.

2. Nature of the Property As Restrictive of the Types of Resources Eligible for § 402 Protection

In light of the above analysis, any limitation on the scope of properties to which § 402 may apply must only operate selectively—but does the equivalency standard mandate that certain types of properties be excluded from consideration? The Department of Defense in Dugong suggested that it does. The government argued that only tangible, inanimate properties are eligible for protections under § 402 because § 402 requires federal agencies to regard "property which is on the World Heritage List or on the applicable country's equivalent of the National Register," and because the National Register protects only tangible, inanimate properties. The district court did not address whether proving that a foreign cultural property is also a "property" under the NHPA's statutory framework is a baseline requirement for protection under § 402. Instead, the court treated the dugong as an “object” as defined in the NHPA regulations.

Here, as before, the language and intent behind § 402 informs an investigation into whether the equivalency standard requires that only certain types of "equivalent" property be taken into consideration prior to an agency's undertaking. Congress used the term "equivalent" to describe the relationship between a foreign nation's historic preservation law or register to the National Register, not to inform an analysis of the type of property that must be considered. In addition, the full scope of protection under § 402 extends to properties on the World Heritage List, which consists of properties that would not be recognized as eligible for inclusion in the National Register, even under the Dugong court's stripped-down "property,"

208. McHUGH, supra note 33, at CRS-2.  
210. Id.  
211. Id. at *9.  
as opposed to "historic property," standard.  For example, the category of natural heritage is recognized on the World Heritage List; by contrast, the National Register does not list properties for protection without some significant connection to human beings. A federal agency conducting an undertaking that might adversely affect a World Heritage Site is required to consider the effects of its actions on that property. If a country has decided that certain landscapes have cultural significance to its population, for example, limiting the application of § 402 to the types of property that the National Register protects would promote an absurd result: the agency would be required to accept the foreign nation's determination that a cultural landscape is significant if it is listed on the World Heritage List, but it would be able to reject that determination when the same class of property is at issue, but the property's significance is national, rather than global, in scope.

3. Only Properties Actually Designated Under Foreign Law As Culturally or Historically Significant Should Be Eligible for § 402 Protection

Considering the wide variety in properties that an agency may confront in its quest to comply with § 402, where can a baseline be drawn? The criteria for nominating properties to the World Heritage List are based entirely on the significance of the property to the global community, judged by one or more of six possible standards. Moreover, the eligibility criteria for listing properties on the National Register is based on that property's significance to American history, architecture, archaeology, engineering, and culture. In order to ensure that federal agencies operating overseas are on notice that they must consider the impact of their actions on historically and culturally significant foreign properties, § 402's process should apply only to properties—as defined under the foreign law—that are designated for protection under the foreign law, and only when those designations are based on their significance to the people of that nation.

213. Id.
214. The National Register category closest to natural heritage protection would probably be "sites," which requires a connection to the human race as an element of the eligibility criteria. "A site is the location of a significant event, a prehistoric or historic occupation or activity, or a building or structure, whether standing, ruined, or vanished, where the location itself maintains historical or archeological value regardless of the value of any existing structure." 36 C.F.R. 60.3(l) (2008).
In other words, if a foreign law determines that a certain intangible cultural property (such as traditional knowledge of the medicinal uses of a plant) or a folkloric custom (such as a dance or ritual) is culturally or historically significant and worthy of protection, but does not designate for protection the land on which these activities exist on the independent basis of the land's significance (such as its necessity to the preservation of the knowledge or custom), a § 402 analysis should be limited only to the cultural property that is actually designated for protection—the custom itself. If the equivalent foreign law does not protect the land for cultural or historic reasons, agencies operating within the paradigm of the NHPA and the World Heritage Convention, which only protect properties based on their significance to national and world heritage, should not be expected to infer that anything other than the designated property itself must be accorded consideration.

Consider a hypothetical scenario: In willing compliance with its responsibilities under the NHPA, a federal agency operating in a country that protects intangible cultural property would first seek to discover if a cultural patrimony law exists, and next, whether that law or its register was the “equivalent of the National Register.” Listed on the register may be the traditional knowledge of an ancient style of building construction.\(^\text{218}\) The agency would recognize the traditional knowledge as intangible property that is listed for protection and is thus eligible for § 402’s compliance process, which most likely includes some amount of consultation with local community and preservation groups in order to further investigate the federal undertaking’s potential for harmful effects on the intangible property.\(^\text{219}\) However, if the agency has no way of determining whether the area in which it is operating has any connection whatsoever to the protected intangible cultural property, it has no notice that the consultation process under § 402 should commence.\(^\text{220}\) As a result, the agency will most likely not

\(^{218}\) See, e.g., Cultural Properties Act (Korea), supra note 195, art. 2(1)2, 2(1)4.

\(^{219}\) The District Court for the Northern District of California took up this issue in Okinawa Dugong v. Gates. There, the court found that the bare bones “take into account” process under § 402 required

(1) identification of protected property, (2) generation, collection, consideration, and weighing of information pertaining to how the undertaking will affect the historic property, (3) a determination as to whether there will be adverse effects or no adverse effects, and (4) if necessary, development and evaluation of alternatives or modifications to the undertaking that could avoid or mitigate the adverse effects.

\(^\text{220}\) See 16 U.S.C. 470a-2, which requires the Federal agency to take into account the effect of an undertaking on such properties “prior to the approval of any Federal undertaking.” Id. (emphasis added).
seek to initiate consultation based on the listed property, and it will
not know to mitigate the adverse effects of its undertaking on the
traditional knowledge.\textsuperscript{221}

In another variation on this scenario, the agency may recognize that
actions it intends to take will adversely impact this traditional knowl-
edge, and it may engage in measures to mitigate the harmful effects by
creating an arrangement whereby the holders of the protected knowl-
edge agree to relocate to another area. Having thus faithfully trav-
erersed the complexities of complying with the NHPA in an
international context, requiring the agency to further “take into ac-
count” the impact of the undertaking on an undesignated area in
which this knowledge has traditionally been accumulated or prac-
ticed—for example, without any notice to the agency that the land is
also protected—would ask more of the agency than § 402 requires.\textsuperscript{222}

In a statutory analysis in which so many variables exist, this seems
an appropriate place to limit the reach of § 402.

\section*{IV. Conclusion}

The ambiguity of the language “equivalent of the National Regis-
ter” in § 402 leaves federal agencies undertaking action overseas with-
out clear guidance as to whether a country has an official preservation
scheme in place and whether that scheme is “equivalent,” so as to
trigger the requirements of § 402.\textsuperscript{223} As a result, the agency may not
know whether there are cultural or historically significant resources
that must be taken into account prior to undertaking the action, and
foreign populations cannot rely on § 402 to supply the protection that
it purports to offer.\textsuperscript{224} Understanding the baseline requirements for
what foreign legislation would need to be in order to qualify as
“equivalent of the National Register” would reduce the burden on
federal agencies acting overseas by providing them with the param-
eters for taking the first step under § 402’s process—\textit{identifying} the his-
torically or culturally significant properties.

The court in \textit{Dugong} shed some light on the requirements of § 402
by articulating criteria by which a foreign cultural property law may
be deemed equivalent to the National Register. The court’s broad in-
terpretation of “equivalent” as requiring a corresponding effect or
function in the foreign law, interpreted with reference to the text, stat-
utary context, and legislative history of § 402, indicates that the for-
eign law will most likely need to utilize some form of a register-based mechanism as a baseline requirement in order to qualify for equivalency under the NHPA.

In addition, a liberal extension of NHPA’s protections to different types of property is warranted by the legislative history and text of § 402. Whether a foreign protected resource constitutes “property” should be considered by reference to the definitions developed by that foreign country rather than the limited conception of protection-worthy property espoused by the NHPA. Limiting the scope of protection to the types of properties that the National Register recognizes undermines the internationalism of § 402, which is to allow foreign nations to determine what properties—and what types of properties—are significant to their history and cultural heritage. However, the reach of § 402 should be limited to only those that are properties actually designated for their cultural or historic significance, or their necessity to the preservation of such a designated property. In that way, U.S. agencies operating overseas will know from examining the equivalent foreign register that a property must be considered. Therefore, the interpretation of “equivalent of the National Register” that hews closest to § 402’s language, statutory context, and legislative purpose, is that equivalency requires, at a minimum, that a country maintain a register of culturally significant property.

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