1978

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Michael S. Blass

Recommendation Citation
Available at: http://ir.lawnet.fordham.edu/flr/vol46/iss6/5

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LEGAL RESTRICTIONS ON AMERICAN ACCESS TO FOREIGN CULTURAL PROPERTY

I. INTRODUCTION

Artistic and ethnological objects always have been valued as important records of human accomplishment.¹ In modern times, cultural property² has taken on an even greater significance, for more than ever cultural property has become an active object of financial investment.³ The growing international demand for cultural property has brought about an alarming increase in the looting and destruction of cultural sites around the world.⁴ Archaeological remains, national monuments, art galleries, temples and churches are all falling prey to thieves eager to meet the demands of an insatiable market. This situation, described by one scholar as the “murder of man’s history,”⁵ has become the subject of legislation throughout the world.⁶

In recent decades, scores of countries have enacted unilateral restrictions on the acquisition of cultural property within their borders.⁷ Many countries, including the United States, have entered into bilateral and multilateral agreements designed to limit the trafficking in important cultural materials. These growing restraints on the international exchange of art have raised the important question of who shall control the right to possess cultural property. The resolution of this question involves the balancing of two conflicting considerations. On the one hand, the artifacts of past civilizations are the “legitimate heritage of all mankind and not just of those states currently occupying the physical sites of early cultures.”⁸ On the other hand, modern

². Cultural property is a generic term referring to all types of artistic, archaeological, and ethnological material.
⁴. H.R. Rep. No. 824, 92d Cong., 2d Sess. 2-3 (1972). The sudden decline about 900 A.D. of the prodigious Mayan civilization in Central America continues to be one of the great mysteries of human civilization. Many of the important clues to this mystery have been obliterated by the clandestine art trade. Looters leave many archaeological sites a pile of rubble by hacking up large limestone slabs, called stelae, that contain key hieroglyphic and decorative carvings. N.Y. Times, Mar. 26, 1973, at 1, col. 2; Wall St. J., June 2, 1970, at 1, col. 1.
⁶. For a discussion of the various types of protective legislation around the world, see Nieć, Legislative Models of Protection of Cultural Property, 27 Hastings L.J. 1089 (1976). For an extensive listing of these national treasury laws, see L. DuBoff, Deskbook of Art Law 1008-71 (1977).
⁷. See notes 25-30 infra and accompanying text.
nations, especially the art-rich countries of the Third World, have an important stake in fostering a proud cultural heritage. Any effective plan for controlling the flow of art will have to accommodate both sides of the issue.

This Comment will present the problems inherent in the regulation of the trade in cultural property and trace the development of the United States' response to these problems. Two important and recent developments will be discussed in particular. The first is a federal court of appeals decision involving the application of stolen property laws to the importation of cultural artifacts declared to be the national property of the Mexican Government. The second is a bill proposed in Congress and recently passed by the House of Representatives that will enable the executive branch to impose, at its discretion, broad restrictions on the importation of cultural objects from all parts of the globe.

II. THE NEED FOR CONTROLS

Art looters work quickly and efficiently. They have discovered—and dismantled—countless archaeological sites, many of which were previously unknown to scholars and professional archaeologists. Very often, their operations are financed by foreigners employing native diggers and even local government officials in international schemes of art smuggling. They are known to conceal their plunder in commercial shipping crates and to transport it through many countries. The objects they peddle have ultimately been acquired by some of the most respected collecting institutions in the world. In fact, it is believed that most of the cultural antiquities held for sale in the United States are stolen or illegally exported from the country of origin.

Although a good deal of the illicit trafficking is in pre-Columbian artifacts, the problem is by no means limited to Latin America. Any country with a rich cultural heritage or unique ethnological art is a potential target for the

10. United States v. McClain, 545 F.2d 988 (5th Cir. 1977); see notes 53-99 infra and accompanying text.
13. Id. at 28, col. 4.
14. See, e.g., United States v. Hollinshead, 495 F.2d 1154, 1155 (9th Cir. 1974) (pre-Columbian stelae packed in crates at a Venezuelan fish packing plant).
15. Nieć, supra note 6, at 1091.
17. Nor is it a problem unique to modern times. In the early 19th century, Lord Elgin removed sculpture from the Parthenon in Athens and shipped it to England where it is now displayed in the British Museum as the "Elgin Marbles." L. DuBoff, supra note 6, at 65-69.
18. Italy, "the 600-mile-long art gallery," is a literal showcase of Western civilization with many of its treasures unguarded and vulnerable to depredation. Id. at 70. Turkey has already lost innumerable archaeological treasures. Nieć, supra note 5, at 1091.
19. In 1973, newspapers throughout this country told the story of the Afo-A-Kom, a sacred
world's art thieves. The smuggled art almost invariably travels from the underdeveloped "art-rich" nations to economically wealthier "art-hungry" nations, the United States, Europe, and Japan being the primary markets. If the situation persists, humanity may someday be haunted by "the spectre of a world denuded of all artistic and cultural treasures in order to stock the museums and private collections of one or a few wealthy nations." The plundered materials, especially the archaeological artifacts, have a dual importance for humanity. In addition to being attractive pieces of art, cultural objects also serve as documents of the past. Such documents, however, cannot be read properly once they are removed from their original site. When taken from an illegal excavation, a cultural object is usually smuggled out of the country with every attempt made to hide its true origins. Knowledge of its precise archaeological environment becomes a mystery. The result is a beautiful, but meaningless, work of art; for the historical significance of the work, once taken out of its context, is forever lost.

The loss of a cultural object can be especially devastating to the nation from which it was taken. Most of the victimized nations, such as those in Central America and Africa, are underdeveloped and striving to build a national unity. In addition to attracting valuable tourist revenues, the cultural heritage provides these governments with a highly visible focal point around which to build this unity. It is no surprise, then, that the destruction of the national heritage has become an important political issue for these countries, virtually all of which have enacted legislative schemes designed to control the loss of their cultural property. Most of these laws require the issuance of

statue belonging to the people of Kom in East Cameroon. The statue, regarded by these tribal people as embodying the very essence of their cultural identity, was stolen from its storage shed in 1966. The loss caused a perceptible deterioration in the social stability of the 40,000 inhabitants of Kom. Several years later, the statue was discovered selling for $60,000 in the window of a prominent New York art dealer. Following a wave of public outrage, funds were raised to reimburse the apparently innocent dealer, and the statue was returned to Cameroon. For a thorough discussion of the Afo-A-Kom affair, see DuBoff & Allen, The Afo-A-Kom Affair: A Plea To Save a Cultural Heritage, in Art Law Domestic and International 425 (L. DuBoff ed. 1975). See also N.Y. Times, Oct. 30, 1973, at 1, col. 3; N.Y. Times, Oct. 25, 1973, at 1, col. 6.


22. Bernal, supra note 1, at 120.


24. Id.; H.R. Rep. No. 824, 92d Cong., 2d Sess. 3 (1972); Bernal, supra note 1, at 120; Wall St. J., June 2, 1970, at 1, col. 1. On the other hand, the scientific loss may be equally great if international controls result in denying scholars access to cultural property. 1977 Hearings, supra note 8, at 70-71 (statement of Mr. Holland).

25. Bernal, supra note 1, at 119; Hamilton, supra note 9, at 348.

26. Merryman, supra note 21, at 238; see note 6 supra.
special permits before such material may be removed from the country.  

Many countries, such as Mexico and Guatemala, have enacted broad national treasury laws which vest the national government with legal title in the nation's cultural patrimony.  

Mexico's most recent law on the subject, enacted in 1972 after a "bitter constitutional debate," extends national ownership to even those cultural objects that were already privately owned. The Mexican law is but one example of these strict enactments that generally prohibit the removal of any cultural objects from the country.

Despite these attempts at domestic governmental controls, the illicit trade in cultural property continues to increase. This trend stems largely from the fact that most of the countries affected simply do not have the resources to enforce their own controls. The material to be protected is frequently located in remote areas that are difficult to reach because of rugged terrain. The guards whom these countries can afford to hire are usually underpaid and very susceptible to bribes. However, even if these countries were able to spend large sums of money on the protection of their national treasures, such action would probably be doomed to failure. As long as the primary market for a nation's antiquities exists in the more developed countries where buyers are willing to pay astronomical prices, it can be expected that these local attempts at control will be defeated by the deeper pockets of the wealthier art-importing nations.

III. THE TRADITIONAL REMEDIES

A. The Civil Remedy

When a cultural object is illegally removed from a foreign nation and brought into the United States, the foreign government can seek the return of the object by bringing a civil action in an American court. Judicial relief is almost never sought in these cases, however, because of the many complications inherent in such a procedure. The principal remedy, an action for

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27. 1977 Hearings, supra note 8, at 42 (statement of Mr. Marks).


29. Hamilton, supra note 9, at 348.


33. Id.

34. Id. In Guatemala, for example, a customs administrator who was ostensibly guarding against the illicit transporting of goods was discovered to be a ringleader of a group of looters and smugglers. N.Y. Times, Mar. 27, 1973, at 1, col. 8.

35. Merryman, supra note 21, at 241-42.

36. "Where civil action is brought, potential problem areas read like a law school syllabus—
replevin, has proven too expensive and time consuming to be a meaningful deterrent to the pillaging of archaeological sites.\textsuperscript{37} To begin with, it forces the plaintiff-government to show "not only some right of property but the right of possession."\textsuperscript{38}

This can be particularly difficult in cases involving ancient cultural artifacts that have been illegally excavated, for their origins are rarely adequately documented.\textsuperscript{39} Such objects change hands many times, generating complicated chains of title.\textsuperscript{40} Assuming the country of origin could even locate the right defendant, it would be extremely burdensome for the country to prove that the object came from within its borders, and virtually impossible for it to establish the right to possess that object. To illustrate, the government of Honduras would have to show that a claimed pre-Columbian artifact came from inside its territory rather than from nearby Guatemala, and it would have to prove further that the artifact came from land or collections belonging to the Government of Honduras. The plaintiff-government would also have to meet the applicable statute of limitations.\textsuperscript{41} Finally, the civil remedy has the drawback of forcing a foreign nation to place itself at the mercy of an unfamiliar legal system, a situation which can become both frustrating and embarrassing.\textsuperscript{42}

\textbf{B. The Criminal Action}

Where a cultural object has been stolen abroad and imported into the United States, this country's criminal statutes will come into play.\textsuperscript{43} The most ownership, title, conflicts of law, proof of foreign law, comity, damages, statute of limitations or laches, public law versus penal law, the distinction between goods, real estate and fixtures, and so on." Rogers & Cohen, \textit{Art Pillage—International Solutions}, in Art Law Domestic and International 315, 322 (L. DuBoff ed. 1975). One noteworthy exception occurred when Guatemala brought suit against an American art dealer, Clive Hollinshead, for the return of certain pre-Columbian stelae. Hollinshead was, at the time, being prosecuted in the United States for violating the National Stolen Property Act when he brought the stelae into this country. \textit{Id.} at 321; see notes 73-77 infra and accompanying text.


40. Smuggled artifacts typically pass through numerous countries. \textit{1977 Hearings, supra} note 8, at 19 (statement of Joseph Duffey as presented by Mr. Mauer). Two of the most common entrepots are Switzerland and Lebanon. Nafziger, \textit{supra} note 32, at 232-33 n.6.

41. In New York, the action must be brought within three years from the time of the taking. N.Y. Civ. Prac. Law § 214 (McKinney 1972). If the cause of action accrued outside the state, the limitation periods of both states must be considered. \textit{Id.} § 202. Federal diversity actions would be subject to state periods of limitation. \textit{Id.} 326 U.S. 99 (1945).

42. Rogers & Cohen, \textit{supra} note 36, at 302; Nafziger, \textit{supra} note 30, at 73.

43. \textit{Comment, Legal Approaches to the Trade in Stolen Antiquities, 2 Syracuse J. Int'l L. & Com.} 51, 59 (1974) [hereinafter cited as \textit{Legal Approaches}].
important statute in this area is the National Stolen Property Act (NSPA), which makes it a crime to transport "in interstate or foreign commerce any goods . . . of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud . . . ." The statute further prohibits the receipt or sale of such goods if they "are a part of, or . . . constitute interstate or foreign commerce . . . ." The fact that many cultural objects have a value below $5,000 at the situs of their discovery does not bar application of the NSPA because, under this statute, the value of the property can be determined by its market value at any time during receipt and concealment. Where the NSPA does not apply, state stolen property statutes may come into play, since such statutes generally can be invoked for possession of stolen property having little or no value whatsoever.

The effectiveness of the criminal prosecution in cultural property cases is diminished because an essential element in any prosecution for the crime of receiving stolen goods is knowledge on the part of the accused that the property is stolen, or knowledge that would put him on inquiry as to its stolen character. When a person buys a cultural object in this country, he is rarely able to obtain accurate information on the provenance of that object. Most purchasers, even professional art dealers, are simply incapable of learning how a particular object was removed from its country of origin. Consequently, the scienter requirement is a great obstacle to the application of stolen property laws to cases involving foreign cultural property.

With all the problems inherent in both the civil and criminal actions, it is not surprising that the recovery of important cultural property has more often

45. Id. Violators are to be "fined not more than $10,000 or imprisoned not more than ten years, or both." Id. § 2314.
46. Id. § 2315.
47. The defendant in United States v. Kramer, 289 F.2d 909 (2d Cir. 1961), for example, was convicted at trial of receiving blank money orders onto which he had subsequently forged the face value. While the Second Circuit reversed the conviction on evidentiary grounds, it held that the NSPA was nevertheless applicable, for "[i]t is not essential that the stolen property be worth [the statutory amount] at the moment of receipt." Id. at 921.
48. See, e.g., Miss. Code Ann. § 97-17-67 (1972); N.Y. Penal Law § 165.40 (McKinney 1975). In New York, if the defendant "is in the business of buying, selling or otherwise dealing in property," he will be subject to criminal possession in at least the second degree. N.Y. Penal Law § 165.45 (McKinney 1975) (maximum four years imprisonment, id. § 70.00, and possible fine, id. § 80.00). This is especially relevant in cultural property cases since such property is usually imported by professional art dealers.
50. One illustration of this is the Afo-A-Kom incident. See note 19 supra.
come about through private negotiations than judicial relief, a process which can have very little deterrent effect on the illicit trade. This state of affairs, however, may be significantly changed by the recent case of United States v. McClain.

McClain involved five defendants who were convicted of conspiring to transport, receive, and sell stolen pre-Columbian artifacts in interstate and foreign commerce in violation of the NSPA. The prosecution charged that the artifacts involved were the property of Mexico by reason of that government’s declaration of ownership over all pre-Columbian artifacts within its borders. The Mexican Government’s ownership was asserted by the prosecution “despite the probability or possibility that the defendants, or their vendors, acquired [the objects] from private individuals or ‘found’ them . . . on private property in Mexico.” The defendants contended that the Mexican Government’s declaration of ownership was “not enough to bring the objects within the protection of the NSPA.”

The evidence showed that one of the defendants had attempted to sell certain pre-Columbian artifacts to the director of the Mexican Cultural Institute in San Antonio, Texas, an organization which turned out to be an official arm of the Mexican Government. In addition, the other defendants had offered to sell some of the artifacts to an undercover FBI agent. Though it was conceded that the material had been illegally exported from Mexico, there was no evidence as to how or when such exportation occurred. The defendants were convicted on the basis of testimony by a deputy attorney general of Mexico that ownership of these objects had been vested in the Mexican Government since 1897.

The Fifth Circuit Court of Appeals reversed the convictions upon a finding that, contrary to the expert testimony at trial, government ownership of all pre-Columbian artifacts in Mexico did not come about until 1972. It was in that year that the Mexican legislature enacted a law which stated that “archaeological monuments, movables and immovables, are the inalienable and imprescriptible property of the Nation.” The declaration included any objects, even those in private collections, that are the “product of the cultures prior to the establishment of the Spanish culture in the National Territory.” Clearly, the material in the McClain case was within the category established by the new law. Since, however, there was no evidence of when the material was removed from Mexico, the Fifth Circuit found that the jury had no basis for determining that removal occurred at a time when the law was in effect.

52. Legal Approaches, supra note 43, at 60.
53. 545 F.2d 988 (5th Cir. 1977).
54. Id. at 993.
55. Id. at 994.
56. Id. at 993.
57. Id. at 992.
59. 545 F.2d at 1000.
In its decision, the Fifth Circuit pointed out the distinction between a government's power to regulate and actual ownership, and reaffirmed the principle that illegal exportation does not render an object "stolen" within any meaning of the word. That is, while a government may have the inherent power to regulate the movement of articles through and within its borders, such power does not vest ownership of those articles in the government. The court made it clear, however, that a government can acquire actual ownership of property simply by declaring its ownership of that property. In so doing, a government need not ever possess the objects; in fact, it does not even have to know they exist. Once such a declaration is made, a subsequent unauthorized exportation of that property will be "a sufficient act of conversion to be deemed a theft." Thus, according to McClain, anyone possessing property in this country and knowing it was removed from a nation that has declared itself the owner of that property will be subject to criminal prosecution in the United States.

The McClain court recognized the validity of the Mexican declaration of ownership as being "an attribute of sovereignty." This deference to foreign sovereignty grows out of the American act of state doctrine, which states that "[e]very sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." More specifically, the United States Supreme Court has held that this principle is "applicable to a case involving the title to property brought within the custody of a court." In fact, in 1972, the Senate Report on the UNESCO Convention indicated that this country would recognize the validity of a foreign nation's decree of ownership over "certain cultural property" within its jurisdiction, and that "[i]llegal removal of such property ... should be recognized as theft.

The great impact which the McClain case may have upon professionals in the art field was acknowledged by the court in the very first sentence of its opinion: "Museum directors, art dealers, and innumerable private collectors throughout this country must have been in a state of shock when they read the news—if they did—of the convictions of the five defendants in this case."

60. Id. at 1002.
61. Id. at 1002-03.
62. "[P]ossession is but a frequent incident, not the sine qua non of ownership, in the common law or the civil law." Id. at 992.
63. Under present Mexican law, cultural artifacts belong to the state "even when they are 'unknown' or lost." Nafziger, supra note 30, at 70.
64. 545 F.2d at 1003 n.33.
65. Id. at 1003.
Officials of established and respected museums, who generally have come to support control over the illicit traffic in antiquities, have nevertheless expressed concern over the ramifications of McClain. It is feared that such a use of the NSPA could place museum trustees and other collectors in jeopardy of conviction as a result of foreign statutes that are often overbroad and rarely available in English translations.

McClain was not the first case to look to foreign national treasury laws in a United States stolen property prosecution. In 1974, in United States v. Hollinshead, the Ninth Circuit affirmed the conviction of Clive Hollinshead, an American art dealer who imported into this country a pre-Columbian artifact that had been declared the public property of the government of Guatemala. The Hollinshead case was unusual, however, in that the stolen object was so well known that the defendant must have been aware of its origin. Furthermore, the involvement of Hollinshead and his codefendant in the illegal transport of the property was so clear that "[i]t would have been astonishing if the jury had found that they did not know the stele was stolen." Accordingly, the question of Hollinshead's knowledge of a Guatemalan declaration of ownership was of minimal importance to the establishment of scienter in the case.

The Hollinshead jury was instructed that every person is presumed to know what the law forbids. On appeal, it was contended that no such presumption exists with respect to foreign law. The Ninth Circuit sustained the contention, but held the error not prejudicial in the context of the entire jury charge, which had made it clear that conviction required proof beyond a reasonable doubt that the defendants knew the objects were stolen.

The crime of receiving stolen goods requires that the guilty person possess the goods with knowledge that they were stolen. The word "stolen," how-

69. 545 F.2d at 991.
70. See note 125 infra and accompanying text.
72. Id. at 3. The court of appeals in McClain had to rely on English translations of Mexican law (i.e., in addition to the testimony of the Government's expert witness) prepared by amici curiae who themselves were unable to procure translations even from such sources as the Library of Congress, the Mexican Embassy, and the Organization of American States. 545 F.2d at 997 n.15. The court did not consider whether criminal sanctions should be imposed where it appears that the accused could not with reasonable effort determine what the law requires of him. See Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970).
73. 495 F.2d 1154 (9th Cir. 1974).
74. Nafziger, supra note 30, at 72.
75. 495 F.2d at 1155-56.
76. Id. at 1155.
77. Id. at 1156.
ever, has no common law meaning, and has been subject to very broad
definitions in criminal cases. In the context of stolen property statutes, such as
the NSPA and the National Motor Vehicle Theft Act, the word "stealing"
has generally been interpreted to mean all felonious takings with an intent to
deprive another of his property. Accordingly, it is essential for the accused
to know that the goods were owned by someone at the time of the taking.

In Morissette v. United States, the defendant was convicted of stealing
United States government property in violation of 18 U.S.C. § 641. The
property involved was a quantity of spent bomb casings which Morissette
found on an Air Force bombing range. Morissette openly carried away the
casings, thinking that they had been abandoned by the government. The
United States Supreme Court reversed the conviction because, in taking the
property, Morissette did not intend to deprive anyone of the rights of own-
nership with respect to that property. The Court stated that "it is not apparent
how Morissette could have knowingly or intentionally converted property that
he did not know could be converted." In McClain, while the defendants knew that the material was illegally
exported, there was no suggestion that they knew the objects had been
declared by Mexico to be the property of the state. Thus, while the defend-
ants clearly knew of the taking of the objects, it was not clear that they
knew such original taking was with the intent to wrongfully deprive anyone
of the ownership of those objects. Nevertheless, the court stated that the mere
existence of the legislative declaration combined with the unauthorized expor-
tation was sufficient to bring the NSPA into play. It was indicated that the
convictions in this case would have been affirmed had the Mexican decree
been in existence when the artifacts were exported. Consequently, it appears
that a theft occurs when an object is removed from a country at a time when
it is owned by the state, regardless of whether or not the defendant knew it
was so owned. Thus, it would seem that a person attempting to bring an
illegally exported object into this country would either be free to do so or be

79. See, e.g., United States v. Turley, 352 U.S. 407 (1957); Lyda v. United States, 279 F.2d
461 (5th Cir. 1960); Crabb v. Zerbst, 99 F.2d 562 (5th Cir. 1938).
1218, 1227 (9th Cir.), cert. denied, 429 U.S. 839 (1976).
82. 342 U.S. 246 (1952).
83. The statute provides that "[w]hoever embezzles, steals, purloins, or knowingly converts
. . . [a] thing of value of the United States" is subject to fine and imprisonment. 18 U.S.C. § 641
(1976).
84. 342 U.S. at 271.
85. At trial, the sole evidence as to ownership of the material was the erroneous testimony of
the Government's expert on Mexican law, L. DuBoff, The Deskbook of Art Law 83 (1977); see
United States v. McClain, 545 F.2d 988, 993 (5th Cir. 1977), and the court of appeals did not
suggest that there was any indication the defendants knew the material was stolen.
86. Id. at 1000-01.
87. Id. at 1003.
88. See note 114 infra and accompanying text.
guilty of a federal crime, depending entirely on whether the country of origin had declared ownership of that object. Even though the actus reus and mens rea of such a person might be exactly the same in either situation, the McClain reasoning would require drastically different results.

While it is generally true that ignorance of the law is no defense,\textsuperscript{88} the McClain case involved more than just ignorance of the law. Receiving stolen goods, like the crime of larceny, requires the accused to know that the property rights of another are being violated.\textsuperscript{90} In cases involving cultural property owned by a foreign government only by reason of a legislative decree, the sole way in which the accused could know that property rights were involved would be through realization of that decree. Accordingly, one may wonder why the McClain court placed so much emphasis on the date of the Mexican declaration while entirely ignoring the question of whether the defendants actually knew of any such declaration.

The court in McClain noted that the NSPA has been applied to foreign thefts before,\textsuperscript{91} and cited two examples in addition to Hollinshead.\textsuperscript{92} In the first example, United States v. Rabin,\textsuperscript{93} the court stated that "[w]herever the right to possess property is recognized the taking and carrying away of the property of another without his consent and with intent to deprive him of it is stealing."\textsuperscript{94} Stealing was thus recognized in Rabin as an offense against possession.\textsuperscript{95} Yet, McClain would invoke the NSPA regardless of whether a person carrying away property knew it was wrongfully taken from the possession of another. For example, a citizen of Mexico who moves to the United States taking his private collection of pre-Columbian artifacts with him could be prosecuted under the McClain interpretation of the NSPA.\textsuperscript{96} Similarly, an American citizen who purchases such artifacts in Mexico without any knowledge of that country's ownership of all pre-Columbian materials could be criminally liable when he brings the items home with him to this country.

In the second case, United States v. Greco,\textsuperscript{97} the Second Circuit explicitly stated that it was not "concerned with the unlikely case where the goods . . .

\textsuperscript{90} J. Hall, General Principles of Criminal Law 392-93 (2d ed. 1960); see notes 82-84 supra and accompanying text.
\textsuperscript{91} 545 F.2d at 994.
\textsuperscript{92} 495 F.2d 1154 (9th Cir. 1974); see notes 73-77 supra and accompanying text.
\textsuperscript{93} 316 F.2d 564 (7th Cir.), cert. denied, 375 U.S. 815 (1963).
\textsuperscript{94} Id. at 566. The court held that certain bearer bonds, which had been forcibly removed from a Canadian bank vault, could be characterized as stolen even without proof of a Canadian law proscribing such removal.
\textsuperscript{96} The court hinted, however, that this extreme situation would be so contrary to "American notions of fundamental fairness" that a due process defense could possibly prevail here. 545 F.2d at 996 n.12.
\textsuperscript{97} 298 F.2d 247 (2d Cir.), cert. denied, 369 U.S. 820 (1962).
might be 'stolen' according to the laws of one of the two countries and yet not be 'stolen' according to the laws of the other country." 98 Although the NSPA has indeed been applied to goods stolen in other countries, the application of the statute to nationally owned cultural material is only a recent development. 99

IV. NONGOVERNMENTAL RESTRICTIONS

While special governmental controls on the importation of cultural property have been slow to develop in this country, regulation has been steadily developing among museums themselves in recent years. This has come about primarily through the activities of various national and international museum associations which have promulgated ethical codes designed to guide the acquisition policies of member institutions.

The most important of these nongovernmental organizations (NGOs) is the International Council of Museums (ICOM), which was established in 1946 and now represents approximately 3,000 institutions in over 100 countries. 100 In 1970, ICOM reported the enactment of its ethical rules for museums. 101 Three years later, representatives from six of the major American organizations issued the Joint Statement in Support of ICOM Ethics of Acquisition. 102 This document recognized that "[m]useums have in the past either engaged in, or tolerated on the part of others, activities often detrimental to the integrity of their mission," 103 and further stated that the participating organizations will "cooperate fully with foreign countries . . . to preserve cultural property . . . and to prevent illicit traffic in such cultural property." 104 The statement expressed the belief that such cooperation is best implemented by "refusing to acquire" cultural property exported illegally, 105 and advocated the implementation of controls which curtail the illicit traffic but which encourage legitimate exchange.

Although the proclamations of the NGOs could never be as effective as congressional legislation, they can serve as an important deterrent to the

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98. Id. at 251.
99. Even though the NSPA has been in effect since 1934, Hollinshead was the first American dealer to be convicted in the United States for trafficking in stolen antiquities from another country. N.Y. Times, Mar. 27, 1973, at 28, col. 5.
100. Nafziger, supra note 32, at 244.
102. Reprinted in Art Works: Law, Policy, Practice 642 (F. Feldman & S. Weil eds. 1974). In attendance were the American Association of Museums, the United States Committee of ICOM, the College Art Association of America, the Association of Art Museum Directors, the Archaeological Institute of America, and the American Anthropological Association Society for American Archaeology.
103. Id.
104. Id.
105. Id. It should be noted that this resolution does not affirmatively state that participating organizations will refrain from acquiring such property.
acquisition of illicit cultural property by the world's museums and other large-volume collectors. NGOs perform an important role as pressure groups that can shape public opinion and "mobilize shame" within the profession.\textsuperscript{106} Furthermore, an institution's accreditation can depend upon its adherence to the guidelines. Loss of accreditation could mean the loss of endowments and even tax exemptions.\textsuperscript{107}

In addition to the activities of NGOs, institutions throughout the country are adopting their own policies dealing with illegally exported art.\textsuperscript{108} But even if most of the important museums refrained from acquiring suspect property, the major market for illicit art would remain largely unaffected. The fact remains that museum acquisitions are usually not purchased outright by the museum. Most art coming into this country for sale is acquired by private dealers and collectors; it is the gifts of these private individuals that make most of the public collections in this country possible.\textsuperscript{109} Accordingly, effective regulation of cultural acquisitions in this country will require measures directed at the activities of private collectors, rather than just public institutions.

V. A REVIEW OF UNITED STATES POLICIES

A. The Free Trade Position

The fact that much of the illicit cultural material ultimately comes to rest in the United States\textsuperscript{110} was, until recent years, largely ignored by the American government.\textsuperscript{111} Traditionally, the flow of art into this country has actually been encouraged by duty-free entry for cultural material\textsuperscript{112} and tax deductions for gifts of art to certain institutions.\textsuperscript{113} The possibility that many of the art works being imported were exported illegally from another nation was of no consequence in this country. To this day, as a general rule, possession of an illegally exported object cannot be challenged in this country merely because of its illegal exportation.\textsuperscript{114}

It was not until the early 1970s that the United States began to show a

\begin{footnotes}
\item[106] Nafziger, supra note 32, at 243, 249.
\item[107] Hamilton, supra note 9, at 352.
\item[108] See, e.g., The Field Museum of Natural History: Policy Statement Concerning Acquisition of Antiquities, reprinted in Art Works: Law, Policy, Practice 627 (F. Feldman \& S. Weil eds. 1974). "The Museum will not acquire any archaeological or ethnographic object that cannot be shown to the satisfaction of the Museum official or committee responsible for its acquisition to have been exported legally from its country of origin." \textit{Id.} at 628.
\item[109] 1977 Hearings, supra note 8, at 40 (statement of Mr. Emmerich).
\item[110] See 1972 Senate Report, supra note 68, at 543.
\item[111] Legal Response, supra note 51, at 956.
\item[113] I.R.C. § 170.
\item[114] United States v. McClain, 545 F.2d 988, 996 (5th Cir. 1977) (quoting Bator, \textit{International Trade in National Art Treasures: Regulation and Deregulation}, in Art Law Domestic and International 295, 300 (L. DuBoff ed. 1975)). The court pointed out that if "an object were considered 'stolen' merely because it was illegally exported, the meaning of the term 'stolen' would be stretched beyond its conventional meaning." \textit{Id.} at 1002.
\end{footnotes}
serious interest in controlling the importation of illicitly acquired cultural material. By this time the trade had come to be recognized as a widespread and well-organized business.\textsuperscript{115} It also had become apparent that the illicit trade was an important issue to many foreign governments,\textsuperscript{116} and that continued United States indifference could have undesirable consequences with respect to this country's foreign relations. Despite these realizations, congressional action has been slowed by some persistent arguments against legislative restrictions on the movement of art.

The most common argument against restrictions is based on the "black market theory." As the art-exporting nations have tightened their controls on art acquisition, the prices for their cultural objects have risen dramatically, making this property more attractive to investors and therefore all the more sought-after by looters.\textsuperscript{117} Many countries nevertheless continue on a path of legislative overkill. Mexican law, for instance, does not allow duplicates or even the most insignificant artifacts to be exported from the country.\textsuperscript{118} Museum storerooms in Mexico are overstuffed with pieces because of the shortage of display rooms.\textsuperscript{119} Meanwhile, the material most in need of protection, that which is still in the countryside, is placed in greater jeopardy than ever before.\textsuperscript{120} It is feared that additional restrictions in the form of United States legislation will only further aggravate the situation.\textsuperscript{121}

Another reason for United States inaction is the belief that Americans will be making a noble but very pointless sacrifice by curtailing the flow of art into this country. Most of the older cities in this country, particularly in the Northeast, already have outstanding museums that have been building their collections for decades.\textsuperscript{122} A large part of the United States, however, has not been so fortunate, and only recently have many areas of the country experienced the cultural growth that was once exclusive to the older cities. The states in the Sun Belt, for instance, are developing economic and political power faster than any other part of the country, and the demand for cultural attractions in this region has risen accordingly.\textsuperscript{123} Legislators from these states are reluctant to support legislation that would deny their constituents the same cultural opportunities those in other parts of the country have been

\textsuperscript{115} See H.R. Rep. No. 824, 92d Cong., 2d Sess. 2-3 (1972); Wall St. J., June 2, 1972, at 1, col. 1.

\textsuperscript{116} See notes 25-26 supra and accompanying text.

\textsuperscript{117} See 1972 Senate Report, supra note 68, at 543; Legal Approaches, supra note 43, at 65-66.

\textsuperscript{118} "At least on paper, Mexico has taken a giant step backward, reentrenching regulatory methods which have long been discredited." Rogers & Cohen, supra note 36, at 322.

\textsuperscript{119} N.Y. Times, Mar. 27, 1973, at 28, col. 3.

\textsuperscript{120} After Mexico enacted its most recent and most stringent national treasury law, there were more Mexican antiquities being offered for sale in New York than ever before. N.Y. Times, Mar. 27, 1973, at 28, col. 1.

\textsuperscript{121} One estimate is that illegal excavations would increase by 30-50\%. 1977 Hearings, supra note 8, at 45 (statement of Mr. Merrin).

\textsuperscript{122} Id. at 39 (statement of Mr. Emmerich).

\textsuperscript{123} N.Y. Times, Nov. 1, 1976, at 24, col. 2.
enjoying for generations. While most of the more established museums have come out in favor of import restrictions, nearly all of the museums on record as opposing proposed controls are from the less culturally developed areas of the country. It has been further argued that while millions of Americans will be denied access to the cultural material, the illicit trade will only be diverted to the other art-importing nations such as Japan, Switzerland, France, and West Germany, which do not have any policy of restricting such imports.

B. The UNESCO Convention

The first global agreement against the international trade in illicit cultural materials came about in 1970 when the United Nations Educational Scientific and Cultural Organization (UNESCO) adopted its convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. The United States played a key role in the formulation of this convention, particularly in the rejection of a proposed Preliminary Draft which would have prohibited signatory nations from importing any cultural item not exported with the approval of its country of origin. Under the Preliminary Draft, a country could exclude the rest of the world from acquiring its art simply by refusing to issue special certificates which would be necessary to

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124. See, e.g., 1977 Hearings, supra note 8, at 22 (statement of Congressman Gibbons of Florida).
125. Id. at 70 (statement of Prof. Coe); see note 108 supra and accompanying text.
126. Among those expressing opposition to proposed import restrictions are the North Carolina Museum of Art, id. at 121, the Seattle Art Museum, id. at 132, and the Hunter Museum of Art (Tennessee), id. at 108.
127. Id. at 31 (statement of Mr. Ewing). The only nations to sign the UNESCO Convention, see notes 128-40 infra and accompanying text, thus far are Third World art-exporting nations, id. at 38 (statement of Mr. Emmerich as presented by Mr. Ewing). It is the position of the United States Department of State that other art-importing countries are awaiting United States action before implementing controls of their own. Id. at 18 (statement of Hon. Joseph Duffey as presented by Mr. Maurer).
130. The Convention is the result of a decade of negotiations. Legal Approaches, supra note 43, at 56.
132. United States v. McClain, 545 F.2d 988, 996-97 n.14 (5th Cir. 1977); Bator, Regulation and Deregulation of International Trade, in Art Law Domestic and International 299, 301 (L. DuBoff ed. 1975); Legal Response, supra note 51, at 951.
prove lawful exportation. The United States strongly opposed this draft on the
ground that it was contrary to the interests of legitimate cultural exchange. The American Society for International Law then organized a panel of experts which submitted an alternate draft on behalf of the United States. The UNESCO Convention in its final form represents a compromise between the severe Preliminary Draft and the alternative draft by the United States.

The Convention deals exclusively with material "specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science" and which comes within certain categories set forth in the agreement. State Parties are to set up "national services" for the protection of their cultural heritage "as appropriate for each country," and must issue special certificates before cultural property may legally be removed from their borders. There is, however, no general provision against the importation of cultural property which is not accompanied by such a certificate. At the suggestion of the United States, a crisis provision was included which provides that when a nation's cultural patrimony is in jeopardy of destruction, that nation shall "call upon" other State Parties "to participate in a concerted international effort" for the protection of that patrimony. This provision contemplates the future implementation of bilateral and multilateral agreements as they are needed, with import and export controls specifically mentioned as tools to be utilized.

In August 1972, the United States Senate voted 79-0 to give its advice and consent to the UNESCO Convention. The approval, however, was made subject to the understanding that the United States is not obligated to impose restrictions on the importation of cultural objects, and that the Convention will not affect existing remedies in state or federal courts. Additionally, the Senate provided that the terms of the Convention are not self-executing.

1. Rogers & Cohen, supra note 36, at 317-18. It is widely recognized that nations which require export certificates rarely grant them. 1977 Hearings, supra note 8, at 32 (statement of Mr. Ewing), 42 (statement of Mr. Marks). Mexico has required export certificates since 1934. Since then only between 50 and 70 have been issued. United States v. McClain, 545 F.2d 988, 993 (5th Cir. 1977).
2. Rogers & Cohen, supra note 36, at 318.
3. UNESCO Convention, supra note 129, art. 1.
4. Id. art. 5. This language allows State Parties to avoid entirely the establishment of such services with all the accompanying expenses.
5. Id. art. 6(a).
6. The only importation prohibition contained in the Convention applies to property stolen from a museum or monument of a State Party. Id. art 7(b)(i). Such property must be returned to the State Party on demand, but only if the requesting state pays "just compensation" to innocent purchasers or persons having a valid title. Id. art. 7(b)(ii).
7. Id. art. 9.
8. Id.
11. The report specifies that innocent purchasers need not be compensated where this is contrary to United States law. Id. at 539.
12. It should be noted that advice and consent does not, in and of itself, operate to make the
These conditions, and other understandings expressed by the Senate, suggest the basic character of the UNESCO Convention. Standing by itself, the Convention represents very little in the nature of affirmative control. Rather, it serves as a starting point for international cooperation in protecting the world's cultural heritage. It is essentially a framework within which nations might be expected to fashion more effective measures suited to their specific needs.

C. The Mexico Treaty

While the UNESCO Convention was reaching the final stages of negotiations, the United States concluded a bilateral agreement with Mexico in an effort to alleviate the growing problem of illicit traffic in pre-Columbian properties between the two nations. The primary objective of the Mexico Treaty is to deter illicit excavations and at the same time encourage the legitimate discovery and exchange of archeological and historical materials. Upon the request of one of the parties, the other party is to "employ the legal means at its disposal to recover and return from its territory stolen" cultural property that was removed from the territory of the requesting party after the effective date of the treaty. No action is required until the requesting party has furnished documented evidence establishing its claim to the property. The attorney general of the requested party is authorized to institute civil proceedings in the appropriate district court in cases where the return of treaty binding upon the United States. Advice and consent is primarily a function of consultation and approval and is not equivalent to ratification. See K. Holloway, Modern Trends in Treaty Law 53-54 (1967). This is particularly important when the treaty is not self-executing. "Our constitution declares a treaty to be the law of the land," but when the treaty is not self-executing, "the legislature must execute the contract, before it can become a rule for the Court." Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829).

145. Altogether, there were seven reservations and understandings. Other than those set forth in the text, the Senate expressed the following: (a) only those museums whose acquisitions are presently under national control shall be subject to governmental restrictions, (b) the United States need not establish any additional national services for the protection of the national patrimony, (c) theft and the receipt of stolen cultural objects are already prohibited by "the laws of the United States, and presumably the laws of most states," (d) regulation of antique dealers is not obligatory. 1972 Senate Report, supra note 68, at 538-41.


148. Mexico Treaty, supra note 146, at art. II. The treaty is intended to avoid the excesses of the over-broad national treasury laws, see, e.g., notes 28-30 supra and accompanying text, by reason of an express limitation that it shall only apply to material of "outstanding importance." Mexico Treaty art. I.

149. Mexico Treaty, supra note 146, art. III(1).

150. Id. art. III(2).

151. The federal courts have jurisdiction under 28 U.S.C. § 1345 (1970). This provision is, therefore, self-executing.
the property cannot be otherwise effected.152

The Mexico Treaty serves as an important indicator of the willingness of the United States to cooperate with other nations in their efforts to save their national patrimony. It obligates the federal government to aid in the recovery of this property, whereas previously the Mexican government was left to operate on its own through unfamiliar courts or, as was more often the case, to attempt recovery through private negotiations.153 The treaty did not, however, attempt to deal with the complications inherent in the traditional legal remedies in this area.154 In fact, its effectiveness was severely restricted by limiting application of the treaty to “stolen” cultural property.155

When the United States ratified the Mexico Treaty, it was with the clear understanding that both nations would benefit by its operation.156 Shortly after this ratification, Mexico enacted its current national treasury law prohibiting all export of cultural material from that country.157 This development critically undermined the treaty's objective of legitimate exchange, and raises at least a suggestion of bad faith as to Mexico's performance under the treaty.158 On the other hand, the treaty has had only limited application since coming into force159 and should not seriously be expected to influence Mexican art policies.

D. The Pre-Columbian Act

The shortcomings of the Mexico Treaty became painfully apparent in the years following its ratification as the illicit trade in Mexican and other pre-Columbian antiquities continued to rise.160 Consequently, in 1972 the United States acted again to alleviate the effects of a "flourishing international market" for this material.161 This time the action came in the form of a Department of State proposal for unilateral controls,162 a proposal which received the support of this country's major collecting institutions and dealers.163

The Pre-Columbian Act164 applies to any stone carving, the product of a

152. Mexico Treaty, supra note 146, art. III(3).
153. See note 52 supra and accompanying text.
154. See notes 36-52 supra and accompanying text.
155. See notes 78-84 supra and accompanying text.
156. 117 Cong. Rec. 2520, 2521 (Feb. 10, 1971) (statement of Senator Mansfield). Treaties should always benefit this country by securing foreign governmental action “in a way deemed advantageous to the United States.” Dep’t of State Circular No. 175, 50 Am. J. Int’l L. 784, 785 (1956).
157. See notes 28-30 supra and accompanying text.
159. Nafziger, supra note 30, at 74.
162. Id. at 2.
163. Id. at 3.
pre-Columbian Indian culture, which existed as a monument or architectural structure or part thereof. Under its provisions, the Secretary of the Treasury, after consulting with the Secretary of State, is to promulgate a list of the specific types of material to be protected. Any item on this list may not be imported into this country unless it is accompanied by a certificate issued by the country of origin certifying that the object was not exported in violation of the laws of that country.

If an object requires but is not accompanied by an export certificate, it will be forfeited to the United States and returned to the country of origin. Generally, the importer of the property will not be compensated for his loss. He may, however, petition the Secretary of the Treasury for a remission or mitigation of the forfeiture under the Tariff Act of 1930.

The Pre-Columbian Act has an enormous advantage over the Mexico Treaty in that it is designed to prevent the illicit material from entering this country in the first instance rather than attempting to facilitate the recovery of items after they have already been acquired by United States residents. While the treaty has had only limited application since its ratification, the Pre-Columbian Act has proven highly effective in controlling the flow of illicit material into the United States. This success has largely been due to energetic enforcement efforts of the United States Customs Service, which has been applying the import restrictions even to the smaller non-monumental objects that do not come under the Act.

VI. THE NEW LEGISLATION
A. General Approach

When the United States Senate gave its advice and consent to the UNESCO Convention, it was with the explicit understanding that the provisions of the Convention were not self-executing. Since that time, there have been three attempts to enact implementing legislation in the United States Congress. The first two of these died in committee. The third, however, has
recently passed the House and is presently awaiting action in the Senate.\textsuperscript{176}

The current legislation is similar to the Pre-Columbian Act in its use of import restrictions as a means to curb the domestic market for illicit foreign cultural property. It is considerably more sophisticated, however, since it is intended to deal with cultural material coming from all over the world rather than just that which emanates from Latin American countries.

The bill provides a three-pronged attack against the illicit trade. The first prong authorizes the President to enter into bilateral and multilateral agreements with other countries pursuant to article nine of the UNESCO Convention.\textsuperscript{177} Secondly, the President is empowered to apply unilateral restrictions to meet "emergency conditions" with respect to the cultural patrimony of a party to the Convention (State Party).\textsuperscript{178} Finally, the bill imposes a total ban on the importation of any article of cultural property that has been stolen from a museum or other public monument of a State Party after the effective date of the Act.\textsuperscript{179}

\section*{B. Presidential Action}

Before the President may enter into a multilateral or bilateral agreement\textsuperscript{180} under the Act, he must first be requested to do so by a party to the UNESCO Convention.\textsuperscript{181} In addition, the bill sets forth a number of conditions which must exist before any import restrictions may be implemented pursuant to such an agreement. The first of these requires that the cultural patrimony of the State Party must indeed be in jeopardy of pillage.\textsuperscript{182} This does not mean, however, that the situation must be of extraordinary proportions before this country can respond.\textsuperscript{183} Rather, it will help to ensure that the President will not agree to restrictions merely to please a requesting government.

The second condition to the application of import restrictions under this part of the bill requires the State Party to already be taking measures of its own to protect its cultural patrimony.\textsuperscript{184} The mere establishment of export controls by the requesting country would only be a "minimum step" toward the satisfaction of this requirement;\textsuperscript{185} and it must appear that the requesting country has not only passed laws, but is making good faith efforts at enforcing those laws.\textsuperscript{186} Undoubtedly, this requirement is intended to prevent the United

\begin{footnotesize}{
\begin{enumerate}{
\item[177.] Implementing Bill, supra note 175, § 2; see note 131 supra and accompanying text.
\item[178.] Implementing Bill, supra note 175, § 3.
\item[179.] Id. § 7.
\item[180.] While the bilateral agreements may only be entered into with parties to the UNESCO Convention, multilateral action need only involve at least one State Party. Id. § 2(a). This recognizes the fact that the illicit art trade involves many countries, 1977 Hearings, supra note 8, at 19, some of which have shown little interest in becoming State Parties, id. at 31.
\item[181.] Implementing Bill, supra note 175, § 2(a).
\item[182.] Id.
\item[184.] Implementing Bill, supra note 175, § 2.
\item[185.] House Report, supra note 183, at 6.
\item[186.] Id.
\end{enumerate}{
\end{footnotesize}}
States from being relied upon as the enforcement agent of foreign cultural property laws.\textsuperscript{187}

The third prerequisite is a finding that the implementation of import restrictions would be of substantial benefit in deterring the pillaging of the foreign patrimony, and that any less drastic action is unavailable.\textsuperscript{188} The bill thus provides that restricting the flow of cultural materials into this country shall only be a measure of last resort in the effort to save another nation's cultural patrimony.\textsuperscript{189} This particular requirement addresses itself to the widespread belief that curtailing the flow of art into this country will only divert the illicit trade to other art-importing nations and will, therefore, have little deterrent effect on that trade.\textsuperscript{190}

The final condition to any Presidential action in this area requires that any restrictions imposed be consistent with the interests of legitimate cultural exchange.\textsuperscript{191} This is in keeping with this country's previous responses to the illicit art trade which have consistently sought to avoid excessive controls that might impede lawful access to foreign cultural materials.\textsuperscript{192} Before entering into any agreement limiting the importation of cultural material into this country, the President is urged by the terms of the bill to obtain a commitment from the requesting nation to allow such exchanges as would not jeopardize its cultural patrimony.\textsuperscript{193} This provision anticipates that many of the countries which may seek American assistance under the bill will be countries that, like Mexico, do not allow the exportation of any historic cultural material whatsoever.\textsuperscript{194}

If an emergency situation arises with respect to a State Party's cultural patrimony, and that country requests American assistance, the President is authorized to apply import restrictions unilaterally without engaging in any formal negotiations with a State Party.\textsuperscript{195} The bill defines three situations that qualify as an "emergency,"\textsuperscript{196} and further states that no restrictions may be imposed without a finding that their application would reduce the incentive for the pillaging.\textsuperscript{197}

\begin{itemize}
\item \textsuperscript{187} See id.
\item \textsuperscript{188} Implementing Bill, supra note 175, § 2.
\item \textsuperscript{189} House Report, supra note 183, at 6.
\item \textsuperscript{190} See note 127 supra and accompanying text.
\item \textsuperscript{191} Implementing Bill, supra note 175, § 2(a)(4).
\item \textsuperscript{192} See notes 133, 148, 164-67 supra and accompanying text.
\item \textsuperscript{193} Implementing Bill, supra note 175, § 2(a).
\item \textsuperscript{194} House Report, supra note 183, at 5.
\item \textsuperscript{195} Implementing Bill, supra note 175, § 3. Any such restrictions are limited to an effective duration period of two years, or until a bilateral or multilateral agreement is concluded with the nation concerned, whichever period is shorter. Id. The section two agreements have an initial effective period of five years, but can be extended at the will of the President. Id. § 2(b).
\item \textsuperscript{196} An emergency is deemed to exist if: (1) the material in jeopardy from pillage is of a newly discovered, historically important type, or (2) the material originates from a site connected with an important culture whose survival is at serious risk, or (3) the material is from the remains of a particular civilization, the record of which is in jeopardy of crisis proportions. Id. § 3(a).
\item \textsuperscript{197} Id.
\end{itemize}
C. The Cultural Property Advisory Committee

It is apparent that the proposed bill vests the executive branch with considerable discretion in combating the illicit market for cultural property in this country. This feature has caused a good deal of concern among art collectors and dealers that the bill will be used to promote “interests far removed from the protection of art or the preservation of archaeological sites.” Indeed, the State Department has openly advocated the implementation of import controls for the advancement of foreign relations. Consequently, in an effort to offset such potential abuse, the bill provides for the establishment of the Cultural Property Advisory Committee, which consists of nine experts appointed by the President from among nominations submitted by specified professional organizations in the field. The Committee, representing museum, archaeological, dealer, and academic interests, is to submit to the President views and recommendations concerning any actions to be taken under the bill.

The concern that cultural importation might be made subject to political vagaries is not entirely assuaged by the establishment of the Cultural Property Advisory Committee, since the committee’s recommendations are not in any way binding upon the President. His only obligation is to consider the committee’s proposals and to report to Congress any departures from those recommendations. Even so, the State Department, which may be expected to administer the provisions of the bill, opposes the establishment of the Advisory Committee, because it believes that “this is a matter that can be best left to the President under general guidance from the Congress.”

D. Enforcement Provisions

Once the President decides to apply import restrictions under a section three emergency action or a section two agreement, the Secretary of the Treasury, after consulting with the Secretary of State, is required to promulgate a list specifying what archaeological and ethnological objects are covered. Any material so designated shall not be allowed to enter the United States unless accompanied by an export certificate issued by the State Party. Importation will, however, be allowed even without a certificate if the consignee presents

198. 1977 Hearings, supra note 8, at 33 (statement of Mr. Ewing).
199. Id. at 81.
200. Implementing Bill, supra note 175, § 5.
201. Id. § 5(b), (f).
202. The President is required to consider these recommendations if they are submitted to him within 120 days from the time he furnishes the committee with information concerning a proposed bilateral or multilateral agreement, or 60 days from the time he furnishes information on proposed unilateral action. Id. §§ 2(c)(3), 3(c)(2).
203. Id. § 2(d).
204. 1977 Hearings, supra note 8, at 32 (statement of Mr. Ewing).
205. Id. at 81.
206. Implementing Bill, supra note 175, § 4. This same procedure is utilized under the Pre-Columbian Act. See note 166 supra and accompanying text.
207. Implementing Bill, supra note 175, § 6(a). The certificate requirement can be satisfied by any documentation certifying that the object was not exported illegally. Id.
satisfactory evidence that the material was exported from the State Party at least ten years before the date of entry into the United States, that no American citizen or permanent resident had acquired an interest in the material over such period, and that the State Party had fair notice of the location of the material. 208

The ten-years abroad provision is yet another example of this country's interest in excluding foreign cultural material only where it serves to deter the illicit trade in such material. The ten-year period between the time an object is removed from a foreign country and the time it can be brought into the United States market is a considerable discouragement to the looting of that object. After this period, however, it is considered that the material has been outside the country of origin for so long that its exclusion from the United States "would no longer serve to deter pillage and would unnecessarily deny access to the American viewing public." 209

Importation will also be allowed without a certificate if the consignee presents satisfactory evidence that the material was exported from the State Party on or before the listing by the Secretary of the Treasury. 210 If, however, the consignee does not meet the requirements for importation, the customs official is required to take custody of the material and send it to a bonded warehouse for storage at the risk and expense of the consignee. 211 If the necessary documentation is still not presented within 90 days, the material becomes subject to seizure and judicial forfeiture. 212 The person attempting the illegal importation can apply for a remission or mitigation of this penalty under the Tariff Act of 1930; 213 otherwise, any material so forfeited is to be

208. Id. § 6(b). "Satisfactory evidence" consists of a declaration under oath by the consignor and consignee which (1) states that the material was exported from the State Party at least ten years before, (2) names all those who had an interest in the material during this period and declares that they are not citizens or permanent residents of the United States, and (3) shows compliance with regulations issued by the Secretary of the Treasury regarding fair notice to the State Party of the location of the material after its export from that country, together with certified copies of export documentation. Id. § 6(c)(1). Fair notice of the location of the material can be in the form of public exhibition or publication. Id. § 6(b)(2)(A)(ii).

209. House Report, supra note 183, at 14. The provision against any American interest in the material during this period was inserted at the request of the State Department in order to avoid the possibility that "some U.S. persons may acquire the object and leave it abroad until the 10 year period has expired and thus circumvent this provision." 1977 Hearings, supra note 8, at 83.

210. Implementing Bill, supra note 175, § 6(b)(2)(B). In this context, "satisfactory evidence" consists of one or more declarations under oath that the material was exported prior to such date, together with certified documents of exportation such as bills of sale, exhibition catalogs, copies of publication, and export or import documents. Id. § 6(c)(2).

211. Id. § 6(b).

212. The 90-day period can be extended by the Secretary of the Treasury "for good cause shown." Id. A museum can apply to the Secretary for permission to take possession of any material seized under the act pending a final determination of whether there was a violation. Id. § 8.

213. See note 170 supra. The bill explicitly incorporates "all provisions of law relating to seizure, judicial forfeiture and condemnation for violation of the customs laws . . . ." Implementing Bill, supra note 175, § 9(a). This includes "the right to full court review to decide all questions of law and fact involved." House Report, supra note 183, at 15.
offered for return to the country of origin.\textsuperscript{214}

When the importation is violative of the section seven prohibition concerning material stolen from a State Party's museum or monument,\textsuperscript{215} the forfeiture provisions also apply. However, in this case, the provisions of the bill might entitle the claimant to just compensation from the aggrieved State Party. This would be in accord with the UNESCO Convention\textsuperscript{216}—which the bill is designed to implement—and would also be consistent with laws in this country that protect some good faith purchasers who buy from persons having a voidable title.\textsuperscript{217} Specifically, the bill provides that if the claimant establishes a valid title as against the institution from which the property was stolen, no forfeiture shall be decreed unless the State Party pays him just compensation.\textsuperscript{218} If the claimant cannot establish such title, but can establish that he is a bona fide purchaser for value, forfeiture shall not be decreed unless the State Party pays compensation equal to the value paid by the claimant.\textsuperscript{219} If the United States, however, establishes that the State Party, as a matter of reciprocity or as a matter of its own law, would return a stolen cultural object without requiring compensation, a bona fide purchaser will not be compensated.\textsuperscript{220}

The proposed bill will apply to very broadly defined types of materials,\textsuperscript{221} allowing the President considerable room in implementing measures to fit situations as they arise. However, despite the fact that no actual controls could be applied without the promulgation of more specific listings, the general threat of seizure and forfeiture contained in the bill may have the undesirable effect of deterring many legitimate imports.\textsuperscript{222} But even if only the designated imports are deterred, there is widespread concern that the provisions of the bill will result in a serious loss of cultural treasures to the United States while the illicit trade is able to continue unmolested in other major art-importing nations of the world.\textsuperscript{223} The House Ways and Means Committee recognized this as a "legitimate" concern but insisted that "the United States should take a moral stand and exercise its leadership . . .

\textsuperscript{214.} As in the Pre-Columbian Act, supra notes 160-72 and accompanying text, the foreign government must agree to pay the expenses of such return. Otherwise, the material is to be disposed of according to the United States Customs laws. Implementing Bill, supra note 175, § 9(b).
\textsuperscript{215.} Id. § 7.
\textsuperscript{216.} See note 138 supra.
\textsuperscript{217.} See, e.g., U.C.C. § 2-403(1) (a transferor can convey good title even if he himself acquired the goods through larcenous fraud).
\textsuperscript{218.} Implementing Bill, supra note 175 § 9(c).
\textsuperscript{219.} Id.
\textsuperscript{220.} Id. Reciprocity must be demonstrated by a government decree, proclamation, written commitment, written opinion, or other written document. House Report, supra note 183, at 16.
\textsuperscript{221.} Implementing Bill, supra note 175, § 15(2).
\textsuperscript{222.} 1977 Hearings, supra note 8, at 56 (statement of Mr. Rueppel)
\textsuperscript{223.} See note 119 supra and accompanying text. "The American public will have made a costly and yet totally unnecessary sacrifice in terms of the cultural enrichment of this country." 1977 Hearings, supra note 8, at 31 (statement of Mr. Ewing).
irrespective of whether other countries continue to tolerate such illicit trade." This position, however, is clearly inconsistent with the explicit conditions in the bill that no restrictions are to be implemented by the President without a determination that the action would serve to deter the pillaging of the material.

VII. THE POLICY CONFLICT

Over the past decade, the emergence of an American policy toward foreign cultural property has become rather clear. This country, more than any other major art-importing nation, has shown itself committed to aiding other nations in their efforts to save their cultural patrimony from the destruction of an illicit art trade. At the same time, in its approach to the problem, the United States has not by any means abandoned the interests of legitimate cultural exchange. Congress has persistently indicated that it has no intention of imposing any across-the-board restrictions on cultural imports. Rather, restrictive measures are to be very selective, screening out only that material which is of "outstanding importance to the national patrimony." The United States has further shown an unwillingness to make long-term commitments in excluding any particular type of cultural object. The Pre-Columbian Act and the proposed implementation of the UNESCO Convention both revolve around a plan of discretionary restrictions that are to be applied only on an ad hoc basis by the executive branch. When the Preliminary Draft of the UNESCO Convention would have required participating nations to exclude cultural imports according to the dictates of exporting nations, the United States "resisted vehemently" in favor of its own discretionary approach. This country refused to abdicate to other nations the right to decide what cultural material should be available to its citizens. In recommending passage of the bill to implement the UNESCO Convention, the House Ways and Means Committee stated its intention to "ensure that the United States will not automatically enforce through import controls whatever export prohibitions are established by other States Party to protect their cultural patrimony." The Committee believed that a foreign country should not be able "merely to rely upon the United States and other countries to enforce its export controls." Despite all this, under United States v. McClain, foreign governments will be able to prevent Americans from acquiring cultural material simply by

224. House Report, supra note 183, at 8. See also 1977 Hearings, supra note 8, at 48 (statement of Mr. Brandt).
225. Implementing Bill, supra note 175, §§ 2(a)(3), 3(a).
227. See pt. V(D) supra.
228. See pt. VI supra.
229. United States v. McClain, 545 F.2d 988, 997 n.14 (5th Cir. 1977); see notes 130-33 supra and accompanying text.
231. Id. at 6.
232. 545 F.2d 988 (5th Cir. 1977).
declaring their ownership of that material. Regardless of what measures Congress is considering, or what lists are promulgated by the executive branch under the Pre-Columbian Act or the proposed bill, the United States will have to give force to any such foreign decree by prosecuting those who import the foreign property into this country. This places the United States under precisely those obligations that it has always resisted.

The McClain result was largely due to the deference accorded to foreign decrees under the American Act of State Doctrine. The Act of State Doctrine does not, however, require American courts to recognize the validity of any and all foreign governmental decrees. Neither the inherent nature of sovereignty nor the obligations of international law compel such recognition; the mere fact that a controversy involves matters of foreign relations does not in and of itself prevent a court of law from disposing of that case on its merits.

A foreign act of state has been denied recognition in American courts, for instance, where such recognition would have been "deeply inconsistent" with the public policy of this country. Foreign divorce decrees, for example, have often been invalidated for this reason. Accordingly, in cases where the legitimate exchange of cultural material is threatened by another country's broad declarations of ownership of such property, American courts could conceivably look to Congressional expressions of policy as a basis for deciding title on the merits rather than according to the foreign decree. As a general rule, however, courts in this country have been extremely reluctant to apply public policy in this manner. In fact, in a recent application of the


235. Baker v. Carr, 369 U.S. 186, 211 (1962). However, the more important the implications to foreign relations, the more the aggrieved party should look to political, not judicial, channels for relief. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964); Shapleigh v. Mier, 299 U.S. 468, 471 (1937).

236. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 447 (1964) (White, J., dissenting); A. Nussbaum, Principles of Private International Law 118 (1943). Foreign laws can be denied effect in United States courts even if they are of "obvious political and social importance to the acting country." 376 U.S. at 447.


238. See Tag v. Rogers, 267 F.2d 664, 668 (D.C. Cir. 1959), cert. denied, 362 U.S. 904 (1960) ("[I]t is the duty of the federal courts to accept as law the latest expression of policy made by the constitutionally authorized policy-making authority.").

239. Paulsen & Sovern, "Public Policy" in the Conflict of Laws, 56 Colum. L. Rev. 969, 972 (1956). Public policy is frequently hard to define or delimit. Enunciation of what policy requires comes close to being a political function and, therefore, is avoided by courts of law. See A. Nussbaum, supra note 236, at 119. Public policy plays a much greater role in the choice of law rules of Continental Europe than it does in this country. Id. at 112. One American commentator proposes that public policy should override the Act of State Doctrine primarily in cases involving the deprivation of human rights rather than purely economic rights. Simson, The Public Policy Doctrine in Choice of Law: A Reconsideration of Older Themes, 1974 Wash. U.L.Q. 391, 408-12.
Act of State Doctrine, the United States Supreme Court made it clear that American courts should decline to question the validity of foreign expropriations of property no matter how offensive to the public policy of this country such expropriations might be.\textsuperscript{240}

It appears, then, that when a foreign government enacts a law designed to prevent Americans from acquiring even privately owned cultural material within its borders, American courts cannot deny the validity of that law solely because it contravenes the express policy interests of the United States. This does not mean that legal precedent leaves this country with no other choice but to accept the foreign decrees of national ownership without exception. An American court of law might deny recognition to a foreign act of state if the executive branch has articulated an intention that it should do so.\textsuperscript{241} The State Department, which already has been very active in formulating American policy in this area,\textsuperscript{242} could issue a statement to the effect that transactions in private cultural property should not be disturbed in this country because of foreign national treasury laws. It is unlikely, however, that such a statement would be issued. The State Department's interest in art law is primarily motivated by its interest in cultivating good foreign relations.\textsuperscript{243} Recognition of Mexican national treasury laws, for instance, will undoubtedly be a factor in continued cooperation by that country in controlling the flow of drugs and stolen automobiles across our borders.\textsuperscript{244} The United States executive branch would be extremely reluctant to jeopardize this cooperation by invalidating the Mexican cultural laws.

In short, the United States faces a genuine dilemma regarding the future importation of foreign cultural materials. Principles of American jurisprudence, as well as the realities of international coexistence, dictate that this country cannot cavalierly ignore legal decrees issuing from foreign sovereigns. On the other hand, giving full recognition to foreign cultural legislation will seriously threaten American access to the world's cultural patrimony.

\textbf{VIII. Conclusion}

As with most of today's valuable resources, the world's store of cultural property is in critical need of conservation. This Comment has discussed the


\textsuperscript{241} First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972); Bernstein v. N.V. Nederlandsche-Amerikaansche, 210 F.2d 375 (2d Cir. 1954) (per curiam); A. Ehrenzweig, A Treatise on the Conflict of Laws 171 (1962). In Bernstein, where this principle was first applied, the Second Circuit declined to recognize a confiscation of property by the Nazi Government after the State Department advised that American courts should not validate such acts. In the First Nat'l City Bank case, however, where the United States Supreme Court had occasion to consider the Bernstein exception, only a plurality of three Justices expressed their approval of it, see 406 U.S. 759, 768 (1972), while the two concurring and four dissenting Justices rejected it, see id. at 773 (Douglas, J., concurring), id. (Powell, J., concurring), id. at 776-78 (Brennan, J., dissenting).

\textsuperscript{242} See note 162 supra and accompanying text.

\textsuperscript{243} See note 198 supra and accompanying text.

\textsuperscript{244} Nafziger, \textit{supra} note 30. at 71-72.
legal response of the United States to that crisis and has pointed out the conflict between that response and the excessively restrictive measures of art-exporting countries such as Mexico. Although the United States policy of legitimate cultural exchange is being thwarted by legislative schemes abroad, this country can and should exercise its influence as the world's major art-importing nation to secure more reasonable policies from the countries concerned. Effective regulation cannot be accomplished through unilateral action alone. Experience has shown, rather, that control is best effected when prudent restrictions are implemented at the situs of import as well as within the country of origin.

The proposed legislation recognizes that reciprocity is essential to controlling the international trade in cultural materials. The bill expressly urges the President to use United States cooperation as a bargaining tool in procuring from other countries reasonable policies that would be both favorable to the cultural interests of the United States and protective of important cultural properties abroad.\textsuperscript{245} If, however, such influence is not brought to bear, the principles applied in \textit{United States v. McClain}\textsuperscript{246} may easily become the means through which foreign governments will be able to decide \textit{sua sponte} what—if any—cultural material shall be available to Americans.

\textit{Michael S. Blass}

\textsuperscript{245} See notes 193-94 \textit{supra} and accompanying text.
\textsuperscript{246} See notes 53-99 \textit{supra} and accompanying text.