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## Protection of Indigenous Populations' Cultural Property in Peru, Mexico and the United States, The

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## THE PROTECTION OF INDIGENOUS POPULATIONS' CULTURAL PROPERTY IN PERU, MEXICO AND THE UNITED STATES

The Governor asked him how much he would give and how soon. Atahualpa said that he would give a room full of gold. The room measured 22 feet long by 17 feet wide, and [was to be] filled to a white line half way up its height—[the line] he described must have been about 1.5 estados [over eight feet] high. He said that up to this level he would fill the room with various objects of gold—jars, pots, tiles, and other pieces. He would also give the entire hut filled twice over with silver. And he would complete this within 2 months.

—Francisco de Xerez, November 1532<sup>1</sup>

### I. INTRODUCTION

This comment will examine current international agreements and national legislation protecting cultural property as a non-renewable resource for the indigenous populations, and the modern nations in which they reside as a whole, of Peru, Mexico, and the United States. Contemporary law enforcement efforts, as well as their historical development, regarding the protection of cultural property in Peru, Mexico, and the United States will be discussed. In addition, this comment will examine the debate concerning whether a total ban on trade in

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1. Francisco de Xerez, the secretary of Francisco Marquis Pizarro, describing the ransom of Atahualpa Inca, the last Inca ruler, was executed by the Spanish on July 26, 1533. JOHN HEMMING, *THE CONQUEST OF THE INCAS* 47-48 (1970). In 1532, Francisco de Xerez, with Spanish mercenaries, captured Atahualpa at Cajamarca, Peru. After the payment of Atahualpa's ransom, worth about \$50 million by today's bullion standards, the monarch was garroted. Thus ended the Inca Empire, and began the exploitation of its indigenous population. MICHAEL E. MOSELEY, *THE INCAS AND THEIR ANCESTORS* 7 (1992).

antiquities or a national and international regulated trade will provide greater protection for cultural property.

Indigenous groups today are unable to enforce claims to their individual cultural property before international tribunals because only recognized nation-states are allowed to join international agreements. The protection of indigenous populations' cultural property is left solely to the nation-states in which these indigenous groups currently reside. In order to provide an effective means of protecting the cultural property of indigenous populations, this comment will argue for the inclusion of indigenous groups in the process of independently enforcing their individual cultural property rights under international agreements. In conclusion, this comment will propose a national and international regulated trade in cultural property with the intention to provide indigenous groups with the ability to maintain control over their individual cultural property. Under this proposed regulated trade model, indigenous populations could designate protected cultural property that may not enter this licit antiquities trade. Furthermore, the nation-states in which the indigenous groups reside would provide protection to cultural property barred from the antiquities trade, money generated by the sale of cultural property would benefit the affiliated indigenous population, and indigenous groups would have the ability to enforce claims to their cultural property before international tribunals.

The primary goal of this comment is to persuade readers that the cultural property rights of indigenous populations should be recognized; indigenous populations should have the right to independently enforce their cultural property rights under international agreements; and a regulated trade in antiquities should be created in order to provide greater protection to archaeological sites and cultural property.

## II. THE RELATIONSHIP OF INDIGENOUS POPULATIONS TO CULTURAL PROPERTY, PARTICIPANTS IN THE ILLEGAL ANTIQUITIES TRADE, AND THE IMPACT OF THE ILLEGAL TRADE IN CULTURAL PROPERTY

### A. *Cultural Property and Indigenous Populations*

The term "cultural property"<sup>2</sup> encompasses a vast array of objects.

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2. Synonyms for cultural property include the terms "cultural patrimony" (national patrimony), "cultural heritage" and "antiquities." All of these words can be used interchangeably, however, the term cultural patrimony is often applied to objects that are of such significance that they form an integral part of the cultural heritage and identity of a particular cultural group. Karen J. Warren, *A Philosophical Perspective on the Ethics and Resolution of Cultural Properties Issues*, in *ETHICS OF COLLECTING CULTURAL PROPERTY: WHOSE CULTURE? WHOSE PROPERTY?* 8 (Phyllis Mauch Messenger ed., University of New Mexico Press 1989).

Similar to the term "art," there is not a set definition for cultural property. Rather, a general definition for cultural property "includes all objects produced or adopted by a given culture—that is, works of art with special historical, archaeological, or ethnological values."<sup>3</sup> Cultural property can be viewed as objects holding monetary value within the international art market.<sup>4</sup> Cultural property can also be viewed as items that function as "a repository of cultural and traditional information,"<sup>5</sup> which places these items beyond any monetary value assigned by the international art market. For indigenous populations,<sup>6</sup> cultural property is of vital importance to their communities because these items are often viewed as integral elements of their religion.<sup>7</sup>

The ability to retain and control significant objects of cultural property is important for indigenous populations attempting to secure and nourish their individual cultural heritage.<sup>8</sup> Stripping indigenous peoples of their cultural property denies these populations access to

"[A] precise and binding definition of cultural property seems to be an understandable scientific desire but [is] beyond any practical reach." Martin Philip Wyss, *The Protection of the Cultural Heritage and its Legal Dimensions: The Heidelberg Symposium 22-23 June 1990*, 1 INT'L J. CULTURAL PROP. 234 (1992).

3. RALPH E. LERNER & JUDITH BRESLER, *ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS, AND ARTISTS* 299 (1989).

See also Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, art. 1, 11806 U.N.T.S. 234-236. Article 1 of the United Nations Educational, Scientific and Cultural Organization 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property [hereinafter UNESCO Convention] defines "cultural property" as "property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science."

4. See JOHN E. CONKLIN, *ART CRIME* 187-188 (1994).

5. Robin A. Morris, *Legal and Ethical Issues in the Trade in Cultural Property*, N.Z.L.J., Feb. 1990 at 40, 42 n.1.

6. Synonyms for indigenous population include the terms "indigenous groups," "indigenous people," "aboriginal people," and "aboriginal population." "Within certain jurisdictions there are indigenous peoples sharing the territory with later arrivals, e.g. the Indians of North America, the Aborigines of Australia, the Bushman of South Africa." 1 LYNDEL V. PROTT & P.J. O'KEEFE, *LAW AND THE CULTURAL HERITAGE* 135 (1984).

"The category of indigenous peoples is generally understood to include not only the Native tribes of the American continents, but also other culturally distinctive non-state groupings, such as the Australian aboriginal communities and tribal peoples of southern Asia, that are similarly threatened by the legacies of colonialism." James Anaya, *International Law and Indigenous Peoples*, CULTURAL SURVIVAL Q., Spring 1994 at 42.

7. For a discussion of the importance of cultural property to Native American religion, see *Indian Rights: Native Americans Versus American Museums—A Battle for Artifacts*, 7 AM. INDIAN L. REV. 125, 125-127 (1979).

8. See generally, Robert T. Coulter, *Commentary on the UN Draft Declaration on the Rights of Indigenous Peoples*, CULTURAL SURVIVAL Q., Spring 1994, at 37, 40-41. Catherine Bell, *Aboriginal Claims to Cultural Property in Canada: A Comparative Legal Analysis of the Repatriation Debate*, 17 AM. INDIAN L. REV. 457 (1992).

their history, cripples their present ability to retain their defining individual cultural heritage, and jeopardizes their future generations' cultural vigor.

*B. The Illicit Trade in Antiquities and the Demand for Cultural Property.*

Antiquities, by definition, are rare and their finite supply designates them as items of value. The increasing demand for cultural property as luxury items marking social distinction, and their limited supply, have fueled the illicit antiquities market.

The illicit trade in antiquities is a complex and multi-layered system.<sup>9</sup> The top echelon of the illicit antiquities trade is made up of collectors, dealers, museum curators, and scholars who acquire antiquities.<sup>10</sup> Smugglers are the middle-men, moving looted and stolen antiquities across international borders,<sup>11</sup> usually to the markets of "purchaser nations."<sup>12</sup> The activities of smugglers in source nations<sup>13</sup> are usually ignored by police officials, politicians, and customs agents who often accept bribes.<sup>14</sup> The bottom of this illicit trade system is made up of looters or "grave-robbers," who are usually poor peasants selling their discoveries at low prices to smugglers.<sup>15</sup>

The trade in illicit antiquities is a multi-million dollar international business.<sup>16</sup> It is difficult to obtain accurate numbers on the value of individual stolen cultural property and the extent of the antiquities trade. However, estimates run from \$2 billion to \$6 billion annually.<sup>17</sup> These staggering numbers place the illicit trade in antiquities "only

9. See Jeffrey Schaire, *Notes from the Editor: Shades of Gray*, ART & ANTIQUITIES, May 1990, at 12.

10. See *id.*

11. See *id.*

12. Countries whose citizens purchase foreign antiquities are referred to as "purchaser nations," "market nations," "collector nations," "artifact poor nations," and "demand nations." Countries which contain large reserves of antiquities are referred to as "source nations," "nations of origin," "artifact rich nations," and "supply nations." Jessica L. Darraby, *Current Developments in International Trade of Cultural Property: Duties of Collectors, Traders and Claimants*, in THE LAW AND BUSINESS OF ART 718 & n.50, 58 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. 297, 1990). The application of these terms to countries can be confusing because "purchaser nations" can also be "source nations." The United States, Canada, Western Europe, and Japan are "purchaser nations," however, they are also "source nations" with large repositories of portable cultural property.

13. See *id.* at 385.

14. See Schaire, *supra* note 9, at 12.

15. *Id.*

16. See Ricardo J. Elia, *Popular Archaeology and the Antiquities Market: A Review Essay*, 18 J. OF FIELD ARCHAEOLOGY 95, 96 (1991).

17. See Marguerite Holloway, *Trends in Archaeology: The Preservation of Past*, SCI. AM., May 1995, at 98, 101.

behind drug smuggling and perhaps weapons trading,"<sup>18</sup> in terms of international illegally transferred goods.

The established traditions of the art market, which functions under secrecy and informality, provide the ideal setting for the introduction of stolen cultural property into the legal art market.<sup>19</sup> The numerous levels of the illicit art market's multi-layered system insulates the participants in the Trade's upper echelon from knowledge concerning illegal transactions.<sup>20</sup>

The demand for cultural property is fueled directly or indirectly by scholars, museums, dealers, and collectors.<sup>21</sup> Scholars indirectly generate demand for cultural property through discovery, research, and publication of information concerning antiquities.<sup>22</sup> Scholars also provide authenticity or provenance to antiquities, which is of great importance to collectors and dealers who are wary of accepting fakes into their collections.<sup>23</sup> Museums, which are closely associated with research and various scientific disciplines, directly and indirectly create demand

18. Elia, *supra* note 16, at 96.

19. See Giuliana Luna, *The Protection of the Cultural Heritage: An Italian Perspective*, in *THE PROTECTION OF THE ARTISTIC AND ARCHAEOLOGICAL HERITAGE: A VIEW FROM ITALY AND INDIA* 21, at 171-81 (1976).

20. See generally Hugues de Varine, *The Rape and Plunder of Cultures*, in *LAW, ETHICS, AND THE VISUAL ARTS* 46 (John H. Merryman & Albert E. Elsen eds., University of Pennsylvania Press 1987).

21. See generally de Varine, *supra* note 20, at 46-53. See generally Prott & O'Keefe, *supra* note 6.

22. See de Varine, *supra* note 20, at 47-48.

Scholarly research and publication influences the art market: If an archaeologist publishes something about an important artifact—say, end scrapers [a stone implement that has a blunt end for scrapping]—then all of a sudden end scrapers become items that are sold . . . and all of a sudden people want them in their collections and bang! End scrapers are selling for five bucks apiece. And that makes archaeologists awfully nervous, because every time we publish we aid and abet the market that's costing us our data base.

Spencer P.M. Harrington, *The Looting of Arkansas: How One State Copes With the Erosion of its Cultural Heritage*, *ARCHAEOLOGY*, May/June 1991, at 28.

23. See generally Jaime Litvak King, *Cultural Property and National Sovereignty*, in *ETHICS OF COLLECTING CULTURAL PROPERTY: WHOSE CULTURE? WHOSE PROPERTY?* 204-205 (Phyllis Mauch Messenger ed., University of New Mexico Press 1989); David M. Pendergast, *And the Loot Goes On: Winning Some Battles, But Not the War*, 18 *J. OF FIELD ARCHAEOLOGY* 89, 94 (1991).

"Artwork is generally authenticated by (a) stylistic inquiry, (b) documentation, and (c) scientific verification." See LERNER & BRESLER, *supra* note 3, at 56 (1989). "Provenance" is a term used in the art world which refers to the origin or history of an objects ownership. See generally Jessica L. Darraby, *Current Developments in International Trade of Cultural Property: Duties of Collectors, Traders and Claimants*, in *THE LAW AND BUSINESS OF ART* 659, 716 n. 22 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. 297, 1990).

for cultural property.<sup>24</sup> Museums expand their collections through purchases at public sales, from dealers, or from donations by collectors.<sup>25</sup> The demand for cultural property created by the activities of museums includes field research, purchases, and publicity of exhibitions.<sup>26</sup> By themselves, museums account for a small portion of the demand in antiquities; however, one could say that they have become the institutions of its justification.<sup>27</sup> This is especially true in the United States, where there are favorable "tax relief" incentives for the donation of fine art objects.<sup>28</sup>

Collectors are the greatest generators of the demand for cultural property, especially illicitly obtained antiquities<sup>29</sup>, and their motives are many and varied.<sup>30</sup> Part of the general definition for a collector holds that such an individual "will sacrifice almost anything in order to add to a collection, and will pursue new items with a passion that borders on the fanatic."<sup>31</sup> Collectors care about each object within their collection, and usually about the object's social and technological history.<sup>32</sup> However, most collectors do not recognize the destructive loss to science caused by looting.<sup>33</sup>

Dealers promote the demand for cultural property, providing museums and collectors with antiquities.<sup>34</sup> Dealers make their living from trading in cultural property,<sup>35</sup> and they generate demand by cultivating

24. "They play a much more extensive role in transmitting information and molding the public's taste." LERNER & BRESLER, *supra* note 3, at 48.

25. "Indeed, it must be recognized that the museum is the normal final resting-place for all cultural goods that have been shorn of their sacred and functional properties." *Id.*

26. *See id.*

27. *See id.* *See generally* CONKLIN, *supra* note 4, at 201-204. *See generally* David Wilson, *Return and Restitution: A Museum Perspective* 99-106, in, WHO OWNS THE PAST? (Isabel McBryde ed., Oxford University Press 1985); Timothy Kaiser, *Dealing for Dollars*, 17 J. OF FIELD ARCHAEOLOGY 205, 205-10 (1990); Pendergast, *supra* note 23, at 89-95.

28. *See de Varine, supra* note 20, at 48. *See generally* Kaiser, *supra* note 27. *See also* Pendergast, *supra* note 23. *See also* Colin Renfrew, *Viewpoint: Collectors Are the Real Looters*, ARCHAEOLOGY, May/June 1993, at 16, 17 (calling for a "re-examination of the tax concessions" for donations of antiquities made to museums).

29. *See de Varine, supra* note 20, at 48.

30. *See id.*

31. *See* Pendergast, *supra* note 23, at 91.

32. *See id.*

33. *See id.* "In the rich countries, and in the upper social classes of the poor countries, collectors represent a considerable market on their own, whose operation is little known. One will finance clandestine excavations in Peru in order to stock a private museum with gold artifacts culled from tombs (at a cost of totally destroying the rest of the funerary furniture)." *See de Varine, supra* note 20, at 48.

34. *See de Varine, supra* note 20, at 49. *See generally* Prott & O'Keefe, *supra* note 6, at 17.

35. *See* PROTT & O'KEEFE, *supra* note 6, at 17.

"a mysterious aura around their activities, referring to their intelligence networks, keeping the sources of their merchandise secret, maintaining an aloofness, and tantalizing prospective buyers."<sup>36</sup> In short, unscrupulous dealers treat antiquities as mere objects that are to be purchased, traded, and resold for a profit.<sup>37</sup>

The origins of antiquities are often hidden by the art auction system, which can provide the proper sale records necessary for the establishment of an object's provenance.<sup>38</sup> Purchasers at auctions are not required to identify themselves or even be present at the sale.<sup>39</sup> Thus, a stolen object can move from an auction house into obscurity. Additionally, the laws of some countries act to obscure the origins of stolen antiquities. For example, Switzerland allows individuals to deposit artworks in their banks. After five years, as long as the individual was not the thief, the artwork becomes the depositor's property.<sup>40</sup>

### *C. The Effect of the Illicit Trade in Cultural Property on the Archaeological Record.*

The illicit trade in cultural property, through the looting of archaeological sites, causes irreparable harm to the archaeological record<sup>41</sup> and the archaeological context.<sup>42</sup> Individuals who locate antiquities will completely loot the surrounding area, which destroys much of the archaeological information that can be gleaned from the site.

In order to obtain information on the behavior of past communities, archaeologists employ careful methods of excavation when they examine an archaeological site.<sup>43</sup> However, looters<sup>44</sup> do not practice these

36. CONKLIN, *supra* note 4, at 195.

37. "Legitimate dealers are angered by brokers and private dealers who trade in stolen art, because those brokers and private dealers both victimize legitimate dealers and hurt their reputations, making it difficult for them to win the trust of potential clients." *Id.*

38. See CONKLIN, *supra* note 4, at 159, 161, 269-270 ("[a]lthough unscrupulous antiquities dealers, curators, and collectors have traditionally hidden their dealings behind a veneer of genteel and sophisticated respectability, the illegal art trade is, in reality, a dirty business involving dirty money."). See also Elia, *supra* note 16, at 96.

39. See generally CONKLIN, *supra* note 4, at 38-43, 110-11.

40. See Anthony J. Del Piano, *The Fine Art of Forgery, Theft, and Fraud: Corruption in the World of Art and Antiquities*, CRIM. JUS., Summer 1993, at 16, 17.

41. "The archaeological record is the data amassed from survey and excavation," and represents the materials that make up world history. BRIAN M. FAGAN, *PEOPLE OF THE EARTH: AN INTRODUCTION TO WORLD PREHISTORY* 15 (1992).

42. Archaeological context refers to "the material remains of past sociocultural systems—the pottery fragments, stone flakes, and crumbled house foundations that exist in the present." GUY GIBBON, *ANTHROPOLOGICAL ARCHAEOLOGY* 417 (1984).

43. See CONKLIN, *supra* note 4, at 228.

44. The term "looter" refers to any individual who loots archaeological sites without the use of established archaeological methods. The practice of looting in Peru is usually carried out by poor peasants referred to as "huaqueros." The pay the huaqueros receive is very low for the



careful techniques.<sup>45</sup> Rather, objects of scientific value are damaged or destroyed by looters in their quest for salable antiquities.<sup>46</sup> After looters have removed the artifacts<sup>47</sup> they recover from an archaeological site, the historical value of that site is often destroyed.<sup>48</sup> Furthermore, the looting of an archaeological site causes the loss of scientific information, which includes remains of ancient floors and fires, traces of change in soil color, botanical remains, the position of human remains, and the relation between interred objects.<sup>49</sup> All of this information, which is vital for the reconstruction of past life ways, is lost when individuals loot an archaeological site for salable objects.<sup>50</sup>

The looting of archaeological sites does not just rob the cultural heritage of a local community associated with the site's remains or the entire nation in which it is located. Rather, a looted archaeological site represents an irreplaceable loss to the worlds' cultural heritage, through the loss of information concerning the behavior of a past community or civilization.

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back breaking work they do, which strips their country of its cultural heritage. *See generally* Carol L. Howell, *Daring to Deal with Huaqueros*, *ARCHAEOLOGY*, May/June 1992, 56-58; Carl Nagin, *The Peruvian Gold Rush*, *ART AND ANTIQUITIES*, May 1990, 98-105, 134-45.

Looters can be organized and well-funded groups. For example "pot hunters" paid \$10,000 in 1987 to the owners of Slack Farm, near Uniontown, Kentucky, for the right to "excavate" their land. The Slack Farm area had included an undisturbed Native American archaeological site, which was occupied between 1450 and 1650 C.E. After paying the owners, the looters used a tractor to bulldoze through the old village to reach the graves. Bones, potsherds, stone implements, and hearths were pushed aside in search of salable grave goods. When the looters finished, the Slack Farm site was full of shovel holes and gaping trenches. Unfortunately, looting on this devastating scale is commonplace in the United States. *See FAGAN, supra* note 41, at 18.

Not only do looters cause damage to archaeological sites, they will occasionally break up antiquities in order to get them past customs or to sell easier. *See CONKLIN, supra* note 4, at 252.

45. *See generally* Howell, *supra* note 44.

46. *See id.* "It is tragically clear that wiping out a site can wipe out cultural identity—something that happens when ethnic groups clash, each trying to obliterate the culture of the other. China's razing of the monasteries of Tibet is but one example." Holloway, *supra* note 17, at 101.

47. The term "artifact" encompasses any form of archaeological discovery, which includes stone axes, pottery, butchered animal bones, and "manifestations of human behavior found in archaeological sites." *See FAGAN, supra* note 41, at 17-18.

48. *See generally* Clemency Coggins, *Archaeology and the Art Market*, 175 *SCI.* 263 (1972).

49. *See generally id.*

50. *See generally id.*

### III. INTERNATIONAL ATTEMPTS AND PROTECTIVE MEASURES IN PERU, MEXICO, AND THE UNITED STATES TO HALT THE ILLEGAL TRADE IN CULTURAL PROPERTY

#### A. *International Law Protecting Cultural Property*

Two early attempts to protect cultural property include a Papal Bull, issued in 1462 by Pope Pius II, which sought to control the excavation of relics in the Papal States, and a Royal Proclamation in 1666 forbidding the destruction of ancient monuments in Sweden.<sup>51</sup> During the mid-1800s numerous nation-states began to adopt legislation regulating the ownership, export, and excavation of antiquities, artwork, and cultural property.<sup>52</sup>

The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (Hague Convention) was the first modern international agreement to protect artwork, which developed as a direct result of the destruction caused by the bombing and plundering during the World Wars.<sup>53</sup> The Hague Convention prohibits looting or the destruction of art objects during war, with an exception for cases of military necessity.<sup>54</sup> The most recent invocation of the Hague Convention occurred during the Iraqi Persian Gulf Conflict of 1991, where claims of damage to cultural property were made against the government of Iraq.<sup>55</sup> The Hague Convention developed a preventative method for protecting cultural property from looting, however, it is only applicable during military conflict.<sup>56</sup>

A more comprehensive effort to protect cultural property, through the restriction of the illicit trade in antiquities, during times of peace is the United Nation's 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO Convention).<sup>57</sup> The UNESCO

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51. See PROTTE & O'KEEFE, *supra* note 6, at 453.

52. See *id.* at 454. During the eighteenth century, the principles of protecting cultural property during warfare began to develop and were first codified under the "Lieber Code" of 1863. See also SHARON A. WILLIAMS, *THE INTERNATIONAL AND NATIONAL PROTECTION OF MOVABLE CULTURAL PROPERTY: A COMPARATIVE STUDY* 15 (1978).

53. See Barbara Hoffman, *The Spoils of War*, *ARCHAEOLOGY*, Nov/Dec 1993, at 37. See generally LYNN H. NICHOLAS, *THE RAPE OF EUROPA* (1994). See generally JOHN H. MERRYMAN & ALBERT E. ELSEN, *LAW, ETHICS, AND THE VISUAL ARTS* 34-35 (1987).

54. Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240. As of January 1, 1992, seventy-six nations were parties to this convention. However, the United States has not joined.

55. See David A. Meyer, *The 1954 Hague Cultural Property Convention and its Emergence into Customary International Law*, 11 B.U. INT'L L.J. 349, 371-77 (1993).

56. See Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 54.

57. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and

Convention established principles for the control of the international trade in cultural property<sup>58</sup> by enabling nations to enter into pacts for the enforcement of each other's individual cultural property laws.<sup>59</sup> Agreements made between nations, pursuant to the UNESCO Convention, provide aggrieved nations with the ability to pursue claims for illegally transferred cultural property in foreign jurisdictions through the granting of standing to member nations and enabling the enforcement of national antiquities laws in the courts of the signatories.<sup>60</sup> Rather than the Hague Convention's focus on the importance of cultural property to the world's heritage, the UNESCO Convention attempts to protect the individual cultural property of individual nations.

To date, the UNESCO Convention has been signed and ratified by seventy-eight nations,<sup>61</sup> most of which are "Third World" source nations that are ex-colonies.<sup>62</sup> The UNESCO convention requires nations to: develop an export licensing systems; appropriate funds for scientific excavations; publicize losses of important cultural property; publicize their restrictions on the trading of cultural property; require dealers to record their acquisitions and transactions; prohibit unauthorized imports; help repatriate illegally exported cultural property; and compile inventories of their important artworks, monuments, and sites.<sup>63</sup> Some source nations did not ratify the UNESCO Convention because they could not afford to implement its requirements.<sup>64</sup> Additionally, many European purchaser nations refused to sign on to the UNESCO Convention because it was incompatible with current Common Market regulations, they did not want to repatriate previously acquired cultural property resting within their museums, and they already had established systems to protect their own cultural property.<sup>65</sup> Currently, the only major art importing countries to join the UNESCO Convention are the United States<sup>66</sup>, Australia<sup>67</sup>, and Canada.<sup>68</sup> The United States Senate gave its

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Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 232 (provides protection of cultural property and heritage by prohibiting illegal transfers).

58. See Leo J. Harris, *From the Collector's Perspective: The Legality of Importing Pre-Columbian Art and Artifacts*, in ETHICS OF COLLECTING CULTURAL PROPERTY: WHOSE CULTURE? WHOSE PROPERTY? 163-164 (Phyllis Mauch Messenger ed., 1989).

59. See generally CONKLIN, *supra* note 4, at 280-284.

60. See *id.*

61. See Barbara Borst, *Africa: Fight Intensifies Against Theft of Native Treasures*, INTER PRESS SERVICE, Nov. 14, 1994, at 2, available in LEXIS, News Library, Curnws File.

62. See CONKLIN, *supra* note 4, at 280. The United States, Mexico, and Peru have joined the UNESCO Convention. See Harris, *supra* note 58, at 163.

63. See CONKLIN, *supra* note 4, at 280. See also UNESCO Convention, *supra* note 3, art. 5(a)-(g), art. 6(a)-(c), and art. 7(b)(ii).

64. See CONKLIN, *supra* note 4, at 281.

65. See *id.* at 281-282. See also Harris, *supra* note 58, at 165.

66. See Convention on Cultural Property, 19 U.S.C. § 2601-13 (1988). See CONKLIN, *supra*

consent to ratification of the UNESCO Convention in 1972, with seven reservations and understandings.<sup>69</sup> However, the United States Congress did not pass the implementing legislation, necessary to fulfill the obligations established by the UNESCO Convention, until January 12, 1983.<sup>70</sup> In 1983, the United States Congress passed the Convention on Cultural Property Implementation Act,<sup>71</sup> enabling a foreign nation to ask the United States to place restrictions on the importation of specifically defined categories of archaeological antiquities which are part of its patrimony and in danger of being looted.<sup>72</sup> In short, this Act allows the United States President to enter into bilateral treaties, pursuant to the UNESCO Convention, restricting the importation of cultural property from nations that request cooperation. At this writing, the United States has entered into treaties restricting the importation of designated cultural property with Mexico,<sup>73</sup> Peru,<sup>74</sup> Guatemala,<sup>75</sup> Bolivia,<sup>76</sup> Ecuador,<sup>77</sup> and El Salvador.<sup>78</sup> The United States has only en-

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note 4, at 281.

67. Australia's enabling legislation for the UNESCO Convention is the 1986 Protection of Movable Cultural Heritage Act. *See* Protection of Movable Cultural Heritage Act, 1986 Austl. C. Acts 11. *See also* Jerry Theodorou, *A New International Law for Antiquities?*, MINERVA, March/April 1992, at 32.

68. Canada joined the UNESCO Convention in 1978, making cultural property claims of reciprocating nations enforceable within Canadian courts under the Cultural Property Export and Import Act, S.C., ch. 50, § 31(2) (1975) (Can.).

69. *See* Harris, *supra* note 58, at 164.

70. *See id.*

71. *See* 19 U.S.C. §2601-13 (1988). *See also* CONKLIN, *supra* note 4, at 281.

72. *See* CONKLIN, *supra* note 4, at 281.

73. *See* Treaty of Cooperation between the United States of America and the United Mexican States Providing for the Recovery and Return of Stolen Archaeological, Historical, and Cultural Properties, July 17, 1970, U.S.-Mex., 22 U.S.T. 494, 1970.

74. *See* Agreement Between the United States of America and the Republic of Peru for the Recovery and Return of Stolen Archaeological, Historical, and Cultural Properties, Sep. 15, 1981, U.S.-Peru, 33 U.S.T. 1607, 1981.

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

76. *See* Bolivia was granted protection for antique ceremonial textiles belonging to the Aymara indigenous population from Coroma, Bolivia. CONKLIN, *supra* note 4, at 282. *See also* Import Restrictions on Cultural Textile Artifacts from Bolivia, 54 Fed. Reg. 10,618-19 (1989).

77. *See* Agreement Between the United States of America and the Republic of Ecuador for the Recovery and Return of Stolen Archaeological, Historical, and Cultural Properties, Nov. 17, 1983 U.S.-Ecuador, T.I.A.S. No. 11,075, 1983.

78. *See* Import Restrictions on Archaeological Material from El Salvador, 52 Fed. Reg. 34,614 (1987). El Salvador receives protection for pre-Columbian antiquities from the Cara Sucia Archaeological Region. For information concerning El Salvador's request for emergency import restrictions, *See* Ann Guthrie Hingston, *U.S. Implementation of the UNESCO Cultural Property Convention*, in ETHICS OF COLLECTING CULTURAL PROPERTY: WHOSE CULTURE?

tered into six treaties for the protection of cultural property from source nations because it is difficult for source nations to create specific lists of cultural property to be protected and the low priority political leaders place on the protection of their nations' cultural property.<sup>79</sup>

The UNESCO Convention is "widely regarded as ineffectual"<sup>80</sup> because the major art importing nations of Western Europe and Japan have failed to join.<sup>81</sup> Many UNESCO Convention provisions are slanted in favor of source nations and the transaction costs of litigation are placed on the purchaser nations.<sup>82</sup> Therefore, nations that purchase art and have the resources to protect their individual cultural property have no incentive to join the UNESCO Convention, other than the fear of becoming entangled in an embarrassing international incident.<sup>83</sup> Additionally, the provisions of the UNESCO Convention have been "watered down" by the United States' enabling legislation, the 1983 Convention on Cultural Property Implementation Act.<sup>84</sup> The Convention on Cultural Property Implementation Act allows the President to place import restrictions only on designated archaeological and ethnological objects on a country-by-country basis.<sup>85</sup> The Act places limits on archaeological and ethnological objects holding that "archaeological material" must be, "of cultural significance; at least 250 years old; and normally discovered as a result of scientific excavation, clandestine or accidental digging, or exploration on land or under water."<sup>86</sup> The Act also holds that "ethnological material" must be "the product of a tribal or nonindustrial society and important to the cultural heritage of a people because of its distinctive characteristics, comparative rarity, or its contri-

WHOSE PROPERTY? 134-137 (Phyllis Mauch Messenger ed., 1989).

79. See CONKLIN, *supra* note 4, at 282.

80. Theodorou, *supra* note 67, at 32.

81. See *id.*

82. "The UNESCO Convention was seen as a non-starter by the Europeans and Japan because it was seen as favoring too heavily the interests of the art-exporting nations and aligned constituents." Theodorou, *supra* note 67, at 32.

83. Purchaser nations "have increasingly returned stolen and illegally exported objects to the countries from which they came, often publicizing the repatriation of those objects to maximize good will." CONKLIN, *supra* note 4, at 282.

84. See Theodorou, *supra* note 67, at 32.

The United States ratification of the UNESCO Convention "includes no provisions for export permits, dealer registration, regulation of museums, nor does it recognize the definitions of cultural property used by other signatories." Ellen Herscher, *International Control Efforts: Are There Any Good Solutions?*, in *ETHICS OF COLLECTING CULTURAL PROPERTY: WHOSE CULTURE? WHOSE PROPERTY?* 119 (Phyllis Mauch Messenger ed. 1989)).

85. See Hingston, *supra* note 78, at 131-32.

86. *Id.* See also Convention on Cultural Property Implementation Act of 1983, Pub. L. No. 97-446, Title III § 302, Jan. 12, 1983, 96 Stat. 2351 (codified at 19 U.S.C. § 2601-2613 (1988 & Supp. 1994)).

bution to the knowledge of the origins, development, or history of that people."<sup>87</sup> Because of these limitations, only a few cases involving pre-Columbian cultural property have successfully invoked the Act.<sup>88</sup>

Due to the limited usefulness of the UNESCO Convention, the International Institute for the Unification of Private Law (UNIDROIT) has been working to develop a more effective means of controlling the illicit trade in cultural property.<sup>89</sup> UNIDROIT has been attempting to codify the international law concerning cultural property since 1984, at the request of UNESCO.<sup>90</sup> The UNIDROIT Convention members, made up of experts from around the world, are attempting to reconcile the rights of good faith purchasers in purchaser nations and the need to protect the cultural property of source nations.<sup>91</sup> Although there is great hope for the UNIDROIT Convention proposal, it is unlikely, due to a number of unresolved issues, that there will be any consensus soon.<sup>92</sup>

### B. Peruvian Legislation Protecting Cultural Property

Today, nations employ three basic types of laws to provide protection to their cultural property.<sup>93</sup> The first category of these laws is termed selective export controls, or screening, which are implemented in order to retain only those cultural objects deemed to be the most important, while allowing a general free trade in all other items.<sup>94</sup> This control method has been adopted in Canada, Japan, and the United Kingdom.<sup>95</sup> The second category involves a total ban on the export of cultural property.<sup>96</sup> This method of protection is used by some Latin American nations, the People's Republic of China, and a few Mediterranean countries.<sup>97</sup> Finally, many nations, such as Peru and Mexico,

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87. See Hingston, *supra* note 78, at 131-32. See also Cultural Property Implementation Act of 1983, 19 U.S.C. § 2601-2613 (1988 & Supp. 1994).

88. See Theodorou, *supra* note 67, at 32.

89. See *id.*

90. See Theodorou, *supra* note 67, at 32. See generally Jerome M. Eisenberg, Conservation and the Antiquities Trade, MINERVA, March/April 1994, at 38. See also Preliminary Draft UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, arts. 1-10, reprinted in abbreviated version in Jerome M. Eisenberg, *The UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects: Report on the Fourth Meeting*, MINERVA, March/April 1994 at 41.

91. See Theodorou, *supra* note 67, at 32.

92. For list of unresolved issues, see Eisenberg, *supra* note 90, at 41-42.

93. See Herscher, *supra* note 84, at 118.

94. See *id.*

95. See *id.*

96. See *id.*

97. See *id.*

declare national ownership of certain types of cultural property, including undiscovered cultural property.<sup>98</sup>

The current population of Peru is 24,087,372,<sup>99</sup> with forty-five percent of this demographic statistic belonging to various indigenous groups<sup>100</sup> and thirty-seven percent being made up of Mestizos.<sup>101</sup> Based on these population demographics, one could make the argument that Peru is an "Indian Nation." However, the political power and economy of Peru is controlled by the minority European population and some Mestizos. This could explain the history of indifference officials within the Peruvian Government have held toward the looting of its nation's indigenous populations cultural heritage.<sup>102</sup> Peru has a long history of looting,<sup>103</sup> and the legal mechanisms for the protection of its cultural property were slowly established.<sup>104</sup> The first effort to guard Peru's cultural heritage occurred in 1822, when the Spanish colonies sought their independence.<sup>105</sup> During this period "a decree was passed forbidding the excavation of prehispanic monuments and providing for the creation of a national museum."<sup>106</sup> This decree was reaffirmed by another in 1837, and in 1893 an additional decree was created out of concern for the exportation of cultural property.<sup>107</sup> The 1893 decree declared that excavations could not take place without a license, all Pre-Columbian structures were Peruvian national monuments, and a Bureau for the Preservation of Antiquities should be established.<sup>108</sup> Furthermore, the 1893 decree allowed excavators to keep archaeological

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98. *See id.*

99. *See* THE WORLD ALMANAC AND BOOK OF FACTS 1996 807 (World Almanac Books 1996) [hereinafter "Almanac"].

100. *See id.* There are too many indigenous "Indian" groups within Peru to be fully described in this article.

101. *See id.* The term "Mestizo" refers to a mixed population of indigenous "New World" peoples and Europeans. *See also* MICHAEL D. COE, MEXICO: FROM THE OLMECS TO THE AZTECS 202.

102. Prior to the Inca Empire, numerous Andean civilizations existed in Ecuador, Peru, Bolivia, Chile, and Argentina. *See generally* RICHARD W. KEATINGE, PERUVIAN PREHISTORY: AN OVERVIEW OF PRE-INCA AND INCA SOCIETY (1988).

103. The looting of the indigenous populations' archaeological sites has a long history in Peru, which stretches back to the Spanish Conquest of 1532. A single example of this occurred when the invading Spanish looted the Huaca del Sol, an enormous Moche pyramid near present day Trujillo, by diverting a river to scour away a side of the structure. The operation uncovered great quantities of gold objects that were melted down for bullion. *See generally* Christopher Donnan, *Masterworks of Art Reveal a Remarkable Pre-Inca World*, 177 NATIONAL GEOGRAPHIC 17, 17-33 (1990).

104. *See* PROTTE & O'KEEFE, *supra* note 6, at 59.

105. *See id.* at 60.

106. *Id.*

107. *See id.*

108. *See id.*

discoveries; however, duplicates, photographs, and detailed information had to be provided to the Peruvian state.<sup>109</sup> In 1911 another decree amended the decree of 1893, providing that original artifacts recovered from archaeological excavations were to be the property of the state.<sup>110</sup>

In 1929 Peru passed Law No. 6634,<sup>111</sup> which became the most important legal instrument for the protection of its cultural property.<sup>112</sup> Under Law No. 6634, all pre-Columbian antiquities and monumental architecture are considered to be the property of the Peruvian nation,<sup>113</sup> extending the state's protection beyond artifacts not in private collections to those possessed as individual property.<sup>114</sup> The exception to Law No. 6634, which allowed one to maintain their property rights to cultural property, covers antiquities that were in private collections when the law was enacted and properly registered with the Peruvian government within one-year of the establishment of the register.<sup>115</sup> Additionally, this law prohibits the export of cultural property from the nation of Peru without the government's permission.<sup>116</sup> Antiquities can be used by private Peruvian citizens and these "user rights" can be sold; however, non-citizens are not allowed to participate in this trade.<sup>117</sup> In addition, national and foreign scientific institutions, with permission of the Peruvian government, can investigate and study pre-Columbian antiquities.<sup>118</sup>

Although Law No. 6634 provides for the protection of artifacts within the borders of Peru, laws that declare national ownership of

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109. *See id.*

110. *See* PROTTE & O'KEEFE, *supra* note 6, at 60.

111. *See* Law No. 6634 of June 13, 1929 [hereinafter "Law No. 6634"] reprinted in Frederic J. Truslow, *Peru's Recovery of Cultural Patrimony*, 15 N.Y.U. J. Int'l L. & Pol. 839 n.15 (1983). Regulations under the Law were adopted as Supreme Resolution No. 49 of Mar. 31, 1933.

112. *See* PROTTE & O'KEEFE, *supra* note 6, at 60. Law No. 24047. On January 5, 1985, Law No. 6634 was repealed by the Peruvian government and replaced by Law No. 24047. On February 27, 1985, the government of Peru passed a decree stating that pre-Columbian art objects "belonging to the nations's cultural wealth are untouchable." On June 22, 1985, the Peruvian government passed a law establishing that all "archaeological sites belong to the state." In *Peru v. Johnson*, the court held the view that the new Peruvian law meant antiquities discovered between January 5, 1985 and June 22, 1985 were private property and not the property of the Peruvian nation. *See Peru v. Johnson*, 720 F. Supp. 810 (C.D.Cal. 1989).

113. *See* Truslow, *supra* note 111, at 841.

114. *See* PROTTE & O'KEEFE, *supra* note 6, at 60.

115. *See* Law No. 6634, *supra* note 111, arts. 4 & 11. *See also* Truslow, *supra* note 111, at 841-42.

116. *See* Law No. 6634, *supra* note 111, art. 10. *See also* Truslow, *supra* note 111, at 842. *See also* PROTTE & O'KEEFE, *supra* note 6, at 60-1.

117. *See* Truslow, *supra* note 111, at 842-43.

118. *See* PROTTE & O'KEEFE, *supra* note 6, at 60-1.



certain types of cultural property have proven to be ineffective in halting the illicit international trade in antiquities because they are only enforceable within countries that have adopted them.<sup>119</sup> Due to a flourishing illegal trade of cultural property from Peru to the United States, the Peruvian government sought to achieve an agreement with the United States that would allow Peru to seek the repatriation of stolen antiquities.<sup>120</sup> At the request of the Peruvian Ambassador Fernando Schwalb Lopez Aldana, coupled with the severe damage known to be occurring to Peru's cultural history, the United States agreed to the creation of an agreement between the two nations for the protection of Peruvian cultural property.<sup>121</sup> On September 15, 1981, the United States and Peru signed the Agreement Respecting the Recovery and Return of Stolen Archaeological, Historical, and Cultural Properties (Executive Agreement).<sup>122</sup>

The 1981 Executive Agreement between the United States and Peru is not a treaty.<sup>123</sup> Rather, the Executive Agreement is an accord between the two nations that cannot change the existing provisions of either Peru or the United States.<sup>124</sup> Therefore, the Executive Agreement does not provide provisions authorizing the United States government to engage in legal actions on Peru's behalf.<sup>125</sup> However, this agreement is significant because each nation has agreed to use their legal mechanisms for the recovery and return from its territory stolen archaeological, historical, and cultural properties that have been illegally removed from either nations' territory.<sup>126</sup> Furthermore, the Executive Agreement provides that each nation will inform the other of stolen cultural property from its borders; requires the two nations to take actions to detect and locate the entry of stolen antiquities into their territory and return the items; or help facilitate a private action for the return of this property to its place of origin.<sup>127</sup> Finally, the Executive agreement provides that expenses incurred in returning cultural property will be paid by the requesting nation.<sup>128</sup>

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119. See Herscher, *supra* note 84, at 118.

120. *Peru Wages Campaign to Halt Trade in Stolen Art Treasures*, N.Y. TIMES, Oct. 4, 1981, at 13, reprinted in JOHN H. MERRYMAN AND ALBERT E. ELSER, LAW, ETHICS, AND THE VISUAL ARTS 59 (1987).

121. See Truslow, *supra* note 111, at 845.

122. See Agreement Respecting the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, Sept. 15, 1981, United States-Peru, T.I.A.S. No. 10,136. See also Truslow, *supra* note 111, at 845.

123. See Truslow, *supra* note 111, at 846.

124. See *id.*

125. See *id.*

126. See *id.*

127. See *id.*

128. See *id.*

Based on the Executive Agreement between the United States and Peru, one would assume that there would be few problems inhibiting the return of stolen Peruvian cultural property recovered in the United States. However, in *Peru v. Johnson*, the Court held that Peru was required to prove that the antiquities in question were excavated illegally from the Peruvian nation.<sup>129</sup> The Court came to this decision due to a loophole or ambiguities in the Peruvian nationalization laws,<sup>130</sup> and because expert testimony revealed that the antiquities in question could have originated in Columbia, Ecuador, Peru, or Bolivia.<sup>131</sup> Naturally, Peru was unable to meet this overwhelming burden, and the antiquities in question were returned to the American dealer.<sup>132</sup> The Court's ruling in *Peru v. Johnson*, concerning ownership disputes, favors the antiquities purchaser unless the claimant nation can prove that the cultural property in question originated from within its geographical boundaries.

The ruling of the Court in *Peru v. Johnson* is a set back to the Peruvian government's attempts to reclaim stolen property from the United States and halt the looting of its archaeological sites. Peru is now forced to prove that cultural property it claims originated from within its borders, even if these antiquities clearly represent a culture that once occupied Peruvian territory. This, of course, is difficult because many of Peru's past indigenous cultures were not confined to the modern borders of the Peruvian nation.<sup>133</sup> Therefore, for Peru to prove that stolen antiquities originated from within its borders, it would have to police and record all of its archaeological sites. At the moment this is beyond the abilities of the Peruvian government.<sup>134</sup>

129. See *Peru v. Johnson*, 720 F.Supp. 810, 810-815 (C.D.Cal. 1989).

130. *Id.*

131. See generally MOSELEY, *supra* note 1, The extent of the Pre-Columbian "Peruvian" or Andean cultures spread beyond the modern boundaries of Columbia, Ecuador, Chile, Peru, Bolivia, and Argentina. See also *Peru v. Johnson*, 720 F. Supp. at 810-815.

132. The Court in *Peru v. Johnson* held:

Peru may not prevail in this action to recover the artifacts here concerned because:

- (a) We do not know in what country they were found and from which they were exported.
- (b) If they were found in Peru, we do not know when.
- (c) We do not know if they were in private possession in Peru more than one year after the official registry book was opened.
- (d) The extent of Peru's claim of ownership as part of its domestic law is uncertain.

See *Peru v. Johnson*, 720 F. Supp. at 815.

133. See generally MOSELEY, *supra* note 1.

134. See CONKLIN, *supra* note 4, at 259. Peru has a multitude of problems which drain resources that could be used to protect its cultural heritage. Peru must divert its resources to deal with rebels, drug trafficking, and an impoverished indigenous population. There is not enough money for Peru to police its 60,000 known archaeological sites. See also Nagin, *supra* note 44,

The overwhelming majority of Peru's archaeological sites represent past indigenous cultures, from which the modern indigenous populations are descended. The cultural heritage of Peru's indigenous peoples is endangered by looters,<sup>135</sup> smugglers, dealers, collectors, poverty, and the inability of international agreements to place substantial barriers to the international illicit trade in cultural property.

### C. Mexican Legislation Protecting Cultural Property

The population of Mexico is 93,985,848,<sup>136</sup> with thirty percent of this population belonging to numerous indigenous groups<sup>137</sup> and sixty percent being composed of Mestizos.<sup>138</sup> Like Peru, Mexico had a long and complex history prior to the European colonization.<sup>139</sup> Additionally, the indigenous population of Mexico suffered a substantial drop shortly after the Spanish colonization,<sup>140</sup> an event which occurred in all the European colonies of North and South America.

After Mexico gained its independence from Spain in 1821, interest began to grow in the archaeological sites located within its borders.<sup>141</sup> Despite the developing interest in the history of indigenous culture, no action was taken to preserve Mexico's cultural property until a 1897 law was enacted declaring all archaeological monuments to be the property of the state and prohibiting their removal "without express authorization of the Executive of the Union."<sup>142</sup> The Law on Archaeological Monuments of 1897 (Law of 1897) also proclaimed that movable cultural property could not be exported without legal authorization.<sup>143</sup>

In 1930 Mexico enacted a second law to protect cultural property, The Law on the Protection and Conservation of Monuments and Natu-

at 102-03.

135. See generally Nagin, *supra* 44, at 102.

136. See Almanac, *supra* note 99, at 797.

137. See *id.* There are too many indigenous groups within Mexico to be fully described in this article.

138. See *id.*

139. Some Pre-Columbian Mesoamerican Civilizations that developed within the borders of modern Mexico include the Olmecs, Zapotecs, Mayans, Toltecs, and Aztecs. See generally COE, *supra* note 101.

140. Prior to the Spanish conquest of 1519, the indigenous population of central Mexico was estimated to have numbered eleven million people. By 1650 there were only 1.5 million indigenous people remaining within central Mexico. See COE, *supra* note 101, at 202.

141. See PROTT & O'KEEFE, *supra* note 6, at 56.

142. Ley Sobre Monumentos Arqueologicos, (Law On Archaeological Monuments), art. 1, Diario Oficial de la Federacion, May 11, 1897 (hereinafter "Law of 1897"), reprinted in LEONARD D. DUBOFF, THE DESK BOOK OF ART LAW 975 (1977 and Supp. 1984, V 1-19). Monuments were defined as city ruins, fortifications, palaces, pyramids, temples, sculpted or inscripted rocks, and edifices interesting for the study of Mexican history. art. 2.

143. See *id.* art. 6.

ral Beauty of 1930 (Law of 1930).<sup>144</sup> The Law of 1930 defined monuments as being both movable and immovable objects,<sup>145</sup> and it allowed private ownership of antiquities.<sup>146</sup> However, cultural property could not be exported without governmental consent<sup>147</sup> and the government retained the right of first refusal over antiquities offered for sale.<sup>148</sup> Furthermore, any important antiquities recovered by unauthorized or authorized excavations were considered to be national property.<sup>149</sup>

Mexico's enactment of The Law for the Protection and Preservation of Archaeological and Historic Monuments, Typical Towns and Places of Scenic Beauty of 1934 (Law of 1934) was an expansion of the government's control over Pre-Columbian cultural property.<sup>150</sup> The Law of 1934 reaffirmed export restrictions on cultural property and declared immovable objects, and items located within immovable objects, to be the property of the state.<sup>151</sup> In addition to the provisions of the Law of 1930, the Law of 1934 required privately held movable cultural property to be registered on "The Register of Private Archaeological Property."<sup>152</sup> Any Pre-Columbian cultural property not registered within two years of its discovery was assumed to be the property of the Mexican nation and its export was restricted.<sup>153</sup>

In 1970 Mexico passed another law intended to protect cultural property, The Federal Law Concerning Cultural Patrimony of the Nation (Law of 1970).<sup>154</sup> The Law of 1970 declared that the ownership

144. See Leslie S. Potter and Bruce Zagaris, *Toward a Common U.S.-Mexican Cultural Heritage: The Need for a Regional Americas Initiative in the Recovery and Return of Stolen Cultural Property*, 5 TRANSNAT'L LAW. 627, 668 (1992). See also Law on the Protection and Conservation of Monuments and Natural Beauty, 58 D.O. 7 (Jan. 31, 1930) [hereinafter "Law of 1930"], reprinted in DUBOFF, *supra* note 142, at 976-980 (1977).

145. See Law of 1930, *supra* note 144, art. 1

146. See *id.* art. 16.

147. See *id.* arts. 19 and 20.

148. See *id.* art. 16

149. See *id.* art. 27.

150. See Clifton E. Wilson, *The Maya Crisis and the Law: Current United States Legal Practice and the International Law of the Maya Antiquities Trade*, 1 ARIZ. J. INT'L & COMP. L. 283, 294 (1982). See also Law for the Protection and Preservation of Archaeological and Historic Monuments, Typical Towns and Places of Scenic Beauty, 82 D.O. 152 (Jan. 19, 1934) [hereinafter "Law of 1934"], reprinted in DUBOFF, *supra* note 142, at 972-74 (1977).

151. See Law of 1934, *supra* note 150, art. 4. Archaeological monuments were defined as "all vestiges of the aboriginal civilization dating from before the completion of the Conquest." *Id.* art. 3.

152. *Id.* art 9.

153. See *id.* arts. 12 and 23.

154. See FEDERAL LAW CONCERNING CULTURAL PATRIMONY OF THE NATION, 303 D.O. 8 (Dec. 16, 1970) [hereinafter "Law of 1970"], reprinted in DUBOFF, *supra* note 142, at 962-71 (1977).

of movable cultural property, which did not "constitute unique, rare specimens of exceptional value for their aesthetic quality or for their cultural qualities,"<sup>155</sup> could be transferred.<sup>156</sup> However, in order to export this qualified cultural property it was necessary to gain permission from the Secretariat of Public Education.<sup>157</sup> All other previously enacted export controls for cultural property were maintained by the Law of 1970, and the register requirement of the Law of 1934 was retained.<sup>158</sup> Additionally, the Law of 1970 recognized the provision of the 1934 law, which declared immovable archaeological monuments and objects recovered from within them as the property of the state.<sup>159</sup>

The most recent legislation, restricting the export from Mexico of cultural property, is the Federal Law on Archaeological, Artistic and Historic Monuments and Zones of 1972 (Law of 1972).<sup>160</sup> The Law of 1972 declares movable and immovable archaeological monuments within Mexico to be the "inalienable and imprescriptible property of the nation,"<sup>161</sup> and places a complete ban on the export of cultural property. However, the Law of 1972 provides exceptions to this export ban, allowing archaeological monuments to be exported by the President for cultural exchanges with foreign nations, gifts to foreign governments, or the use of foreign scientific institutions.<sup>162</sup> In addition, the Law of 1972 maintains the registration system established by the Law of 1934,<sup>163</sup> and provides penalties for illegal excavations and the export of cultural property.<sup>164</sup> Unfortunately, the Law of 1972 promotes the illicit trade in antiquities because of its complete ban on the export of cultural property. The result of this export ban is the creation of an economic incentive, due to scarcity, to traffic in Mexico's cultural property.<sup>165</sup>

Responding to the increase in Mexican cultural property entering the United States, Mexico and the United States signed a bilateral treaty to inhibit the international trade in Mexican Pre-Columbian antiquities. The United States and Mexico signed the Treaty of Cooperation Between the United States of America and the United Mexican States

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155. *Id.* art. 53.

156. *See id.* art. 54.

157. *See id.* art. 54.

158. *See id.* art. 22.

159. *See id.* art. 2.

160. *See* FEDERAL LAW ON ARCHAEOLOGICAL, ARTISTIC AND HISTORIC MONUMENTS AND ZONES, 312 D.O. 16 (May 6, 1972) [hereinafter "Law of 1972"]. *See also* United States v. McClain, 545 F.2d 988, 1000 (5th Cir. 1977).

161. *Id.* art. 27. The Law of 1972 is not retroactive; therefore, all rights legally acquired under the previous laws are considered valid. *See id.* art. 4.

162. *See id.* art. 16.

163. *See id.* art. 21.

164. *See id.* arts. 47 and 53.

165. *See* Potter & Zagaris, *supra* note 144, at 670.

Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties (U.S.-Mexico Treaty) on July 17, 1970.<sup>166</sup>

The U.S.-Mexico Treaty provides that each country will use all "legal means at its disposal to recover and return from its territory stolen archaeological, historical and cultural properties that are removed after the date of entry into force of the Treaty from the territory of the requesting party."<sup>167</sup> The provisions of this treaty specifically protect Pre-Columbian antiquities, official documents made prior to 1920, religious objects, and historical items that are declared to be "of outstanding importance to the national patrimony."<sup>168</sup> Furthermore, the U.S.-Mexico Treaty enables the Attorney General of each nation to initiate civil action in the appropriate courts to facilitate the return of cultural property covered by the treaty.<sup>169</sup>

The greatest criticism of the U.S.-Mexico Treaty is that its focus is on stolen cultural property and not on the prevention of the illicit trade in antiquities.<sup>170</sup> Additionally, Mexico's Law of 1972, banning the export of most Pre-Columbian cultural property, has been criticized because it hinders the 1970 bilateral treaty's goal of a licit trade.<sup>171</sup> The U.S.-Mexico Treaty also fails to provide a mechanism for defining when an antiquity constitutes an object of outstanding cultural importance. Therefore, a licit Mexican antiquities market at this time is impossible and the international illicit trade in Mexican Pre-Columbian antiquities continues.

#### D. *The Protection of Cultural Property in the United States*

The United States currently has a population of 248,709,873.<sup>172</sup> Out of this demographic statistic whites, or people of caucasian ancestry, account for 199,686,070<sup>173</sup> of the total population. Indigenous groups in the United States,<sup>174</sup> followed by their population statistics,

166. See Treaty of Cooperation Between the United States of America and the United Mexican States Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, July 17, 1970, U.S.-Mexico, 22 U.S.T. 494, T.I.A.S. No. 7088 [hereinafter "U.S.-Mexico Treaty"], brought into force March 24, 1971. Reprinted in SHARON A. WILLIAMS, *THE INTERNATIONAL AND NATIONAL PROTECTION OF MOVABLE PROPERTY: A COMPARATIVE STUDY* 287-89 (1978).

167. U.S.-Mexico Treaty, *supra* note 166, art. III.

168. *Id.* art. I.

169. See *id.* art. III.

170. See generally, Michael S. Blass, *Legal Restrictions on American Access to Foreign Cultural Property*, 46 *FORDHAM L. REV.* 1177, 1195 (1978).

171. See *id.* at 1194.

172. See UNITED STATES 1990 CENSUS OF POPULATION: GENERAL POPULATION CHARACTERISTICS, 3 (Issued November 1992) [hereinafter "Census"].

173. See *id.*

174. The indigenous population of the United States is made up of American Indian (Native

include: American Indians (Native Americans) 1,878,285;<sup>175</sup> Eskimos (Inuits) 57,152;<sup>176</sup> Aleuts 23,797;<sup>177</sup> and Native Hawaiians 211,014.<sup>178</sup>

Although the United States has a multitude of indigenous cultures, they have been left unprotected and ignored until recently. This lack of care for indigenous culture in the United States is largely a result of the majority populations' identification with its European heritage.<sup>179</sup> The effect has been an inward flow of various European antiquities into the United States, legitimized by weak import restrictions, advantageous tax deductions for donations, and an outward flow of indigenous cultural property.<sup>180</sup> The failure of the United States to enact strong export restrictions on its indigenous and non-indigenous cultural property may be due to a belief in open and free markets, or the perception that there is no "American" cultural property worthy of protection.<sup>181</sup>

There was little care or awareness for the preservation of indigenous culture during the settlement of the United States.<sup>182</sup> Native Americans were often viewed as a "barbarous race,"<sup>183</sup> who never

American), Eskimo (Inuit), Aleut, and Native Hawaiian groups. These indigenous groups can further be divided into a multitude of subgroups, but they are too numerous to be individually mentioned within this article. Today there are more than six hundred Native American nations, tribes, and bands. See SHARON O'BRIEN, *AMERICAN INDIAN TRIBAL GOVERNMENTS* 77 (1989).

175. See Census, *supra* note 172, at 3. The European expansion throughout the modern North American countries of Canada and the United States during the sixteenth, seventeenth, eighteenth, and nineteenth centuries triggered a dramatic population collapse of indigenous groups. The depopulation of North American indigenous populations was due to disease, warfare, population relocation, and the destruction of indigenous peoples' traditional way of life. By 1850 the total United States Native American population had been reduced to 250,000 from over five million within three centuries. See O'BRIEN, *supra* note 174, at 77. See generally, Jared Diamond, *The Arrow of Disease*, DISCOVER, October 1992, at 64 (concerning the depopulation of the New World's indigenous population). See also ANN RAMENOFKY, *VECTORS OF DEATH: THE ARCHAEOLOGY OF EUROPEAN CONTACT* (1987).

176. See Census, *supra* note 172, at 3.

177. See *id.*

178. See *id.*

179. See Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 73 B.U. L. REV. 559, 562-563 (1995).

180. See *id.* at 563.

181. See *id.* The failure of the United States to provide legal protection for its indigenous population's cultural property may be due to the view held by the majority of Americans that indigenous culture does not represent their European heritage. See also Harrington, *supra* note 22, at 30.

182. See PROTTE & O'KEEFE, *supra* note 6, at 62-3.

183. See *id.* at 63. Some initially perceived Native Americans to be the typical specimens of Rousseau's "noble savage" or "primitive man," who were equal to one another because of their independence. See generally, JEAN-JACQUES ROUSSEAU, *A DISCOURSE ON INEQUALITY*, (Maurice Cranston trans. 1987). However, the majority of Europeans, and their American decedents, viewed Native Americans to be heathens, which justified the British wars of expansion

could have constructed the burial mounds or developed the antiquities discovered by the European colonists and pioneers in the Eastern United States.<sup>184</sup> Rather, the common belief was that the continent had been occupied prior to the Native Americans by a more advanced people or refugees from an Old World civilization.<sup>185</sup> Euro-Americans used this ideology to legitimize their collecting of Native American relics, destruction of indigenous archaeological sites, and settlement of the "New World."<sup>186</sup>

Despite an early action to protect Native American culture through the setting aside of two Native American earthen pyramids and a large mound by the Ohio Land Company in Marietta, Ohio, in 1788,<sup>187</sup> the first attempt to widely preserve historic ruins did not occur until Congress passed the Antiquities Act of 1906.<sup>188</sup> This Act was a response to the destruction and looting of Native American Pueblo remains in the Southwestern United States.<sup>189</sup> In addition to creating the first Native American national monument at Mesa Verde,<sup>190</sup> the Antiquities Act of 1906 grants the President the power to set aside historic landmarks and structures as national monuments.<sup>191</sup> Furthermore, the Act provides that any individual who excavates, appropriates, injures, or causes the destruction of any historic or prehistoric ruin or antiquity on land owned or under the control of the federal government, without permission from the federal department holding jurisdiction over the land, shall be fined and may be imprisoned.<sup>192</sup>

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and the latter American settlement of the United States. See generally, ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT* (1990).

184. See A. Irving Hallowell, *The Beginnings of Anthropology in America*, in *Contributions to Anthropology: Selected Papers of A. Irving Hallowell* 36, 114 (1976).

185. See *id.* The burial mounds and prehistoric earthworks of the eastern United States were also attributed to the lost tribes of Israel or the Phoenicians. The early settlers of the United States denied any connection between these archaeological sites and the Native Americans. See also Deborah L. Nichols et al., *Ancestral Sites, Shrines, and Graves: Native American Perspectives on the Ethics of Collecting Cultural Properties* 27-28, in *THE ETHICS OF COLLECTING CULTURAL PROPERTY: WHOSE CULTURE? WHOSE PROPERTY?* (Phyllis Mauch Messinger ed., 1989).

186. See Don D. Fowler, *Conserving American Archaeological Resources* 137, in *AMERICAN ARCHAEOLOGY, PAST AND FUTURE* (David J. Meltzer, Don D. Fowler, and Jeremy Sabloff eds., 1986).

187. See Hallowell, *supra* note 184, at 111-112.

188. See Ch. 3060, § 2, 34 Stat. 225 (1906) (codified as amended at 16 U.S.C. §§ 431-33m (1988)). The Antiquities Act of 1906 was originally proposed in 1900. However, the act took six years to pass due to political debate. See also H. MARCUS PRICE III, *DISPUTING THE DEAD: U.S. LAW ON ABORIGINAL REMAINS AND GRAVE GOODS* 25 (1991).

189. See PROTTE & O'KEEFE, *supra* note 6, at 63.

190. See Gerstenblith, *supra* note 179, at 579.

191. See 16 U.S.C. §431 (1988).

192. See *id.* § 433. Permits to conduct excavations on federal land are granted by the Secre-



The Antiquities Act of 1906 failed to provide adequate protection of indigenous cultural property because the Act was too vague,<sup>193</sup> the provisions were not enforced,<sup>194</sup> and the Act lacked any provisions regarding the consideration of indigenous interests in recovered cultural property.<sup>195</sup>

Further attempts at preserving historical sites in the United States during the early twentieth century focused on protecting structures associated with the European colonization.<sup>196</sup> The Historic Sites, Buildings and Antiquities Act of 1935<sup>197</sup> authorized the Secretary of the Interior to restore, reconstruct, and maintain sites of historic interest.<sup>198</sup> Additionally, the Secretary of the Interior was authorized to establish museums and enter into contracts for the protection, preservation, or operation of historic buildings, archaeological sites, and archaeological objects.<sup>199</sup> Despite having "little relevance to the problem of disposition of prehistoric aboriginal remains and grave goods, it indicates the continuing national concern for preservation of antiquities."<sup>200</sup> The Historic Sites, Buildings, and Antiquities Act of 1935 failed to recognize indigenous peoples' interests in cultural property.

In an attempt to protect historical and archaeological data from loss resulting from the construction of dams and other federal construction projects, the Reservoir Act<sup>201</sup> was passed in 1960. This Act allows the Secretary of the Interior to conduct archaeological surveys of areas to be altered due to the construction of dams.<sup>202</sup> Sites to be preserved, however, must be of "exceptional significance," which is a vague criteria.<sup>203</sup> In 1966, Congress enacted the National Historic Preservation Act (NHPA),<sup>204</sup> which provides for the maintenance of a national reg-

taries of the Interior, Agriculture, and Army. *See also id.* § 432.

193. In *United States v. Diaz*, a person was convicted by a federal district court under the Antiquities Act for the removal of antiquities from federal land. Upon appeal, this decision was reversed. The appellate court found the Act's definitions for "ruin," "object of antiquity," and "monument" to be too vague. *See United States v. Diaz*, 499 F.2d 113,114 (9th Cir. 1974).

194. *See Gerstenblieth, supra* note 179, at 579.

195. *See PRICE, supra* note 188, at 25.

196. *See Gerstenblieth, supra* note 179, at 579.

197. *See* Historic Sites, Buildings and Antiquities Act of 1935, Ch. 593, 49 Stat. 666 (1935) (codified as amended at 16 U.S.C. s 1 (1988)).

198. *See* 16 U.S.C. § 462(f) (1988).

199. *See id.* § 462(e).

200. PRICE, *supra* note 188, at 26.

201. *See* Reservoir Act, Pub. L. No. 86-523, § 1, 74 Stat. 220 (1960) (codified at 16 U.S.C. §§ 469 to 469c-1 (1988)).

202. *See id.*

203. *See* PRICE, *supra* note 188, at 26.

204. *See* National Historic Preservation Act, Pub. L. No. 89-665, § 1, 80 Stat. 915 (1966) (codified as amended at 16 U.S.C. §§ 470a to 470w-6 (1988 & Supp. III 1991)).

ister of districts, sites, buildings, and objects of significant American history, architecture, archaeology, and culture.<sup>205</sup> The NHPA was an expansion of the register mandated under the Historic Sites Act of 1935 requiring federal agencies to "establish a program to locate, inventory, and nominate to the secretary all properties under the agency's ownership or control," that qualify for registration on the National Register of Historic Places.<sup>206</sup> Additionally, the NHPA provides for the Secretary of the Interior to coordinate the participation of the United States in the Convention Concerning the Protection of the World Cultural and Natural Heritage, acting in cooperation with the Secretary of State, the Smithsonian Institution, and the Advisory Council on Historic Preservation.<sup>207</sup>

The NHPA is designed for the protection of historic and cultural property from destruction.<sup>208</sup> However, it fails to provide a mechanism for the repatriation of indigenous peoples' claims to human remains and cultural property.<sup>209</sup> For indigenous groups to have structures or archaeological sites protected, it would be necessary to press for their inclusion on the National Register of Historic Places, which has a stringent criteria for inclusion.<sup>210</sup>

Following the implementation of the NHPA, the National Environmental Act of 1969 (NEPA)<sup>211</sup> requires that environmental and cultural values be taken into consideration alongside technological and economic issues when federal projects are proposed.<sup>212</sup> Furthermore, the NEPA provides that the federal government will employ all practical means to improve and manage federal plans, functions, programs, and resources in order to "preserve important historic, cultural, and natural aspects of the national heritage."<sup>213</sup> Under the NEPA, should a proposed federal project significantly impact "the quality of the human environment" an environmental impact statement (EIS) must be prepared by the appropriate federal agency.<sup>214</sup>

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205. See 16 U.S.C. §§ 470a-70d (1988). The National Preservation Act of 1966 was amended in 1980 in order to provide guidance for the national historic preservation program at the federal, state, and local levels.

206. 16 U.S.C. §§ 470h-2(a)(2) (1988).

207. See 16 U.S.C. §§ 470a-1(a) (1988). The nomination of sites that are of international significance to the World Heritage Committee on behalf of the United States is also to be conducted by the Secretary of the Interior. See also *id.* § 470a-1(b).

208. See PRICE, *supra* note 188, at 27.

209. See *id.*

210. See *id.*

211. See National Environmental Act of 1969, Pub. L. No. 91-190, § 2, 83 Stat. 852 (1970) (codified at 42 U.S.C. §§ 4321-70a (1988 & Supp. III 1991)).

212. See 42 U.S.C. §§ 4331-32 (1988 & Supp. III 1991).

213. *Id.* at § 4331(b)(4).

214. *Id.* at § 4332(C).

The focus of the NEPA is on the preservation of historical structures and antiquities, not on the repatriation of lost or stolen cultural property to indigenous populations.<sup>215</sup> However, the concerns of indigenous groups and all other citizens can be voiced at the required public hearings on the EIS of the proposed federal project.<sup>216</sup>

The American Indian Religious Freedom Act of 1978 (AIRFA)<sup>217</sup> specifically considers Native American cultural values and religious expression. Native Americans have cited AIRFA as the controlling authority for their right to retain possession of their cultural property.<sup>218</sup> Additionally, Native American groups have claimed AIRFA authorizes the repatriation of their religious objects from museum collections.<sup>219</sup> However, AIRFA does not have any provisions maintaining that museums must return religious objects originally belonging to Native American communities. Rather, AIRFA only applies to federal agencies<sup>220</sup> and Courts have held that the Act is only a statement of the federal government's policy of recognizing Native American religious beliefs.<sup>221</sup>

Under AIRFA, the federal government will protect Native Americans' right of freedom to practice their traditional religions.<sup>222</sup> Additionally, federal agencies and departments must consider the effect of governmental projects on Native Americans' religious beliefs, objects, and practices.<sup>223</sup> While AIRFA does not require government agencies to protect Native Americans' cultural property, it creates a forum where Native American values and views can be expressed concerning federal projects.<sup>224</sup>

The effective replacement of the Antiquities Act of 1903 is the Archaeological Resources Protection Act of 1979 (ARPA).<sup>225</sup> The

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215. See PRICE, *supra* note 188, at 28.

216. See *id.*

217. See American Indian Religious Freedom Act of 1978, Pub. L. No. 95-341, § 1, 92 Stat. 469 (1978) (codified at 42 U.S.C. § 1996 (1988)). See generally, Alfonso Ortiz, *American Indian Religious Freedom: First People and the First Amendment*, CULTURAL SURVIVAL Q. Winter 1996, at 26.

218. See Blair Bowman, *Indian Rights: Native Americans Versus American Museums-A Battle For Artifacts*, 7 AM. INDIAN L. REV. 125 (1979). See also PRICE, *supra* note 188, at 29.

219. See Bowman, *supra* note 218, at 125.

220. See Pub. L. No. 95-341, 1978 U.S.C.A.N. (95 Stat.) 1262, 1265-165.

221. See *Wilson v. Block*, 708 F. 2d 735 (D.C. Cir.), cert denied, 464 U.S. 956 (1983). See also *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

222. See 42 U.S.C. § 1996 (1988).

223. See American Indian Religious Freedom Act of 1978, Pub. L. No. 95-341, 1978 U.S.C.A.N. (95 Stat.) 1262, 1265.

224. See PRICE, *supra* note 188, at 30.

225. Archaeological Resources Protection Act of 1979, Pub. L. No. 96-95, 93 Stat. 721 (1979) (codified as amended at 16 U.S.C. §§ 470aa-70mm (1988)). It is not clear whether the

ARPA was passed in order to provide protection for archaeological resources<sup>226</sup> and sites located on public and Indian lands.<sup>227</sup> Under the ARPA the sale, purchase, transport, exchange, or receipt of archaeological resources removed without proper permission from public or Indian lands is prohibited.<sup>228</sup> The ARPA provides Native American groups with some protection for their cultural property through the requirement of a permit from the Native American community to excavate on their land.<sup>229</sup> A criticism of the ARPA is that it prevents repatriation of Native American remains and cultural property because it requires any recovered objects to be preserved by a suitable institution.<sup>230</sup> Once again, the ARPA is a measure which fails to promote the repatriation of indigenous populations' cultural property.

The application of the ARPA to private property, when archaeological resources are removed without the permission of the owner, was upheld by the Supreme Court's decision to deny certiorari on January 18, 1994 in a case determining an important provision of the ARPA.<sup>231</sup> In *United States v. Gerber*, the United States Court of Appeals for the Seventh Circuit unanimously held that the ARPA was not limited to archaeological objects removed from federal and Indian lands.<sup>232</sup> The holding in *United States v. Austin*,<sup>233</sup> which upheld the

ARPA repealed the Antiquities Act of 1906. See Thomas Boyd, *Disputes Regarding the Possession of Native American Religious and Cultural Objects and Human Remains: A Discussion of the Applicable Law and Proposed Legislation*, 55 MO. L. REV. 883, 897 (1990).

The ARPA's purpose "is to secure for the present and future benefit of the American people, the protection of archaeological resources and sites located on public and Indian lands." 16 U.S.C. § 470aa(b) (1988).

226. The term "archaeological resource" is defined as any material remains of past human life or activities of archaeological interest which are at least one hundred years old. See 16 U.S.C. § 470bb(1) (1988). Therefore, the ARPA is more specific than the Antiquities Act of 1906, which fails to define ambiguous terms such as "ruin" or "object of antiquity."

227. See 16 U.S.C. § 470aa(b) (1988).

228. See *id.* at §470ee (1988).

229. See *id.* at § 470cc(c), (g) (1988).

230. See Margaret B. Bowman, *The Reburial of Native American Skeletal Remains: Approaches to the Resolution of a Conflict*, 13 HARV. ENVTL. L. REV. 147, 188-189 (1989).

231. See *Gerber v. United States*, 510 U.S. 1071 (1994).

232. See *United States v. Gerber*, 999 F.2d 1112, 1116 (7th Cir. 1993). Gerber pleaded guilty to misdemeanor violations of the ARPA, 16 U.S.C. §§ 470aa et seq., and was sentenced to twelve months in prison. However, Gerber reserved the right to appeal on the ground that the ARPA did not apply to his offense. Gerber had entered upon land owned by the General Electric Company, without permission, and excavated a prehistoric Native American antiquities from an earthen burial mound associated with "Hopewell phenomenon" culture. See also *id.* at 1113-14. Gerber was convicted under the section of the ARPA which provides that:

no person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange, in interstate or foreign commerce, any archaeological resource excavated, removed, sold, purchased, exchanged, transported, or received in violation of any provision, rule, regulation, ordinance, or permit in

constitutionality of the ARPA, together with *Gerber* provides the legal basis for the prosecution of ARPA violations on privately owned land.

The most current and strongest federal legislation to recognize the interests of contemporary indigenous populations in cultural property is the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA).<sup>234</sup> Under the NAGPRA, federal agencies and all museums that have possession of indigenous human remains and associated grave goods are required to compile an inventory<sup>235</sup> of their holdings and, if possible, identify the geographical region and cultural affiliation of these items.<sup>236</sup> Furthermore, these inventories are to be completed in consultation with Native Hawaiian leaders, Native American tribal governments, and traditional religious leaders within five years of the NAGPRA's enactment.<sup>237</sup> Any human remains and associated grave goods must be returned expeditiously if a request is made by a lineal descendant, Native American tribe, or Native Hawaiian organization.<sup>238</sup> When the inventory fails to establish a cultural affiliation, a Native American or Native Hawaiian group can take possession through proving by a preponderance of the evidence that it has a cultural affiliation with the human remains and cultural property.<sup>239</sup> Museums which fail to comply with the NAGPRA documentation provisions are subject to civil penalties.<sup>240</sup> Finally, the NAGPRA extends the protection of human remains beyond trafficking in these items obtained in violation of the statute to all skeletal remains excavated prior to the enactment of the NAGPRA.<sup>241</sup>

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effect under State or local Law.

*See also* 16 U.S.C. § 479ec(c).

*Gerber* argued that the ARPA did not apply to archaeological artifacts removed from land not owned by the federal government or Indian Tribes, despite the Act's reference to the contrary. *See Gerber*, 999 F.2d at 1113. The Court concluded that section 470ec(c) of the ARPA is not limited to archaeological objects removed from federal and Indian lands. *See also id.* at 1116.

233. *See United States v. Austin*, 902 F.2d 743 (9th Cir. 1989). In *Austin*, the Court held that the ARPA was not unconstitutionally overbroad or vague. *See also id.* at 744-45.

234. *See* Native American Graves Protection and Repatriation Act of 1990, Pub. L. No. 101-601, § 2, 104 Stat. 3048 (1990) (codified at 25 U.S.C. §§ 3001-13 (Supp. III 1991)).

235. The compilation of these inventories has proven to be burdensome, laborious, and expensive for federal agencies and museums. Furthermore, the feasibility of this project has been called into question. *See Boyd, supra* note 225, at 928.

236. *See* 25 U.S.C. § 3003(a) (Supp. III 1991).

237. *See id.* at § 3003(b).

238. *See* 25 U.S.C. § 3005(a)(1) (Supp. V 1993).

239. *See id.* § 3005(a)(4) (Supp. V 1993). Cultural affiliation can be established based upon "geographical kinship, biological, archaeological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion." *Id.*

240. *See* 25 U.S.C. § 3007.

241. *See id.* at § 3001(13) (Supp. V 1993). The ARPA still regulates excavations, but the NAGPRA requires that the appropriate Native American or Native Hawaiian group be consulted

The enactment of the NAGPRA provides the United States' indigenous populations with the means to control their affiliated human remains and cultural property. While most archaeologists agree with the Native American and Native Hawaiian groups that historical human remains should be returned for reburial, there is disagreement about the repatriation of ancient skeletal remains which are not clearly affiliated with any modern indigenous group.<sup>242</sup> For example, the Umatilla tribe of northeastern Oregon, has recently demanded the return of a prehistoric 9,300 year-old skeleton discovered on land administered by the Army Corps of Engineers along the Columbia River in Kennewick, Washington.<sup>243</sup> Many archaeologists believe that the skeleton, one of the oldest discovered in North America, is not affiliated with the Umatillas or any modern Native American group.<sup>244</sup> In order to maintain access to the remains for further study, which could provide information on the origins of Native Americans, archaeologists are seeking an injunction in federal court to halt the return of the skeleton to the Umatillas for reburial.<sup>245</sup> Sebastian LeBeau, repatriation officer for the Cheyenne River Sioux of the Lakota tribe, defends the repatriation of indigenous human remains stating "we never asked science to make a determination as to our origins."<sup>246</sup>

In addition to the federal laws protecting the cultural property of the United States, numerous state programs and laws have been implemented to encourage the protection of human remains and associated grave goods.<sup>247</sup> Although each states' statutes vary in the degree of protection, they primarily criminalize the possession and transfer of human remains.<sup>248</sup>

In order to halt the flow of Pre-Columbian cultural property from entering the United States, the Pre-Columbian Art Act<sup>249</sup> was implemented in 1972. This Act provides that no Pre-Columbian monumental or architectural sculpture or mural could be imported into the United

prior to the removal of any human remains or associated objects. *See also id.* at § 3002(c) (Supp. V 1993).

242. *See* George Johnson, *Indian Tribes' Creationists Thwart Archaeologists*, N.Y. TIMES, Oct. 22, 1996, at A1, B6.

243. *See id.* at B6.

244. *See id.*

245. *See id.*

246. *Id.*

247. *See* Gerstenblith, *supra* note 179, at 631 and note 310 for list of state statutes protecting human remains and cultural property.

248. *See id.*

249. *See* Pre-Columbian Art Act, Pub. L. No. 92-587, § 201, 86 Stat. 1297 (1972) (codified at 19 U.S.C. §§ 2091-95 (1988)). The Pre-Columbian Art Act was implemented due to the destruction of Pre-Columbian monuments in the 1960s. *See also* Hingston, *supra* note 78, at 131.

States without an issued certificate from the country of origin stating that the exported antiquity was not removed in violation of its laws.<sup>250</sup> Monumental or architectural sculpture includes any immobile structure or part of a structure which is subject to export control of the country of origin.<sup>251</sup> The Pre-Columbian Art Act applies to monumental or architectural sculpture from Mexico, Central America, South America, and the Caribbean Islands.<sup>252</sup>

Unfortunately, the Pre-Columbian Art Act has not been a successful deterrent to the looting of Pre-Columbian archaeological sites. Rather, this statute has encouraged looters to break into Pre-Columbian tombs in search of smaller antiquities not protected by this Act.<sup>253</sup> Due to the failure of the Pre-Columbian Art Act to halt the flow of Pre-Columbian artifacts into the United States, and because the Act only provides for the forfeiture of antiquities found to be in violation, some courts have recognized that additional methods of deterrence are needed.<sup>254</sup> The National Stolen Property Act,<sup>255</sup> in addition to the civil requirements of the Pre-Columbian Art Act, provides criminal penalties for trafficking in stolen cultural property.<sup>256</sup> The National Stolen Property Act provides that it is a felony to knowingly sell or receive stolen goods worth five thousand dollars or more in interstate or foreign commerce.<sup>257</sup> However, the successful use of the National Stolen Property Act has been called into question with the court's holding in *Peru v. Johnson*.<sup>258</sup>

#### IV. THE DEBATE CONCERNING A REGULATED TRADE IN CULTURAL PROPERTY

When examining the debate concerning a regulated trade in cultural property it is easy to slip into moral arguments concerning the cultural, scientific, and historic value of antiquities. To begin assessing the merits of proposed regulatory models for a licit trade in antiquities, it is necessary to set aside moral arguments and examine the few standardized principles in the debate concerning a legal trade in cultural property.<sup>259</sup> The varying range of attitudes toward cultural property has been

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250. See 19 U.S.C. § 2092(a) (1988).

251. See *id.* at § 2093.

252. See *id.* at § 2095(3).

253. See CONKLIN, *supra* note 4, at 252-53.

254. See generally, *United States v. McClain*, 593 F.2d 658 (5th Cir. 1979).

255. See 18 U.S.C. §§ 2314, 2315 (1988 & Supp.II 1990).

256. See *id.* at §§ 2314, 2315 (1988 & Supp. V 1993).

257. See *id.* at § 2315

258. See *supra* Part III.B, *Peru v. Johnson*, and accompanying note 132.

259. See generally Karen J. Warren, *A Philosophical Perspective on the Ethics and Resolution of Cultural Property Issues* 1-25, in *THE ETHICS OF COLLECTING CULTURAL PROPERTY*:

classified by John Henry Merryman into two distinct groups, those holding to the belief of "cultural internationalism" (internationalists) and those holding the view of "cultural nationalism" (nationalists).<sup>260</sup>

Internationalists hold the view that the international movement of antiquities serves a legitimate purpose because the spread of cultural property promotes the education of our "common cultural heritage."<sup>261</sup> Additionally, internationalists believe that the current destructive demand for cultural property would be "partially satisfied" by a free trade in antiquities.<sup>262</sup> The nationalists, however, make the argument that cultural property belongs to the people, or their descendants, who generated them.<sup>263</sup> Some nationalists hold the opinion that all cultural property outside its country of origin should be repatriated.<sup>264</sup>

Often, collectors and dealers hold the internationalists view that collecting and selling cultural property serves a legitimate purpose.<sup>265</sup> Collectors and dealers believe that their activities actually protect antiquities<sup>266</sup> and promote cultural understanding.<sup>267</sup> While collectors and dealers would like to see a licit trade in cultural property, they disagree over which antiquities should enter the market and who should be allowed to participate.<sup>268</sup> Archaeologists, however, see the collectors and dealers as the true looters.<sup>269</sup> Professor Colin Renfrew, a prominent archaeologist, referred to their activities saying, "we must show them the monstrosity of what they are doing."<sup>270</sup> Antiquities are viewed by archaeologists as cultural byproducts which provide insight, through the

WHOSE CULTURE? WHOSE PROPERTY? (Phyllis Mauch Messenger ed., 1989).

260. See John H. Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 846 (1986).

261. See *id.* at 846-47.

262. See *id.* at 847.

263. See John H. Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881, 1903-04 (1985).

264. See generally Warren, *supra* note 259, at 7-10.

265. See generally *id.* at 3-8; Gillett G. Griffin, *Collecting Pre-Columbian Art* 103-15, in THE ETHICS OF COLLECTING CULTURAL PROPERTY: WHOSE CULTURE? WHOSE PROPERTY? (Phyllis Mauch Messenger ed., 1989).

266. See Griffin, *supra* note 265, at 108-10. See also Warren, *supra* note 259, at 3-4. See also Charles S. Koczka, *The Need for Enforcing Regulations on the International Art Trade*, in THE ETHICS OF COLLECTING CULTURAL PROPERTY: WHOSE CULTURE? WHOSE PROPERTY? 191 (Phyllis Mauch Messenger ed., 1989).

267. See John H. Merryman and Albert E. Elsen, *The Importance of a Licit Market*, in 1 LAW, ETHICS, AND THE VISUAL ARTS 62, 62-4 (John H. Merryman and Albert E. Elsen eds., 1987). See generally, Griffin, *supra* note 265, at 103-15. See also Warren, *supra* note 259, at 7.

268. See Eisenberg, *supra* note 90, at 40.

269. See Ricardo J. Elia, *Book: A Seductive and Troubling Work*, ARCHAEOLOGY, Jan./Feb. 1993, at 64,69. See also Halloway, *supra* note 17, at 101.

270. Eisenberg, *supra* note 90, at 38. See Renfrew, *supra* note 28, at 16-17.



use of scientific techniques, into the behavior of past cultures.<sup>271</sup> Adhering to this view, some scholars have called for the prohibition of any private trade in cultural property.<sup>272</sup>

While the idea of prohibiting a private trade in cultural property has its merits, where all peoples have a right to the cultural properties which make up their cultural heritage, there are no legal means available to halt the demand for antiquities. Accepting the fact that archaeological sites are being destroyed and cultural property looted at a staggering rate,<sup>273</sup> that current international efforts have failed to stem the international illicit trade in antiquities,<sup>274</sup> and that domestic legislation has failed to halt the demand for artifacts,<sup>275</sup> a proposal for a regulated licit trade in cultural property becomes palatable.

#### V. PROPOSAL FOR A REGULATED TRADE IN CULTURAL PROPERTY

For any proposal to be successful it should be equitable, providing indigenous populations with the means to protect designated cultural property and reduce the demand for illicit antiquities. A partial solution to the current destructive effects of the illicit trade in antiquities is the creation of a national and international regulated trade in cultural property; where indigenous groups maintain control of their individual cultural property; where indigenous groups designate protected cultural property that may not enter the antiquities trade; where governments must provide protection to cultural property designated not to enter the antiquities trade; and where indigenous groups can enforce claims to their protected cultural property before international tribunals.

In order to reduce the demand for illicit antiquities, a proposal should account for the monetary incentive illegal antiquities trafficking provides.<sup>276</sup> Initially, governments should establish annual antiquities sales where high quality, authentic, well documented, collectable, and exportable cultural property is made available. All antiquities placed on sale should be photographed and full descriptions of the objects record-

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271. See discussion *supra* Part II.C., and accompanying note 43.

272. See generally Note, John Moustakas, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179 (1989), at 1202-21 (discussion of inalienability for group rights in property). See also Herscher, *supra* note 84, at 117.

273. See discussion *infra* Part II.B., and accompanying note 17.

274. See discussion *supra* Part III.A.

275. See discussion *supra* Part III.B-D. Although the United States' current domestic legislation offers protection to cultural property, and a means for indigenous populations to have their stolen heritage repatriated, there is not enough money to police all of the known and unknown archaeological sites. See generally, Holloway, *supra* note 17, at 98.

276. See discussion *supra* II.B. "If the market cannot be supplied through legal means, it will be supplied illegally." Merryman and Elsen, *supra* note 267, at 63, (Referring to the demand for cultural property).

ed. This record would be open for study, and it would allow a nation to monitor the cultural property that leaves its borders. It is hoped that collectors and dealers would be willing to purchase documented cultural property from the country of origin instead of smugglers, who cannot guarantee authenticity.<sup>277</sup> Governments should also pay higher rewards to individuals who find cultural property than could be received from smugglers. Additionally, if an antiquity includes precious metals, the finder should receive more than the object's value melted down. This will reduce the risk of individuals destroying an object for economic gain. Funds for these purchases would hopefully be covered by the governments' antiquities sales, or the finders could take a share of the sale. It is possible that smugglers will simply pay a higher price than a government, however, any object not sold on the licit market could be construed as a fake.

Each government entering this licit antiquities trade should create an agency in charge of regulating excavations, discoveries, and the sale of antiquities. This agency would be responsible for managing the government's antiquities sale, providing the documents necessary for authenticity, and paying finders for their discoveries. Additionally, this agency would manage the funds generated by the sale of the cultural property. Source nations, often developing countries, would especially benefit. A licit trade in cultural property could fund preservation and education programs aimed at protecting antiquities barred from the market.<sup>278</sup>

It is important for countries to offer high quality antiquities at its sales in order to entice collectors and dealers away from the smugglers. However, it is important for a country to provide its indigenous population with the means to retain control of cultural property affiliated with its heritage. For any proposal of a licit antiquities market to be fair, it must provide for the rights of indigenous people to control their cultural property. Indigenous groups, working with the governmental agency overseeing the licit antiquities sale, could designate cultural property that would not enter the market. The government should enact laws to protect these designated artifacts, and use funds generated by the licit antiquities trade to police important archaeological sites. Cultural property affiliated to an indigenous group that is not designated to be protected should benefit that community economically.

Finally, indigenous populations should be included in the process of enforcing their cultural property rights before international tribunals. Currently, indigenous and ethnic groups without state status are gener-

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277. Collectors, dealers, and museums do not wish to add fake antiquities to their holdings. See discussion *supra* Part II.B.

278. See Merryman and Elsen, *supra* note 267, at 63.

ally not allowed to enter into United Nations deliberations or enforce their rights under international treaties.<sup>279</sup>

#### VI. CONCLUSION

It is hoped that this proposal will generate continued debate concerning a licit trade in cultural property, raising new questions and ideas about the protection of our heritage. Many individuals, particularly archaeologists and cultural anthropologists, will criticize this comment's proposal. However, laws and international treaties do not reduce the demand for cultural property; therefore, the destruction of archaeological sites will continue unless a controlled trade in antiquities can be established.

A regulated trade in antiquities, which allows indigenous groups control over affiliated cultural property, would benefit purchaser nations, source nations, scholars, and indigenous populations. Purchaser nations would have access to legally exportable antiquities and reduce the risk of an international incident. Source nations would be able to retain, preserve, and protect their cultural property. Scholars would benefit from the greater preservation of archaeological sites. Finally, indigenous populations would gain a more effective means to preserve their cultural property.

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279. See Russel L. Barsh, *Indigenous Peoples in the 1990s: From Object to Subject of International Law?*, 7 HARV. HUM. RTS. J. 33 (1994)