

# The UNESCO Convention on Cultural Property: Overdue for Implementation

*United States law generally permits the legal importation of cultural property that persons have illegally exported from foreign nations. This situation limits the ability of foreign nations to protect their cultural property. UNESCO has drafted a convention to limit the legal importation of illegal exports. Although Congress has ratified this convention, it remains inoperative pending passage of implementing legislation. This comment examines the arguments for and against implementation and concludes that implementation is warranted.*

## INTRODUCTION

A large portion of the world's illegally exported cultural property<sup>1</sup> is imported into the United States.<sup>2</sup> American purchasers

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<sup>1</sup> For purposes of this comment, "cultural property" is defined as property toward which a nation's people feel racial, ethnic, or national affinity. Much of this property is considered art. However, what constitutes art is itself a disputed issue. D. PARKER, *THE ANALYSIS OF ART* 1-30 (1926). Recognizing that many products of a culture are valued by that and succeeding cultures as representative of human identity and history is more important than an exact definition. One author has defined cultural property as: "The collective store which has been produced [that] comprises mankind's cultural heritage. In this sense, cultural property is universal in character, as the medium through which intellectual exchange is possible amongst the peoples of the world." S. WILLIAMS, *THE INTERNATIONAL AND NATIONAL PROTECTION OF MOVABLE CULTURAL PROPERTY* 1 (1978).

<sup>2</sup> One expert estimates that the United States constitutes 50% of the world market for illegally exported cultural property. *Cultural Property Treaty Legislation: Hearing Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. 30 (1979) [hereinafter cited as *1979 Hearing*] (statement of Clemency Coggins, representing the Archaeological Institute of America). Another expert estimates the figure to be between 25% and 35%. *Convention on Cultural Property Implementation Act: Hearing Before the Subcomm. on International Trade of the Senate Comm. on Finance*, 95th Cong., 2d Sess. 42 (1978) [hereinafter cited as *1978 Hearing*]

covet this property as art and willingly pay high prices for it.<sup>3</sup> Unfortunately, cultural property is often stolen from foreign nations and these thefts have caused the pillage of important archaeological sites.<sup>4</sup> Nevertheless, United States law generally permits the import of illegally exported property and provides foreign nations with no adequate means of repatriation.<sup>5</sup>

An intense controversy exists over the extent to which the United States should tolerate the import of illegal exports.<sup>6</sup> Some archaeological scholars contend that permissive import laws encourage both destruction of archaeological sites and violation of foreign laws protecting those sites.<sup>7</sup> The United States Department of State has acknowledged that our domestic law frustrates the efforts of foreign nations to enforce their export laws, placing the United States in an awkward political situation.<sup>8</sup> Art dealers naturally have a different perspective. They encourage the import of cultural property, arguing that a ready supply stimulates the growth and quality of domestic museums

(statement of Douglas C. Ewing, President, American Association of Dealers in Ancient, Oriental and Primitive Art).

<sup>3</sup> See Carley, *Archaeological Objects Smuggled at Brisk Rates as Their Prices Soar*, Wall St. J., June 2, 1970, at 1, col. 1. See generally Hamblin, *The Billion Dollar Traffic in Illegal Art—How It Works and How To Stop It*, SMITHSONIAN, March 1972, at 16-28. Cultural property has an enhanced investment value in the United States because it is often tax deductible. Anthione, *Deductions for Charitable Contributions of Appreciated Property—The Art World*, 35 TAX. L. REV. 239, 273-75 (1980).

<sup>4</sup> See generally L. DuBOFF, *THE DESKBOOK OF ART LAW* 69-103 (1977); K. MEYER, *THE PLUNDERED PAST* (1973).

<sup>5</sup> See notes 23-36 and accompanying text *infra*.

<sup>6</sup> This controversy emerged during a series of congressional hearings on proposed legislation for import controls on various illegal exports. 1979 *Hearing*, *supra* note 2; 1978 *Hearing*, *supra* note 2; UNESCO *Convention on Cultural Property: Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 95th Cong., 1st Sess. (1977) [hereinafter cited as 1977 *Hearing*].

<sup>7</sup> 1978 *Hearing*, *supra* note 2, at 59-60 (statement of Prof. James R. Wiseman, Boston University, speaking on behalf of the Association for Field Archaeology).

<sup>8</sup> 1979 *Hearing*, *supra* note 2, at 4 (statement of Mark B. Feldman, Deputy Legal Advisor, Department of State). Many nations restrict export of cultural property. B. BURNHAM, *THE PROTECTION OF CULTURAL PROPERTY: HANDBOOK OF NATIONAL LEGISLATIONS* (1974) (abstracts laws of many nations). See generally S. WILLIAMS, *supra* note 1; Niec, *Legislative Models of Protection of Cultural Property*, 27 HASTINGS L.J. 1089 (1976); Williams, *Protection of Cultural Property: The Canadian Approach*, 22 ARIZ. L. REV. 737 (1980).

and quickens the public's understanding of art, beauty, and cultural diversity.<sup>9</sup> Although these positions conflict, advocates of each tentatively agree on two points. First, some domestic limitation of the import of cultural property is necessary to discourage the wanton destruction of important archaeological sites.<sup>10</sup> Second, some international control over the import of cultural property is essential to effectively discourage illegal export.<sup>11</sup> Absent international control, the import restrictions of individual nations cannot deter illegal exports since other nations without import controls freely receive illegally exported items.<sup>12</sup>

In 1970 the United Nations Educational, Scientific and Cultural Organization (UNESCO)<sup>13</sup> opened for signature a Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO Convention).<sup>14</sup> This convention calls for its signatories to control commerce in cultural property when pillage threatens a nation's archaeological sites,<sup>15</sup> and forbids the im-

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\* 1979 Hearing, *supra* note 2, at 38-42 (statement of Douglas C. Ewing, President, American Association of Dealers in Ancient, Oriental and Primitive Art).

<sup>10</sup> *Id.* at 39 (statement of Douglas C. Ewing, President, American Association of Dealers in Ancient, Oriental and Primitive Art). Such limitations would enable United States Customs officials to seize the illegally imported cultural property that these limitations seek to protect. Confiscation by the United States Treasury Department is the usual procedure for dealing with illegal imports. See, e.g., 19 U.S.C. § 1592 (1976); 19 C.F.R. § 162.21 (1981).

<sup>11</sup> See notes 91-115 and accompanying text *infra*.

<sup>12</sup> See notes 108-115 and accompanying text *infra*.

<sup>13</sup> UNESCO was established in 1946 as the branch of the United Nations concerned with international cooperation in the areas of education, culture, and science. "The organs of UNESCO are a General Conference (composed of representatives from each member state), an Executive Board (consisting of 34 government representatives elected by the General Conference) and a Secretariat. UNESCO had 125 members and 3 associate members in 1969." G. PAXTON, *THE STATESMAN'S Y.B.* 18-19 (1978/79), reprinted in L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *INTERNATIONAL LAW* 1052-53 (1980) [hereinafter cited as HENKIN, ET AL.].

<sup>14</sup> Gen'l Conf. of UNESCO, Nov. 14, 1970, reprinted in 10 INT'L LEGAL MATS. 289 (1971) [hereinafter cited as UNESCO Convention].

<sup>15</sup> Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States Parties who are affected. The State Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of

port of particular categories of stolen, government-owned, cultural property.<sup>16</sup> If a sufficient number of nations join the UNESCO Convention, it would solve the pressing problem of pillage of cultural property. Although the United States ratified the Convention in 1972,<sup>17</sup> it does not bind the United States, because Congress has never enacted implementing legislation.<sup>18</sup>

This comment urges that Congress immediately pass legislation to implement the UNESCO Convention.<sup>19</sup> Part I illustrates the limited protection that existing law affords cultural property. Part II describes the UNESCO Convention's development as a protective tool blunted by the necessity of ensuring a supply of cultural property for United States markets. Part III examines Congress' failure to enact implementing legislation. Part IV

exports and imports and international commerce in the specific materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremedial injury to the cultural heritage of the requesting State.

UNESCO Convention, *supra* note 14, art. 9.

<sup>16</sup> *Id.* art. 7(b)(i). "The States Party to this Convention undertake . . . to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution. . . ." *Id.*

<sup>17</sup> S. Res. Ratification, 92d Cong., 2d Sess., 118 CONG. REC. 27925 (1972) [hereinafter cited as Resolution of Ratification].

<sup>18</sup> See notes 82-87 and accompanying text *infra*. The House of Representatives passed an implementing statute in 1977, but further progress has been stalled. 123 CONG. REC. 33929, 33933 (1977). See Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 283 (1982).

<sup>19</sup> Art dealers have recognized that the pillage of cultural property is most effectively dealt with through international agreement. 1979 *Hearing, supra* note 2, at 39 (statement of Douglas C. Ewing, President, American Association of Dealers in Ancient, Oriental and Primitive Art). Art dealers, however, generally oppose efforts to enact import restrictions on the ground that such restrictions previously have been more restrictive than is practical or necessary. McAlee, *From the Boston Raphael to Peruvian Pots: Limitations on the Importation of Art Into the United States*, 85 DICKINSON L. REV. 565 (1981). Mr. McAlee is a partner in the firm Arnold & Porter of Washington, D.C. He represents the American Association of Dealers in Ancient, Oriental and Primitive Art. *Id.* This association has opposed enactment of import restrictions necessary to implement the UNESCO Convention. 1979 *Hearing, supra* note 2, at 41; 1977 *Hearing, supra* note 6, at 30. See notes 90-102 and accompanying text *infra*. Although Mr. McAlee does not support the proposed implementing legislation, contending that it is overbroad, he notes: "The United States should implement the Convention in accordance with its terms, and use its best efforts to obtain the support of other art-importing nations in critical situations of pillage." McAlee, *supra* this note, at 604-05.

describes other international agreements that call for more restrictive limitations on legal imports than those mandated in the UNESCO Convention. This section asserts that quick congressional implementation of the UNESCO Convention will establish its moderate provisions between the United States and other nations and thus protect United States art-importing interests. The comment concludes that the UNESCO Convention, when fully operative, will provide limited but significant protection of cultural property and protect the interests of art importers.

### I. EXISTING METHODS FOR PROTECTING CULTURAL PROPERTY

X is a United States citizen and the director of a publicly-owned museum. She travels from her office in Boston to Istanbul, seeking Byzantine art for her museum. A tour guide directs X to a Turkish farmer who has recently found a cache of Byzantine jewelry while plowing his field. X knows that Turkish law prohibits the jewelry's export without approval of the Turkish government. She also knows that the Turkish government will not approve the export. Nevertheless, she buys the jewelry and smuggles it through Turkish customs. Returning to the United States, X properly declares the jewelry at customs and later places it in the museum.<sup>20</sup> X violated Turkish export law by removing the jewelry from Turkey.<sup>21</sup> Importing it into the United States, however, was legal.<sup>22</sup>

#### A. *The General Rule*

The United States permits the import of illegally exported cultural property in most circumstances. Further, the United States generally fails to provide the foreign nation with a mechanism for recovering illegally exported items. The United States has no domestic law prohibiting the import of illegally exported Byzantine jewelry.<sup>23</sup> Although X violated Turkish export law,<sup>24</sup>

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<sup>20</sup> See K. MEYER, *supra* note 4, at 56-122 (describing similar behavior by actual museum personnel).

<sup>21</sup> Antiquities Law Nr. 1710, of 1973 (Turkey) (forbidding the export of antiquities) *abstracted in* B. BURNHAM, *supra* note 8, at 146.

<sup>22</sup> See note 23 and accompanying text *infra*.

<sup>23</sup> The only relevant domestic law prohibits the importation of pre-Columbian art work. Act on the Regulation and Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals, 19 U.S.C. §§ 2091-2095 (1976)

Turkish courts have no jurisdiction over her in the United States,<sup>25</sup> and United States courts do not enforce penal and revenue laws of foreign nations.<sup>26</sup> Thus, the Turkish government cannot force return of the jewelry under United States import or Turkish export laws.<sup>27</sup>

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[hereinafter cited as Pre-Columbian Antiquities Act].

<sup>24</sup> Antiquities Law Nr. 1710, of 1973 (Turkey) (forbidding the export of antiquities) abstracted in B. BURNHAM, *supra* note 8, at 146.

<sup>25</sup> N. LEECH, C. OLIVER & J. SWEENEY, *THE INTERNATIONAL LEGAL SYSTEM* 110-11 (1973) [hereinafter cited as LEECH, ET AL.]

<sup>26</sup> *Huntington v. Attrill*, 146 U.S. 657 (1892); *The Antelope*, 23 U.S. 66 (1 Wheat.) (1825). See generally Note, *The Enforcement of Foreign Non-Criminal Penal and Revenue Judgments in England and the United States*, 16 INT'L & COMP. L.Q. 663 (1967).

<sup>27</sup> However, an export from a foreign country that has both export controls and national legislation vesting ownership of all cultural property in the state, has been the basis for a criminal prosecution under a United States statute. *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977) [hereinafter cited as *McClain I*]. See also *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974) (Guatemalan national monument stolen; defendant convicted of interstate and foreign transport of stolen property). In *McClain I*, the court reviewed convictions under the National Stolen Property Act, 18 U.S.C. §§ 2314-2315 (1976) [hereinafter cited as NSPA]. The NSPA bars the transport of goods in interstate or foreign commerce, and receipt or concealment of goods after such transport, when it is known that the goods were stolen, unlawfully converted, or taken by fraud. *Id.* The defendants had been involved with transporting pre-Columbian artifacts from California to Texas after their illegal export from Mexico. *McClain I*, 545 F.2d at 992. The Fifth Circuit held that Mexico's legislative declaration of ownership of all cultural property gave Mexico a sufficient ownership interest in the artifacts to allow prosecution under the NSPA for illegal export of cultural property from Mexico. *Id.* at 1001. The court thus sustained the prosecution's theory. However, it reversed and remanded the trial court's verdict on the ground that the trial court had improperly instructed the jury as to the year in which Mexico became the owner of all cultural property within its borders. *Id.* at 1003. The defendants were tried and convicted a second time, and again appealed. *United States v. McClain*, 593 F.2d 658 (5th Cir.), *cert. denied*, 444 U.S. 918 (1979) [hereinafter cited as *McClain II*]. The circuit court affirmed, in theory, the *McClain I* rationale. However, the Fifth Circuit again reversed the convictions, this time on the ground that the Mexican statutes relied upon by the prosecution were too vague to warn adequately that the exported cultural property was owned by Mexico. *McClain II*, 593 F.2d at 670.

The *McClain* decisions are not inconsistent with this comment's assertion that the United States does not enforce the export laws of foreign nations. Although *McClain I* and *II* can, arguably, be read to yield that result, these cases actually focus on the predicates for a foreign state's ownership of cultural property. The illegal export is simply evidence that the property has been re-

Turkey might attempt to sue X in replevin<sup>28</sup> in the United States. To succeed, Turkey must assert its title to the jewelry and show that the farmer could not effectively pass title to X.<sup>29</sup> Such an action would involve complicated issues of foreign law, conflicts of law, and the bona fide purchaser doctrine.<sup>30</sup> The property would have to be extremely valuable to warrant such an effort.

A situation similar to this hypothetical arose in *Kunstsummlungen zu Weimar v. Elicofon*.<sup>31</sup> In that case a dispute arose over title to a pair of Dürer paintings, valued at ten million dollars. The paintings had been removed from a state-owned museum in what is now East Germany.<sup>32</sup> The museum sought to recover the paintings from Edward Elicofon, who had purchased them in New York shortly after World War II.<sup>33</sup> The court found against Elicofon, holding that under conflicts of law theories, the New York bona fide purchaser doctrine controlled the case.<sup>34</sup> Under this doctrine an innocent purchaser cannot derive

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moved from its owner. *Contra* McAlee, *supra* note 19, at 597 (contending that *McClain I* and *II* give foreign nations a "blank check" to rewrite United States law); Note, *Art Theft: National Stolen Property Act Applied to Nationalized Pre-Columbian Artifacts*, 10 J. INT'L L. & POL. 569 (1978) [hereinafter cited as *Art Theft*] (arguing that *McClain I* confuses Mexican export regulations with the United States law of theft).

<sup>28</sup> Replevin is a common law action that allows a person with a right to possess property to recover it from a wrongful possessor. BLACK'S LAW DICTIONARY 1168 (5th ed. 1979).

<sup>29</sup> McAlee, *supra* note 19, at 591-94.

<sup>30</sup> *Id.*

<sup>31</sup> No. 69-C-93, slip op. (E.D.N.Y. June 15, 1981). This decision is unreported, pending appeal. Telephone conversation with Ruth Brennan, staff assistant to Chief Judge Jacob Mishler, Eastern District of New York (Mar. 5, 1982). Although unreported, Judge Mishler's opinion has been described extensively. Maitland, *From Schwartzburg to Flatbush, the Mysterious Journey of Hans and Felicitas Tucher*, ART NEWS, Sept. 1981, at 78.

The *Elicofon* case has been in litigation for twelve years. Previous decisions involving possession of the Dürers have focused on who may assert a claim for title. See, e.g., *Kunstsummlungen zu Weimar v. Elicofon*, 478 F.2d 231 (2d Cir. 1973); *Federal Republic of Germany v. Elicofon*, 358 F. Supp. 747 (E.D.N.Y. 1970).

<sup>32</sup> Maitland, *supra* note 31, at 80.

<sup>33</sup> *Id.*

<sup>34</sup> *Kunstsummlungen zu Weimar v. Elicofon*, No. 69-C-93, slip op. at 41-42 (E.D.N.Y. June 15, 1981) (unreported pending appeal) citing *Wyatt v. Fulrath*, 16 N.Y.2d 169, 211 N.E.2d, 637, N.Y.S.2d 233 (1965); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 246 (1971). See also Maitland, *supra* note 31, at 84.

legal title to stolen goods from the seller, and thus has no right to retain the goods.<sup>35</sup> Applying East German law, which would find the paintings to be stolen goods, the court held that Elicofon did not obtain title, and therefore had no possessory right.<sup>36</sup> This case illustrates the difficulty and uncertainty that a foreign nation faces in seeking to recover cultural property through civil action in the United States.

### B. Modifications of the General Rule

Generally, United States customs laws permit the import of illegally exported cultural property. A foreign nation can only recover such property if it establishes title to the property.<sup>37</sup> However, there are two modifications of this rule: The Treaty of Cooperation between the United States of America and the United Mexican States Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties (United States-Mexico Treaty),<sup>38</sup> and the Act on the Regulation and Importation of Pre-Columbian Monumental or Architec-

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<sup>35</sup> Kunstsummlungen zu Weimar v. Elicofon, No. 69-C-93, slip op. at 9 (E.D.N.Y. June 15, 1981) (unreported pending appeal); Maitland, *supra* note 31, at 84.

<sup>36</sup> Kunstsummlungen zu Weimar v. Elicofon, No. 69-C-93, slip op. at 7-8 (E.D.N.Y. June 15, 1981) (unreported pending appeal); Maitland, *supra* note 31, at 84.

<sup>37</sup> See notes 23-36 and accompanying text *supra*.

<sup>38</sup> 22 U.S.T. 494, T.I.A.S. No. 7088 (1970) [hereinafter cited as United States-Mexico Treaty]. The United States-Mexico Treaty resulted from talks between Presidents Johnson and Ordaz in 1967. In 1969, as the problem of illegal exports grew worse, Mexico suggested a treaty modeled after the successful United States-Mexico Convention of 1936 for the Recovery and Return of Stolen or Embezzled Motor Vehicles and Airplanes, Oct. 6, 1936, 50 Stat. 1333 (1937), T.S. No. 914. Mexico noted that the United States had been the major beneficiary of the 1936 agreement, and asserted that the same cooperation should extend to illegally exported pre-Columbian objects. Note, *The Legal Response to the Illicit Movement of Cultural Property*, 5 L. & POL. INT'L BUS. 932, 943 (1973) [hereinafter cited as *Illicit Movement*]. For an overview of United States and Mexican relations on cultural property issues, see A. MANERO, *LA DEFENSA JURIDICA Y SOCIAL DEL PATRIMONIO CULTURAL* (1976); Nafziger, *Controlling the Northward Flow of Mexican Antiquities*, 7 LAW. AM. 68 (1975); Nafziger, *La Regulación del Movimiento Internacional de Bienes Culturales entre Mexico y los Estados Unidos*, 16 ANALES DE ANTROPOLOGIA 123 (1979); Comment, *New Legal Tools to Curb the Illicit Traffic in Pre-Columbian Antiquities*, 12 COLUM. J. TRANSNAT'L L. 316 (1973).

tural Sculpture or Murals (Pre-Columbian Antiquities Act).<sup>39</sup> Each provides limited assistance to foreign nations seeking return of illegally exported cultural property.

### 1. The United States-Mexico Treaty

The United States-Mexico Treaty requires its signatories to encourage trade and to discourage some illegal exports.<sup>40</sup> Under the Treaty the nations have agreed to encourage archaeological and artistic interchange as well as legitimate commerce in art.<sup>41</sup> Because Mexican export laws<sup>42</sup> are more restrictive than ours, however, this agreement principally benefits United States collectors, dealers, and museums.<sup>43</sup>

The Treaty also requires each nation to use the "legal means at its disposal to recover and return from its territory the archaeological, historical and cultural properties" stolen from the other's government.<sup>44</sup> Although applicable to both governments, this provision largely protects Mexico which suffers the greater loss of cultural property. The Treaty even empowers the United States Attorney General to assert claims on Mexico's behalf,<sup>45</sup> thus sparing Mexico the burden of litigating in a foreign court. The agreement creates no new legal rights for Mexico beyond those it may assert on its own behalf.<sup>46</sup> Thus, Mexico may compel the Attorney General to act only when cultural property has been stolen.<sup>47</sup> The Treaty does not enforce Mexico's export laws.<sup>48</sup>

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<sup>39</sup> Pre-Columbian Antiquities Act, *supra* note 23, 19 U.S.C. §§ 2091-2095 (1976).

<sup>40</sup> United States-Mexico Treaty, *supra* note 38, arts. II(1) & III(1).

<sup>41</sup> *Id.* art II(1).

<sup>42</sup> For descriptions of Mexican laws protecting cultural property, see B. BURNHAM, *supra* note 8, at 112. For analysis and history of these laws, see *McClain I*, *supra* note 27, 545 F.2d 998, and *McClain II*, *supra* note 27, 593 F.2d 658. Mexico claims ownership of all pre-Columbian property within its borders as well as many other categories of cultural property. See note 27 *supra*.

<sup>43</sup> *Illicit Movement*, *supra* note 38, at 944-46.

<sup>44</sup> United States-Mexico Treaty, *supra* note 38, art. III(1).

<sup>45</sup> *Id.* art. III(3).

<sup>46</sup> See *Illicit Movement*, *supra* note 38, at 947-48. "Since the domestic law applicable to such proceedings is not altered by the Treaty, a new cause of action affecting substantive property rights is not being created." *Id.*

<sup>47</sup> See notes 23-36 and accompanying text *supra*.

<sup>48</sup> See note 46 and accompanying text *supra*. But see McAlee, *supra* note 19,

## 2. The Pre-Columbian Antiquities Act

The United States Congress has paid special attention to the pillage of pre-Columbian sites throughout Latin America.<sup>49</sup> In 1972 Congress expressed its concern by passing the Pre-Columbian Antiquities Act,<sup>50</sup> creating an exception to the general rule that illegal export does not bar subsequent legal import. The Act prohibits importation of pre-Columbian monuments, sculpture, and murals without certification of legal export from the country of origin.<sup>51</sup>

The Act protects pre-Columbian monuments, tremendously popular objects of illegal export. Given the size and bulk of these monuments, exporters frequently have reduced them to rubble to facilitate shipping and sold them piecemeal. Exporters have destroyed entire buildings as well as sizeable monuments in this fashion.<sup>52</sup> Since the Act now curtails legal import into the large United States market, illegal exporters have less incentive to destroy important monuments and archaeological sites. However, the Act does not discourage traffic in other pre-Columbian property, such as pottery.

The United States-Mexico Treaty and the Pre-Columbian Antiquities Act have limited utility in thwarting the international problem of illegally exported cultural property. The Treaty applies only to stolen, government-owned, cultural property; the Act applies only to Pre-Columbian monuments. Both are geographically limited. Even if property covered by the Treaty and the Act no longer comes to the United States, it may go to other

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at 593-94. McAlee interprets *McClain I* and *McClain II*, discussed in note 27 *supra*, as resulting in the enforcement of Mexican export law by United States courts. This comment does not share McAlee's view. See note 27 *supra*. From his reading of the *McClain* cases, McAlee argues that civil suits might be based, in part, upon violation of export laws. McAlee, *supra* note 19, at 591-93. He then suggests that the Mexican government could call upon the United States Attorney General to institute civil proceedings to vindicate Mexico's export laws. *Id.* McAlee, however, reports that Mexico has made only one request to recover property under the United States-Mexico Treaty. *Id.* at 593 n.122.

<sup>49</sup> See H.R. REP. No. 824, 92d Cong., 2d Sess. (1972) (congressional discussion of need to assist Latin America with problem of pillage). See also McAlee, *supra* note 19, at 569-75.

<sup>50</sup> Pre-Columbian Antiquities Act, *supra* note 23, 19 U.S.C. §§ 2091-2095 (1976).

<sup>51</sup> *Id.* § 2092.

<sup>52</sup> See Coggins, *The Maya Scandal: How Thieves Strip Sites of Past Cultures*, SMITHSONIAN, Oct. 1970, at 8.

nations that lack similar restraints.<sup>53</sup>

## II. THE UNESCO CONVENTION

Art-rich nations want to stop the pillage of their cultural property. Through the UNESCO Convention, they created an international agreement that protects their cultural property through binding restraints on member governments. The United States, an art importer, sought to protect its market for cultural property.<sup>54</sup> The UNESCO Convention reconciled the needs of nations rich in cultural property with those of the United States.

The UNESCO Convention began to take form in 1962,<sup>55</sup> and a Preliminary Draft emerged in 1969.<sup>56</sup> This draft proposed strict limitations on exports of cultural property and prohibited all legal import without legal export.<sup>57</sup> The Preliminary Draft broadly defined protected cultural property.<sup>58</sup> The draft also provided that member nations would confiscate and return cultural property to its home state if illegal import was attempted.<sup>59</sup> A second draft, the Secretariat Draft,<sup>60</sup> incorporated only minor changes.<sup>61</sup> In 1970 a Special Committee of Governmental Experts convened to prepare the final draft.<sup>62</sup>

Although previously uninterested in the UNESCO Conven-

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<sup>53</sup> See notes 108-115 and accompanying text *infra*.

<sup>54</sup> Two authors have described the UNESCO Convention and the impact of United States negotiation efforts upon its evolution. Comment, *The UNESCO Convention on the Illicit Movement of Art Treasures*, 12 HARV. INT'L L.J. 537 (1971) [hereinafter cited as *Art Treasures*]; *Illicit Movement*, *supra* note 38, at 956.

<sup>55</sup> *Art Treasures*, *supra* note 54, at 538; *Illicit Movement*, *supra* note 38, at 949.

<sup>56</sup> *Art Treasures*, *supra* note 54, at 539; *Illicit Movement*, *supra* note 38, at 950.

<sup>57</sup> *Illicit Movement*, *supra* note 38, at 950-52.

<sup>58</sup> The draft would protect "almost the entirety of the cultural spectrum, including 'property of artistic interest more than fifty years old,' rare books, objects of ethnological interest, scientific collections, photographic and musical archives, and mineral specimens." *Id.* at 950.

<sup>59</sup> *Id.* at 952.

<sup>60</sup> UNESCO GEN'L CONF. DOC. 16 C/17 (1970), reprinted in 9 INT'L LEGAL MATS. 1031 (1970).

<sup>61</sup> *Art Treasures*, *supra* note 54, at 540; *Illicit Movement*, *supra* note 38, at 955.

<sup>62</sup> *Art Treasures*, *supra* note 54, at 540; *Illicit Movement*, *supra* note 38, at 955-56.

tion,<sup>63</sup> the United States submitted its own draft to the Special Committee.<sup>64</sup> The United States draft omitted the strict export and import controls of the Preliminary and Secretariat drafts<sup>65</sup> and instead suggested a non-mandatory provision for "such controls" as member nations deemed necessary and appropriate.<sup>66</sup> The United States draft made no provision for repatriation of cultural property. Instead, it added a "crisis" provision to deal with emergency situations created by pillage of archaeological sites.<sup>67</sup> Under this provision nations would work together *ad hoc* to combat illegal exports by controlling imports. This cooperation would occur only upon request by a state whose cultural property was in jeopardy.

As adopted by the General Conference of UNESCO in 1970,<sup>68</sup> the Convention retained the strict export controls of the earlier drafts.<sup>69</sup> However, it severely narrowed the definition of cultural property subject to import controls.<sup>70</sup> The Convention's mandatory import controls apply only to cultural property "stolen from a museum or a religious or secular public monument or similar institution."<sup>71</sup> Repatriation is required only for such objects.<sup>72</sup> Thus, while the United States unsuccessfully opposed export and import controls, the narrow scope of the Convention's import controls reflects United States influence.

The most important concession to United States interests was the adoption of article 9,<sup>73</sup> a crisis provision similar to that proposed by the United States draft.<sup>74</sup> Article 9 permits the United States to continue to import illegally exported cultural property until an aggrieved nation requests its help in discouraging pillage.<sup>75</sup> Such a request triggers United States agreement "to participate in a concerted international effort to determine and

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<sup>63</sup> *Illicit Movement*, *supra* note 38, at 956.

<sup>64</sup> *Id.* at 957-58.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> S. EXEC. REP. No. 29, 92d Cong., 2d Sess. 17 (1972); *Art Treasures*, *supra* note 54, at 540.

<sup>69</sup> UNESCO Convention, *supra* note 14, art. 6(a).

<sup>70</sup> *Illicit Movement*, *supra* note 38, at 960.

<sup>71</sup> UNESCO Convention, *supra* note 14, art. 7(b)(i).

<sup>72</sup> *Id.* art. 7(b)(ii).

<sup>73</sup> *Id.* art. 9, set forth in note 15 *supra*.

<sup>74</sup> *Illicit Movement*, *supra* note 38, at 962.

<sup>75</sup> UNESCO Convention, *supra* note 14, art. 9.

carry out the necessary concrete measures, including the control of exports and imports" to deter the pillage.<sup>76</sup> This language enables the United States to tailor its response to a particular situation,<sup>77</sup> thus allowing it to consider its own interests in formulating a flexible response.

The United States negotiation effort moved the Convention's drafters away from blanket prohibition of illegal exports.<sup>78</sup> Thus, the Convention leaves the general rule intact,<sup>79</sup> with two relatively narrow qualifications. First, it is illegal to import some stolen property under the Convention.<sup>80</sup> Second, article 9 calls for import controls if the United States determines that this will curtail an emergency situation.<sup>81</sup>

### III. CONGRESSIONAL RELUCTANCE TO IMPLEMENT THE UNESCO CONVENTION

The United States Senate ratified the UNESCO Convention in 1972,<sup>82</sup> with one reservation<sup>83</sup> and six understandings,<sup>84</sup> all of

<sup>76</sup> *Id.*

<sup>77</sup> *Illicit Movement*, *supra* note 38, at 962. "As in the U.S. Alternate Draft, a flexible approach is available to the parties on a case-by-case basis; no limitations are placed on the types of action that may be taken." *Id.*

<sup>78</sup> The text of the UNESCO Convention was the product of U.S. leadership in persuading a majority of UNESCO to adopt a moderate and compromise position. The position of the Soviet bloc countries and many Third World countries, which would have effectively ended all international trade in cultural objects, was rejected. Instead the Convention provides an umbrella for and encouragement of action to contain crisis situations where some category of archaeological object becomes, in effect, an endangered species.

<sup>79</sup> *1979 Hearing*, *supra* note 2, at 17 (statement of Prof. Paul M. Bator, Harvard University, a United States delegate to the UNESCO Convention drafting sessions).

<sup>80</sup> See notes 23-36 and accompanying text *supra*.

<sup>81</sup> UNESCO Convention, *supra* note 14, art. 7(b)(i), quoted at text accompanying note 71 *supra*.

<sup>82</sup> UNESCO Convention, *supra* note 14, art. 9, discussed at text accompanying notes 73-77 *supra*.

<sup>83</sup> Resolution of Ratification, *supra* note 17 (adopted 79-0).

<sup>84</sup> A reservation is:

[I]nserted into a treaty as an implied or specified condition of ratification. . . . Normally a reservation possesses limiting effects; the state making the reservation denies the applicability of a portion of the treaty to relations of that state with the other state or states that may be parties to the instrument.

which limit United States obligations.<sup>85</sup> One of the understandings ensured that the Convention was neither retroactive nor self-executing.<sup>86</sup> As a result, implementing legislation is necessary before the Convention's terms become binding federal law.<sup>87</sup>

Proposals for implementing legislation have focused on two provisions of the Convention. The first is enactment of import controls for items stolen from museums or religious or secular monuments.<sup>88</sup> The second is a grant of power to the President to enter into article 9 agreements with other nations when necessary to protect cultural property from pillage.<sup>89</sup> This section examines the controversy surrounding these proposals.

### A. *The Debate Over Article 9*

Art dealers have been the principal opponents of implementing legislation.<sup>90</sup> Dealers accept the Convention's goals of stopping theft and deterring pillage.<sup>91</sup> They insist, however, that the

G. VON GLAHN, *LAW AMONG NATIONS* 488 (4th ed. 1981).

<sup>84</sup> Understandings are: "[S]tatements attached to the ratification of a treaty by means of which a party to the agreement specifies its own interpretation of certain provisions of the instrument." *Id.* at 489.

<sup>85</sup> The reservation and understandings are part of the Resolution of Ratification, *supra* note 17. Only the understanding specifying that the Convention is not self-executing, thus requiring congressional implementation, is relevant to this comment. The other understandings clarify the operation of other Convention provisions. The reservation allows the United States to choose whether to impose export controls for the protection of domestic property, a matter which otherwise would be mandatory under the Convention. UNESCO Convention, *supra* note 14, art. 6.

<sup>86</sup> Resolution of Ratification, *supra* note 17. "The United States understands the provisions of the Convention to be neither self-executing nor retroactive." *Id.*

<sup>87</sup> LEECH, ET AL., *supra* note 25, at 1026.

<sup>88</sup> UNESCO Convention, *supra* note 14, art. 7(b)(i), set forth in note 16 *supra*. See notes 68-72 and accompanying text *supra*. The proposals for implementing this article have not been controversial. McAlee, *supra* note 19, at 600.

<sup>89</sup> UNESCO Convention, *supra* note 14, art. 9, set forth in note 15 *supra*. See notes 73-77 and accompanying text *supra*.

<sup>90</sup> The most active opponent has been the American Association of Dealers in Ancient, Oriental and Primitive Art. 1979 Hearing, *supra* note 2, at 38; 1978 Hearing, *supra* note 2, at 41; 1977 Hearing, *supra* note 6, at 30. See note 19 *supra*. See generally McAlee, *supra* note 19.

<sup>91</sup> See note 10 and accompanying text *supra*.

proposed implementing legislation does not represent the terms of the UNESCO Convention<sup>92</sup> because it is more restrictive than the Convention requires.<sup>93</sup> The art dealers argue that the proposed legislation would unnecessarily eliminate the American market in cultural property<sup>94</sup> and would cripple domestic museums and scholarship.<sup>95</sup>

Art dealers particularly criticize the proposed legislation to implement article 9. Article 9 calls for member states to join in a "concerted international effort," including import controls, to deter serious instances of pillage.<sup>96</sup> Until recently, however, the proposed implementing legislation allowed the President to respond independently to an emergency situation involving pillage in another nation, when asked.<sup>97</sup> Critics argued that removing the "concerted international effort" prerequisite would impose obligations on the United States not mandated by the Convention.<sup>98</sup> These opponents, however, have succeeded in persuading

<sup>92</sup> See generally McAlee, *supra* note 19, at 600-05.

<sup>93</sup> See notes 73-77 and accompanying text *supra*.

<sup>94</sup> See, e.g., 1979 Hearing, *supra* note 2, at 39 (statement of Douglas C. Ewing, President, American Association of Dealers in Ancient, Oriental and Primitive Art).

<sup>95</sup> "Exposure of the Western World to most of the types of art with which this bill deals began only comparatively recently, and I believe that this bill's effects on the world trade of ancient and primitive art will greatly lessen future study, academic and otherwise, of these fields." 1978 Hearing, *supra* note 2, at 41 (statement of Douglas C. Ewing, President, American Association of Dealers in Ancient, Oriental and Primitive Art).

<sup>96</sup> UNESCO Convention, *supra* note 14, art. 9. See notes 73-77 and accompanying text *supra*.

<sup>97</sup> S. 426, 97th Cong., 1st Sess. § 2 (1981). This section states:

(a) Agreement Authority.—If the President determines, after a request is made to the United States under Article 9 of the Convention by any State Party, that—

(1) the cultural patrimony of a State Party is in jeopardy. . . .

(2) the State Party has taken measures . . . to protect its cultural patrimony:

(3) the application of import restrictions . . . would be of benefit. . . .

(4) the President may enter into—

(A) a bilateral agreement . . . or

(B) a multi-lateral agreement. . . .

*Id.*

<sup>98</sup> "The major flaw of H.R. 3403 [identical to S. 426, 97th Cong., 1st Sess. § 2 (1981), set forth in note 97 *supra*] is not in phrases included, but in a clause

Congress to rewrite the legislation and restore this barrier to United States involvement.<sup>99</sup>

Art dealers are also concerned that the President could abuse his authority under article 9.<sup>100</sup> They fear that he could use his power to make import control agreements with foreign nations for diplomatic purposes unrelated to the preservation of endangered cultural property.<sup>101</sup> These dealers suggest that congressional review would guard against improper use of presidential power.<sup>102</sup> However, congressional overview would emasculate the purpose of article 9, which is to provide a tool for quick and flexible reaction to emergency situations of pillage.<sup>103</sup>

Early versions of the implementing legislation granted broad power to the President.<sup>104</sup> Recent proposals substantially restrain presidential action.<sup>105</sup> These restraints will deter presiden-

excluded. The UNESCO Convention . . . calls for a 'concerted international effort'. . . . But the bill does not do that." 1979 Hearing, *supra* note 2, at 39 (statement of Douglas C. Ewing, President, American Association of Dealers in Ancient, Oriental and Primitive Art). See McAlee, *supra* note 19, at 601-04.

<sup>99</sup> S. 1723, 97th Cong., 1st Sess. (1981) (the current legislative proposal). The President must determine that import controls "applied in concert with comparable restrictions implemented, or to be implemented, by those nations . . . having a significant import trade in such materials, would be of substantial benefit in deterring a serious situation of pillage. . . ." *Id.* § 2(a)(3).

<sup>100</sup> 1979 Hearing, *supra* note 2, at 41 (statement of Douglas C. Ewing, President, American Association of Dealers in Ancient, Oriental and Primitive Art). "We know that powers unreviewed are those most likely to be abused." *Id.*

<sup>101</sup> See McAlee, *supra* note 19, at 601-02.

<sup>102</sup> 1979 Hearing, *supra* note 2, at 41 (statement of Douglas C. Ewing, President, American Association of Dealers in Ancient, Oriental and Primitive Art).

<sup>103</sup> See notes 73-77 and accompanying text *supra*.

<sup>104</sup> See, e.g., H.R. 11754, 94th Cong., 1st Sess. § 1 (1973). Under the earliest proposal for implementing legislation, the President would have considerable discretion to make bilateral and multilateral agreements calling for import controls. The President must find that a foreign nation's cultural property was "in jeopardy," that this nation "had taken measures" to protect its property, and that "import controls by the United States would help deter such pillage." After making these findings, and "considering" the advice of a "panel of experts" (that the President selected), the President could freely act. *Id.*

<sup>105</sup> Under the current proposed legislation, the President must satisfy a number of restrictions upon his authority. S. 1723, 97th Cong., 1st Sess. §§ 2(a)-3(c) (1981). Initially he must make findings that cultural property is "in jeopardy," that the nation needing assistance has "taken measures" to protect its property, that import restrictions imposed by the United States "would be of substantial benefit in deterring" pillage, that these restrictions "applied in concert" with other nations would deter pillage, and that these restrictions are

tial departure from the purposes of the UNESCO Convention. They require the President to solicit advice from a panel of experts, including art importers, and to publish any action taken against this advice.<sup>106</sup> Further, these restraints strictly limit the duration of import controls.<sup>107</sup>

### B. *The Debate Over Ultimate Effectiveness*

The alleged futility of United States implementation of the Convention is the most compelling argument against the proposed implementing legislation. Because many art-importing nations have not joined the UNESCO Convention,<sup>108</sup> American art dealers argue that implementation would deny the American public access to cultural property and would fail to diminish global trade in illegal exports.<sup>109</sup> Cultural property denied to Americans would simply be diverted to nations without import

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“consistent with the general interest of the international community.” *Id.* § 2(a). The legislation then requires that the President “endeavor to obtain the commitment of the State Party concerned to permit the exchange of archaeological and ethnological materials. . . .” *Id.* Finally, the President must consider the advice of a committee of experts which he appoints from a pool of candidates nominated by various concerned groups, including art dealers. *Id.* § 3(c)(2). If the President decides to impose import restrictions, he must “promptly . . . submit to Congress a document containing a description of such action, the differences (if any) between such action and the views and recommendations contained in any committee report . . . and the reasons for any such difference.” *Id.* § 2(g). No agreement may be binding for longer than five years. *Id.* § 2(b).

<sup>106</sup> *Id.* §§ 2-3.

<sup>107</sup> *Id.* § 2(b) (five-year maximum).

<sup>108</sup> McAlee, *supra* note 19, at 604 n.175 (lists signatories as of Feb. 10, 1981: Ecuador, Bulgaria, Nigeria, the Central African Republic, Cameroon, Kuwait, Democratic Kampuchea, Yugoslavia, Mexico, Niger, Libya, Argentina, Iraq, Brazil, the Dominican Republic, Egypt, Panama, the German Democratic Republic, Poland, Jordan, Zaire, Algeria, Iran, Syria, Tunisia, Nepal, Saudi Arabia, Bolivia, India, Czechoslovakia, Nicaragua, Qatar, Mauritania, Tanzania, Uruguay, El Salvador, Mauritius, Canada, Oman, Italy, Hungary, Guinea, Honduras, Peru, and Cuba).

<sup>109</sup> 1978 *Hearing*, *supra* note 2, at 47 (statement of Douglas C. Ewing, President of the American Association of Dealers in Ancient, Oriental and Primitive Art). “Certainly, the other major art-importing countries in Europe, the Near East, and the Far East, will have no incentive whatsoever to pass legislation because as long as the United States acts unilaterally, there will be every benefit to them from the added flow of art from U.S. actions.” *Id.* See McAlee, *supra* note 19, at 604.

controls.<sup>110</sup>

This argument is short-sighted. It ignores the United States influence in the international art market.<sup>111</sup> Furthermore, it is doubtful that the remaining world art market could absorb all of the property denied entry into the United States.<sup>112</sup> In addition, market theory suggests that the loss of a major buyer may tend to decrease prices and thus reduce incentive to illegally export cultural property.

Because of the increasing number of signatories to the UNESCO Convention,<sup>113</sup> the diversion argument has lost much of its force. Two major art-importing nations, Italy and Canada, have recently signed the Convention.<sup>114</sup> The Common Market also has recently recommended that member states adopt the UNESCO Convention.<sup>115</sup> If the United States implements the Convention, this would encourage other art-importing countries to consider the UNESCO Convention a workable international agreement. In turn, the diversion argument would evaporate.

### C. *The Argument for Implementation*

Despite arguable defects in the proposed implementing legislation,<sup>116</sup> further delay in enactment is not warranted.<sup>117</sup> The

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<sup>110</sup> See note 109 *supra*.

<sup>111</sup> One expert believes that this influence is both practical—the United States market is large, see note 2 *supra*, as well as psychological—United States action will encourage interested groups in other nations to press for adoption of the UNESCO Convention. 1978 *Hearing, supra* note 2, at 62-63 (statement of Clemency Coggins, Research Fellow, Peabody Museum; Chairman, Subcommittee on the Preservation of Archaeological Resources, Archaeological Institute of America).

<sup>112</sup> The United States provides 25%-50% of the world market. See note 2 *supra*. But see McAlee, *supra* note 19, at 575 (asserting that the United States ban on imports of pre-Columbian artifacts did not reduce destruction of archaeological sites, but giving no authority).

<sup>113</sup> 1979 *Hearing, supra* note 2, at 5 (statement of Mark B. Feldman, Deputy Legal Advisor, Dept. of State, reporting an increase from 30 to 43 signatories between April 1977 and Sept. 1979). See McAlee, *supra* note 19, at 604 n.175 (listing 45 signatories as of Feb. 10, 1981, set forth in note 108 *supra*).

<sup>114</sup> 1979 *Hearing, supra* note 2, at 5 (statement of Mark B. Feldman, Deputy Legal Advisor, Dept. of State).

<sup>115</sup> *Id.* at 5-6.

<sup>116</sup> See notes 90-115 and accompanying text *supra*.

<sup>117</sup> One scholar lists ethical and practical implications of further delay: The bill should be passed because it is the best feasible step that the United States can take at the present time toward interna-

Convention and the proposed legislation aggressively protect those concerned with perpetuating a lucrative market in cultural property. To delay implementation merely to fine-tune protection for art-importers ignores strong domestic support for immediate implementation.<sup>118</sup>

The prior Presidential administration supported the proposed implementing legislation.<sup>119</sup> Representatives of the Department of State repeatedly have appeared before Congress to argue for enactment.<sup>120</sup> These representatives view the proposed legislation as a balanced approach to competing global interests, and have asserted that passage of the legislation is essential to projecting the United States image as a moral nation.<sup>121</sup>

A related concern of the State Department has been that further delay in passing implementing legislation will make the negotiation of other treaties more difficult.<sup>122</sup> Undue delay in pass-

tional cooperation in the protection of the world's heritage. Considerations: (1) Most of the antiquities concerned were illegally removed from the country of origin. (2) Most of the antiquities were removed by clandestine diggers who by their activities destroy the context of the objects' deposition on which much of the historical and sociological significance is based. (3) U.S. taxpayers have been placed into the position of subsidizing the illegal activities mentioned in (1) and (2). (4) Most of the arguments advanced by opponents of the bill ignore the ethics that are involved. (5) The art public is deluded by forgeries and by the falsification of the provenience of many of the objects. (6) Art plunder has grown to a critical level in recent years; ancient sites are a vanishing resource.

1978 Hearing, *supra* note 2, at 59-60 (statement of Prof. James R. Wiseman, Boston University, on behalf of the Association for Field Archaeology).

<sup>118</sup> See notes 7-8 and accompanying text *supra*; notes 119-127 and accompanying text *infra*.

<sup>119</sup> 1977 Hearing, *supra* note 6, at 18-19 (statement of Eli Maurer, Assistant Legal Advisor, Dept. of State); McAlee, *supra* note 19, at 599. The Reagan administration has not yet stated its views on implementing legislation. Telephone conversation with Eli Maurer, Assistant Legal Advisor, Dept. of State (March 5, 1982).

<sup>120</sup> 1979 Hearing, *supra* note 2, at 18; 1978 Hearing, *supra* note 2, at 16; 1977 Hearing, *supra* note 6, at 3.

<sup>121</sup> See, e.g., 1978 Hearing, *supra* note 2, at 17 (statement of Mark B. Feldman, Deputy Legal Advisor, Dept. of State).

<sup>122</sup> See *id.* at 39.

We turned this Convention around. I feel personally committed because I helped organize a diplomatic effort which succeeded. I do not know whether it would have succeeded in 1978, but it succeeded in 1970. . . . It was a hard fought diplomatic success. I do

ing the UNESCO Convention will cast doubt on the good faith of American negotiation of all treaties.<sup>123</sup>

Representatives of museums and scholarly organizations are active proponents of implementing legislation.<sup>124</sup> They argue that implementing the UNESCO Convention will benefit archaeology and preserve historical sites by raising the legal standards of trade in cultural property.<sup>125</sup> They assert that economic incentive to pillage archaeological sites will diminish when the market for this art work is reduced.<sup>126</sup> In sum, they contend that the proposed implementing legislation judiciously balances their concerns against commercial interests.<sup>127</sup>

Despite domestic support for enabling legislation, Congress has been reluctant to act. This opposition rests in part on the congressional perception of UNESCO as an organization partial to Third World concerns. Throughout the hearings on imple-

not know when we will have another one in UNESCO.

*Id.* (statement of Mark B. Feldman, Deputy Legal Advisor, Dept. of State).

<sup>123</sup> 1979 *Hearing*, *supra* note 2, at 19 (statement of Prof. Paul M. Bator, Harvard Law School, a U.S. delegate to the UNESCO Convention). "[T]he UNESCO Convention, which we have signed and ratified in a constitutional process, imposes obligations on the United States which we should now carry out in good faith." *Id.*

<sup>124</sup> Every national organization representing American archaeologists, every national American museum organization, and many of the nation's largest and most important museums have clearly stated their support for both the UNESCO Convention and the proposed U.S. legislation supporting it. Opposition to the bill has come chiefly from dealers and their opposition is clearly self-serving.

1979 *Hearing*, *supra* note 2, at 67 (statement of Dr. Mary Elizabeth King, on behalf of the Curators' Committee of the American Association of Museums, The Society for American Archaeology, The American Association of Museums, and with the endorsement of the Association of Science Museum Directors). King added that museums support the goals of the UNESCO Convention, despite its limits on their ability to fill gaps in their collections. *Id.*

<sup>125</sup> 1979 *Hearing*, *supra* note 2, at 65-69 (statement of Mary Elizabeth King, Council Member and Chairwoman, Curators Committee, American Association of Museums).

<sup>126</sup> 1979 *Hearing*, *supra* note 2, at 35-38 (statement of Ian Graham, Curator of Maya Hieroglyphics, Peabody Museum, Harvard University); 1979 *Hearing*, *supra* note 2, at 31-33 (statement of Prof. James R. Wiseman, Director, Archaeological Studies Program, Boston University, on behalf of the Association of Field Archaeology). See notes 111-112 and accompanying text *supra*.

<sup>127</sup> See 1978 *Hearing*, *supra* note 2, at 70 (statement of Prof. Karen D. Vitelli, University of Maryland, on behalf of the Archaeological Institute of America and the Association for Field Archaeology).

menting legislation, members of Congress have noted the increase of Third World influence in international organizations and the marked decline of United States influence.<sup>128</sup> Some legislators use this observation to argue that implementation should be delayed until the art-rich Third World proves its commitment to American interests.<sup>129</sup> Proponents of the legislation point out that this is not a criticism of the implementing legislation.<sup>130</sup>

The interests of art importers are valid. However, delay in passing implementing legislation ultimately may compromise these interests more than acceptance of the legislation's terms. Many foreign nations increasingly are adopting more aggressive means to control illegal exports than the UNESCO Convention contemplates.<sup>131</sup> Further delay can only encourage these efforts.

In sum, implementation of the UNESCO Convention will provide a framework for United States action to protect cultural property and will prove United States sincerity in negotiation of the Convention. The alternative course—no protection and the resulting appearance of bad faith—seems far less appealing.

#### IV. THE THIRD WORLD THREAT TO UNITED STATES ART IMPORTING INTERESTS

Failure to implement the UNESCO Convention may subject the United States to a less advantageous approach to the worldwide problem of illegal commerce in cultural property. Many art-rich nations that originally accommodated United States interests in the UNESCO Convention now advocate a hard-line

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<sup>128</sup> "The United States is the least influential country in UNESCO. We pay about 25 to 30 percent of the carrying charges, and we are continuously maligned and downgraded. Now, this is a UNESCO Convention and every country in UNESCO has more influence than the United States." *Id.* at 34 (statement of Sen. Ribicoff).

<sup>129</sup> "UNESCO is one of the worst of all of the international organizations in its attitude toward U.S. policy. I am more concerned with this than arguments between museums . . . and American dealers. . . ." *Id.* at 37 (statement of Sen. Ribicoff).

<sup>130</sup> "It would be shameful to kill this legislation, and the archaeological knowledge with it, out of pique on UNESCO. Surely that organization can be dealt with in other ways." *Id.* at 75 (statement of Prof. Karen D. Vitelli, University of Maryland, on behalf of the Archaeological Institute of America and the Association for Field Archaeology).

<sup>131</sup> See notes 132-147 and accompanying text *infra*.

approach to illegal trade in cultural property. The United Nations,<sup>132</sup> the Non-Aligned Nations,<sup>133</sup> and the Organization of American States (OAS),<sup>134</sup> have made multiparty demands for

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<sup>132</sup> The General Assembly has passed a resolution on "Restitution of Works of Art to Countries Victim of Expropriation," which states, in part:

Deploiring the wholesale removal, virtually without payment, of objets d'art from one country to another, frequently as a result of colonial or foreign occupation, convinced that the restitution of such works would make good the serious damage suffered by countries as a result of such removal . . . , [the United Nations] calls upon all the states concerned to prohibit the expropriation of works of art from territories still under colonial or alien domination.

G.A. Res. 3187, 28 U.N. GAOR Supp. (No. 30) at 9, U.N. Doc. A/9030 (1974).

<sup>133</sup> "The people of the non-aligned countries wish to safeguard their own personality, to revive and enrich their cultural heritage, and to promote in all fields their authenticity which has been seriously alienated by colonialism." Political Declaration of the Fourth Conference of Heads of Government of Non-Aligned Countries of 1973 (signed by nearly 100 nations), *FOURTH CONFERENCE OF HEADS OF STATES OR GOVERNMENTS OF NON-ALIGNED COUNTRIES*, Algiers, Sept. 5-9, 1973: *FUNDAMENTAL TEXTS* (Algiers, Algeria, Ministry of Foreign Affairs, n.d.) 9-26, *reprinted in* 1 O. JANKOWITSCH & K. SAUVANT, *THE THIRD WORLD WITHOUT SUPERPOWERS: THE COLLECTED DOCUMENTS OF THE NON-ALIGNED COUNTRIES* 189-94 (1978).

The Fifth Conference of Non-Aligned Nations adopted a resolution entitled "Restitution of Art Treasures and Ancient Manuscripts to the Countries from which They Have Been Looted." It stated:

Reaffirming the principles of the Universal Declaration on Human Rights and the African Cultural Convention on the rights of States to recover the art treasures and manuscript looted from them, Referring to the UNESCO Convention adopted on 14 November, 1970, at its Sixteenth Session. Convinced of the right of States to recover their art treasures and manuscripts which are part of their heritage . . . Requests urgently all States in possession of works of art and manuscripts to restore them promptly to their countries of origin.

*FIFTH CONFERENCE OF HEADS OF STATE OR GOVERNMENT OF NON-ALIGNED COUNTRIES*, Colombo, Aug. 16-19, 1976, *FUNDAMENTAL TEXT, DECLARATION, RESOLUTIONS, ACTION PROGRAMME FOR ECONOMIC COOPERATION* (Colombo, Sri Lanka, Ministry of Foreign Affairs, 1977) 3-50, *reprinted in* 2 O. JANKOWITSCH & K. SAUVANT, *THE THIRD WORLD WITHOUT SUPERPOWERS: THE COLLECTED DOCUMENTS OF THE NON-ALIGNED COUNTRIES* 880 (1978).

<sup>134</sup> Convention on the Protection of the Archaeological, Historical, and Artistic Heritage (Convention of San Salvador), Gen'l Assembly of OAS, June 16, 1976, OAS T.S. 47 (1976), *reprinted in* 15 INT'L LEGAL MATS. 1350 [hereinafter cited as OAS Convention].

The OAS is a regional organization whose functions "are the preservation of peace, and the advancement of economic, social and cultural welfare of its

the restitution of all illegally exported cultural property and the establishment of restrictive export-import controls.<sup>135</sup> Steadily increasing membership in these more stringent cultural agreements evidences the strength of this movement.<sup>136</sup>

The most ambitious Latin American effort to protect its cultural property is the OAS-sponsored Convention on the Protection of the Archaeological, Historical and Artistic Heritage of the American Nations (OAS Convention).<sup>137</sup> It differs from the UNESCO Convention in calling for virtual elimination of trade in cultural property.<sup>138</sup> The militancy of the OAS Convention results from its signatories' belief that developed countries tolerate illicit trade because of their colonial mentality.<sup>139</sup>

members." HENKIN ET AL., *supra* note 13, at 1041-42.

<sup>135</sup> 1978 Hearings, *supra* note 2, at 17 (statement of Mark B. Feldman, Deputy Legal Advisor, Dept. of State). "In the United Nations and in the Organization of American States, we have been confronted with demands for the restitution of all art illegally removed from countries of origin and for the establishment of a comprehensive system of export and import controls on all cultural property." *Id.*

<sup>136</sup> As of July 1, 1980, signatories to the OAS Convention were Bolivia, Chile, Costa Rica, Ecuador, El Salvador, Guatemala, Haiti, Nicaragua, Panama, and Peru. Inter-American Treaties and Conventions: Signatures, Ratifications and Deposits with Explanatory notes, T.S. 9, at 124 (OAS General Secretariat, Washington, rev. 1980); telephone conversation with Eliana P. Vela, Treaty Officer, Washington office of the OAS (March 5, 1982).

<sup>137</sup> OAS Convention, *supra* note 134.

<sup>138</sup> *Id.* art. 1.

The purpose of this Convention is to identify, register, protect, and safeguard the property making up the cultural heritage of the American nations in order: (a) to prevent illegal exportation or importation of cultural property; (b) to protect cooperations among the American states for mutual awareness and appreciation of their cultural property.

*Id.*

<sup>139</sup> In the words of one scholar,

The cultural imperialism of the western world is still present in the cultural life of developing countries. . . . Alongside the aspirations for new and more equal international aspirations for new and more equal international relations, people tend to become more conscious of their own, long time neglected cultural values. Claims for 'spiritual decolonization,' 'affirmation of cultural identity,' 'preservations of authenticity in culture' are not the expression of nostalgia for a remote past, but are rather a part of efforts these countries are making in their struggle for more equitable international relations. . . . With much right the thesis is asserted that cooperation in the field of culture and education constitutes today

The OAS Convention imposed strict requirements on the traffic of cultural property. The OAS Convention recommends that each member state register domestic collections of cultural property.<sup>140</sup> It requires certification of all exports.<sup>141</sup> Most important, the OAS Convention prohibits any import of cultural property without this export certification.<sup>142</sup> Thus, under the OAS Convention, legal importation is very narrowly defined. Unless the country of origin authorizes an object's loan or sale, import is illegal. The OAS Convention requires that each country use all available means to prevent illegal excavation or removal of cultural property.<sup>143</sup> It similarly requires each country to employ any effective means to return wrongfully held cultural property to its rightful domain.<sup>144</sup> There are simple procedures for requesting the return of illicitly exported cultural property,<sup>145</sup> and requests must be accompanied by the petitioning state's proof of ownership.<sup>146</sup>

Because of these strict terms, the United States is unlikely to join the OAS Convention. Nevertheless, a unified Latin American effort will slow traffic in cultural property to all nations, including the United States.<sup>147</sup>

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the unique way capable of assuring the access to the new international order, that cooperation in the field of culture is indispensable in the edification of the new economic order.

See Cvjeticanin, *Education and Culture as Factors of the New Economic Order*, in THE NEW INTERNATIONAL ECONOMIC ORDER 340, at 341-42 (1976-77, 1980 trans.).

<sup>140</sup> OAS Convention, *supra* note 134, art. 7.

<sup>141</sup> *Id.* art. 3.

<sup>142</sup> *Id.* art. 3. "The cultural property included in the above article shall receive maximum protection at the international level, and its exportation and importation shall be considered unlawful except when the state owning it authorizes its exportation for purposes of promoting knowledge of national cultures." *Id.*

<sup>143</sup> *Id.* art. 9.

<sup>144</sup> *Id.* art. 10.

<sup>145</sup> *Id.* arts. 11, 12.

<sup>146</sup> *Id.* art. 11.

<sup>147</sup> Latin American nations have acted to protect their cultural property. As of August, 1980, the OAS had allotted almost \$13,000,000 to protect cultural property. 3 OAS DEV. NEWSLETTER, No. 8, at 3 (Aug. 1980). The OAS plans to establish the following organizations:

Inter-American Center for Inventorying the Historical and Artistic Heritage, in Colombia; Inter-American Subregional Center for Restoration of Personal Property, Specializing in Statuary and Paint-

The United States can, however, mitigate the impact of the OAS Convention, since some art-rich nations are affiliated with both conventions.<sup>148</sup> Panama, for example, has dual affiliation. Upon implementing the UNESCO Convention, the United States could demand that Panama fulfill its obligations under that Convention. It could negotiate with Panama under article 9, if Panama's cultural property was in jeopardy. Although Panama and its OAS affiliates may be more restrictive *inter se*, the United States would be protected. By holding Panama to the terms of the UNESCO Convention, the United States may diffuse the harsher terms of the OAS Convention.

### CONCLUSION

Implementing the UNESCO Convention would serve United States domestic interests. Citizens, scholars, and museums deplore the pillage caused by an uncontrolled market for illicitly exported cultural property. Nevertheless, art importers, collectors, and museums rely on a market in cultural property. These needs are reconciled to the best possible United States advantage in the UNESCO Convention. The Department of State has acknowledged that there is little likelihood of the United States renegotiating a more favorable agreement since the Convention was negotiated in an era when United States influence was substantially greater than it is today.

Implementation of the UNESCO Convention offers far-sighted protection of United States importing interests. Many art-rich nations are adopting stringent multilateral agreements with little or no provision for international trade in cultural property. The United States has an opportunity to formalize its relationship with many of these nations through the mutual con-

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ing, in Peru; Inter-American Subregional Center for Restoration of Personal Property, Specializing in Pre-Columbian and Colonial Ceramics; and Inter-American Center on Culturology, in Venezuela.

10 OAS CHRONICLE, No. 10-11, at 5 (Oct.-Nov. 1975).

The most recent major conference focusing on cultural policies was the Inter-Governmental Conference on Cultural Policies in Latin America (also referred to as the Bogota Conference on Cultural Policies) which took place on Jan. 10-20, 1978, in Bogota, Colombia. The conference attracted 200 delegates from 26 countries. They adopted 58 recommendations and a declaration containing specific proposals for cultural cooperation. A second cultural conference is anticipated in 1981-82. 24 UNESCO CHRONICLE, No. 1, at 7 (Jan.-Feb. 1978).

<sup>148</sup> See notes 108 & 136 *supra*.

cession of conflicting interests incorporated in the UNESCO Convention. Accordingly, this comment advocates that Congress act immediately to implement the UNESCO Convention. The Convention is the only extant agreement which both protects cultural property and allows a carefully regulated market.

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