

U.S. POLICY ON THE ENFORCEMENT OF FOREIGN EXPORT RESTRICTIONS ON CULTURAL PROPERTY & DESTRUCTIVE ASPECTS OF RETENTION SCHEMES

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I. INTRODUCTION

To ameliorate the weaknesses in current cultural property law, remedies should be sought that address the problems of theft, destruction, and looting before they occur. This article first provides a general background of cultural property law in Section II. Section III then discusses cultural nationalism and cultural internationalism and how these concepts influence current legal regimes regarding the protection of cultural property. Cultural nationalism is criticized in Section IV, on the basis that it leads to the practice of indiscriminate retention of cultural objects. The idea that cultural identity is lost through trade in cultural property is criticized in Section V on the bases that: nations have populations with many identities at different periods of time; the idea of a nation having one identity is spurious, given the economic gain a nation obtains by retaining cultural property; and cultural retentionism is facilitated by the fact that cultural property has been made an exception to free trade. Therefore, as discussed in Section VI, defining what constitutes cultural property is important to developing legitimate trade in cultural property.

This paper will discuss the UNESCO Convention, the Convention on Cultural Property Implementation Act, the

National Stolen Property Act, and case law pertaining to the repatriation of cultural property in Sections VII and VIII. Next, Section IX will examine why foreign export restrictions are enforced under the McClain Doctrine, despite the U.S. policy against enforcing foreign export restrictions. Section X will examine the possibility of strictly analyzing and enforcing cultural property, as defined. Section XI will examine the controversy over the Elgin Marbles and the risks associated with the repatriation of cultural property. Retentionism will be distinguished from preservation, and the recent destruction of cultural property in Afghanistan will be discussed as an example of why repatriation of cultural property is not synonymous with protection. In Section XII, the possibility of creating a waiver under the UNESCO Convention will be examined. This waiver would permit parties to the UNESCO Convention to decline the request of a source nation for repatriation in cases where the source nation has not fulfilled its safeguarding obligations under the UNESCO Convention. Section XIII will illustrate the destructiveness of a retention scheme by describing the situation in Afghanistan that led to the destruction of its museums and ultimately the destruction of the Bamiyan Buddhas. Finally, this paper will propose in Section XIV that the UNESCO Convention can be improved through an amendment much like the Second Protocol to the Hague Convention. This paper will conclude in Section XV that the current law regarding cultural property is very inconsistent and does not aid in the protection of cultural property. Rather, current law unquestioningly assumes that repatriation is a good end in and of itself. This assumption undermines free trade, which may in fact better protect cultural property, or at least not be as damaging to cultural heritage, as the current law assumes.

II. BACKGROUND

There are two underlying and overlapping theories on why cultural property should be protected. One theory, cultural internationalism, reasons that cultural property should be protected because such property is linked to the development of

a common human culture.¹ The other theory, cultural nationalism, reasons that cultural property should be protected because such property is linked to the national heritage of a group of people.² International agreements have been based upon both theories. The United States signed the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of November 14, 1970 (UNESCO Convention).³ In 1983, the United States implemented UNESCO in the U.S. Convention on Cultural Property Implementation Act (CPIA).⁴ The UNESCO Convention is based upon the theory of cultural nationalism, which favors the repatriation of cultural property. Often repatriation is seen as a means of protecting cultural property or as a remedy when the cultural property has been stolen.⁵

This paper examines why the repatriation of cultural property is not synonymous with the protection of cultural property. Further, although the United States signed the UNESCO Convention and implemented it domestically, the United States did so in a manner that deliberately rejected cultural nationalism as the underlying basis of the UNESCO Convention. Furthermore, the United States did not fully implement Article 6 of the Convention, which requires parties to honor the export restrictions on cultural property imposed by other parties.⁶ The United States limited its recognition of foreign export restrictions to situations where there is an agreement to enforce foreign export restrictions and to cases of

1. JOHN HENRY MERRYMAN, *Two Ways of Thinking About Cultural Property*, in THINKING ABOUT THE ELGIN MARBLES: CRITICAL ESSAYS ON CULTURAL PROPERTY, ART AND LAW 66, 66–67, 79 (2000) [hereinafter *Two Ways of Thinking*].

2. *See id.* at 67, 83.

3. Brenna Adler, Comment, *The International Art Auction Industry: Has Competition Tarnished Its Finish?*, 23 NW. J. INT'L L. & BUS. 433, 457–58 (2003).

4. Sarah E. Botha, *Art Conservation: Problems Encountered in an Unregulated Industry*, 26 COLUM. J.L. & ARTS 251, 271 (2003).

5. MERRYMAN, *Two Ways of Thinking*, *supra* note 1, at 82–83.

6. Monique Olivier, *The UNIDROIT Convention: Attempting to Regulate the International Trade and Traffic of Cultural Property*, 26 GOLDEN GATE U. L. REV. 627, 643 (1996).

emergency where looting has reached crisis proportions.⁷ Despite this deliberate attempt to limit the U.S. recognition of foreign export restrictions, source nations have been able to enforce their export restrictions in the United States by making claims to cultural property on the basis that it has been stolen, when in fact it really only has been exported in contradiction of the laws of the source nation.⁸ Thus, an inconsistency in U.S. policy regarding cultural property protection has been created: Even though the United States does not recognize foreign export restrictions except by agreement and in cases of emergency, antitheft laws effectively circumvent U.S. policy on cultural property protection. This inconsistency should be remedied by legislation on the matter.

Further, this paper examines how cultural property laws based on a theory of cultural nationalism promote the practice of retentionism by source nations and concludes that retentionism can be destructive to cultural property, as illustrated by the situation in Afghanistan. Therefore, the UNESCO Convention, which fosters retentionism of cultural property, should be amended to place more of the burden on those trying to retain cultural property protection and to institute proactive—rather than reactionary—protective measures. This can be accomplished by amending the UNESCO Convention in a manner modeled after the Second Protocol to the 1954 Hague Convention, which provides for the establishment of a fund for the peacetime protection of cultural property from theft and looting. To that end, a waiver of cultural protection should be recognized in the event that a source nation does not live up to its UNESCO Convention obligations. These measures address the root of the problem in cultural property protection—safeguarding it from destruction, theft, and looting—rather than impose remedies such as repatriation only after such events already have occurred.

7. *Id.* at 643–46.

8. See generally Adina Kurjatko, Comment, *Are Finders Keepers? The Need for a Uniform Law Governing the Rights of Original Owners and Good Faith Purchasers of Stolen Art*, 5 U.C. DAVIS J. INT'L L. & POL'Y 59, 62 (1999) (stating that national laws are manipulated to “legitimize” the sale of stolen cultural property).

III. CULTURAL NATIONALISM & CULTURAL INTERNATIONALISM

In *Two Ways of Thinking about Cultural Property*, John Henry Merryman outlines two attitudes toward cultural property: cultural nationalism and cultural internationalism.⁹ Cultural nationalism is the belief that cultural property is a part of national cultural heritage. Cultural internationalism is the belief that cultural property is part of a common human culture.¹⁰ The UNESCO Convention embodies cultural nationalist ideals, whereas the Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 (Hague Convention) embodies cultural internationalism.¹¹ This difference is evident in the preambles of the two agreements. The Preamble of the UNESCO Convention states: “[C]ultural property constitutes one of the basic elements of civilization and national culture, and that its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting.”¹² Alternatively, the Hague Convention Preamble states: “[T]hat damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind.”¹³

Thus, the UNESCO Convention is based upon a theory of cultural nationalism in that cultural property is believed to be best appreciated within the context of its place of origin, and the Hague Convention is based upon a theory of cultural internationalism in that cultural property is believed to belong to the cultural heritage of all mankind. Cultural nationalism “gives nations a special interest, implies the attribution of national character to objects, independently of their location or ownership, and legitimizes national export controls and

9. MERRYMAN, *Two Ways of Thinking*, *supra* note 1, at 83.

10. *Id.* at 66–67, 79.

11. *Id.* at 68, 79.

12. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Preamble, Nov. 14, 1970, 823 U.N.T.S. 231, 232 10 I.L.M. 289, 290 [hereinafter UNESCO Convention].

13. Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, Preamble, 249 U.N.T.S. 215, 240 [hereinafter Hague Convention].

demands for the 'repatriation' of cultural property."¹⁴ Moreover,

[a]s a corollary of this way of thinking, the world divides itself into source nations and market nations. Nations like Mexico, Egypt, Greece and India are obvious examples [of source nations]. In market nations, the demand exceeds the supply. France, Germany, Japan, the Scandinavian nations, Switzerland and the United States are examples [of market nations]. Demand in the market nation encourages export from source nations. When, as is often (but not always) the case, the source nation is relatively poor and the market nation wealthy, an unrestricted market will encourage the net export of cultural property.¹⁵

Source nations may be described as those countries that are art-rich, or as the origin of cultural objects being exported.¹⁶ Market nations may be described as those countries where there is either a high demand or highly developed marketplace for cultural objects from art-rich nations.¹⁷ This is not to say that a country cannot fall under both categories since, in some ways, the United States may fall in either category. For example, the United States is generally considered a market nation for cultural property due to its highly-developed marketplace and high demand for cultural objects. At the same time, the United States may be considered art-rich in terms of the cultural objects created by its Native American population and thus may be considered a source nation when discussing Native American art.¹⁸ For the purposes of this paper, the terms market nation and source nation are meant to indicate an overall classification of a nation. In a source nation, cultural objects find their way to the marketplace from that nation. In a market nation, there is a highly-developed marketplace for the sale of cultural objects in

14. MERRYMAN, *Two Ways of Thinking*, *supra* note 1, at 67.

15. *Id.* (internal citations omitted).

16. *Id.*

17. *Id.*

18. See MERRYMAN, *Two Ways of Thinking*, *supra* note 1, at 67 n.4 ("a nation can be both a source of and a market for cultural property").

that nation.

Generally, a source nation prefers to retain its cultural property because such property may have significance to its cultural heritage or national history.¹⁹ This explains why:

Despite their enthusiasm for other kinds of export trade, most source nations vigorously oppose the export of cultural objects. Almost every national government (the United States and Switzerland are the principal exceptions) treats cultural objects within its jurisdiction as parts of a "national cultural heritage." National laws prohibit or limit export, and international agreements support these national restraints on trade. This way of thinking about cultural property is embodied in the [UNESCO Convention], which is the keystone of a network of national and international attempts to deal with the "illicit" international traffic in smuggled and/or stolen cultural objects.²⁰

By implementing the UNESCO Convention into domestic law, the United States has essentially agreed with Convention parties that repatriation best achieves the protection of cultural property; however, this may not always be the best means of protection.²¹

IV. NATIONAL IDENTITY & CULTURAL PATRIMONY

In the sense that every work of art or antiquity is entitled to special treatment, not all such works are cultural property. Cultural property is entitled to special protection because it is unique and not fungible.²² The vase sitting on my kitchen table may not be considered cultural property, but an ancient Grecian urn probably would. Such objects of cultural importance are rightfully treated because of their great cultural significance to all of mankind due to their age, historical context, and overall

19. See Jordana Hughes, Note, *The Trend Toward Liberal Enforcement of Repatriation Claims in Cultural Property Disputes*, 33 GEO. WASH. INT'L L. REV. 131, 145 (2000).

20. MERRYMAN, *Two Ways of Thinking*, *supra* note 1, at 68.

21. *Infra* Section V.

22. See Hague Convention, *supra* 13, arts. 1-2.

uniqueness. Source nations also argue that property of cultural significance to their national heritage is entitled to this protection.²³

The U.S. implementation of the UNESCO Convention illustrates the U.S. support for the efforts by source nations to protect their cultural heritage. The Convention's Preamble presumes that cultural property can be appreciated only in relation to the fullest possible information regarding its origin, history, and traditional setting of its country of origin.²⁴ This statement is considered to embody cultural nationalism.²⁵ By becoming a party to the UNESCO Convention, the United States is agreeing with the Convention's Preamble and thereby is taking a cultural nationalist approach to cultural property protection. Yet the United States attempts to limit the full implications of a cultural nationalist policy by not implementing Article 6 of the Convention domestically.²⁶ The Convention's Preamble supports the idea that cultural property is best appreciated within the context of its place of origin.²⁷ This then translates into a policy favoring the repatriation of cultural property to its cultural origin.

Unfortunately, the preference for repatriation is not always in the best interest of cultural property or its owners. To a certain extent, the United States has limited its practice of repatriating cultural objects. By not implementing Article 6 of the UNESCO Convention, the CPIA has limited the remedy of repatriation of cultural property to its country of origin, to situations in which the object has been stolen, and to situations in which the cultural property has been imported into the United States, in violation of an export restriction in times of emergency. The United States purposefully limited its enforcement of foreign export restrictions to cases of emergency.²⁸ This limitation has been eroded by judicial interpretation of other domestic U.S. laws and has resulted in

23. MERRYMAN, *Two Ways of Thinking*, *supra* note 1, at 68.

24. UNESCO Convention, *supra* note 12, at Preamble.

25. *Supra* Section II.

26. Olivier, *supra* note 6, at 643 & n.106.

27. UNESCO Convention, *supra* note 12, at Preamble.

28. *See* Olivier, *supra* note 6, at 644.

the enforcement of foreign export restrictions even when there is no emergency situation.²⁹

Arguably every work of art is unique, but not all works are of great importance to humankind or to a country's national heritage. Many source nations would like to treat their national work and antiquities as being of great significance to all of humankind or at least critical to their own national identity in order for their cultural property to be entitled to special treatment under international law. This is attributable to self-interest in preserving their national cultural heritage.

[One argument] used most frequently in relation to the protection of the national art heritage relates to national or regional identity, that is, the extent to which this heritage can define "those elements of national life which characterize a country and distinguish its attitudes, institutions, behaviour, [and] way of life from those of other countries." Like the physical well-being of its people and lands, the cultural identity of a nation must be cherished and protected, according to this argument.³⁰

The national identity argument has been criticized on many levels, one such provocative criticism is as follows:

"In the context of large, heterogeneous nation-states should we speak of multiple identities or a single one? Is it valid to speak of 'national' identity as if all nations were the same? Is national identity a fixed entity or a changing one? These questions recall debates about the concept of 'national character,' long discredited in part because of its ingrained stereotypical assumptions." In the past, national identity has usually been ascribed to a population coextensive with the geographic boundaries of a nation, and most European countries would consider themselves to have a distinct national identity, with the national artistic patrimony making a

29. *Infra* Sections VII–IX.

30. John O'Hagan & Clare McAndrew, *Restricting International Trade in the National Artistic Patrimony: Economic Rationale and Policy Instruments*, 10 INT'L J. CULTURAL PROP. 32, 35 (2001).

significant contribution to this. However, many European countries are not monocultural but, owing to immigration over the last century, multicultural, France and Britain being good examples. Even disregarding immigration, countries such as Belgium, with its Flemish and French communities, and Switzerland, with its Italian-, German-, and French-speaking groups, are also culturally divided. The real danger of emphasizing national identity and common cultural heritage could be the exclusion of certain ethnic groups from the national cultural debate, as well as a resistance to change over time.³¹

The idea that certain cultural property represents the heritage of a nation is put into question, since it is difficult to say that one object can represent all of the diverse ethnic elements present in a nation at any given time. This argument against the idea of a common national heritage is significant because it puts into question the concept of cultural nationalism, which is one of the UNESCO Convention's founding principles. What this means is that if the Preamble of the UNESCO Convention is wrong when it states that cultural property can be appreciated only in relation to the fullest possible information regarding its origin, history, and traditional setting of its country of origin, then perhaps the remedy of repatriating the cultural property in question to its place of origin or traditional setting is not the best means of protecting such cultural property.

The argument against cultural nationalism as a reason to grant the remedy of repatriation of cultural property is compelling when it concerns cultural property that has not been stolen. However, when theft of cultural property is the issue, return of the cultural property to its lawful owner is imperative. The United States recognized the importance of helping source nations protect cultural property from theft by enacting the CPIA.³² Sections 2606 and 2609 of the CPIA prohibit the

31. *Id.* at 35–36.

32. *See, e.g.,* Botha, *supra* note 4, at 271–72 (allowing the United States “to seize a historic Mexican manuscript and return it to the Mexican government, based on the

importation of stolen cultural property or, in the case of prior agreement or emergency, the importation of cultural property that is subject to foreign export restrictions.³³ The United States limited its recognition of foreign export restrictions to cultural property imported from UNESCO Convention signatory countries that have “made detailed requests documenting the crisis proportions of the loss of cultural property.”³⁴

In contrast, other U.S. laws regarding theft³⁵ essentially circumvent this limitation and permit the repatriation of all property deemed culturally significant by a source nation, even when it is privately owned. This is problematic because it results in the United States essentially enforcing foreign export restrictions on cultural property, which undermines the intent of the CPIA as implemented by the United States and further misconstrues the intent of U.S. theft laws by allowing states to proclaim ownership of property even in cases when an individual already privately owns it. The protection of cultural property has become equated with its repatriation, but oftentimes protection and repatriation are not synonymous. Incidentally, the United States does not have export restrictions on its cultural property.³⁶

Another difficulty with current U.S. cultural-property law is that source nations may unilaterally deem any object to be of great cultural significance, since the listing requirement of the CPIA is easily circumvented by invoking U.S. antitheft laws.³⁷ For example, a source nation may deem a document to have cultural significance, because it was signed by an important historic figure of the source nation’s nationality. Consider further that this document comes into the possession of a U.S.

likelihood that the manuscript had been stolen” as a result of enacting the CPIA).

33. Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2606, 2609 (2000).

34. Clemency Chase Coggins, *United States Cultural Property Legislation: Observations of a Combatant*, 7 INT’L J. OF CULTURAL PROP. 52, 53–54 (1998).

35. Discussed *infra* Sections VII–IX.

36. MERRYMAN, *Two Ways of Thinking*, *supra* note 1, at 89.

37. See 19 U.S.C. § 2606 (forbidding importation of archaeological or ethnological material into the United States that has been exported without the state party’s issuance of a certification or other documentation that certifies that exportation was not in violation of the state party’s laws).

citizen who purchased it while vacationing abroad, but the source nation has not listed the document as protected property in accordance with Article 5 of the UNESCO Convention, as codified in CPIA section 2605. The source nation may have a national law stating that property becomes the property of the source [nation] upon the property's removal from the source nation. Since the document has left the source nation and found its way into the United States, the source nation may make a claim under U.S. law that the document is the property of the source nation and that its possession by the U.S. citizen is unlawful. The U.S. courts (federal or state) would then analyze the source nation's claim in terms of applicable laws against property theft, and the source nation may regain possession of the document on the grounds that it was stolen. The CPIA would not be implicated since the source nation's claim is brought on grounds of theft and not the CPIA. Under CPIA § 2604, covered property that is the subject of foreign export restrictions must be listed in a national inventory of protected property.³⁸ This gives notice to importers of the restriction against bringing the listed property into the United States. Similarly, Article 5 of the UNESCO Convention requires that property protected under the agreement must be inventoried and listed publicly.³⁹ The document would then be eligible to be

38. *Id.* § 2604. Section 2604, Designation of Materials Covered by Agreements or Emergency Actions, states:

After any agreement enters into force under section 2602 of this title, or emergency action is taken under section 2603 of this title, the Secretary, in consultation with the Secretary of State, shall by regulation promulgate (and when appropriate shall revise) a list of the archaeological or ethnological material of the State Party covered by the agreement or by such action. The Secretary may list such material by type or other appropriate classification, but each listing made under this section shall be sufficiently specific and precise to insure that (1) the import restrictions under section 2606 of this title are applied only to the archeological and ethnological material covered by the agreement or emergency action; and (2) fair notice is given to importers and other persons as to what material is subject to such restrictions.

Id.

39. UNESCO Convention, *supra* note 12, at art. 5. UNESCO Article 5 states in part:

To ensure the protection of their cultural property against illicit import,

repatriated even though application of the CPIA would not dictate this result.

Also, the unilateral designation of an object as having significance to a source nation's national heritage is suspect because of the lack of objectivity in this process. Moreover, the reason behind a source nation's designation of an object as constituting cultural property may sometimes have more to do with economic incentives than the protection of national cultural heritage. That is to say:

[A] country's historical artistic patrimony may act as the magnet that attracts tourists to a country. Examples of this abound, such as the Louvre in Paris, the Pyramids in Egypt, the Book of Kells in Trinity College Dublin, the Zwinger in Dresden, and so on. Tourists spend money and create major employment. Thus, by protecting these national cultural assets, everyone in the country, it is argued, benefits.⁴⁰

Even more convincing, however, is the argument that protecting national patrimony is a matter of national pride and that "[f]ew people . . . would be happy if their country 'became known abroad as a cultural wasteland.'"⁴¹ Regardless of the reason a source nation may restrict the export of cultural property, it is

export and transfer of ownership, the States Parties to this Convention undertake, as appropriate for each country, to set up within their territories one or more national services, where such services do not already exist, for the protection of the cultural heritage, with a qualified staff sufficient in number for the effective carrying out of the following functions . . . (b) establishing and keeping up to date, on the basis of a national inventory of protected property, a list of important public and private cultural property whose export would constitute an appreciable impoverishment of the national cultural heritage.

See id. Note that the difference between UNESCO and the CPIA in the related sections is due to the fact that the United States does not recognize foreign export restrictions on cultural property except by agreement or cases of emergency. Therefore, in the example given above, the property in question would only be listed in the United States if it were subject to an agreement or emergency situation in which the United States would enforce a foreign export restriction. Although the ownership claim of the source nation essentially functions as an export restriction, the property is not listed as required by the CPIA.

40. O'Hagan & McAndrew, *supra* note 30, at 38.

41. *Id.* at 37.

important that the United States examine its own policy of enforcing foreign export restrictions to determine if it should facilitate restricting trade in cultural property.

V. REPATRIATION OF CULTURAL PROPERTY & FREE TRADE

Repatriation of cultural property exported unlawfully from its country of origin does not always ensure [the] physical safety of an object, nor does it mean that an object is better protected in a market nation. Sometimes a source nation's request for the repatriation of certain cultural property may have an economic basis as well as a moral basis, premised on the argument that the loss of cultural property means losing its cultural identity or heritage. Although the

practice of national retention of cultural property has a superficial appeal; it seems to many people to be natural and reasonable, a normal expression of the obvious relation between the object and the national culture: Olmec heads clearly belong in Mexico because they are Mexican; classical Greek sculptures are Greek and belong in Greece [P]ermitting cultural objects to be exported is what seems anomalous. How can one permit the nation's "cultural heritage," or "cultural patrimony," to be taken abroad? National cultural objects held (imprisoned?) in foreign museums and collections should be rescued—"repatriated"—returned to their homeland, their *patria*.⁴²

The fact that the retention of cultural property also has an economic basis is often overlooked. Moreover, in some instances, retentionism by source nations is motivated by "the simple desire to keep important or valuable objects from leaving the national territory even though they have no significant relation to the nation's history or culture—what might fairly be referred to as 'naked' retentionism or, less kindly, as 'hoarding.'"⁴³

42. JOHN HENRY MERRYMAN, *The Retention of Cultural Property*, in THINKING ABOUT THE ELGIN MARBLES: CRITICAL ESSAYS ON CULTURAL PROPERTY, ART AND LAW 122, 133 (2000) (internal citations omitted) [hereinafter *The Retention of Cultural Property*].

43. JOHN HENRY MERRYMAN, *A Licit International Trade In Cultural Objects*, in

This argument is supported by the fact that not all objects that are repatriated are of great cultural significance. Cultural property and art in general are culturally significant, but because it is difficult to quantify the importance of an object, many claims for repatriation are asserted for any and all cultural property. This is why many international agreements require that a list be kept of cultural property. By virtue of an object being so listed, it is deemed to be of great cultural significance. The international community has made efforts to define cultural property and limit its protection to what is listed in certain international agreements.⁴⁴ This definition is important because the parameters of cultural property are not generally known, and because of the special protection granted to cultural property. Unfortunately, U.S. laws ignore these lists and definitions. Consequently, the development of legitimate trade in cultural property has been hampered.

Despite the global movement toward trade liberalization, the trade in cultural property has been mostly restricted by export controls and retention schemes. For example, Article XX(f) of the General Agreement on Trade and Tariffs of 1947 (GATT) as amended, an international agreement to further promote free trade amongst nations, allows an exception to free trade for the protection of national treasures of artistic, historic, or archaeological importance.⁴⁵ Thus, the movement toward trade liberalization has not included cultural property. One of the reasons for this is that the international community has assumed that retentionism of cultural property is natural and reasonable—a normal expression of the obvious relation between the object and the national culture. The only limitation imposed on the practice of retentionism is found in the attempt to define which property of cultural significance rises to the

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44. See, e.g., UNESCO Convention, *supra* note 12, at art. 1; see also Hague Convention, *supra* note 13, at art. 1; see also UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, Annex art. 2, 34 I.L.M. 1322 [hereinafter UNIDROIT Convention].

45. General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XX(f), 61 Stat. A-11, A-61, 55 U.N.T.S. 194, 262.

status of being considered a national treasure—property of great importance to the cultural heritage of every people or to certain defined areas.⁴⁶ Therefore, defining which property is a national treasure is of great importance to the cultural heritage is of critical importance.

VI. DEFINING CULTURAL PROPERTY

The international community affords cultural property special legal status, conferring the benefit of certain privileges and protections. Sometimes this protection comes in the form of restrictions and prohibitions on the transfer of cultural property.⁴⁷ An object such as an autograph of a favorite contemporary celebrity may be freely sold and shipped to a foreign country while an original manuscript dated November 19, 1778, bearing the signature of Junipero Serra, may not.⁴⁸ Both are simple pieces of autographed paper, yet one is subject to different handling. The reason for this is because the manuscript, due in part to its age and historical significance, has achieved special status based upon many factors. The main factor is that the manuscript falls within one of the many definitions of cultural property.⁴⁹ Alternatively, the contemporary autograph must wait at least one hundred years or attain a designation of great importance to the cultural heritage of a nation before it becomes cultural property. Defining cultural property is important because nations may unilaterally deem an object to have cultural significance without facing scrutiny from the international community. Thus, attempts have been made in a number of international agreements to obtain a consensus on what is cultural property so that domestic laws may properly address issues such as the repatriation of cultural property.

Three major international agreements that define cultural

46. See MERRYMAN, *The Retention of Cultural Property*, *supra* note 42, at 133–34.

47. See UNESCO Convention, *supra* note 12, at arts. 6–8 (limiting the exporting of cultural property from territories and placing restrictions on museums acquiring cultural property).

48. See *United States v. An Original Manuscript Dated Nov. 19, 1778*, No. 96 CIV. 6221 (LAP), 1999 WL 97894, at *1 (S.D.N.Y. Feb. 22, 1999).

49. *Id.* at *3.

property are the Hague Convention, the UNESCO Convention, and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of June 24, 1995 (UNIDROIT). The Hague Convention defines cultural property in Article 1 as:

(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;

(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in subparagraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in subparagraph (a);

(c) centres containing a large amount of cultural property as defined in subparagraphs (a) and (b), to be known as "centres containing monuments."⁵⁰

The Hague Convention's definition of cultural property is interesting because it includes not only the object of cultural significance, but also the museum or place in which it is contained. This is because the purpose of the Hague Convention is to prevent damage to cultural objects of significance during armed conflict.⁵¹ The Hague Convention imposes obligations on the contracting parties to protect cultural property by safeguarding it against foreseeable effects of armed conflict and by refraining from any act of hostility directed against such property.⁵²

Article 1 of the UNESCO Convention defines cultural

50. Hague Convention, *supra* note 13, at art. 1.

51. *Id.* at art. 2.

52. *Id.* at arts. 3-4.

property as:

[P]roperty which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, literature, art or science and which belongs to the following categories: a. [r]are collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest; b. property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance; c. products of archaeological excavations (including regular and clandestine) or of archaeological discoveries; d. elements of artistic or historical monuments or archaeological sites which have been dismembered; e. antiquities more than one hundred years old, such as inscriptions, coins and engraved seals; objects of ethnological interest; property of artistic interest, such as; i. pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand); ii. original works of statuary art and sculpture in any material; iii. original engravings, prints and lithographs; iv. original artistic assemblages and montages in any material; rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections; postage, revenue and similar stamps, singly or in collections; archives, including sound, photographic and cinematographic archives; articles of furniture more than one hundred years old and old musical instruments.⁵³

The UNESCO Convention is similar to the Hague Convention in that each requires identification by the source nation of specific property subject to protection.⁵⁴ The UNESCO

53. UNESCO Convention, *supra* note 12, at art. 1.

54. See Hague Convention, *supra* note 13, at art. 8(6); see also UNESCO

Convention's definition is much more detailed in comparison to the Hague Convention's catch-all phrasing of "other objects of artistic, historical or archaeological interest."⁵⁵ The two conventions cover most of the same objects, but the UNESCO Convention does not include museums or other places where cultural property resides. The UNESCO Convention obliges signatory states to protect cultural property within its territory against the dangers of theft, clandestine export, and illicit export.

UNIDROIT Article 2 defines cultural property as "those [objects] which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science and belong to one of the categories listed in the Annex."⁵⁶ The Annex lists the same elements as the UNESCO Convention.⁵⁷ Thus, UNIDROIT's definition of cultural property is the same as UNESCO's. UNIDROIT, however, does not require a designation by each source nation of the property's importance.⁵⁸ UNIDROIT's focus is similar to the UNESCO

Convention, *supra* note 12, at art. 5(b).

55. See UNESCO Convention, *supra* note 12, at art. 1; see also Hague Convention, *supra* note 13, at art. 1(a).

56. UNIDROIT Convention, *supra* note 44, at art. 2.

57. *Id.* at Annex.

58. *Id.* UNIDROIT's cultural property categories are:

- (a) [r]are collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
- (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;
- (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
- (d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
- (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
- (f) objects of ethnological interest;
- (g) property of artistic interest, such as:
 - (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
 - (ii) original works of statuary art and sculpture in any material;

Convention's; however, UNIDROIT emphasizes the restitution and return of cultural objects that have been stolen or illegally exported.

The Hague Convention and the UNESCO Convention require that signatories list the objects believed to fall under the definition of protected cultural property.⁵⁹ In the case of the Hague Convention, this listing entitles an object to enhanced protection that otherwise would be unavailable.⁶⁰ UNIDROIT leaves the definition more open-ended by not requiring a list; rather it leaves it to a source nation's discretion to determine which property falls within the definition of cultural property.⁶¹ Although the United States is not a UNIDROIT signatory, it has effectively adopted UNIDROIT's approach by passing laws on the theft and repatriation of cultural property that allow U.S. states to identify cultural property.⁶² Even though the United States signed the UNESCO Convention (which requires signatories to designate their protected cultural property on a public inventory list), laws such as the U.S. National Stolen Property Act (NSPA) have enabled U.S. states to protect cultural property from exportation from the property's country of origin without being placed on this required list.⁶³ Thus, an internationally-acceptable definition of cultural property should be established, the United States should adopt UNIDROIT's definition of cultural property, or the United States should

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- (iii) original engravings, prints and lithographs;
 - (iv) original artistic assemblages and montages in any material;
 - (i) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;
 - (j) postage, revenue and similar stamps, singly or in collections;
 - (k) archives, including sound, photographic and cinematographic archives;
 - (k) articles of furniture more than one hundred years old and old musical instruments.

Id.

59. Hague Convention, *supra* note 13, at art. 8(6); UNESCO Convention, *supra* note 12, at art. 5(b).

60. Hague Convention, *supra* note 13, at art. 8(6).

61. UNIDROIT Convention, *supra* note 44, at art. 2.

62. Discussed *infra* Sections VII-IX.

63. 18 U.S.C. § 2314 (2000).

enforce the listing requirements of Article 5 of the UNESCO Convention and CPIA section 2605. By enforcing the CPIA and the UNESCO Convention's listing requirements, cultural property would be subject to protective laws. Consequently, the laws protecting cultural property would become more consistent.

Additionally, the significance of the object should be a factor in determining whether it falls within the scope of protection granted by the UNESCO Convention or the CPIA. For example, if the object is not culturally significant, it should not be covered by the UNESCO Convention. Scrutiny should be applied in making this determination based upon factors such as: scarcity, whether another similar item exists, age, scientific importance, and historical significance. Generally, the object's origin country would best be able to make this determination, but this determination should also be subject to some universal standard. Protection for cultural property should only be granted in cases where the cultural object is of great national or international significance. In the United States, applying a national law, such as the NSPA, in other situations would be inconsistent. This application also would provide property that does not meet this standard more protection than it is entitled to under the CPIA.

VII. U.S. CONVENTION ON CULTURAL PROPERTY IMPLEMENTATION ACT

The United States became one of the first market nations to ratify the UNESCO Convention in 1972, but it did not become a party to the Convention until 1983 through its adoption of the CPIA.⁶⁴ The first case under the CPIA did not arise until 1995, when the Italian government requested assistance from the United States to investigate the proposed auction of a Roman marble torso of Artemis, circa first century A.D., stolen in 1988 from a convent near Naples.⁶⁵ The sale was to take place

64. RALPH E. LERNER & JUDITH BRESLER, *ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, AND ARTISTS* 566 (Practicing Law Institute 1998); *see* Convention on Cultural Property Implementation Act, Pub. L. No. 97-446, 96 Stat. 2350 (1983) (codified as amended at 19 U.S.C. §§ 2601-2613 (2000)).

65. Andrew Slayman, *Recent Cases of Repatriation of Antiquities to Italy from the United States*, 7 INT'L J. CULTURAL PROP. 456, 457-59 (1998).

through Sotheby's in New York, and the statue was expected to sell for \$60,000 to \$90,000.⁶⁶ However, the statue did not sell. It was identified by Italian police looking through Sotheby's catalogue.⁶⁷ In April 1996, the U.S. Attorney's Office filed a forfeiture notice citing the CPIA and Italy's claim was not contested.⁶⁸ Thereafter, the statue was returned to Italy.⁶⁹ This is one of the only notable cases brought under the CPIA.⁷⁰

One of the primary protections provided for cultural property under the CPIA is that the United States may impose import restrictions on certain categories of archaeological or ethnological material in response to a request for such restrictions from another party to the UNESCO Convention.⁷¹ The import restriction becomes effective on the date that a descriptive list of the objects is published in the U.S. Federal Register.⁷² Thereafter, restricted objects may not enter the United States without an export certificate issued by the country of origin or documentation that the object left the country of origin prior to the effective date of the restriction.⁷³ Temporary emergency import restrictions may be imposed upon request from a UNESCO Convention member if any archaeological or ethnological material of any source nation is:

- (1) a newly discovered type of material which is of importance for the understanding of the history of mankind and is in jeopardy from pillage, dismantling, dispersal, or fragmentation;
- (2) identifiable as coming from any site recognized to be of high cultural significance if such site is in jeopardy from pillage, dismantling, dispersal, or fragmentation which is, or threatens to be, of crisis proportions; or

66. *Id.* at 457.

67. *Id.*

68. *Id.* at 457-58.

69. *Id.* at 458.

70. See Slayman, *supra* note 65, at 459.

71. Cultural Property Implementation Act, 19 U.S.C. § 2602(a) (2000).

72. *Id.* § 2602(f); see James A.R. Nafziger, *Seizure and Forfeiture of Cultural Property by the United States*, 5 VILL. SPORTS & ENT. L.J. 19, 26-27 (1998).

73. 19 U.S.C. § 2606.

(3) a part of the remains of a particular culture or civilization, the record of which is in jeopardy from pillage, dismantling, dispersal, or fragmentation which is, or threatens to be, of crisis proportions; and application of the import restrictions set forth in section 2606 of this title on a temporary basis would, in whole or in part, reduce the incentive for such pillage, dismantling, dispersal or fragmentation.⁷⁴

Violations of §§ 2606 or 2607 of the CPIA result in seizure and forfeiture of the property.⁷⁵ The property will be offered for return to the source nation owner. If not returned to the source nation owner, it may be returned to a claimant who establishes that he is a bona-fide purchaser for value of the property with valid title.⁷⁶ If the property is not returned to a source nation owner or claimant, it will be disposed of in accordance with customs laws regarding forfeited articles.⁷⁷ Cultural property that is either stolen or not declared to the U.S. Customs Service when imported is subject to seizure and forfeiture under 18 U.S.C. § 545, 19 U.S.C. § 1497, and 19 U.S.C. § 1595(a). The persons involved in such theft or unlawful entry may be subject to civil and criminal penalties under 18 U.S.C. § 545, 19 U.S.C. § 2314, 19 U.S.C. § 1497, and 19 U.S.C. § 1595(a).⁷⁸

The CPIA covers stolen and illegally-exported cultural property. The two types of property are distinguishable. Essentially, in order for an object to be considered stolen it must have an owner.⁷⁹ Illegal exportation occurs when an object is

74. *Id.* § 2603.

75. *Id.* § 2609(a).

76. *Id.* § 2609(b).

77. *Id.*

78. U.S. CUSTOMS SERVICE, *What Every Member of the Trade Community Should Know About: Works of Art, Collector's Pieces, Antiques, and Other Cultural Property* 14 (2001), at http://www.cbp.gov/ImageCache/cgov/content/laws/informed_fcompliance_5fregs/icp061_2epdf/v1/icp061.pdf.

79. *United States v. Pre-Columbian Artifacts*, 845 F. Supp. 544, 547 (N.D. Ill. 1993); see also *United States v. McClain*, 545 F.2d 988, 1000-02 (5th Cir. 1977) (construing the word "stolen" in the National Stolen Property Act to imply the protection of owners and ownership rights and holding "that a declaration of national ownership is necessary before illegal exportation of an article can be considered theft") [hereinafter McClain I].

removed from its country of origin without a permit, if such a permit is required.⁸⁰ Many source nations have national laws that vest ownership in the source nation of cultural property and restrict the export of cultural property. Often a CPIA violation involves a breach of sections 2606 and 2607, which prohibit the importation of stolen and illegally-exported property.⁸¹ Sometimes the distinction between stolen and illegally-exported property is blurred because a source nation often claims ownership of all cultural property. When it leaves the country without an export license, it may be considered stolen and illegally exported. Most actions brought to recover cultural property, however, are based upon a claim of theft. One reason for this may be because not all market nations are signatories to an international agreement for repatriation of cultural property, and a source nation may always avail itself of national laws to reclaim their stolen property.

It is an established principle of private international law that nations will judicially enforce foreign private law rights, including rights of ownership. If a thief steals my Jackson Pollock painting in California and takes it to Canada, I can sue him in a Canadian court and recover my Pollock. In the absence of a treaty, however, a court will not enforce another nation's

80. See MERRYMAN, *The Retention of Cultural Property*, *supra* note 42, at 127–33 (illustrating the difference between theft and illegal exportation).

81. CPIA section 2606(a) states:

Documentation of lawful exportation. No designated archaeological or ethnological material that is exported (whether or not such exportation is to the United States) from the State Party after the designation of such material under section 2604 of this title may be imported into the United States unless the State Party issues a certification or other documentation which certifies that such exportation was not in violation of the laws of the State Party.

19 U.S.C. § 2606. CPIA section 2607 states:

No article of cultural property documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution in any State Party which is stolen from such institution after the effective date of this chapter, or after the date of entry into force of the Convention for the State Party, whichever date is later, may be imported into the United States.

19 U.S.C. § 2607.

export controls.⁸²

This method of repatriation of cultural property arguably functions as an export restriction. Interestingly, because most source nations claim ownership of all cultural property, a demand for repatriation of cultural property is rarely based upon an illegal export claim.

The United States entered a reservation to the UNESCO Convention, refusing to enforce “export controls of foreign countries solely on the basis of illicit trafficking of cultural property.”⁸³ The United States agreed that UNESCO Convention parties may request the exclusion of specific cultural items from being imported into the United States if those items are at risk.⁸⁴ Unfortunately, the specificity required to impose these emergency actions also severely limit their effectiveness. For example, in *In re Search Warrant Executed Feb. 1, 1995*, the CPIA governed, because it was initially believed that the defendant had imported archeological material from the Sipan region of Peru. This importation would protect the material under 19 C.F.R. § 12.104(g)(b).⁸⁵ Later it became evident that none of the artifacts were from that region, and therefore, the CPIA did not apply.⁸⁶ Because the United States has many other laws against the theft of property, the usefulness of the CPIA in preventing the importation of stolen cultural materials is limited. Other U.S. laws and mechanisms appear to be more effective in stemming the illicit trade in cultural property, such as: the NSPA; the Pre-Columbian Monumental and Architectural Sculpture and Mural Statute; various bilateral treaties; and the U.S. Customs Service’s general authority to seize items for reasons of false documentation, invoicing,

82. John Henry Merryman, *Cultural Property, International Trade and Human Rights*, 19 CARDOZO ARTS & ENT. L.J. 51, 58 (2001) [hereinafter *Int’l Trade and Human Rights*].

83. Nafziger, *supra* note 72, at 26.

84. *Id.*

85. *In re Search Warrant Executed Feb. 1, 1995*, No. M 18-65 (RJW), 1995 WL 406276, at *1 (S.D.N.Y. Jul. 7, 1995).

86. *Id.* Note that 19 C.F.R. § 12.104 was initially issued as a Custom Regulations interim ruling in 1985 and 1986 to carry out the policies of the CPIA. 50 Fed. Reg. 26,193 (June 25, 1985) (codified at 19 C.F.R. § 12.104); 51 Fed. Reg. 6,905 (Feb. 27, 1986) (codified at 19 C.F.R. § 12.104).

evaluations, and fraud.⁸⁷

VIII. THE NATIONAL STOLEN PROPERTY ACT UNDERMINES THE
PURPOSE OF THE CONVENTION ON CULTURAL PROPERTY
IMPLEMENTATION ACT

In *United States v. Schultz*, the defendant was charged with possessing stolen Egyptian artifacts under the NSPA.⁸⁸ The defendant was charged with theft under 18 U.S.C. § 2315 and the artifacts in his possession were also considered stolen under Egyptian Law 117.⁸⁹ Egyptian Law 117 “provides that, as of 1983, all Egyptian ‘antiquities’—that is, objects over a century old having archeological or historical importance (Law 117, Art. 1) ‘are considered to be public property,’ that is, property of the state.”⁹⁰ Although the State of Egypt owned the antiquities, this case was not considered to be an illegal export case, but rather a

87. See Nafzinger, *supra* note 70, at 22–25; see also National Stolen Property Act, ch. 333, 48 Stat. 794 (1934) (codified as amended at 18 U.S.C. §§ 2314–15 (2000)).

88. *United States v. Schultz*, 178 F. Supp. 2d 445, 446 (S.D.N.Y. 2002), *aff’d*, 333 F.3d 393 (2nd Cir. 2003).

89. *Id.* at 446. Eighteen U.S.C. § 2315, entitled “Sale or receipt of stolen goods, securities, moneys, or fraudulent State tax stamps,” states in part:

Whoever receives, possesses, conceals, stores, barter, sells or disposes of any goods, wares, or merchandise, securities, or money of the value of \$5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of \$500 or more, which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken, knowing the same to have been stolen, unlawfully converted, or taken; or [w]hoever receives, possesses, conceals, stores, barter, sells, or disposes of any falsely made, forged, altered, or counterfeited securities or tax stamps, or pledges or accepts as security for a loan any falsely made, forged, altered, or counterfeited securities or tax stamps, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been so falsely made, forged, altered, or counterfeited; or [w]hoever receives in interstate or foreign commerce, or conceals, stores, barter, sells, or disposes of, any tool, implement, or thing used or intended to be used in falsely making, forging, altering, or counterfeiting any security or tax stamp, or any part thereof, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing that the same is fitted to be used, or has been used, in falsely making, forging, altering, or counterfeiting any security or tax stamp, or any part thereof—shall be fined under this title or imprisoned not more than ten years, or both.

18 U.S.C. § 2315 (2000).

90. *Schultz*, 178 F. Supp. 2d at 446.

theft case.⁹¹ In fact, the defendant moved to dismiss the indictment, arguing that the CPIA superseded 18 U.S.C. § 2315, and that Congress meant to substitute a civil enforcement regime for criminal substitution.⁹² The defendant also claimed that Egyptian Law 117 is “really more in the nature of a licensing and export regulation, the violation of which does not constitute theft of property in the sense covered by section 2315.”⁹³ The Court denied the defendant’s motion.⁹⁴

This case is interesting because a source nation’s claim of ownership of certain cultural property can effectively act as an export restriction of cultural property, though not in a purely technical sense. This technical distinction is, in reality, very minute. For example, in *Peru v. Johnson*, the Government of Peru claimed ownership of certain artifacts seized by the U.S. Customs Service, but it was unable to prove ownership due to the lack of evidence as to the time and place of discovery of the artifacts and the uncertainty in Peruvian law.⁹⁵ The action was based upon a claim of conversion and turned on a question regarding the Peruvian law of June 13, 1929, proclaiming all unregistered artifacts in the territory of Peru to be the property of Peru.⁹⁶ The court stated that:

[T]he domestic effect of such a pronouncement appears to be extremely limited. Possession of the artifacts is allowed to remain in private hands, and such objects may be transferred by gift or bequest or intestate succession. There is no indication in the record that Peru ever has sought to exercise its ownership rights in such property, so long as there is no removal from that country. The laws of Peru concerning its artifacts could reasonably be considered to have no more effect than export restrictions, and . . . export restrictions

91. *Id.* at 448–49.

92. *Id.* at 446–47.

93. *Id.* at 446.

94. *Id.* at 449.

95. *Peru v. Johnson*, 720 F. Supp. 810 (C.D. Cal. 1989); *see also* *Peru v. Wendt*, 933 F.2d 1013 (9th Cir. 1991); 1991 WL 80599, at *1 (9th Cir. May, 15, 1991) (affirming *Johnson*).

96. *Johnson*, 720 F. Supp. at 814.

constitute an exercise of the police power of a state; “[t]hey do not create ‘ownership’ in the state. The state comes to own property only when it acquires such property in the general manner by which private persons come to own property, or when it declares itself the owner.”⁹⁷

Johnson is similar to *Schultz* in that it is argued in both cases that a source nation’s ownership claim in certain artifacts considered to be cultural property is, in fact, an export regulation. In *Schultz*, the court finds that Egyptian Law 117 is not an export regulation,⁹⁸ while in *Johnson*, the court finds that the Peruvian law of June 13, 1929 could be considered an export regulation.⁹⁹ In *Schultz*, the court considered whether Egyptian Law 117 transferred ownership and right to possession of the artifacts to the source nation.¹⁰⁰ Conflicting testimony was presented in this regard.¹⁰¹ The defendant offered the opinion of a professor of Islamic and Middle Eastern law at UCLA Law School that “nothing in [Egyptian] Law 117 definitively presents the Antiquities Authority from leaving physical possession of even an antiquity discovered after 1983 in the hands of a private finder, so long as the private finder promptly notifies the Authority of his find.”¹⁰² The U.S. government presented the testimonies of the Secretary General to the Supreme Council of Antiquities and the Director of Criminal Investigations for the Antiquities Police. The defendant objected to the testimony on hearsay and due process grounds, as well as the fact that the Egyptian documents that the director summarized were not made available to the defendant.¹⁰³ The court determined that it “may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence.”¹⁰⁴ The court also

97. *Id.* at 814 (quoting *McClain I*, 545 F.2d 988, 1002 (5th Cir. 1977)).

98. *Schultz*, 178 F. Supp. 2d at 447.

99. *Johnson*, 720 F. Supp. at 814.

100. *Schultz*, 178 F. Supp. 2d at 446.

101. *Id.*

102. *Id.* at 447.

103. *Id.* at 448 n.4.

104. *Id.* (citing FED. R. CRIM. P. 26.1).

determined that the defendant did not present any material evidence to the contrary regarding Egyptian Law 117.

Schultz is significant because even though Egyptian Law 117 appears to be similar to the Peruvian law of June 13, 1929, the Southern District of New York did not find it was an export restriction.¹⁰⁵ On the other hand, the Central District of California found that the Peruvian law was an export restriction.¹⁰⁶ The difference appears to be whether a source nation exercises the right of possession over the object. However, the ruling in *Schultz* is troubling, because the question of possession of the artifacts should not be determined on the basis that the defendant is unable to present evidence that rises to a level of materiality. It is not entirely clear from the opinion that Egyptian Law 117 vests the source nation with ownership and possession of the artifacts. Moreover, it is generally unclear when U.S. courts can appropriately interpret foreign law given language barriers, cultural differences, and lack of familiarity with the law in question.

In *United States v. Pre-Columbian Artifacts*, Guatemala used the NSPA as a means of enforcing its export restriction.¹⁰⁷ The question of artifact possession is addressed in a very different manner than in either *Schultz* or *Johnson*. In *Pre-Columbian Artifacts*, an interpleader action was filed by the United States to determine the ownership of certain Pre-Columbian artifacts seized from the defendants.¹⁰⁸ Guatemala claimed that the artifacts were illegally exported or stolen.¹⁰⁹ For the purposes of resolving the interpleader motion, the court assumed that the artifacts were illegally exported from Guatemala.¹¹⁰ The court then cited the Guatemalan brief, noting that:

[I]t is accepted that the law of Guatemala provides that upon export without authorization, the artifacts are

105. *Schultz*, 178 F. Supp. 2d at 447.

106. *Peru v. Johnson*, 720 F. Supp. 810, 814 (C.D. Cal. 1989).

107. *United States v. Pre-Columbian Artifacts*, 845 F. Supp. 544, 547 (N.D. Ill. 1993).

108. *Id.* at 545.

109. *Id.*

110. *Id.* at 546.

confiscated in favor of the Republic of Guatemala, and become the property of Guatemala. Article 21 of Guatemala's "Congressional Law for the Protection and Maintenance of the Monuments, Archeological, Historical, Artistic Objects and Handicrafts" provides for "confiscation in favor of the State" upon illicit export.¹¹¹

Thus, Guatemala claimed that under its law, it obtained the right to possess the artifacts upon their exportation without government permission.¹¹² Further, Guatemala claimed that Article 21 made the defendants' possession of the allegedly illicitly exported artifacts the possession of stolen property in violation of the NSPA.¹¹³

In *Johnson*, the court stated that since Peru did not seek to exercise its ownership rights over the artifacts until their removal, its law of June 13, 1929 "could reasonably be considered to have no more effect than export restrictions"¹¹⁴ and such restrictions "do not create 'ownership' in the State."¹¹⁵ Arguably, under *Johnson*, Guatemalan Article 21 would be construed as an export regulation. Instead, the court in *Pre-Columbian Artifacts* found that the transference of ownership upon illegal exportation to constitute a valid means of claiming ownership.¹¹⁶ In *Schultz*, the artifacts became the property of Egypt upon enactment of Egyptian Law 117, not upon exportation.¹¹⁷

In contrast, the *Pre-Columbian Artifacts* court explained:

Mere violation of export restrictions does not make possession of the illegally exported property a violation of the NSPA. For the property to be stolen, it must belong to someone else. Here . . . [t]he only allegation is that the artifacts belong to the Republic. The NSPA

111. *Id.*

112. *Id.* at 547.

113. *Id.* at 546.

114. *Id.* (quoting *McClain I*, 545 F.2d 988, 1002 (5th Cir. 1977)).

115. *Peru v. Johnson*, 720 F. Supp. 810, 814 (C.D. Cal. 1989).

116. *Pre-Columbian Artifacts*, 845 F. Supp. at 547.

117. *United States v. Schultz*, 178 F. Supp. 2d 445, 447 (S.D.N.Y. 2002).

“protects ownership derived from foreign legislative pronouncements, even though the owned objects have never been reduced to possession by the foreign government.” Guatemalan law (as assumed for purposes of the present motion) provides that, upon illegal export, the artifacts became the property of the Republic. Therefore, the moment the artifacts left Guatemala they became the property of the Republic.¹¹⁸

The result in *Pre-Columbian Artifacts* differs from *Schultz* and *Johnson*. Perhaps this is because of the underlying causes of action—the NSPA or conversion. In both *Pre-Columbian Artifacts* and *Schultz*, it was found that the source nation could make a NPSA claim that its artifacts were stolen because the defendants illicitly removed cultural property from the source nation, which claimed ownership of certain cultural property.¹¹⁹

The *Schultz* court recognized the importance of the source nation to have “all, [of] the rights ordinarily associated with ownership of property, including title, possession, and right to transfer.”¹²⁰ In *Schultz*, the court found the source nation to have such rights. The results of its investigation into that matter are a bit unclear, however, given the defendant’s testimony, even though the court finds his expert’s testimony to be immaterial.¹²¹ In *Pre-Columbian Artifacts*, the source nation’s possession is clearly the result of a violation of its export restriction.¹²² This seems contrary to the rationale used by the *Johnson* court—that export restrictions constitute an exercise of a source nation’s police power and do not create ownership in the source nation. This difference may be explained by the fact that the *Johnson* case was a case for conversion. This explanation is unsatisfactory, however, because conversion is akin to theft. Another explanation is that Guatemala requested or should have requested that the United States enforce its export

118. *Pre-Columbian Artifacts*, 845 F. Supp. at 547 (internal citations omitted) (quoting *United States v. McClain*, 593 F.2d 658, 664 (5th Cir. 1979) [hereinafter *McClain II*]).

119. *Id.* at 546–47; *Schultz*, 178 F. Supp. 2d at 446–48.

120. *Schultz*, 178 F. Supp. 2d at 447.

121. *Id.* at 447–48 & n.4.

122. *Pre-Columbian Artifacts*, 845 F. Supp. at 547.

restrictions under either a bilateral agreement—such as the Agreement Between the United States of America and the Republic of Guatemala for the Recovery and Return of Stolen Archaeological, Historical and Cultural Property, May 21, 1984—¹²³ or the CPIA in case of an emergency, as did the Italian government in *United States v. An Antique Platter of Gold*.¹²⁴ *Pre-Columbian Artifacts*, however, was brought under the NSPA—not the CPIA or a bilateral agreement with the United States.¹²⁵ In order to reconcile these decisions, one may conclude that, in fact, the *Pre-Columbian Artifacts* court should have decided the matter in accordance with the CPIA or a bilateral agreement.

In *An Antique Platter of Gold*, the U.S. Customs Service seized a gold Phiale of Italian origin upon the request of the Italian government via a Letters Rogatory Request.¹²⁶ In 1991, the defendant purchased the gold Phiale through a New York art dealer, who brokered a transaction to obtain the piece from a Swiss art dealer.¹²⁷ The New York art dealer flew to Switzerland, obtained the gold Phiale from the Swiss art dealer, returned to the U.S. with the gold Phiale, and gave it to the defendant.¹²⁸ The New York art dealer's customs broker listed Switzerland as the gold Phiale's country of origin.¹²⁹ In 1995, the Italian government requested assistance from the U.S. government in investigating the circumstances of the gold Phiale's exportation and requested its return to Italy.¹³⁰ Italy based its ownership claim on Article 44 of Italy's Law of June 1, 1939, declaring that an archeological item is presumed to belong to the state, unless its possessor can show private ownership prior to 1902.¹³¹

123. See Agreement Between the United States of America and the Republic of Guatemala for the Recovery and Return of Stolen Archaeological, Historical and Cultural Property, May 21, 1984, U.S.-Guat., T.I.A.S. No. 11,077.

124. *United States v. An Antique Platter of Gold*, 184 F.3d 131, 134 (2d Cir. 1999).

125. *Pre-Colombian Artifacts*, 845 F. Supp. at 546.

126. *Antique Platter of Gold*, 184 F.3d at 134.

127. *Id.* at 133.

128. *Id.* at 133–34.

129. *Id.* at 133.

130. *Id.* at 134.

131. *Id.*

The U.S. government complied with Italy's request and seized the gold Phiale from the defendant.¹³² Soon thereafter, the United States filed a civil forfeiture action under the NSPA and 18 U.S.C. § 545, based on false statements on the customs forms.¹³³ The court upheld the district court's decision that the gold Phiale was stolen under the meaning of the NSPA and that the misstatement on the customs form was material.¹³⁴

In *An Antique Platter of Gold* the court was acting in accordance with the UNESCO Convention and the CPIA, yet the two are never mentioned in the opinion. Once again, the NSPA was used to enforce another country's ownership claim, which—like the cases above—could be seen as enforcing another country's export restrictions. Whether the gold Phiale was in private ownership prior to 1902 is unclear, but from the facts reported in the opinion, the gold Phiale was owned by a private antique collector in Sicily who traded it to another art collector who then sold it to a Zurich art dealership.¹³⁵ No other facts are presented as to whether the first reported owner owned the piece prior to 1902, and the court does not investigate this matter. Apparently, the court believed that the defendant had the burden of researching Italian law and tracing the origins of the gold Phiale to show that the first reported owner had lawful title to the object under Italian law. Italy's right of possession to the object was not discussed in this case, whereas it was in *Schultz* and *Johnson*.

All of the cases discussed above cite the NSPA as a legal basis for the proposition that a source nation may retrieve its stolen or illegally-exported cultural property. The cases are inconsistent in theory, but the result is that the NSPA is an overwhelmingly useful tool used by source nations to circumvent the limitations of the CPIA in retrieving illegally-exported cultural property. The results in all of the cases may have been very different if there had been more fact-finding on the issue of the right of the source nation to possess the antiquity. For

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 133.

example, if it had been found in *Schultz* that the defendant were allowed to possess the artifacts and the source nation obtained the right to possess the artifacts only upon illegal exportation, it is likely that the court would have viewed Egyptian Law 117 as an export restriction not to be enforced by U.S. courts. In contrast, in *Pre-Columbian Artifacts*, the court did not have any trouble with Guatemala's ownership claim based upon conversion as a result of the objects' illegal exportation. This discrepancy may be explained by the fact that the court was really applying the CPIA and just got its reasoning wrong—just as in *An Antique Platter of Gold*, where the U.S. government's confiscation of the gold Phiale was pursuant to a formal request by the Italian government, based on the UNESCO Convention and the CPIA. Thus, in both the *Pre-Columbian Artifacts* and *An Antique Platter of Gold*, it seems that although the NSPA is cited as the legal basis for the decisions, the bases for the U.S. governments' confiscation and return of the artifacts were the UNESCO Convention and the CPIA. In essence, the discrepancies between these cases can be attributed to the fact that the judicial branch operates under the NSPA, while the executive branch takes action under the UNESCO Convention and the CPIA.

U.S. law could be much clearer if, in cases where a source nation has claimed ownership of certain cultural property, the burden proving the object's right to possession were on the source nation claiming ownership rather than on the defendant. Currently, all a source nation must do to repatriate illegally-exported cultural property is claim that it has a domestic law declaring itself to be the object's owner. The source nation should also have to show that it has the right to possess the object, not just a right to confiscate it upon exportation. In the case of the latter, the source nation is just using its law as an export restriction to circumvent the CPIA, which was implemented to address this very issue.

IX. THE MCCLAIN DOCTRINE AND WHY IT SHOULD BE INVALIDATED

An explanation for why courts continue to look at the NSPA without regard to whether they are actually enforcing foreign

export restrictions is that the watershed case for enforcing the NSPA was decided prior to the CPIA's enactment. The United States deliberately made a reservation to the UNESCO Convention by refusing to recognize foreign export restrictions, except in cases of emergency.¹³⁶ Yet, U.S. courts effectively recognize foreign export restrictions under the McClain doctrine.¹³⁷ The result is that the United States has two divergent theories on the repatriation of cultural property. One theory is that foreign export restrictions should not be enforced upon request, except in cases of emergency.¹³⁸ The other theory is that the NSPA has a broad definition of stolen property that encompasses situations where a source nation has claimed title to the property in question.¹³⁹ The problem with the latter approach is that application of the NSPA is inconsistent and the right to possession question is often ignored. Additionally, bilateral agreements on the return of a requesting source nation's cultural property further complicate the matter, since they are also often overlooked in favor of the NSPA. The CPIA and certain bilateral agreements on the return of cultural property to its country of origin can be seen as providing exceptions to when the United States will recognize a source nation's export restrictions, while the NSPA provides a means of circumventing them both.

In *United States v. McClain (McClain I)* a legal doctrine was established. In *McClain I*, the defendants appealed their convictions by the Western District of Texas for violation of and conspiracy to violate the NSPA, arising out of transactions involving pre-Columbian artifacts exported to the United States from Mexico in violation of Mexican law.¹⁴⁰ The defendants argued that application of the NSPA "to cases of mere illegal

136. See S. Rep. No. 97-564 (1982), reprinted in 1982 U.S.C.C.A.N. 4078, 4098-4101, 4104--05.

137. See *infra* notes 140-48 and accompanying text; see also, e.g., *United States v. Pre-Columbian Artifacts*, 845 F. Supp. 544, 547 (N.D. Ill. 1993).

138. E.g., *In re Search Warrant Executed Feb. 1, 1995*, No. M 18-65 (RJW), 1995 WL 406276, at *1 (S.D.N.Y. Jul. 7, 1995).

139. E.g., *U.S. v. Schultz*, 333 F.3d 393, 398-99 (2nd Cir. 2003).

140. *McClain I*, 545 F.2d 988, 991-92 (5th Cir. 1977), *reh'g denied*, 551 F.2d 52 (5th Cir. 1977).

exportation constitutes unwarranted federal enforcement of foreign law” and that “Mexican legislative declarations of ‘ownership’ of pre-Columbian artifacts are . . . not enough to bring the objects within the protection of the NSPA.”¹⁴¹ The defendants also challenged the definition of “stolen” under the NSPA.¹⁴² The Fifth Circuit responded that:

“The general rule today in the United States . . . is that it is not a violation of law to import simply because an item has been illegally exported from another country. This is a fundamental general rule today with respect to art importation This means that a person who imports a work of art which has been illegally exported is not for that reason alone actionable, and the possession of that work cannot for that reason alone be disturbed in the United States.” This general rule has been qualified by congressional statute and by treaties. But we cannot say that the intent of any statute, treaty, or general policy of encouraging the importation of art more than 100 years old was to narrow the National Stolen Property Act so as to make it inapplicable to art objects or artifacts declared to be the property of another country and illegally imported into this country.¹⁴³

The Fifth Circuit then referenced 19 U.S.C.A. §§ 2091–95, enacted in 1972, prohibiting the importation into the United States of pre-Columbian monumental or architectural sculpture or murals without a certification from the source nation stating that such exportation was not in violation of that country’s laws.¹⁴⁴

The Fifth Circuit reversed the defendants’ convictions and remanded the case, but only on the grounds that the lower court erred in its interpretation of Mexican law and that Mexico had

141. *Id.* at 994.

142. *Id.*

143. *Id.* at 996–97 (footnotes omitted) (quoting Bator, *International Trade in National Art Treasures: Regulation and Deregulation*, in *ART LAW: DOMESTIC AND INTERNATIONAL* 295, 300 (Leonard D. DuBoff ed., 1975)).

144. *Id.* at 996 n.14.

ownership of pre-Columbian artifacts as of 1972.¹⁴⁵ The defendants then appealed a “second round of convictions.”¹⁴⁶ In *United States v. McClain (McClain II)*, the Fifth Circuit reversed the defendants’ convictions, in part, on substantive counts, since it was found that the jury instructions were flawed. But the Fifth Circuit affirmed the conspiracy count because the error in the jury instructions was harmless.¹⁴⁷

The McClain saga is complicated but it has led to the establishment of a doctrine of law. *McClain I* has given rise to what is known as the “McClain Doctrine.” The McClain Doctrine states that the NSPA definition of cultural property applies to art objects and artifacts that are illegally imported into the United States, which are declared to be the property of a source nation.¹⁴⁸ The McClain Doctrine thereby has the effect of recognizing the legislative declarations of ownership by source nations. This circumvents the U.S. reservation in the UNESCO Convention regarding the recognition of foreign export restrictions, because legislative declarations of ownership by source nations are tantamount to export restrictions.

The McClain Doctrine seems harmless on its face, but it has led to confusion in the law, as evidenced by cases determined in accordance with the Doctrine: *Johnson, Schultz, An Antique Platter of Gold*, and *Pre-Columbian Artifacts*. This confusion stems from the fact that, even though it is not a violation of law to import an art object or artifact simply because the item has been illegally exported from another country, this is essentially what happens when a source nation declares itself the owner of such property and then asserts a claim in the United States under the NSPA for the return of its property. Perhaps the right of possession of a source nation to the property would provide a proper litmus test as to whether a source nation has the right to assert such a claim. Additionally, a claim for repatriation of cultural property by a source nation should be asserted under the CPIA or applicable bilateral

145. See *id.* at 1003–04.

146. *McClain II*, 593 F.2d 658, 658 (5th Cir. 1979).

147. See *id.* at 668–72.

148. See *McClain I*, 545 F.2d at 1000–01.

agreement. The differences in the outcome of these repatriation cases may also be explained by the fact that the *McClain I* property in question was subject to the NSPA;¹⁴⁹ the *Pre-Columbian Artifacts* property was subject to either the Agreement Between the United States of America and the Republic of Guatemala for the Recovery and Return of Stolen Archaeological, Historical and Cultural Property, May 21, 1984 or the NSPA;¹⁵⁰ and the *An Antique Platter of Gold* property was subject to the CPIA and the Italian government requested the return of the property in accordance with the UNESCO Convention.¹⁵¹

Thus, the NSPA is simply acting as a criminal enforcement mechanism in conjunction with either the CPIA or a bilateral agreement even though this is not acknowledged by any of the courts. In this sense, it could be said that arguments regarding preemption of the NSPA by the CPIA or a bilateral agreement may not be warranted since it has been clearly decided in *McClain I* that the NSPA applies to “art objects or artifacts declared to be the property of another country and illegally imported into this country.”¹⁵² On the other hand, it may be argued that the NSPA only applies or should only apply to art objects or artifacts when such property is also subject either to the CPIA or to a bilateral agreement regarding the repatriation of cultural property. This would only include “cultural property documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution in any State Party which is stolen from such institution,” cultural property subject to emergency action, or cultural property covered by an applicable bilateral agreement.¹⁵³ This would, consequently, lead to more consistent and comprehensible application of U.S. law.

149. *Id.* at 991–92.

150. *United States v. Pre-Columbian Artifacts*, 845 F. Supp. 544, 547 (N.D. Ill. 1993).

151. *See United States v. An Antique Platter of Gold*, 184 F.3d 131, 134 (2d Cir. 1999).

152. *McClain I*, 545 F.2d at 997.

153. Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2604, 2607 (2000).

In *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, a replevin action for the return of Cypriot mosaics was made by a Greek-Orthodox church against the ultimate owners of the mosaic.¹⁵⁴ The Church prevailed in the action.¹⁵⁵ What is interesting in this case is the concurring opinion in which Circuit Judge Cudahy stated that:

While the UNESCO Convention seems to contemplate primarily measures to be implemented by the executive branch of a government through its import and export rules and policies, the judicial branch should certainly attempt to reflect in its decision making the spirit as well as the letter of an international agreement to which the United States is a party.¹⁵⁶

Also, further clarification of U.S. law in the area of repatriation of cultural property could be achieved by making a distinction between situations in which a source nation declares itself the owner of certain cultural property and situations in which a source nation is simply prohibiting the export of certain cultural property. These can be classified as expropriation laws and embargo laws.¹⁵⁷ In some cases, the categories can be mixed. A source nation may: “[T]otally forbid the export of particularly important objects; permit the export, subject to preemptive purchase, of other kinds . . . and allow the export, with or without a permit, of less important objects”; or claim ownership of an entire type of property.¹⁵⁸ These can all be generally referred to as retention schemes.¹⁵⁹

In cases where the NSPA is applied in matters concerning art objects and artifacts declared to be the property of another country and illegally imported into the United States, it should be determined whether the foreign law functions as an expropriation of the property or an embargo against exporting

154. See *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 286 (7th Cir. 1990).

155. *Id.* at 291.

156. *Id.* at 296.

157. MERRYMAN, *The Retention of Cultural Property*, *supra* note 42, at 122–23.

158. *Id.* at 123.

159. *Id.*

the property. If the law functions as an embargo, the NSPA should only be applied if the property is subject to emergency action or a bilateral agreement regarding the repatriation of a certain type of cultural property. If the law functions as an expropriation, then the court should turn its attention to matters concerning the defendant's due process rights by looking into whether the defendant has received adequate and timely compensation for the property.

In *Schultz*, Egyptian Law 117 could be classified as an expropriatory law. It would then be appropriate to return the artifacts as long as the CPIA covered the artifacts in question and all concerns regarding due process were satisfied. In *Pre-Columbian Artifacts*, Article 21 of Guatemalan law declaring the source nation to be the owner of all artifacts illegally exported is a mixture of both an expropriatory and embargo law. The determinative factor should be whether due process was afforded the defendant and whether it would be appropriate to enforce the export restriction. In the case of *Pre-Columbian Artifacts*, it would be appropriate to enforce the export restriction as long as the United States had a bilateral agreement with Guatemala regarding the repatriation of the type of property in question. In any event, the NSPA should be applied in a manner that is consistent with the CPIA. Therefore, when a source nation has claimed ownership of an object constituting a piece of cultural property, it should be determined whether the declaration of ownership is a de facto export restriction. If so, the cultural property should not be repatriated unless it would also be repatriated under the CPIA.

X. STRICT SCRUTINY FOR RETENTION SCHEMES ON CULTURAL PROPERTY

A clarification of what protection should be afforded to cultural property is needed on an international scale. The underlying reason that cultural property is being protected must first be taken into account. Not all cultural objects are important to humankind, a nation's cultural heritage, or a national identity. An important issue to note is that:

[W]hat belongs to the national artistic patrimony is subjective and varies considerably from country to

country. Central to the definition, though, is that objects belonging to the national artistic patrimony are of long standing and contribute in an integral way to the cultural identity or tradition of a country or region.¹⁶⁰

In enforcing any international agreement regarding the protection of cultural property, it is important to look at the purpose of the agreement and the definition of cultural property. For example, the UNESCO Convention states: [C]ultural property constitutes one of the basic elements of civilization and national culture, and that its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting.”¹⁶¹

As stated above, the UNESCO Convention takes an approach toward cultural property called cultural nationalism because of its focus on preserving a source nation's cultural heritage. In contrast, the Hague Convention takes an approach toward cultural property called cultural internationalism, because its focus is on protecting cultural property for all of humankind. The distinction between preservation and protection is important because the peacetime preservationist tendencies in the current cultural property legal regime, specifically the UNESCO Convention, tend to favor the repatriation of cultural property under all circumstances. This is achieved by giving broad meaning to the term cultural property, since the designation of an object as a piece of cultural property grants the object a certain legal status. This designation should not “apply to the generality of cultural objects, but only to those having unusual value because of their uniqueness and their importance to a people.”¹⁶² Thus, something more than a classification of being a piece of cultural property should be required before the object is granted special legal protections, such as repatriation. This is why the UNESCO Convention's listing requirement is important. Moreover, the “concept of a

160. O'Hagan & McAndrew, *supra* note 30, at 33.

161. UNESCO Convention, *supra* note 12, at Preamble.

162. Merryman, *Int'l Trade and Human Rights*, *supra* note 82, at 54 (citing Judge Pescatore of the European Court of Justice).

‘national cultural patrimony’ is frequently cited and treated as an established political and legal category.”¹⁶³ The reason for this is because “[c]ultural nationalism transcends jurisdiction and sovereignty; even though many ‘Greek’ sculptures are in the British Museum and the Louvre beyond the reach of Greek laws, they remain Greek. Where do these attitudes come from? The major premise is nationalism itself”¹⁶⁴ Cultural nationalism is exemplified in the case of the Elgin Marbles.

XI. THE ELGIN MARBLES, REPATRIATION & PRESERVATION

One infamous situation involving a source nation’s request for the return of its cultural property is the controversy over the Elgin Marbles.¹⁶⁵ The history of the controversy is complicated, but in sum, Thomas Bruce—7th Earl of Elgin, the British Ambassador to the Government of the Ottoman Empire—removed many marble sculpture panels from the Greek Parthenon and shipped them to England between 1801 and 1812.¹⁶⁶ In 1816, Bruce sold the Elgin Marbles to the British Museum where they are today.¹⁶⁷ In 1983, the Greek government officially requested the return of the Elgin Marbles, and the request was denied.¹⁶⁸ Thereafter, a debate has ensued regarding the basis of Greece’s claim to the Elgin Marbles. Arguably, had Greece enacted an ownership law declaring itself the owner of all cultural property as seen in *McClain I* and if British law recognized the McClain Doctrine, Greece could have successfully argued for the return of the Elgin Marbles. Greece was not successful, yet there is much international support for its claim of entitlement to the Elgin Marbles.¹⁶⁹ One reason for such international support is the view that the taking of the

163. MERRYMAN, *The Retention of Cultural Property*, *supra* note 42, at 133.

164. *Id.* at 134.

165. See JOHN HENRY MERRYMAN, *Thinking About the Elgin Marbles*, in THINKING ABOUT THE ELGIN MARBLES: CRITICAL ESSAYS ON CULTURAL PROPERTY, ART AND LAW 24, 34–35 (2000) [hereinafter *Thinking About the Elgin Marbles*].

166. *Id.* at 24.

167. *Id.*

168. *Id.* at 24–25.

169. See *id.* at 25 n.10.

Elgin Marbles was immoral.¹⁷⁰ Removing the Elgin Marbles from the Parthenon could be viewed as an act of pillage, and thus Lord Elgin never acquired rightful title to the Marbles—a national Greek treasure.¹⁷¹ The controversy over the Marbles is an example of cultural internationalism and illustrates the importance of the Elgin Marbles on the basis “of ancient Greece’s profound impact on later societies. [E]veryone has been influenced—whether aware of it or not—by the sculptures and the civilization they represent and thus have some, finite, intangible interest in the preservation and accessibility” of the Elgin Marbles.¹⁷²

Whether one believes that the Elgin Marbles should be returned to Greece or not, it is clear that:

[T]he [Elgin] Marbles dramatically illustrate an important fact: [T]he Metropolitan Museum in New York, the British Museum in London, the Louvre in Paris, the Hermitage in Leningrad and indeed all of the great Western museums contain vast collections of works from other parts of the world. If the principle were established that works of foreign origin should be returned to their sources, as Third World nations increasingly demand in UNESCO and other international fora, the holdings of the major Western museums would be drastically depleted. The Elgin Marbles symbolize the entire body of unrepatriated cultural property in the world’s museums and private collections.¹⁷³

Although Greece’s claim to the Elgin Marbles is compelling in that the Elgin Marbles are an important part of Greek national heritage, it is interesting to examine what would happen if the Elgin Marbles were returned. It has been argued that if the Elgin Marbles were returned to Greece and

170. *Id.* at 25.

171. *See id.* at 39.

172. David Rudenstine, *Cultural Property: The Hard Question of Repatriation – The Rightness and Utility of Voluntary Repatriation*, 19 CARDOZO ARTS & ENT. L.J. 69, 75 (2001).

173. MERRYMAN, *The Retention of Cultural Property*, *supra* note 42, at 35.

reinstalled on the Parthenon, the reinstallation would harm the Elgin Marbles, and they would be subject to decay due to exposure to the elements. This argument may be criticized as paternalistic, yet:

[W]e know what has happened to the few works that were left o[n] the Parthenon. Those that were not removed have deteriorated terribly in the intervening 175 years. Those taken to England and installed in the British Museum (as well as those smaller portions removed to France, Germany, and elsewhere) have on the contrary been much better preserved.¹⁷⁴

Thus, the Elgin Marbles may be better protected by remaining in England.

In response to the concern that returning the Elgin Marbles to the Greek Parthenon might cause damage to them, Greece has undertaken the construction of a museum in close proximity to the Parthenon for the Elgin Marbles' display and preservation.¹⁷⁵ Greece has undertaken construction of the museum even though there has been no indication by England that the Elgin Marbles will be returned. Incidentally, the museum is to be completed just in time for the 2004 Summer Olympic Games to be held in Athens, Greece.¹⁷⁶ If the Elgin Marbles are not returned to Greece, the museum will stand empty.¹⁷⁷

The Elgin Marbles are examples of immovable cultural artifacts—monuments, buildings, and their attachments—versus movable cultural property—paintings and sculptures. This distinction is important because it may be argued that immovable artifacts and undiscovered artifacts—which the UNESCO Convention, UNIDROIT, and many of the bilateral agreements regarding the repatriation of cultural property treat the same as movable cultural property—should be addressed

174. *Id.* at 48.

175. Jason Hollander, *Architecture Dean Bernard Tschumi Designs New Acropolis Museum in Athens*, COLUM. NEWS, Apr. 24, 2002, available at http://www.columbia.edu/cu/news/02/04/tschumi_nam.html.

176. Lam Pin Foo, *Relic Raiders*, THE STRAITS TIMES (Singapore), Oct. 28, 2001, at 37.

177. *Id.*

separately. One reason for this is because immovable cultural property, which is stolen or illegally exported, is the product of looting.¹⁷⁸ Also, the removal of previously undiscovered artifacts leads to a loss in scientific information that is generally received from intact excavation sites.¹⁷⁹ Finally, while movable cultural property can generally be traced back to its place of origin more easily, the theft or illegal export of immovable artifacts generally leads to complicated ownership disputes.¹⁸⁰

XII. WAIVER OF RIGHTS UNDER THE UNESCO CONVENTION

The current legal regime could be also be improved by clarifying whether the law is assisting in cultural retention or preservation. This would eliminate some of the confusion in the current state of the law. For example, the UNESCO Convention is concerned with preserving the cultural heritage of source nations.¹⁸¹ The intent of the agreement is to assist source nations in preventing the drain of its culturally-significant artifacts to market nations.¹⁸² Simply enacting the UNESCO Convention domestically and returning stolen or illegally-exported cultural property does not truly preserve the national patrimony. This is because much has been lost by the removal of artifacts from undiscovered sites or from the breaking apart of pieces of immovable cultural property. Article 12 of the UNESCO Convention requires that parties to the agreement “take all appropriate measures to prohibit and prevent the illicit import,

178. See Stephanie Doyal, *Implementing the UNIDROIT Convention on Cultural Property into Domestic Law: The Case of Italy*, 39 COLUM. J. TRANSNAT'L L. 657, 664–65 (2001).

179. See Kevin F. Jowers, Comment, *International and National Legal Efforts to Protect Cultural Property: The 1970 UNESCO Convention, the United States, and Mexico*, 38 TEX. INT'L L.J. 145, 162–63 (2003) (explaining Mexico's policy to prevent the destruction and illegal export of cultural property, which adopted an “expansive definition” of monuments that almost completely banned all exportation of archaeological materials, “including those discovered by accident or through exploration”).

180. See Christa L. Kirby, Comment, *Stolen Cultural Property: Available Museum Responses to an International Dilemma*, 104 DICK. L. REV. 729, 731–33 (2000) (discussing the disputes “between the true owners or countries of origin and good-faith purchasers” of cultural property).

181. See UNESCO Convention, *supra* note 12, at Preamble.

182. *Id.*

export and transfer of ownership of cultural property.”¹⁸³ To the extent that a source nation has failed in this task, it asks other countries for assistance. It may be argued that if an object is stolen or illegally exported, then the source nation has failed in its obligation to protect the object, and thus perhaps waived its right to expect another nation to assist in the objects repatriation. This may seem an austere remedy to some. But where a source nation is shown to be very negligent in its protective duty, it might be appropriate to refuse repatriation.

XIII. DESTRUCTIVE ASPECTS OF REPATRIATION & THE INABILITY TO PROTECT THE BAMİYAN BUDDHAS

Repatriation should not be viewed as a form of cultural property protection. There are cases where cultural property has been repatriated, and the end result was the property's destruction. Often national legislation and international conventions treat repatriation and protection as though they are synonymous. Thus, the 1970 UNESCO Convention is largely about retention of cultural property, but the Convention speaks only of “protection”—that is, protection against removal. The implication is that retention accomplishes, or at least advances, protection. The argument is that nations try to retain cultural property to protect it.

It takes little thought to see that, while preventing the export of cultural property may in some cases protect it, in other cases, retention may endanger the object or be irrelevant to its preservation; there is no generally predictable relation between the two concepts. For example, rigorous enforcement of the prohibition against export might discourage destructive looting . . . [b]ut mere retention of . . . objects without protective measures, which are expensive and require sustained professional attention, can assure their destruction through neglect, the action of the elements, vandalism, and so on. If sold, traded, or lent abroad, they might enter museums or other environments in which they

183. *Id.* at art. 12.

would be carefully conserved.¹⁸⁴

A recent example of repatriation being destructive to cultural property is the case of Afghanistan.

The Kabul Museum in Afghanistan, which contains Islamic art, Roman bronzes, Alexandrian glass, Chinese lacquerware, Indian ivories, and an extensive Buddhist collection, has been devastated over the past decade. "The Afghan government's restrictions on the trade of cultural property and its decision to claim excavated archeological material as state property did not protect the Kabul museum's collection. Factional fighting dispersed and destroyed it."¹⁸⁵ The history of the Kabul museum is tragic. In the past,

[a]s Soviet troops withdrew and the country fell apart, the museum staff packed the collection into crates, the most valuable of which were moved to the presidential palace. In the years that followed, looting claimed over 70% of the museum collection—estimated at 100,000 artefacts [sic]—and fed an active Pakistani underground art-dealing network.¹⁸⁶

Part of the remaining collection was transferred to the Kabul Hotel.¹⁸⁷ When the Taliban took over Kabul in 1996, the looting largely stopped and

[t]he new city masters placed guards around the museum, and the crates were moved from the Kabul Hotel to the Ministry of Information and Culture. In 1999, responding to international pressure to protect the art, the authorities threatened looters and vandals with amputation.

Unfortunately, the Taliban's cultural enlightenment was brief.¹⁸⁸

In early 2001, the destruction began.

184. MERRIMAN, *The Retention of Cultural Property*, *supra* note 42, at 150 (footnote omitted).

185. James Cuno, *The Whole World's Treasures*, Mar. 11, 2001, BOSTON GLOBE, at E7.

186. *Afghanistan's Art Missing*, ECONOMIST, Dec. 22, 2001, at 15.

187. *Id.*

188. *Id.*

First, human figures in pictures were painted over. Then . . . the authorities ordered the destruction of all statues and non-Islamic shrines. The dynamiting of the huge Buddhas at Bamiyan seized most of the world's attention. But Taliban officials also vandalised [sic] the museum, smashing the remains of the collection with hammers and axes. The crates in the Ministry of Culture received the same treatment.¹⁸⁹

The Taliban leader Mullah Mohammed Omar commented:

In view of the fatwa [religious edict] of prominent Afghan scholars and the verdict of the Afghan Supreme Court it has been decided to break down all statues/idols present in different parts of the country. This is because these idols have been gods of the infidels, who worshipped them, and these are respected even now and perhaps maybe turned into gods again. The real God is only Allah, and all other false gods should be removed.

Whoever thinks this is harmful to the history of Afghanistan then I tell them they must first see the history if [sic] Islam. Some people believe in these statues and pray to them If people say these are not our beliefs but only part of the history of Afghanistan, then all we are breaking are stones.

The breaking of statues is an Islamic order and I have given this decision in the light of a fatwa of the ulema and the supreme court [sic] of Afganistan.

According to Islam, I don't worry about anything. My job is the implementation of Islamic order.¹⁹⁰

The international community was outraged by the campaign of cultural destruction executed by the Afghan government, yet nothing was done to prevent it. Philip Reeker, spokesman for the U.S. State Department, responded to the Taliban's

189. *Id.*

190. *Destructive Frenzy in Afghanistan: Comments by the Taliban*, ARCHAEOLOGY ONLINE NEWS, (Mar. 2, 2001), at <http://www.archaeology.org/found.php?page=/online/news/afghanistan/taliban.html>.

comments:

The United States is distressed and baffled by this announcement by the Taliban. Their action directly contradicts one of Islam's basic tenets—tolerance for other religions. Deliberate destruction of statues and sculpture held as sacred by peoples of different faiths is incomprehensible, as is the Taliban's utter rejection of the treasures of Afghanistan's past. The United States joins the United Nations Special Mission to Afghanistan, the UN Economic and Social Council and other governments in urging the Taliban to halt this desecration of Afghanistan's cultural heritage.¹⁹¹

191. *Destructive Frenzy in Afghanistan: International Reactions*, ARCHAEOLOGY ONLINE NEWS, (Mar. 2, 2001), at <http://www.archaeology.org/found.php?page=/online/news/afghanistan/international.html> [hereinafter *International Reactions*]. Other reactions are as follows: From the U.N., Secretary General Kofi Annan stated:

[T]he unique and irreplaceable relics of Afghanistan's rich heritage, both Islamic and non-Islamic, is the strongest foundation for a better, more peaceful and more tolerant future for all its people. Destroying any relic, any monument, any statue will only prolong the climate of conflict. After 22 years of war, destruction and drought, there can only be one priority for the government: to rebuild the country, to renew the fabric of society, and to relieve the immense suffering and deprivation of the people of Afghanistan.

Destructive Frenzy in Afghanistan: Comments from the United Nations, ARCHAEOLOGY ONLINE NEWS, (Mar. 2, 2001), at <http://www.archaeology.org/found.php?page=/online/news/afghanistan/UN.html>. UNESCO Director General Koichiro Matsuura stated:

[[T]hey] carry a terrible responsibility before the people of Afghanistan and before history. The loss of the Afghan statues, and of the Buddhas of Bamiyan in particular, would be a loss for humanity as a whole. Words fail me to describe adequately my feelings of consternation and powerlessness as I see the reports of the irreversible damage[,] damage that is being done to Afghanistan's exceptional cultural heritage.

Id. (alteration in original). The European Union stated: "[T]he EU strongly urges the Taliban leadership not to implement this deeply tragic decision which will deprive the people of Afghanistan of its rich cultural heritage." *International Reactions*, *supra*. French Foreign Ministry spokesman Bernard Valero stated: "The announcement by Mullah Mohamed Omar, supreme leader of the Taliban, that all pre-Islamic statues would be destroyed is appalling." *Id.* Nancy Dupree of the Society for the Preservation of Afghanistan's Cultural Heritage stated:

It is absolutely sickening. I can't believe what I'm hearing. You could not enter the Bamiyan Valley without being in awe of the creative dynamism of these figures. They belong to the whole world; they don't belong only to Afghanistan. Why spend money on an old building when the people need so

Despite the pleas of the international community, the Taliban continued its destruction of Afghanistan's cultural property.¹⁹² The United States should take note of what happened in Afghanistan in shaping its future policy toward the repatriation of cultural property—especially in enforcing foreign export restrictions—since repatriation is not always synonymous with protection, and protection of cultural property is the underlying universal purpose of cultural property law.

Preventing the type of cultural destruction that occurred in Afghanistan is supposed to be addressed by international convention(s); however, these agreements have proved to be toothless against peacetime destruction of cultural property. One solution to the problem of the lack of enforcement measures in international agreements has been proposed by the International Criminal Court, which will include the destruction of cultural property as a crime, thereby allowing prosecution of persons who intentionally destroy cultural property as war criminals.¹⁹³ Although

[s]ome argue that free trade in cultural property only encourages looting and pillaging of archeological sites . . . when an ancient object is offered to a museum for acquisition, the looting, if indeed there was nay, has already occurred. Now the museum must decide whether to bring the object into its public collection where it can be preserved, studied, and enjoyed and where its whereabouts can be made widely known Some critics of . . . museums argue that even officially excavated objects should remain in the possession of the country where they were found. The National Museum of Afghanistan once held the finding of foreign

much? These old buildings are Afghanistan's identity. And when you lose your identity, you've lost your soul.

Destructive Frenzy in Afghanistan: Comments from Non-governmental Organizations, ARCHAEOLOGY ONLINE NEWS, (Mar. 2, 2001), at <http://www.archaeology.org/found.php?page=/online/news/afghanistan/nongov.html>.

192. Sarah Eagen, Comment, *Preserving Cultural Property: Our Public Duty: A look at How and Why We Must Create International Laws that Support International Action*, 13 PACE INT'L L. REV. 407, 431–32 (2001).

193. Mehmet Komurcu, *Cultural Heritage Endangered by Large Dams and Its Protection Under International Law*, 20 WIS. INT'L L.J. 233, 287 (2002).

archeological teams bound by agreements to deposit all excavated objects with the Afghan government.¹⁹⁴

Unfortunately, this policy led to the ultimate destruction of these objects. The

Afghan government's restrictions on the trade of cultural property and its decision to claim excavated archeological material as state property did not protect the Kabul museum's collection . . . It is clear that trade restrictions and nationalistic cultural policy cannot protect the world's cultural property. The tragedies in Afghanistan . . . prove[s] this. We need to establish clear priorities: Respect for national cultural property and the protection of archeological sites, for sure. But above all else, the preservation of the world's cultural legacy, object by object if necessary, through licit and free international trade. Nationalist cultural policy is a failure. It either exposes the world's treasures to undue risk, as in Afghanistan, or creates an illicit market for antiquities.¹⁹⁵

The enforcement of foreign export restrictions facilitates the retention of cultural objects by source nations following a policy of cultural nationalism.

The United States intentionally limited the scope of the UNESCO Convention's domestic application by limiting recognition of foreign export restrictions to emergency situations. The NSPA and other domestic laws, however, have effectively been enforced in a manner that recognizes foreign export restrictions and undermines the intent of the CPIA. This is not a policy that the United States intended to have; therefore, the McClain Doctrine should be invalidated. Moreover, stricter scrutiny of foreign export restrictions should be applied in situations where a source nation has not taken adequate measures to protect cultural objects from theft and looting. The application of this type of scrutiny could result in a waiver of making a claim under the UNESCO Convention or the CPIA if the country has not lived up to its obligations. This

194. Cuno, *supra* note 185, at E7.

195. *Id.*

would distribute the burden of cultural property protection amongst source and market nations. One of the problems in the current protection scheme is that it results in market nations policing the trade in cultural property after it has been looted or stolen. At that stage, much of the valuable archeological information has already been lost.

The current situation has developed because many source nations are unable to protect their cultural property for economic or political reasons. It is important to note that the practice of "safeguarding" items from destruction caused by armed conflict, which has been largely criticized due to the atrocities committed by the Nazis in World War II who confiscated thousands of works of art under the guise of "safeguarding" them from the hazards of war, can also be a means of preserving cultural property when done correctly. One case in which the United States was criticized for this practice involved the Holy Crown of Saint Stephen and the royal regalia of Hungary. The United States took these objects "under protective custody, which led to criticism that [it was] behaving like Hitler and his agents; it was thought that [the United States] had intended to keep these treasures. In fact, Hungarian refugees wanted [the United States] to keep them out of the hands of the communist regime."¹⁹⁶ The objects were kept in Fort Knox and returned to Hungary in 1978.¹⁹⁷

Unfortunately, the term "safeguarding" of cultural property has been subject to abuse in the past. Also, this term and practice is subject to more criticism when the decision to "safeguard" cultural objects is made unilaterally and when the objects are removed from their country of origin; however, just because the term has been used to justify the theft of cultural property in the past, the practice of safeguarding cultural objects should not be completely ruled out as a legitimate form of cultural property protection if done in a transparent manner. More importantly, the cultural property should not be placed in such dire straits as to need safeguarding, but when the

196. Ely Mauer, *The Role of the State Department Regarding National and Private Claims for the Restitution of Stolen Cultural Property*, in *THE SPOILS OF WAR* 142, 144 (Elizabeth Simpson ed., 1997).

197. *Id.*

emergency case should arise, safeguarding amongst nations should be an option.

Rather than depend on market nations to protect a country's national heritage, source nations should address the protection of cultural property. For example, UNESCO could focus its efforts on training source nations in how to preserve and protect its cultural property and assisting with fundraising efforts for source nations' museums. Another manner of addressing the problem of looting and the resulting damage to cultural property is to look to the protections granted under the Hague Convention and its Second Protocol.

XIV. SECOND PROTOCOL TO THE HAGUE CONVENTION & AMENDING THE UNESCO CONVENTION

Another approach that would assist in clarifying issues regarding the repatriation of cultural property on an international scale is to propose an amendment to the UNESCO Convention similar to the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (Second Protocol).¹⁹⁸ This approach is reasonable, because the UNESCO Convention was drafted as a peacetime counterpart to the Hague Convention. The Hague Convention was meant to provide protection for cultural property in times of armed conflict, while the UNESCO Convention was meant to provide an international framework for the protection of cultural property in peacetime. Thus, any addition or amendment to the Hague Convention could easily be adapted for the UNESCO Convention. Article 3 of the Hague Convention requires that states "prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate."¹⁹⁹ The Hague Convention does not delineate what measures should be taken.

198. Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, March 26, 1999, 38 I.L.M. 769 [hereinafter Second Protocol].

199. Hague Convention, *supra* note 13, at art. 3.

Article 5 of the Second Protocol elaborates upon Article 3 of the Hague Convention by requiring signatories to take preparatory measures in time of peace for the safeguarding of cultural property against the foreseeable effects of an armed conflict and it lists some required protective activities.²⁰⁰ Article 5 of the UNESCO Convention requires states to set up one or more national services within their territories with a qualified staff in sufficient number for the protection of cultural property in peacetime. Further, Article 5 provides examples of some of the functions that the service is supposed to carry out; but it does not explain the service in detail, nor does it explain to what extent specific measures should be taken.²⁰¹

200. Second Protocol, *supra* note 198, at art. 5.

201. UNESCO Convention, *supra* note 12, at art. 5. Article 5 of the UNESCO Convention states:

To ensure the protection of their cultural property against illicit import, export and transfer of ownership, the States Parties to this Convention undertake, as appropriate for each country, to set up within their territories one or more national services, where such services do not already exist, for the protection of the cultural heritage, with a qualified staff sufficient in number for the effective carrying out of the following functions:

- (a) Contributing to the formation of draft laws and regulations designed to secure the protection of the cultural heritage and particularly prevention of the illicit import, export and transfer of ownership of important cultural property;
- (b) establishing and keeping up to date, on the basis of a national inventory of protected property, a list of important public and private cultural property whose export would constitute an appreciable impoverishment of the national cultural heritage;
- (c) promoting the development or the establishment of scientific and technical institutions (museums, libraries, archives, laboratories, workshops . . .) required to ensure the preservation and presentation of cultural property;
- (d) organizing the supervision of archaeological excavations, ensuring the preservation *in situ* of certain cultural property, and protecting certain areas reserved for future archaeological research;
- (e) establishing, for the benefit of those concerned (curators, collectors, antique dealers, etc.) rules in conformity with the ethical principles set forth in this Convention; and taking steps to ensure the observance of those rules;
- (f) taking educational measures to stimulate and develop respect for the cultural heritage of all States, and spreading knowledge of the provisions of this Convention;

The Second Protocol provides specific examples of measures to be taken, such as “the preparation of inventories, the planning of emergency measures for protection against fire or structural collapse, the preparation for the removal of movable cultural property or the provision for adequate in situ protection of such property, and the designation of competent authorities responsible for the safeguarding of cultural property.”²⁰²

A UNESCO Convention amendment could have similar measures applicable in peacetime. Such measures might include: the planning of emergency measures for protection against fire or structural collapse of museums, the preparation for the removal of movable cultural property after discovery or the provision of adequate in situ protection of such property at an archeological excavation site, and the designation of competent authorities responsible for the physical safeguarding of cultural property at all locations, rather than the establishment of an administrative body. The UNESCO Convention already calls for preparing inventories and organizing the supervision of archaeological excavations,²⁰³ but additional duties could be added to further specify the functions of a national service.

Most importantly, the Second Protocol acknowledges that these additional measures may be costly, require expertise, and that some nations may not have the resources to implement the measures without assistance.²⁰⁴ Thus,

the Second Protocol provides for the setting up of a Fund for the protection of cultural property in the event of armed conflict. The Fund was specifically established to provide financial or other assistance in support of preparatory or other measures to be taken in peacetime . . . [and] will be managed by the Committee for the Protection of Cultural Property in the Event of Armed Conflict, which is to be set up pursuant to the

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- (g) seeing that appropriate publicity is given to the disappearance of any items of cultural property.

Id.

202. Second Protocol, *supra* note 198, at art. 5.

203. UNESCO Convention, *supra* note 12, at art. 5.

204. *See* Second Protocol, *supra* note 198, at art. 29.

Second Protocol.²⁰⁵

A similar fund could be set up pursuant to a UNESCO Convention amendment. This fund would protect cultural property during peacetime, thereby curtailing theft and illicit trade—the most onerous problems in the protection of cultural property. The suggested measures ameliorate these problems without further restricting licit trade in cultural property.

XV. CONCLUSION

On the one hand, the UNESCO Convention is a useful tool in combating theft and the illicit trade of cultural property. On the other hand, since the UNESCO Convention embodies cultural nationalist ideals, it tends to favor the indiscriminate repatriation of cultural property. The United States has implemented the UNESCO Convention through the CPIA with the reservation that it will only recognize foreign export restrictions in times of emergency when the loss of certain cultural property has reached crisis proportions. This reservation has been circumvented by the McClain Doctrine. The result is that a source nation may enforce its export restriction in the United States. Therefore, U.S. law facilitates the repatriation of cultural property under all circumstances.

This practice undermines the intent of the CPIA and free trade in cultural property. Some may argue that trade restrictions on cultural property are necessary to preserve and protect a nation's cultural heritage. As the case of Afghanistan illustrates, however, trade restrictions are a form of retentionism. This practice is not synonymous with protection. Therefore, it is important that cultural property is treated with special care and that the laws affecting it take into account whether the property in question is truly cultural property as defined in the applicable international agreement and whether a nation requesting repatriation is fulfilling its international obligations regarding the protection of cultural property. For

205. Jean-Marie Henckaerts, *New Rules for the Protection of Cultural Property in Armed Conflict*, 835 INT'L REV. OF THE RED CROSS, 593, 593 (1999), available at <http://www.icrc.org/Web/eng/siteeng0.nsf/iwpList260/DFE2EF4C9B065770C1256B66005D898C> (footnote omitted).

example, the United States should not apply the NSPA in a manner that is inconsistent with the CPIA. The fact that a state claims ownership of cultural property should trigger an examination as to whether the claim of ownership is tantamount to an export restriction. If so, it should be determined whether it is appropriate to enforce the export restriction in the context of the CPIA. Since cultural property protection is an international issue, it is critical that all nations participate. Thus, source nations should fulfill their obligations under any international agreement they have signed regarding the protection of cultural property.

The protection of cultural property requires economic resources, so a fund should be established. One method for creating such a fund would be to follow the example of the Second Protocol to the Hague Convention and amend the UNESCO Convention. An amendment would also allow for the addition of specific protective measures. The consequential liberalization of licit trade in cultural property would lead to a more rational international policy regarding cultural property. Although the current legal regime favors retention over protection, the latter approach should be favored. In essence, this means that viewing repatriation after an object has been removed from its country of origin as a form of protection must be replaced with the idea that protecting cultural property does not mean sending it home, but rather preventing its departure in the first place.