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## Historic Preservation in Southeast Asia: The Role of Public-Private Partnerships

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# Historic Preservation in Southeast Asia: The Role of Public-Private Partnerships

## ABSTRACT

*The role of globalization in the rapid economic success of Southeast Asia is exemplified by the growing westernization of the region's cities. While globalization has its benefits, such as encouraging investment and global connectivity, it also threatens the cultural heritage of a given area by encouraging a sort of homogeneity that makes modern cities all look alike. In particular, the goal of economic development often stands at odds with the preservation of structures and properties that reflect the cultural heritage of the region. Furthermore, many of the countries of the region are under pressure to better protect property rights, another policy that can run counter to the goals of historic preservation. In this Note, the Author looks at the state of property rights, urban development, and historic preservation in four Southeast Asian countries and proposes a solution that is able to balance the competing goals of historic preservation, globalization, and economic development. This solution, which has been employed in parts of South America, involves public-private partnerships that incorporate historic preservation into general urban planning and encourage private involvement and investment.*

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## I. INTRODUCTION

In today's world of rapid globalization and urbanization, many have become concerned about the apparent homogeneity of modern cities. While economic globalization is seen as a positive force for bringing developing countries to a better economic state, it is often feared because it is perceived as undermining cultural identities and differences. As an example, critics point to cities in such rapid-growth areas as Southeast Asia and note how similar they now seem to Western cities.<sup>1</sup> While these critics are right to fear cultural globalization and its effect on cultural identity, there is still room for economic globalization and the celebration of cultural heritage to

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1. William S. Logan, *Introduction: Globalization, Cultural Identity, and Heritage*, in *THE DISAPPEARING 'ASIAN' CITY: PROTECTING ASIA'S URBAN HERITAGE IN A GLOBALIZING WORLD* xii, xii-xiii (William S. Logan ed., 2002).

exist side by side. A closer look at these cities will reveal that a wealth of historically and culturally important structures still exists. Many of these sites, however, are in great danger of destruction or misuse; thus it is necessary for governments to take action in protecting them. Historic preservation has long been accepted and promoted in the United States and other Western countries, but it has been sorely neglected in developing and transitional countries.<sup>2</sup>

It is true that many of these countries lack the resources needed to successfully promote historic preservation. Many developing countries are also more concerned right now with promoting economic development,<sup>3</sup> a goal that may seem incompatible with historic preservation. This Note proposes, however, that developing countries can achieve both of these goals through programs that incorporate historic preservation into general urban planning and by encouraging private involvement and investment. In particular, this Note proposes a public-private partnership, an example of which is currently being employed in Quito, Ecuador.

Part II of this Note analyzes the state of property rights, urban planning, and historic preservation in four Southeast Asian countries: Cambodia, Singapore, the Philippines, and Indonesia. Part III will look at some approaches to historic preservation and at the various tools available to governments. Finally, Part IV will detail a solution, as well as some of the arguments against historic preservation as a goal for developing countries.

## II. BACKGROUND

### A. *Phnom Penh, Cambodia*

Cambodia, once the center of the powerful Khmer kingdom, is a former French colony on the Southeast Asian mainland. The country is highly underdeveloped and poor, and only 15% of Cambodia's population lives in urban areas.<sup>4</sup> The majority of this urban population resides in the country's capital, Phnom Penh.<sup>5</sup>

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2. *Id.* at xiii.

3. *Id.* at xiv-xv.

4. William Chapman, "The Best Laid Schemes": *Land-Use Planning and Historic Preservation in Cambodia*, 7 PAC. RIM L. & POL'Y J. 529, 533-34 (1998).

5. *Id.* at 534.

## 1. Property Rights in Cambodia

Cambodia's colonial and post-independence history has had a profound impact on the status of property rights in the country.<sup>6</sup> The traditional Khmer and Cambodian cultures did not have a notion of private property comparable to that of Western nations.<sup>7</sup> When the French intervened in the region they introduced, for the first time, the modern sense of private property and passed the first significant law protecting property owners.<sup>8</sup> This law really only applied to the wealthy elite, as most of the population continued to adhere to more traditional property ideals.<sup>9</sup> During the socialist regimes of the 1970s and 1980s, private ownership of land was forbidden as incompatible with socialist policy.<sup>10</sup>

In 1989, the modern ideal of private property was reborn in Cambodia, culminating in the 1992 Land Law, which set out general principles of land tenure.<sup>11</sup> Since 1990, the country has gone from having the vast majority of all property owned by the government to having nearly all property in private hands.<sup>12</sup> The aforementioned Land Law includes "provisions for proprietorship, temporary possession, authorization to cultivate land, right of use, and rights to carry mortgages and loans."<sup>13</sup> The law also provides a system for registering and recording land ownership, which is of particular importance given that Cambodia's socialist governments destroyed all land ownership records predating 1974.<sup>14</sup>

The Land Law has helped to improve property rights substantially in Cambodia, although the country has quite a ways to go. The Heritage Foundation/Wall Street Journal Index of Economic Freedom measures the level of economic freedom in a given country based on a set of economic areas, including property rights.<sup>15</sup> For each area the index gives the country a rating on a scale from 1.0 to 5.0, where 1.0 means free and 5.0 means repressed.<sup>16</sup> In 2004, Cambodia was labeled as "mostly free" by the index, but received a

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6. *Id.* at 541–42.

7. *Id.* at 541.

8. *Id.* at 542.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 544.

14. *Id.*

15. THE HERITAGE FOUND./WALL ST. JOURNAL, THE INDEX OF ECONOMIC FREEDOM (2004), available at <http://cf.heritage.org/index2004test/countries.cfm> [hereinafter THE INDEX OF ECONOMIC FREEDOM].

16. *Id.*

score of 4.0 in the area of property rights.<sup>17</sup> The index attributes this score to a high degree of corruption in Cambodia's judiciary and, to a lesser degree, domination of the judiciary by the executive.<sup>18</sup> In addition, the index indicates that the land titling system does not function properly because many land owners lack the documentation to prove their ownership.<sup>19</sup>

## 2. Urban Land-Use Planning in Cambodia

Cambodia's first modern legislation aimed specifically at land use planning and development was the CNATUC law, passed in 1994.<sup>20</sup> This law's stated goal is "to promote the organization and embellishment of the urban and rural areas throughout the Kingdom of Cambodia with the purpose of assuring the development of this country."<sup>21</sup> In each municipality the CNATUC law sets up a Bureau of Metropolitan Affairs (Bureau des Affaires Urbaines, or BAU) that oversees development and land use and formulates a master plan for that municipality.<sup>22</sup> According to the law, "private entities and public authorities shall strictly adhere to such master plans during their construction works."<sup>23</sup> In reality, however, owners tend to do as they please and regulation of construction is almost nonexistent.<sup>24</sup>

In his articles on historic preservation and urban planning in Cambodia, William Chapman has discussed two notable proposals for urban development in Phnom Penh.<sup>25</sup> The first of these was completed in 1996 by the Planning and Development Cooperative, Inc. (PADCO), a U.S. organization in association with SAWA and the Integrated Resources Information Centre, both of which are non-

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17. *Id.*

18. *Id.*

19. *Id.*

20. William Chapman, *Too Little, Too Late? Urban Planning and Conservation in Phnom Penh, Cambodia*, in *THE DISAPPEARING 'ASIAN' CITY: PROTECTING ASIA'S URBAN HERITAGE IN A GLOBALIZING WORLD*, *supra* note 1, at 35, 45. The anagram stands for the name of the committee that recommended the law, the Comité National de l'Aménagement du Territoire, d'Urbanisme et de la Construction.

21. "[Law on the Country Planning, Urbanization and Construction]," ch. I, art. 1 (Cambodia), *translated in* KINGDOM OF CAMBODIA, *THE COMPENDIUM OF CAMBODIAN LAWS, VOLUME I* (1994), *available at* <http://law.nus.edu.sg/apcel/dbase/cambodia/primary/caazon.html> [hereinafter *Law on the Country Planning*].

22. Chapman, *supra* note 20, at 45; *see also* Law on the Country Planning, *supra* note 21, ch. II, art. 5 ("The Committee for Planning, Urbanization and Construction of the Municipality of Phnom Penh or the Subcommittee for Planning, Urbanization and Construction of each province and municipality, shall respectively draw up their own development master-plans for the reorganization and development of their respective city, province and municipality.").

23. Law on the Country Planning, *supra* note 21, ch. III, art. 6.

24. Chapman, *supra* note 4, at 545.

25. Chapman, *supra* note 20, at 47.

governmental international organizations located in Phnom Penh.<sup>26</sup> This report “details infrastructural needs, housing issues, and existing urban conditions throughout Cambodia” and tends to follow Western, and particularly North American, precedents in land use regulation and zoning.<sup>27</sup> The second study was commissioned by the BAU of Phnom Penh and published under the Atelier Parisien d’Urbanisme and the Cambodian Ministry of Culture in 1997.<sup>28</sup> This proposal, while also from a Western perspective, differs from the PADCO report in that it has a more European flavor.<sup>29</sup> Both reports have their shortcomings, particularly as they relate to the issue of historical preservation.<sup>30</sup>

### 3. Historic Preservation in Cambodia

The historical and cultural heritage of Phnom Penh is characterized by a series of overlays representing different periods of dominance and cultural infusion.<sup>31</sup> These overlays include the pervasive Cambodian heritage, as well as areas of Chinese and Vietnamese heritage brought to the area during the Khmer kingdom and colonial periods.<sup>32</sup> The primary overlay, and the most visibly evident, is the French colonial heritage brought in the nineteenth century, when the French established the modern city of Phnom Penh.<sup>33</sup> This heritage is manifested in the general spatial plan of the city, as well as in the many colonial buildings still in existence.<sup>34</sup> In the years since 1979, when a new influx of population from the rural areas arrived in the city, many of these historic structures saw considerable exterior and interior damage due to the need for housing for these new residents.<sup>35</sup>

Despite this wealth of historic properties, many in Cambodia do not hold historic preservation as a high priority.<sup>36</sup> In general the Cambodian people and outside investors are more concerned with the economic development of the country than with the preservation of structures that could be put to better use.<sup>37</sup> Those preservation projects that receive a great deal of attention, such as the Angkor

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26. *Id.*  
 27. Chapman, *supra* note 4, at 547.  
 28. Chapman, *supra* note 20, at 47.  
 29. Chapman, *supra* note 4, at 547.  
 30. *Id.* at 546–47.  
 31. Chapman, *supra* note 20, at 38.  
 32. *Id.* at 39.  
 33. *Id.* at 40.  
 34. *Id.* at 36–37.  
 35. *Id.* at 44.  
 36. Chapman, *supra* note 4, at 529.  
 37. *Id.*

Wat complex in rural Cambodia, are prized because they represent the country's national identity and attract a greater number of tourists.<sup>38</sup> The structures in Phnom Penh that represent vestiges of Cambodia's colonial past are not valued as part of the country's historical legacy.<sup>39</sup>

Of the two proposals for the urban redevelopment of Phnom Penh mentioned above, only the BAU proposal takes historic preservation into account.<sup>40</sup> While it provides for the recognition of historic structures throughout the city, the BAU proposal does little to "fully integrate measures for protection into the broader urban scheme."<sup>41</sup> The proposal identifies 202 buildings as important targets of preservation, most of which are of "singular and/or monumental character."<sup>42</sup> Smaller, less important buildings that could be preserved as part of a historical area are ignored.<sup>43</sup> Furthermore, there are no procedures for review or compliance, thus making it difficult to ensure that even the selected properties will be preserved.<sup>44</sup> Chapman estimates that as many as 10–20% of the designated structures have already been destroyed, perhaps even before the list was created.<sup>45</sup> The PADCO report does not even mention Cambodia's historical heritage, which Chapman finds to be particularly surprising given that historic preservation is generally accepted as part of North American urban planning.<sup>46</sup>

The shortcomings of these proposals reflect the low priority that both Cambodians and outside investors attribute to historic preservation.<sup>47</sup> The BAU proposal falls short in failing to provide regulatory controls to protect historic structures and in viewing historic structures as isolated monuments rather than as part of an integrated whole.<sup>48</sup> According to Chapman, "the particular wishes of individual investors will always gain the upper hand in land-use matters."<sup>49</sup>

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38. *Id.* at 530.

39. *Id.* at 531.

40. *Id.* at 545–47.

41. *Id.* at 546.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 546–47.

46. Chapman, *supra* note 20, at 47.

47. Chapman, *supra* note 4, at 529.

48. *Id.* at 551–52.

49. *Id.* at 551.



## B. Singapore

Singapore is a thriving city-state located on an island off the coast of Malaysia. It was founded as a British colony in the early nineteenth century and became part of the independent Malaysian Federation in 1963.<sup>50</sup> It left the federation and became an independent country in 1965.<sup>51</sup> Today the population is almost completely urbanized and Singapore is one of the most prosperous nations in Southeast Asia.<sup>52</sup>

### 1. Property Rights in Singapore

During the two years that Singapore was part of the Malaysian Federation, the Malaysian constitution governed property rights in the country.<sup>53</sup> This constitution contained a takings clause similar to that contained in the U.S. Constitution.<sup>54</sup> Upon independence, Singapore removed this clause from its constitution and declared it inoperable for the development the country sought.<sup>55</sup> In her study of public housing development in Singapore, Aya Gruber analyzes the distinction between the concerns of the American and Singaporean governments: “[u]nlike the United States government, who was concerned with the procedural dangers of government takings, the Singapore government was willing to subordinate procedural protections in order to implement bold housing policies.”<sup>56</sup> The Land Acquisition Act of 1967 facilitated this purpose by allowing the government to acquire private property for housing and development purposes, but it also contained provisions for giving notice to property owners and for providing an appeals process and just compensation.<sup>57</sup> Unlike many other statutes providing for just compensation, the Singapore statute placed a maximum on the level of just compensation that the government could pay to property owners.<sup>58</sup>

Despite these provisions of the Land Acquisition Act, Singapore has sought the protection of private property rights as a means of

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50. CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK 492 (2005), available at <http://www.odci.gov/cia/publications/factbook/geos/sn.html> [hereinafter THE WORLD FACTBOOK].

51. *Id.*

52. *Id.*

53. Aya Gruber, *Public Housing in Singapore: The Use of Ends-Based Reasoning in the Quest for a Workable System*, 38 HARV. INT'L L.J. 236, 241 (1997).

54. *Id.*

55. *Id.*

56. *Id.* at 242.

57. *Id.*

58. *Id.*

courting foreign investment.<sup>59</sup> The country is generally lauded for its protection of property rights, but there have been some instances of judicial bias in favor of government officials.<sup>60</sup> The 2004 Heritage Foundation/Wall Street Journal Index of Economic Freedom labeled Singapore in general as “free” and assigned the country a grade of 1.0 in the area of property rights.<sup>61</sup> The index also found some evidence of government bias, but concluded that “the court system is very efficient and strongly protects private property, and there is no threat of expropriation.”<sup>62</sup>

## 2. Urban Land-Use Planning in Singapore

Originally, Singapore’s main concern regarding urban development was the need to provide adequate housing.<sup>63</sup> While the Land Acquisition Act provided the means for the government to purchase land to set aside for development, the Housing and Development Act further facilitated this goal by creating the Housing and Development Board (HDB) and giving it “extensive powers to create and implement housing policies.”<sup>64</sup> The Urban Redevelopment Authority (URA), which began as a department within the HDB, has functioned as a separate entity and as Singapore’s national land use planning authority since the mid-1970s.<sup>65</sup> The URA has expanded beyond the original goal of providing housing and now focuses on urban development in general.<sup>66</sup> The Concept Plan 2001, the most recent concept plan, identifies scarcity of land as the main challenge in urban land use planning.<sup>67</sup> This plan outlines seven somewhat vague proposals: (1) new homes in familiar places, (2) high-rise city living, (3) more choices with recreation, (4) greater flexibility for businesses, (5) a global business centre, (6) an extensive rail network, and (7) focus on identity.<sup>68</sup>

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59. Li-ann Thio, *Lex Rex or Rex Lex? Competing Conceptions of the Rule of Law in Singapore*, 20 UCLA PAC. BASIN L. J. 1, 23 (2002).

60. *Id.* at 19–20.

61. THE INDEX OF ECONOMIC FREEDOM, *supra* note 15.

62. *Id.*

63. Gruber, *supra* note 53, at 239.

64. *Id.* at 243.

65. Urban Redevelopment Authority (Sing.), About Us: Our History, <http://www.ura.gov.sg/about/ura-history.htm> (last visited Mar. 26, 2006) [hereinafter Our History].

66. *Id.*

67. URBAN REDEVELOPMENT AUTHORITY (Sing.), CONCEPT PLAN 2001 (2001), <http://www.ura.gov.sg/conceptplan2001/index.html>.

68. *Id.*

### 3. Historic Preservation in Singapore

The built heritage of Singapore largely reflects its British colonial past, as well as the influx of Chinese immigrants to the country.<sup>69</sup> Although initially the government set up a committee on the preservation of historical monuments, it eventually cleared many historic and ethnic areas, such as the entire Chinatown area, to make room for new housing developments.<sup>70</sup> Gradually the URA began to see historic preservation as an important feature that should be integrated into the general redevelopment plan.<sup>71</sup> The 1989 Conservation Plan identified several areas for conservation, and the 2001 Concept Plan continues this strategy as part of its focus on identity.<sup>72</sup> The URA's strategies have been criticized, however, as preserving façades for the purposes of tourists.<sup>73</sup> The International Council of Monuments and Sites in 2000 described the heritage of Singapore as "at risk" and claimed that the country had "given up on its historic roots from the perspective of its built heritage."<sup>74</sup>

While there has been some challenge to the URA's attempts to acquire land for preservation purposes, in 1990 the Singapore Court of Appeals (the final court of appeals in Singapore) partially approved the practice in *Basco Enterprises Pte. Ltd. v. Soh Siong Wai*.<sup>75</sup> That case involved the Stamford House, a historic building that the government acquired under the Land Acquisition Act along with several other buildings in the same area.<sup>76</sup> The plaintiffs, the former owners of the property, claimed that the property was acquired for an improper purpose because the act only authorized the purchase of private property for urban redevelopment purposes.<sup>77</sup> They argued that, because the government's true purpose in purchasing the property was preservation, the purchase should have been made under the Preservation of Monuments Act.<sup>78</sup> The plaintiffs' reasoning

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69. See Urban Redevelopment Authority (Sing.), About Us: Conservation Programme, <http://www.ura.gov.sg/about/ura-conservatnprog.htm> (last visited Mar. 26, 2006) ("The conservation of historic buildings and areas is an integral part of city planning. This allows Singapore to preserve its colourful past and retain its identity as an Asian city of heritage.").

70. Gruber, *supra* note 53, at 261.

71. Our History, *supra* note 65.

72. *Id.*; URBAN REDEVELOPMENT AUTHORITY (Sing.), CONCEPT PLAN 2001: IDENTITY (2001), <http://www.ura.gov.sg/conceptplan2001/identity.html>.

73. INT'L COUNCIL ON MONUMENTS AND SITES, HERITAGE AT RISK (2000), available at [http://www.international.icomos.org/risk/singa\\_2000.htm](http://www.international.icomos.org/risk/singa_2000.htm).

74. *Id.*

75. *Basco Enter. Pte. Ltd. v. Soh Siong Wai*, 1 MLJ 193, 199 (Sing. 1989).

76. *Id.* at 194–95.

77. *Id.* at 195.

78. *Id.* at 196. Property owners whose property is acquired under the Preservation of Monuments Act are entitled to compensation equal to the current

was that preservation did not fall under the ambit of urban redevelopment because a separate statute was in place to deal with preservation, and thus the purpose of the Land Acquisition Act was at the exclusion of the purpose of the Preservation of Monuments Act.<sup>79</sup>

The court, however, disagreed with the plaintiffs' argument that preservation was not part of urban redevelopment, holding that:

Stamford House was acquired together with other buildings in the area for the purpose of urban redevelopment, and just because, as one aspect only of the redevelopment, its façade is to be preserved or because the whole of the existing building is to be preserved, does not . . . mean that it is not within the ambit of urban development.<sup>80</sup>

As for the plaintiffs' argument that the purposes of the two statutes were exclusive, the court held that such an argument assumes that the property was a monument under the Preservation of Monuments Act and that there was no evidence that this was the case.<sup>81</sup> A narrow reading of this case would apply the holding only to the acquisition and preservation of properties purchased as part of an area-wide redevelopment program and not to the purchase of individual buildings.<sup>82</sup> The Court avoids expanding the holding beyond this reading, but does indicate in dicta that the purchase of an individual building for preservation purposes might also be covered under the ambit of development.<sup>83</sup>

### C. Manila, Philippines

The Philippines is a country made up of several islands off the coast of Borneo. While economically better off than most developed countries, poverty levels are still high.<sup>84</sup> The capital city of Manila has been the primary cultural, political, and economic center of the archipelago ever since the Spanish arrived and colonized the Philippines at the end of the sixteenth century.<sup>85</sup> The Spanish ruled until the Spanish-American War in 1898, when the islands came

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market value of the property, whereas those whose property is acquired under the Land Acquisition Act are only entitled to compensation equal to the market value of the property in 1973. *Id.* at 195-96.

79. *Id.* at 196.

80. *Id.* at 199.

81. *Id.* at 198.

82. *Id.* at 199.

83. *Id.*

84. THE WORLD FACTBOOK, *supra* note 50, at 438.

85. Fergus T. Maclaren & Augusto Villalon, *Manila's Intramuros: Storming the Walls*, in THE DISAPPEARING 'ASIAN' CITY: PROTECTING ASIA'S URBAN HERITAGE IN A GLOBALIZING WORLD, *supra* note 1, at 4, 8.

under U.S. rule.<sup>86</sup> During World War II, the Philippines were occupied by Japan. Independence did not arrive until 1946, after the United States had retaken control.<sup>87</sup>

### 1. Property Rights in the Philippines

The Philippines' legacy as a former territory of the United States is reflected in the country's Constitution, which has many provisions in common with the U.S. Constitution.<sup>88</sup> One such provision is contained in Article III, Section 1: "No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied equal protection of the laws."<sup>89</sup> This is almost exactly similar to the due process clause of the Fifth and Fourteenth Amendments of the U.S. Constitution and the Equal Protection Clause of the Fourteenth Amendment.<sup>90</sup> Article III, Section 9 contains another provision that echoes the Fifth Amendment: "Private property shall not be taken for public use without just compensation."<sup>91</sup> Thus the Filipino Constitution appears to formally give the same protections to private property as does the U.S. Constitution.<sup>92</sup> In 2004, The Heritage Foundation/Wall Street Journal Index of Economic Freedom rated the Philippines as "mostly unfree" in general economic terms.<sup>93</sup> In the area of property rights, the country received a grade of 4.0, which the index attributed largely to the inefficiency and corruption that afflicts the Filipino judiciary.<sup>94</sup> There also appears to have been instances of the judiciary going beyond the bounds of statutory interpretation and straying into policymaking.<sup>95</sup>

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86. *Id.* at 9.

87. THE WORLD FACTBOOK, *supra* note 50, at 436.

88. CONST. (1987), Art. III, (Phil.), available at <http://www.chanrobles.com/article3.htm>.

89. *Id.* § 1.

90. U.S. CONST. amend. V, § 1; *id.* amend. XIV, § 1.

91. CONST. (1987), Art. III, § 9 (Phil.), available at <http://www.chanrobles.com/article3.htm>; U.S. CONST. amend. V, § 1.

92. CONST. (1987), Art. III (Phil.), available at <http://www.chanrobles.com/article3.htm>.

93. THE INDEX OF ECONOMIC FREEDOM, *supra* note 15.

94. *Id.*

95. *Id.*

## 2. Urban Land-Use Planning in the Philippines

The Filipino Constitution goes beyond the U.S. Constitution in requiring the state to provide property rights and housing for the urban poor.<sup>96</sup> According to Article XIII, Section 9:

The State shall, by law, and for the common good, undertake, in cooperation with the private sector, a continuing program of urban land reform and housing which will make available at affordable cost, decent housing and basic services to under-privileged and homeless citizens in urban centers and resettlement areas. It shall also promote adequate employment opportunities to such citizens. In the implementation of such program the State shall respect the rights of small property owners.<sup>97</sup>

This provision was included largely as a means of dealing with the country's urban squatter problem.<sup>98</sup> Since independence, migrants from rural areas have flooded the urban areas of the Philippines, causing an acute housing problem.<sup>99</sup> Many of these migrants have become squatters and have taken up residence on the undeveloped or abandoned property of others.<sup>100</sup> In 1995, about 40% of the urban population did not own the land they occupied.<sup>101</sup>

To deal with this problem, the Filipino government has used its constitutional powers to set up the Community Mortgage Program (CMP).<sup>102</sup> The CMP facilitates the process by which the urban poor can gain title to the land they occupy and by which they can receive financing for land purchase and housing construction.<sup>103</sup> Due to judicial bias in favor of squatters, private property owners are usually unsuccessful in their attempts to evict squatters, thus they are often willing to work with the CMP and sell their land at a reasonable price.<sup>104</sup> The CMP also sets up community organizations that represent the collective in taking out infrastructure loans and ensuring that members pay their mortgages.<sup>105</sup> While ambitious, the program has so far only helped about 2% of the people in the Philippines who live in substandard urban housing.<sup>106</sup>

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96. CONST. (1987), Art. XIII, § 9 (Phil.), available at <http://www.chanrobles.com/article13urbanreform.htm>.

97. *Id.*

98. Bernadette Atuahene, *Legal Title to Land as an Intervention Against Urban Poverty in Developing Nations*, 36 GEO. WASH. INT'L L. REV. 1109, 1145 (2004).

99. *Id.* at 1144.

100. *Id.* at 1144–45.

101. *Id.* at 1145.

102. *Id.*

103. *Id.* at 1146.

104. *Id.*

105. *Id.* at 1146–47.

106. *Id.* at 1151.

In general, land policies of the Filipino government have encouraged competition in land use rather than providing a comprehensive plan for urban development.<sup>107</sup> This has led to a growing rift between preservation and conservation groups and pro-development groups.<sup>108</sup> In 1981, the city passed a new zoning ordinance that sought to remedy problems created by prior zoning ordinances, but it has also failed.<sup>109</sup> The Metropolitan Manila Commission (MMC), which issues clearances as a prerequisite for a building permit, has aggravated the city's problems by issuing clearances even when a property owner is clearly in violation of the zoning ordinance.<sup>110</sup> The City of Manila website is quite critical of this ordinance and states that "the objectives of the ordinance were often overwhelmed by the real state market mechanism and the demands of market economy."<sup>111</sup>

Manila and other Filipino cities have also had significant problems with urban sprawl as the city runs out of room for its rapidly growing population.<sup>112</sup> This has led to the conversion of land surrounding urban areas from agricultural uses to urban or industrial uses.<sup>113</sup> Land conversion is often sought by landowners to prevent the government from forcing them to accept tenants under the Comprehensive Agrarian Reform Law.<sup>114</sup>

### 3. Historic Preservation in the Philippines

Manila has a rich cultural heritage as the center of the Spanish, and later U.S., government in the Philippines.<sup>115</sup> Many view the city's historic Intramuros area as the key heritage conservation site in Manila.<sup>116</sup> As the center of Spanish civil and religious power in the Philippines and Asia, Intramuros is still considered to be "the supreme symbol of the country's Spanish heritage."<sup>117</sup> The area was planned as the main focus of Spanish Manila and was characterized by the walls and moat which surround it.<sup>118</sup> Most of the government

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107. Maclaren & Villalon, *supra* note 85, at 10.

108. *Id.*

109. City of Manila, Development, <http://www.cityofmanila.com.ph/development.htm> (last visited Mar. 26, 2006).

110. *Id.*

111. *Id.*

112. Philip F. Kelly, *Rethinking Sustainable Development: Urbanization and the Politics of Land in the Manila Region*, 590 ANNALS AM. ACAD. POL. & SOC. SCI. 170, 170-72 (2003).

113. *Id.*

114. *Id.* at 179-80.

115. Maclaren & Villalon, *supra* note 85, at 7-10.

116. *Id.* at 4.

117. *Id.* at 7.

118. *Id.* at 8.

buildings were located within these walls until after the United States took over and began moving government offices to other parts of the city.<sup>119</sup> The Intramuros began to decline in importance and influence, and, in 1945, the area was almost totally destroyed when the United States recaptured Manila from the Japanese.<sup>120</sup>

Following the War, only a few buildings remained in the Intramuros area.<sup>121</sup> The area has become a popular destination of squatters, who seize privately held property, remove the ruins and rubble, and build illegal shanties.<sup>122</sup> While many in the Philippines view the Intramuros as the national heritage symbol, few have visited the area or appear concerned about its preservation.<sup>123</sup> Thus it was left out of city redevelopment programs until 1979, when the government created the Intramuros Administration.<sup>124</sup> This agency was given the responsibility of preserving, developing, and restoring the Intramuros area and drafting the Intramuros Building Code.<sup>125</sup> Critics of the agency note that the aforementioned code does little to maintain authenticity or promote preventative maintenance and adaptive re-use.<sup>126</sup> For example, although the Intramuros Administration did stop the construction of a series of restaurants atop the Intramuros walls that would have violated the building code, it allowed the construction of a large building intended to house a printing press for the *Manila Bulletin* which also violated the building code.<sup>127</sup> This two-faced approach to development has discouraged many property owners to build in the Intramuros because they perceive the code to be anti-development.<sup>128</sup>

#### D. Semarang, Indonesia

The country of Indonesia is comprised of an archipelago that roughly straddles the equator. Only about twenty-five percent of the population is officially "urbanized," but these figures do not account for people living in villages or towns that are not official municipalities.<sup>129</sup> Indonesia, always a center of commerce, came

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119. *Id.* at 6–9.

120. *Id.* at 6.

121. *Id.*

122. *Id.* at 10.

123. *Id.* at 15.

124. *Id.* at 10, 15.

125. *Id.* at 15–18.

126. *Id.* at 18.

127. *Id.* at 19.

128. *Id.*

129. Stephen Day, *Suburban Sprawl or Suburban Villages? Defining Planning Principles for New Land Development in Indonesia*, 5 PAC. RIM L. & POL'Y J. 331, 336–37 (1996).



under Dutch rule beginning in the early seventeenth century after the Dutch expelled the Portuguese.<sup>130</sup> Semarang, a city on the north coast of Java, is not the largest or most important city in Indonesia, but it does have a population of around 1.6 million people and an important heritage as a major trading center under Dutch rule.<sup>131</sup>

### 1. Property Rights in Indonesia

Prior to European rule, property rights in Indonesia were largely governed by the concept of *adat*, the rules of which varied throughout the archipelago.<sup>132</sup> According to Daniel Fitzpatrick, who looked at the principles of *adat* as they applied to modern Indonesian land law, the most fundamental principle of *adat* is the emphasis it places on “maintaining an appropriate equilibrium (*rukun*) among individuals, the community, and the cosmos.”<sup>133</sup> Another important principle is that the interests of the collective outweigh those of the individual.<sup>134</sup> The principles of *adat* have been used to develop a land law in Indonesia that recognizes certain rights, “including rights to possess, use, harvest, pledge, lease, and priority to buy.”<sup>135</sup> These rights are quite common in urban areas such as Semarang, but other principles of *adat* have all but disappeared in urban areas, including principles of community controls over individual rights.<sup>136</sup> Some Western principles have been adopted in modern Indonesian land law, including the ability to register, transfer, and mortgage land.<sup>137</sup>

In 2004, Indonesia was labeled as “mostly unfree” by The Heritage Foundation/Wall Street Journal Index of Economic Freedom.<sup>138</sup> In the area of property rights, the country received a grade of 4.0, largely due to arbitrariness and corruption within the judiciary.<sup>139</sup> According to the index, “the government has suspended many private infrastructure projects for economic and political reasons,” and “the court system does not provide adequate legal recourse for settling property disputes.”<sup>140</sup> Furthermore, the laws on

130. Joost Coté, *Searching for Semarang: Nation, Urban Memory, and Cultural Heritage*, in *THE DISAPPEARING ‘ASIAN’ CITY: PROTECTING ASIA’S URBAN HERITAGE IN A GLOBALIZING WORLD*, *supra* note 1, at 124, 130.

131. *Id.* at 126, 130.

132. Daniel Fitzpatrick, *Disputes and Pluralism in Modern Indonesian Land Law*, 22 *YALE J. INT’L L.* 171, 176 (1997).

133. *Id.* at 177.

134. *Id.*

135. *Id.* at 180.

136. *Id.*

137. *Id.* at 183.

138. *THE INDEX OF ECONOMIC FREEDOM*, *supra* note 15.

139. *Id.*

140. *Id.*

the acquisition of land for development do little to protect private property owners.<sup>141</sup> The original 1961 Law on Revocation of Title mandated compulsory acquisition, but the subsequent 1975 Decree of the Minister of Internal Affairs on Release and the 1993 Presidential Decision on Procurement both require discussion and deliberation with titleholders and that the titleholders accept the amount and form of compensation.<sup>142</sup> Usually, however, the courts and government subjugate these procedures to the overriding principle of "development."<sup>143</sup>

## 2. Urban Land-Use Planning in Indonesia

According to Joost Coté, in his article on the preservation of Semarang's urban heritage, "[o]f all Indonesia's large cities, Semarang remained perhaps least threatened by the population explosion and developmental expansion of the latter decades of the twentieth century."<sup>144</sup> Following independence, the Soeharto presidency initiated a "New Order" government that sought to modernize the country through progress (*kemajuan*) and development (*pembangunan*).<sup>145</sup> Urbanization was a major characteristic of this program.<sup>146</sup> There is not a single ministry for urban development at the national level.<sup>147</sup> The Ministry of Home Affairs oversees the various regional governments, the Ministry of Public Works oversees infrastructure and planning, and the Ministry of Finance handles the financing of development projects.<sup>148</sup> The Directorate General of Human Settlements (DGCK), which operates within the Ministry of Public Works, is responsible for oversight of "city and regional planning."<sup>149</sup> Another important national agency in the urban development process is the National Development Planning Agency (BAPPENAS), which is responsible for overall planning and allocation of resources.<sup>150</sup>

The population of Semarang and neighboring cities has expanded rapidly as people from the rural areas stream into urban

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141. Fitzpatrick, *supra* note 132, at 199.

142. *Id.* at 199–200.

143. *Id.* at 199.

144. Coté, *supra* note 130, at 126.

145. *Id.* at 125.

146. *Id.*

147. WORLD BANK, STAFF APPRAISAL REPORT: INDONESIA – SEMARANG-SURAKARTA URBAN DEVELOPMENT PROJECT 1 (1994), available at [http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1994/05/16/000009265\\_3961005223045/Rendered/PDF/multi0page.pdf](http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1994/05/16/000009265_3961005223045/Rendered/PDF/multi0page.pdf).

148. *Id.*

149. *Id.*

150. *Id.*

areas.<sup>151</sup> The city's main problem in the area of urban development appears to be that the development of infrastructure has not kept up with this expansion in population.<sup>152</sup> In 1994, the World Bank initiated the Semarang-Surakarta Urban Development Project, which aimed to address the infrastructure problems of Semarang and the neighboring city of Surakarta.<sup>153</sup> The report accompanying this project does not mention heritage conservation as a goal.<sup>154</sup>

### 3. Historic Preservation in Indonesia

Prior to Dutch rule, Semarang was an important port in a large trade network that linked the Indonesian islands.<sup>155</sup> The city's built heritage reflects both the original feudal Hindu civilization and the subsequent Islamic infusion that helped cities like Semarang become "cosmopolitan centres of civilization."<sup>156</sup> During the early seventeenth century Chinese traders began settling in Semarang, further coloring the built heritage of the city.<sup>157</sup> European culture was brought first by the Portuguese and later the Dutch, who began to settle in Semarang in 1687.<sup>158</sup> In 1708, the city itself came under Dutch rule, and, in 1743, Semarang became the capital of the region.<sup>159</sup>

Today the city has a decidedly multi-cultural character that reflects both the pre-European culture, the Chinese culture, and the European culture.<sup>160</sup> The city is also home to Indonesia's leading twentieth century architects and town planners, who have placed an emphasis on preserving the cultural identity of the city.<sup>161</sup> This movement emerged in the late 1980s as part of the "autonomous development or take-off state" in Indonesian regional development.<sup>162</sup> According to Joost Corté, this period was characterized by cities becoming "increasingly independent of government stimulus and increasingly powered by private corporate interest."<sup>163</sup> Furthermore,

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151. *Id.* at 3.

152. *Id.*

153. *Id.* at 1.

154. *Id.*

155. Coté, *supra* note 130, at 130.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 133.

161. *Id.* at 141.

162. *Id.* at 127-28.

163. *Id.* at 128.

the growing middle-class of Indonesia's cities is now in a position to place a stronger emphasis on the country's culture and history.<sup>164</sup>

### III. ANALYSIS: METHODS OF HISTORIC PRESERVATION

The government that seeks to preserve its historic structures and districts has a wide range of examples to follow from around the world. Some of these methods have been successful, but many have met with failure because they do not have the support of the public or because they have a flawed idea of what historic preservation means in an urban context. Michel Bonnette, president of the Canadian National Committee of the International Council on Monuments and Sites, identifies the two fundamental tasks in managing historic cities as "finding the right approach to urban conservation and ensuring that all the actors involved in the planning and decisionmaking understand and support it."<sup>165</sup>

Bonnette sets out a series of guidelines for governments to follow that will ensure that urban preservation is sustainable.<sup>166</sup> First, governments must operate under the assumption that everything in the historic district should be preserved as is.<sup>167</sup> Second, they must accurately assign a value to each structure in the district that will then enable them to classify each structure and set possible standards for protection.<sup>168</sup> Third, individual structures in the district must be allowed to adapt to fit new contemporary living standards.<sup>169</sup> Fourth, new structures designed to fill in gaps or replace unrecoverable structures must fit the unique characteristics of the historic district.<sup>170</sup> Finally, governments should seek the participation of local people in the process.<sup>171</sup>

At this point, this Note will analyze some of the approaches to historic preservation taken in other parts of the world and discuss how well they satisfy the guidelines outlined by Bonnette. These approaches are characterized by the level of government intervention displayed and are divided into categories based on the five "tools" of government intervention identified by John de Monchaux and J.

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164. *Id.*

165. Michel Bonnette, *Strategies for Sustainable Urban Preservation*, in *HISTORIC CITIES AND SACRED SITES: CULTURAL ROOTS FOR URBAN FUTURES* 131, 131 (Ismail Serageldin et al. eds., 2001).

166. *Id.* at 135.

167. *Id.*

168. *Id.*

169. *Id.* at 136.

170. *Id.*

171. *Id.*

Mark Schuster, co-chairs of the Salzburg Seminar.<sup>172</sup> These tools are, in order from highest to lowest level of government intervention: (1) ownership and operation; (2) regulation; (3) incentives; (4) establishment, allocation, and enforcement of property rights; and (5) information.<sup>173</sup>

This Note does not discuss the possibility of allowing private individuals to take almost total control of the historic preservation process because the author does not view this as a workable means of achieving sustainable historic preservation. The economic actions of the private sphere are governed by market forces, which tend to account for the private benefits, not the social benefits, of consumption.<sup>174</sup> When an individual chooses to conserve a historic structure, this conservation will often have “spillover effects” that benefit the society at large; market forces are usually unable to foster these “spillover effects.”<sup>175</sup> Market forces can also be inequitable in determining which properties to preserve: “Markets often encounter geographic realities that threaten private support of a historic setting, they may neglect the cultural interests and legacies of minority groups, and they bar access to historic places with price barriers.”<sup>176</sup> Thus, this Author agrees with a number of other scholars in determining that government intervention of some kind is necessary for a program of historic preservation to be successful.<sup>177</sup>

#### A. Ownership and Operation

Under the tool of ownership and operation, governments “might choose to implement policy through direct provision, in this case by owning and operating heritage resources.”<sup>178</sup> This tool represents both the heaviest level of government intervention (that is, completely government control over the preservation of a historic property), and the most familiar level of government intervention.<sup>179</sup> According to de Monchaux and Schuster, this tool carries the message of “the state will do X,” meaning that the state will make all choices in historic preservation for the given property.<sup>180</sup>

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172. John de Monchaux & J. Mark Schuster, *Five Things to Do, in PRESERVING THE BUILT HERITAGE: TOOLS FOR IMPLEMENTATION* 3, 5 (J. Mark Schuster et. al. eds., 1997).

173. *Id.*

174. *Id.* at 9.

175. *Id.*

176. *Id.* at 10.

177. *Id.* at 9.

178. *Id.* at 5.

179. *Id.*

180. *Id.* at 6.

The tool of ownership and operation is attractive to governments because it allows them to sidestep the problems that usually arise when they deal with private property owners.<sup>181</sup> Governments can also purchase properties owned by private individuals who lack the means of preserving their historic character.<sup>182</sup> The main problem with this tool, however, and the chief reason it is not employed more often, is the drain on public funds that occurs from purchasing property from private hands, particularly in those jurisdictions that require just compensation.<sup>183</sup> Furthermore, bureaucratic systems like those needed to operate government-owned properties "are prone to inertia, may have little or no initiative, and may lack the motivation of directly concerned players."<sup>184</sup>

Few governments have the resources to own and operate all the historic properties in their country, but there are many examples of countries using this approach as part of a broader historic preservation scheme. For example, Singapore has employed government ownership as means of restoring historic properties that were in private hands, even when it was not clearly evident that the private owners lack the resources to preserve the property.<sup>185</sup> Singapore is in a better economic position to employ this approach than other countries because its Constitution contains no takings clause, and thus the government does not have to pay as much as other governments might.<sup>186</sup> In analyzing the ownership and operation tool of government intervention, Stefano Bianca, director of the Historic Cities Support Programme of the Aga Khan for Culture, notes that "rich [Muslim] countries with highly centralized administrative structures have tended to expropriate private land holdings and to pursue wholesale redevelopment of historic districts" and points to Saudi Arabia as an example.<sup>187</sup>

Because of the high cost of purchasing and maintaining private property, many governments have employed variations on the ownership and operation tool. Some governments that find themselves in control of a large amount of historic property as a result of sudden political change have chosen to sell those properties

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181. Stefano Bianca, *Direct Government Involvement in Architectural Heritage Management: Legitimation, Limits, and Opportunities of Ownership and Operation*, in PRESERVING THE BUILT HERITAGE: TOOLS FOR IMPLEMENTATION, *supra* note 172, at 13, 21.

182. *Id.*

183. *Id.* at 22.

184. *Id.* at 29.

185. See *Basco Enter. Pte. Ltd. v. Soh Siong Wai*, 1 MLJ 193, 193–94 (Sing. 1989) (upholding the government's acquisition of property for preservation purposes).

186. For acquisitions under the Land Acquisition Act, the government only has to pay compensation equal to the fair market value in 1973. *Id.* at 194–95.

187. Bianca, *supra* note 181, at 25.

with conditions regarding future use and maintenance attached, while others have retained ownership but allowed private individuals to operate the property through lease arrangements.<sup>188</sup> Another option is to set up national or municipal trusts that can receive donations from private owners and can also acquire buildings on their own.<sup>189</sup> As an example, Bianca suggests a modernization of the ancient Muslim concept of *waqf* property, under which rulers and rich private individuals would make donations of land to the public domain out of religious motivation and concern for the public good.<sup>190</sup> In recent times, such *waqf* properties have been nationalized and now lay in the hands of government; Bianca proposes that this system could become “a model for a semigovernmental heritage management institution, fueled by private contributions and anchored in the old customs and traditions of Muslim societies.”<sup>191</sup>

### B. Regulation

The regulation tool of government intervention allows a government to “choose to regulate the actions of other actors, particularly those private individuals or institutional entities that own and occupy heritage resources.”<sup>192</sup> This is probably the most common type of historic preservation employed by governments. This tool sends the message to private property owners that “you must (or must not) do X,” thus limiting the options of property owners in how they go about dealing with their property, but still giving them some choice.<sup>193</sup> In his analysis of this tool, David Throsby identifies two types of regulation: “hard” regulations, which are “enforceable directives requiring certain behavior, implemented through legislation, and involving penalties for noncompliance,” and “soft” regulations, which are “unenforceable directives calling for certain behavior, implemented by agreement, and not involving penalties.”<sup>194</sup>

Among the benefits of regulation, Throsby identifies both certainty and flexibility as positive attributes. The functioning of regulations is not subject to negotiation, concession, or special dealing.<sup>195</sup> Thus there can be a high degree of certainty as to how a

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188. *Id.* at 26.

189. *Id.*

190. *Id.* at 27–28.

191. *Id.*

192. John de Monchaux & Schuster, *supra* note 172, at 5.

193. *Id.* at 6.

194. David Throsby, *Making Preservation Happen: The Pros and Cons of Regulation*, in PRESERVING THE BUILT HERITAGE: TOOLS FOR IMPLEMENTATION, *supra* note 172, at 32, 34.

195. *Id.* at 40.

given regulation will operate.<sup>196</sup> Regulations can also be invoked and removed speedily, thereby providing a high degree of short-run flexibility.<sup>197</sup> Sometimes governments are also placed in situations in which they must choose between regulating a private owner and allowing the destruction of a historic building.<sup>198</sup> Similarly, governments also find themselves forced to regulate when the social costs of an individual action are so high that the action must be prohibited outright by regulation rather than allowing market forces to determine a solution.<sup>199</sup> Finally, governments in transitional and developing countries may lack the infrastructure needed to support more complex methods.<sup>200</sup>

Unfortunately, regulation carries a number of problems. Regulation can create inefficiency because it “distorts the free working of the market, resulting in an outcome that must be less than socially optimal” and because uniform standards can lead to arbitrariness when they are applied to properties with dissimilar needs for preservation.<sup>201</sup> Regulations also involve administrative costs, which governments must bear as they formulate and enforce standards, and compliance costs, which individuals bear in satisfying regulatory requirements.<sup>202</sup> Other problems with regulations include their failure to encourage anything above minimal standards and their tendency to reflect interest group capture.<sup>203</sup>

There are examples of regulatory controls in almost every historic preservation program. For example, any proposal for development in the Intramuros area of Manila must be cleared by the Intramuros Administration as being in compliance with the area’s building code.<sup>204</sup> This building code declares that “the general appearance and architecture of buildings and structures within Intramuros shall conform to the Philippines colonial architecture of the 1890s through provisions in the Intramuros Rules that govern the height, bulk, and architectural design of buildings.”<sup>205</sup> The actual operation of these provisions has been variable, however, because public opinion, which often colors the decisions of administration officials, tends to focus on the negative aspects of the code.<sup>206</sup>

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196. *Id.*

197. *Id.*

198. *Id.* at 38.

199. *Id.* at 39.

200. *Id.* at 41.

201. *Id.* at 36.

202. *Id.* at 37.

203. *Id.*

204. Maclaren & Villalon, *supra* note 85, at 16.

205. *Id.*

206. *Id.* at 18–19. See also *supra* text accompanying notes 126–28 (describing negative aspects of the code).



Conversely, legislation by the municipal government of Bombay, India has met with more success and higher levels of public support.<sup>207</sup> This legislation designates several areas in the city as historic and worthy of protection and sets standards for the preservation of historic structures.<sup>208</sup> The implementing authority tends to take a flexible approach toward authentic architectural and material conservation, which has led to criticism from some “purist” citizen groups.<sup>209</sup>

### C. Incentives (and Disincentives)

Under the third tool of government intervention, “the state might provide incentives or disincentives designed to bring the actions of other actors with respect to heritage resources into line with the desired policy.”<sup>210</sup> One way to think about incentives is as a contract whereby the government makes an offer to property owners, who can choose to accept or decline the offer.<sup>211</sup> Thus, the message that incentives transmit is “if you do X, the state will do Y.”<sup>212</sup> J. Mark Schuster, in discussing incentives, identifies two basic types of incentives: direct incentives, which are often grants “through which government writes a check and transfers money to another actor in preservation system,” and indirect incentives, which are usually tax-based and can incite preservation without government expenditure.<sup>213</sup>

Incentives have many benefits because they allow the government to encourage historic preservation without forcing private actors to do anything. Schuster cites Richard Roddewig, one of the few commentators to study the subject of incentives for historic preservation, in noting that “incentives provide compensation while they counter economic forces or government policies that create high land values and threaten even well-maintained historic buildings.”<sup>214</sup> Incentives are also useful in promoting collaborations and

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207. Rahul Mehrotra, *Bazaars in Victorian Arcades: Conserving Bombay's Colonial Heritage*, in HISTORIC CITIES AND SACRED SITES: CULTURAL ROOTS FOR URBAN FUTURES, *supra* note 165, at 154, 158–59.

208. *Id.* at 158.

209. *Id.* at 159.

210. John de Monchaux & Schuster, *supra* note 172, at 5.

211. J. Mark Schuster, *Inciting Preservation*, in PRESERVING THE BUILT HERITAGE: TOOLS FOR IMPLEMENTATION, *supra* note 172, at 49, 51.

212. *Id.*

213. *Id.* at 53, 57. Indirect incentives can also take the form of loans, low interest rate loans, loan guarantees, and guarantees against loss, but tax-based incentives are the most common. *Id.* at 57.

214. *Id.* at 50 (citing Richard J. Roddewig, ECONOMIC INCENTIVES FOR HISTORIC PRESERVATION (1987)).

partnerships because they can encourage a non-centralized pooling of resources.<sup>215</sup> Other benefits of incentives include their tendency to level the playing field between rehabilitation of a historic property and new construction or abandonment and the ability of states to use incentives to compensate private owners burdened by other forms of historic preservation.<sup>216</sup>

Incentives do have their downsides, however. From the view of government, direct incentives can be costly because they can require government expenditures and may put a strain on public resources.<sup>217</sup> Since grants must be applied for and are not always handed out, those who apply often do not know whether they will receive a grant until it is received.<sup>218</sup> Thus direct incentives pose problems for property owners because they lack an element of certainty.<sup>219</sup> In contrast, indirect incentives do provide an element of certainty because a property owner can usually tell ahead of time which tax-based incentives they can use and because these incentives are often automatic.<sup>220</sup> Indirect incentives, however, are often costly to governments because they mean a decrease in tax revenues and because governments often lack control over their operation.<sup>221</sup>

The most popular form of direct incentive is the project grant, which governments can provide directly to property owners or non-profit institutions for the purpose of maintaining or restoring historic properties.<sup>222</sup> For example, Britain's Historic Buildings and Ancient Monuments Act of 1953 provides a means for the government to establish grants payable to property owners for maintenance and repair, provided that the property owners provide reasonable public access.<sup>223</sup> Direct incentives can also be combined with regulations, such as the system in France whereby the Ministry of Culture can compel maintenance of historic properties, but must provide more than 50% of the cost.<sup>224</sup>

Governments have several options regarding indirect tax incentives. One option is to use income tax incentives to reduce the cost to property owners of maintaining and restoring historic properties.<sup>225</sup> The United States provides such an incentive through

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215. *Id.* (citing Donald Haider, *Grants as a Tool of Public Policy*, in *PRIVATIZATION: THE TOOLS OF GOVERNMENT ACTION* 93 (Lester M. Salamon ed., 1989)).

216. *Id.* at 50.

217. *Id.* at 72.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* at 53.

223. *Id.* at 54.

224. *Id.* at 54–55.

225. *Id.* at 60.

a three-tiered tax credit provided to encourage rehabilitation of older buildings and by way of a disincentive that prohibits deductions for the demolition of historic properties.<sup>226</sup> Governments can also use property tax incentives that reduce the cost of preserving a historic property in relation to the cost of razing it and rebuilding.<sup>227</sup> The state of Oregon has a system in which property owners who agree to maintain historic properties and open them to the public at least one day a year are not assessed property taxes for fifteen years.<sup>228</sup> In Turkey, cultural properties identified as Class I or Class II are fully exempt from all property taxes.<sup>229</sup>

#### D. Reformulation of Property Rights

The fourth tool of government intervention allows a government to “establish, allocate, and enforce the property rights of individual parties as these affect the preservation and use of heritage resources.”<sup>230</sup> The basic message of this tool is that “you have the right to do X, and the state will enforce that right.” John J. Costonis identifies two ways in which governments may adapt property rights for historic preservation purposes: the recognition of transferable development rights, which allow owners of restricted historic properties to transfer unused development rights from the restricted property to other properties, and the recognition and use of private property instruments such as easements, covenants, and equitable servitudes.<sup>231</sup>

Transferable development rights operate under a reformulation of property rights that rejects the presumption that “the development rights of a site are inextricably wedded to that site and to that site alone.”<sup>232</sup> This reformulation has three characteristics: (1) it permits the severance of development rights from a “transferor site”; (2) it permits the owner to transmit these development rights to a “transferee site”; and (3) it permits those rights to be attached to the transferee site.<sup>233</sup> Under some systems, the owner of the restricted property may transfer these development rights to other properties he owns or to properties owned by others in exchange for

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226. *Id.* at 60–61.

227. *Id.* at 60.

228. *Id.* at 63.

229. *Id.* at 64.

230. John de Monchaux & Schuster, *supra* note 172, at 5.

231. John J. Costonis, *The Redefinition of Property Rights as a Tool for Historic Preservation*, in PRESERVING THE BUILT HERITAGE: TOOLS FOR IMPLEMENTATION, *supra* note 172, at 81, 82.

232. *Id.* at 85.

233. *Id.*

consideration.<sup>234</sup> An example of this kind of system is found in the landmark U.S. regulatory takings case *Penn Central Transportation Co. v. New York City*, in which the availability of transferable development rights played a large role in the court's upholding of New York City's historic preservation regulations.<sup>235</sup> Costonis also proposes a hypothetical development rights transfer program for Chicago.<sup>236</sup>

There are a variety of other private property instruments under Anglo-American law available to governments and property owners, most of which are already integral parts of property law in certain countries.<sup>237</sup> In particular, "less-than-fee" instruments, which include negative easements, real covenants, and equitable servitudes, are often called "preservation easements," regardless of the type of interest used, and provide a means for governments and organizations to acquire a preservation interest in property without actually owning it.<sup>238</sup> For example, the government or a historic preservation association could acquire a "façade easement" from a property owner, whereby the owner retains ownership of the property but gives control over the building's façade to the easement-holder, who is then responsible for the maintenance and preservation of the façade.<sup>239</sup> Costonis recommends equitable servitudes as the interest most suited for preservation purposes.<sup>240</sup> Unlike negative easements, which courts usually restrict to a limited number of purposes, equitable servitudes can be employed for any legitimate social goal.<sup>241</sup> Equitable servitudes are also unlike real covenants in that they do not have to be appurtenant to a benefited parcel.<sup>242</sup> While many U.S. courts have shown their willingness to recognize preservation easements, Costonis recommends that legislatures directly address the situation by authorizing them through statute.<sup>243</sup>

While transferable development rights and preservation easements may be useful tools in the United States, there are limits to their application in other countries. These types of property rights,

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234. *Id.*

235. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 137 (1978). The Court held that "[w]hile these rights may well not have constituted 'just compensation' if a 'taking' had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation." *Id.*

236. Costonis, *supra* note 229, at 91–92.

237. *Id.* at 81.

238. *Id.* at 87.

239. *Id.* at 82.

240. *Id.* at 88.

241. *Id.*

242. *Id.*

243. *Id.*

in particular the less-than-fee interests, are characteristics of Anglo-American property law and may not be available in all countries.<sup>244</sup> It also may be difficult for governments to encourage property owners to transfer preservation easements without offering some sort of compensation, which can put a strain on state resources. Regarding transferable development rights, it is possible that a few or even just a single property may receive all of the excess development rights in an area, thereby creating severe urban design and service overloads.<sup>245</sup> Some sort of planning mechanism must ensure that excess development rights are dispersed so as to prevent such an overload.<sup>246</sup>

### E. Information

The last tool of government intervention allows the state to “collect and distribute information intended to influence the actions of others who might be engaged in the preservation or use of the built heritage.”<sup>247</sup> According to J. Mark Schuster, governments need to use information as a means of explaining how it is using its other tools.<sup>248</sup> The inherent message in the tool of information can be either “You should do X” or “You need to know Y to do X,” thus reflecting the broad range of functions that information can serve.<sup>249</sup>

Schuster identifies three primary reasons for using information as a tool in historic preservation. The first of these is to ensure that the public is aware of both the government’s historic preservation policy and the various tools available to the public, as well as how to implement those tools.<sup>250</sup> Many owners of historic property may not realize that they are obligated to do anything regarding to maintenance or preservation or that the government provides assistance or makes certain methods available. Second, information is essential in educating the general public about the existence of historic properties and why it is necessary to preserve them.<sup>251</sup> Many historic properties rely on donations or admission fees for maintenance and preservation. Thus, it is important that the general public be aware that they can visit those properties. The public also

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244. *Id.* at 87.

245. *Id.* at 90.

246. *Id.*

247. John de Monchaux & Schuster, *supra* note 172, at 5.

248. J. Mark Schuster, *Information as a Tool of Preservation Action*, in PRESERVING THE BUILT HERITAGE: TOOLS FOR IMPLEMENTATION, *supra* note 172, at 100, 100.

249. John de Monchaux & Schuster, *supra* note 172, at 6; Schuster, *supra* note 246, at 101.

250. Schuster, *supra* note 246, at 102.

251. *Id.*

needs to be educated on the benefits of preserving historic properties in general. Finally, Schuster points out that information may encourage others to act and may also guide them in their actions.<sup>252</sup> Government cannot always take the lead role because it lacks the resources and means necessary, but it can use information to encourage private individuals to take a more active role.

Despite these benefits, information does have its drawbacks. It is probably impossible for a government to rely on information alone to solve its historic preservation problems and thus it must be used in conjunction with other tools. For example, many, if not most, countries have some sort of register listing historic places, but few of these registers are very effective. The BAU study in Cambodia identifies 202 buildings in Phnom Penh as worthy of preservation, yet estimates suggest that 10–20% of those structures were destroyed before the list was even published.<sup>253</sup> This failure is largely due to the fact that the city lacks sufficient measures for review and compliance, indicating that Cambodia needs to develop its regulation tool.<sup>254</sup> While information is an invaluable, and some say necessary, tool of preservation-minded governments, it cannot and should not be used exclusively.

#### IV. SOLUTION: PUBLIC-PRIVATE PARTNERSHIPS

It may very well be possible that a government can take the five tools identified by de Monchaux and Schuster and use them to control the entire historic preservation process. It would be much more effective and efficient, however, if governments were to adapt those tools so that they can create partnerships with private individuals and organizations. In his discussion of public-private partnerships, Charles A. Riley II notes that “[by] building cross-sector relationships that will permit risks and costs, as well as benefits and profits, to be shared, organizations involved in historic preservation will address not only the dire problem of funding, but also the challenge of gaining access to the media for the dissemination of information.”<sup>255</sup> Furthermore, private organizations provide access to certain management and business resources that are useful to the day-to-day operations of historic sites.<sup>256</sup> These private actors can include nongovernmental organizations (NGOs), quasi-autonomous

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252. *Id.*

253. Chapman, *supra* note 4, at 546–47.

254. *Id.* at 546.

255. Charles A. Riley II, *When Public Meets Private*, in PRESERVING THE BUILT HERITAGE: TOOLS FOR IMPLEMENTATION, *supra* note 172, at 157, 157.

256. *Id.*

nongovernmental organizations (QUANGOs), nonprofit organizations, corporate entities, and private individuals.<sup>257</sup> Public-private partnerships can also involve all five of the aforementioned tools of governmental intervention, particularly ownership, incentives, and information.<sup>258</sup>

As a solution to the problems of historic preservation in Southeast Asia, this Note proposes a public-private partnership that seeks to develop collaboration between government and private actors. An example of this proposed partnership has been implemented in parts of South America, in particular Quito, Ecuador.

#### A. *Partnerships in Action: Quito, Ecuador*

The public-private partnership that today manages the historic preservation program of Quito, Ecuador was put in place largely with funding from the Inter-American Development Bank (IADB), which is part of the IDB Group. This organization describes itself as “the main source of multilateral financing for economic, social, and institutional development . . . in Latin America and the Caribbean.”<sup>259</sup> Although this organization provides financing for all kinds of projects, one of its stated goals is to promote urban development through urban heritage conservation.<sup>260</sup>

As part of its involvement in heritage protection, the IADB has emphasized involvement by the private sector through public-private partnerships.<sup>261</sup> This emphasis recognizes the important and necessary role of the public sector, but also allows the public sector to share some of the risk with private actors.<sup>262</sup> Public-private partnerships allow the government to encourage private sector involvement in two ways: (1) by stabilizing the regulatory environment; and (2) by pioneering investments by the public sector.<sup>263</sup> These partnerships also allow the public sector to avoid problems such as land speculation and gentrification that might arise when heritage preservation is dominated by private actors.<sup>264</sup>

257. *Id.*

258. *Id.* at 158.

259. Inter-Am. Dev. Bank, About the IDB, <http://www.iadb.org/aboutus/index.cfm?language=English> (last visited Mar. 26, 2006).

260. See Inter-Am. Dev. Bank, Sustainable Development Department: Urban Heritage Conservation, [http://www.iadb.org/sds/soc/site\\_5224\\_e.htm](http://www.iadb.org/sds/soc/site_5224_e.htm) (last visited Mar. 26, 2006) (describing the bank’s finance projects).

261. Eduardo Rojas, *Revitalization of Historic Cities with Private Sector Involvement: Lessons from Latin America*, in HISTORIC CITIES AND SACRED SITES: CULTURAL ROOTS FOR URBAN FUTURES, *supra* note 165, at 391, 397.

262. *Id.*

263. *Id.*

264. *Id.* at 398.

The Quito project involves three components: (1) creating externalities that would attract private investment; (2) creating a mixed-capital company owned by the municipality and a nongovernmental organization; and (3) creating a social development program that would support the social groups that benefit from the program and help to mitigate the effects of gentrification.<sup>265</sup> The aforementioned mixed-capital company, the Semi-Public Corporation for the Development of the Historic City Center (ECH), is a unique institution.<sup>266</sup> While the municipal government has majority ownership of the company, it is governed by private law and can thus enter into partnerships with private entities and continue to serve the municipality's interest.<sup>267</sup> The essential mission of the company is "to entice private investors by taking the up-front investment risk in a development project."<sup>268</sup>

The project has been largely successful. Land prices in the area have steadily risen, indicating growing involvement by private investors, and tourism has also seen a boost.<sup>269</sup> Eduardo Rojas, an urban development specialist at the IADB, attributes this success to "the political will of the municipality . . . and the efficient and nonpartisan management of the ECH."<sup>270</sup> There has been some threat of a speculative rise in land prices, but the ECH has taken steps to mitigate such a threat.<sup>271</sup> The financial crisis of January 1999 following the devaluation of the Brazilian currency also caused problems by making it difficult to obtain private investment, but it appears that the market may have rebounded in recent years.<sup>272</sup>

### *B. Adapting the Quito Project to Southeast Asia*

The success of the Quito project suggests an approach that may be workable in other developing countries. While the IADB's public-private partnerships have been implemented in other Latin American cities, most notably in Montevideo, Uruguay, IADB has not been involved in any projects outside Latin America due to its regional nature.<sup>273</sup> This Note proposes that the Quito project could be adapted as a workable solution for Southeast Asia, assuming that a regional

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265. *Id.* at 398–99.

266. EDUARDO ROJAS, OLD CITIES, NEW ASSETS: PRESERVING LATIN AMERICA'S URBAN HERITAGE 92 (1999).

267. *Id.* at 92–93.

268. David Mangurian, *All Dressed Up and Looking for Investors*, IDBAMÉRICA, June 1999, <http://www.iadb.org/idbamerica/English/SRURBANE/srurbane2.html>.

269. ROJAS, *supra* note 264, at 100.

270. *Id.*

271. *Id.* at 101.

272. Mangurian, *supra* note 266.

273. Rojas, *supra* note 259, at 398.



development bank, such as the Asian Development Bank, is willing to provide the financing to implement such a project.

Such a project is appealing because it can provide for government intervention without infringing on private property rights. Its use of a mixed-capital corporation owned by both the public and private sectors resembles one of the variations on the ownership and operation tool suggested by Bianca: the urban development corporation.<sup>274</sup> These organizations, sometimes called Historic Area Development Corporations, can be designed so that "[p]rivate investors could obtain shares by injecting capital, while the government, holding all public land assets including streets, squares, vacant land, and social facilities, would initiate and facilitate urban revitalization."<sup>275</sup> This arrangement also ensures that the costs and benefits of historic preservation are equitably shared between the private and public sectors.<sup>276</sup>

The project also provides a stable regulatory environment, which is important in encouraging private investment, and a means of informing and educating the public about the importance of historic preservation.<sup>277</sup> The project could be further adapted to allow both incentives and reformulations of property rights to encourage private property owners to preserve their historic properties. The mixed-capital corporation could make payments of grants to private property owners to facilitate maintenance and preservation. In addition to purchasing property outright, the corporation could purchase preservation easements from property owners.

The program will need to be specifically adapted to each country, particularly because the countries of Southeast Asia are at different levels of economic development and protect property rights at different levels. The program would probably work best in Singapore, where property rights are already well protected and private investment is more readily available.<sup>278</sup> The government there, however, has found ways to keep the costs of ownership and operation low by limiting the amount of compensation that can be paid to property owners.<sup>279</sup> One concern with the methods employed in Singapore is that the government may not have the proper motivation in preserving historic properties. It appears that the

274. Bianca, *supra* note 181, at 28.

275. *Id.*

276. *Id.*

277. Rojas, *supra* note 259, at 399.

278. See *supra* text accompanying notes 59-62 (describing the protection of property rights in Singapore).

279. See *supra* note 78 (explaining that those whose property is acquired under the Land Acquisition Act are only entitled to compensation equal to the market value of the property in 1973).

government sees historic preservation as primarily a means of promoting tourism, a legitimate goal but one that values certain properties over others based solely on their tourism potential. Theoretically, historic preservation efforts should turn a blind eye towards a property's tourism value, however, in many developing or transitional countries it is understandable that promotion of tourism is a major goal.

The public-private partnership method would also work well in Indonesia and the Philippines, assuming that some changes are made in the area of private property rights. Protection of property rights is essential to encouraging private investment and both countries score poorly in how well they protect property rights.<sup>280</sup> Both countries should also better develop the tools they have available. The Philippines, in particular, needs to learn how to use its tool of information so as to educate the people of Manila about the importance of preserving areas such as Intramuros.<sup>281</sup> The government also needs to better enforce its regulatory structure so that the regulations are not arbitrarily applied to projects based upon their economic value or popular support.<sup>282</sup> Indonesia also needs to develop its information tool to better educate its people about "a wider social history in order to contextualize the architectural environment of the colonial period."<sup>283</sup>

Finally, Cambodia probably has the longest way to go in adapting its current situation to the needs of a public-private partnership. Property rights in the country must be better protected and the government must come up with a better system of recording land titles.<sup>284</sup> The government also needs to improve its use of the tool of information. For example, Cambodia needs a better system of registering and listing historic properties that is both accurate and complete.<sup>285</sup> The government also needs to educate the public about preserving the country's cultural heritage, particularly those structures that reflect Cambodia's French colonial period and ethnic minorities.<sup>286</sup> Finally, Cambodia needs to improve its regulatory

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280. See *supra* text accompanying notes 93–95, 138–43 (explaining property rights in the Philippines and Indonesia).

281. See Maclaren & Villalon, *supra* note 85, at 15 (describing the Filipinos' view of Intramuros).

282. See *supra* text accompanying notes 126–28 (criticizing the government's approach to development).

283. Coté, *supra* note 130, at 141.

284. See *supra* text accompanying notes 15–19 (explaining property rights in Cambodia).

285. See *supra* text accompanying notes 42–45 (describing the problems in Cambodian system).

286. See Chapman, *supra* note 4, at 531 (discussing how those structures are undervalued).

structure and provide better incentives to encourage the preservation of historic properties in private hands. Assuming that some of these changes are made, the public-private partnership system could provide a viable way of encouraging private involvement in the preservation process.

### C. Criticism of Historic Preservation as a Goal

The major criticism of historic preservation is that controlling the development of historic properties could have an adverse effect on a city's economic development by preventing the full economic use of the city's property.<sup>287</sup> Another criticism is that many historic properties in developing cities tend to be reminders of the city's colonial past, thus serving to reinforce a legacy that such cities would rather forget.<sup>288</sup> Finally, historic preservation may require the undermining of property rights, an important feature of economic liberalization.

#### 1. Historic Preservation Stands in the Way of Economic Development

Any limitation on the full economic use of property in a city will have an effect on the economic development of that city. Less developed countries and cities may see historic preservation as interfering with their economic development and may put it off until they have reached a higher state of development. This is particularly true of Cambodia, where "people and outside investors are more concerned with immediate economic needs" and desire the economic prosperity experienced by the country's neighbors.<sup>289</sup> The other countries of Southeast Asia are not exactly sterling examples of how to attain this economic prosperity while also preserving cultural heritage. In Singapore, the HDB subordinated historic preservation to its goal of providing public housing and demolished historic structures all over the city to make way for new residential and commercial development.<sup>290</sup> Manila's Intramuros area has yet to live up to the city's vision because restrictions on development have prevented the necessary mix of residential and commercial activities needed to give life to the area.<sup>291</sup> In Semarang and other parts of

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287. See, e.g., *id.* at 529–30 (discussing a tendency in Cambodia to preserve only those properties seen as sources of economic development through tourism, such as the Angkor Wat complex).

288. See, e.g., Logan, *supra* note 1, at xv–xvi (describing the colonization influences in some Asian countries and the struggles against them).

289. Chapman, *supra* note 4, at 529.

290. Gruber, *supra* note 53, at 261.

291. Maclaren & Villalon, *supra* note 85, at 17.

Indonesia, the concern for historic preservation did not reach its current state until the middle-class became empowered by the country's economic development.<sup>292</sup> Can one blame Cambodia and other less-developed countries for wanting to put off historic preservation?

Historic preservation does not have to stand in the way of economic development. In the mid-1990s, many key agencies, including the World Bank, began to see historic preservation and cultural heritage protection as a factor in developing sustainable cities.<sup>293</sup> In his introduction to *The Disappearing 'Asian' City*, William S. Logan notes that:

Rather than seeing cultural heritage protection as an obstacle to development, it is now recognized that the two can go hand-in-hand, and that policies dealing with the two aspects together can bring about more effective programmes to raise standards of living in developing countries and elsewhere, and lead cities towards a more sustainable future.<sup>294</sup>

Preserving cultural heritage through historic preservation also encourages broader participation in the cultural identity of one's city or country, which enriches what Logan describes as "the cultural dimension of development."<sup>295</sup> The most lucrative economic benefit of historic preservation, however, may be its role in promoting tourism.<sup>296</sup> Tourism was a driving force behind the Singaporean government's acquisition of "Stamford House," the subject of the *Basco* decision mentioned above.<sup>297</sup> Similarly, one of the missions of Manila's Intramuros Administration is the rehabilitation of Fort Santiago and the surrounding area as a tourist attraction.<sup>298</sup> Development-oriented governments, including those in Southeast Asia, see cultural tourism as a viable means of boosting both their national economy and their stature on the world stage.<sup>299</sup>

Historic preservation may also be useful as a means of combating the cultural globalization and Westernization that often accompany rapid economic development.<sup>300</sup> As countries in transition open up their economies to foreign investment, they risk the watering

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292. Côté, *supra* note 130, at 127–28.

293. Logan, *supra* note 1, at xii, xxi.

294. *Id.*

295. *Id.*

296. *Id.*

297. *Basco Enter. Pte. Ltd. v. Soh Siong Wai*, 1 MLJ 193, 195 (Sing. 1989). The year that the property was acquired, Singapore's Tourism Task Force "recommended the restoration and preservation of buildings of historic interest as part of the need to project Singapore as a place of Oriental mystique and charm for tourists." *Id.*

298. Maclaren & Villalon, *supra* note 85, at 6.

299. Logan, *supra* note 1, at xxi.

300. *Id.* at xvii.

down of their cultural identity by influences from foreign culture, particularly that of the United States.<sup>301</sup> Some Western influence may be necessary or even desirable, but, as Logan puts it, "it would be regrettable if ultimately a bland world culture replaced the vibrant variety of local cultures that now exists."<sup>302</sup> Preservation of cultural heritage can help to reinforce cultural values and increase interest in local history, traditions, and cultural identity.<sup>303</sup>

## 2. Historic Preservation Reinforces Colonial Legacies

Critics of historic preservation also point out that it serves as a reminder of a city's former colonial legacy. All four of the countries studied above were under colonial rule as recently as the first half of the twentieth century. These periods of colonial domination were "generally times of bitterness that ended in debilitating wars of independence" and are often seen as a legacy better left forgotten.<sup>304</sup> Most large Asian cities continue to hold architectural artifacts of their respective colonial period and these structures are often more in danger than those that reflect the indigenous culture.<sup>305</sup> Phnom Penh, Cambodia, as the center of French rule in the region, is home to many surviving French colonial structures that are almost completely excluded from the city's nominal historic preservation program.<sup>306</sup> Countries such as Bangladesh and Korea have also viewed colonial structures as unworthy of preservation, with Korea going so far as to dismantle reminders of its Japanese colonial period.<sup>307</sup>

This dismissal of a city's colonial legacy ignores the value that can be gained from preserving historic colonial structures. As an example, Logan points to the city of Galle in Sri Lanka, which was built by the Dutch and led to debate about whether such a colonial reminder should be preserved.<sup>308</sup> The historians of the country chose to preserve the city: "While it is a monument to a period of foreign domination, it is also a monument to the wealth, productivity, technology, and craftsmanship of Sri Lankan society in the 17th,

301. *Id.* at xv.

302. *Id.*

303. *Id.* at xvii-xviii.

304. *Id.* at xvi.

305. *Id.*

306. "For example, the striking remnants of the French colonial presence, villas, institutional and commercial buildings, and, indeed, the entire streetscapes of Cambodian cities and towns . . . are barely considered cultural legacies." Chapman, *supra* note 4, at 531.

307. Logan, *supra* note 1, at xvi.

308. *Id.*

18th, and 19th centuries.”<sup>309</sup> The view of placing local indigenous culture above all cultures also manifests itself in the failure to preserve historic structures that reflect the cultural heritage of non-dominant ethnic groups.<sup>310</sup> For example, the Chinese have had a substantial impact on most of the cities of Southeast Asia, yet their historic properties are often ignored by local preservation boards.<sup>311</sup>

### 3. Historic Preservation Burdens Property Rights

Finally some argue that historic preservation places an unnecessary burden on property rights.<sup>312</sup> This argument usually points to preservation regulation as constituting a taking of land because it prevents the owner from using the land to its full economic capacity. It is true that historic preservation through regulation limits an owner’s use, but such a situation is not always a regulatory taking. Even in the United States, where property rights afford much higher protection than the four countries analyzed above, preservation regulation has been held constitutional and is not considered a regulatory taking.<sup>313</sup> Property owners deserve to have their rights protected, but sometimes it is necessary that they yield certain rights to the public good, including the right to do whatever they wish with a historically and culturally important structure.

That said, however, these four countries arguably need to do a better job protecting property rights, even as they go about preserving historic properties. Private and foreign investors are often unwilling to invest in a country if they fear that their investment will be taken away or severely limited through government regulation. Given the importance of private investment to the solution this Note has proposed, property rights must play an integral role for such a solution to be successful. Governments have a wide variety of tools available to them that are less intrusive in the rights of property owners than regulation, thus they should use regulation only where it is necessary.

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309. *Id.* (quoting Ray Rudowski, *Dutch Treat*, FAR E. ECON. REV., July 20, 2000, at 80–81).

310. *Id.*

311. *See, e.g.*, Chapman, *supra* note 20, at 39 (describing the historic legacy of the Chinese in Phnom Penh); Gruber, *supra* note 53, at 261 (discussing the destruction of Singapore’s entire Chinatown area to make way for HDB development).

312. Costonis, *supra* note 229, at 83–84.

313. *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978) (holding that New York’s preservation laws do not constitute a regulatory taking).

## V. CONCLUSION

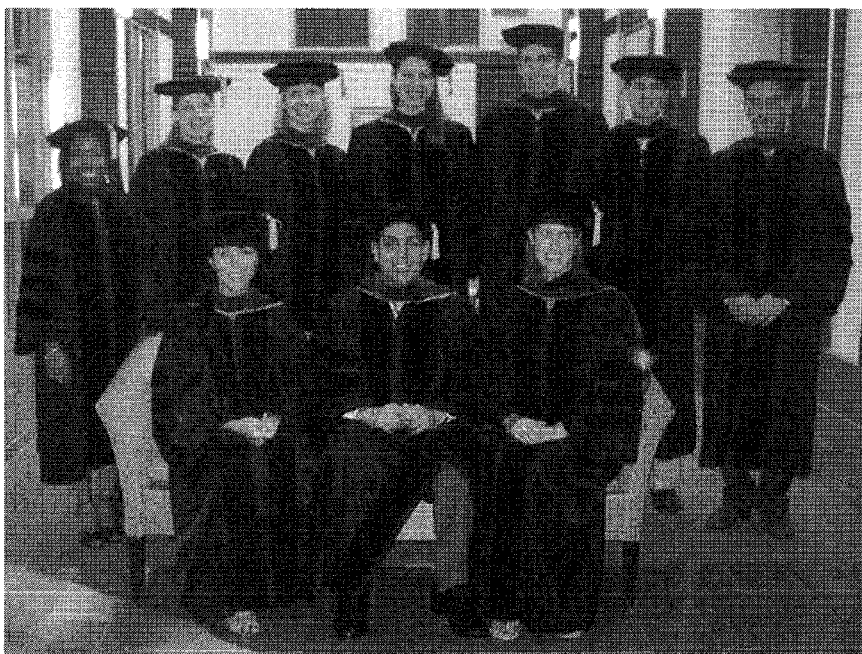
Despite the various criticisms of historic preservation as a goal for developing countries, the protection of cultural identity from the forces of globalization requires some attempt to preserve the built heritage of Southeast Asia's cities. While the government and private spheres must play a role in historic preservation, neither side can afford to go it alone. Public-private partnerships can provide the means necessary for governments in developing countries to encourage both investment and participation from the private sphere. This participation will alleviate costs and ensure that the public is aware of the benefits of historic preservation.

Given the fragile state of historic properties, it is important that governments act now while there is still a chance to save them. However, governments must work carefully to properly establish programs that balance the various tools available to them, protect private property rights, and ensure sustainability. It may seem easier for governments to go it alone, but it is ultimately better for governments to seek involvement of the private sphere to ensure that funding is available and that there is popular support for historic preservation.

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