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Keeping the Barbarians outside the Gate: Toward a Comprehensive International Agreement Protecting Cultural Property

Edward M. Cottrell*

“The British say they have saved the [Elgin] Marbles. Well, thank you very much. Now give them back.” – Melina Mercouri¹

In 1897, a British expedition arrived in the Nigerian city of Benin while the king of Nigeria was engaged in a sacred ritual, during which contact with foreigners was forbidden. The British insisted upon an audience, producing a conflict in which most of the expedition team was killed. When the British retaliated, the citizenry was massacred, the city sacked, the royal palace burned, the kingdom toppled, and tens of thousands of bronze, ivory, and wooden antiquities plundered, many of them sent to Britain, some lost forever. When Nigeria opened its National Museum seventy-one years later, many of the nation’s most significant artifacts could be shown only in photographs and replicas.²

Nations feel an obligation to provide—indeed, a nation’s citizens may demand—protection for their “cultural property”: the works of art or architecture, religious or historical artifacts, or other physical embodiments of a nation’s cultural output. When, however, such property is transported abroad, reclaiming the property may be difficult, at best, and all but impossible by nonviolent means, at worst. This Comment proposes a framework for a new international treaty governing both the treatment of cultural property and the creation of an international body to resolve disputes and promote the protection

* JD 2008; The University of Chicago. I would like to thank Professor Richard Helmholz for showing me that—contrary to my expectations—the law of property disputes can be fascinating and enjoyable.

¹ Susan Crosland, *Melina and the Marbles*, Sun Times (London) 15 (May 24, 1983).

² Teresa McGuire, *African Antiquities Removed during Colonialism: Restoring a Stolen Cultural Legacy*, 1990 Detroit Coll L Rev 31, 43 & n 89, 62 & nn 183–85 (1990).

of cultural property. This is not a new goal, of course, but the Comment's main contention is that it is possible to resolve the conflicts that have prevented past efforts in this regard from achieving meaningful success.

In order to understand, much less resolve, the challenges inherent to this undertaking, a good deal of background is necessary. The term "cultural property" is difficult to define and the concept has a substantial history, so Section I briefly discusses this topic. Additionally, the challenges facing any international agreement regarding cultural property in the proposal, ratification, and application stages are legion, and numerous such challenges have proven their capacity as "deal breakers," so these problems will be examined in Section II. A number of proposed agreements have been adopted or have fallen short of meaningful adoption; there is agreement that none of these proposals is adequate, so an examination of these failed proposals is prerequisite to understanding the reasons why proposed agreements obtain ratification or fail. Sections III and IV examine these historical agreements and various proposals. Section V proposes the framework for a new, comprehensive solution to international cultural-property disputes. Finally, Section VI offers conclusions about the potential for implementing, either in whole or in part, the Comment's recommendations.

I. HISTORICAL BACKGROUND

At first blush, it is tempting to define cultural property as including only chattels, limited to art and historic relics. This definition is clearly inadequate, however, when one considers, for example, the Parthenon, cave drawings, the Bamiyan Buddhas,³ or similarly immovable products of various cultures. Thus, unsurprisingly, a variety of definitions have been offered, both in international dialogue among nations and by academics.

The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict ("Hague Convention")⁴ and the Second Protocol to the

³ Carlotta Gall, *Buddha Shards and Big Ideas: Afghans Weigh Reconstruction of Statues Taliban Destroyed*, Intl Herald Trib 1 (Dec 6, 2006) (reporting on international efforts to restore the Bamiyan Buddhas, more than 1,500 years old and "once the largest standing Buddha statues in the world" until they were blown up by the Taliban).

⁴ Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954, 249 UN Treaty Ser 215 (1954) ("Hague Convention"). The Convention is not ratified by the United States, though "[t]he provisions of the convention were incorporated into U.S. Rules of Engagement for Vietnam restricting the targeting of civilian and cultural objects." Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 AF L Rev 1, 17 & nn 82-85 (2005).

Hague Convention (“Second Protocol”)⁵ define cultural property broadly, including all “movable or immovable property of great importance to the cultural heritage of every people,” “buildings whose main and effective purpose is to preserve or exhibit [] movable cultural property,” and “centres containing a large amount of cultural property.”⁶ The definition in the UN Educational, Scientific and Cultural Organization (“UNESCO”) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property (“UNESCO Convention”)⁷ is more specific, covers chattels only, and specifies categories of chattels as covered, including flora and fauna, archeological finds, works of art in any medium, rare manuscripts, postage, coins and revenue, and archives of any kind.⁸ The definition given by the International Institute for the Unification of Private Law (“UNIDROIT”) Convention on Stolen or Illegally Exported Cultural Objects (“UNIDROIT Convention”),⁹ the most recent major effort at a comprehensive international agreement, essentially parallels the UNESCO Convention’s definition.¹⁰

The most recent major effort to protect cultural property internationally and achieve some measure of success, the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (“CSICH”) of 2003, by necessity takes a far broader definition, attempting to protect “the practices, representations, expressions, knowledge, skills—as well as the instruments, objects, artefacts and cultural spaces associated therewith—that communities, groups and, in some cases, individuals recognize as part of their cultural heritage,” specifically including “(a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; (b) performing arts; (c) social practices, rituals and festive events; (d) knowledge and practices

⁵ Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 38 ILM 769 (1999) (“Second Protocol”).

⁶ Hague Convention, art 1.

⁷ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Property (1970), 10 ILM 289 (1971) (“UNESCO Convention”) (noting that it is “incumbent upon every State to protect the cultural property existing within its territory against the dangers of theft, clandestine excavation, and illegal export”), adopted in the United States under the Convention on Cultural Property Implementation Act, Pub L No 97-446, 96 Stat 2329 (1983), codified at 19 USC §§ 2601–13 (2000).

⁸ UNESCO Convention, art 1.

⁹ Final Act of the Diplomatic Conference for the Adoption of a Draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects (June 24, 2005), 34 ILM 1322 (1995) (“UNIDROIT Convention”).

¹⁰ *Id.*, art 2 & annex.

concerning nature and the universe; [and] (e) traditional craftsmanship.”¹¹ This language is necessarily very broad, but appears to protect nearly every nonphysical manifestation of cultural heritage, particularly those which members of a community, groups, or even individuals would consider special or identifying characteristics. Since the language is so broad as to protect “knowledge” and “skills,” it almost certainly represents an effort to include less abstract manifestations of cultural property, such as religious imagery. Therefore, Native American groups, for example, might have cognizable claims against the use of their images and symbols at sporting events¹² or in performance art.¹³

Cultural property can be especially hard to define in certain contexts, as well. For example, the Draft European Convention on the Protection of the Underwater Cultural Heritage of 1985 defines “underwater cultural property” as “all remains and objects and any other traces of human existence located entirely or in part in the sea, lakes, rivers, canals, artificial reservoirs or other bodies of water, or recovered from any such environment, or washed ashore.”¹⁴

Due to the additional challenges posed by intangible forms of cultural property, including freedom-of-speech concerns, this Comment considers only tangible forms of cultural property. Likewise, cultural property at sea poses

¹¹ UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, art 2 (2003), available online at <<http://unesdoc.unesco.org/images/0013/001325/132540e.pdf>> (visited Dec 5, 2008) (“CSICH”). While the CSICH has been ratified or acceded to by forty-six countries as of December 2006, and entered into force on April 20, 2006, it faces much the same problem as most other recent efforts, in that it has not been ratified, acceded to, or otherwise accepted by the United States, the United Kingdom, Germany, or Russia, to name just a few key “players” in the international market for cultural property. For a list of states parties to the CSICH, see <<http://portal.unesco.org/la/convention.asp?language=E&KO=17116>> (visited Dec 5, 2008).

¹² See, for example, Chaz Scoggins, *River Hawks Finally Putting the Advantage into Home Ice*, The Sun (Lowell, Mass) (Dec 13, 2006). The National Collegiate Athletics Association (“NCAA”) in 2005 adopted a policy barring “NCAA colleges and universities from displaying hostile and abusive racial/ethnic/national origin mascots, nicknames or imagery at any of the 88 NCAA championships.” The University of North Dakota sued the NCAA to enjoin enforcement of the policy, and a state court judge granted a temporary injunction. The case was resolved when the parties entered into a settlement agreement. *North Dakota v NCAA*, No 06-C-01333, slip op (ND Dist Ct, NE Central Jud Dist Oct 26, 2007), available online at <<http://www.ag.nd.gov/NCAA/SettlementAgreement.pdf>> (visited Dec 5, 2008).

¹³ For example, during the 2004 Grammy Awards, the band OutKast “outraged” Native American leaders with a performance utilizing feathers in their hair, Plains-tribe-style war cries, buckskin bikinis, and most offensive of all, a sacred Navajo song. The performance was later likened to a “crude blackface routine.” Eireann Brooks, Note, *Cultural Imperialism vs. Cultural Protectionism: Hollywood’s Response to UNESCO Efforts to Promote Cultural Diversity*, 5 J Int’l Bus & L 112, 117–18 (2006).

¹⁴ Draft European Convention on the Protection of the Underwater Cultural Heritage (1985), cited in Anastasia Strati, *The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea* 10 (Martinus Nijhoff 1995) (Shigeru Oda, ed).

additional problems,¹⁵ so this Comment considers explicitly only objects found on land. As the following discussion illuminates, the challenges of implementing any meaningful agreement are sufficient in number and severity to make the separate consideration of tangible and intangible property, in particular, necessary to any meaningful agreement among nations. Specifically, for the purposes of this Comment, unless otherwise specified, the term “cultural property” is intended to include all physical objects, including buildings, which would be included in that term under the definitions set forth in either the Hague Convention or the UNESCO Convention.

II. THE PROBLEMS

A variety of difficulties have prevented the widespread adoption of a satisfactory and comprehensive agreement on international protections of cultural property. Scholars generally agree that the agreements that have been adopted are insufficient, as numerous cultural-property disputes remain unresolved around the world. Among the most famous contested relics, the Elgin Marbles, a collection of marble sculptures removed from what is modern-day Greece to England in 1806, remain a source of significant controversy and debate.¹⁶ Countless other artifacts have been taken from their countries of origin, including many of the treasures of Europe taken by invading Nazis acting either officially or as individuals.¹⁷ Armed conflict is, of course, a major source of cultural-property disputes,¹⁸ as is made clear by the fact that conflict prompted the first treaty on the topic of cultural property in the Hague Convention. Sometimes, the threat is not even from abroad, but from within, as in the case of the Taliban—the then-established, if not internationally recognized, government of Afghanistan—destroying the Bamiyan Buddhas over widespread international protest and condemnation. Thus, the sources of disputes over cultural property

¹⁵ See generally Marian Leigh Miller, Comment, *Underwater Cultural Heritage: Is the Titanic Still in Peril as Courts Battle over the Future of the Historic Vessel?*, 20 Emory Intl L Rev 345 (2006).

¹⁶ See, for example, John Henry Merryman, *Thinking about the Elgin Marbles*, 83 Mich L Rev 1881, 1881 (1985) (arguing that the British claim to the Marbles is actually stronger than the Greek argument for repatriation); Josh Shuart, *Is All “Pharaoh” in Love and War? The British Museum’s Title to the Rosetta Stone and the Sphinx’s Beard*, 52 Kan L Rev 667, 670–71 (2004) (arguing that the title to the disputed artifacts should be decided under the prevailing international law of the nineteenth century, that “under this set of laws, the British Museum obtained valid title to both artifacts,” and that “contemporary international law . . . cannot be invoked ex post facto to divest the Museum of ownership.”).

¹⁷ See generally, for example, Stephanie Cuba, Note, *Stop the Clock: The Case to Suspend the Statute of Limitations on Claims for Nazi-Looted Art*, 17 Cardozo Arts & Enter L J 447 (1999); Amy L. Click, Comment, *German Pillage and Russian Revenge, Stolen Degas, Fifty Years Later—Whose Art Is It Anyway?*, 5 Tulsa J Comp & Intl L 185 (1997).

¹⁸ See generally Reynolds, 56 AF L Rev 1 (2005) (cited in note 4).

and threats to cultural property's existence include peaceful exportation, as in the case of the Elgin Marbles; conquest and plunder, as in the cases of Nazi loot; and internal threats, as in the case of the Bamiyan Buddhas. Any agreement aiming to be comprehensive must therefore recognize and address the challenges created by each of these types of disputes. Broadly, the major types of challenges which arise time and again are in defining terms, controlling legal and illicit trade in cultural property, justiciability of disputes, and reconciliation of the interests of "supplier states" with those of "market states." The following is a summary of the major issues which have proved to be stumbling blocks in past attempts at meaningful protection.

A. DEFINITIONS OF CULTURAL PROPERTY

When definitions of cultural property are too broad, as is the Hague Convention's definition, they are simultaneously underinclusive and overinclusive. For example, the Hague Convention's definition leaves both governments and private parties in doubt as to whether an early-production Ford Model A automobile would be considered protected property under that agreement. The Model A is movable property, arguably of great importance to the secular history of the United States, yet it is neither unique—being, after all, a mass-produced commodity—nor explicitly covered by the Hague Convention's definition. At the same time, the Hague Convention may be overinclusive. The language of that agreement protects "buildings whose main and effective purpose is to preserve or exhibit . . . movable cultural property."¹⁹ Taken literally, this would mean that an art gallery or even a flea market might be protected property, even if no artistic works are stored in such a location for longer than a few days. An agreement that could be taken to extend special protection to common shops, even in wartime, faces an uphill battle for ratification.

On the other hand, an overly narrow definition of cultural property poses an additional set of problems. Most obviously, narrow definitions risk "missing" various items worthy of protection. A definition explicitly limiting protection to chattels, for example, would not protect architecturally or historically important buildings, statuary, or unique places, such as Stonehenge. A definition covering only artistic works, whether chattels or fixed installations, would exclude many of the same objects and places, but would also miss many historical artifacts, such as ancient currency, which is more rare than a Model A due to antiquity, but not significantly more artistic in nature. Additionally, a narrow definition may fail to gain much support. Nations with significant interests in a broad range of types of cultural property may desire more comprehensive agreements, rather

¹⁹ Hague Convention, art 1, §§ (b), (c).

than patchwork compromises covering narrow segments of the entire field, which may at times conflict with each other, while those nations with narrow interests may have no desire to participate in some agreements at all. Further, narrow definitions encourage a proliferation of regional, rather than global, agreements, in which only cultural property with a certain origin—say, Incan—is protected; this is problematic in a world in which the parties interested in cultural property from a particular region may not be primarily within that region. A treaty governing disputes between parties in South America regarding Incan relics would be of little use if it were shown that nearly all persons interested in such relics were, in fact, North Americans or Europeans.

Thus, any definition of cultural property contained in an international agreement must strike a proper balance. It must be broad enough to satisfy the states parties, specific enough to be clear in its scope, and narrow enough to leave out especially problematic regional or historical problems.²⁰

B. THE PROBLEMS OF “THEFT,” ILLEGAL EXCAVATION, AND ILLEGAL RETENTION

Though all nations “recognize some concept of ‘theft,’ and United States courts have applied foreign law in a variety of cases,” conceptions of theft vary widely, making application of any one nation’s conception to a particular incidence of trafficking in cultural property difficult.²¹ Some United States courts, for example, have found that certain foreign laws are insufficiently clear and stable to afford relief to governments or private parties seeking relief here. For example, in *Government of Peru v Johnson*, a United States district court denied repatriation of various objects to Peru on the grounds that,

[e]ven if it were to be assumed that the artifacts came from Peru, in order for the plaintiff to recover them, it must prove that the Government of Peru was the legal owner at the time of their removal from that country. Such ownership depends upon the laws of Peru, which are far from precise and have changed several times over the years.²²

Choice of laws will also frequently present difficulties in the more complex cases. The UNIDROIT Convention, over the protests of the United States,²³

²⁰ For more on this, see Sections II.G, II.H, and II.J.

²¹ See Harold S. Burman, *Introductory Note to the UNIDROIT Convention*, 34 ILM 1322, 1323 & n 1 (1995).

²² *Government of Peru v Johnson*, 720 F Supp 810, 812 (CD Cal 1989) (reversing substantive convictions of defendants where Mexican law had not clearly vested title to artifacts in the Mexican government at the time of the acts in question). See also *United States v McClain*, 593 F2d 658, 670 (5th Cir 1979) (same); *United States v McClain*, 545 F2d 988, 997–1003 (5th Cir 1977) (same).

²³ Burman, *Introductory Note* at 1323 (cited in note 21).

includes illegally excavated materials and materials legally excavated but unlawfully retained in its definition of stolen cultural property.²⁴ One reason the United States has not ratified the UNIDROIT Convention is that the language the Convention uses in these definitions creates a substantial risk that one country's legislation may apply to foreign nationals *ex post*. The Fifth Circuit raised this concern in *McClain v United States*.²⁵ The *McClain* court reversed the appellants' convictions on a substantive charge of art theft, finding that

under [the district court's] view of Mexican law, we believe the defendants may have suffered the prejudice of being convicted pursuant to laws that were too vague to be a predicate for criminal liability under our jurisprudential standards. It may well be, as testified so emphatically by most of the Mexican witnesses, that Mexico has considered itself the owner of all pre-Columbian artifacts for almost 100 years. If so, however, it has not expressed that view with sufficient clarity to survive translation into terms understandable by and binding upon American citizens.²⁶

These problems—*ex post* application, unclear statutory texts, and legislative overreaching in claiming more material as cultural property than is objectively warranted—are especially difficult to overcome in a global, as opposed to regional, context. Many nations' courts will, of necessity, be somewhat familiar with the laws of neighboring nations. When, however, conflicts arise between states that follow the common law and those following civil law, or more dramatically, nations following opposing religious codes that have been enacted in whole or in part into law, such as Israel and Saudi Arabia, such problems may range from barely judiciable to completely intractable.

C. THE ILLEGAL-EXPORTATION PROBLEMS

Just as with the definition and elimination of theft, illegal exportation of cultural property poses a series of problems. First and foremost is the problem of defining what constitutes an illegal export or import of cultural property. Second, the application of new laws and treaties to an existing trade may create a perception of unfairness that unduly stifles legitimate trade, as when an international broker of antiquities is suddenly barred from selling or shipping objects, and his customers from buying or receiving them. This is particularly problematic for museums, especially American-style nonprofits; one can easily imagine, for example, that an overly protective agreement could have a crippling impact on international Holocaust education, by requiring the repatriation of the

²⁴ UNIDROIT Convention, art 3, § 2.

²⁵ *McClain*, 593 F2d at 658.

²⁶ *Id* at 670.

bulk of the physical collections of Holocaust memorial museums around the world.

D. THE PROBLEMS OF LEGAL EXPORTATION AND LEGAL EXCHANGE

There is essentially universal agreement that certain types of exchanges of cultural property serve the greater international good by facilitating cultural exchanges, while preserving each culture and its physical output.²⁷ Further, some cultural property is immobile, yet subject to a claim by a nation other than the one where it is physically situated, which may in fact be stronger than the claim of the latter nation. For example, ruins of Roman amphitheatres and aqueducts are scattered throughout Europe and various Mediterranean nations. These ruins are as much modern Italy's cultural property as that of the countries where they are found, yet exporting them would destroy a part of what makes them significant, were it even possible. Thus, any agreement must provide both for ongoing, consensual exchanges for the purposes of education and entertainment, as well as some form of trusteeship, by which host nations and nonprofits therein may be enabled to assume responsibility for both temporary and permanent deposits of cultural properties outside their countries of origin.

There is, again, an ex-post-application problem with legal exports. A nation that has not previously asserted a legal claim to certain objects may well wish to do so in the future, perhaps for entirely legitimate reasons.²⁸ For example, effects of the Russian Orthodox Church were weakly protected, at best, under Soviet rule, given the general disregard for religion, but the present governments of former Soviet-bloc countries may legitimately wish to assert cultural claims to objects that were legally exported or moved internally in the USSR.²⁹

This presents yet another scenario, which may be termed the "exploitation problem," which arises when a government essentially plunders its own people, as in the cases of the USSR and Nazi Germany, and permits objects that would be included in any reasonable definition of cultural property to be disseminated for profit or other reasons. A government may also actively destroy its own

²⁷ See, for example, the preamble to the UNIDROIT Convention at 1330, ¶ 3 ("The States Parties . . . [are] convinced of the fundamental importance of the protection of cultural heritage and of cultural exchanges for promoting understanding between peoples, and the dissemination of culture for the well-being of humanity and the progress of civilisation" but "deeply concerned" about the impact of illicit trade on specific cultures and "the heritage of all peoples.").

²⁸ See, for example, *McClain*, 545 F2d at 997.

²⁹ See, for example, William B. Husband, *Soviet Atheism and Russian Orthodox Strategies of Resistance, 1917–1932*, 70 J Mod Hist 74, 78, 82 (1998).

nation's cultural property for any number of reasons.³⁰ Indeed, both the USSR and Nazi Germany also engaged in such activities, suppressing disfavored groups or belief systems by destroying their cultural property.³¹ When government takes it upon itself to control culture by force, the result may be the same as it was in those two societies: nations which neither understand themselves nor are understood by others, essential elements of their culture having been wiped away.

E. BONA FIDE—PURCHASER AND DUE-DILIGENCE PROBLEMS

Any agreement respecting cultural property must address the question of bona fide purchasers, who conduct reasonable due diligence but have no reason to believe that objects purchased or obtained gratuitously are protected as cultural property.³² That is, any agreement on the topic must offer some protection to the legitimate trade in cultural property and to its major players—especially museums—or risk utterly crippling that trade and greatly reducing the exchange of cultural property between nations. For example, even assuming no laws are applied ex post facto, an agreement that provided for a “first right of refusal” by the source nation of a piece of cultural property offered for sale, but without a fair compensation clause, could cripple the legitimate international trade in art and historical or archeological relics, as the risk of costly government preemption could dissuade legitimate traders in such property from placing their goods for sale. Likewise, vague definitions or inadequate dispute-resolution procedures could lead to unfair prosecutions of individuals for theft³³ and therefore discourage buyers, including institutions.

F. DEFINITIONAL AND JURISDICTIONAL PROBLEMS

As already discussed, definitions of theft and perhaps of such concepts as importation and exportation will vary between nations, so any agreement must address definitional issues, either by a choice-of-laws provision or by explicitly

³⁰ See generally, for example, Kanchana Wangkeo, *Monumental Challenges: The Lawfulness of Destroying Cultural Heritage during Peacetime*, 28 Yale J Intl L 183 (2003) (discussing numerous examples of such destruction around the world, with a variety of motivating factors and involving various types of conflicting parties).

³¹ Id.

³² Article 4 of the UNIDROIT Convention addresses this by providing that possessors who “neither knew nor ought reasonably to have known that [an] object was stolen and can prove that [they] exercised due diligence” “shall be entitled . . . to payment of fair and reasonable compensation.” UNIDROIT Convention, art 4, ¶ 1.

³³ See, for example, *McClain*, 545 F2d at 997 (finding that ambiguities in the Mexican government's asserted rights over property led directly to criminal prosecution against those possessing it).

defining any potentially ambiguous terms. Terms most likely to cause problems are “cultural property,” “theft,” and terms that name specific types of property. Other specificity requirements are more subtle, such as the qualifications and duties of any internal monitoring or control agencies established or required to be established by an agreement. For example, the UNESCO Convention requires the establishment of “one or more national services” by each state party, with numerous responsibilities, but with no specifications as to qualification or competency other than that the services consist of “qualified staff sufficient in number for the effective carrying out of the [enumerated] functions.”³⁴

Jurisdiction, as with all international agreements, poses major problems for the regulation of cultural property, and the question of which courts may hear a dispute is a salient one, especially when the dispute is between two sovereign governments.³⁵ Jurisdiction must be clearly established—as clearly as is ever possible with jurisdictional questions—either in the courts of the states parties or in an independent, international body. The former solution poses significant difficulties. It is tempting simply to provide that jurisdiction over disputes shall rest with the courts of the source nation, but the very identity of that nation will often be a matter of dispute.

Further, attempting to provide for jurisdiction by simply stating that it shall lie in the courts of a state situated in a particular manner in a given type of dispute may not make it so; a nation’s constitution, statutory law, or other rules may prevent its courts from having jurisdiction. To take a somewhat simple example, imagine that a personal belonging—let us say a pocket watch of Benjamin Franklin—found its way to France, by way of a Belgian purchaser, in

³⁴ UNESCO Convention, art 5.

³⁵ It is not clear, for example, that there would be any appropriate venue in the United States for a suit to which the United States government and another sovereign government were opposing parties. That is, while the judicial power of the United States extends to cases arising under treaties made by the federal government, “to controversies to which the United States shall be a party,” and to controversies between foreign states, on the one hand, and a State or citizens thereof, on the other, it is far from clear that it was meant to extend to suits in which the only parties are sovereign states, possibly only foreign states. US Const, art III, § 2, cl 1, 4, 8. While this point itself is tangential to my Comment, while the disputes in question are arguably intentionally excluded from the judicial powers clause, and while it is somewhat comical to picture two sovereign nations arguing at the Supreme Court, this brief discussion illustrates the problem: only suits between private parties or between a private party and a government entity are very likely to be justiciable in any established forum in any nation. Even if a nation’s laws were to extend that nation’s courts’ jurisdiction to such suits, the problem of the parties respecting a decision in such a court is substantial. This observation demonstrates that a very large number of cultural-property disputes will not find a suitable forum in a traditional court. In short, a new type of forum— independent and international—is essential to the fair decision of cases involving cultural property, as well as the respect and submission of the parties, who often will be sovereign states and who often will have gone to war with each other one or more times.

1770 and has been traded frequently around Europe ever since. Now, though neither the United States government nor any American individual asserts a claim over the watch, both French and Belgian persons lay claim to it. A United States court may well refuse to hear the case due to lack of jurisdiction or the doctrine of *forum non conveniens*, among other reasons;³⁶ there may be no way to determine whether a French court, Belgian court, or the court of some other country has the strongest case for jurisdiction.

G. STATUTES OF LIMITATIONS, INDIGENOUS GROUPS, COLONIES, TERRITORIES, AND SIMILAR PROBLEMS

Because cultural-property disputes frequently involve very old, even prehistoric, objects, a statute of limitations is essential. The Elgin Marbles were taken to England relatively recently by comparison to some disputed objects, not to mention twentieth-century war booty. Older disputes abound, such as the competing claims to the Temple Mount in Jerusalem. Any agreement respecting cultural property must be tailored so as to avoid such sticky questions, or risk failing to obtain the assent of major “player” states. This is most easily accomplished by means of a statute of limitations, or prescription.³⁷ As Burman notes, this is contrary to United States practice, in which most relevant state laws are more favorable to claimants.³⁸ Yet an agreement that allows for states parties to offer greater protection to claimants, as the UNIDROIT Convention does,³⁹ avoids major conflict on this topic, while making entry into the agreement attractive to states that do not wish to offer such additional protection.

³⁶ See, for example, *Piper Aircraft Co v Reyno*, 454 US 235 (1981) (holding that Scotland had a greater jurisdictional interest than the United States under the doctrine of *forum non conveniens* when an American-made aircraft carrying only Scottish passengers crashed in England). It is also questionable whether United States courts even have judicial power in the hypothetical stated. See US Const, art III, § 2. Similar problems would undoubtedly arise in most other countries, making timely resolution of such disputes difficult or impossible.

³⁷ For example, the UNIDROIT Convention asserts that claims must be brought within three years of the time that the claimant learned of the theft and identified the possessor, and in any case within fifty years of the theft, yet then goes on to provide that states parties may provide by legislation for a period of seventy-five years or any other duration for several broad categories of objects. UNIDROIT Convention, art 3. The fifty-year limitation conveniently situates the broadest reach of the Convention, barring legislation to the contrary regarding one of the exceptions, just after the end of World War II and the Holocaust, which, of course, are central events in any discussion of cultural property. For more on this topic, see, for example, Cuba, 17 Cardozo Arts & Enter L J at 447 (cited in note 17); Click, 5 Tulsa J Comp & Intl L at 185 (cited in note 17).

³⁸ Burman, 34 ILM at 1323 (cited in note 21).

³⁹ UNIDROIT Convention, art 9.

A related problem is that of indigenous groups, a topic that caused some discussion at the UNIDROIT Convention, with the former British colonies of the United States, Canada, and Australia expressing particular concern that such groups should be specifically addressed.⁴⁰ This poses a possible stumbling block in that the governments of some nations have particularly strong interests in providing such protections, others in avoiding them, and that some nations have essentially no indigenous minorities.

Additional and similar problems are raised when considering nonmetropolitan territories, colonies, occupied states, and disputed territories such as Kashmir. One simplistic approach to this problem would be to declare that nations may consider as theirs all cultural property within their official—as reckoned internally—borders at some time, probably the time of a nation’s ratification or accession to a governing agreement.⁴¹ This is problematic for numerous reasons, not least of which are border disputes and the presence of illicit property at the time of ratification. Another approach is to catalog problem areas, which would include such places as Guam, Kashmir, and Iraq. This is clearly a temporary fix at best, as the global geopolitical map is rarely stable for long, and some provision for updating the catalog would be necessary, lest the treaty fall into obsolescence.

H. MULTIPLE-CLAIMS PROBLEMS

As previously mentioned,⁴² in some cases multiple nations have particularly strong claims to a particular object, making an international tribunal capable of hearing such cases even more necessary.⁴³ The original draft of the UNIDROIT Convention contained “a provision that would have allowed a forum State to refuse to return an object on the basis that it had as close a relationship with the object as did the requesting State,” but this provision was dropped “at the urging

⁴⁰ Id, preamble & art 5. See also Burman, 34 ILM at 1322 (cited in note 21). For more on this issue, see Kristin Ann Mattiske, *Recognition of Indigenous Heritage in the Modern World: US Legal Protection in Light of International Custom*, 27 Brooklyn J Intl L 1105 (2002).

⁴¹ The UNIDROIT Convention essentially pursues this approach, subject to the following condition, among others:

If a Contracting State has two or more territorial units, whether or not possessing different systems of law applicable in relation to the matters dealt with in this Convention, it may, at the time of signature or of the deposit of its instrument of ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may substitute for its declaration another declaration at any time.

UNIDROIT Convention, art 14, § 1.

⁴² See Section II.G & n 15.

⁴³ For the classic Elgin Marbles example, see Shuart, 52 Kan L Rev at 670–71 (cited in note 16).

of the United States and a number of other States.”⁴⁴ Given the level of resistance to this default rule, a new proposal will likely need to offer a dispute-resolution mechanism—the approach taken in this Comment—or a different default rule in order to find widespread acceptance.

I. FUNDAMENTAL DIFFERENCES BETWEEN “SUPPLIER STATES” AND “MARKET STATES”

A “market state,” defined as a nation where the cultural output of other nations is often consumed or collected, and a “source state,” one where the output was produced, may have very different priorities. Indeed, as Harold Burman notes in his introduction to the UNIDROIT Convention, there is a marked difference in participation in cultural property agreements between “source” states and “market” states, such as the United States, Canada, and Australia; indeed, the failure of market states other than the United States, Canada, and Australia to ratify the UNESCO Convention was the primary motivation for the drafting of the UNIDROIT Convention.⁴⁵ This divide is prompted by the different philosophies motivating various governments, not to mention the powerful force of private money, which creates the international market for cultural property in the first place.⁴⁶

J. THE “REGIONAL CULTURAL PROPERTY” AND MULTISTATE-OWNER PROBLEM

Some artifacts are properly considered “regional” cultural property. Ancient empires often spanned territories comprising the land of multiple modern nations. Thus, there are concepts of a “European cultural area” (an idea that has gained force with the rise of the European Union) and the treatment of the Mediterranean Sea as a “sea of human civilisation.”⁴⁷ The former concept has, in fact, been used to prevent repatriation of cultural property to the actual country of origin.⁴⁸ Special situations such as those of Europe and the Mediterranean will

⁴⁴ Burman, 34 ILM at 1322 (cited in note 21).

⁴⁵ Id at 1322, 1324. See generally Jane Warring, Comment, *Underground Debates: The Fundamental Differences of Opinion that Thwart UNESCO’s Progress in Fighting the Illicit Trade in Cultural Property*, 19 Emory Intl L Rev 227 (2005) (examining in depth the differences that separate the player states from each other).

⁴⁶ Adam Goldberg, *Reaffirming McClain: The National Stolen Property Act and the Abiding Trade in Looted Cultural Objects*, 53 UCLA L Rev 1031, 1059–64 (2006).

⁴⁷ Anastasia Strati, *Deep Sea Cultural Property and the Common Heritage of Mankind*, 40 Intl & Comp L Q 859, 861 (1991).

⁴⁸ Id at 861 n 11 (citations omitted).

always require treatment as such. As with the case of disputed territory,⁴⁹ a catalog of all such situations is probably unworkable. Attempting to address every similar situation—from that of Texas to that of Kashmir and from that of the Mediterranean seabed to that of the Levant—with a single, global framework is only likely to create more barriers to acceptance, not fewer. A far simpler and more flexible approach is to provide a background set of rules under which all transactions take place, around which states parties can contract subject to other constraints, most often preexisting treaties. This is the method adopted by most international agreements, including the UNESCO and UNIDROIT Conventions, because it is the most practical and leads to the most streamlined negotiations. Overall efficiency is also higher, because no global consensus is required on a multitude of problem areas in which only a few states may have real interests in order to approve a working document.

III. HISTORICAL APPROACHES TO THE PROBLEMS

As noted above, a number of historical approaches have been taken to these problems. A brief summary of each major effort at obtaining international consensus and a glance at a few regional agreements will inform the proposal of a new solution. Specifically, it is helpful to look at the three major international agreements, followed by a few regional agreements and relevant legal decisions.

A. THE HAGUE CONVENTION (1954)

As its full name implies, the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict addresses only the circumstances of armed conflict as they apply to cultural property. As the first major effort to secure international protection of cultural property, the Hague Convention was developed in the immediate aftermath of two of the bloodiest wars ever fought, namely World War II and the Korean War. It was thus logical that protections under wartime conditions be considered before serious discussion of peaceful disputes, such as that over the Elgin Marbles, took place. As the Preamble to the Hague Convention states, the convention was intended to further the purposes of the Conventions of the Hague of 1899⁵⁰ and 1907,⁵¹ as

⁴⁹ See Section II.G.

⁵⁰ Hague Convention II: Laws and Customs of War on Land (1899), 32 Stat 1803, available online at <http://avalon.law.yale.edu/19th_century/hague02.asp> (visited Dec 5, 2008). Article 56 includes the entire protection afforded under Hague 1899:

The property of the communes, that of religious, charitable, and educational institutions, and those of arts and science, even when State property, shall be treated as private property.

well as the Washington Pact of 1935.⁵² None of these prior conventions had extended significant protections to cultural property with any specificity.

The Hague Convention, as a first and limited effort, had significant shortcomings with respect to the problems discussed in this Comment. Its definitions are extremely broad⁵³ and very little is said about most of the other problem areas. The primary strengths of the Convention with respect to these areas are in its imposition of duties upon occupying forces⁵⁴ and the provision that separate agreements may be reached between states parties for special concerns.⁵⁵ An additional strength is in the geographical breadth of adoption and application the convention has found, as it has been invoked in Cambodia, Israel, what was then Yugoslavia, and Kuwait.⁵⁶ On the other hand, the Convention's "reliance on national laws and ad hoc criminal tribunals to prosecute individuals" weakens its force; this fact helps to explain why the Convention has not been more frequently invoked.⁵⁷

B. THE UNESCO CONVENTION (1970)

Prior to 1970, the Hague Convention was the only major agreement governing cultural property internationally. Adopted to provide more general coverage, the UNESCO Convention overcomes the challenges of vague and overbroad definitions of the protected property,⁵⁸ though at the expense of limiting coverage to chattels. It fails, however, to provide much guidance to states parties regarding legislation controlling the sale, import, or export of

All seizure of, and destruction, or intentional damage done to such institutions, to historical monuments, works of art or science, is prohibited, and should be made the subject of proceedings.

⁵¹ Hague Convention IV: Laws and Customs of War on Land (1907), 36 Stat 2277, available online at <http://avalon.law.yale.edu/20th_century/hague04.asp> (visited Dec 5, 2008). Again, Article 56 is the only directly relevant text; it is identical to Hague 1899, Article 56, except for minor wording changes.

⁵² Protection of Artistic and Scientific Institutions and Historic Monuments (1935), 49 Stat 3267, available online at <<http://palimpsest.stanford.edu/bytopic/intern/roerich.html>> (visited Dec 5, 2008). As the name implies, this agreement covered only institutions and monuments; it did not extend any protection to chattels.

⁵³ See text accompanying note 4.

⁵⁴ Hague Convention, art 5.

⁵⁵ Id, art 24. The Second Protocol does little more than refine the application of the Hague Convention and does not extend significant additional protections to cultural property, either during armed conflict or during times of peace.

⁵⁶ Matthew D. Thurlow, *Protecting Cultural Property in Iraq: How American Military Policy Comports with International Law*, 8 Yale Hum Rts & Dev L J 153, 161 nn 49, 51 (2005).

⁵⁷ Id.

⁵⁸ See notes 6 & 7 and accompanying text.

cultural property; issues such as ex post application of laws are not addressed. Bona fide purchasers are, however, accorded protection.⁵⁹ Jurisdictional problems are not addressed; the only provision for dispute resolution between states parties is a “good offices” arbitration clause, and its applicability to disputes over property, rather than over the implementation of the agreement, is unclear.⁶⁰ There is no statute of limitations, no clear provision for multiple claims problems, little apparent regard for the differing priorities of market and source nations, and no consideration of regional cultural property. Like the Hague Convention, however, the UNESCO Convention does provide that separate agreements may be reached between states parties for special concerns.⁶¹

C. THE UNIDROIT CONVENTION (1995)

1. Prehistory

As Harold Burman noted in his introduction to the Final Act of the UNIDROIT Convention, the Convention’s purpose was “to reduce illicit traffic in cultural objects by expanding the rights upon which return of such objects can be sought, and by widening the scope of objects subject to its provisions, in comparison to earlier conventions and treaties.”⁶² Citing the failure of the UNESCO Convention to obtain broad support among market states, UNESCO asked UNIDROIT in the 1980s to prepare a more comprehensive agreement that would bring other market states, especially Japan and Western European countries, into the agreement framework.

2. Protections in the Final Act

Like the UNESCO Convention, the UNIDROIT Convention avoids vague and overbroad definitions of the protected property,⁶³ again including only chattels. The UNIDROIT Convention also improves upon the UNESCO Convention by providing a more complete definition of “stolen” property, including “illegally excavated” property in that definition, over the objection of the United States.⁶⁴ Additionally, the UNIDROIT Convention offers protection

⁵⁹ UNESCO Convention, art 7, § (b)(ii).

⁶⁰ *Id.*, art 17, § 5.

⁶¹ *Id.*, art 15. The text addresses only “cultural property removed, whatever the reason, from its territory of origin, before the entry into force of this Convention for the States concerned.” That is, while states parties remain free to bargain over past transfers of cultural property, it is unclear that the Convention contemplates them retaining freedom to bargain over transfers occurring after entry into the Convention.

⁶² Burman, 34 ILM at 1322 (cited in note 21).

⁶³ See notes 6–9 and accompanying text.

⁶⁴ UNIDROIT Convention, art 3, § 2; Burman, 34 ILM at 1323 (cited in note 21).

to good-faith purchasers, provides a reasonable statute of limitations,⁶⁵ and recognizes that claims may not always be open-and-shut by providing that disputes may be heard by any court or competent authority in the state where disputed property is located or may be submitted to arbitration.⁶⁶ Moreover, the UNIDROIT Convention, by necessity, arose from extensive consideration of the competing desires of market and source nations. There is no explicit mention of “regional cultural property,” but the Convention does allow for additional bargaining over special concerns⁶⁷ and for region-based, as opposed to state-based, applications of the convention.⁶⁸

3. The Convention Debates and Changes from Early Proposals

Burman summarizes many of the major arguments that arose during the convention and many of the changes that were made to the draft, prior to creation of the Final Act.⁶⁹ They have been repeated, where appropriate, in the relevant portions of Section II above.

4. Problems

Despite the extensive negotiations and explicit recognition of differences between source and market states, the UNIDROIT Convention failed to achieve ratification by even a simple majority of the signatory countries. The United States, though it achieved numerous goals in the debates and was claimant-friendly, did not even sign it.⁷⁰ Thus, in terms of its goal of achieving expanded protection and bringing more market states into an agreement framework, the Convention was an unmitigated failure. The reasons for its failure appear to be largely a simple collective action problem; individual market states lack the incentive to sign until significant numbers of other market states have done so. Other difficulties are particular to the interests of the individual states, particularly market states. For example, the UNIDROIT Convention reverses the civil law presumption that bona fide purchasers of stolen objects receive

⁶⁵ See note 37 and accompanying text.

⁶⁶ UNIDROIT Convention, art 8.

⁶⁷ *Id.*, art 13, §§ 1, 2.

⁶⁸ *Id.*, § 3.

⁶⁹ Burman, 34 *ILM* at 1322–24 (cited in note 21).

⁷⁰ Onimi Erekosima and Brian Koosed, *Intellectual Property Crimes*, 41 *Am Crim L Rev* 809, 855–57 (2004). See also Burman, 34 *ILM* at 1324 (cited in note 21), stating that

[M]ost U.S. commentators have stated that unless a sufficient number of market States—other than those already a party to the 1970 UNESCO Convention (i.e., other than Canada or Australia)—ratify the UNIDROIT Convention, it is premature to consider in detail the possible benefits or drawbacks of the Convention for the United States.

good title, adopting instead the *nemo dat* rule of common law countries and imposing due diligence requirements.⁷¹ That is, disagreements over the best default rules to implement will themselves cause difficulty in adopting a single framework; market states with different legal systems, particularly common-versus civil-law jurisdictions, will be at odds over these presumptions.

D. OTHER AGREEMENTS AND INTERNATIONAL CASE LAW

1. Other Bilateral or Multiparty Agreements

As has already been noted, bilateral and multilateral agreements of narrower scope than the UNESCO or UNIDROIT Conventions abound. For example, on January 19, 2006, the United States and Italy renewed their Memorandum of Understanding (“MOU”), barring “importation of Etruscan, Greek and Roman artifacts from Italy” to the United States for five additional years.⁷² This agreement, which extends a 2001 MOU, has been less well-received than its predecessor. While Italian parties have generally looked favorably on it, American art dealers and museum officials have criticized it as impeding legitimate trade and have noted Italy’s lagging cooperative efforts.⁷³ The United States, as a major market state, has also reached or renewed similar agreements with other nations, most recently renewing another 2001 MOU, this one with Bolivia.⁷⁴ Numerous additional, broader treaties governing special types of cultural property, such as the Draft European Convention on the Protection of the Underwater Cultural Heritage of 1985⁷⁵ and the CSICH,⁷⁶ have also been signed. The effect of these local and global agreements is to create a patchwork of protections; while a significant portion of the world’s cultural property receives some protection, the protections are not uniform in substance, in definitional scope, or in territorial extent.

2. *Beyeler v Italy*

In 2000, the European Court of Human Rights (“ECtHR”) handed down a ruling that seemed to strike blows both to members of the art community and to national governments seeking to protect their cultural heritage. In *Beyeler v Italy*,

⁷¹ Jennifer H. Lehman, Note, *The Continued Struggle with Stolen Cultural Property: The Hague Convention, the UNESCO Convention, and the UNIDROIT Draft Convention*, 14 *Ariz J Intl & Comp L* 527, 547 (1997).

⁷² *US Extends Its Ban on Importing Ancient Italian Artifacts*, 12 *Intl L Update* (Feb 2006) (Lexis).

⁷³ *Id.*

⁷⁴ US State Department, *United States and Bolivia Extend Cultural Property Protection Agreement*, available online at <<http://www.state.gov/r/pa/prs/ps/2006/77382.htm>> (visited Dec 5, 2008).

⁷⁵ See notes 14 & 15 and text accompanying note 14.

⁷⁶ See note 11 and accompanying text.

the ECtHR ruled that under the UNESCO Convention, the government of Italy violated the rights of a Swiss national. The individual in question bought a Van Gogh painting in 1977 from an Italian seller, failed to declare the sale for six years, then resold the painting. The government later exercised its right of preemption well after the time of sale and for a price far below market value.⁷⁷ At the same time, however, the ECtHR stated, arguably as dicta, that Italy could have exercised a valid right of preemption if it had done so earlier. In effect, this ruling would allow nations to halt, by statute, exportation of any objects they can reasonably designate as cultural property under the terms of the UNESCO Convention, or at least to preempt any such exports with a first right of purchase, provided that the preemption is timely. The variation in protection created by the patchwork of agreements is thus exaggerated further by this power in national and regional courts to interpret the treaties' meanings. This is, of course, a problem with any international agreement, but it is especially acute in the arena of cultural property, where regional bodies will often be able to assert meaningful claims of interest in disputed property and where the disputes concern not abstract human rights or the domestic application of relevant laws, but the disposition of objects that are by definition scarce and often unique. It is thus entirely possible that, were the dispute to be litigated, the courts of Greece, England, and the European Union, applying their own laws and jurisprudential standards, could reach different conclusions about the fate of the Elgin Marbles.⁷⁸ The possibility of this kind of legal wrangling argues for creation of an international tribunal competent to resolve such disputes, either through judicial means or through arbitration, so that nationalism, regionalism, and other philosophical challenges are minimized through the involvement of unbiased parties.

IV. PROPOSED REMEDIES

Several proposals have been made for achieving broader, more uniform protections of cultural property. These proposals, with the exception of the UNIDROIT Convention, have been put forth by academics; a brief look at the type and scope of the proposals offered is helpful for completeness.

⁷⁷ *Beyeler v Italy*, 2000-1 Eur Ct HR 57.

⁷⁸ Assuming that each court would defer to a preceding decision by one of the others, as is most likely, it is, of course, impossible that the entire collection could actually pass through each court. I mean only that the outcome is conceivably dependent on the forum selection and that resolutions of multiple, similar claims between the same parties could be in conflict with each other.

A. THE UNIDROIT CONVENTION (1995)

Because the UNIDROIT Convention has already been discussed at length,⁷⁹ it will suffice to say that it is the most significant attempt at protection since 1970. Implementing it, even in those countries where it has been signed, has proven neither easy nor perfectly satisfactory.⁸⁰

B. OTHER PROPOSALS IN ACADEMIC JOURNALS

Most academic proposals advocate one of two courses: either that nations accede to the latest treaty in the area of cultural property, if they have not already, or that existing agreements or practices thereunder be modified in some respect.⁸¹

In 1984, Ann Prunty proposed an international tribunal for settling cultural-property disputes, which she envisioned as an add-on to the UNESCO Convention, despite its many problems, some of which she highlighted.⁸² Because she wrote prior to the UNIDROIT Convention, Prunty had far less information to draw on about what terms would be acceptable to various states. Further, her tribunal was necessarily bound up in the language and terms of the UNESCO Convention, the broad lack of support for which was a driving force behind the UNIDROIT Convention and is a motivation for this Comment. Prunty's commentary remains valuable, as it raised numerous still-valid critiques of the UNESCO Convention and highlighted the need for an international dispute resolution body. Time, however, has rendered it incomplete and insufficient as a platform for reform, in light of the UNIDROIT Convention. Both the fact that the states signing that agreement preferred a new agreement to a modification of the UNESCO Convention and the subsequent failure of the

⁷⁹ See Sections II and III.C.

⁸⁰ See generally, for example, Stephanie Doyal, *Implementing the UNIDROIT Convention on Cultural Property into Domestic Law: The Case of Italy*, 39 Colum J Transnatl L 657 (2001) (noting that Italy's ratification, though a major step forward for the Convention, was problematic and compromised the meaning of several of the convention's provisions). See also Lehman, 14 Ariz J Intl & Comp L at 531 (1997) (cited in note 71) (examining the impact of various provisions of the UNIDROIT Convention on the laws of various nations and noting, among other things, that "[o]ne treaty, the Hague Convention, aims to protect the physical integrity of cultural property in the event of armed conflict. Another, the UNESCO Convention, poses to protect a people's right to retain control of its cultural objects, while the third, the UNIDROIT Convention," makes it easier for a people to recover stolen cultural property.).

⁸¹ See, for example, Warring, 19 Emory Intl L Rev at 259-95 (cited in note 45).

⁸² Ann P. Prunty, Note, *Toward Establishing an International Tribunal for the Settlement of Cultural Property Disputes: How to Keep Greece from Losing Its Marbles*, 72 Geo L J 1155, 1158 (1984) (proposing an international tribunal and discussing hypothetical examples of disputes that could face it).

UNIDROIT Convention highlight the need for something different from both conventions.

Numerous other proposals involve narrow circumstances or narrow challenges. For example, one author has advocated for “an intertwining web of bilateral and multilateral agreements” to remedy the dispersion of China’s cultural property.⁸³ Other proposals deal with US-occupied Iraq,⁸⁴ indigenous groups,⁸⁵ or narrow problems such as choice-of-law rules.⁸⁶ Thus, while many commentators have expressed frustration with both the UNESCO and UNIDROIT Conventions, it appears many of these same commentators are resigned to essentially ad hoc implementations and applications of the UNESCO Convention and smaller-scale treaties after the UNIDROIT Convention’s failure to remedy the problems found in these older agreements.⁸⁷

V. RESOLVING THE STALEMATE

A possible solution to the current stalemate lies in an agreement that offers essentially the same enhanced protections found in the UNIDROIT Convention, but with provisions and modifications to make it more palatable to source and market states alike. A workable—that is, ratifiable, enforceable, and meaningfully protective—agreement will resolve certain problems, many of which relate to choice of law, and will provide for the formation of an unbiased international body to resolve disputes, functioning as a court or as an arbitral body as necessary. The primary contribution of this Comment will be to sketch the terms of such an agreement, with a focus on the structure and functions of the corresponding body. For convenience, I will refer to the proposed agreement as “the Agreement” and the corresponding tribunal as “the Tribunal.”

⁸³ Jason M. Taylor, Comment, *The Rape and Return of China's Cultural Property: How Can Bilateral Agreements Stem the Bleeding of China's Cultural Heritage in a Flawed System?*, 3 Loyola U Chi Intl L Rev 233, 255 (2006).

⁸⁴ Ian M. Ralby, Note, *Prosecuting Cultural Property Crimes in Iraq*, 37 Georgetown J Intl L 165 (2005).

⁸⁵ Sarah Palmer, Cherie Shanteau, and Deborah Osborne, *Strategies for Addressing Native Traditional Cultural Properties*, 20 J Nat Resources & Envir L 45 (Fall 2005); Mattiske, 27 Brooklyn J Intl L 1105 (cited in note 40).

⁸⁶ Symeon C. Symeonides, *A Choice-of-Law Rule for Conflicts Involving Stolen Cultural Property*, 38 Vand J Transnat L 1177 (2005).

⁸⁷ See also Patricia Youngblood Reyhan, *A Chaotic Palette: Conflict of Laws in Litigation Between Original Owners and Good-Faith Purchasers of Stolen Art*, 50 Duke L J 955 (2001) (focusing on the conflict of laws questions); Aaron M. Boyce, Note, *A Proposal to Combat the Illegal Trafficking of Pre-Columbian Artifacts*, 3 Tex Hisp J L & Poly 91 (1997) (focusing almost exclusively on pre-Columbian artifacts from Latin America); Lisa J. Borodkin, Note, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 Colum L Rev 377, 411–16 (1995) (arguing for state auctions to stem the illegal flow of cultural property, but not proposing agreements to this effect).

A. THE PARTIES

Ultimately, a goal of the Agreement will be universal ratification. Even the UNESCO Convention has achieved ratification only by 103 countries, and the United States, which implemented the convention only partially, took thirteen years to do so, making it the first major market country to adhere.⁸⁸ Thus, a realistic proposal must be made with more obtainable goals in mind. In particular, it should focus on obtaining the assent of key market states, most importantly the United States, Western European countries, Canada, Australia, and Japan.⁸⁹ Both the UNESCO and UNIDROIT Conventions have failed primarily due to the minimal ratification by market states; when market states fail to agree to abide by the rules of an agreement, the incentives for source countries to ratify it are minimized, as are the incentives for other market states.

At the outset of such an ambitious undertaking, a little realism is needed. No comprehensive treaty has yet gained broad or even critical levels of acceptance, so it remains unknown exactly what a treaty must do to gain widespread ratification. This Comment attempts only to propose a new framework around which dialogue between source and market states might resume. As with all ambitious ideas, the end product is very likely to be different from what anyone envisions at the outset. Nonetheless, the proposed framework offers significant common ground on which to move forward with another attempt at a comprehensive, multilateral agreement, for reasons that will be made clear.

B. THE AGREEMENT FRAMEWORK

1. Overview

Those authors who have dealt with the UNIDROIT Convention largely agree that the framework is a good one.⁹⁰ Additionally, the broad participation in the Convention—it “was attended by over seventy countries, as well as a number

⁸⁸ *Saving Antiquities for Everyone* (2008), available online at <<http://www.savingantiquities.org/heritagetreaties.php#unesco1970>> (visited Dec 5, 2008).

⁸⁹ Some nations, such as China and India, may be currently primarily seen as source nations, but the rapidly expanding economies of those countries mean that they will likely become major market nations, as well. Italy is a classic example of a nation that is already both a source and a market state and wields substantial influence in any discussions of cultural property. Thus, emphasis should also be placed on ratification by China and India before they, too, become major powers on “both sides of the table,” making discussions even more difficult.

⁹⁰ See, for example, Ian M. Goldrich, Comment, *Balancing the Need for Repatriation of Illegally Removed Cultural Property with the Interests of Bona Fide Purchasers: Applying the UNIDROIT Convention to the Case of the Gold Phiale*, 23 *Fordham Intl L J* 118, 164 (1999) (arguing for United States ratification and implementation); Lehman, 14 *Ariz J Intl & Comp L* at 548–49 (cited in note 71) (arguing for broad adoption).

of observer states and international organizations,”⁹¹ including nearly all of the priority market states—and the resulting enormous efforts expended in its drafting caution against hastily making radical departures from its terms, despite its poor ratification record. Nevertheless, a few modifications to the UNIDROIT Convention’s basic terms will make the Agreement stronger both in protection and in appeal.

2. Types of Claims and Objects Covered

Firstly, the definition of cultural property should be expanded slightly, so as to encompass certain buildings; historically, artistically, archeologically, or architecturally important sites; and certain quasi-chattels, such as shipwrecks,⁹² the debris of war, and ancient ruins, which are often immovable, though often technically chattels. Although injuries to immovable cultural property are most likely during times of war, they also occur during times of peace, as in the case of the Bamiyan Buddhas or the near-destruction of the Myonichikan.⁹³

Secondly, definitions of disputed terms, such as “stolen,” “theft,” “illegally excavated,” and “illegally retained” must be given more clearly than in preceding agreements. Specifically, the Agreement must be clear that cultural property may only be considered improperly taken or held if it meets certain conditions, such as if it is taken by force, taken by invaders, taken in violation of an explicit statute or governmental decision banning such an act, or held when a right of first refusal existed at the time of the current holder’s acquisition of the property, but no notice of the transfer was given to the government or other party with such a right. Additionally, the Agreement will require states parties to form agencies competent to designate items and places as protected cultural property, as well as to approve or deny requests for permission to excavate, destroy, import, or export such property. This parallels the UNESCO Convention,⁹⁴ but the Agreement should also impose some standards of qualification for the membership of such boards, if an agreement on those standards can be reached. A possible approach would be to require that at least a certain percentage or

⁹¹ Burman, 34 ILM at 1322 (cited in note 21).

⁹² Again, this Agreement is not intended to cover cultural property at sea, specifically; the reference here is to shipwrecks and their contents only, particularly in the case of historically significant wrecks in non-international waters. See notes 14 & 15 and accompanying text.

⁹³ The Myonichikan, the last standing Frank Lloyd Wright structure in Tokyo, was slated for demolition and saved only after major efforts by “especially tenacious Japanese preservationists.” The Myonichikan is an almost-ideal example of a fixed object of cultural property that is of some significance to more than one culture or nation. Chester H. Liebs, *Listing of Tangible Cultural Properties: Expanded Recognition for Historic Buildings in Japan*, 7 Pac Rim L & Poly J 679, 683 & n 13 (1998).

⁹⁴ See note 34 and accompanying text.

certain number of the staff members of these groups be certified as competent to serve by international historical, archeological, or artistic foundations (which, of course, would have to become non-state parties to the Agreement), or perhaps by the Tribunal. The standard of competency must be low enough for all states parties to comply, but high enough such that informed decisions are made about a nation's cultural property. These provisions would avoid the ex post application and ambiguity problems found in cases like *McClain*, *Government of Peru*, and *Beyeler*.

3. Claims

A central idea of the Agreement is that international cultural-property disputes and some purely domestic ones will be tried before or arbitrated by the Tribunal. Thus, the Agreement will need to address who may bring claims for recovery, preservation, or repatriation, with greater specificity than prior agreements. A key principle is that cases must be tried or arbitrated when the complete destruction of cultural property, such as the Bamiyan Buddhas, is contemplated. This requirement will be subject to an emergency exception, which should be carefully limited to national security questions, such as invasion, civil war, and natural disasters; even cases falling within the emergency exception would be subject to examination after property has been destroyed if aggrieved parties so desire and a judicial remedy is available. Expedited procedures will be available when a complete destruction is contemplated, and the states parties must agree that they will not destroy contested cultural property and that their courts will temporarily enjoin others from doing so until the dispute can be resolved. Claims for repatriation, rescission, and trover, however, are likely to be far more common than those for destruction.

In either case, it is necessary that a broad range of claimants be able to file complaints. Potential plaintiffs would include governments, both national and local, libraries, museums, conservation agencies, academic institutions, individuals asserting a particular right to a particular object, ethnic and racial groups, and indigenous peoples. This satisfies the concerns expressed by the United States, Canada, and Australia during the UNIDROIT Convention, but raises the specter of an enormous body of litigation and arbitration taking place outside of local and national court systems, which in turn raises the specter of an enormous backlog of claims as well as the even more disturbing prospect of increased international hostilities.

A particularly elegant prophylactic may be found by analogy to shareholders' derivative lawsuits in the law of corporations. In such a suit, a shareholder seeks to sue the directors or managers of a company *on behalf of* the company itself.

Most jurisdictions require that a plaintiff make a demand upon the board of directors of the company that the board itself file the suit.⁹⁵ This requirement helps reduce frivolous litigation, reducing the resulting burden on both corporate directors and judges. A potential application of a similar principle here requires some explanation.

In American law, the demand requirement serves as a tool to give standing to parties who would otherwise lack it; that is, a shareholder does not have standing to sue the officers, though the company itself does. Likewise, under the proposed Agreement, governmental parties seeking to pursue claims against governments or nongovernmental entities located in other states will have the right to do so by direct application to the Tribunal. Other claimants will be required first to make a “demand” of the national agency set up under the Agreement⁹⁶ that it press the claim on the claimant’s behalf, either diplomatically or by application to the Tribunal. Should the agency then fail to do so, a nongovernmental claimant would be entitled to petition the Tribunal directly. Such a direct petition would be allowed only on a factual showing that the destruction or permanent loss of cultural property is an immediate threat or upon showing that a domestic court or designated body of either the claimant’s nation of citizenship or the nation in which the disputed property may be found has determined (a) that the claim relates to protected cultural property under the Agreement, though not necessarily under an agency decision and (b) that demand was made and denied.⁹⁷

The advantage of this system is that it gives governments some control over the international disputes in which they may become involved, while protecting the right of private parties to seek redress for harms to themselves or to their nations’ cultural properties. Further, it keeps the workload of the Tribunal to a minimum by giving it a clear role as an appellate body, requiring all cultural-property claims in nonemergency scenarios to begin with the domestic government, which is where most such claims are likely to begin anyway.

⁹⁵ See, for example, *Aronson v Lewis*, 473 A2d 805, 812 (Del 1983) (noting that “the demand requirement is a recognition of the fundamental precept that directors manage the business and affairs of corporations”). By analogy, the demand requirement proposed here recognizes the fundamental precept that governments, not citizens or organizations, manage the business and affairs—especially foreign affairs—of nations.

⁹⁶ See Section V.B.2.

⁹⁷ Alternatively, unreasonable judicial inaction on such a petition should be grounds for direct petition, as well; a reasonable maximum time period within which a judicial or agency finding must be issued might be one year. Likewise, a showing that domestic courts or other designated bodies have refused to consider the question of whether or not the claim is legitimately brought may be grounds for appeal. An opt-out provision may be necessary, here, to obtain the acquiescence of some nations, whose governments may fear their judicial systems will otherwise be subjected to unwanted international scrutiny.

Plaintiffs will naturally think of “going to court” before they think of appeals to an international dispute-resolution body. Parties would retain the option, at the beginning of proceedings, mutually to consent to arbitration; otherwise the proceedings would take the form of a trial. In the former, the goal of the proceedings would be a mutually acceptable agreement; in the latter, it would be a judicial order.

C. THE DISPUTE-RESOLUTION BODY, POSSIBLE STRUCTURES, AND PROS AND CONS

The Tribunal could be formed in a number of ways. Most basically, it could exist under the umbrella of an extant international organization, or it could be created independently. I believe that an independent structure is best, though a strong case could be made for placing it under the authority of the United Nations or possibly the World Trade Organization (“WTO”).

1. Under the Auspices of the United Nations

The United Nations offers a few clear advantages over either a new body or another extant body: it is recognized, established, and has substantial leverage in bringing parties to the table, both to discuss the Agreement and after its ratification. Further, the UN is one of the few bodies with significant power or influence over sovereign states, making enforcement of the Tribunal’s decisions simpler. Finally, the whole body, or perhaps the Security Council, could be given a form of veto power to prevent the Tribunal from hearing especially politically sensitive disputes, such as an Israeli demand (presumably brought by a citizen) that the Dome of the Rock be removed from the Temple Mount.

An arrangement involving the UN, however, has potentially hidden pitfalls. Given that many cultural-property disputes arise from military conflict, this arrangement risks bringing already volatile disputes a bit too close to other geopolitical disputes. Further, the Tribunal would need to be situated adjacent to, subordinate to, or within UNESCO. In the first scenario, the Tribunal’s mission would be parallel to, but somewhat at odds with, UNESCO, which, after all, played central roles in both the UNESCO and UNIDROIT Conventions. This, along with the ever-increasing bulk of the UN bureaucracy, risks bureaucratic paralysis. Making the Tribunal subordinate to or part of UNESCO would remove it one level from the UN proper, perhaps diminishing the effectiveness of the controls that make the UN an attractive host for the Tribunal. While none of these objections is dispositive and the UN remains attractive, these concerns mean the decision to make the Tribunal subordinate to the UN should not be automatic.

2. Under the Auspices of the World Trade Organization

The WTO would offer many of the same advantages as the UN, such as respectability and established stature, but without the same enforcement powers or big-picture mission that would help a UN-subordinated Tribunal avoid the most controversial disputes. Two advantages lie in the relevancy of the Tribunal's mission to the WTO's mission and in the leverage the WTO would have in bringing about ratification by member states.⁹⁸

The WTO, however, has obvious disadvantages, as well, particularly in the form of "mission drift," in that cultural-property disputes are not clearly within the WTO's intended sphere of influence or authority. First, cultural-property disputes often have nothing to do with trade, as many disputes are more closely analogous to criminal cases, including war crimes, than to traditional trade disputes. Second, the difficulty of grafting a new agreement onto the WTO without harming both the WTO and the new body must also be considered. Because the current agreement most closely related to cultural property is the Agreement on Trade-Related Aspects of Intellectual Property Rights,⁹⁹ a new agreement would be necessary, but the complex nature of cultural-property disputes just discussed means that such an agreement would, itself, be evidence of mission drift within the WTO, undermining its own credibility. Finally, the WTO has its own dispute-resolution policies and procedures, which are by necessity more suited to resolving disputes related to ongoing trade relationships than resolving those over individual chattels.¹⁰⁰

⁹⁸ World Trade Organization, *Understanding the WTO—Overview: A Navigational Guide* (2005), available online at <http://www.wto.int/english/thewto_e/whatis_e/tif_e/agrm1_e.htm> (visited Dec 5, 2008). All World Trade Organization ("WTO") member states must enter into the WTO agreements. Thus, were the WTO to make the Agreement one of these texts, it would have substantial leverage in obtaining rapid ratification by the WTO member nations.

⁹⁹ Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization (1994), 1869 UN Treaty Ser 157.

¹⁰⁰ See, for example, World Trade Organization, *Understanding the WTO—Settling Disputes: A Unique Contribution*, available online at <http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm> (visited Dec 5, 2008). WTO-administrable disputes arise from trade disagreements. The rulings thereon are coercive and binding and are adopted unless there is unanimous opposition to a given ruling. This degree of coerciveness makes it unlikely many states with large stakes in the cultural property "game" would support the adoption of a new WTO agreement, covering cultural property and subject to the same dispute resolution procedures; everyone benefits from fair trade policy, but not everyone benefits from fair cultural property policies, especially when those policies may be set by no more than a plurality of interested countries.

3. Under the Auspices of Another Extant Multilateral Organization

There are no obviously good candidates, though the World Intellectual Property Organization¹⁰¹ or the International Foundation for Cultural Property Protection¹⁰² could be considered. The lack of enforcement power or comparably widespread respect makes all such candidates less attractive than the UN or WTO, however.

4. As an Independent Body

The final option—making the Tribunal independent—offers clear advantages and relatively few political drawbacks. As an independent body, the Tribunal would avoid the disadvantages faced by the choice of the UN or the WTO, especially bureaucratic bloat or paralysis. Further, the UN would remain an appropriate forum for oversight of the implementation of the Agreement and the Tribunal's actions. The Agreement could also provide the UN, if sufficient numbers of states felt it to be necessary, with a "trump card" or veto power. The disadvantages include the difficulty and cost of establishing another international body, the loss of leverage in obtaining ratification, and a relative lack of enforcement powers. However, if the Tribunal ended up functioning primarily as an arbitration panel, this might not be a fatal flaw. Given the growing acceptance of the idea of international courts, such as the European Court of Justice and International Criminal Court, the Tribunal could take on either an arbitral or judicial function. The disadvantages of independence just mentioned, as well as questions about enforceability of the Tribunal's decisions and the fact that nations will be the typical claimants in any dispute, however, make the arbitrator's role more attractive. If an independent structure proves desirable, but enforcement powers concern the states contemplating the Agreement, a sanctions provision can be incorporated into the Agreement or perhaps enacted separately through the UN or WTO, which authorizes sanctions or the reduction of cultural property exchanges in the face of non-compliance by states parties with Tribunal decisions.

5. Structure, Membership, and Representation

The time, place, and method of assembly for the Tribunal will depend on the chosen method of formation. While it will not likely prove necessary for the Tribunal to be in session year-round, expedited hearings for emergency requests might require some form of availability, as by teleconferencing.

¹⁰¹ For general information on the World Intellectual Property Organization, see <<http://www.wipo.int/>> (visited Dec 5, 2008).

¹⁰² For general information on the International Foundation for Cultural Property Protection, see <<http://www.ifcpp.org/>> (visited Dec 5, 2008).

The membership (the “judges”) of the Tribunal should be chosen such that it is capable of functioning with respect and expertise and with a minimum of bias. That is, the Tribunal itself must be structured such that it is competent to decide disputes in the field of cultural property, but such that the impact of any individual judge’s biases with respect to a given dispute is minimized. To this end, member states should be able to nominate judges directly, following whatever procedures are normally followed for nominations of ambassadors and similar officials or are provided for in the enacting legislation. Alternatively, a state could designate its sitting judges in certain courts to be candidates for Tribunal service, to be selected more or less randomly. No particular expertise in the field of cultural property will be required, though nomination of judges with such expertise will be encouraged. Further, all disputes must be judged or arbitrated by a panel comprising no fewer than five judges, with no two from the same country. A judge may not sit on a panel when the dispute at bar involves the judge’s home country or entities therein. This method of judge selection and empanelment will ensure judicial independence, a high degree of professionalism, and a minimization of any regional biases. Finally, no nonmember nation that is allowed to send an observer for any reason may have a vote affecting the outcome of any dispute.

6. Procedures

The Tribunal should have some power to structure its own proceedings, though many of its procedures will need to be discussed in the Agreement. Because this is itself a topic comparable to drafting the Federal Rules of Civil Procedure, it is beyond the scope of this Comment, but topics such as the method and requirements of filing of complaints and responses will need to be addressed or left within the discretion of the Tribunal.

7. Statute of Limitations

A statute of limitations comparable to that found in the UNIDROIT Convention¹⁰³ will be necessary, but there must be a “sunset” provision for certain claims in the recent past, yet outside the standard window. This will allow old but still hotly contested events to find a forum; many such disputes have languished simply because there have never been proper fora. There should be a period of years during which cultural-property claims related to the Holocaust or wars within a certain window—perhaps the last one or two hundred years—could be brought. This period could run either from the effective date of the Agreement, when enough countries have ratified it for it to take effect, or from the date the claimant’s country ratifies the Agreement. While it is tempting to

¹⁰³ See note 37 and accompanying text.

exclude World War II and Holocaust claims, as the UNIDROIT Convention does, it is unconscionable to continue to assert that external agreements will be able to resolve all such disputes, as many of the parties in interest have already died and others are dying every day.¹⁰⁴

D. THE CONVENTION AND RATIFICATION PROCEDURES

The Agreement convention should set its own procedural rules, as is normal for such meetings. The ratification procedures may be similar to the UNIDROIT Convention, with the possible caveat that once the critical mass of ratifications for entry into force is reached, certain restrictions on trade in cultural property—sanctions—between member and nonmember states take effect. If this coercive provision proves to be a barrier, this provision could be changed to make sanctions against nonmembers an optional course of action for member states. The critical idea is that there remains some pressure on nonmember states, particularly market states, to accede to the Agreement or find it more difficult to engage in trade with members.

E. POTENTIAL PROBLEMS

The most obvious—and critical—hurdle is obtaining broad ratification of the Agreement. As the UNIDROIT Convention spectacularly demonstrated, the ratification and accession process of even a widely-supported and carefully negotiated agreement is fraught with peril, so no proposed agreement can be a sure success. The Agreement as outlined here, however, improves upon the UNIDROIT Convention by placing slightly more weight on the concerns of the market states than was expressed by the UNIDROIT Convention.¹⁰⁵ Further, the dispute-resolution process is explicitly designed to offer both source and market states an ongoing and policy-determining role in adjudicating or arbitrating disputes. Finally, a narrow definition of terms with both emotional and legal significance, such as “theft,” and other structural aspects of the proposed framework, such as mandatory membership qualifications for the national cultural property administrative agencies, should assuage some concerns of market states.¹⁰⁶ These features hardly guarantee the Agreement would succeed where the UNIDROIT Convention failed, but constitute at the least a step in the right direction.

¹⁰⁴ Kenneth Baker, *More Voices Demanding Repatriation of Looted Art: Legal, Moral Issues Complicate Claims*, San Fran Chron PK-10 (Mar 9, 2003).

¹⁰⁵ See, for example, Section V.B.3.

¹⁰⁶ See discussion in Section V.B.2.

As always with international agreements, sovereignty and control are potential sticking points. States may be reluctant to yield jurisdiction over cultural-property disputes to an independent body. This reluctance could argue for incorporating the Tribunal into the UN or WTO. If necessary, the domestic controls through the “demand” process could also be strengthened, such that certain claims—those where the claimants are all found in one nation, for example—need not leave domestic court systems.

Enforceability challenges are also a hurdle that must be overcome, as with all treaties. The simplest solution to these problems is to incorporate the Tribunal under the UN or WTO. This, however, may give the Tribunal more the appearance of an authoritative court and less that of an arbitration panel. The emotional nature of many cultural-property claims means that arbitration may be better received by parties in these cases and the preservation of arbitral proceedings as a legitimate option is therefore important.

The risk of a judicial backlog at the Tribunal should be mitigated by the demand process, which will allow some filtering of sensitive or frivolous claims at the national level. Expedition of emergency requests, as when total losses are contemplated, will also improve efficiency and effectiveness.

Other challenges include the “regional cultural property” question and the presentation of claims not covered by the Agreement. With regards to the former, provision should be made, as in UNIDROIT,¹⁰⁷ for regional settlements of these questions, rather than direct incorporation of, say, “the Palestinian question” into the Agreement. The latter anticipates claims over property not included in the Agreement’s definition of “cultural property,” such as maritime property (such as the *Titanic*), or purely domestic disputes over which of two museums holds title to a relic. In such cases, where the dispute involves unprotected property or when it is purely domestic and there is no destruction of protected cultural property contemplated, the Tribunal should have power to dismiss the complaint and remand the case to the appropriate court system.

VI. CONCLUSION

International protection of cultural property has a short and already troubled past. With only two major agreements respecting cultural property during peacetime having been reached, both of which failed for want of sufficient ratification and application, a new agreement is necessary. By learning from the difficulties that have plagued the UNESCO and UNIDROIT Conventions and pursuing a new agreement following the framework set forth in Section V, with primary goals of addressing the problems identified in Section II and bringing

¹⁰⁷ See notes 67 & 68 and accompanying text.

into compliance the major “market” states, a new agreement can be reached. Further, if this new Agreement establishes the proposed Tribunal, nations can be assured of peaceful, fair, and independent actions to preserve their culture and heritage. In demanding the repatriation of the Elgin Marbles, Melina Mercouri said, “The British say they have saved the Marbles. Well, thank you very much. Now give them back.”¹⁰⁸ The Tribunal would give her—and others like her—a venue in which to make that very demand.

¹⁰⁸ Crosland, *Melina and the Marbles*, Sun Times (London) at 15 (cited in note 1).



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