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STRUGGLING AGAINST THE TIDE: UNITED STATES PARTICIPATION IN EFFORTS TO CURTAIL THE ILLICIT FLOW OF CULTURAL PROPERTIES

I. Introduction

Cultural property, whether classified as architecture, sculpture, painting or artifact, has been regarded as something particularly worthy of special study and protection.1 Aside from its often extraordinary aesthetic value, such property is also of importance for its unique historical function.2 Cultural property serves as a tangible record of the development of civilizations and of man in general; its preservation is imperative if future generations are to observe the accomplishments of the past as well as those more contemporaneous in nature.3

It is an unfortunate reality that certain nations are essentially devoid of culturally valuable objects while others are virtually natural depositories.4 An illicit international market and traffic in such goods has developed in response to this situation. As this development has a se-


2. S. Williams, The International and National Protection of Movable Cultural Property 52-57 (1978). The historical function refers to cultural property's role in the explanation and understanding of prior civilizations and cultures. Id. See Note, The Legal Response to the Illicit Movement of Cultural Property, 5 Law & Pol'y Int'l Bus. 932, 936 (1973). It is stated there that cultural property also has what might be described as an educative function; the study and observation of foreign art serves to broaden perspectives and reduce parochialism. Id.

3. Williams, supra note 2, at 52. Man's accomplishments and achievements, as recorded in the form of cultural property, may in this regard be viewed as assuming a universal character; the identification and enchantment with such property cannot be said to belong exclusively to any one nation. Notwithstanding this universal character, however, the fact remains that cultural property is found within the borders of sovereign nations which exercise exclusive jurisdiction therein. Frequently, these states, laden with culturally significant objects, have enacted legislation rendering their removal illegal. E.g., Federal Law on Archaeological Artistic and Historic Monuments, 312 Diario Oficial [D.O.] 16, May 6, 1972, cited in U.S. v. McClain, 545 F.2d 988, 1000 (5th Cir. 1977) (absolutely forbidding the exportation of pre-Columbian artifacts from Mexico). For a useful reference material listing the various national legislations relating to the protection of cultural property, see B. Burnham, Handbook of National Legislations: The Protection of Cultural Property (1975).

4. Merryman, The Protection of Artistic National Patrimony Against Pillaging and Theft, in Art Law, Domestic and International 230, 233 (L. Duboff ed. 1975); Williams, supra note 2, at 56; Note, supra note 2, at 934.
vere negative impact on the overall status of cultural items, legal measures have been sought in an effort to control what has become a significant threat to the continued existence of cultural properties.

This note will examine the major legal responses that have emerged to deal with this problem. Particular emphasis will be placed on the policies being formulated by the United States in its participation in these legal measures, as that nation represents a major destination point of the illicit traffic.

II. UNITED STATES PARTICIPATION IN MAJOR LEGAL RESPONSES

A. Background

At the heart of the problem of the illicit traffic in cultural properties lies a fundamental conflict of interests between art-rich nations,

5. The effects of this traffic have been referred to as the "murder of man's history." Nafziger, Controlling the Northward Flow of Mexican Antiquities, 7 LAW. AM. 68 (1971). Contributing to the problem faced by Mexico is the fact that widespread inflation in the international art market has led to a change in emphasis from European art objects to the less familiar pre-Columbian artifacts found throughout the Latin and Central American countries. Id. It should be noted that as private collectors have acquired more and more illicitly removed artifacts, their market value has increased tremendously. Note, supra note 2, at 934. While countries like Mexico have suffered the outrage of unauthorized removal of their artifacts, the practice has also resulted in the destruction and desecration of many objects in the process of extraction from their natural sites and subsequent transportation abroad. Nafziger, supra, at 69; Note, supra note 2, at 936-37, n.20. See also Rogers & Cohen, Art Pillage—International Solutions, in ART LAW, DOMESTIC AND INTERNATIONAL 230, 315 (L. Duboff ed. 1975). One of these artifacts is known as stela, which is notable for its ornamental and sculptural face. This portion is valued and desired in the marketplace. In order to remove the face, various means are adopted including the use of crowbars, chisels and acid, frequently causing the ruin of the entire piece. Nafziger, supra, at 69. It should be further noted that this practice is often the result of well-conceived and financed operations, employing armed natives and transporting the artifacts by land, sea and air. Id. at 70.

6. E.g., UNESCO Convention, supra note 1.

7. Note, The Retention and Retrieval of Art and Antiquities Through International and National Means: The Tug of War Over Cultural Property, 5 BROOKLYN J. INT'L L. 103, 113 (1979). While the focus of the instant discussion is upon the major legal measures to which the United States is a party, it should be noted that other nations have been active in this area as well. Id. For example, it has been reported that European efforts have produced two regional conventions aimed at the protection of cultural property, while Asian activity has been fairly limited to the national level. Id. at 117. See generally Burnham, supra note 3. For a comprehensive survey and discussion of both national and international action in this regard, see Williams, supra note 2. This book is of particular interest for its additional analysis of existing measures designed to protect cultural property in the event of war, a significant threat to cultural property's existence wholly apart from the destructive consequences of the illicit traffic in such items which is the subject of the instant discussion.
seeking desperately to retain their national treasures, and those persons and institutions residing in importing countries, such as the United States, who desire the unrestricted movement of art. Disputes have continually arisen between these opposing positions with the result that the decisionmakers in importing countries are repeatedly pressed to effectuate their resolution. Indeed, increased global interdependence forces the recognition that it is hardly in the best interests of the United States to alienate art-rich nations by wholly ignoring their efforts to eliminate the exportation of certain cultural property. On the other hand, those persons and institutions in the United States advocating the free movement of art are presumably not without political influence; their position also requires attention and consideration. Thus, the United States must, through formulation of its foreign policy, seek an accommodation of these positions.

Historically, the United States has been accused of encouraging the illicit movement of cultural property. The source of this allegation is twofold. First, certain laws have created an incentive to bring

8. From a broad viewpoint, the situation may be analyzed as an elementary example of the law of supply and demand: given the scarcity of the demanded resource (cultural property) and a limited supply due to the existing export controls imposed by art-rich countries, a large unsatisfied demand exists thereby nurturing a lucrative black market.

Dealing more substantively with the conflict, five specific interests have been identified which essentially argue against free mobility. Merryman, supra note 4, at 233-38. See also Bator, Regulation and Deregulation of International Trade, in ART LAW, DOMESTIC AND INTERNATIONAL 230, 302-04 (L. Duboff ed. 1975); Note, supra note 2, at 935-38. These include: (1) "specific cultural value," the cultural identification and special significance that often attach to a particular item within a specific community; (2) "the archaeological interest," involving the idea of context; the significance of certain artifacts lies in their particular location where they assist in presenting a composite picture of how a certain civilization was organized and why; (3) "the integrity of the work of art," which refers to the concept that, aesthetically, "the whole of the work of art is greater than the sum of its parts"; (4) "the safety of the work of art," indicating that irreparable harm may befall a given object should it travel internationally. Merryman, supra, at 233-36. (5) "Cultural imperialism," which refers to the notion held by certain art-importing nations that they are particularly well-suited as a depository of the world's artistic treasures, regardless of the circumstances of their procurement. Nafziger, supra note 5, at 71; Merryman, supra, at 236-37. As economic considerations have come to play a predominant role in the illicit traffic of art objects, however, the fifth factor has become largely dormant and discredited. Id. at 230, 233, 236-37.

9. For example, it was recently reported that:

Senator Daniel Patrick Moynihan, Democrat of New York, had blocked the [implementation of the UNESCO Convention] in the past, partly on the behalf of New York art dealers concerned that United States enforcement of the UNESCO convention [sic] would mean that they would lose all their business to the countries that did not enforce it.


10. E.g., Nafziger, supra note 5, at 71; Rogers & Cohen, supra note 5, at 316.
art into the country; for example, it has been noted that United States customs laws have permitted certain art to enter the country duty-free. An additional factor has been the allowance of a significant federal income tax deduction for certain art donations; donation of artistic property to certain institutions has permitted the donor to deduct up to 30% of adjusted gross income. Significantly, the value of the donation is based upon the current market value of the gift at the time of donation, as opposed to its value when the donor acquired it. Thus, the incentive has existed for persons to speculate actively in art objects on the expectation that market forces will cause them to appreciate, thereby resulting in a windfall tax savings—should they later choose to donate.

The second and clearly most significant source of the allegation that the United States encourages the importation of illicit art, is the absence of laws dealing with the problem:

On the importing side [of the problem] the principal form of regulation is a form of nonregulation, and it is fundamental that this be understood. The general rule today in the United States, and I think in almost all other art-importing countries, is that it is not a violation of law to import simply because an item has been illegally exported from another country. The mere fact of illegal export does not render the import of a work of art illegal under United States law. This means that a person who imports a work of art which has been illegally exported is not for that reason alone actionable, and the possession of that work of art cannot for that reason alone be disturbed in the United States.

It is difficult to pinpoint a specific reason for United States inaction. Several possibilities exist, however. First, it is conceivable that the United States was actually unaware of the magnitude of the problem; about fifteen years ago it became apparent that certain cultural properties, notably pre-Columbian artifacts, were facing extinction due

11. Rogers & Cohen, supra note 5, at 316. The authors note that antiquities, ethnographic objects more than fifty years old, and works of original art in general are beneficiaries of this policy. Id.
14. A further factor to consider, although not embodied in law, is the increasing Western emphasis on higher education. It has been suggested that this emphasis has produced a concomitant demand for "artistic experiences." Note, supra note 2, at 933.
15. Bator, supra note 8, at 300-01.
to increased world demand and the destructive practices of illicit exporters. Thus, the United States may have been guilty of seriously underestimating the substance of complaints frequently voiced by the suffering art-rich countries. A second possibility is related to the idea of "cultural imperialism." A nation takes pride in the quality of its cultural institutions; by building a reputation for cultural and artistic excellence, respect and prestige follow, thereby attesting to the success and development of the social structure. Accordingly, the continued import of culturally significant objects is not to be discouraged. Finally, the economic philosophy of the United States is a relevant consideration. The free market system has great support in the United States, an adherent to a capitalistic economic philosophy. Hence, allowing market forces to determine the overall distribution of cultural properties would naturally follow. Any governmental interference with market operations would tend to be disfavored.

As a result of the general practice of allowing illegally exported cultural properties legal entry into the United States, it is not surprising that it should emerge as a major destination point for the illicit traffic. In the eyes of the art-rich nations, the United States resembles an enormous warehouse of wrongfully taken property. For example, it is not unusual for a country to discover one of its well-known treasures appearing in an American collection, museum or offered for sale in an art catalogue.

Given the United States previous general policy of nonregulation of the influx of illegally exported cultural property, any subsequent regulation thereof represents a contraction of the above-quoted general rule. Two considerations, however, have led the United States to reevaluate its policy. The first is the remarkable increase in volume

16. Note, supra note 2, at 956; see supra text accompanying notes 4-5.
17. See Merryman, supra note 4, at 233, 236-37.
18. See, e.g., U.S. v. Hollingshead, 495 F.2d 1154 (9th Cir. 1974) (Hollingshead involved a prosecution for a violation of the National Stolen Property Act, 18 U.S.C. §§ 2314-2315 (1976). The offense was based on the defendant's illegal transportation of a famous pre-Columbian stela, which later surfaced in the defendant's California based art collection). See infra text accompanying notes 116-20.
19. A Raphael portrait, which had been illegally exported from Italy, was seized by United States Customs officers from the Boston Museum of Fine Arts on January 7, 1971. The Customs Service was able to exercise jurisdiction because the painting had not been declared upon entry into the United States and was technically contraband. N.Y. Times, Jan. 8, 1971 § 1, at 1, col. 1.
21. Professor Bator feels that the fundamental policy issue in this area is the extent to which an art-importing nation like the United States should modify this rule. Bator, supra note 8, at 301.
and sophistication of the traffic. The second factor concerns the growth of a cultural awareness on the part of the citizens of art-rich nations—citizens whose heritage is facing extinction. This is significant because of a concomitant rise in American desire for the continued economic and political support of many of these art-laden Latin American countries. Consequently, these countries have an important bargaining chip with which they can influence United States foreign policy with regard to controlling the flow of cultural property.

As many of the countries seeking to protect their cultural properties are politically and economically unable to exercise extensive control over them, major legal measures in the form of a multilateral convention, bilateral treaties and unilateral legislation have been resorted to, with United States participation in these measures beginning in the early 1970's and gradually increasing thereafter.

B. Multilateral Response: The UNESCO Convention

The UNESCO Convention represents the potentially most effective legal device to arrest the illicit flow of cultural property. Only through the process of mutual cooperation and recognition of shared values and experiences among members of the global community will there emerge effective regulation to eliminate the relative ease presently enjoyed by those who would seek to remove the property from

22. Note, supra note 2, at 956. See supra notes 4-6 and accompanying text.
23. Note, supra note 2, at 956. The author there notes that:

[T]he 1960's brought rapid economic development to Latin America and the growth of an educated middle class. To the educated citizen who knows that these artifacts represent a background of highly advanced civilization, preservation of this heritage is a highly popular and political issue. Political pressure was undoubtedly exerted on the United States to ameliorate the problem.

Id. at 956-57 (footnotes omitted).
24. Id. at 957.
25. Id.
26. Nafziger, supra note 5, at 70. It is stated there that “[t]he property is largely unprotected because of the prohibitive cost of an adequate cordon of guards. Bribery of official guards, where there are any, is pervasive.” Id. (footnote omitted).
27. See infra text accompanying notes 28-185.
28. UNESCO Convention, supra note 1, at 289. For a thorough examination of the Convention and its background, see Williams, supra note 2, at 178-91; Note, supra note 2, at 948-68 (comparing the final draft with earlier versions and the United States' objections thereto); Comment, The UNESCO Convention on the Illicit Movement of Art Treasures, 12 Harv. Int'l L. J. 537 (1971) [hereinafter cited as Comment, Illicit Movement]. See generally Comment, New Legal Tools to Curb the Illicit Traffic in Pre-Columbian Artifacts, 12 Colum. J. Transnat'l L. 316 (1973) [hereinafter cited as Comment, New Legal Tools].
one nation to another. The preamble to the Convention embodies this recognition, which is the spirit and rationale behind its adoption.

The Convention, at the outset, specifies two requirements that cultural property must satisfy in order to qualify for protection: (1) a definitional test and (2) a connection test. The definitional test demands that cultural property first be designated, by each party to the Convention, on either religious or secular grounds, as being important to any one of six academic areas of discipline. In addition, the property must fall within one of eleven "type" categories. Upon meeting both parts

29. It has been widely acknowledged that one nation, acting alone in attempting to restrict the importation of such items, will only cause the flow to be diverted to another nation, where no such restrictions exist. E.g., Nafziger, supra note 5, at 77; Note, supra note 7, at 110.

30. UNESCO Convention, supra note 1, preamble, at 289. For example, aside from its articulation of the transnational value and importance of cultural property with regard to increased knowledge, mutual respect and appreciation, the preamble recognizes the duty and obligation of all nations to become and remain sensitive to their own cultural heritages and to undertake measures to ensure their protection and preservation. Id. See Williams, supra note 2, at 180.

31. UNESCO Convention, supra note 1, arts. 1, 4, at 289-90. These tests are derived from the language contained in articles 1 and 4 of the Convention. See Comment, Illicit Movement, supra note 28, at 542-46; Williams, supra note 2, at 180-81.

32. UNESCO Convention, supra note 1, art. 1, at 289. The six academic areas are: archaeology, prehistory, history, literature, art and science. Id.

33. Id. at 289-90. The list and description of the "type" categories are:

(a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
(b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;
(c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
(d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
(e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
(f) objects of ethnological interest;
(g) property of artistic interest, such as:
   (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
   (ii) original works of statuary art and sculpture in any material;
   (iii) original engravings, prints and lithographs;
   (iv) original artistic assemblages and montages in any material;
(h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;
(i) postage, revenue and similar stamps, singly or in collections;
of the definitional test, the cultural property must then pass muster under the connection test embodied in article 4. This test requires a sufficient nexus between a given object and the state seeking its protection. Presumably, the connection test was designed to reduce the chance that a given country will assert a parochial or spurious claim to an item. Consequently, the movement of cultural property would not be unduly burdened.

It has been advanced, however, that the connection test leaves open serious questions which will undoubtedly give rise to disputes. For example, it has been observed that conflicts may arise where an artist, native to one country, creates an important work in another country where he has temporary residency. Perhaps more importantly, the commentator notes the obvious want of a priority system

(j) archives, including sound, photographic and cinematographic archives;
(k) articles of furniture more than one hundred years old and old musical instruments.

Id. One writer has taken exception to the scope of this strand of the definitional test:

The inclusion of two of these categories gives cause for concern. Paragraph (a) includes objects of purely scientific interest not peculiar to one country, but of general interest to scientists all over the world. The controls established by the convention are inappropriate for this type of material, for which ease of transportation among scientists in different countries should be a primary consideration.

Comment, Illicit Movement, supra note 28, at 544-45. In addition, the author objects to the inclusion of contemporary art and literature as failing to consider the possibilities that wide circulation may outweigh protection. Id. at 545.

34. UNESCO Convention, supra note 1, art. 4, at 290.
35. Id. To meet this nexus, property must fall within one or more of the following categories:
(a) Cultural property created by the individual or collective genius of nationals of the State concerned or created within the territory of that State by foreign nationals or stateless persons resident within such territory;
(b) cultural property found within the national territory;
(c) cultural property acquired by archaeological, ethnological or natural science missions, with the consent of the competent authorities of the country of origin of such property;
(d) cultural property which has been the subject of a freely agreed exchange;
(e) cultural property received as a gift or purchased legally with the consent of the competent authorities of the country of origin of such property.

Id.

36. Id. preamble, at 289. This interpretation comports with an express consideration included in the preamble to the Convention: "[T]he interchange of cultural property among nations for scientific, cultural and educational purposes increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations . . . ." Id.

37. Comment, Illicit Movement, supra note 28, at 545.
38. Id.
for the categories listed under the connection test,\textsuperscript{39} and the absence of any provision creating a "tribunal or agency for the resolution of disputes,"\textsuperscript{40} except as UNESCO will "extend its good offices to reach a settlement."\textsuperscript{41} Clearly these omissions significantly reduce the overall effectiveness of the Convention, for the elimination of disputes over cultural property was one of the stated purposes behind its creation.\textsuperscript{42} It should be borne in mind, however, that the Convention is but a framework for controlling the illicit traffic in cultural goods. As concrete disputes arise, the opportunity will exist to confront directly any glaring deficiencies or gaps in the framework, as opposed to approaching them in the abstract. To this end, greater substantive content may be added to the Convention in a manner similar to American constitutional adjudication, where the text of the document, often ambiguous, undergoes interpretation to reflect the shared values and expectations of the persons it was designed to govern. Moreover, article 25 provides that the Convention may be revised.\textsuperscript{43} Thus, the means exist by which tribunals may be organized or a permanent arbitration panel established.

In providing for enforcement, the Convention places duties upon both the art-rich and the art-importing states. Article 5 requires parties to the Convention to establish "national services" for the protection of cultural property where such services do not already exist.\textsuperscript{44} The key to this obligation is the insertion of the qualification that services are to be "appropriate for each country," thereby abrogating any mandatory minimal level of authority which might otherwise be required.\textsuperscript{45} The functions such services are to perform include: (1) the proposal of legislation to implement protection operations; (2) the supervision of archeological excavations; (3) the establishment of ethical

\begin{itemize}
  \item \textsuperscript{39} Id.
  \item \textsuperscript{40} Id.
  \item \textsuperscript{41} UNESCO Convention, supra note 1, art. 17, at 292.
  \item \textsuperscript{42} Id. preamble, at 289. The preamble notes that "the illicit traffic in cultural property is an obstacle to that understanding between nations which it is part of Unesco's mission to promote." \textit{Id}.
  \item \textsuperscript{43} Id. art. 25, at 293.
  \item \textsuperscript{44} Id. art. 5, at 290. The Convention offers no express definition of "national services" but does detail several functions they are to perform. \textit{Id}.
  \item \textsuperscript{45} Id. art. 5, at 290. It has been observed that the inclusion of the phrase "as appropriate for each country," while taking into account the particular conditions of each signatory, renders the "[establishment of] such national services . . . merely admonitory, since the United States, for example, could easily assert that the functions of the services are already being performed 'appropriately' by such agencies as the Smithsonian Institution, the National Gallery of Art and federal, state and local law enforcement authorities." Comment, \textit{Illicit Movement}, supra note 28, at 547. \textit{See Williams, supra note 2, at 181-82 nn. 180-81.}
standards for dealers and collectors of cultural property and (4) the promotion of education, with the goal of encouraging respect for the cultural heritages of other states.  

Dealing more directly with the problem of widespread illicit exportation of cultural objects, article 6 requires that the parties to the Convention draft a “certificate” which will state that the exportation of a given item is permissible; exportation of any item covered by the Convention is to be denied unless accompanied by such a certificate. This “certificate” requirement has been severely criticized by legal writers. Specifically, the problem of the administrative burdens in enforcement is notable. The effect of the requirement is in essence to require protected property to possess a “passport.” “[I]t must be admitted that the practical difficulties of border enforcement, especially for a country such as the United States with open borders for travelers leaving the country would be very difficult.” The “certificate” requirement is important, despite the difficulties surrounding it, for it places a duty on those nations which fear the destruction of their patrimonies to take the first step in ameliorating a problem which affects them most. A nation that would refuse to take significant measures towards curtailing the outward flow of its cultural property should not be heard to complain about the inaction of importing countries that contribute to the problem. To a certain extent then, such export controls may be seen as the quid pro quo for the import controls contained in article 7.

Article 7 provides for import control requirements. Article 7(a) states that the parties to the Convention agree to undertake those measures “consistent with national legislation to prevent museums and similar institutions ... from acquiring cultural property ... which has been illegally exported.” By adding the phrase “consistent with national legislation,” the control appears to be directed toward

46. UNESCO Convention, supra note 1, art. 5, at 290.
47. Id. art. 6, at 290-91.
48. E.g., Comment, Illicit Movement, supra note 28, at 543, 548.
49. Id. at 548. In light of this difficulty the Senate ratified the Convention, but expressly reserved the right to avoid imposing export controls. S. Res. 129, 92d Cong., 2d Sess., 118 Cong. Rec. 27,924-25 (1972). However, as the United States is essentially a destination point for illicitly exported items, this reservation is believed to be of no real consequence. Comment, New Legal Tools, supra note 28, at 334.
50. UNESCO Convention, supra note 1, art. 7, at 291. It should be noted that these controls are not coextensive with the export controls required by article 6. Thus, in certain cases, the prevention of illicit exportation, without more, will not serve as an absolute bar to importation in another country. See Comment, Illicit Movement, supra note 28, at 549. The author there notes that an earlier draft of the Convention did require coextensive controls. Id.
51. UNESCO Convention, supra note 1, art. 7, at 291 (emphasis added).
institutions that the governments of the parties to the Convention own or operate. Thus, the door is left open for private institutions to acquire illicitly exported items legally.

Article 7(b)(i) places an absolute import ban on cultural property in certain circumstances: (1) the item must have been stolen from a museum or similar institution, or a religious or secular public monument and (2) the property must have been documented in the inventory of such institution. A close reading of the section reveals how this provides only narrow coverage. First, the distinction is made between stolen property and that which has been merely exported illicitly. Article 3 defines "illicit" as "the import, export, or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention." Thus, by the insertion of the word "stolen" in article 7, the implication is clear that the drafters intended the term to connote larceny or theft; hence, "stolen" is used in its conventional sense. Therefore, article 7(b)(i) would appear inapplicable to the situation where a cultural item is merely exported without authorization. Second, the item stolen must have been taken from a specified class of victims, i.e., a museum or similar institution; property stolen from an individual's home would not be subject to the import ban.

Article 7(b)(ii) provides for the return of property stolen under article 7(b)(i). In particular, importing states are "to take appropriate steps to recover and return" such stolen property provided that the

52. See Comment, Illicit Movement, supra note 28, at 550. Indeed, this was the interpretation given to the phrase by the Senate when it ratified the Convention subject to the express understanding that "Article 7(a) is to apply to institutions whose acquisition policy is subject to national control under existing domestic legislation and does not... require the enactment of new legislation to establish national control over other institutions." S. Res. 129, 92d Cong., 2d Sess., 118 CONG. REC. 27,924-25 (1972). See Note, supra note 2, at 960-62; Comment, New Legal Tools, supra note 28, at 334. This appears to be a serious blow to the proponents of restricted movement of cultural property. Congressional power to regulate foreign commerce, as interpreted by the Supreme Court, would presumably allow the contemplated control over private institutions' acquisition policies in this area. See, e.g., Gibbons v. Ogden, 9 Wheat. 1 (1824). As an alternative, such legislation is arguably sustainable under the Treaty Power of Article VI of the Constitution. See Missouri v. Holland, 252 U.S. 416 (1920); Reid v. Covert, 354 U.S. 1 (1957) (dictum).

53. Note, supra note 2, at 960-61.

54. UNESCO Convention, supra note 1, at art. 7(b)(i).

55. Id. art. 3.

56. Id. art. 7(b)(ii).
country requesting the return of the particular item pay just compensation to an innocent purchaser or one who has valid title. In addition, only states may utilize the Convention's recovery machinery; the individual private litigant must resort to other existing legal means of recovery.

Article 9 provides for what one commentator has referred to as "the 'emergency' provision." This allows one country to call upon other parties "to participate in a concerted international effort" to eliminate the pillaging of its patrimony, where such covert activity has been so extensive as to place it in serious jeopardy. The article contemplates action such as a complete control of imports and exports, as well as multilateral and bilateral agreements apart from the Convention itself.

1. United States Participation

The Senate ratified the Convention by providing its advice and consent on August 11, 1972. The ratification was qualified, however, by six express understandings and a reservation. Clearly the most

57. Id. The Senate expressed an understanding, upon ratification, that article 7(b) does not preclude other available remedies that may already exist under the respective laws of the participating nations where such remedies would allow recovery without payment of just compensation. S. Res. 129, 92d Cong., 2d Sess., 118 Cong. Rec. 27,924-25 (1972). As a result, the Convention's use would be limited to cases where the possessor does hold valid title as against the original owner. Comment, Illicit Movement, supra note 28, at 550-51.

58. Note, supra note 7, at 112-13; Comment, Illicit Movement, supra note 28, at 550. For example, a private party might institute an action against the good itself under United States law. Note, supra, at 112-13.


60. UNESCO Convention, supra note 1, art. 9, at 291.


63. Id. These qualifications are as follows:

The United States reserved the right to determine whether or not to impose export controls over cultural property.

The United States understands the provisions of the Convention to be neither self-executing nor retroactive.

The United States understands Article 3 not to modify property interest in cultural property under the laws of the states parties.

The United States understands Article 7(a) to apply to institutions whose acquisition policy is subject to national control under existing domestic legislation and not to require the enactment of new legislation to establish national control over other institutions.

The United States understands that Article 7(b) is without prejudice to other remedies, civil or penal, available under the laws of the states parties for the recovery of stolen cultural property to the rightful owner without payment
critical of the understandings was that the Convention was not to be self-executing or retroactive. As a result, the Convention was without force in the United States until Congress enacted the necessary implementing legislation.\(^{64}\)

**C. Bilateral Response: United States-Mexico Treaty**

The United States-Mexico Treaty\(^ {65}\) represents a type of action contemplated by article 9 of the UNESCO Convention.\(^ {66}\) It was written in recognition of the severe problem Mexico faced during the 1960's when Mayan ruins were being desecrated at an alarming rate.\(^ {67}\) The Treaty had its origin in a meeting between the American and Mexican Presidents in 1967, although it was not the subject of a formal Mexican request until 1969.\(^ {68}\) There was a spirit of close cooperation and reciprocity behind the adoption of the instrument; Mexico had historically assisted the United States in the latter's efforts to eliminate the cross-

or compensation. The United States is further prepared to take additional steps contemplated by Article 7(b)(ii) for the return of covered stolen cultural property without payment or compensation, except to the extent required by the Constitution of the United States, for those states parties that agree to do the same for the United States institutions.

The United States understands the words "as appropriate for each country" in Article 10(a) as permitting each state party to determine the extent of regulation, if any, of antique dealers and declares that in the United States that determination would be made by the appropriate authorities of state and municipal governments.

The United States understands Article 13(d) as applying to objects removed from the country of origin after the entry into force of this Convention, for the states concerned and, as stated by the Chairman of the Special Committee of Governmental Exports that prepared the text, and reported in paragraph 23 of the Report of that Committee, the means of recovery of cultural property under subparagraph (d) are the judicial actions referred to in subparagraph (c) of Article 13, and that such actions are controlled by the law of the requested State, the requesting State having to submit necessary proofs.

\(^{Id.}\)


\(^{66}\) See supra text accompanying notes 59-61.

\(^{67}\) See Nafziger, supra note 5, at 68-69.

\(^{68}\) Id. at 71. See Note, supra note 2, at 943; Comment, New Legal Tools, supra note 28, at 320 & n.20.
border traffic in stolen cars, marijuana and narcotics. By signing the Treaty, therefore, the United States was essentially returning a favor. In its short introduction, the Treaty cites this “spirit of close cooperation” and notes the common value, also expressed in the UNESCO Convention, of promoting the protection of and further education in property of cultural significance. Specifically, the Treaty sets forth four measures primarily designed to eliminate the destructive consequences of illicit thefts and excavations:

1. The Parties undertake individually and, as appropriate, jointly,
   (a) to encourage the discovery, excavation, preservation, and study of archaeological sites and materials by qualified scientists and scholars of both countries;
   (b) to deter illicit excavations of archeological sites and the theft of archaeological, historical or cultural properties;
   (c) to facilitate the circulation and exhibit in both countries of archaeological, historical and cultural properties in order to enhance the mutual understanding and appreciation of the artistic and cultural heritage of the two countries; and
   (d) consistent with the laws and regulations assuring the conservation of national archaeological, historical and cultural properties, to permit legitimate international commerce in art objects.

These measures represent a positive plan to combat the problems caused by illicit traffic in cultural goods. By encouraging discovery and study of such property by qualified scholars and scientists, systematic detailed inquiry will replace the wanton pillage and destruction typically associated with the illicit movement. In addition, by promoting legitimate international commerce in art, the incentive for the “black-market” will be reduced.

The types of property covered by the Treaty are defined in article

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69. Nafziger, supra note 5, at 71-72; Note, supra note 2, at 943.
70. It should be noted that American interest in maintaining good political and economic relations with the Latin American countries in general was an influence in the United States’ willingness to sign such a treaty. Nafziger, supra note 4, at 71. See supra text accompanying notes 25-27.
71. United States-Mexico Treaty, supra note 65, at 495; UNESCO Convention, supra note 1, preamble at 289.
72. United States-Mexico Treaty, supra note 65, art. II.
I. In referring to pre-Columbian artifacts and art objects, only such items which are "of outstanding importance to the national patri- 
mony" of each country are included. While this would appear to indi-
cate a rather broad class, the scope of the coverage is narrowed by 
other clauses. First, the property must have been stolen, as contrasted 
with that which has been only exported without authorization. Second, 
the property must belong to the "federal, state, or municipal gov-
ernments or their instrumentalities," thus excluding privately owned 
items. Despite these limitations, the definitions are essentially flexible 
since the Treaty stipulates that the application of the definitions to a 
particular item is to be made by agreement between the two parties.

Article III provides for the return of stolen cultural property cov-
ered by the Treaty. Upon request made through diplomatic offices, 
the party requested is "to employ the legal means at its disposal" to 
effectuate the property's recovery and return from its jurisdiction, 
provided it is furnished with evidence and documentation establishing 
the requesting nation's claim. The Treaty does not define the "legal 
means" contemplated by article III. It should be noted, however, that 
the United States Customs Service is able to recover art objects under 
certain circumstances, such as where an object has not been declared 
or has been declared falsely. Presumably this type of action is within 
the purview of the Treaty. In the event that property cannot be recov-
ered and returned by such "legal means," the Attorney General of each

73. United States-Mexico Treaty, supra note 65, art. III, para. 3.
74. Id. preamble.
75. Id.
76. Id. art. I, para. 2. In the event that the two parties fail to reach an agreement, a 
"panel of qualified experts whose appointment and procedures shall be described by the 
two governments" will make the determination. Id.
77. Id. art. III, para. 2.
78. Id. art. III, para. 1.
79. Id. art. III, para. 2.
in relevant part:

If the Secretary [of the Treasury] has reasonable cause to believe that [an 
intentional or negligent false declaration has been made and] . . . that seizure is 
otherwise essential . . . to prevent the introduction of prohibited or restricted 
merchandise into . . . the United States, then such merchandise may be seized 
and, upon assessment of a monetary penalty, forfeited unless the monetary pen-
alty is paid within the time specified by law. . . . After seizure of merchandise 
under this subsection, the Secretary may, in the case of restricted merchan-
dise, . . . return such merchandise upon the deposit of security. . . .

Id. (emphasis added). Thus, the availability of this law as a means of enabling Customs 
officials to recover an item would appear to depend upon the item having been classified 
as restricted or prohibited and whether or not the monetary penalty was paid.
nation is empowered to institute a civil action to this end in the appropriate district court of their respective countries. To be noted is the inclusion of the sentence: "Nothing in this Treaty shall be deemed to alter the domestic law of the Parties otherwise applicable to such proceedings." By implication then, the Treaty appears to allow the United States to act as plaintiff on behalf of the Mexican Government, utilizing any available civil causes of action and thus relieving Mexico from the burden of pursuing a lawsuit in a foreign tribunal.

Article V is in the nature of a "supremacy clause." Specifically, it provides that in the event property covered by the Treaty is seized by, or is seized by and forfeited to the party to whom a request has been made for its recovery and return, the processes established by article III are controlling. This is so regardless of any inconsistent statutory requirements that may otherwise be applicable where property has been illegally imported into either country.

The obligation of the United States under this document cannot be fully appreciated without a brief discussion of the applicable Mexican law. Beginning in 1897, Mexico has enacted a series of laws detailing its interest in pre-Columbian artifacts and demonstrating its intent to exercise strict control over their transfer and exportation. In 1970, Mexico adopted legislation which vested ownership in the nation of immovable archaeological monuments and smaller movable items found in or on them. In 1972, this ownership right was reaffirmed and extended to movable artifacts as well, notwithstanding the fact that many such artifacts were, and continue to be, in the possession of private Mexican collectors. Thus, it is evident that since the Mexican

82. United States-Mexico Treaty, supra note 65, art. III, para. 3.
83. Id. Another writer has stated that "no new causes of action are created under the instrument. . ." Comment, New Legal Tools, supra note 28, at 321.
84. United States-Mexico Treaty, supra note 65, art. V.
85. Id.
87. Federal Law Concerning Cultural Patrimony of the Nation of December 16, 1970, art. 52, 303 D.O. 8, cited in U.S. v. McClain, 545 F.2d at 999. See also WILLIAMS, supra note 2, at 132; Note, supra note 2, at 944-45; Comment, New Legal Tools, supra note 28, at 326-27. Article 50 defines archaeological monuments as all artifacts, movable and immovable, which were the products of the pre-Columbian cultures. Comment, New Legal Tools, supra note 28, at 327-28 & n.14.
88. Federal Law on Archaeological, Artistic and Historic Monuments and Zones, art. 27, 312 D.O. 16, May 6, 1972, cited in U.S. v. McClain, 545 F.2d at 1000. Article 27 provides: "Archaeological monuments, movable and immovable, are the inalienable and
Government has made itself the “owner” of all pre-Columbian artifacts found within its territory, the United States would appear bound to use legal means to bring about their recovery and return if imported, assuming of course that the act of illegal exportation under these circumstances renders such items “stolen” within the meaning of the Treaty. It has been suggested that the severe limitations placed on legal exports will not work to undermine the Treaty since exports will be allowed for purposes of cultural exchange when arrangements are made by the Mexican President. Regardless of this possibility, however, it would appear that the United States obligation has, on the whole, been significantly increased, and its desire, expressed in article II, to permit legal and legitimate commerce in art objects, has been effectively undercut with respect to pre-Columbian artifacts, for such limited legal exports will undoubtedly fall far short of satisfying the demand for cultural properties of the pre-Columbian era.

The United States-Mexico Treaty has a distinct practical advantage over a multilateral agreement such as the UNESCO Convention; it has been recognized that such bilateral agreements allow the parties to draw terms with more precision to suit their individual needs. In this respect, bilateral agreements tend to supplement the underlying policy expressed in the UNESCO Convention. Moreover, the Treaty represents a growing recognition on the part of the United States of its role in the extensive problems Mexico faces as the result of widespread looting of pre-Columbian artifacts. The values and goals listed in the Treaty indicate an increased readiness of the United States to look beyond the parochial interests tied to a philosophy based on the free movement of cultural property, toward larger transnational values inherent in the educated, ordered and professional study of art.

impresscriptible property of the Nation.” Id. Article 16 provides that “the exportation of archaeological monuments is prohibited with the exception of exchanges or donations made to foreign Governments or scientific institutions by Presidential agreement.” Id. art. 16. Thus it can be seen that legal exportation is limited to this narrow exception. Williams, supra note 2, at 132; Note, supra note 2, at 944-45; Comment, New Legal Tools, supra note 28, at 326-28.


90. See supra note 88 and accompanying text.

91. Note, supra note 2, at 944-45.

92. Id. at 942.
D. United States Unilateral Response

In October of 1972, Congress imposed a significant qualification on the general rule of allowing the legal entry of cultural property that has been illegally exported from another country. This qualification came in the form of national legislation aimed specifically at certain types of pre-Columbian art. This legislation differs markedly from the United States-Mexico Treaty in two important substantive aspects. First, there is no requirement that the cultural property covered by the legislation be stolen; all that is necessary to bring the Act into play is that the property be "subject to export control by the country of origin." Accordingly, the fact that a foreign country has declared that this type of property cannot be legally exported will suffice to bring it within the scope of the law. Second, the law is not limited to those countries that have signed an international agreement with the United States; nations which do in fact exercise such export control are eligible to be the law's beneficiaries.

The limitations of the law are found in the manner by which its parameters are determined. By definition, the law applies only to "pre-Columbian monumental or architectural sculpture[s] or mural[s]," meaning "any stone carving or wall art" which was the product of the pre-Columbian cultures of Latin America and was, in whole or in part, "an immovable monument or architectural structure." Realizing the vagueness of this definition, Congress directed the Secretary of the Treasury, upon consultation with the Secretary of State, to promulgate and revise lists of objects that will fall within the definition of the Act. One can therefore see that this legislation is far from a blanket prohibition concerning pre-Columbian art.

The mechanics of the statute are relatively simple. Assuming a person desires to import a pre-Columbian artifact into the United

93. See supra text accompanying notes 16-18.
95. Id. at § 2095(3)(A)(iii). The phrase "country of origin" is further defined to mean "the country where such [property covered by the Act] was first discovered." Id. at § 2095(4).
96. 19 C.F.R. § 12.105(a) (1983) (promulgating the list of countries that are affected by the statute: Belize, Bolivia, British Honduras, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Peru, and Venezuela).
States, he/she must present a certificate to customs officers, issued by the country of origin, certifying that the exportation of that item was legal. Failure to produce a certificate results in the seizure of the item at the expense of the person seeking its admission. After seizure, the person ordinarily has 90 days in which to produce the certificate or else the item is forfeited under existing customs laws. There is an exception, however. A person may produce evidence sufficient to establish that the particular item is not protected by the statute or was exported prior to the date of its effective coverage. If the item is forfeited for violation of the statute, the item is first offered to the country of origin for return; the item will be returned provided that such country assumes all expenses associated with the return. Where no such return is made, the object is disposed of according to the applicable customs laws.

The statute has acknowledged significance in that it further demonstrates the United States concern regarding the overall status of cultural property that was seen to emerge in the terms of the United States-Mexico Treaty. The statute also provides the basis for repelling the flow of cultural property at the border without having to resort to action in an attempt to recover and return such property after it has been relocated in an American museum or private collection. Given liberal enforcement, moreover, the difficulty in importing illegally exported cultural property will be clearly increased. Finally, given that the United States unquestionably houses a large portion of the market for illicitly exported cultural property, the statute may have great significance as a precedent for other art-importing states to follow. Art-rich nations now have a stronger argument to present to other importing countries, in that their repeated pleas for assistance are no longer falling on deaf ears. Accordingly, such art-rich nations would be more justified in exerting stronger political and economic pressure to bear on

100. Id. § 2092(b). The expenses involved are for storage in “a bonded warehouse or public store.” Id.
101. Id.
102. Id. § 2092(b)(2)-(3). The effective date will depend upon when the particular object was declared to be within the statutory coverage. See id. § 2091.
103. Id. § 2093.
104. Id. § 2093(c).
105. See Comment, New Legal Tools, supra note 28, at 323.
107. Comment, New Legal Tools, supra note 28, at 323. The author there notes, however, that the law is far from “a final solution.” Like any customs law, it lends itself to evasion and is subject to administrative problems. Id.
noncompliant countries. Whether or not this will occur remains to be seen.

Judicial action in this area has been scarce. Thus far, the only demonstrated judicial basis available to deter the traffic in illicitly exported items has been the National Stolen Property Act (NSPA). The ability to utilize this statute turns on the question of scienter: in order to be convicted under the NSPA, a defendant must have knowledge that the goods in which he deals or transports were stolen. In United States v. Hollingshead, the defendant was a well-known Californian art dealer who was convicted of transporting a famous Guatemalan stela in interstate commerce knowing it to have been stolen. Under Guatemalan law, the stela involved was the property of the Republic and could not be exported without governmental permission, which was not given. Defendant's appeal was based on a contention that the trial judge committed reversible error by instructing the jury that there is a presumption that "every person knows what the law forbids." Defendant argued that since it is Guatemalan law that renders the stela stolen property, there could be no presumption of knowledge of that country's law. The court rejected this argument, pointing out that the evidence was "overwhelming" that the defendant was aware that the stela was stolen under Guatemalan law. Moreover, this conclusion was particularly compelling since the stela involved was so well known and had even been named. When this fact was considered along with the judge's further instruction that the jury must find beyond reasonable doubt that the defendant knew the stela was stolen, any error committed by the earlier instruction was, in the court's opinion, nonprejudicial. In Hollingshead, the element of scienter was easily established due to the notoriety of the object involved. The Fifth Circuit, however, was confronted with a much more difficult problem in United States v. Mc-

108. 18 U.S.C. §§ 2314-2315 (1976). This act imposes fines and/or imprisonment on persons who transport goods in interstate or foreign commerce, or receive, counsel, store, barter, or sell goods which constitute commerce, knowing them to have been stolen. The value of the goods must exceed five thousand dollars.
109. Id.
110. 495 F.2d 1154 (9th Cir. 1974).
111. Id. at 1155.
112. Id.
113. Id.
114. Id.
115. Id.
116. The name of the object was Machaquilla Stele 2. Id.
117. Id. at 1156.
Clain.\textsuperscript{118} In McClain, the defendants were appealing from a conviction for the attempted sale of movable pre-Columbian artifacts to an undercover F.B.I. agent.\textsuperscript{119} The artifacts in question had been smuggled out of Mexico, which has absolutely prohibited the exportation of such items since 1972.\textsuperscript{120} In their attempts to sell the artifacts, the defendants had made statements indicating their awareness that Mexico did not permit such exportations.\textsuperscript{121} Accordingly, the defendants did not dispute the illegality of the export, but primarily contended that a Mexican legislative declaration of ownership does not bring the artifacts under the classification of "stolen" once they are illegally exported; thus, to apply the NSPA to a case of mere illegal exportation would be an unwarranted enforcement of foreign law.\textsuperscript{122} The court rejected this contention and held that a declaration of national ownership coupled with an illegal exportation renders the objects "stolen" within the meaning of the NSPA.\textsuperscript{123} The court refused to adopt a strict construction of the word "stolen" as used in the NSPA; it felt that a narrow construction "would violate the apparent objective of Congress: the protection of owners of stolen property."\textsuperscript{124}

The defendants further argued that to refer to any foreign law for purposes of ascertaining what is or is not "stolen" would render uncertain the administration of the NSPA.\textsuperscript{125} In response, the court stated that the requirement of scienter precluded the possibility of a defendant being convicted of an offense "he could not have understood to exist."\textsuperscript{126} Nonetheless, whether such a requirement does preclude such a possibility is uncertain. One writer has taken the position that, because the defendants only expressed knowledge that Mexican law forbade the exportation of such artifacts, for a conviction to be sustained necessarily implied that the defendants were also aware that Mexico had claimed ownership of the items.\textsuperscript{127} This knowledge was not clearly

\begin{thebibliography}{99}

\bibitem{118} 545 F.2d 988 (5th Cir. 1977). For a detailed analysis of this decision, see Comment, \textit{Art Theft: National Stolen Property Act Applied to Nationalized Mexican Pre-Columbian Artifacts}, 10 N.Y.U. J. INT'L L. & POL'T 569 (1978).
\bibitem{119} 545 F.2d at 992.
\bibitem{120} See supra text accompanying notes 86-91.
\bibitem{121} 545 F.2d at 993.
\bibitem{122} \textit{Id.} at 994.
\bibitem{123} \textit{Id.} at 1000-01.
\bibitem{124} \textit{Id.} at 1001.
\bibitem{125} \textit{Id.} at 1001-02 n.30.
\bibitem{126} \textit{Id.}
\bibitem{127} Comment, \textit{supra} note 118, at 604-05. As scienter is the \textit{mens rea} under the NSPA, it must be established beyond reasonable doubt. \textit{See generally} In Re Winship, 397 U.S. 358 (1970). Defendant's conviction, therefore, implies the scienter of Mexico's claim to ownership. 397 U.S. at 358.
\end{thebibliography}
shown to exist on the defendants' part and thus, a due process question arose.\textsuperscript{128} The defendants' convictions were reversed, however, because of an erroneous instruction that Mexico had owned such artifacts since 1897.\textsuperscript{129} This instruction was considered prejudicial because the jury could have been more willing to find scienter if Mexico had in fact claimed ownership for over seventy-five years when it had not unequivocally done so until 1972.\textsuperscript{130}

E. Recent Developments

On September 15, 1981, the United States entered into an international agreement with Peru for the recovery and return of stolen archaeological, historical and cultural properties.\textsuperscript{131} This Agreement essentially parallels the 1970 United States-Mexico Treaty,\textsuperscript{132} but contains two modifications worthy of discussion. The first of these modifications may be described as an "early-warning system." The United States-Peru Agreement places upon each party the duty to inform the other of known thefts of protected property when there is a likelihood that such stolen property will be placed in international trade.\textsuperscript{133} In addition, the party believing its property stolen is to furnish a description of it to the other in order to facilitate its identification.\textsuperscript{134} Thereafter, the customs services of each country are to "take such actions as may be lawful and practicable to detect the entry of such objects into [their respective countries] and to locate such objects within [them]."\textsuperscript{135} Upon location of any property meeting the description of that reported stolen, the locating party is to provide the other with information as to the property's whereabouts and the procedure re-

\textsuperscript{128} More specifically, if the defendants were unaware that Mexico "owned" the artifacts, the requisite culpable mental state was lacking and hence the defendants would have been deprived of due process of law. See generally In Re Winship, 397 U.S. 358.

\textsuperscript{129} U.S. v. McClain, 545 F.2d at 1000.

\textsuperscript{130} Id. Defendants were again convicted upon retrial. The convictions were reversed, however, in U.S. v. McClain, 593 F.2d 658 (5th Cir.), cert. denied, 444 U.S. 918 (1979). The basis for reversal was the trial judge's action of allowing the jury to decide when Mexico validly declared ownership of the artifacts in question. The court found it was only since 1972 that Mexico made a clear pronouncement of ownership. As the jury could have concluded that Mexico owned the property since 1897, the defendants stood in danger of being convicted under a vague articulation of a criminal prescription. Id. at 671.


\textsuperscript{132} See supra text accompanying notes 65-93.

\textsuperscript{133} United States-Peru Agreement, supra note 131, art. II, para. 1.

\textsuperscript{134} Id.

\textsuperscript{135} Id.
required to secure its return.\textsuperscript{136}

This modification is a significant improvement over the United States-Mexico Treaty. The idea of an “early-warning system” is a useful concept because it places the warned party on guard as to a possible attempt at importation. The United States Customs Service, if properly informed, could effectively step-up its ordinary detection practices if it was provided with knowledge of exactly what to look for and, if possible, when and where. Also, by informing the country seeking recovery of a stolen item of the steps involved in its return, that country can properly weigh the merits of its return against the time and expense necessary to accomplish it.

The second modification involves the means available to the requested party for the recovery and return of a stolen item. The Agreement places each nation under an obligation to employ the legal means at its disposal to bring about an object’s return upon request of the other; the Agreement, however, unlike the United States-Mexico Treaty, does not expressly authorize the Attorney General of either country to institute a civil action to accomplish this return when other means fail. Instead, in the event that legal authorization cannot be obtained, the requested party is to “do everything possible to protect the legal rights of the requesting Party and facilitate its bringing a private action for return of the property.”\textsuperscript{137}

It would appear that this Agreement is somewhat of a step backward in the effort to control the illicit traffic in pre-Columbian art. Although the Agreement provides for enhanced detection procedures calling for more cooperation between the two nations, its procedures for protecting the integrity of cultural patrimony accomplish very little by requiring the requesting party to resort to a lawsuit in a foreign tribunal when other attempts to recover property fail. Whether or not the omission of the ability to institute a civil suit on the part of the requested party is of consequence remains to be seen. The Agreement does indicate, however, the continued willingness of the United States to work with other nations in rectifying the destructive results associated with the illegal exportation of cultural property.

A second recent development merits attention because of its somewhat imaginative character. The United States Customs Service is purportedly “testing its ability” to institute criminal proceedings against persons who import cultural property claimed as national patrimony by other countries.\textsuperscript{138} Primarily, the prosecution would be based upon

\textsuperscript{136} \textit{Id.}
\textsuperscript{137} \textit{Id.} art. II, para. 4.
\textsuperscript{138} \textit{N.Y. Times}, Sept. 1, 1981, § 1, at 1, col. 2.
the smuggling law under which the Customs Service is empowered to seek a criminal prosecution where property is brought into the United States "contrary to law." It is then argued that the "contrary to law" requirement is met once property, which has been declared to belong to a foreign nation, is illegally exported resulting in a violation of the National Stolen Property Act. This theory would appear to be under the authority of United States v. McClain. The legitimacy of this theory would appear to be doubtful given the problems associated with the McClain decision itself. The United States willingness to pursue

140. 18 U.S.C. §§ 2314-2315 (1976). This theory, of course, assumes that the property involved exceeds $5,000 in value, as this minimum amount is required to bring the NSPA into play. Id.
141. 545 F.2d 988.
142. See supra text accompanying notes 125-28. Also casting doubt on the availability of this theory was a bill, introduced on September 28, 1982, which would have amended the NSPA to overrule the McClain decision. This bill was not enacted by the 97th Congress. S. 2963, 97th Cong., 2d Sess. (1982). The bill reads:
To amend sections 2314 and 2315 of title 18, United States Code, relating to stolen archaeological material.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2314 of title 18, United States Code, is amended by adding at the end thereof the following:

'No archaeological or ethnological material taken from a foreign government or country claiming ownership shall be considered as stolen, converted, or taken by fraud within the meaning of this section where the claim of ownership is based only upon—

'(1) a declaration by the foreign government of national ownership of the material; or

'(2) other acts by the foreign government intended to establish ownership of the material and functionally equivalent to a declaration of national ownership, and the alleged act of stealing, converting, or taking is based only upon—

'(A) illegal export of the material from the foreign country;

'(B) the defendant's knowledge of the illegal export; and

'(C) the claim of ownership described in clauses (1) and (2).'

Sec. 2. Section 2315 of title 18, United States Code, is amended by adding at the end thereof the following:

'No archaeological or ethnological material taken from a foreign government or country claiming ownership shall be considered as stolen, unlawfully converted, or taken within the meaning of this section where the claim of ownership is based only upon—

'(1) a declaration by the foreign government of national ownership of the material; and

'(2) other acts by the foreign government intended to establish ownership of the material and functionally equivalent to a declaration of national ownership, and the alleged act of stealing, converting, or taking is based only upon—

'(A) illegal export of the material from the foreign country;

'(B) the defendant's knowledge of the illegal export; and
this theory, however, again testifies to its continued sensitivity to the problems inherent in this area.

The Customs Service has the ability, in certain circumstances, to seek prosecutions directly without resort to the NSPA. Intentionally false declarations, for example, may result in a criminal conviction under federal law. On January 26, 1982, a New York City art importer pleaded guilty to filing a false customs declaration which had undervalued $228,000 worth of Peruvian pre-Columbian artifacts. It has been reported that Federal prosecutors are continuing their investigation of pre-Columbian art imports, thus confirming the United States' accelerated commitment to rectifying the damage caused by the illicit traffic.

Clearly the most significant development in this area, however, was the implementation of the UNESCO Convention by the United States on January 12, 1983. This enactment represents the culmination of over eleven years of effort to draw an acceptable compromise between those groups and individuals who argued for immediate action by the United States for reasons of principle and leadership and those who argued that existing proposals created overly broad restrictions and may have fostered unwarranted retention practices and policies by certain foreign governments.

The Implementation Act "substantially emulates" an earlier bill passed by the House in 1977 and "implements the essential obli-

'B) the defendant's knowledge of the illegal export; and
'C) the claim of ownership described in clauses (1) and (2).'

Id.

143. 18 U.S.C. § 542 (1976). This section deals with false statements made, without reasonable cause to believe the truth thereof, upon entry or attempted entry of imported merchandise into United States commerce. Punishment may involve a fine of up to $5,000 and/or imprisonment of not more than two years. Id. 18 U.S.C. § 1001 (1976) provides for criminal sanctions for false statements in general, without specific reference to the importation of merchandise.


145. Id.

146. Implementation Act, supra note 64. See supra text accompanying notes 28-64 for a discussion of the Convention and United States participation therein.


148. Id.

149. Id. at 61 (statement of James Berry Hill).

150. See supra note 64.

gations of the Cultural Property Convention." In describing the material falling within the scope of the Act, § 302 requires that archaeological material be of cultural significance, at least 250 years old and be "normally discovered as a result of scientific excavation, clandestine or accidental digging, or exploration on land or underwater." Ethnological material must be a "product of a tribal or nonindustrial society" and be "important to the cultural heritage of a people because of its distinctive characteristics, comparative rarity, or its contribution to the knowledge of the origins, development, or history of that people." Moreover, these items must have been first discovered in and subject to export control by a "State Party."

Sections 303-305 and 307 implement article 9 of the UNESCO Convention. Section 303 grants substantive authority to "the President to enter into bilateral or multilateral agreements intended to provide [United States] cooperation towards protecting" against wanton pillage or destruction of another State Party's cultural patrimony. The protection contemplated is in the form of import restrictions; importation of "designated archaeological or ethnological material" is precluded unless the items are accompanied by a certificate or documentation, issued by the State Party, certifying the legality of the exportation of the items. The President's authority to enter into such agreements is qualified, however, by several prerequisite findings including a request by a State Party for United States assistance; that prior protective measures have been taken by the State Party; that United States action "would be of substantial benefit" to deter pillage "if applied in concert with similar restrictions" which are or will be adopted by other importing nations; and that such action is in the "interest of the international community" regarding the study of such

152. Id.
154. Id. § 302(2)(C)(ii)(I)-(II).
155. Id. § 302(2). It was reported that these careful definitions are designed to mirror the United States concern that only truly significant and valuable objects will be extended protection rather than "trinkets and other objects" which are basically non-distinctive and have little historical value. S. REP. No. 564, 97th Cong., 2d Sess. 25 (1982).
156. S. REP. No. 564, 97th Cong., 2d Sess. 26 (1982). The Senate report refers to §§ 203-205, 207 of the Act, but these sections were renumbered as §§ 303-305, 307 in the final version of the Act. Id.
158. Implementation Act, supra note 64, § 307(a).
159. Id. § 303(a)(1).
160. Id. § 303(a)(1)(B).
161. Id. § 303(a)(1)(C)(i).
The Act makes clear that the President is not to enter into such agreements unless the other art-importing nations of the global community act accordingly. To provide flexibility, however, a limited exception was made to this "concerted effort" requirement; the President may enter into such executive agreements notwithstanding the failure of another importing nation to implement similar protective measures where: (1) restrictions by that nation "are not essential to deter a serious situation of pillage" and (2) the United States participation will still be part of a concerted effort undertaken by the remaining art-importing countries.

Additional features of this agreement-making authority include: (1) a directive to the President to suspend United States participation in import restrictions if other importers either fail to act or do so inadequately to deter pillage and (2) power to extend an agreement up to five years beyond the ordinary five year effective period.

Section 304 contemplates the emergency implementation of the import restrictions of § 307, that is, without the prior conclusion of an executive agreement. This emergency authority contains certain lim-
itations: (1) the State Party must have made a prior request for United States assistance;\(^{168}\) (2) the President must consider the views of the Committee—expressed in its report—before acting\(^{168}\) and (3) the emergency action can only continue for five years subject to three-year extensions if the emergency conditions persist.\(^{170}\)

The enforcement mechanism of the Act is embodied in §§ 307-308, and 310.\(^{171}\) Section 307 directs customs officers, "notwithstanding any other provision of law," to refuse release of any "designated archaeological or ethnological material"\(^{172}\) which is unaccompanied by either a certificate authorizing its export from the State Party of origin or "satisfactory evidence"\(^{173}\) that the material was exported: (1) before designation of the matter as protected;\(^{174}\) or (2) at least ten years before entry into the United States.\(^{175}\) Failure to produce such evidence or documentation within ninety days subjects the material to seizure and forfeiture under § 310.\(^{176}\) Section 308 implements article 7(b)(i) of the UNESCO Convention\(^{177}\) by imposing an absolute import ban on items

(2) identifiable as coming from any site recognized to be of high cultural significance if such site is in jeopardy from pillage, dismantling, dispersal, or fragmentation which is, or threatens to be, of crisis proportions; or

(3) a part of the remains of a particular culture or civilization, the record of which is in jeopardy from pillage, dismantling, dispersal, or fragmentation which is, or threatens to be, of crisis proportions;

and application of the import restrictions set forth in section 307 on a temporary basis would, in whole or in part, reduce the incentive for such pillage, dismantling, dispersal, or fragmentation.

Id. § 304(a).

168. Id. § 304(c)(1).

169. Id. § 304(c)(2). See supra text accompanying note 163.

170. Implementation Act § 304(c)(3). It should be further noted that subsequent to any agreement made under § 303 or emergency action taken under § 304, the Secretary of the Treasury must promulgate regulations listing the cultural property covered by the above action. Id. § 305. This requirement is intended to ensure that the import restrictions of § 307 are only applied to such "designated" material and that "fair notice" is provided to those persons who may seek to bring such items into the United States. Id. § 305. See also id. § 302(7) for a definition of "designated archaeological or ethnological material."

171. See supra text accompanying notes 156-58.


173. See id. § 307(c) for a definition of "satisfactory evidence."

174. See supra text accompanying note 170.

175. Implementation Act, supra note 64, § 307(b)(2)(A)-(B). Aside from this ten year requirement, neither the person on whose behalf the material is being imported, nor anyone "related to" him or her can have "contracted for or acquired an interest, directly or indirectly, in such material more than one year before that date of entry, ..." Id. § 307(b)(2)(A). The term "related person" is defined in § 307(d).

176. Id. § 307(b).

177. See supra text accompanying notes 54-55.
of "cultural property documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution in any State Party."178 This definition of cultural property is designed to cover cultural property listed in article 1 of the UNESCO Convention,179 but is not limited to "whether or not the [items are] specifically designated by the State Party" as important; "[t]he term is thus broader than, but inclusive of, 'archaeological or ethnological material.' "180

In general, "designated archaeological or ethnological material" or "cultural property" introduced into the United States in violation of § 307 or § 308, respectively, is subject to seizure and forfeiture under the existing customs laws.181 This section further details the procedure to be followed for the return of such items to the claimant State Party, and states when just compensation or reimbursement is necessary.182

Lastly, the Act specifies evidentiary requirements for forfeiture proceedings brought concerning illegal importations,183 and § 312 delimits a class of objects to which the provisions of the Act do not apply.184

In sum, the Implementation Act represents a huge step for the United States in accepting responsibility for its role as a major art importer. The Act's significance lies in its careful attempt to secure a compromise between the complementary interests that have been shown to underlie this area.185 Whether or not the framework established will accomplish this goal will ultimately rest on the extent to which the President, given his broad discretionary powers under the Act, sees this area as deserving of positive policy development.

III. Conclusion

The foregoing survey of the major legal responses to the illicit traffic in cultural properties illustrates the United States emerging foreign policy with respect to its role as a major art importer. It is important to see that there exist valid interests and claims on both sides of the question whether art should freely circulate from one nation to an-

178. Implementation Act, supra note 64, § 308.
179. See supra notes 32-33 and accompanying text.
181. Implementation Act, supra note 64, § 310(a).
182. Id. § 310(b)-(c). Section 309 states that a public museum or other cultural or scientific institution can apply to retain cultural items pending a final determination by customs officials of any violations of §§ 307-308. Id. § 309.
183. Id. § 311.
184. Id. § 312.
185. See supra text accompanying notes 7-8.
other. Of utmost importance is the preservation of cultural property and its protection from wanton pillage and destruction. What is called for is a balance that preserves the art-rich nations' right to possess art representing their cultural patrimonies within their borders and, at the same time, recognizes the importance of allowing such art to be displayed and represented, to some degree, abroad. To this end, the legal responses discussed are imperfect but positive steps; they demonstrate that action must be taken in order to protect particular items from certain destruction. Imperfect as they are, they detail the need for additional study and action in this area.

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