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## The Continuing Development of United States Policy Concerning the International Movement of Cultural Property

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# The Continuing Development of United States Policy Concerning the International Movement of Cultural Property

## I. Introduction

Since the early 1970's the international legal community has become increasingly aware of the illicit traffic in cultural properties.<sup>1</sup> Although this problem traces back to the days of Greece and Rome, only recently has it become questioned.<sup>2</sup> Generally, the policy among art collectors and museums was to acquire whatever was available without any question as to the particular provenance of the work.<sup>3</sup> Through the efforts of dedicated archaeologists and art historians,<sup>4</sup> however, the problem has been brought to the attention of the world legal community. This movement reached its current plateau with the implementation by the United States of the 1970 UNESCO Convention on Cultural Property.<sup>5</sup>

In the United States, implementation of the Convention did not come easily; numerous bills were introduced between the Senate's original approval in 1972<sup>6</sup> and final implementation in 1983.<sup>7</sup> Even with the signing of this legislation, the controversy has not ended. Questions still persist concerning enforcement, repose of objects already in American collections, and claims made by interested parties regarding the need for additional legislation.<sup>8</sup>

The ongoing legislative efforts concerning the international movement of cultural property reflects the fact that this is an area of

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1. In this comment the term "cultural property" is used to mean any works of art, archaeological finds, handicrafts, ideas, land and fixtures, manufactured goods of pre-industrial societies, and paleontological remains. *See generally*, P. BATOR, *THE INTERNATIONAL TRADE IN ART* (1983) [originally published as *An Essay on the International Trade in Art*, 34 *STANFORD L. REV.* 275 (1981)]; R. DUFFY, *ART LAW: REPRESENTING ARTISTS, DEALERS, AND COLLECTORS* (1977); B. BURNHAM, *THE ART CRISIS* (1975).

2. *See generally, supra* note 1; *see also* J. HESS, *THE GRAND ACQUISITORS* (1974).

3. *Id.*

4. The first and most noted among these people is Dr. Clemency Coggins of Harvard University. Dr. Coggins was first to bring the pervasive problem of the illegal taking and international sale of cultural property to the attention of the world.

5. The Cultural Property Implementation Act, Pub. L. No. 97-446, 96 Stat. 2351 (1985) (codified at 19 U.S.C. § 2601 (1983)) [hereinafter cited as Cultural Property Act].

6. 118 CONG. REC. 27,924, 27,925 (1972).

7. For a discussion of the downfalls of earlier bills, *see infra* notes 98-101 and accompanying text.

8. *See infra* notes 231-37 and accompanying text.

the law that is far from settled.<sup>9</sup> In the United States, case law is not conclusive and the enforcement policy of the U.S. Customs Service still leaves open some areas of question.<sup>10</sup> This comment will look first at why this illicit traffic in cultural property is an area of controversy and describe what competing interests are involved. Next the actions that have been taken both on the international level and unilaterally by the United States to counter and possibly solve the problem will be examined. Finally, the still developing policy of the United States will be reviewed and evaluated.<sup>11</sup>

## II. The Problem

Interest in art as an investment is a recent phenomenon.<sup>12</sup> Ethnographic<sup>13</sup> and ancient<sup>14</sup> art have proved to be especially big investment winners.<sup>15</sup> This interest has sparked a rise in prices which in turn has translated into an increase in the looting and pillaging of archaeological sites<sup>16</sup> in areas with a rich cultural past.<sup>17</sup> The matter has simply become one of supply and demand.

The looting and theft of objects from burial mounds and tombs has become so ingrained in the history of art-rich nations that names have developed for those who participate in such activities. In Italy these people are *tombaroli*; in South and Central America *huaqueros*; and in Greece, the *archokepiloi*.<sup>18</sup> The illicit digging that goes on is by no means confined to art-rich areas, however. The problem is international in scope, with sites even in the southwestern United States routinely excavated and stripped of their valuable objects.<sup>19</sup>

The means utilized in this destruction range from the innocent discovery of objects in a farmer's field to the mass excavations of major archaeological sites using heavy earthmoving and excavation equipment.<sup>20</sup> Similarly, costs of these excavations range from almost

9. See *infra* notes 212-37 and accompanying text.

10. See *infra* text of section V.B.

11. Commentary in this area is certainly not lacking; a number of respected experts have emerged. Among them are James R. McAlee, Paul M. Bator, Leonard G. DuBoff, James F. Fitzpatrick, James A.R. Nafziger, and John Henry Merryman.

12. B. BURHAM, *THE ART CRISIS* 191 (1975) [hereinafter cited as BURNHAM].

13. The term "ethnographic" refers to the branch of anthropology dealing with the scientific description of individual cultures. *THE RANDOM HOUSE COLLEGE DICTIONARY* 454 (rev. ed., 1982).

14. In this comment "ancient" refers to any object originating from any pre-industrial society located anywhere in the world.

15. BURNHAM, *supra* note 12, at 120.

16. *Id.* at 14.

17. Especially affected are South and Central America, and those areas around the Mediterranean which are rich in history.

18. Vitelli, *The ABC's of the Art Market*, *EARLY MAN*, Spring, 1982, at 29, 30.

19. See, Blair, *Indian Rights: Native Americans Versus American Museums — A Battle for Artifacts*, 7 *AMER. INDIAN L. REV.* 125 (1979).

20. Pendergast, *Fighting a Losing Battle: Xuantunich, Belize*, *ARCHAEOLOGY*, July-

nothing up to the large amounts necessary for the mass excavations that are allegedly financed by interests in Europe and North America.<sup>21</sup> At times this \$3 billion per year business<sup>22</sup> operates almost on the basis of made-to-order thefts, with dealers placing orders with local "amateur" archaeologists.<sup>23</sup>

Persons involved in this business range from Peruvian farmers who have turned to tomb robbing because of drought and economically depressed circumstances,<sup>24</sup> to international journalists and diplomats who move objects across national borders, often under protection of the diplomatic pouch.<sup>25</sup> Corrupt government cultural officials<sup>26</sup> and unscrupulous archaeological assistants have also been implicated.<sup>27</sup> Finally, groups such as museum officials and art dealers have been accused of being involved in the illicit trade in antiquities.<sup>28</sup>

The era of the peasant who finds an object and unknowingly sells it to a foreign dealer for a meager sum is gone.<sup>29</sup> Illicit trading in art objects has now become big business. It is estimated that between sixty and ninety percent of the items available are the fruits of illicit excavations.<sup>30</sup> While most of these objects have headed to the United States, the most lucrative market for such items,<sup>31</sup> others find their way to Europe, Scandinavia, or Japan.

Interests in the debate for international and domestic legislation on the import and export of cultural property range widely as can be discerned from the discussion above. At one end are the dealers and collectors of art, especially those dealing with ethnographic and archaeological objects. On the other are both the officials of nations with rich cultural heritage and the archaeologists. Originally caught in the middle of this discussion were the ethnographic and art muse-

Aug. 1981, at 12 [hereinafter cited as Pendergast]; Reinhold, *Theft and Vandalism: An Archaeological Disaster*, EXPEDITION, Summer 1973, at 2 [hereinafter cited as Reinhold].

21. McGuigan, Shannon, Wilkinson, and Malone, *The Booming Trade in Smuggled Art*, NEWSWEEK, May 30, 1983, at 84 [hereinafter cited as NEWSWEEK].

22. P. BATOR, THE INTERNATIONAL TRADE IN ART 16 (1983) [hereinafter cited as BATOR].

23. See NEWSWEEK, *supra* note 21, at 85.

24. *Id.* at 84.

25. *Id.*

26. A European dealer estimates that 60 to 70% of the officials in the Orient who are responsible for the preservation of antiquities are corrupt. BURNHAM, *supra* note 12, at 84.

27. See NEWSWEEK, *supra* note 21.

28. See J. HESS, THE GRAND ACQUISITORS (1974).

29. It is reported that even in remote areas auction house price lists concerning antiquities have been found. BURNHAM, *supra* note 12, at 103.

30. *Id.* at 95. Most of these items are small, metal objects. Responsibility for illicit trading has been placed with the dealers because it is their money that supports this flow of art objects. See also L. DUBOFF, ART LAW: DOMESTIC AND INTERNATIONAL, 289 (1975) [hereinafter cited as DUBOFF]; K. MEYER, THE PLUNDERED PAST, 124 (1973) [hereinafter cited as MEYER].

31. NEWSWEEK, *supra* note 21, at 84.

ums throughout the world that acquired and displayed objects with provenances that are somewhat suspect.<sup>32</sup> Recently, however, this situation has changed. Various professional organizations in the museum field have adopted ethical standards aligning those organizations with the archaeological community and the officials of art-rich nations.<sup>33</sup>

*A. Those Parties in Favor of Strict Regulation of the International Art Market: Archaeologists and Culturally Rich Nations*

Some of the nations in the world that are culturally and historically the richest are also economically the poorest. These nations do not have the resources to provide for their people's social and economic welfare, let alone to protect the vast numbers of archaeological sites and other cultural landmarks located within their borders from pillage and plunder.<sup>34</sup> These nations, some of which spent a great deal of time as colonies and have only recently become independent, are generally referred to as non-aligned or lesser developed nations. They are located mostly in Africa, Southeast Asia, and Central and South America.<sup>35</sup>

An object of art is a great communicator and something of unique value to a developing nation. Certain objects tell a people who they are and what they have in common; a cultural heritage helps to develop and satisfy a people's need for identity.<sup>36</sup> This is the major reason why such nations have a need and an interest in their cultural patrimony.<sup>37</sup> This need not only extends to objects presently inside their borders, but also to those which have been removed by colonial powers.<sup>38</sup> Every object in the national museum of a colonial power is a reminder to a former colony of those years during which that foreign power imposed its rule.

Recently independent nations have attempted to develop a spirit

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32. BURNHAM, *supra* note 12, at 191.

33. This discussion of the problems involved in the control of the international trade in cultural properties is a quick survey at best. For a more detailed and explicit explanation, see BATOR, *supra* note 22. For a very good, but involved discussion, see also *Symposium on International Art Law* 15 N.Y.U.J. INT'L L. & POL. 757-900 (1984).

34. Mexico, a good example, has about 11,000 sites within its borders. It would take lifetimes for an army of archaeologists to fully investigate each and every site. Physical protection of these sites is obviously impossible. Reinhold, *supra* note 20, at 5.

35. This, however, does not mean that the plundering of cultural landmarks is predominantly a problem of lesser developed nations. Nations interested in protecting their cultural patrimony include the United States, Canada, New Zealand, Italy, and China.

36. DUBOFF, *supra* note 30, at 234.

37. See Comment, *Emerging U.S. Policy with Regard to the International Movement of National Cultural Property*, 7 INT'L TRADE L.J. 166 (1982).

38. See *infra* notes 125-28 and accompanying text for a discussion of the repatriation of objects of art. The most striking and continuing example of repatriation is the ongoing conflict between Britain and Greece for the return of the so-called "Elgin Marbles." See *infra* note 62 and accompanying text.

of national unity and pride not only from works by contemporary nationalistic artists, but by associating current regimes with ancient tribal empires that once controlled the same land area.<sup>39</sup> The political benefits of such a practice have been proved throughout history.<sup>40</sup> The continued taking of the national heritage of these nations only compounds their political and social problems and illustrates their subservience to European nations and the United States.<sup>41</sup>

What is most disheartening to officials of these developing nations is that their own citizens are willfully taking part in this plundering in the hope that they might earn a better living.<sup>42</sup> The estimates of the number of people in these nations who participate in the illicit excavation and transportation of cultural property is astounding. It is estimated that one percent of the entire population of Costa Rica is involved in "amateur" archaeology.<sup>43</sup> This translates to more than 4,400 people.<sup>44</sup>

A second group in favor of restrictions on the flow of cultural property are the professional, university trained archaeologists.<sup>45</sup> Their discipline has grown from the collection of "specimens" as an academic curiosity to a modern science that carefully searches for objects in hope of placing them in an archaeological context, solving specific problems, and understanding the texture of human history from which the object has emerged.<sup>46</sup>

To an archaeologist a work of pre-Columbian<sup>47</sup> or classical<sup>48</sup> art is more than a piece of sculpture or a religious object. It is a unique story and a part of a greater archaeological whole. When such an object is removed from its original archaeological setting by those in search of financial gain it becomes a mere curio, stripped of any educational value. It is pretty, perhaps, but has no story to tell.<sup>49</sup>

39. Examples include Nigeria and the West African empire of Benin, Mexico and the Aztecs, and Peru and the Incas.

40. The best example of this is France under the rule of Napoleon. The neo-classical style of David's painting and of the architecture of Vignon, especially La Madeleine, was used by Napoleon to tie and associate his fledgling empire to the classicism and power of ancient Greece and Rome.

41. Wardwell, *Repatriation of Artworks: An Old Problem Resurfaces*, ART IN AMERICA, September, 1980, at 13.

42. See BURNHAM, *supra* note 12, at 127; NEWSWEEK, *supra* note 21.

43. Reinhold, *supra* note 20, at 6.

44. *Id.*

45. Archaeologists are not in any way united in supporting agreements and legislation to generally restrict the international traffic in antiquities and art objects. See generally N.Y. Times, Aug. 21, 1982, at A22, col. 5 (Letter to the Editor from Edward Munves, Jr.); N.Y. Times, Oct. 19, 1982, at A30, col. 5 (Letter to the Editor from Bernard V. Bathmer).

46. See J. ACKERMAN, ART AND ARCHAEOLOGY 40 (1963) [hereinafter cited as ACKERMAN].

47. "Pre-Columbian" refers to those items of Native American cultures that date prior to 1500 A.D.

48. "Classical" works are those associated with either the Greek or Roman Empire.

49. Vitelli, *Implementing the UNESCO Convention: A Challenge for Archaeologists*, 45 AM. ANTIQUITY 558 (1980).

After a site has been exploited for its most saleable objects the archaeologist is left with the distasteful task known as "backdirt archaeology."<sup>50</sup> The ravaged site is cluttered with fragments of pottery, human bones, and objects the looters have deemed unsaleable.<sup>51</sup> The archaeologist's work then becomes more of a hopeless salvage operation than any kind of careful excavation. In such a situation the archaeological context and sequential relationships of the objects are lost forever.<sup>52</sup>

### *B. The Dealers and Collectors: Toward Preserving the Free Flow of Art*

On the side of the argument favoring the free flow of cultural property are the dealers in art and their clients who, for the most part are private collectors.<sup>53</sup> The arguments these dealers and private collectors make against strict controls center upon concepts of free trade and the free possession of personal property—two concepts held dear by the United States and other western nations.<sup>54</sup> Historically, this argument has a strong foundation. The United States has subsidized the free movement of art since 1909 when the Payne-Aldrich Tariff Act<sup>55</sup> dissolved the import duty on works of art. This Act is primarily responsible for the growth of the Metropolitan Museum of Art in New York and the National Gallery of Art, in Washington, D.C. into world-class museums such as they are today.<sup>56</sup> Without the free flow of cultural property the United States would have been unable to amass the rich collections that it now houses within its borders.

Also argued is the point that restrictions on the international market will be ineffective because of inherent difficulties in enforcement of this type of legislation. This argument stresses the idea that any strict prohibition on import and export will only fuel a black

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50. Pendergast, *supra* note 20.

51. *Id.*

52. *See id.* At an archaeological dig site soil is painstakingly removed in thin layers and any artifacts found are noted and their positions recorded. Through this process an idea and feel for the particular culture associated with that layer may be developed. If any object were found in an unexpected layer, it would mean that there was some contact between that civilization and another. *See generally* ACKERMAN, *supra* note 46.

53. *See To Implement the UNESCO Convention on Cultural Property: Hearings on H.R.3403 Before the Subcomm. on Trade of the Comm. on Ways and Means, 96th Cong., 1st Sess. 48-54 (1979)* (statement of Andre Emmerich, American Association of Dealers in Ancient, Oriental, and Primitive Art) [hereinafter cited as Subcommittee Hearings].

54. *See* Comment, *Current Practices and Problems in Combatting Illegality in the Art Market*, 12 SETON HALL L. REV. 506, 541 (1982).

55. Payne-Aldrich Tariff Act of 1909, ch. 6, 36 Stat. 11, 81-82 (1909) (cited in McAlee, *From the Boston Raphael to Peruvian Pots: Limitations on the Importation of Art Into The United States*, 85 DICK. L. REV. 565, at 567 (1981) [hereinafter cited as McAlee].

56. *See* McAlee, *supra* note 55, at 568.

market and fail to eradicate it.<sup>57</sup> Such a restricted market, it is argued, would cause more illicit digging than it would prevent because the objects would become more valuable as their scarcity increased.<sup>58</sup>

The whole idea of monetary value is emphasized by the dealers. They generally believe that associating a dollar value with a work will enhance that work's position in the eyes of society, insuring that it will be preserved.<sup>59</sup> They feel that an object is better off displayed in a museum or gallery in the United States or Europe than in a storeroom in its native country.<sup>60</sup>

### *C. Caught in the Middle: The Museums of Ancient and Ethnographic Art*

Caught in the middle of this debate are the museums. On the one hand they are dedicated to the preservation and display of objects of art. This is done through acquisitions, for the acquiring of objects is the life-blood of any museum. Yet museums are also educational institutions and must share the moral obligations and values society requires of such institutions. Because of this obligation, ethics in museum acquisitions and operations must be defined and maintained.<sup>61</sup> For example, the argument is made that artworks are better off in a Western museum. In industrialized nations preservation techniques are more advanced, the object is accessible to more scholars and the general population for study, and security and protection of the work are better.<sup>62</sup>

This demonstrates the museum's dilemma. How aggressive should a museum's acquisition policy be? To what extent should an object's provenance and importance to its country of origin be con-

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57. See generally Merryman, *International Art Law: From Cultural Nationalism to a Common Cultural Heritage*, 15 N.Y.U. J. INT'L L. & POL. 757 (1983) [hereinafter cited as *International Art Law*].

58. Schneider, *Plunder or Excavation? Observations and Suggestions on the Regulation of Ownership and Trade in the Evidence of Cultural Patrimony*, 9 SYRACUSE J. INT'L L. & COMM. 1, 6 (1982).

59. See *supra* note 53.

60. *Id.*

61. See generally ASSOCIATION OF ART MUSEUM DIRECTORS, *PROFESSIONAL PRACTICES IN ART MUSEUMS* (1981).

62. The most frequently cited example in support of this preservation argument involves the so-called "Elgin Marbles" case. The "Elgin Marbles" were 247 of the original 524 feet of friezes from the Parthenon in Athens that were taken from Greece in 1801 and 1803 by Lord Elgin for his country home in England. Eventually, all of these works ended up in the British Museum and are in excellent condition today. The Parthenon, however, has not fared as well, having been blown up in the early nineteenth century when used as a Turkish munitions dump, ravaged by tourists, and most recently attacked by that major threat to many of the world's cultural monuments — air pollution. See Daniel, *Editorial ANTIQUITY*, Mar., 1982, at 2; *Greece is Pressing Britain for Return of Antiquities*, N.Y. Times, Nov. 21, 1982, at A25, col. 1.

In addition, horror stories have been told of ancient monuments and pyramids being used for target practice and being ground up for roadbed because it was cheaper than importing gravel. Reinhold, *supra* note 20, at 5.



sidered? Should a museum decline to acquire a particularly important work because of questionable origin and risk the loss of that object to the scholarly community indefinitely? Clearly these are problems which are not easily resolved.

The preservation theory is also a strong counter argument to those who advocate the importance of national patrimony.<sup>63</sup> A corollary to the preservation idea is that certain works comprise the cultural heritage of all western civilization and therefore should be readily accessible to as many people of as many nations as possible.<sup>64</sup> Additionally, certain objects taken from one nation have become a part of the national patrimony of the nation that currently possesses them.<sup>65</sup> This national identification with a work of art emphasizes the concept that art is not only a medium for the communication of ideas, it also provides for the cross-fertilization of cultures. In short, objects of art prove valuable for all parties involved.<sup>66</sup>

### III. The UNESCO Convention on the Protection of Cultural Property: A Unified Response to the Pillage of Cultural Property

#### A. *The International Response*

Fifty-three nations are presently parties to the 1970 UNESCO Convention on the Protection of Cultural Property,<sup>67</sup> the most recent being the United States which became a signatory state on January 12, 1983.<sup>68</sup> Although there has been talk of France also implementing the Convention,<sup>69</sup> as of this writing no such action has been taken, nor is any expected in the near future.<sup>70</sup>

The Convention grew out of a number of international agreements, starting with a League of Nations resolution in 1922.<sup>71</sup> The purpose of most of these prior agreements was to protect cultural property during wartime. The 1970 Convention is therefore unique in that its purpose is to provide for the protection of objects in time

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63. See *supra* notes 34-52 and accompanying text.

64. See BATOR, *supra* note 22, at 27-32.

65. See *id.*

66. See *id.* at 29. As an example, the value of primitive art and African art in particular to modern painting is immeasurable. This can most easily be seen in Picasso's "Les Desmoiselles d'Avignon."

67. UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, No. 11806, 823 U.N.T.S. 231 (1972), reprinted in 10 INT'L LEGAL MAT. 289 (1971) [hereinafter cited as UNESCO Convention].

68. Cultural Property Act, *supra* note 5.

69. Bolla, *Keynote Address: The UNESCO Convention on Illicit Traffic of Art*, 15 N.Y.U. J. INT'L L. & POL. 765, 769 (1983).

70. Conversation with Geoffrey R. Scott, Professor of Law, Dickinson School of Law, Carlisle, Pennsylvania (Feb. 27, 1985).

71. Protit, *International Control of Illicit Movement of the Cultural Heritage: The 1970 UNESCO Convention and Some Possible Alternatives*, 10 SYRACUSE J. INT'L L. & COM. 333, 337 (1983).

of peace as well as in time of war. Moreover, contrary to prior agreements, the UNESCO Convention provides protection for objects other than those of monumental quality.<sup>72</sup>

The Convention defines three classifications of cultural property to be protected. The protected classes are: those items crucial to a nation's cultural past as designated by that particular nation,<sup>73</sup> those items placed on exhibit in museums and secular or religious public monuments,<sup>74</sup> and those items of a nation's cultural patrimony that are in immediate danger of pillage.<sup>75</sup>

The first distinction is quite broad and rather loosely constructed. It is broad in that it categorizes cultural property into ten different areas.<sup>76</sup> It is also a loose definition in that it allows a signatory state to unilaterally make distinctions concerning the relative importance of its cultural property.

The second classification of cultural property protects items that might obviously be subject to theft and be resold in another country.<sup>77</sup> Provisions in the third definition of cultural property that call for the protection of items in imminent danger of pillage are designed to deal with emergency situations such as the case with Mayan stelae in the early 1970's<sup>78</sup> and the protection of cultural landmarks endangered by war.<sup>79</sup>

The means of protection called for by the Convention consist of a system of import and export restrictions implemented by signatory states which requires a high degree of international cooperation.<sup>80</sup> The power to create such restrictions is left to the governments of each nation.<sup>81</sup> Signatories agree that authorization and export certificates are called for before any object may leave a particular nation.<sup>82</sup> On import restrictions, the parties to the Convention agree to respect and enforce the export regulations of other signatory na-

72. See UNESCO Convention, *supra* note 67, at art. 1.

73. *Id.*

74. *Id.* at art. 7(b)(i).

75. *Id.* at art. 1.

76. One such category, for example, includes items that may be relevant to a nation's historical or artistic heritage. *Id.* at art. 9.

77. *Id.* at art. 7.

78. *Id.* at art. 9. A stela (*pl.* stelae) is an upright stone slab or pillar bearing an inscription or design that serves as a monument, marker, or the like. RANDOM HOUSE COLLEGE DICTIONARY 1286 (rev. ed. 1982).

In the late 1960's and early 1970's stelae located in Mexico and Central America were attacked by profit seekers using chain saws and sledge hammers. These pillagers cut off the carved faces, broke them into more manageable pieces, and smuggled them out of Mexico, Guatemala, and other Central American countries for the purpose of selling them at a handsome profit. See *U.S. v. Hollingshead*, 495 F.2d 1154 (9th Cir. 1974); Reinhold, *supra* note 20, at 2.

79. See UNESCO Convention, *supra* note 67, at art. 11.

80. *Id.* at art. 2.

81. *Id.* at art. 6.

82. *Id.* at art. 5.

tions.<sup>83</sup> Provisions for educational and preservation programs are set forth in an effort to make the people of the signatory states more aware of the value of their cultural patrimony.<sup>84</sup>

Provisions in the Convention dealing with import restrictions and definitions of stolen objects are the provisions that cause the most difficulty for the wealthy art-consuming nations.<sup>85</sup> Nations in Europe, North America, and Japan are the principle markets for the objects that leave the culturally rich yet economically poor nations that are the moving forces in UNESCO. If an absolutely free market were to be permitted it would be dominated by wealth and the poor would be helpless to prevent or control this trading. Essentially this is the basis upon which the international antiquities market has operated until recently. The UNESCO Convention is an attempt at a concerted effort to try to control the situation.<sup>86</sup>

#### *B. United States Participation: The UNESCO Convention and its Implementing Legislation*

On January 12, 1983 the United States implemented the 1970 UNESCO Convention and became a fully participatory state party.<sup>87</sup> UNESCO was established in 1945 as the United Nations Educational, Scientific, and Cultural Organization. In the last few years, however, it has moved toward the left, becoming a forum for non-aligned and Eastern Bloc nations.<sup>88</sup> The targets for most of the ideological attacks waged during UNESCO proceedings are the United States and Israel.<sup>89</sup> Because of these attacks and the fact that it believed UNESCO was mismanaged,<sup>90</sup> the United States terminated its membership on December 31, 1984 and stopped making its large contributions to the payment of UNESCO's expenses.<sup>91</sup>

The fact that the United States is no longer a UNESCO member does not, however, mean that there has been any change in

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83. *Id.*

84. *Id.* at art. 10.

85. *See infra* text accompanying notes 194-237.

86. Of the 53 nations who have become parties to the UNESCO Convention, only the United States, Canada, and possibly Italy can be considered "art-consuming" nations.

87. Convention on Cultural Property Law, title III 19 U.S.C. § 2601-2613 (1982). *See* Cultural Property Act, *supra* note 5.

88. *See* Rabinowitz, *UNESCO Wordfest: The West Loses, Again*, Wall St. J., August 24, 1982, at 28, col. 1; *Culture Vultures*, Wall St. J., August 9, 1982, at 12, col. 1.

89. *See supra* note 88. Of the 200 resolutions passed at the 1982 Mexico meeting on cultural property, few, if any, had anything to do with cultural property and its protection. Most of these resolutions condemned or attempted to condemn acts by the United States or Israel. *See id.*

90. *See* Washington Post, January 1, 1985, at 1, col. 5; N.Y. Times, December 20, 1984, at A1, col. 6.

91. *Id.* 80% of UNESCO's budget was spent at UNESCO's Paris office so only 20% was left to be spent on actual programs. The United States had been paying 25% of UNESCO's \$187 million budget.

United States policy concerning the Cultural Property law signed by President Reagan.<sup>92</sup> The American withdrawal certainly weakens the force of UNESCO as a world organization,<sup>93</sup> but it does not have any effect on the Cultural Property Act. The legislation is still in effect and will remain on the books indefinitely.

The Cultural Property Implementation Act of the United States<sup>94</sup> that was signed into law was not, however, the full text of the UNESCO Convention. Only sections (7) and (9) of the Convention text were implemented and with some modifications. These are the sections that deal with stolen property and import restrictions in crisis situations.<sup>95</sup> The decision to accept the Convention only as modified was a compromise designed to balance the interests of the various groups that lobbied strongly for and against regulation.<sup>96</sup> The fact that it took ten years from the time of approval by the Senate<sup>97</sup> in 1972 to the time the Act was finally implemented in 1983, is testament to the fact that the battle was hard fought.

Bills to implement the Convention were introduced in the 93rd Congress in 1973 and in each successive session through the 97th Congress.<sup>98</sup> The major criticism of the bills which failed, was that they went too far beyond the original scope of the UNESCO Convention and called for United States action even in the absence of concerted international action.<sup>99</sup> The final bill as enacted does provide for unilateral action, but only in emergency situations and with a presidential directive based on appropriate procedures.<sup>100</sup>

The Act in its final form was a rider on an omnibus tariff bill passed at the very end of the 97th Congress. No hearings were held

92. See *supra* note 87.

93. Hoving, *Politics, Art, and Gabble*, 212 CONNOISSEUR 14 (1982).

94. See *supra* parts III A, B, and C.

95. The Cultural Property Act, *supra* note 5, has provisions that call for the Cultural Property Advisory Committee to advise the President on emergency situation requests by signatory nations, e.g., § 306. The Act also requires any signatory nation to have taken steps on its own to protect its cultural heritage before any request for such restrictions will be honored.

96. See text of sections II, IIA, B and C.

97. For Senate approval, see 118 CONG. REC. 27,924-25 (1972).

98. Past bills include: H.R. 3403, 96th Cong., 1st Sess. (1979); H.R. 5643, 95th Cong., 1st Sess. (1977); H.R. 14171, 94th Cong., 2d Sess. (1976); and S. 2677, 93rd Cong., 1st Sess. (1973).

99. See materials cited *supra* note 58.

100. Cultural Property Act, *supra* note 5, at § 305. These "appropriate measures" are spelled out in §§304-07 of the Act. To be considered for import restrictions, an archaeological object must be of cultural significance, at least 250 years old and normally discovered as a result of scientific excavation, accidental digging or exploration on land or under water. An ethnographic object must be the product of a tribal or nonindustrial society and important to the cultural heritage of a people.

The United States received its first request for protection of objects under this legislation on October 2, 1985. The request came from Canada and involved Canadian Indian artifacts. Canada's written request was accompanied by documentation on the extent of the need for assistance as is required by the Act. *Canada Files First Request to U.S. for Protection of Endangered Artifacts*, AVISO, Nov. 1985, at 1.

because they would have delayed a vote until after the close of the session, effectively ruining any chance of passage.<sup>101</sup>

To fully understand the reasoning behind the Cultural Property Act it is necessary to examine the legislative history of all previous bills on the subject.<sup>102</sup> In the hearings on each of the unsuccessful attempts at passage the direction of the testimony was identical and the people or groups who testified were generally the same. The dealers in ancient and ethnographic art testified in opposition to the bill; the archaeological community supported it. Throughout these hearings the Administration urged passage.<sup>103</sup>

During each of the hearings testimony against the earlier bills centered mainly upon the fact that no art-importing nation other than Canada<sup>104</sup> had implemented the Convention. The bill was thought to be a hopeless act of self-denial by the United States. It was believed that any objects originally destined for the United States would merely be rerouted to other art-importing nations.<sup>105</sup>

Proposed revisions also included a better defined and simpler system of repose for objects currently in this country,<sup>106</sup> and a provision for the reimbursement of a good faith purchaser who stood to forfeit an illicitly obtained object as would normally be provided for in a business purchase context.<sup>107</sup> These particular provisions were not contained in the Cultural Property Act as finally enacted and questions concerning these issues remain unresolved. Lobbying efforts for new legislation that would fully satisfy these and other interests are still ongoing.<sup>108</sup>

#### IV. Other Methods of Protecting Cultural Heritage: Bilateral Agreements, Civil Suits, Import and Export Regulations, and Non-Governmental Attempts at Control

##### A. *Bilateral Agreements*

Some commentators believe that because bilateral agreements can be tailored to a specific problem, they are the most effective means of controlling the international art market.<sup>109</sup> The needs of each unique party may be better served by such an agreement. How-

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101. See *Miscellaneous Tariff Bills, 1982: Hearings on S.1723 Before the Subcomm. on Int'l Trade of the Senate Comm. on Finance, 97th Cong., 2d Sess.* 431-474, 549-569 (1982).

102. See materials cited *supra* note 88.

103. See *generally id.*

104. Possibly Italy should be included.

105. See *generally* Subcommittee Hearings, *supra* note 53, at 38-54.

106. See *id.* at 87-91 (Statements of Metropolitan Museum of Art).

107. *Id.* at 86; see also U.C.C. § 2-403 (1977).

108. See *infra* text accompanying notes 231-37.

109. Nafziger, *The New International Legal Framework for the Return, Restitution or Forfeiture of Cultural Property*, 15 N.Y.U. J. INT'L L. & POL. 789, 812 (1983) [hereinafter cited as Nafziger].

ever, critics argue that such agreements are used, at least in the United States, more as bargaining chips for agreements on issues the State Department sees as more substantive and crucial to the interests of the United States than for the protection of the cultural patrimony of poorer nations.<sup>110</sup>

These bilateral agreements vary in form. The agreement may be in the form of a treaty, such as the one the United States signed with Mexico in 1970.<sup>111</sup> An executive agreement is another type of arrangement used to deal with the protection of cultural property. The best example of an executive agreement entered into for this purpose is that signed by the United States and Peru in 1981.<sup>112</sup> Finally, a much more idealistic form of bilateral agreement is exemplified by the agreement between Zaire and Belgium that has been in effect for approximately fifteen years.<sup>113</sup> A developing nation like Zaire may gain much from such an agreement although this is not always the case.<sup>114</sup>

The treaty between the United States and Mexico<sup>115</sup> provides for the protection of objects of "outstanding importance to the national patrimony" of either nation by providing for the return of objects that were taken from one of the two nations to the other by inappropriate means.<sup>116</sup> Under the treaty each nation pledges to promote educational and preservation activities concerning cultural property<sup>117</sup> and take affirmative legal action when the situation warrants it.<sup>118</sup> This could involve either a civil suit in the name of Mexico in a United States District Court or the use of diplomatic pressure for the return of a particular object or group of objects.<sup>119</sup>

Similarly the United States' executive agreement with Peru<sup>120</sup> provides for the return of cultural property. The agreement does not, however, have any substantive effect on the existing laws of either

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110. The common complaint in disputes with South and Central American nations is that a cultural property treaty is merely a bargaining chip in the war against drugs. It is claimed that the United States agrees to sign cultural treaties only if the other signatory responds by signing a drug enforcement treaty. Subcommittee Hearings, *supra* note 53, at 50.

111. Treaty Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, July 17, 1970, United States-Mexico, 22 U.S.T. 494, T.I.A.S. No. 7088 [hereinafter cited as U.S.-Mexico Treaty].

112. Agreement Respecting the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, Sept. 15, 1981, United States-Peru, T.I.A.S. No. 10136 [hereinafter cited as Executive Agreement].

113. Nofziger, *supra* note 109, at 810; Wardell, *Repatriation of Artworks: An Old Problem Resurfaces*, ART IN AMERICA, Sept., 1980, at 17.

114. See *infra* note 127 and accompanying text.

115. See *supra* note 101.

116. U.S.-Mexico Treaty, *supra* note 111, at art. I.

117. *Id.* at art. II.

118. *Id.* at art. III.

119. *Id.*

120. Executive Agreement, *supra* note 112.

country.<sup>121</sup> This agreement is an executive agreement and not a treaty. No legislative action implementing the agreement has been taken as there was with the Mexican Treaty.<sup>122</sup> Nevertheless, the agreement parallels the Treaty and requires that each country provide the legal means necessary for the recovery of cultural property that has been removed from the jurisdiction of either one of the signatories.<sup>123</sup> Most significantly, the agreement does *not* authorize legal action by the United States on behalf of Peru to enforce the agreement.<sup>124</sup>

The best way to protect a developing nation's cultural heritage and to repatriate items removed by a former colonial power is exemplified by the agreement between Belgium and Zaire.<sup>125</sup> Since 1970, these two nations have been working together to return objects taken from Zaire during Belgium's tenure as a colonial power.<sup>126</sup> Not only does Zaire receive items from Belgian museums that are essential to its cultural heritage, but Belgium also sends technicians to help establish and maintain a Zairean museological corps. Although this solution may be criticized as too idealistic,<sup>127</sup> it goes to the source of the problem and attempts to correct it by education as well as proper administration and control over cultural resources.<sup>128</sup>

#### *B. Civil Suits for the Return of Cultural Property*<sup>129</sup>

When a major piece of cultural property is discovered in a foreign nation, the nation deprived of that work may choose to bring a civil suit for its return in the nation where the work is currently located.<sup>130</sup> Success, however, may be much more difficult to obtain than one might expect. The nation filing the suit must submit itself

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121. Truslow, *Peru's Recovery of Cultural Patrimony*, 15 N.Y.U. J. INT'L L. & POL. 839, 846 (1983) [hereinafter cited as Truslow].

122. Senate ratification of the U.S.-Mexico Treaty occurred on February 10, 1971.

123. Executive Agreement, *supra* note 112, at art. II(2); Truslow, *supra* note 121, at 846, n.35.

124. Executive Agreement, *supra* note 112. This is explained by the distinction between an executive agreement and a treaty.

125. *See supra* note 113.

126. Repatriation of items taken during periods of colonialism has been viewed as the most complex and delicate issue that museums will face in the next few years. WEIL, *BEAUTY AND THE BEASTS* 106 (1983).

127. It is rumored that returned items have been spotted for sale on the open market. Daniel, *Editorial*, *ANTIQUITY*, Mar. 1982, at 2.

128. *Id.* It has been pointed out that a policy of allowing some of the works of a former colony to be repatriated would appease the recently independent nation and allow the former colonizer to keep some of the objections which it had.

129. Since litigation involving cultural property has many aspects and complications, this section will deal with only those problems relating to the comparatively simple interpleader action to quiet title on a disputed object. *See infra* notes 197-98 and accompanying text for a discussion of the more complicated litigation issues such as the definition of "stolen" in a cultural property context relating to export restrictions.

130. This procedure is not limited to actions initiated by nations; an individual may also bring such a suit. *See Winkworth v. Christie, Manson and Woods Ltd.* [1980] A11 E.R. 1121.

to an unfamiliar judicial system, go through the expense of securing foreign counsel, and proceed with what may very well be protracted and costly litigation.

The problems of litigation unique to cases involving works of art must also be considered. Because most of these objects travel easily and frequently across international borders and may very well be hundreds of years old, title is an obvious problem. Jurisdictional questions, as well as conflict and choice of law questions, also cause difficulties for litigants in these suits.<sup>131</sup> The most troublesome problem associated with litigation involving title to works of art, however, is the statute of limitations—when it begins to run and when it is tolled.

Notwithstanding these many difficulties, countries subject themselves to the problems associated with civil suits and the recovery of cultural property. Their purpose is to show strength and make the point that their particular nation will not stand for the pillage of its cultural past. A civil suit, in the form of an interpleader action, is the most common type of action brought by these nations in an attempt to settle title disputes in common law countries such as the United States.

A recent case which illustrates many of these problems and which has evoked extensive commentary is *Kunstsammlungen zu Weimar v. Elicofon*.<sup>132</sup> Parties to this case included an East German art museum (KZW), a Brooklyn lawyer, and the Grand-Duchess of Saxony-Weimar. Each party had a claim to two Dürer paintings and each claim was based on a different body of law.<sup>133</sup> The United

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131. See generally *Jurisdictional Issues in the International Movement of Cultural Property: 20th Annual Regional Meeting of the American Society of International Law* 10 SYRACUSE J. INT'L L. & COM. 279 (1983).

132. 678 F.2d 1150 (2d Cir. 1982) [hereinafter cited as *KZW v. Elicofon*]. See Note, *International Law in Domestic Forums: The State of the Art*, 9 BROOKLYN J. INT'L L. 179 (1983); Note, *Property Law: International Stolen Art*, 23 HARV. INT'L L.J. 466 (1983); Note, *Kunstammlungen zu Weimar v. Elicofon: Theft of Priceless Art Treasures Gives Rise to Protracted International Legal Battle*, 19 TEXAS INT'L L.J. 189 (1984). For discussion and explanation, see Maitland, *From Schwarzburg to Flatbush*, ARTNEWS, Sept. 1981, at 78.

The *KZW* case involved two works painted in 1499 by Northern Renaissance painter Albrecht Dürer. These works were rare for two reasons; first, because there are few surviving Dürers, and second, because they were oil on wood panel. Although challenged by the Grand Duchess, the works passed from the state collection of Saxony-Weimar to Germany by an act of legislation in 1918. They were exhibited in Germany until 1943 when they were hidden in a castle to protect them from allied bombings. When the castle fell to the Allies in 1945, the paintings disappeared. Without knowing the value of the two works a Brooklyn lawyer by the name of Elicofon purchased them from a former G.I. in 1946 for \$450. Not until 1966 did Elicofon find out that these paintings were worth \$6 million. The action to recover the paintings was originally filed in 1969 in the United States by the Federal Republic of Germany (West Germany), then the only German government recognized by the United States. In 1974 the United States recognized the German Democratic Republic (East Germany) and the East Germany Museum *Kunstsammlungen zu Weimar* (KZW) was allowed to proceed with the suit.

133. Interestingly, *KZW's* claim was based on the law of the State of New York which did not allow purchasers to receive good title from a thief. Elicofon's claim was based on German law concerning the passing of good title from the custodian of the painting in Ger-



States District Court in New York used New York State law to decide the case in favor of the museum.<sup>134</sup>

*KZW v. Elicofon* also involved the issue of the tolling of the statute of limitations in an art litigation context. Elicofon claimed that he should be granted title because of twenty years of uninterrupted good faith possession starting with his good faith purchase in 1946.<sup>135</sup> The court ruled against this, however, and said that the statute was tolled until the demand was made for the return of the two paintings in 1966.<sup>136</sup> This concept is generally referred to as the "demand-refusal" rule. *KZW v. Elicofon* illustrates the complicated nature of any legal proceeding involving the protection and return of cultural property stolen from one country and illicitly transported to another.<sup>137</sup>

*O'Keeffe v. Snyder*<sup>138</sup> is another case that brings out problems that may be encountered when attempting to quiet title to a work of art. The question in this case concerned the tolling of the statute of limitations in a situation involving an adversely possessed chattel. The court's decision rested on what actions constituted open and notorious possession of a painting by an innocent purchaser. The New Jersey court ruled that display in the private home of the purchaser was not enough; the possession had to be more public. In other words, the painting had to be exhibited in a gallery. Although this ruling has been criticized,<sup>139</sup> the court justified its decision on the reasoning O'Keeffe could not have possibly known where the works were and who possessed them without a display more public than in a private living room.<sup>140</sup>

Particularly important to the decision in *O'Keeffe* is the question of the statute of limitations, how long it is tolled and when it begins to run in an adverse possession case involving a chattel. This question was the major issue on appeal in the New Jersey Superior and Supreme Courts.<sup>141</sup> The majority in the Superior Court placed the

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many, to the G.I., then to Elicofon. The Grand-Duchess' claim was based on nineteenth century German dynastic law that distinguished sovereign property from personal property. See *supra* note 132.

134. Federal Republic of Germany v. Elicofon, 536 F.Supp. 813 (E.D.N.Y. 1978).

135. 678 F.2d 1150, at 1160.

136. *Id.* at 1160-62.

137. Admittedly, *KZW v. Elicofon* does not involve the international movement of antiquities, but it does demonstrate some problems that are encountered in suits involving archaeological and ethnographic material — the principle subject matter dealt with in this comment.

138. 83 N.J. 478, 416 A.2d 862 (1980). This case involved noted American twentieth century abstract artist Georgia O'Keeffe and the theft in 1946 of three of her paintings from a gallery owned by her husband, photographer Alfred Stieglitz.

139. See Comment, *The Recovery of Stolen Art: Of Paintings, Statues, and Statutes of Limitation*. 27 U.C.L.A. L. REV. 1122 (1980).

140. 170 N.J. Super. 75, 84, 405 A.2d 840, 844 (1979).

141. See *id.*; see also *supra* note 138.

date on which the statute began to run as the date on which all elements of adverse possession were met.<sup>142</sup> Thus the statute was tolled until 1976 when O'Keeffe located the works in a New York gallery, thirty years after they were originally stolen.<sup>143</sup> Plaintiff could not have filed suit to reclaim the paintings any earlier because she had no idea who was holding them.

The running of the statute is now handled in much the same manner as statute of limitations questions in tort suits. The statute will be tolled until the particular offense is discovered by the injured party *who them must use due diligence in pursuing the claim*.<sup>144</sup> This rule shifts the emphasis from the conduct of the possessor to the conduct of the original owner.<sup>145</sup> It was because of this rule that the Superior Court decision in favor of O'Keeffe was reversed and remanded by the New Jersey Supreme Court. The question of when the theft occurred and whether O'Keeffe exercised due diligence in pursuing her claim still needed to be resolved.<sup>146</sup>

### C. *Export Restrictions*

With the United States the only major exception, every nation in the world protects its cultural patrimony through export restrictions.<sup>147</sup> These nations value their cultural heritage very highly and wish to make every effort to protect it.<sup>148</sup> Restrictions may be as loose as they are in Switzerland, West Germany, or The Netherlands, or they may be extremely restrictive as they are in Greece, Mexico, and Peru. The latter nations have nationalized certain categories of cultural property so that removal of any object from the country, even after a legitimate purchase, is difficult and requires export certificates and other clearances, if export is permitted at all.<sup>149</sup>

Generally the objects and works most heavily protected by export legislation are Old Masters and pre-Columbian antiquities.<sup>150</sup> Objects that are the easiest to export are twentieth century works by

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142. The elements of adverse possession include possession that is continuous, adverse, notorious, open, and exclusive.

143. 170 N.J. Super. at 89, 405 A.2d at 847.

144. 83 N.J. at 498, 416 A.2d at 872.

145. *Id.*

146. 83 N.J. at 493-494, 505, 416 A.2d at 870, 877.

147. In addition to the United States, the only nations that do not have export restrictions on art objects are Denmark, Uganda, Singapore, and Togo. BATOR, *supra* note 22, at 38 n.71.

148. See *supra* text accompanying notes 32-37.

149. See generally B. BURNHAM, HANDBOOK OF NATIONAL LEGISLATION (1974); BATOR, *supra* note 22, at 38 n.72.

150. Grant, *Miseries and Masterpieces*, CONNOISSEUR, Sept. 1983, at 25 [hereinafter cited as Grant].

living artists.<sup>151</sup> In examining such legislation, interests of nations rich in cultural heritage must be considered. Most nations are interested in protecting their cultural heritage for nationalistic reasons. At the same time, however, they try to use works of art as good will ambassadors to foster international relations.<sup>152</sup> Protective legislation attempts to balance these interests so that those works most essential to a nation's heritage are those most stringently protected while those that a nation would like to make most visible have fewer restrictions placed on their international movement.

A good example of a restrictive export law on cultural property that works, yet is not oppressive, is that of Great Britain.<sup>153</sup> The British act provides for the protection of cultural property through the requirement of an export license for all works which are valued over £8000 or are over fifty years old.<sup>154</sup> If a work to be exported falls within these limits and fits the additional requirements concerning its importance to British heritage and education,<sup>155</sup> the license will be withheld to give the nation itself the opportunity to buy and retain the work by matching the purchase price. Funds for this are provided by the National Heritage Memorial Fund, the Henry Moore Foundation, and other private concerns acting in the British national interest.<sup>156</sup> Works purchased in this manner are generally retained by British museums.<sup>157</sup>

The retention of cultural property through these purchase provisions does not block all exports. If the price paid is not matched, the license will be granted and the work will be permitted to leave the country.<sup>158</sup> This occurs in over thirty percent of the cases where the

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151. *Id.*

152. *See supra* notes 34-44 and accompanying text.

153. Stat. Inst. 1981 No. 1641 (Great Britain).

154. *Id.*

155. *Id.*

156. *See generally* DUFFY, ART LAW: REPRESENTING ARTISTS, DEALERS, AND COLLECTORS 359-360; Bennett and Brand, *Conservation, Control and Heritage — Public Law and Portable Antiquities*, 12 *ANGLO-AMERICAN L.R.* 141 (1983) [hereinafter cited as Bennett and Brand].

157. Most recently the Fund has provided money for the purchase of a painting by Ducio, and drawings by Rubens, Raphael, and Rembrandt originally purchased by the J. Paul Getty Museum in Malibu, California. Although these works were not produced by British artists, they have been in British hands for generations and have become a part of the cultural heritage of Great Britain. *Britannia's Export Law Rules*, 72 *ART IN AMERICA*, Oct. 1984, at 248; Thomas, *Museum is Battling to Keep a Painting in Britain*, *N.Y. Times*, July 28, 1984, at 11, col. 1. This fund system is considered a success by many authorities and was the model for a similar statute in Canada. Cultural Property Export and Import Act, ch. 50, 1974-75-76 *Con. Stat.* 1155. *See Clark, The Cultural Property Export and Import Act of Canada: Legislation to Encourage National Cooperation*, 15 *N.Y.U. J. INT'L L. & POL.* 771 (1983) [hereinafter cited as Clark]. *See also* Bennett and Brand, *supra* note 156, at 169. *Contra supra* *N.Y. Times*, July 28, 1984, at 11, col. 1.

158. The practice in drafting contracts that involve works subject to a statute with a retention provision such as Britain's is to make the transaction contingent upon the granting of an export license.

license is not immediately granted.<sup>159</sup>

The success of the British statute is tied to the fact that it protects the works most essential to British national heritage while at the same time allowing for some export. Export restrictions similar to those in the British statute predominate in the major nations of Europe, although they may be much more restrictive.<sup>160</sup>

Statutes far more restrictive than that of Great Britain and widely criticized by authorities in the United States have been enacted in nations such as Mexico and Peru.<sup>161</sup> These countries have nationalized their cultural property and claim that any export constitutes a violation of national law.<sup>162</sup> International legal authorities consider these laws complicated and ambiguous, causing problems not only for the governments that enacted them but also for those nations in which the importation of art is "big business." Nations such as the United States have particular interest in the effect of these laws because the objects to be protected generally end up in museums and private collections within their borders, making the possessors violators of foreign law.

The basic argument asserted against these strict export laws is that they contradict the traditional views on personal property held by the United States and other art-importing nations.<sup>163</sup> With these statutes ownership is based on acts of national legislation and not on the common law concepts of personal property at the foundations of Anglo-American law. This conflict is at the heart of all the problems which have recently developed in relation to import and export restrictions on cultural property around the world, particularly in the area of pre-Columbian antiquities.<sup>164</sup>

Although the intent of countries which nationalize cultural property is to protect that property, the effect of strict export laws may very well be further pillage of objects from illicit dig sites and theft from understaffed and underfunded museums. Critics point out that a complete bar to export creates and perpetuates the black market in these objects and that protection is therefore not enhanced.<sup>165</sup>

A respected authority in this area, John Henry Merryman of Stanford University, has noted that although it is within the power of any nation to enact whatever protective legislation it wants no

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159. Bennett and Brand, *supra* note 156, at 165.

160. Grant, *supra* note 150, at 25.

161. See also *New Antiquities Law*, 3 *STOLEN ART ALERT* 2 (1982) (discussing the recent nationalization by Costa Rica of cultural property).

162. See generally BATOR, *supra* note 22.

163. See generally *International Art Law*, *supra* note 57; Merryman, *Trading in Art: Cultural Nationalism versus Internationalism*, 18 *STAN. LAWYER*, Spring, 1984, at 24.

164. See *infra* note 217 and accompanying text.

165. See *International Art Law*, *supra* note 57.

matter how unreasonable,<sup>166</sup> there are five particular problems that will be caused by oppressively restrictive export regulations.<sup>167</sup> The first of these problems is that any excavation or export of cultural property will be carried out covertly, callously, and anonymously. Secondly, the income from the trade in these objects will ultimately go to the wrong people. Merryman notes that a proper representation of various national cultures would not be made available to world museums, corruption and frustration would permeate the ranks of national police and customs officials, scholars, and museum personnel, and the most valuable works would leave their countries of origin illicitly.<sup>168</sup>

#### D. Import Restrictions

For any system of export restrictions to be effective, an international system of import regulations is necessary. Potential importing nations must recognize and aid in enforcing restrictions imposed by other countries. By restricting imports, a potential importing nation emphasizes its own policy against accepting the illegal export of goods from a sister nation. If potential importing nations fail to respect other nations' restrictions, all enforcement of export regulations is left with the country of origin and the results may prove disastrous.<sup>169</sup>

Some of the problems which may arise when one nation refuses to respect the export restrictions of another are exemplified in the case of *Attorney General of New Zealand v. Ortiz*.<sup>170</sup> In this British case, the government of New Zealand attempted to enforce a violation of a New Zealand statute which claimed certain classes of cultural property essential to the country's history.<sup>171</sup> The statute was implemented to insure the protection of items created by the Maori, an aboriginal tribe native to New Zealand.<sup>172</sup>

The statute in question required permission from the government before any item of New Zealand's cultural heritage could be removed, and if a violation were to occur, the item was to be for-

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166. *Id.* at 758.

167. *Id.* at 759.

168. *Id.*

169. See *supra* text of section III C.

170. 2 W.L.R. 10 (Q.B. 1982), *rev'd* 3 All E.R. 432 (C.A. 1982), *aff'd* 2 All E.R. 95 (H.L. 1983).

171. New Zealand Historic Articles Act, 1962, ch. 37, 1962 N.Z. stat. (This has been replaced by the Antiquities Act, 1975, ch. 41, 1975 N.Z. stat.) [hereinafter cited as Articles Act].

172. The facts of the case involve the illegal export from New Zealand of a series of large wood-carved panels from the Maori civilization. These panels had been buried in a swamp for some time. They were purchased by a London collector, Ortiz, and offered for resale at a London auction house. The government of New Zealand attempted to enjoin the sale and filed to have the objects returned.

feited to the Crown of New Zealand.<sup>173</sup> The British trial court ruled in favor of New Zealand on the ground that the item was automatically forfeited upon its exit from New Zealand because title was vested in the Crown while the object was still in New Zealand.<sup>174</sup> On appeal the decision was reversed. The appellate court found that there were three types of foreign laws that a British court could not enforce. The first two were revenue and penal laws. As noted at the trial level, British courts will not collect taxes or inflict punishments prescribed under a foreign jurisdiction.<sup>175</sup> The trial court's decision, however, was reversed on the ground that the 1962 New Zealand Act was a foreign public law which is the third category of law unenforceable in an English court.<sup>176</sup> Despite New Zealand's claim that its law provided for the automatic confiscation of illegally exported items and was therefore not a public law, the British Court of Appeal viewed this as a sovereign act by a foreign state which could not be enforced under the English judicial system.<sup>177</sup> New Zealand was not permitted to exercise any sovereign authority beyond its own territorial limits.<sup>178</sup>

A further appeal went to the House of Lords where the issue became one of statutory interpretation.<sup>179</sup> Title to the carvings had not vested in the government of New Zealand before they were taken from the country the House of Lords declared, so there was no property right that could be enforced in England.<sup>180</sup> Although the basis for the decision in the House of Lords differed from that of the Court of Appeal, the result was affirmed.<sup>181</sup>

The decision in the *Ortiz* case clearly demonstrates a need for international cooperation if there is to be effective control over the illicit trade in cultural property. This cooperation is best achieved through multilateral agreements.<sup>182</sup> It is in this spirit that the UNESCO Convention was drafted and one commentator has suggested that if New Zealand and Great Britain had also been parties to the Convention at the time *Ortiz* was decided, the case would have had a different result. This is because there would have been a duty on the part of Britain to recognize the problem and observe the law of New Zealand.<sup>183</sup> Although only fifty-three nations have be-

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173. See Articles Act, *supra* note 171, at § 5.

174. 2 W.L.R. at 10.

175. 3 All E.R. at 457.

176. Editorial, *The Maori Artifact Case in the Court of Appeal*, J. Bus. L. 265 (1982).

177. 3 All E.R. at 459.

178. *Id.* at 456. The concurring opinions cited different reasons for reaching the same conclusion. The problem was not dealt with from the perspective of foreign public laws.

179. 2 All E.R. 93 (H.L. 1983).

180. *Id.* at 98-100.

181. *Id.*

182. See *supra* note 109 and accompanying text.

183. Nafziger, *supra* note 109, at 812.

come signatories, the UNESCO Convention brought the problem of the illicit flow of cultural property to the forefront of world politics and in addition became the emerging standard observed in the world legal community.<sup>184</sup>

Canada is one of the few art-importing nations which have signed and implemented the UNESCO Convention.<sup>185</sup> Under the Canadian legislation, which is modeled after the British example,<sup>186</sup> a restriction on exports is coupled with UNESCO inspired import restrictions. At the request of any other signatory nation, the Attorney General of Canada may file a suit in a Canadian court for the return of an illicitly obtained object. The Act also contains a provision that any nation which makes such a claim and is successful must compensate any innocent purchaser who might be damaged financially by an unfavorable decision.

A recent criminal prosecution under this act, the *Zango-Heller* case, received considerable attention in the American art community.<sup>187</sup> The case involved a claim by Nigeria over an object that had been brought into Canada without the proper Nigerian export certificate. Nigeria requested that the work be returned after it was detained by Canadian officials. As a result, criminal charges were filed.

The controversy in the *Zango-Heller* trial centered around the fact that the object in question, although claimed by Nigeria as a piece of cultural property, had been part of a private collection in Paris from the 1950's until the late 1970's and had been purchased by a New York dealer who attempted to sell the work to a Canadian concern. Nigeria, as a signatory to the UNESCO Convention, made a claim pursuant to the Canadian legislation and had the Canadian government seize the work upon its arrival from the United States and arrest its importers. The defendants, however, successfully claimed that for the UNESCO implementing legislation to be utilized by the prosecution, the work would have had to have left Nigeria after 1978, the effective date of Canada's legislation, and this was not the case. The charges were dismissed at the trial level and this decision was affirmed by the Court of Appeals. A civil suit for the rights to the sculpture was subsequently filed by the dealer and is still pending.<sup>188</sup>

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184. Nafziger, *Comments on the Relevance of Law and Culture to Cultural Property Law*, 10 SYRACUSE J. INT'L L. & COM. 323, at 328 (1983).

185. Canada became a full party to the UNESCO Convention on March 28, 1978.

186. Clark, *supra* note 157, at 786.

187. See Walker, *Appeal Rejected in Zango-Heller Case*, ARTNEWS, Jan. 1985, at 25; *A Hard Landing for Art Dealers*, N.Y. Times, January 3, 1982, at E8, col. 1.

188. New York dealers Issaka Zango and Ben Heller were arrested in Calgary in December, 1981 with a Nigerian terracotta Zango had purchased in 1979. The sculpture was to be sold to Mobil Oil of Canada, Ltd. for \$650,000 (American). The charges under § 37 of the Canadian Cultural Property Export and Import Act, for not having a valid Nigerian export

The decision in the *Zango-Heller* case is in direct opposition to *Ortiz*. While *Ortiz* brought out the difficulties that can result from a lack of international cooperation concerning export and import laws, the *Zango-Heller* case highlighted the problems that may arise when there is over-zealous cooperation among countries that trade in art. In *Ortiz* the British judiciary would not allow the government of New Zealand to institute a suit based on a seemingly legitimate claim under a New Zealand statute. In the *Zango-Heller* case the Canadian government acted at the request of Nigeria to institute a criminal prosecution against innocent purchasers of an object of ethnographic art. Clearly there exists a problem with each of these situations and a balance must be struck between the two approaches.

### E. *The Non-Governmental Approach*

Traditionally, one of the biggest buyers of illicitly obtained antiquities and other forms of cultural property has been the museum community. Recently, however, a strong ethical stance has been taken against this practice by professional organizations in the museum field. Throughout the 1970's writers called for responsibility in the museum community and museum officials took notice.<sup>189</sup> Professional associations in the museum field devised codes of ethics for museums and various museums individually did the same.<sup>190</sup>

In one of these policy statements the American Association of Museums (AAM), which is the largest museum organization in the United States, is to the point on the subject of illicitly obtained art objects. The AAM's *Museum Ethics* states:

Illicit trade in objects encourages the destruction of sites, the violation of national exportation laws, and the contravention of the spirit of national patrimony. Museums must acknowledge the relationships between the marketplace and the initial and often destructive taking of an object for the commercial market. They must not support that illicit market. Each museum must develop a method for considering objects of this status for acquisition that will allow it to acquire or accept an object only when it can determine with reasonable certainty that it has not been immediately derived from this illicit trade and that its acquisition does not contribute to the continuation of that trade.<sup>191</sup>

This is a direct and powerful statement. Similar statements have

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certificate, were dismissed by the Court of Appeals with instructions that the defendants were not to be retried. Zango has filed a subsequent civil suit seeking return of the object. The legal theory in this civil suit parallels that of Zango's criminal defense. See also *supra* note 187.

189. Particularly, MEYER, *supra* note 30.

190. The first, and most famous of these codes was that of the University of Pennsylvania, issued in 1970 (*reprinted in* MEYER, *supra* note 30, at Appendix).

191. AMERICAN ASSOCIATION OF MUSEUMS, MUSEUM ETHICS 12 (1978).



been made by other professional associations in the academic and professional museum field.<sup>192</sup>

Although such statements have been referred to as the "pop-art" of international law,<sup>193</sup> they should not be overlooked because they are definitive statements which eliminate a large potential market for illicitly obtained objects. These statements have a great deal of influence in their respective disciplines. Any non-governmental organization's statement is much more powerful in the art world than any export regulation or emerging custom of international law. Adherence to these ethical standards is necessary for accreditation and accreditation is usually a prerequisite for governmental funding. Museums thus have a stake in maintaining a strong ethical position.

#### V. Present Attempts by the United States to Control the Illicit Traffic in Cultural Property

The Cultural Property Act, signed by the President in 1983, was not the first piece of legislation restricting the illicit movement of cultural property into the United States. In the wake of the Mayan stelae crisis in the early 1970's,<sup>194</sup> legislation was passed which prevented the import of these objects.<sup>195</sup> Experts report that this legislation was effective and that the crisis was alleviated as a result.<sup>196</sup>

Success in this one instance does not mean that all such efforts have fared as well. Other efforts at control, made through the courts and administrative regulation in particular, have not been as successful and have caused consternation among legal scholars and law enforcement officials, as well as art dealers, museum officials and private collectors. The major problem that frustrated and still frustrates the attempts of the courts and the administrative agencies revolves around the definition of the term "stolen." In light of foreign cultural patrimony laws that claim all cultural property as a possession of the state, "stolen" means more than the taking or retaining possession of property that belongs to another.<sup>197</sup>

Compounding the ambiguity surrounding the word "stolen" is the subtle difference between the "illegal" and "illicit" import of an object into the United States. When an object is "illegally" imported into the United States it has entered in violation of an established law or regulation of the United States Customs Service. "Illicit" im-

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192. See, e.g., *supra* note 190.

193. DuBOFF, *supra* note 30.

194. See *supra* note 78. See also generally MEYER, *supra* note 188.

195. 19 U.S.C. § 2091 (Supp. II 1972).

196. *Convention on Cultural Property Implementation Act: Hearings on S.2261 and H.R.5643 Before the Subcomm. on Int'l Trade of the Senate Comm. on Finance, 96th Cong., 2d Sess. 62 (1978)* (letter from Clemency Coggins of Harvard University).

197. See BLACK'S LAW DICTIONARY 739 (5th ed. 1979).

port involves an object that has entered the United States without any violation of an American import law, but possibly in violation of another nation's export laws. Originally, when dealing with works of art, the United States government was not concerned with violations of the laws of other nations.<sup>198</sup> All objects were permitted to enter the country, illicitly or not.

This situation began to change in the early 1970's. The growing problem of looting and destruction was coupled with a growing awareness of that problem. The enforcement situation as it presently exists in the United States resulted from this increased consciousness. The following is an outline of the various aspects of United States policy in the area of cultural property law and the problems associated with each.

#### A. *United States v. McClain — Using the National Stolen Property Act Against Illicit Imports*

If one case could be said to summarize and exemplify the confusion over the situation surrounding the international movement of cultural property, that case would be *United States v. McClain*.<sup>199</sup> This was actually more than one case, however, because it consisted of a series of two trials and two appeals, both of which caused a great deal of controversy in the art and legal communities. Each decision involved the applicability of the National Stolen Property Act (NSPA)<sup>200</sup> to the illicit import of cultural property into the United States. In this case the distinction between "illicit" versus "illegal" imports and the varying definitions of "stolen" all came into play.

The facts of the *McCain* case involved a number of Central American antiquities, most Mexican, that were brought into the United States without the proper export certificates. The objects were not stolen in the traditional sense, only illegally exported. Up until that time this illegal export would not have been a violation of American law, but Mexico had claimed all pre-Columbian antiquities as state property.<sup>201</sup> Based on the Mexican claim to title the United States government proceeded to prosecute under the sections of the NSPA that make the interstate or international transfer of goods known to be stolen and valued over \$5000 illegal.<sup>202</sup>

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198. See *supra* note 55 and accompanying text.

199. 545 F.2d 988 (5th Cir. 1977), *reh'g denied* 551 F.2d 52 (5th Cir. 1977) (*per curiam*) [hereinafter cited as *McClain I*]. There is also a second appeal, i.e., 593 F.2d 658 (5th Cir.), *cert. denied*, 44 U.S. 918 (1979) [hereinafter cited as *McClain II*].

200. 18 U.S.C. § 2314-15.

201. The original Mexican claim of ownership was based on the *Ley Sobre Monumentos Arqueológicas*, *Diario Oficial de Mayo de 1897* (1897) (cited in *McClain I*, *supra* note 199, at 993).

202. See *supra* note 200.

The defendants in *McClain* were convicted and appealed to the Fifth Circuit.<sup>203</sup> Nevertheless, the question as to when title to these particular objects actually vested with the government of Mexico remained. Legislation on the subject had existed since 1897, but the Court of Appeals ruled that the vesting of title to the objects was not unambiguous until May 6, 1972. Because there was no proof that the objects left Mexico after that date the convictions were reversed.<sup>204</sup>

However, even though the convictions were reversed, the Fifth Circuit affirmed the legal theory on which the government proceeded. Illicit import of objects into the United States from a nation that claimed title to cultural property through legislative fiat was sufficient to consider those objects stolen.<sup>205</sup> This decision changed the importation policy on cultural property as it had existed up until that point. Illicit import and illegal import were becoming increasingly synonymous.

On remand the defendants were again convicted and again the verdict was appealed. Subsequently, the convictions were affirmed in part and reversed in part. This second appellate decision made no substantial change in the position taken in its original *McClain* ruling, a fact that angered many in the art and legal communities. Critics viewed the decision as offering a "blank check" to foreign governments in the area of cultural property.<sup>206</sup> Under the *McClain* decision any nation could declare ownership through legislation and have the United States government enforce the act.

The legal theory established by *McClain* was intended to meet its first test in *United States v. Bernstein*,<sup>207</sup> a case involving \$1.5 million worth of gold Peruvian antiquities which entered the United States in violation of a Peruvian law similar to the earlier Mexican claim of ownership over certain classifications of cultural property.<sup>208</sup> The great test of the *McClain* theory never came about, however, because the government chose instead to prosecute on the basis of the undervaluation of the goods brought into the country.<sup>209</sup> The defendant pled guilty and returned the objects to the Peruvian government in exchange for a \$1000 fine and 200 hours of community service.<sup>210</sup>

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203. *McClain I*, *supra* note 199, at 988.

204. *Id.* at 1004.

205. *Id.* at 1003.

206. See BATOR, *supra* note 22; McAlee *supra* note 55, at 565.

207. No. 82-00019-A, (E.D. Va. Mar. 5, 1982).

208. See Schneider, *A Lawyer Looks at U.S. Antiquities Law*, 9 J. FIELD ARCHAEOLOGY 385 (1982); L.A. Daily J., Sept. 4, 1981, at 5, col. 1.

209. 19 U.S.C. § 1592 (1980).

210. Daniels, *Editorial*, ANTIQUITY, March, 1983, at 3.

*B. Policy of the United States Customs Service — Still Evolving*

The Customs Service is the enforcement agency most concerned with international traffic in cultural property in the United States. In 1971 the then existing policy allowing for the free flow of artworks into the United States began to erode.<sup>211</sup> With the enactment of the Pre-Columbian Monuments Act of 1972<sup>212</sup> the Customs Service was given the power to substantively act to control the specific problems concerning pre-Columbian antiquities. Previously, Customs could only proceed against cultural property as it would proceed against any other type of questionably imported goods.

Originally the only available weapons to control trafficking problems involving art works were the general powers against the lack of declaration,<sup>213</sup> false declaration,<sup>214</sup> and smuggling.<sup>215</sup> With the *McClain* decision the Customs Service began to use the NSPA<sup>216</sup> as a means of preventing illicitly obtained objects from entering the country. More recently, Customs has become even more involved in regulating the movement of cultural property under the Cultural Property Act.

The boldest pronouncement on this subject is the Manual Supplement on Seizure and Detention of Pre-Columbian Artifacts issued by the Customs Service in 1982.<sup>217</sup> This directive provided for the detention and possible seizure of pre-Columbian works entering the country without the proper export documentation. The Directive also called for the utilization of the NSPA as set forth in *McClain* if the importer acknowledged awareness of a foreign law claiming ownership, or if other evidence of such knowledge existed.

Justification for the Directive is based on the Pre-Columbian Monuments Act and its accompanying regulations,<sup>218</sup> the NSPA,<sup>219</sup> general Customs provisions against smuggled goods,<sup>220</sup> and especially the agreements the United States has with Mexico and Peru.<sup>221</sup> It is these latter two agreements, coupled with this Customs Directive, that generate the most criticism against the Customs Service. Critics consider the Directive a further extension of the "blank

211. Merryman, *Trading in Art: Cultural Nationalism vs. Internationalism*, 18 STAN. LAWYER, Spring, 1984, at 24.

212. 19 U.S.C. § 2091 (Supp. II, 1972).

213. 19 U.S.C. § 1497 (1980).

214. See *supra* note 209.

215. 18 U.S.C. § 545 (1980).

216. 18 U.S.C. §§ 2314-2315 (1980).

217. *Seizure and Detention of Pre-Columbian Artifacts, Policies & Procedures Manual* Supp. No. 3280-01, U.S. Customs Service (Oct. 5, 1982) [hereinafter cited as Customs Directive].

218. 19 U.S.C. § 2091 (Supp. II, 1972); 19 C.F.R. §§ 12.105-12.109 (1984).

219. See *supra* note 216.

220. Title 19, Code of Federal Regulations (1984).

221. See *supra* notes 111-12.

check" policy wrongfully legitimized in *McClain*.<sup>222</sup>

In justifying the Directive, a Customs official stated that it was merely a recognition of a foreign country's claim of ownership.<sup>223</sup> This official did not feel that Customs was offering "blank check" enforcement of a foreign state's export laws but was only enforcing ownership rights over a particular good, as it would with any other item.<sup>224</sup>

Critics argue that the Directive fails to distinguish between real and theoretical claims of theft and accepts a foreign country's policy of ownership by legislation.<sup>225</sup> Critics also say the Directive goes too far and creates an embargo against all pre-Columbian objects through its provision requiring that each object be detained pending production of proper documentation. The biggest argument against the Directive rests on the belief that Customs was never given the authority to promulgate such a document since the Cultural Property Act was to be the definitive statement by the United States on the movement of cultural property.<sup>226</sup>

The Customs Directive is part of a network of enforcement in the area of cultural property that has most recently included administrative regulations promulgated under the Cultural Property Act.<sup>227</sup> These regulations are an attempt to codify the various strands of United States enforcement policy since *McClain* to the present. They are styled around earlier Customs regulations on pre-Columbian monuments<sup>228</sup> and reflect the numerous concerns expressed during the long legislative debates that preceded the Act.<sup>229</sup> These regulations neither support nor reject any previous pronouncement of Customs on the subject, however. Instead they relate to an entirely different subject matter. The Customs Directive deals with "stolen" property; the new regulations relate to the import and export provisions of the Cultural Property Act.<sup>230</sup> Whether this is a distinction without a difference remains to be seen.

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222. See *supra* text accompanying note 203. See also, Fitzpatrick, *The Lawless Customs Policy Toward Cultural Properties*, 15 N.Y.U. J. INT'L L. & POL. 357 (1983) [hereinafter cited as Fitzpatrick]; McAlee, *The McClain Case, Customs and Congress*, N.Y.U. J. INT'L L. & POL. 813 (1983) [hereinafter cited as *McClain Case*].

223. Walker, *Theoretical Thefts, Real Claims*, ARTNEWS, Mar. 1983, at 11 (quoting Mr. Stuart Seidel of United States Customs Service).

224. *Id.*

225. See *supra* note 211.

226. See Fitzpatrick, *supra* note 222, at 857. The argument emphasizes the fact that the Cultural Property Act was debated for ten years before it was finally enacted, therefore implying that everything that Congress wanted included in the Act was indeed included.

227. 50 Fed. Reg. 26193 (June 25, 1985) (amendments to 19 C.F.R. §§ 12, 178).

228. See *supra* note 218.

229. Telephone interview with John Doyle, United States Customs Service (Feb. 28, 1985).

230. Telephone interview with Ann Guthrie, Cultural Property Advisory Committee (Feb. 28, 1985).

### C. *Recent Legislative Attempts to Modify the Cultural Property Act*

Efforts to pass legislation to modify existing policy on cultural property are still ongoing. In March of 1985 Senator Moynihan, representing New York art dealers, introduced a bill in the Senate that would amend the NSPA so that it would no longer apply in situations such as *McClain*.<sup>231</sup> If this bill were enacted, a foreign decree of ownership through legislative fiat would no longer sustain a cause of action under the NSPA. Similar bills were introduced in previous sessions of Congress<sup>232</sup> and it is rumored that the art dealers, through Senator Moynihan, agreed to support the Cultural Property Act in exchange for passage of this bill.<sup>233</sup> Opposition to any bill of this kind has stemmed from those groups traditionally in favor of regulation in the antiquities market.<sup>234</sup> The Administration has also opposed the bill, calling such legislation contrary to the spirit of the Cultural Property Act.<sup>235</sup>

Another bill that has been proposed to modify the Cultural Property Act was introduced in the 98th Congress in both the House and Senate. It was entitled the Cultural Repose Act and was to refine § 312 of the Cultural Property Act. The purpose of this bill was to provide for the protection of objects held in private collections and museums in the United States by shortening and better defining the elements that initiate the running of the statute of limitations.<sup>236</sup> No action was taken on either of these bills and there are currently no plans for their reintroduction.<sup>237</sup>

## VI. Assessment and Conclusion

United States policy in the area of cultural property law has been the result of years of debate and thought. Various interests have had to be considered and satisfied in the process. The result is not just one unequivocal statement for or against an established and succinct policy. It is a rubric of case law, legislation, and regulation

231. S.605, 99th Cong., 1st Sess. (1983) [hereinafter cited as S.605].

232. S.3102, 97th Cong., 2d Sess. (1982).

233. See *supra* note 222, at 813.

234. *Misc. Tariff Bills, 1982: Hearing on S.1723 Before the Subcomm. on Int'l Trade of the Senate Finance Comm.*, 97th Cong., 2d Sess. 458 (1982) (letter from the American Anthropological Association). See also *supra* text preceding and accompanying notes 32-33.

235. See *supra* note 230. By the Summer of 1985, the opposition to S.605, *supra* note 231, was convinced the bill would not pass. See *Opposition to McClain Override Bill Mounts*, AVISO, July 1985, at 1; *Proposed Bill Would Revise 'McClain' Ruling*, THE ART NEWSLETTER, July 9, 1985, at 7-8.

236. 130 CONG. REC. S.8942 (daily ed. June 29, 1985). See also text accompanying notes 141-46.

237. Telephone interview with Felix Sanchez of Senator Lloyd Bensten's staff (Feb. 14, 1985); Telephone interview with Terri Cornwell of the Congressional Acts Caucus (Feb. 14, 1985).

created in an attempt to address an international problem, while maintaining traditional policies in favor of free trade and the free exchange of ideas through art.

The United States has an interest in cultural internationalism, and even if its policy is not fully settled and unified, the ongoing debate is healthy. It is healthy for those nations interested in protecting their cultural patrimony and for those that would like to see an unrestricted international flow of cultural property. Discussion and debate have stimulated an interest and a genuine concern in an area where there was little if any previous concern. The recent activity in this area of the law can only be encouraged with the understanding that policies concerning cultural property are developing, and will continue to do so.

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