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NOTE

HARMONIOUS MEETING: THE *McCLAIN* DECISION AND THE CULTURAL PROPERTY IMPLEMENTATION ACT

INTRODUCTION

In recent years a burgeoning illicit trade in art has sparked the global pillage of archaeological sites.¹ After a decade of opposition from art dealers,² Congress passed the Cultural Property Implementation Act (CPIA)³ in December 1982, to implement the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Ownership of Cultural Property (UNESCO Convention).⁴ Under the CPIA, the United States agrees to join other art-importing nations in levying import controls over archaeological and ethnological materials that are in jeopardy from pillage.⁵ In an emergency, the United States may impose controls unilaterally.⁶

With the passage of the CPIA, a new issue has emerged. United States art dealers and their political representatives now claim the 1977 construction and application of an existing U.S. statute, the

1. See generally K. MEYER, *THE PLUNDERED PAST* (1973); Bator, *An Essay on the International Trade in Art*, 34 *STAN. L. REV.* 275 (1982); Coggins, *Illicit Traffic of Pre-Columbian Antiquities*, 29 *ART J.* 94 (1969).

2. The legislative history documents a decade of controversy between art dealers and representatives of the U.S. government, the museum community, archaeologists and anthropologists. Legal scholars and advisors to the various constituencies also participated in the years of debate. Between the original bill proposed in 1973, and the final version of the CPIA passed on Dec. 21, 1982, five successive bills, representing varying degrees of revision, entered Congress. See 1982 *U.S. CODE CONG. & AD. NEWS* 4078.

3. Convention on Cultural Property Implementation Act, Pub. L. No. 97-446, §§ 301-315, 96 Stat. 2350-63 (1983) (codified as amended at 19 U.S.C. §§ 2601-2613 (1983)) [hereinafter cited as CPIA]. The CPIA was enacted Jan. 12, 1983.

4. UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 *U.N.T.S.* 231 (1972), 10 *I.L.M.* 289 (1971) [hereinafter cited as UNESCO Convention].

5. The CPIA defines archaeological material as an object of cultural significance at least two hundred and fifty years old and normally discovered as a result of scientific excavation, clandestine or accidental digging, or exploration on land or under water. An ethnological object is the product of a tribal or nonindustrial society that is important to a people's cultural heritage because of the object's characteristics, comparative rarity, or contribution to the knowledge of the origins and history of that people. 19 U.S.C. § 2601(2)(i)-(ii) (1982).

6. *Id.* §§ 2602-2603.

National Stolen Property Act (NSPA),⁷ by the U.S. Court of Appeals for the Fifth Circuit in *United States v. McClain*,⁸ is inconsistent with U.S. law, the CPIA, and the aims of the UNESCO Convention.⁹

The NSPA imposes criminal liability on anyone who transports stolen property in interstate or foreign commerce, knowing it is stolen.¹⁰ In *United States v. McClain*, the Fifth Circuit applied the NSPA to pre-Columbian smuggled artifacts from Mexico.¹¹ The court held that the NSPA applied where a foreign nation had by law clearly declared objects to be government property and where export regulations also forbade their removal from the country.¹²

Critics charge that under *McClain*, the NSPA accepts all foreign ownership laws as valid and violates the CPIA's mandate for multilateral control of the pillage of archaeological sites. The critics fear that the NSPA, as construed under *McClain*, could restrict the U.S. art market and subject U.S. dealers to criminal liability.¹³ Congress is currently considering legislation which would effectively remove cultural property from the reach of the NSPA¹⁴ and thus nullify *McClain*. While the bill remains in Committee, the controversy over *McClain's* validity and its consistency with the CPIA and United States policy toward the illegal art trade continues.¹⁵

7. National Stolen Property Act, ch. 33, § 3, 48 Stat. 794 (1934) (current version at 18 U.S.C. §§ 2314-2315 (1982)) [hereinafter cited as NSPA].

8. *United States v. McClain*, 545 F.2d 988 [*McClain I*], *reh'g denied*, 551 F.2d 52 (5th Cir. 1977), *aff'd in part, rev'd in part*, 593 F.2d 658 (5th Cir. 1979) [*McClain II*], *cert. denied*, 444 U.S. 918 (1979).

9. *A Bill to Amend the National Stolen Property Act, Relating to Stolen Archaeological Property, 1985: Hearing on S. 605 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985) [hereinafter cited as *Hearing on S. 605*]; S. 605, 99th Cong., 1st Sess., 131 CONG. REC. S2611-12 (daily ed. March 6, 1985); H. 10755, 97th Cong., 2d Sess., 128 CONG. REC. 515,987, (daily ed. Dec. 21, 1982); Fitzpatrick, *A Wayward Course: the Lawless Customs Policy Toward Cultural Properties*, 15 N.Y.U. J. INT'L L. & POL., 857 (1983); McAlee, *The McClain Case, Customs, and Congress*, 15 N.Y.U. J. INT'L L. & POL. 813 (1983). See also 18 U.S.C. §§ 2314-2315 (1982).

10. 18 U.S.C. § 2314 (1982).

11. *McClain I*, 545 F.2d 988.

12. *Id.* at 1000-01.

13. *Hearing on S. 605*, *supra* note 9.

14. S. 605, 99th Cong., 1st Sess., 131 CONG. REC. S2611-12 (daily ed. Mar. 6, 1985). The Criminal Law Subcommittee of the Senate Judiciary Committee held hearings on this bill on May 22, 1985. *Hearing on S. 605*, *supra* note 9.

15. *Hearing on S. 605*, *supra* note 9. (Statements of Sen. Paul Laxalt; Sen. Daniel Patrick Moynihan; Sen. Strom Thurmond; Sen. Charles Mathias; Sen. Orrin Hatch; Sen. Joseph Biden; Ely Maurer, Assistant Legal Adviser, Educational, Cultural and Public Affairs, U.S. Dep't of State; Paul M. Bator, Professor of Law, Harvard Univ. (now Professor of Law, University of Chicago); Thomas E. Harvey, General Counsel and Congressional Liaison, U.S. Information Agency; Richard H. Abbey, Chief Counsel, U.S. Customs Service; Maureen Robinson, American Ass'n of Museums; Dr. Albert A. Dekin, Jr., Chair, Governmental Affairs Comm., Society for American Archaeology; Thomas Solley, Director, Indiana Univ. Art Museum; Douglas C. Ewing, President, American Ass'n of Dealers in Ancient, Oriental and Primitive Art; Bernard V. Bothmer, American Ass'n of Dealers in Ancient, Oriental and Primitive Art; James I.K. Knapp, Deputy Assistant Attorney Gen-

This Note will show that the *McClain* construction of the NSPA is fully consistent with U.S. law, with internationally recognized legal doctrines, and with the CPIA and the UNESCO Convention. Section I briefly describes the problem of pillage and summarizes U.S. efforts to control the illicit art trade. Section II presents the *McClain* holding and shows its consistency both with U.S. law and with legal doctrine and practice in other nations. Section III analyzes and responds to arguments of critics that *McClain* is inconsistent with congressional policy in the CPIA, and that the U.S. Customs Service and the State Department are enforcing the NSPA and other U.S. measures in contravention of the CPIA. Section IV explores the value of the NSPA in furthering U.S. policy and shows its harmony with other U.S. and international efforts to control the illicit art trade.

I. BACKGROUND

A. THE PROBLEM OF PILLAGE

The illicit trade in art has reached crisis proportions. Described in a recent news article as “a blitzkrieg on historical sites around the world,”¹⁶ this vandalism may soon strip all known archaeological sites around the world to feed a multi-million dollar market “that subsidizes looting despite an array of federal, state, and international laws” which prohibit this plunder.¹⁷ Scholars calculate that the United States accounts for at least half of the market for pre-Columbian art,¹⁸ nearly all of which has been smuggled from Mexico, Central America,

eral, U.S. Dep't of Justice. See Replies of U.S. Dep't of State to Subcomm. on Criminal Law, Senate Judiciary Comm., Nov. 29, 1985; see also Letter from Secretary of the Interior to Senator Strom Thurmond, (undated) (opposing the passage of S. 605) [on file at the *Cornell International Law Journal*]; Letter from Douglas Ewing to the N.Y. Times, Mar. 5, 1986, at A26, col. 5.

16. Wellborn, *When Greedy Collectors Plunder the Past*, U.S. NEWS & WORLD REP., Mar. 4, 1985, at 79.

17. *Id.*; see also Graham, *Looters Rob Graves and History*, National Geographic, April, 1986, at 453; Lowther, *Robbing Ancient Graves*, MACLEAN'S, Oct. 28, 1985, at 60; Press, *The Hot World of Stolen Art*, NEWSWEEK, Jan. 20, 1986, at 80, col. 1; Weingarten, *Relics Stolen From Mexico Museum Could Be on Underground Auction Block*, Atlanta Constitution, Feb. 1, 1986, at 17, col. 1; *Middle East Art Thefts Tied to Inflated Market*, N.Y. Times, Jan. 7, 1986, at C15, col. 1; Span, *Arresting Trend in Art*, Washington Post, Jan. 7, 1986, at C1, col. 5; *Ugly Trade*, L.A. Times, Jan. 24, 1986, at 4, col. 1; *Ancient Art Stolen in Mexico*, Washington Post, Dec. 27, 1985, at A1, col. 6.

18. Those arts indigenous to the Americas, prior to the discovery of the continent by Europeans, are usually referred to as 'pre-Columbian'. Pre-Columbian art includes pottery, architecture, stone carving, textiles, metallurgy, and paintings, which are the product of a pre-Columbian Indian culture of South America, Mexico, or Central America (*i.e.*, the Aztec, Mayan, and Inca civilizations). Recognition of the aesthetic importance of this art has come only in the 20th century. THE OXFORD COMPANION TO ART 908-23 (H. Osborne ed. 1970).

and the Andean republics of South America.¹⁹ Recent years have seen a dramatic rise in the global theft of art and antiquities,²⁰ accelerated by the ominous use of new technologies that pinpoint rich archaeological sites.²¹

Efforts to curb pillage and regulate the art trade must balance competing values. Art-rich nations wish to preserve their cultural heritage, and often levy sweeping export controls and declare national ownership of their cultural property to do so.²² These measures conflict with the desires of dealers for a free international market in art and with the aesthetic, scientific, and educational benefits which arise from unrestricted international circulation and exchange.²³ Yet as looting increases, the historic context of objects vanishes. The destruction of sites endangers both national heritage and global understanding of ancient cultures. The need for more effective controls seems clear.

The United States, in its efforts to control the illicit trade in art, has attempted to assert the values of both preservation and free trade.²⁴ Until recently the dealers have had the benefit of this balance, because growing U.S. awareness of the need for preservation has taken time to implement.²⁵ Now, however, the CPIA may enable the United States to control the import of endangered archaeological or ethnological materials.²⁶ Furthermore, the U.S. Customs Service is applying the *McClain* construction of the NSPA to prevent pre-Columbian art

19. *Cultural Property Treaty Legislation: Hearings on H.R. 3403 Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. 30 (1979) (statement of Dr. Clemency Coggins, Chairperson, Archaeological Institute of America); MEYER, *supra* note 1.

20. MEYER, *supra* note 1, at 12; Bator, *supra* note 1, at 177, 280-94 and accompanying notes. "According to the International Foundation for Art Research (IFAR), . . . [i]n 1982 museums, galleries and private collectors reported 2,981 thefts of art and antiquities to the IFAR, and only 283 recoveries; by 1984 robberies were up to 4,157 and recoveries down to 160." Press, *supra* note 17, at 60.

21. *Satellite Maps Make Plunder Easy*, San Francisco Chron., Nov. 7, 1985, at 5, col. 5.

22. Merryman, *International Art Law: From Cultural Nationalism to a Common Cultural Heritage*, 15 N.Y.U. J. INT'L L. & POL. 757, 758 (1983); Bator, *supra* note 1, at 294-310, "Mexican legislation provides a striking example of restrictive legislation. . . ."; Nafziger, *International Penal Aspects of Protecting Cultural Property*, 19 INT'L LAW. 835, 845 (1985). See also Mexico's ownership law of 1972 in Ley Federal Sobre Monumentos y Zonas Arqueologicas, Artisticas e Historicas, 312 Diario Oficial D.O. [16] (1972).

23. Merryman, *supra* note 22, at 759; Bator, *supra* note 1, at 295.

24. Merryman, *supra* note 22, at 760-62; see generally, Bator, *supra* note 1.

25. See NSPA, *supra* note 7; Act to Prevent Importation of Pre-Columbian Sculpture and Murals, Pub. L. No. 92-587, §§ 201-205, 86 Stat. 1296 (1972) (codified at 19 U.S.C. §§ 2091-2095 (1982) [hereinafter cited as Pre Columbian Act]); Archaeological Resources Protection Act of 1979, Pub. L. No. 96-95, §§ 2-13, 93 Stat. 721 (1979) (codified at 16 U.S.C. § 470 aa-ll. (1985) [hereinafter cited as ARPA]); see also *infra* notes 52-56, 81-88 and accompanying text.

26. See *infra* notes 57-80 and accompanying text; see also Bator, *supra* note 1, at 858, 864-93.

owned by foreign countries from crossing the U.S. border.²⁷ These measures have provoked U.S. dealers to claim that the NSPA is inconsistent with the CPIA and have engendered the bill to repeal *McClain*.²⁸ Repeal would free dealers from the threat of criminal prosecution for importing stolen art and assuage their fears that U.S. regulation may deflect their market in these antiquities to other countries.²⁹

B. U.S. EFFORTS TO REGULATE THE ILLICIT ART TRADE

1. *International Measures*

The United States attempts to control the illicit art trade through international, national, and municipal remedies. In the international arena, the United States regulates cultural property through four bilateral agreements and an international treaty. A 1972 Treaty with Mexico³⁰ and a 1981 Executive Agreement with Peru³¹ obligate the United States to help those countries recover stolen cultural property through existing U.S. civil and criminal laws. In May, 1984, the United States signed a similar Executive Agreement with Guatemala,³² and an Agreement with Ecuador awaits ratification by that country.³³ The most important U.S. contribution to the international regulation of cultural property, however, is U.S. entry into the UNESCO Convention through passage of the CPIA.

The United Nations Educational Scientific and Cultural Organization began active work toward an international convention to control the illicit trade in cultural property in 1968.³⁴ The UNESCO

27. See McAlee, *supra* note 9, at 815, 829-38; Fitzpatrick, *supra* note 9, at 858, 864-93.

28. *Hearing on S.605, supra* note 9; 131 Cong. Rec. S2611-12 (daily ed. Mar. 6, 1985); McAlee, *supra* note 9, at 827, 836; Fitzpatrick, *supra* note 9, at 864, 865.

29. See *Hearing on S. 605, supra* note 9 (testimony of Sen. Moynihan, Douglas Ewing).

30. Treaty of Cooperation for the Recovery and Return of Stolen Archaeological, Historical, and Cultural Property, July 17, 1970, United States-Mexico, 22 U.S.T. 494, T.I.A.S. No. 7088.

31. Agreement Respecting the Recovery and Return of Stolen Archaeological, Historical, and Cultural Properties, Sept. 15, 1981, United States-Peru, —U.S.T.—, T.I.A.S. No. 10136.

32. Agreement for the Recovery and Return of Stolen Archaeological, Historical, and Cultural Properties, May 21, 1984, United States-Guatemala, —U.S.T.—, T.I.A.S. No. —.

33. Agreement for the Recovery and Return of Stolen Archaeological, Historical, and Cultural Properties, Nov. 17, 1983, United States-Ecuador, — U.S.T. —, T.I.A.S. No. — (not in force).

34. Bator, *supra* note 1, at 371; Note, *The Legal Response to the Illicit Movement of Cultural Property*, 5 LAW & POL. INT'L. BUS., 932, 949-50 (1973).

An early draft, which the United States rejected, emphasized the nationalistic interests of the art-exporting countries. UNESCO Revised Draft Convention Concerning the Means of Prohibiting the Illicit Export and Transfer of Ownership of Cultural Property, 1970, art. 7(a)-(e), *printed in* MEANS OF PROHIBITING AND PREVENTING THE ILLICIT IMPORT, EXPORT AND TRANSFER OF OWNERSHIP OF CULTURAL PROPERTY, UNESCO Doc. SHC/MP/5, Annex III (1970). Known as the "Secretariat Draft," the document imposed

member countries adopted the Convention's final draft in 1970.³⁵ The United States supported entry into the UNESCO Convention in 1972,³⁶ but did not become a member until 1983, when the CPIA, which authorized U.S. entry, finally became law.³⁷ Furthermore, the United States endorsed the UNESCO Convention with important qualifications and accepted only certain provisions of the Treaty.³⁸

Article 9, the crux of the UNESCO Convention, is a brief and general provision that covers archaeological or ethnographic materials which are in jeopardy from pillage.³⁹ Under this article, parties undertake "to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce" in cultural materials. Each state shall, pending agreement, "take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting state."⁴⁰

Article 6 of the UNESCO Convention provides for a system of export controls including state certification of cultural materials authorized for export.⁴¹ "[C]onsistent with national legislation," article 7 of the Convention requires nations to prevent museums and similar institutions from acquiring property illegally exported from other countries.⁴² Parties to the Convention also agree to return property stolen from museums and other institutions to the state of origin upon request, provided the requesting state pays compensation to an innocent purchaser or person with valid title to the property.⁴³

sweeping export and import controls, defined cultural property as "all property which is important for history," and contained an "all or nothing clause" that forbade reservations to the Convention. See Bator, *supra* note 1, at 371-72; Note, *supra*, at 949-55. The Convention's final text represented a more realistic balance of interests between the art-source countries and the art-importing nations. For accounts of the U.S. position and the legislative process that led to the final text, see Bator, *supra* note 1, at 343-44, 370-84; Note, *supra*, at 956-63. The major U.S. contribution was a "crisis" provision, which authorized affirmative measures and controls by member nations implemented on an *ad hoc* basis when a state's cultural heritage is jeopardized by the removal of cultural property highly important to the national patrimony. See Bator, *supra* note 1, at 355, 373, 379; Note, *supra*, at 958.

35. S. EXEC. REP. NO. 29, 92d Cong., 2d. Sess. 17 (1972), [hereinafter cited as "S. EXEC. REP. NO. 29].

36. The Senate gave its advice and consent on August 11, 1972. 118 CONG. REC. 27,924-25 (1972).

37. See CPIA, *supra* note 3.

38. S. EXEC. REP. NO. 29, *supra* note 35, at 9. For a discussion of the U.S. qualifications to understandings of its endorsement of the Convention, see Note, *supra* note 34, at 964-67.

39. UNESCO Convention, *supra* note 4, art. 9.

40. *Id.*

41. *Id.* art. 6(a)-(b).

42. *Id.* art. 7(a).

43. *Id.* art. 7(b). Other provisions of the Convention provide for national inventories and dealer lists to identify art for purposes of control. *Id.* arts. 5(b), 10(a).

As mentioned, the United States modified several of its provisions in endorsing the UNESCO Convention. The United States reserved the right to decide unilaterally whether to impose export controls on its own cultural property.⁴⁴ The United States further qualified its adoption of the Convention with several "understandings."⁴⁵ First, the Senate emphasized that the Convention is neither self-executing nor retroactive.⁴⁶ This qualification created the need for implementing legislation (the CPIA). The Senate also stated that Article 7(a), prohibiting the acquisition of illegally exported materials by museums and similar institutions, applies only to institutions whose acquisition policy is subject to national control.⁴⁷ Since practically all U.S. museums are private, this qualification exempts most U.S. institutions from Article 7(a).⁴⁸ Concerned that acceptance of the UNESCO Convention not impinge on U.S. laws, the United States explicitly linked acceptance of the UNESCO Convention to the maintenance of existing domestic penal remedies, including the NSPA.⁴⁹ For example, the United States emphasized that acceptance of Article 7(b) prohibiting the import of property stolen from museums, "does not affect existing remedies available in state and federal courts."⁵⁰

44. S. EXEC. REP. NO. 29, *supra* note 35, at 9. Paul Bator notes: "It was clear from the beginning that the United States could not and would not give up the right to decide for itself whether and when to apply export controls over works of art. . . ." Bator, *supra* note 1, at 377.

45. S. EXEC. REP. NO. 29, *supra* note 35, at 9.

46. *Id.*

47. *Id.*

48. The Library of Congress and the National Archives are subject to federal control. The Smithsonian Institution is governed by a board of regents. The Smithsonian considers itself a semiprivate organization. Note, *supra* note 34, at 965 n.213. Paul Bator, however, regards article 7(a) as applicable to the Smithsonian. Bator, *supra* note 1, at 362 n.148.

49. S. EXEC. REP. NO. 29, *supra* note 35, at 21 (Letter of Submittal to the Senate from the Department of State, Nov. 11, 1971). The U.S. State Department responded to a Convention requirement that states impose sanctions on persons violating the prohibition against importing stolen property under Article 7(b) by noting that "[t]he laws of the United States and presumably the laws of most states, prohibit the theft and the receipt and transportation of stolen property." *Id.* The letter states the U.S. position that the NSPA and the U.S. Customs statute that triggers its application are consistent with and will assist in the enforcement of the UNESCO Convention's mandates. (Section 545 would apply "Title 18, United States Code, Sections 2314-15 [NSPA] . . . , Title 18 United States Code, to willful violations of Article 7(b) when that provision is implemented by statute"). *Id.* (18 U.S.C. § 545 (1976) provides: "Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported contrary to law, shall be fined not more than \$10,000 or imprisoned not more than five years or both.")

50. S. EXEC. REP. NO. 29, *supra* note 35, at 20 (Letter of Submittal to the Senate from the Department of State, Nov. 11, 1971). Art. 7(b)(ii) of the UNESCO Convention requires member states "at the request of the State Party of origin to take appropriate steps to recover and return any such cultural property imported after the entry into force of this convention in both states concerned, provided, however, that the requesting state shall pay just compensation to an innocent purchaser or to a person who has valid title to that prop-

Although it accepted only aspects of the Convention, the United States endorsed the Convention's central provision, the mandate for both multilateral and unilateral efforts to control pillage.⁵¹ Thus, the United States committed itself to the principle of protection of cultural property on an international scale.

2. National Legislation

Besides international treaties and agreements, four U.S. statutes seek to combat the illicit trade in cultural property.

a. The Pre-Columbian Act of 1972

Passage of the Pre-Columbian Act of 1972⁵² represented a unilateral initiative by the United States to stop the dismemberment of monumental pre-Columbian stelae.⁵³ The Act prohibits the import of illegally exported "pre-Columbian monumental or architectural sculptures or murals."⁵⁴ Unlike state property laws or national criminal law, the Act does not require that the sculptures or murals be stolen, only that they be "subject to export control by the country of origin."⁵⁵ Failure to produce a certificate from the country of origin authorizing export results in detention at the border and, if authorization is not forthcoming, the United States seizes the art and offers to return it to its home country.⁵⁶

b. The Cultural Property Implementation Act

The Cultural Property Implementation Act (CPIA)⁵⁷ implements

erty." *Id.* at 9. The Senate mandated that acceptance of this obligation is "without prejudice to other remedies, civil or penal, for the recovery of stolen cultural property to the rightful owner without compensation." *Id.*

In other qualifications, the U.S. declined to establish national mechanisms to oversee preservation activities and refused to require its dealers to maintain a list of property sold with information about origins and price. *See* S. EXEC. REP. NO. 29, *supra* note 35, at 19-20 (Letter of Submittal to the Senate from the Department of State, Nov. 11, 1971). The State Department position was that the National Park Service of the Department of Interior, the Library of Congress, and the National Archives have responsibilities for the protection of cultural property. *Id.* *See also* Note, *supra* note 34, at 966 n.215; UNESCO Convention, *supra* note 4, art. 5. For the U.S. position on regulation of antique dealers, see S. EXEC. REP. NO. 29, *supra* note 35, at 22 n.106.

51. S. EXEC. REP. NO. 29, *supra* note 35, at 9. *See supra* note 40 and accompanying text.

52. Pre-Columbian Act, *supra* note 25.

53. *See* 19 U.S.C. §§ 2091-2095 (1982). "Stelae are monumental stone slabs, usually carved with both pictures and hieroglyphs, erected in ceremonial centers." Bator, *supra* note 1, at 278 n.4. *See also* Coggins, *Archaeology and the Art Market*, 175 Sci. 263 (1972).

54. 19 U.S.C. §§ 2091-2095 (1982).

55. *Id.* § 2095(3)(A)(iii).

56. *Id.* § 2093.

57. CPIA, *supra* note 3.

articles 9 and 7(b) of the UNESCO Convention.⁵⁸ The Act's provisions are far more detailed and qualified than the UNESCO mandate which it implements. Sections 303 and 304⁵⁹ specifically interpret the general mandate of Article 9 for "concerted international action" to assist a party whose "cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials."⁶⁰ These two sections apply only to archaeological or ethnographic materials over 250 years old⁶¹ and respond only to situations of jeopardy or emergency.⁶² Section 303 allows the United States to impose import controls in concert with other art-importing nations if it finds that these materials are in jeopardy from pillage.⁶³ Section 304 allows the United States to impose controls unilaterally in an emergency.⁶⁴

Both these sections set rigorous conditions under which the United States may act.⁶⁵ Under Section 303, the state party affected must request assistance from the United States in writing, with factual documentation.⁶⁶ Section 303 enumerates four other requirements for Presidential authority to act: (1) that the requesting party's cultural patrimony is in jeopardy; (2) that the affected state has tried to help itself; (3) that import controls will be of substantial benefit, and less drastic remedies are not available; (4) and that U.S. import controls be applied in concert with similar restrictions by other art-importing

58. UNESCO Convention, *supra* note 4, arts. 9, 7(b).

59. 19 U.S.C. §§ 2602, 2604 (1982).

60. UNESCO Convention, *supra* note 4, art. 9.

61. 19 U.S.C. § 2601 (1982).

62. *Id.* §§ 2602, 2604.

63. *Id.* § 2602. A limited exception to the requirement of multilateral action permits the United States to enter into an agreement to bar importation of certain cultural property in a non-emergency situation without full participation of art-importing nations if the President decides that the non-participating nation is "not essential to deter a serious situation of pillage" and the import controls will have substantial benefit. *Id.*

64. *Id.* § 2604.

65. A Cultural Property Advisory Committee assists the President in his determination of the conditions permitting either multinational or unilateral action. This Committee consists of eleven members appointed by the President from constituencies representing the archaeological and anthropological professions, dealers, museum officials, and the general public. *Id.* § 2605. The Committee must make recommendations to the President on whether to enter a bilateral or multilateral agreement with the requesting state party within 150 days. *Id.* §§ 2602(f)(3), 2605(f)(1). For an emergency request or a situation which the Committee considers a crisis, the Committee must report within 90 days. *Id.* §§ 2603(c)(2), 2605(f)(3). If the Committee recommends action, the President may negotiate an agreement with the state party. *Id.* § 2602(f). If, contrary to the Committee's recommendation, the President should decide not to enter an agreement to impose controls, he is required by law to justify his action to Congress. *Id.* § 2602(g)(3).

66. *Id.* § 2602(a)(3). The first request under the CPIA has been received. Interestingly, it comes not from a Latin-American country but from Canada, which in recent years has suffered extensive loss of Iroquois and other North American Indian artifacts to looters who steal the objects and sell them at high prices to dealers in the United States. See generally News Release, "Canada Files First Request to U.S. for Protection of Endangered Artifacts," U.S.I.A., Oct., 2, 1985. See also U.S.I.A. World, Dec. 1985, at 12, col. 1.

nations.⁶⁷ The United States may enter a bilateral agreement with the requesting state party before other art-importing nations levy comparable controls.⁶⁸ If other such nations do not act similarly within a reasonable period, however, the United States must suspend its import controls.⁶⁹ The requirement for multilateral action and for suspension of U.S. controls if such action is not forthcoming respond to the concern of art dealers that "if we adopt stringent legislation, the art market will simply shift elsewhere, to Europe or Japan. . . ." ⁷⁰

Yet significantly, the CPIA permits U.S. action even in the absence of parallel controls by other art-importing nations.⁷¹ In this, the CPIA transcends the requirement of UNESCO's Article 9, which merely requests "provisional measures to the extent feasible."⁷² The Act allows the United States to respond unilaterally in an emergency. An emergency exists when archaeological or ethnological material is (1) newly discovered and of importance for the understanding of the history of mankind, and is in jeopardy from pillage, dismantling, dispersal, or fragmentation; (2) from a site of high cultural significance and one which is in jeopardy of crisis proportion; or (3) part of the remains of a culture or civilization whose record is in jeopardy of crisis proportion.⁷³ Application of import restrictions must reduce the incentive for pillage, dismantling, dispersal, or fragmentation.⁷⁴ The emergency controls are temporary, but they may run for five years with a possible three year extension.⁷⁵

After a multilateral agreement or unilateral emergency action is in force, the Secretary of the Treasury must promulgate a list of the controlled cultural materials and give fair notice of the restrictions to importers and other interested persons. The U.S. Customs Service is responsible for enforcing the import restrictions,⁷⁶ and promulgated interim regulations in 1985 that apply the CPIA's provisions.⁷⁷

In contrast to the sections that cover only archaeological or ethnological materials, Section 308 of the CPIA implements Article 7(b) of the UNESCO Convention by prohibiting the importation of *all* cul-

67. 19 U.S.C. § 2602(a)(1)(A)-(D) (1982).

68. *Id.* § 2602(a)(2)(A). Bilateral and multilateral agreements run for five years and may be extended for five additional years. *Id.* §§ 2602(e), 2605(b).

69. *Id.* § 2602(d)(1)-(2).

70. Emmerich, *Symposium: Legal Aspects of the International Traffic in Stolen Art*, 4 SYRACUSE J. INT'L L. & COM. 51, 111 (1967).

71. 19 U.S.C. § 2604 (1982).

72. UNESCO Convention, *supra* note 4, art. 9.

73. 19 U.S.C. § 2603(a)(1)-(3) (1982).

74. *Id.* § 2603(a).

75. *Id.* § 2603(c)(3).

76. *Id.* § 2613.

77. 19 C.F.R. § 12 (1985). These regulations specify the criteria for documentation, evidence, notice, time limits, forfeiture, and return of controlled cultural materials. *Id.*

tural property stolen from a museum, religious or secular monument, or similar institution. This banned cultural property must be documented as inventory of a museum or institution.⁷⁸ If shown to have been stolen, it is subject to forfeiture and return.⁷⁹ Again, the U.S. Customs Service is responsible for enforcement.⁸⁰

c. The National Stolen Property Act

The National Stolen Property Act (NSPA)⁸¹ prohibits the transportation "in interstate or foreign commerce of any goods, wares, merchandise, . . . of the value of \$5000 or more, knowing the same to have been stolen, converted or taken by fraud."⁸² The need for federal action to control the movement of stolen goods in interstate and foreign commerce underlies the NSPA.⁸³ In *United States v. McClain*,⁸⁴ the Court of Appeals for the Fifth Circuit applied the NSPA to pre-Columbian artifacts illegally exported from a foreign country. The court held that a foreign country can be an owner of property by legislative declaration of ownership, without reducing the property to possession. Proof of exportation after such declaration of ownership is then sufficient to prove that the property is stolen and will trigger the NSPA's penal sanctions.⁸⁵

78. The definition of cultural property follows art. 1 of the UNESCO Convention. 19 U.S.C. § 2601(b) (1982). Cultural property therefore refers not only to archaeological or ethnographic objects but includes a broad range of materials, from art, sculpture, manuscripts, archives, and documents, to rare specimens or collections of flora, fauna, and minerals, and objects of palaeontological interest. UNESCO Convention, *supra* note 4, art. 1(a)-(k).

79. 19 U.S.C. § 2609 (1982). Section 310(a) mandates that any designated archaeological material or article of cultural property which is imported into the United States in violation of section 307 or 308 shall be subject to seizure and forfeiture. *Id.* § 2609(a). In establishing theft, the burden of proof is on the United States. *Id.* § 2610. Subsections 311(1) and (2) require the United States to establish that the archaeological materials have been properly listed and that stolen cultural property is documented as the inventory of a museum or similar institution, and was stolen after the CPIA became law. *Id.* § 2610(1)-(2)(A),(B). "The Convention on Cultural Property Implementation Act, Pub. L. 97-446, became effective on April 12, 1983, and the provisions relating to the importation of stolen property became effective on that date." Inapplicability of Notice and Delayed Effective Date Provisions, 50 Fed. Reg. 26194 (1985).

80. "In the customs territory of the United States, and in the Virgin Islands, the provisions of this title shall be enforced by appropriate customs officers." 19 U.S.C. § 2613 (1982).

81. NSPA, *supra* note 7.

82. *Id.* § 2314.

83. For a discussion of the legislative history of the NSPA, see *United States v. Smith*, 686 F.2d 234, 244-46 (5th Cir. 1982). The *Smith* court noted that the NSPA was an attempt to aid the states by providing a centralized, i.e., federal, means of law enforcement. *Id.*

84. 545 F.2d 988 (5th Cir. 1977).

85. *Id.* at 1000-01; *McClain II*, 593 F.2d 658, 670-71 (5th Cir. 1979). See also *infra* notes 91-121 and accompanying text.

d. The Archaeological Resources Protection Act

A recent U.S. statute protects archaeological materials on U.S. and Indian lands. The Archaeological Resources Protection Act (ARPA) of 1979⁸⁶ establishes penalties for knowing removal without a permit of any archaeological resources located on these lands.⁸⁷ ARPA levies criminal penalties similar to those of the NSPA.⁸⁸

3. *Municipal Remedies*

In addition to international measures and national statutes, civil suits under state law (in state or federal courts) may accomplish the recovery of stolen property. In these actions the plaintiff must prove ownership; if goods are stolen, the original owner will prevail. Traditional property laws apply, involving concepts of title, bona fide purchasers for value, and conversion.⁸⁹ Civil action, however, is at best slow, ponderous, and expensive.⁹⁰

86. ARPA, *supra* note 25.

87. *See Id.* § 470ee.

88. Under ARPA, any person who knowingly commits one of the prohibited acts, upon conviction, could be fined from \$10,000 to \$100,000 or imprisoned for five years or both, depending on the value of the materials and number of offenses. *Id.* § 470ee(d). Under the NSPA, persons convicted of the prohibited activities could be fined \$10,000 to \$100,000 or imprisoned up to ten years or both. 18 U.S.C. § 2314 (1982).

89. *See* Nowell, *American Tools to Control the Illegal Movement of Foreign Origin Archaeological Materials: Criminal and Civil Approaches*, 6 SYRACUSE J. INT'L L. & COM. 77, 102-05 (1978). Legal title is "[o]ne cognizable or enforceable in a court of law, or once which is complete and perfect so far as regards the apparent right of ownership and possession, . . . full and absolute title or apparent right of ownership. . . ." BLACK'S LAW DICTIONARY 807 (5th ed. 1979); a bona fide purchaser for value is "one who has purchased property for value without any notice of any defects in the title of the seller." *Id.* at 161. Conversion is "[a]n unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights." *Id.* at 300.

In a civil suit, where possession is disputed, as when an importer will not recognize the claim of a private institutional, or government owner, interpleader actions may be undertaken to decide the conflicting claims. BLACK'S LAW DICTIONARY defines interpleader as follows:

When two or more persons claim the same thing (or find) of a third, and he, laying no claim to it himself, is ignorant which of them has a right to it, and fears he may be prejudiced by their proceedings against him to recover it, he may join such claimants as defendants and require them to interplead their claims so that he may not be exposed to double or multiple liability. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counter-claim. Interpleader in federal court is governed by the Federal Interpleader Act, 28 U.S.C.A. § 1335, and Fed.R. Civil P. 22. Similar statutes and court rules govern interpleader in state courts.

Id. at 733. *See also* U.S. CUSTOMS SERVICE, SUPPLEMENT TO POLICIES & PROCEDURES MANUAL: SEIZURE AND DETENTION OF PRE-COLUMBIAN ARTIFACTS (Oct. 5, 1982) [hereinafter cited as Customs Service Manual].

90. Nowell, *supra* note 89, at 105. The claimant must prove ownership, which may require specific identification of the objects and their source. Statutes of limitations may preclude recovery even where ownership has been established. *Id.*

II. NSPA AND CPIA: BASES OF THE CONTROVERSY

A. THE NSPA AND THE *McCLAIN* DECISION

1. *The McClain* Decision

In *United States v. McClain*,⁹¹ the U.S. District Court for the Western District of Texas convicted five defendants of conspiring to transport, receive, and sell stolen pre-Columbian artifacts of Mexican origin in interstate commerce in violation of the NSPA.⁹² On appeal, the Fifth Circuit held that the NSPA properly applies to illegal exportation of artifacts which Mexican law has declared to be the property of the nation.⁹³

Critics of *McClain* assert that the court's application of the NSPA lacks a valid legal basis.⁹⁴ They emphasize that under *McClain*, "property can be deemed 'stolen' under the NSPA simply because a foreign country has passed a law declaring that it owns all art objects found within its borders, notwithstanding the fact that citizens of that foreign country may possess and trade in those objects."⁹⁵ They believe that *McClain* accepts "blanket declarations" of state ownership without qualification and that the NSPA consequently turns on the meaning of foreign law.⁹⁶ The critics charge that the *McClain* court's definitions of "stolen" and "ownership," under which governments can suffer theft of property they own but do not possess, are inconsistent with U.S. common law.⁹⁷

91. *United States v. McClain*, 545 F.2d 988 [*McClain I*], *reh'g denied*, 551 F.2d 52 (5th Cir. 1977), *aff'd in part, rev'd in part*, 593 F.2d 658 (5th Cir. 1979) [*McClain II*], *cert. denied*, 444 U.S. 918 (1979).

92. The defendants had negotiated the sale of these objects with an undercover F.B.I. agent; they knew export was illegal and violated Mexican ownership law. The Court of Appeals for the Fifth Circuit reversed the convictions because an inaccurate instruction could have prejudiced the jury as to the defendant's knowledge of Mexico's ownership. *McClain I*, 545 F.2d at 1000.

93. *Id.* at 996, 1002-03 & n.33. On a second appeal, another Fifth Circuit panel found that the defendants clearly knew the goods belonged to the Mexican government and convicted the defendants of conspiracy to violate the NSPA. *McClain II*, 593 F.2d at 671-72. *McClain II* affirmed the *McClain I* holding that the NSPA applies to property illegally exported from a country that had assumed ownership of that property by legislative declaration, and more fully explained the basis and requirements for government ownership. *Id.* at 663-64, 670-71.

94. 128 CONG. REC. H10747 (daily ed. Dec. 21, 1982); 131 CONG. REC. S2611-12 (daily ed. Mar. 6, 1985); McAlee, *supra* note 9, at 836.

95. Fitzpatrick, *supra* note 9, at 863.

96. *Hearing on S. 605, supra* note 9 at 25 (statement of Paul Bator); McAlee, *supra* note 9, at 827 (quoting Bator, *supra* note 1, at 328, 372-73); Fitzpatrick, *supra* note 9, at 870.

97. 128 CONG. REC. H10747 (daily ed. Dec 21, 1982); 131 CONG. REC. S2612 (daily ed. Mar. 6, 1985) (statement of Sen. Moynihan); Fitzpatrick, *supra* note 9, at 863 n.23; Bator, *supra* note 1, at 348 & n.129 (quoting amicus brief filed by Arnold & Porter on behalf of The American Association of Dealers in Ancient, Oriental and Primitive Art).

The critics also argue that *McClain's* interpretation of the NSPA is inconsistent with the CPIA and the aims of the UNESCO Convention. They claim that, in unilaterally responding to the ownership declarations of foreign countries, the NSPA rejects the basic principle of CPIA, which is that U.S. measures to control pillage will be part of a concerted international effort.⁹⁸ The commentators criticize U.S. Customs Service enforcement of the NSPA and the bilateral agreements as inconsistent with the principle of participation in a truly international effort. They accuse the Customs Service of exceeding its statutory authority.⁹⁹

B. THE *McCLAIN* REQUIREMENTS, LEGAL FOUNDATION, AND CONSISTENCY WITH U.S. LAW

1. Requirements

The *McClain* court held that property stolen from a foreign government, like property stolen from a private owner, is within the protection of the NSPA.¹⁰⁰ But contrary to the views of *McClain's* critics,¹⁰¹ blanket declarations do not meet the standards for government ownership under *McClain*. For legitimate ownership, the *McClain* court required clear and unambiguous laws and insisted that the NSPA "cannot properly be applied to items deemed stolen only on the basis of unclear pronouncements by a foreign legislature."¹⁰² A broad claim of national patrimony will not constitute a valid ownership law.¹⁰³

The critics mistakenly believe that under *McClain*, the NSPA equates illegal export with theft, and use this as a major argument against the *McClain* holding.¹⁰⁴ Under *McClain*, however, theft

98. *Hearing on S. 605, supra* note 9 (testimony of Sen. Moynihan, Douglas Ewing); McAlee, *supra* note 9, at 814, 836; Fitzpatrick, *supra* note 9, at 860-63.

99. *Hearing on S. 605, supra* note 9 at 6, 102 (testimony of Sen. Moynihan, Douglas Ewing); McAlee, *supra* note 9, at 815, 829, 836; Fitzpatrick, *supra* note 9, at 869-74, 878-94.

100. *McClain I*, 545 F.2d 988, 994-97 (5th Cir. 1977). "In addition to the rights of ownership as understood by the common law, the N.S.P.A. also protects ownership derived from foreign legislative pronouncements, even though the owned objects have never been reduced to possession by the foreign government. . . ." *McClain II*, 593 F.2d 658, 664 (5th Cir. 1977).

101. *See, e.g.*, Bator, *supra* note 1, at 350: "A blanket legislative declaration of state ownership of all antiquities, discovered and undiscovered, without more, is an abstraction. . . . Yet *McClain* gives this abstraction dramatic weight: illegal export, after the adoption of the declaration, suddenly becomes 'theft'."

102. *McClain II*, 593 F.2d at 671. This mandate requires at the threshold "sufficient clarity to survive translation into terms understandable by and binding upon American citizens." *Id.* at 670. *See also McClain I*, 545 F.2d at 1000.

103. *McClain II*, 593 F.2d at 671.

104. "The key question remains whether excavations unauthorized by a foreign government constitute a 'theft' under the National Stolen Property Act. This is the controversial issue at the heart of the *McClain* decision." Fitzpatrick, *supra* note 9, at 867.

remains distinct from illegal export. Export restrictions must accompany a nation's valid declaration of ownership, but the violation of export controls in the absence of such a declaration does not constitute theft.¹⁰⁵ On this point the *McClain* court was explicit:

the state's power to regulate is not ownership . . . [restrictions on exportation] do not create "ownership" in the state. The state comes to own property only when it acquires such property in the general manner by which private persons come to own property, or when it declares itself the owner; the declaration is an attribute of sovereignty.¹⁰⁶

Critics of the *McClain* holding would withhold recognition of this sovereignty, fearing that a foreign country can invoke the criminal legislation of the United States "by simply waving a magic wand and promulgating [a] metaphysical declaration of ownership."¹⁰⁷ The point, however, is not whether U.S. sanctions under the NSPA will assist the exporting country enforce its export rules, but whether U.S. law applies. In regulating goods that cross its border from a foreign country and defining the conditions under which it will recognize foreign laws, the United States is applying its own law. Moreover, the *McClain* construction of the NSPA is faithful to congressional intent to protect the owners of stolen property, whoever they are.¹⁰⁸

Furthermore, the NSPA mandates the stringent requirement of knowledge (*scienter*) for criminal liability. The defendant must *know* that a country has an ownership law and export restrictions before he is deemed to have stolen property from that country.¹⁰⁹ It is difficult to prove *scienter*. The government must prove beyond a reasonable doubt that the defendant knew the goods were stolen.¹¹⁰ The *McClain*

105. "We do not base this conclusion on illegal export of antiquities." *McClain I*, 545 F.2d at 996.

106. *Id.* at 1002-03.

107. Bator, *supra* note 1, at 350-51.

108. For a general summary of the legislative history and congressional intent behind the NSPA, see *United States v. Smith*, 686 F.2d 234, 244-46 (5th Cir. 1982). "The aim of the statute is, of course, to prohibit the use of interstate transportation facilities for goods having certain unlawful qualities. This reflects a congressional purpose to reach all ways by which an owner is wrongfully deprived of the use of benefits of the use of his property." *Lyda v. United States*, 279 F.2d 461, 464 (5th Cir. 1960). As the *McClain* court recognized, "The Republic of Mexico, when stolen property has moved across the Mexican border, is in a similar position to any state of the United States in which a theft occurs and the property is moved across state boundaries." *McClain I*, 545 F.2d at 994. Thus, the use of the NSPA to regulate foreign commerce is just as much an application of U.S. law as its use to regulate interstate commerce.

109. *McClain I*, 545 F.2d at 992; *McClain II*, 593 F.2d at 672; 18 U.S.C. §§ 2314-2315.

110. *Hearing on S. 605, supra* note 9, at 27 (testimony of James I.K. Knapp). Mr. Knapp provided an Appendix on the applicability of the NSPA to certain forms of stolen archaeological and ethnological material to emphasize the prosecution's heavy burden of proof. The Appendix stated that "[t]he Government would have to show *actual knowledge*. The uncertainty of foreign laws and honest claims of an innocent purchase for value without guilty knowledge would be extremely hard to overcome." *Id.* See also Nowell, *supra* note 89, at 99; Note, *supra* note 34, at 940; Fitzpatrick, *supra* note 9, at 883. Fitzpatrick, a *McClain* critic, notes that the *McClain* decisions emphasized the specific, personal-

court emphasized that any doubt about *scienter* should be resolved in favor of lenity.¹¹¹ Like the requirements of clarity and unambiguity in foreign declarations of ownership, the *scienter* requirement functions both as a limit on practical enforcement and a safeguard that the NSPA will not be applied illegitimately.

2. Legal Foundation

The charge that *McClain* lacks legal foundation rests on the belief that the *McClain* court's definitions of "stolen" and "ownership," and its denotation of governments as owners are inconsistent with U.S. common law.¹¹² Under this view of the common law, "stealing" requires theft from an owner; ownership requires possession. Since governments claim ownership without actual possession of artifacts, they cannot be owners.

In fact, the *McClain* court's definitions have strong legal support both in U.S. law and in the legal doctrines of many nations. In defining "stolen," the *McClain* court relied on a Supreme Court holding in *United States v. Turley*, which interpreted "stolen" broadly.¹¹³ The *Turley* court cited an earlier Fifth Circuit NSPA case, *Crabb v. Zerbst*, which recognized that "stealing [has] no common law meaning to restrict its meaning as an offense, [and] is commonly used to denote any dishonest transaction whereby one person obtains that which rightfully belongs to another . . ."¹¹⁴ *McClain* also relied on a post-*Turley* Fifth Circuit case, *Lyda v. United States*, which, in construing the NSPA, endorsed the broad *Turley* reading of "stolen."¹¹⁵ The *McClain* court, quoting the *Lyda* decision, stated that "[the NSPA] reflects a congressional purpose to reach *all ways* by which an owner is wrongfully deprived of the use or *benefit of the use* of his property (emphasis added)."¹¹⁶

McClain's reading of "stolen" is thus consistent with U.S. precedent. Furthermore, to the degree that the series of broad readings cre-

ized *scienter* requirement of the NSPA and the need for a jury to find that the defendant knew the exportation of Pre-Columbian artifacts violated a clear legislative declaration of a Latin American country. *Id.* at 883-84. Mr. Knapp also stated that "[e]ach of the various elements listed below [for criminal conviction under the NSPA] must be proven beyond a reasonable doubt." *Hearing on S. 605, supra* note 9.

111. *McClain I*, 545 F.2d at 995.

112. See e.g., ARPA, *supra* note 25.

113. 352 U.S. 407 (1957). *Turley* concerned the interstate transportation of stolen vehicles. The court stated that because "stolen" has no accepted common law meaning, the word should be interpreted broadly, consistent with the purpose of the legislation in which it appears. *Id.* at 411-12.

114. *Crabb v. Zerbst*, 99 F.2d 562, 565 (5th Cir. 1938) (cited with approval in *Turley*, 352 U.S. at 412 n.9).

115. *Lyda v. United States*, 279 F.2d 461, 464 (5th Cir. 1960).

116. *McClain I*, 545 F.2d 988, 995 n.6 (5th Cir. 1977).

ate a common law usage of "stolen," *McClain* follows the evolving common law. But whether regarded simply as adopting its precedents, or as a marker on the road of developing common law, *McClain* does not lack legal foundation; it applies accepted principles and definitions of "stealing" and "ownership" to property which a country may own.

The history of "stolen" after *McClain* upholds the court's construction. In *United States v. Smith*,¹¹⁷ the Fifth Circuit, excepting a copyright violation from the broad reach of "stealing" under the NSPA, cited a 1978 Second Circuit case¹¹⁸ to emphasize that stealing is essentially an offense against another's proprietary or possessory interests in property.¹¹⁹ Finally, in *United States v. Gallant*, a district court cited *Smith* to emphasize that "the statutory language 'stolen' and 'converted' covers a broad range of illegal acquisition and use of another's property," and that the phraseology used by Congress, "stolen, converted, or taken by fraud," is intended "to cover illegal acquisitions and uses comprehensively."¹²⁰

3. Ownership and U.S. Law

The *McClain* court asserted that "possession is but a frequent incident, not the *sine qua non* of ownership, in the common law or the civil law."¹²¹ The *McClain* court correctly stated U.S. law, under which a state or national government may be an owner even though it has never physically possessed the goods it owns.

A state may own property or resources. For example, Louisiana has declared that it owns wild birds, quadrupeds, fish, aquatic life, oysters, shellfish, and the beds of bodies of water within the state, although these 'objects' have not been reduced to state possession.¹²² Recent decisions involving NSPA violations have upheld state ownership of alligators.¹²³ In *Geer v. Connecticut*, the U.S. Supreme Court

117. *United States v. Smith*, 686 F.2d 234 (5th Cir. 1982).

118. *United States v. Long Cove Seafood, Inc.*, 582 F.2d 159, 163 (2d Cir. 1978).

119. 686 F.2d at 243.

120. *United States v. Gallant*, 570 F. Supp. 303, 313 (S.D.N.Y. 1983).

121. *McClain I*, 545 F.2d 988, 992 (5th Cir. 1977).

122. 56 LA. REV. STAT. ANN. § 3 (West 1985). See also Replies of U.S. Dep't of State to Questions from the Subcomm. on Criminal Law, Senate Comm. on the Judiciary (testimony of Ely Maurer, Assistant Legal Adviser, Educational, Cultural and Public Affairs, U.S. Dep't of State), June 24, 1985 [hereinafter cited as Replies]. The U.S. Department of Justice concurred in these Replies.

123. *United States v. Plott*, 345 F. Supp. 1229, 1232 (S.D.N.Y. 1972); *United States v. Klapisch*, No. 77-620, slip op. (E.D.N.Y. July 28, 1978) (unreported decision). Judge Sifton held that the Louisiana declaration of ownership of alligators suffices "to establish that the skins of wild alligators may be shown to have been 'stolen' within the meaning" of the NSPA. *Id.*

affirmed that a state owns wildlife in its sovereign capacity.¹²⁴ In *United States v. Long Cove Seafood*, the Second Circuit emphasized that a state or a town may be an owner of clams or other natural resources which are not possessed.¹²⁵

On a national level, the Archaeological Resources Protection Act (ARPA), which protects archaeological artifacts on public and Indian lands,¹²⁶ supports the *McClain* definition of theft and contains parallels in relief to the NSPA.¹²⁷ Although ARPA does not assert public title to artifacts found on Indian lands, the statute's legislative history makes clear that Congress regards such materials as having been stolen.¹²⁸ The Committee on Interior and Insular Affairs justified need for the law by noting "the dramatic rise in recent years of illegal excavations on public lands and Indian lands for private gain" and found that existing penalties "have proven to be an inadequate deterrent to theft of archaeological resources from public lands."¹²⁹ Thus, like the NSPA, ARPA covers stolen materials owned by individuals (Indians) or by sovereign nations (Indian tribes, or the U.S. government). And like the NSPA, ARPA provides criminal penalties for all who knowingly commit one of the prohibited acts.

C. LEGAL CONSISTENCY: INTERNATIONAL ASPECTS

Both common law and civil law systems in many countries reveal concepts of national or state ownership that do not require possessory interests by the government. The doctrine of Treasure Trove provides salient illustration of this kind of government ownership. According to this doctrine, the sovereign or government is entitled to treasure—originally limited to gold and silver—which has been buried in the ground over time and of which the ownership is unknown.¹³⁰

The Treasure Trove doctrine runs through the legal systems of many nations, spanning vast eras and far-flung locations. Numerous examples of laws exist from early Christian times to the twentieth cen-

124. *Geer v. Connecticut*, 161 U.S. 519, 529 (1896). *Plott* court cited the *Geer* holding. 345 F. Supp. at 1232.

125. "We do not suggest that a larceny could not be proven here. If an owner gives permission to a clam digger to take mature clams and expressly prohibits the taking of seed clams, and if the digger exceeds this license and intentionally takes both mature and seed clams, then the digger may be guilty of a larceny of the seed clams. It would be no less a larceny if the owner were a town and the express prohibition were found in a town ordinance." *United States v. Long Cove Seafood* 582 F.2d, 159, 165-66 (1978).

126. 16 U.S.C. § 470aa.-ll. (1982). See *supra* notes 86-88 and accompanying text.

127. 16 U.S.C. § 470aa.-ll. 18 U.S.C. §§ 2314-2315 (1982). See *supra* notes 81-85 and accompanying text.

128. H.R. REP. NO. 311, 96th Cong., 1st Sess., 6-10 (1979).

129. *Id.* at 7.

130. Replies, *supra* note 122. See SIR GEORGE F. HILL, TREASURE TROVE IN LAW AND PRACTICE FROM THE EARLIEST TIME TO THE PRESENT DAY (1980).

tury which vested title in whole or part in the sovereign or government, even though the treasure was not on public lands and had not been reduced to possession.¹³¹ In the United States, a treasure trove law existed in New York before 1829, when it was repealed because the State seldom exercised its title.¹³² In addition, federal legislation is now pending to vest title in the United States in any abandoned historical shipwreck located on the outer continental shelf.¹³³

Significantly, the doctrine of Treasure Trove has been extended beyond its original scope to include jewelry, non-gold coins, and antiquities.¹³⁴ Thus, Treasure Trove laws are the natural predecessors of recent national laws, such as those of many Latin American countries, which claim archaeological treasures and antiquities for the government without regard to ownership of the site or possession of the objects.¹³⁵ Also, in the Treasure Trove laws of several countries, the

131. HILL, *supra* note 130. In England, recent cases have applied the treasure trove doctrine. See, e.g., Attorney-General for the Duchy of Lancaster v. G.E. Overton Farms Ltd., 3 All E.R. 503 (1980), cited in Palmer, *Treasure Trove and the Protection of Antiquities*, 44 MOD. L. REV. 178 (1981). See also Krysz, *Treasure Trove Under Anglo-American Law*, 11 ANGLO-AMERICAN L. REV. 214, 238 n.1A (1982) (describing 1979 discovery of the Thetford treasure).

132. Hill, *supra* note 130, at 287 n.4. Recent cases in Florida, Texas, and North Carolina have upheld sovereign ownership of abandoned shipwrecks in state territorial waters. See State *ex rel.* Ervin v. Massachusetts Co., 95 So.2d 902 (Fla. 1956), cert. denied 355 U.S. 881 (1956); Platoro, Ltd. v. Unidentified Remains of a Vessel, 371 F. Supp. 356 (S.D. Tex. 1973), rev'd on other grounds 508 F.2d 3 (5th Cir. 1975); Bruton v. Flying "W" Enterprises, Inc., 273 N.C. 399, 160 S.E.2d 482 (1968), cited in Read, *Open Season on Ancient Shipwrecks*, 4 NOVA L.J. 213, 217 nn.17-18, 19 (1980).

133. H.R. 1195, 96th Cong., 1st Sess. (1979), cited in Read, *supra* note 132 at 233 & n.8. See also Note, *Property Rights in Recovered Sea Treasure: The Salvor's Perspective*, 3 N.Y. J. INT'L & COMP. L. 271, 303-04 & n.244. (1982).

134. HILL, *supra* note 130.

135. Replies, *supra* note 122; Ely Maurer, Assistant Legal Adviser, Educational, Cultural, and Public Affairs, U. S. Dep't of State, testified that "perhaps two dozen [countries] appear to have legislation which, at least for some categories of cultural property," might approach the *McClain* standard sufficiently to raise the question of the NSPA's applicability to their laws. *Hearing on S. 605, supra* note 9. As governments request assistance in recovering cultural property or Customs or the Justice Department investigates potential violations of U.S. law concerning archaeological artifacts of foreign origin, the U.S. State Department reviews the legislation of individual countries. To date, the courts have found the legislation of Mexico and Peru sufficient to sustain prosecution under the NSPA. See *McClain I*, 545 F.2d 988 (5th Cir. 1977); *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974).

In the *Hollinshead* case, the U. S. Government prosecuted an art dealer who had imported a famous monumental Guatemalan stela, the Machaquila, which had been stolen, dismembered, and exported. Art experts were familiar with the work; it was registered as a Guatemalan historical monument; the dealer knew it was stolen. No one suggested that Guatemalan claims of ownership were invalid, or that the NSPA should not apply. In *McClain*, the objects involved were not renowned but their provenance was traceable; there was evidence that they had been stolen from Mexican pre-Columbian sites in violation of Mexican law, and, as the *McClain* court ascertained through a careful survey of Mexican law, the 1972 law gave valid ownership to Mexico. *McClain* was as clear an instance of theft from a legitimate national owner as was *Hollinshead*. (A particularly interesting aspect of *McClain* is that the defendants were also arranging to sell artifacts accumulated in

taking by finders of the treasure is characterized as theft, embezzlement, or stealing, and subject to criminal prosecution and civil action.¹³⁶ Under English law, title is deemed to be vested in the government while the Treasure Trove is still in the ground

Los Angeles by Clive Hollinshead, the *Hollinshead* defendant, with the items valued at \$850,000. See *McClain II*, 593 F.2d 658, 662-63 (5th Cir. 1979)). The *McClain* court therefore did nothing new; it merely articulated guidelines for valid government ownership. See Replies, *supra* note 122.

In negotiating bilateral agreements with Peru and Ecuador, the U.S. State Department found that Peru, but not Ecuador, had legislation declaring national ownership of archaeological resources. Since this determination, however, Peru has repealed its statute by legislation enacted December, 1984. General Law of Protection for the National Cultural Patrimony, Peru, Law 24047 (Jan. 6, 1985). It is not clear whether this new Peruvian law would meet the standards as recognized under U.S. law. Ecuador's law would not meet the *McClain* standard, however, because although it refers generally to archaeological resources as part of the national patrimony, it does not specifically declare these to be the property of the nation.

Latin American countries that have declared national ownership of at least some categories of archaeological, cultural or palaeontological resources include British Honduras (Belize) (ownership of antiquities is vested in the Crown); Costa Rica, Law 7 (Oct., 1938) (archaeological objects found in the soil and monuments that date prior to the Spanish conquest and not privately held at the time of this law are the property of the state); Nicaragua, Decree 142, art. 1 (July 25, 1941) (archaeological, historical and artistic monuments that are found in the territory of the Republic and not privately held at the time this Decree is promulgated are property of the state) and Decree 142, art. 1 (1979) (archaeological and palaeontological deposits of archaeological interest constitute property of the state and removal of such objects is prohibited); Panama Property Law, art. 82 (Sept. 1946) (exploitation and commerce in archaeological monuments and objects by inexperienced persons and without authorization by the executive branch are prohibited); El Salvador, Law for Protection of Archaeological, Anthropological and Palaeontological Antiquities, art. 1 (1903) (such materials found in the territory of El Salvador are national property); Argentina, Law 9030, art. 1 (archaeological and palaeontological ruins and deposits of scientific interest are declared to be the property of the nation) and art. 7 (the government can expropriate these materials in private hands for the enrichment of national museums); Brazil, Law 3924, art. 7 (July 26, 1961) (archaeological or prehistoric deposits of any nature not declared in a form specified shall be considered patrimonial goods of the union); Bolivia, Law of 1906 (certain ruins, e.g., Tihuanacu, are the property of the nation); Chile, Law 17288, art. 21 (Jan. 27, 1970) (by the sole operation of the law, architectural monuments are the property of the state as are anthropological sites, ruins, and deposits which exist above or beneath the surface of the national territory. Pieces and sites where found are also covered); Venezuela, art. 13 (Aug. 15, 1945) (the following are the property of the State: all archaeological objects from the era prior to the Spanish conquest, and human or animal fossils which may be found in any part of the subsoil of the country). Telephone interview with Faye Armstrong, Attorney Advisor, Office of the Legal Advisor, U.S. Dep't of State (Jan. 21, 1986) (The author is indebted to Ms. Armstrong for her research and translations of the aforementioned laws).

The U.S. State Department also mentioned the many non-Latin American countries which have national ownership laws, including Haiti, Egypt, Greece, Iraq, Jordan, Kuwait, Lebanon, Turkey, Algeria, Liberia, Mauritania, Nigeria, Tanzania, and Tunisia. Replies, *supra* note 122. The validity of the laws of any of these countries for U.S. law would require specific determination and, should NSPA prosecution occur, court decision. See BURNHAM, THE PROTECTION OF CULTURAL PROPERTY: HANDBOOK OF NATIONAL LEGISLATIONS (1974); UNESCO, PROTECTION OF MOVABLE CULTURAL PROPERTY (1984); see also, L. Prott & P.J. O'Keefe, National Legal Control of Illicit Traffic in Cultural Property (1983); Nafziger, *International Penal Aspects of Protecting Cultural Property*, 19 THE INT'L LAW. 835 (1985).

136. Replies, *supra* note 122; HILL, *supra* note 130.

undiscovered.¹³⁷

The nationalization of sub-soil mineral resources further exemplifies a concept of government ownership of objects without regard to ownership of the land itself or to previous possession of those objects.¹³⁸ Governments which nationalize their subsoil mineral resources own them whether discovered or not.¹³⁹ In such cases, if a particular mineral resource, such as oil, is discovered on private land, the oil belongs to the country. If the oil is imported into the U.S., its title is unquestioned.¹⁴⁰

Government ownership without actual possession is an international reality in historical and contemporary practice. As seen in U.S. national and state ownership of natural resources, in the Treasure Trove laws that exist in many countries, and in the nationalization of subsoil mineral riches, the broad prevalence of government ownership supports judicial determination that such ownership validly can exist. *McClain's* interpretation of the NSPA has a firm legal foundation in U.S. law and is consistent with the doctrines of other nations regarding government ownership of property without a possessory interest.

III. THE CONSISTENCY OF THE CPIA WITH U.S. LAW AND ITS ENFORCEMENT

A. THE ARGUMENT AGAINST CONSISTENCY

Critics of the *McClain* decision believe that the NSPA is a unilateral response to the problem of pillage, and therefore violates the basic principle of the CPIA that U.S. participation in control of the illicit art trade should be part of a concerted international effort.¹⁴¹ In this

137. HILL, *supra* note 130.

138. Replies, *supra* note 122.

139. See A. BLAUSTEIN & G. FLANZ, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Burma, art. 18 (1982); Cape Verde, art. 11 (1982); Chile, art. 24 (1980); Costa Rica, art. 121, subsec. 14(b) (1982); Guatemala, art. 63 (1982)).

140. Replies, *supra* note 122. See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 41, comment d, illustration 8 (1985).

141. See *supra* note 98 and accompanying text. It is not within the scope of this Note to address a significant and related controversy, but its existence should be noted. Senator Charles Mathias, Jr. has introduced a new bill, called the Cultural Property Repose Act, that would limit the period in which foreign countries could sue museums and private art collectors in the United States for the return of stolen art. The Senate Subcommittee on Patents, Copyrights, and Trademarks held a Hearing on this bill on January 9, 1986. Supporters of the bill include museums, art dealers, and private collectors, who believe that the CPIA does not afford adequate protection against foreign lawsuits. Many archaeologists and anthropologists, the U.S. State and Justice Departments, and some museums oppose the bill. Opponents believe that the bill would make it easier for art dealers and collectors to purchase and collect stolen goods and that the bill goes against the spirit of the CPIA, under which civil suits may be pursued to resolve questions of ownership. The bill is not scheduled for a vote. See Cultural Property Repose Act, *Hearing on S. 1523 Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. (1986) (unpublished, untitled hearing). See also, *Senators Weigh Limit*

view, not only are the *McClain* decision and U.S. Customs enforcement of it under the NSPA inconsistent with congressional policy in the CPIA, but other U.S. measures, namely the bilateral agreements with several Latin American countries, also violate the premise of the CPIA.¹⁴² The critics accuse the U.S. Customs Service, whose role is to apply all relevant U.S. laws to goods that cross the border, of overstepping its statutory authority and of blanket detention of pre-Columbian art under the aegis of *McClain*.¹⁴³

B. U.S. REGULATION OF CULTURAL PROPERTY: A PLURALISTIC APPROACH

The argument that the NSPA is a unilateral response that is inconsistent with congressional policy in the CPIA misreads congressional intent. U.S. policy on the regulation of cultural property has a common goal. In seeking to deter the illicit trade in art, it relies on unilateral, bilateral, and multilateral approaches. United States remedies therefore include the NSPA, the Pre-Columbian Act of 1972, ARPA, the bilateral agreements with Mexico, Peru, Guatemala, and Ecuador, and the CPIA. These remedies attack aspects of the same problem. Consistent in purpose and complementary in approach, they differ only in procedures and scope. Such differences, however, are not inconsistent.

to *Claims on Stolen Art*, N.Y. Times, Jan. 9, 1986, at C19, col. 1; 2 *Senate Bills Focus on Stolen Art*, N.Y. Times, Feb. 3, 1986, at C19, col. 1.

142. *Hearing on S. 605*, *supra* note 9.

Because *McClain* interprets U.S. criminal laws so as to require the United States to recognize foreign countries' bald assertions of national ownership, the State Department has continued . . . to ban from entry into this country cultural property from the other country, if it claims national ownership—despite the clear intent of the CPIA that such claims alone not determine our import policy. There are currently three such agreements in effect. . . . Most disturbing, however, is an agreement with Guatemala entered into within the last year. Two years after enactment of the CPIA, the State Department has simply disregarded the standards, criteria and requirements of that Act.

Id. (testimony of Sen. Moynihan).

The law [CPIA] required multinational responses as the general rule. . . . Yet in spite of this law, the State Department has continued to negotiate and execute agreements that require only unilateral action. Why is this inconsistency an issue here? Because these agreements are based only on *McClain*-type assertions of ownership, not on any of the standards set forth in the cultural property law.

Id. (testimony of Douglas Ewing).

In the author's view, these statements distort the intention and content of the bilateral agreements and reflect a fundamental misunderstanding of their operation. It may be noted that legal scholars, such as Paul Bator and James Fitzpatrick do not make such claims. The testimony is reproduced here to illustrate the extreme and political nature of the position asserted. In rebuttal, see *Hearing on S. 605*, *supra* note 9 (testimony of Ely Maurer).

143. See *supra* note 99 and accompanying text.

1. *U.S. Statutes*

The NSPA, the Pre-Columbian Act, and ARPA are unilateral statutory measures with common goals and important similarities. The NSPA mandates criminal penalties and seeks to prevent the knowing international and interstate transport, receipt, and sale of stolen goods above \$5000 in value, whatever their nature. Although ARPA applies only to archaeological materials on U.S. and Indian lands, it closely resembles the NSPA in applying penal sanctions for the knowing sale, transport, purchase, or receipt of these materials illicitly obtained. Also, like the NSPA, ARPA protects both public and private owners. The Pre-Columbian Act, a civil statute, represents a unilateral U.S. initiative to prohibit the importation of pre-Columbian sculptures and murals without export certification by the country of origin.¹⁴⁴ Like the NSPA, it observes the export rules of the countries concerned; unlike the NSPA, it does not require that the objects be stolen for its ban on importation to apply.

2. *Bilateral Agreements*

The bilateral agreements with Latin American countries represent yet another U.S. approach to the problems of theft and pillage. Under these agreements, the United States officially stands ready to help the countries concerned recover stolen property under existing U.S. law. The United States actually represents the country in its claim, employing available U.S. laws. If a dealer or other purchaser contests the country's ownership, the United States will initiate suits in federal court to determine who is the owner.¹⁴⁵ The bilateral agreements, which rely on existing U.S. civil laws to supply the remedy for the theft of cultural property, offer an avenue other than national statutes and international conventions by which a country can recover its stolen art.¹⁴⁶ While a nation can always bring civil suit for recovery in

144. 19 U.S.C. §§ 2091-2095 (1982). See *supra* notes 86-88 and accompanying text.

145. See *Hearing on S. 605, supra* note 9, at 41 (testimony of Ely Maurer); see also *Replies, supra* note 122.

146. For example, one such agreement provides:

1. Each Party shall inform the other of thefts of archaeological, historical, or cultural properties of which it has knowledge when it has reason to believe that the objects stolen are likely to be introduced into international trade. In doing so, it shall furnish sufficient descriptive information to enable the other Party to identify the objects. Upon receipt of such information, the other Party, through its customs organization or otherwise as appropriate and with the assistance of the informing Party, shall take such actions as may be lawful and practicable to detect the entry of such objects into its territory and to locate such objects within its territory. If the other Party locates objects which appear to meet the description of those reported stolen, it shall provide the informing Party with all available information concerning their location and the steps which would have to be taken to secure their return, assuming that it can be demonstrated that they have been stolen.

the absence of such an agreement, the agreements bind the parties to aid in the return of stolen art and facilitate international exchange of art between the countries. They do *not* require U.S. law enforcement authorities to return objects to a foreign government on that government's representation of its laws.¹⁴⁷

3. *The CPIA*

The CPIA derives in part from other statutory approaches and expressly relies on the coexistence of U.S. penal and civil laws. According to its legislative history, the CPIA "reflects the approach to illicit trade in art adopted by the Congress in the Pre-Columbian Art Act of 1972. . . ."¹⁴⁸ This approach came from a growing awareness among U.S. policy makers that the destruction and dispersal of irreplaceable sites and artifacts through illicit taking was of grave concern

2. At the request of the other Party, each Party shall employ the legal means at its disposal to recover and return from its territory stolen archaeological, historical and cultural properties that have been removed from the territory of the requesting Party.

3. Requests for the recovery and return of specific archaeological, historical and cultural properties shall be made through diplomatic channels. The requesting Party shall furnish expeditiously, at its expense, documentation and other evidence necessary to establish its claim to such properties.

4. If the requested Party obtains the necessary legal authorization, it shall return the requested archaeological, historical or cultural properties to the persons designated by the requesting Party. If, however, it fails to achieve such authorization, it shall use its best efforts to protect the legal rights of the requesting Party and facilitate its bringing a private action for return of the property.

5. The Parties, through the posting of signs, distribution of pamphlets or such other means as either may select, shall endeavor fully to inform persons entering or leaving their territories of laws of each of the Parties with respect to archaeological, historical or cultural properties and of any specific procedures or requirements established by the Parties in relation thereto.

Agreement for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, *supra* note 32, at art. II.

147. *See id.* In testimony regarding the consistency of the U. S. bilateral agreements with the CPIA, before the Subcommittee on Criminal Law of the Senate Judiciary Committee, Ely Maurer stated:

The central provision of each of these agreements obligates each party, at the request of the other, to use the legal means at its disposal to recover and return from its territory stolen archaeological, historical and cultural properties removed from the territory of the requesting party.

Implementation of these agreements turns entirely on the operation of U.S. law. They do not, as has been suggested, enable the Customs Service, or any other federal law enforcement authority, to seize objects and return them to a foreign government on that government's representation of its laws. Nor do they alter in any way laws governing the importation of cultural property into the United States.

These agreements, in the Department's view, are neither affected by nor inconsistent with the CCPIA [sic], which . . . does not purport to limit ordinary police cooperation in the recovery of stolen property.

Hearing on S. 605, supra note 9, at 5-6 (testimony of Ely Maurer).

148. S. REP. NO. 564, 97th Cong., 2d Sess. 22 (1982). In 1977, Congress stated that the CPIA bill "generally follows the patterns of a broader scale of the Pre-Columbian Art Act." H.R. REP. NO. 615, 95th Cong. 1st Sess. 2 (1977).

not only to the countries being looted but to the United States as a primary destination for the loot.¹⁴⁹ Like the pre-Columbian statute but covering a broader range of materials, the CPIA prohibits importation without requiring that the objects it protects be stolen. In its focus on concerted international effort and its broad prohibition against the theft of cultural property from museums, churches, or similar institutions,¹⁵⁰ the CPIA transcends the scope of the Pre-Columbian Act. But the CPIA and its wholly unilateral predecessor share the same principles and goals: to stop the destruction of archaeological sites and the illegal importation and theft of unique historical artifacts.

Congress has consistently maintained complementary approaches to the control of pillage. The 1972 Senate understanding of the UNESCO Convention's prohibition against importation of cultural property stolen from foreign museums states that "Article 7(b) is without prejudice to other remedies, civil or penal, available under the laws of the states parties."¹⁵¹ The 1982 Senate report approving the Cultural Property Bill specified that the CPIA follows the original 1972 Senate qualification to acceptance of the UNESCO Convention and does not alter existing remedies:

The bill takes into account the reservation and understandings accompanying the grant by the Senate in 1972 of its advice and consent. . . . Further, it neither pre-empts State law in any way, nor modifies any Federal or State remedies that may pertain to articles to which the provisions of this bill apply.¹⁵²

In fact, the 1982 Senate report is even more explicit than the earlier understanding; it specifies that the CPIA does not supersede the NSPA:

Implementation of article 7(b) of the Convention affects neither existing remedies available in State or Federal courts nor laws prohibiting the theft and the knowing receipt and transportation of stolen property in interstate and foreign commerce (e.g., National Stolen Property Act, Title 18, U.S.C. Sections 2314-15). . . .¹⁵³

4. *The CPIA's Unilateral Provision*

Arguments that the NSPA is a unilateral response that opposes the multilateral requirement of the CPIA ignores the important *unilateral* aspect of the CPIA.¹⁵⁴ For although the CPIA embodies the ideal of concerted international effort in its provision for multilateral controls, it also permits the United States to act unilaterally in an

149. S. REP. NO. 564, *supra* note 148, at 23; H.R. REP. NO. 615, *supra* note 148, at 4.

150. *See supra* notes 57-80 and accompanying text.

151. S. EXEC. REP. NO. 29, *supra* note 35, at 4.

152. S. REP. NO. 564, *supra* note 148, at 22.

153. *Id.* at 33.

154. 19 U.S.C. § 2604 (1982). *See supra* notes 71-75 and accompanying text.

emergency, and for a period of eight years. For such action, the President must determine that an emergency exists according to stringent criteria. The material must be newly discovered, from a site of high cultural significance, and the jeopardy from pillage must be of crisis proportions. The only other limitations on unilateral emergency action are that the state party must request assistance and the President must consider the views of his Advisory Committee on the merits of such action.¹⁵⁵ Some commentators believe that the unilateral provision will prove to be the only effective mechanism of the CPIA.¹⁵⁶ This prediction awaits the event, but the presence and importance of the CPIA's unilateral provision do not support a belief that the NSPA clashes with the CPIA.

C. ENFORCEMENT OF U.S. LAW

1. *Criticisms of Customs Enforcement*

Critics view the U.S. Customs Service's detention of pre-Columbian art that may be subject to NSPA prosecution as a new policy, under which Customs enforces all foreign export controls and ownership laws.¹⁵⁷ They believe that the U.S. Customs Service is exceeding its statutory authority, that its actions are inconsistent with Congressional and U.S. policy as declared in the CPIA, and that Customs enforcement has created a virtual embargo on Pre-Columbian art.¹⁵⁸ The critics claim that Customs prevents importation on the basis of other countries' export prohibitions and broadly enforces foreign ownership claims under administrative regulations that rely only on the "questionable" *McClain* interpretation of the NSPA.¹⁵⁹ They further charge that Customs abuses its discretion by detaining goods that may be subject to NSPA prosecution even if the Service is not sure that *scienter* can be proven.¹⁶⁰ The critics also object to the policy under which Customs returns improperly declared pre-Columbian art to Mexico and Peru, and notifies other Latin American countries with ownership laws of potential claims.¹⁶¹ They insist that zealous cus-

155. 19 U.S.C. § 303(c)(3).

156. See Bator, Memorandum on H.R. 5643, printed in *Hearing on H.R. 5643 and S. 2261 Before the Subcomm. on International Trade of the Senate Comm. on Finance*, 95th Cong., 2d Sess. 191-98 (1978). Bator supported the unilateral provision, noting that "[i]n fact such a concerted international effort is extremely unlikely to take place. . . ." *Id.* Appendix A, at 197.

157. See *supra* note 99 and accompanying text.

158. *Hearing on S. 605, supra* note 9 at 6, 102 (testimony of Sen. Moynihan, Douglas Ewing). See Fitzpatrick, *supra* note 9, at 858, 864-65, 869, 871, 892; McAlee, *supra* note 9, at 829, 836-37.

159. Fitzpatrick, *supra* note 9, at 886.

160. *Id.* at 874-75.

161. McAlee, *supra* note 9, at 834-38.

toms enforcement gives priority to bilateral agreements despite the CPIA's mandate for multinational control measures, and illegitimately offers aid to countries with which the United States has no formal agreement.¹⁶²

Critics allege that Customs enforcement violates Congressional and U.S. policy because it constitutes unilateral action and is therefore inconsistent with the multilateral approach of the CPIA and the UNESCO Convention.¹⁶³ Furthermore, in honoring Latin American ownership claims, the Customs Service is said to revive the "blank check" approach, of sweeping enforcement of other nations' export controls, which the United States rejected in the UNESCO Convention and the CPIA.¹⁶⁴ Finally, the critics claim, Customs "new policy" violates the compromise which allowed the CPIA to become law—an agreement that the non-dealer interests would support or not oppose legislative repeal of the *McClain* decision.¹⁶⁵

2. U.S. Customs Enforcement

These attacks on the U.S. Customs Service mischaracterize both the basis on which Customs proceeds and what the Service actually does. U.S. laws properly describe what goods may be imported, and the Customs Service merely enforces U.S. laws.¹⁶⁶ These laws include

162. See *Hearing on S. 605, supra* note 9 at 6, 102 (testimony of Sen. Moynihan, Douglas Ewing).

163. *Id.* See also Fitzpatrick, *supra* note 9, at 858, 871; McAlee, *supra* note 9, at 815, 836-37.

164. McAlee, *supra* note 9, at 815, 836-37.

165. *Hearing on S. 605, supra* note 9 at 6, 102 (testimony of Sen. Moynihan, Douglas Ewing); Fitzpatrick, *supra* note 9, at 862-64; McAlee, *supra* note 9, at 827 n.60.

166. See Customs Requirements Relating to the Importation of Pre-Columbian Art and Artifacts [on file at *Cornell International Law Journal*]. The U.S. Customs Service enforces general and specific statutes, treaties, and agreements that cover cultural property. The Customs Service also enforces the NSPA.

I. General Requirements. General requirements apply to all merchandise, including art. They constitute three categories:

- A. Declaration and Entry Requirements:
19 U.S.C. §§ 149, 1481, 1484, 1485 (1982).
- B. Examination and Customs Inspection:
19 U.S.C. §§ 482, 1496, 1499, 1582 (1982).
- C. Fines, Penalties, and Forfeitures:
19 U.S.C. §§ 542, 545, 1497, 1592 (1982).

II. Specific Requirements.

- A. Pre-Columbian Act, 19 U.S.C. §§ 2091-2095 (1982), 19 C.F.R. §§ 12.105-12.109 (1985).
- B. See Cultural Property Implementation Act, 19 U.S.C. § 2601-2613 (1982).
- C. International Obligations.
 - 1. U.S.-Mexico Agreement, *see supra* note 30.
 - 2. U.S.-Peru Agreement, *see supra* note 31.
 - 3. U.S.-Guatemala Agreement, *see supra* note 32.

III. National Stolen Property Act, 18 U.S.C. §§ 2314-2315 (1982). See also *Hearing on S. 605, supra* note 9. "The United States Customs Service is responsible at the border

general statutes such as the NSPA and a U.S. Customs law that makes it a felony to import any merchandise contrary to U.S. law.¹⁶⁷ Under statutory authority, Customs may detain and appraise objects that *may* be stolen to ascertain their character and origin.¹⁶⁸ Customs is also responsible for enforcing specific laws pertaining to cultural property;¹⁶⁹ in addition, Customs is the agency that refers cases for U.S. action under bilateral agreements.¹⁷⁰

The Customs Service thus enforces a variety of U.S. laws that seek to prevent the illegal importation of goods. To this end, Customs has established stringent administrative guidelines set forth in a 1982 Manual Supplement to direct and restrain its officers in properly enforcing U.S. laws.¹⁷¹ And because pre-Columbian art is the subject of a U.S. statute and of bilateral agreements, Customs appropriately alerts its agents to the potential presence of pre-Columbian art at the border.¹⁷²

The Customs Service does not enforce other countries' export laws. According to the Service's administrative guidelines, "[i]f the foreign country involved does not claim ownership but only controls exports, no action should be taken unless U.S. Customs laws are violated."¹⁷³ Customs does detain pre-Columbian objects that fall within the Pre-Columbian Statute, objects improperly declared, and pre-Columbian objects of Mexican or Peruvian origin.¹⁷⁴ Under the bilateral agreements, the Service returns improperly declared objects from

for enforcing many laws and regulations on its own behalf and on behalf of over 40 other Federal agencies." *Id.* (testimony of Richard H. Abbey, Chief Counsel, U.S. Customs Service).

167. 18 U.S.C. § 545 (1982). *See also* 19 U.S.C. § 1497 (1982) (authorizing penalties for failure to declare articles upon entry into the United States); 19 U.S.C. § 482 (1982) (authorizing Customs agents to search and seize property imported contrary to U.S. laws).

168. 19 U.S.C. §§ 2091-2095 (1982). *See* CPIA, 19 U.S.C. §§ 1602-1613 (1982).

169. The Service enforces the Pre-Columbian Act, 19 U.S.C. §§ 2091-2095 (1982). Since April 1983, it is also responsible for enforcing the CPIA's provision against theft of cultural property from foreign museums or similar institutions. 19 U.S.C. §§ 2601-2613 (1982). *See* 19 C.F.R. § 12 (1985).

170. Minutes of First Meeting, Cultural Property Advisory Committee at 63-64 (testimony of Stuart Seidel, Assistant Chief Counsel, Enforcement and Operations, U.S. Customs Service) (Mar. 29, 1984) [hereinafter cited as Minutes].

171. Customs Service Manual, *supra* note 89.

172. The Manual states that "[c]ustoms Officers should be alert to the importation of any art or artifacts from a Central or South American culture which appears to be from the Pre-Columbian era." *Id.* at 3. This art may be stelae or monumental sculpture prohibited under the Pre-Columbian Act; it may be movable objects stolen from a country with which the United States has a bilateral agreement to help the national owner recover its property; it may be art stolen from a museum and prohibited entry by the CPIA; it may fall under NSPA ban as goods knowingly stolen from an individual or national owner.

173. *Id.* at 3(e); *see also* Minutes, *supra* note 170, at 60. It should be noted, however, that both the Pre-Columbian Act and the CPIA *require* that the countries whose archaeological goods they ban maintain export controls. *See* 19 U.S.C. §§ 2602, 2092(a) (1982).

174. Customs Service Manual, *supra* note 89, at 3(a)-3(c).

Mexico and Peru upon request, unless the importer challenges ownership.¹⁷⁵ If goods come from Mexico or Peru and are properly declared, those countries may still claim ownership to secure return of the goods. If the importer contests national ownership, the U.S. Attorney General may institute a suit for interpleader to resolve the ownership question.¹⁷⁶ If goods come from another country with ownership laws, the Customs Service notifies the country so that it may lay claim if it wishes.¹⁷⁷ Again, when a country claims ownership and the importer disagrees, U.S. courts decide which claimant is the valid owner.¹⁷⁸ The Customs Service uses a country's ownership law as basis for a claim, not as proven ownership.¹⁷⁹

The Customs Service also impounds objects if there are grounds for NSPA prosecution.¹⁸⁰ Under *McClain*, the NSPA clearly applies to cultural property stolen from a foreign country,¹⁸¹ and *McClain* remains a sound basis for enforcement unless overruled or repealed.

175. *Id.* at 3(a).

176. *Id.* at 3(d).

177. *Id.*

178. *Id.*; see also Minutes, *supra* note 170, at 66. "If they wish to claim ownership, we will go to the interpleader action unless the importer wants to give up his right. If they don't wish to claim ownership, we'll release it." *Id.* (testimony of Stuart Seidel).

179. Minutes, *supra* note 170, at 66.

Now why do we notify the people that we think own it? And here's where I think a lot of the people in the art community misunderstand what Customs does. If we find any object that we believe is stolen, we will contact the individual whom we believe it was stolen from. You bring a motorcycle into the United States and there is a report . . . that this particular motorcycle was stolen, we will detain it and notify the owner. If he claims it, even if the person who brought it in is totally innocent, we will allow them to bring a suit in the nature of an interpleader. We have conflicting claims of ownership, and if it was in fact stolen, somebody is entitled to regain possession of that property. And since we have it we don't know who to give it back to: the importer or the person from whom it was taken. And it may have gone through many intermediary steps before it ever comes into the United States. We find ourselves in a bad position. If we give it back to the importer the legitimate owner has a claim against us, or may have a claim against us. We have property which we believe was his that we released. If we give it back to the foreign country, we have a claim by the importer, because the foreign country has not necessarily established valid title. So we don't get involved, we let the U.S. District Court decide who the owner is, which I think is the fair way of doing it, and the Commissioner of Customs believes it's the correct way of doing it. . . .

Id.

180. See Customs Requirements Relating to the Importation of Pre-Columbian Art and Artifacts, *supra* note 166. "If the importer acknowledges that he/she is aware of the foreign law or there is other evidence of such knowledge, consideration should be given to criminal prosecution pursuant to 18 U.S.C. § 2314 in accordance with *U.S. v. McClain* The articles may be seized as evidence of a crime." Customs Service Manual, *supra* note 89, at 3(b). See also *Hearing on S. 605*, *supra* note 9, at 57 (testimony of Richard H. Abbey, stating that the Customs Service is responsible for discovering violations of the NSPA in connection with importations of art and rare archaeological and ethnological articles).

181. We hold that a declaration of national ownership is necessary before illegal exportation of an article can be considered theft, and the exported article considered 'stolen,' within the meaning of the National Property Act. Such a declaration

In compliance with its administrative guidelines, Customs identifies possible NSPA cases and refers them to the Justice Department for decision.¹⁸² Customs refers cases only if the importer admits knowing that a country has an ownership law and export restrictions on the object or if other evidence suggests the object has knowingly been stolen from such a country.¹⁸³ Customs detains the goods as evidence.¹⁸⁴ The critics deny Custom's authority to detain such items when officials are unsure *scienter* can be proven,¹⁸⁵ but Customs responds that detention is only temporary until the Justice Department can determine if the evidence warrants criminal prosecution.¹⁸⁶

The Customs Service does not violate Congressional intention as expressed in the CPIA by enforcing of the NSPA. Congress emphatically stated that the NSPA and CPIA were meant to coexist.¹⁸⁷ Nor does Customs enforce "the broadest declarations of ownership" by foreign sovereigns; where the United States considers that a country's specific ownership law may be valid, it is for the courts to decide if that law meets *McClain's* rigorous standard.¹⁸⁸ The Manual Supplement takes an active view of Customs enforcement of U.S. statutes and bilateral agreements. Whether this creates a "virtual embargo" on

combined with a restriction on exportation without consent of the owner (Mexico) is sufficient to bring the NSPA into play.

McClain I, 545 F.2d 988, 1000-01 (5th Cir. 1977).

182. See Minutes, *supra* note 170, at 64-65.

183. See Customs Service Manual, *supra* note 89, at 3(b).

184. *Id.*

Although the National Stolen Property Act makes it a crime for any person to knowingly possess stolen art work over \$5,000, criminal prosecution may not be possible in all cases because of the inability to establish that the importer knew of the foreign country's legislation. Nonetheless, if the item can be shown to be subject to the ownership claim, it shall be detained regardless of whether the individual is prosecuted or not.

Id.

185. See Fitzpatrick, *supra* note 9, at 875.

186. See Minutes, *supra* note 170, at 64-65.

Let's assume that an individual comes into the United States and declares an item properly for U.S. Customs purposes. He tells us that it is an artifact. He tells us that it is from Peru. He tells us how much he paid and that is the truthful amount that he paid. Has he violated any law? And the answer is, he's probably violated the National Stolen Property Act, if he knew that it was illegal to take it out of Peru. So our instructions cover that situation, if the individual who brings it in tells us—"Oh yes, I know it's illegal to take it out of Peru but who cares, I'm in the United States now"—knowledge of the foreign law, interstate or foreign commerce, item over \$5,000, we will seize the item as evidence of a violation of the National Stolen Property Act, and we will refer the matter to the U.S. Attorney for whatever prosecution he may deem appropriate. If he doesn't deem any appropriate, that ends the matter from criminal prosecution. If the individual insists that the item was lawfully acquired and that he has good title, there is a provision under U.S. law for interpleader action. . . .

Id. (testimony of Stuart Seidel).

187. See *supra* notes 151-53 and accompanying text.

188. See Minutes, *supra* note 170, at 66 (testimony of Stuart Seidel).

pre-Columbian art depends upon one's values and perspective.¹⁸⁹ If enforcement is effective, less pre-Columbian art will enter the United States illegally, legal importers will experience delays, and some goods imported by bona fide purchasers may be subject to return to a country with valid ownership laws. Such enforcement advances the preservation of national patrimony and U.S. relations with Latin American countries. This policy inevitably collides with the desires of dealers and some museum officials for an unrestricted international art market. The tension between these values, however, does not validate the critics' charges that Customs acts *ultra vires*. To those opposed, the law is onerous; nevertheless, the Customs Service acts within the law.¹⁹⁰ Finally, legislative history does not support claims of a "deal" to pass the CPIA in exchange for subsequent legislative repeal of *McClain*.¹⁹¹

The U.S. Customs Service enforces all U.S. measures that control the importation of illicit and stolen cultural property, including the NSPA and the CPIA. It implements the same policy objectives that produced the CPIA and caused Congress to employ complementary measures to address the illicit art trade problem. Customs has not embarked on a new policy in preserving cultural property but rather continues to implement historic U.S. goals. Records of state property returned by Customs to a foreign country exist as early as 1824.¹⁹² In a 1982 letter, the Acting Commissioner of Customs explained that it has "always been the policy of the United States to assist foreign countries in recovering stolen property, particularly art objects,"¹⁹³ and that the Customs Service has worked with the State Department and

189. See Fitzpatrick, *supra* note 9, at 864, 869-71; McAlee, *supra* note 9, at 818-20; *Hearing on S. 605, supra* note 9, at 6, 102 (testimony of Sen. Moynihan, Douglas Ewing).

190. See *supra* notes 157-88 and accompanying text.

191. The U.S. State Department, the U.S. Department of Justice, and USIA officially went on record as not having participated in a "deal" to overturn *McClain*. *Hearing on S. 605, supra* note 9. In 1982, Edward Ing, Senator Matsunaga's chief aide, acting at Senator Matsunaga's request, reached an understanding with a representative of Senator Moynihan that in return for Senator Moynihan's agreement not to block the CPIA, Senator Dole (with Senators Matsunaga and Moynihan) would introduce a bill to repeal *McClain*. Mr. Ing stressed that he acted only on behalf of his principal, Senator Matsunaga, who wished to help end the long deadlock between dealers and the other constituencies and facilitate passage of the CPIA. Mr. Ing described a series of meetings with representatives of public and private interests. Only the principals, i.e., Senator Moynihan and Senator Matsunaga (with Senator Dole's cooperation), agreed that Senator Dole would introduce the bill to repeal *McClain*. This agreement involved no further commitment and did not bind the representatives of government and the academic and museum communities. Mr. Ing received no commitment from officials in the State Department, the Department of Justice, or the U.S. Customs Service, to support the bill. Telephone interview with Edward Ing (Mar. 4, 1985).

192. See Minutes, *supra* note 170, at 66 (testimony of Stuart Seidel).

193. Letter from Alfred R. DeAngelus, Acting Commissioner of Customs, to Senator Moynihan (June 10, 1982). Among the countries which the United States has helped to recover foreign art are India, Italy, Germany, and several Latin American countries. *Id.*

other agencies in this endeavor.¹⁹⁴

IV. *MCCLAIN*, THE CPIA, AND THE CONSISTENCY OF AMERICAN POLICY: A SUMMARY

A. THE VALUE OF *MCCLAIN*

1. *A Sound Legal Basis*

The stringent requirement of *scienter* and the difficulties of proof are likely to limit the *McClain* application of the NSPA to those clear and egregious cases which even critics agree justify NSPA prosecution.¹⁹⁵ Post-*McClain* history does not support fears that *McClain* will lead to indiscriminate enforcement. Indeed, there have been only two NSPA prosecutions involving cultural property.¹⁹⁶ Dealers' fears that the NSPA may subject them to criminal prosecution for trading in illicit art are exaggerated.¹⁹⁷

But although the NSPA under *McClain* is unlikely to result in significant penal enforcement, *McClain* provides a sound legal basis for pluralistic and complementary U.S. efforts to address the continuing problem of pillage. *McClain's* criteria for establishing foreign ownership supply a legal standard under which countries may give effect to their own laws by complying with U.S. laws. Where foreign ownership laws meet the *McClain* requirements, such a country may pursue *civil* recovery of cultural material in U.S. courts. For example, in two 1981 cases involving the attempted import of Peruvian pre-Columbian artifacts, the *McClain* theory enabled Peru to demonstrate its legal ownership and recover the objects. In neither case was a criminal charge under NSPA brought against the dealers involved.¹⁹⁸ Thus, *McClain* furthers the traditional U.S. objective of helping owners recover their art. *McClain* also bolsters the force of the bilateral agreements, which mandate U.S. efforts to help the countries involved recover stolen property. Where, as in the Peruvian cases, the nation has a valid ownership law, *McClain's* legal confirmation that a country owns its art even without possession helps the country establish its legal claim and allows the United States to honor its bilateral agreements.¹⁹⁹

The NSPA under *McClain* also strengthens the goals of the CPIA. The CPIA expresses the U.S. policy of deterring the pillage of

194. *See id.*

195. *See* Bator, *supra* note 1, at 354.

196. *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974); *United States v. McClain*, 593 F.2d 658 (5th Cir. 1979). *See* Bator, *supra* note 1, at 282.

197. *See, e.g., Hearing on S. 605, supra* note 9, at 102 (testimony of Douglas Ewing).

198. Truslow, *Peru's Recovery of Cultural Patrimony*, 15 N.Y.U. J. INT'L L. & POL., 839, 849-50 (1983).

199. *See id.* at 850; *see also Hearings on S. 605, supra* note 9 (testimony of Ely Maurer).

archaeological sites.²⁰⁰ The existence of a U.S. criminal sanction which applies to the theft of such property furthers the U.S. commitment to preserve the integrity of these sites. Specifically, the NSPA reinforces the CPIA's ban on cultural property stolen from museums or similar institutions, for it applies criminal sanctions to all such stolen property valued over \$5000.²⁰¹ The symbolic force of *McClain* is also an important factor. The potential for criminal enforcement may deter the importation of stolen art.

2. *The Deflection Argument*

Besides the threat of criminal prosecution under the NSPA, dealers fear that enforcement of U.S. law will cause an embargo on the importation of illicitly obtained art into the United States, without similar action by other countries. As a result, the market will simply be deflected elsewhere.²⁰² It is difficult to calculate the extent to which this may be true because data is scarce, fragmentary, and difficult to evaluate.²⁰³ Many experts believe, however, that the pre-Columbian statute has had some effect in preventing the dismemberment of stelae and large monumental art.²⁰⁴ At the same time, the theft of smaller pre-Columbian objects has increased greatly.²⁰⁵ To preservationists, this increased theft of movable art indicates a need for more effective enforcement and control.²⁰⁶

200. See *supra* notes 57-80 and accompanying text.

201. See 19 U.S.C. § 2607 (1982); 18 U.S.C. § 2314 (1982).

202. "[U]nderground collections generally do not end up in the public museums; they are enjoyed by a wealthy elite. . . . The trade in cultural property . . . does not end, it simply finds other channels. . . ." *Hearing on S. 605, supra* note 9, at 123 (testimony of Thomas Solley, Director, Indiana Univ. Art Museum); "Unquestionably, the United States unilateral action would surely be tilting at windmills. We would close our border to art objects; they would merely find their way to Swiss collections or Japanese museums or German institutions." *Hearing on H. R. 5643, supra* note 156, at 47 (testimony of Douglas Ewing, in opposition to the Cultural Property Implementation Bill); "Foreign dealers would undoubtedly choose to sell to Swiss, German, Japanese, or indeed, clients of any nation other than the United States. *Id.* at 49; (testimony of Alan Brandt). See also Emmerich, *supra* note 70, at 111.

203. S. REP. NO. 564, *supra* note 146, at 23; Bator, *supra* note 1, at 289-94. One museum representative notes that most looted art goes to private collections, making it especially difficult to evaluate the deflection argument. Telephone interviews with Ellen Herscher, Program Coordinator, American Association of Museums (March 10, 1985).

204. See Bator, *supra* note 1, at 334-35 & n.100.

205. Bator, *supra* note 1, at 334 & n.101. "Clemency Coggins, a scholar of pre-Columbian archaeology at the Peabody Museum in Cambridge, Mass., said a United States law passed in 1973 [sic] [the Pre-Columbian Act of 1972] prohibited the import of large works such as murals and relief sculptures, causing a rise in the traffic of smaller, more portable items, which is not yet controlled by law." N.Y. Times, Dec. 26, 1985, at C28, col. 2.

206. Wolf, *Emerging U.S. Policy With Regard to the International Movement of National Cultural Property*, 7 INT'L TRADE L. J., 175 (1982). See N.Y. Times, Dec. 26, 1985, at C28, col. 2. "The international trade in stolen pre-Columbian artifacts is among the most active of the illegal art markets, several experts said yesterday." *Id.* Experts interviewed included Bonnie Burnham, Director, World Monument Foundation, formerly Director,

Where U.S. statutes, bilateral agreements, and foreign export controls successfully inhibit the importation of stolen art into the United States, some of it is likely to be deflected to other art-importing countries. The United States, however, is the major market for this art.²⁰⁷ Laws of supply and demand suggest that if the U.S. market is cut off, prices will fall, dampening illicit supply. Elimination of a major market should decrease the trade in stolen art. In any case, the deflection argument rests on a narrow conception of U.S. interest in preserving its share of the illicit art trade.²⁰⁸ Such a parochial view should not prevail over the larger consideration of global cultural preservation that favors implementation of complementary U.S. measures to control the pillage of national patrimonies.

B. THE CONSISTENCY OF U.S. EFFORTS TO PRESERVE CULTURAL PATRIMONY

The U.S. efforts to protect cultural property from theft and pillage are complementary. While each means of control is limited in scope and effect, in combination they increase the possibility of control. The deterrent effect of the NSPA supplements the force of the U.S. policy in the CPIA. The various remedies all address the same global problem. To oppose "unilateral" in favor of "multilateral" initiatives is a meaningless exercise in semantics. The "unilateral" Pre-Columbian Act helps a group of Latin American nations retain their archaeological monuments. The bilateral agreements involve international cooperation. The CPIA offers bilateral, multilateral, and unilateral approaches, all to attain a common objective. Those who criticize

International Foundation for Art Research and Clemency Coggins, Professor of Archaeology, Harvard University. *Id.*

207. S. REP. NO. 564, *supra* note 148, at 23 (emphasizes the urgency of passing the CPIA, "because the United States is a principal market. . ."); "The USIA is convinced that the United States is by far the greatest market for [archaeological cultural property] especially from Central and South America and Canada." *Hearing on S. 605, supra* note 9 (testimony of Thomas Harvey, General Counsel and Congressional Liaison of U.S.I.A.). The pillage of Canadian sites also suggests that the United States continues to be a major terminus for stolen artifacts. David Walden of the Department of Communications in Ottawa, commenting that trade in Canadian artifacts is a major problem, describes "an active U.S. market where dealers openly—and legally—offer high prizes for stolen Canadian artifacts." MACLEAN'S, Oct. 28, 1985, col. 2. It is legal to sell artifacts in the United States which have been successfully smuggled out of Canada. This illustrates the distinction between "illegal export" and "theft." Since Canada does not have a national ownership law, artifacts looted from Canada are not considered "stolen" under the NSPA. Canada has become the first nation to invoke the CPIA to control this trade. Walden claimed U. S. dealers "encourage criminal elements here in Canada to loot and plunder archaeological sites." *Id.*

208. *See Symposium: Legal Aspects of the International Traffic in Stolen Art*, 4 SYRACUSE J. INT'L L. & COM. 51, 127 (1967); S. REP. NO. 564, *supra* note 148, at 23; H. REP. NO. 615, *supra* note 148, at 4; *see also Hearing on S. 605, supra* note 9, at 41 (testimony of Ely Maurer); Replies, *supra* note 122.

U.S. application of the NSPA to protect foreign cultural property as a "unilateral" initiative should recognize that ARPA, a "unilateral" U.S. statute, seeks the same protection for U.S. archaeological sites.²⁰⁹

Important policy considerations support the pluralistic U.S. approach to the control of pillage. Many of the countries which are suffering erosion of their cultural patrimony and for which the NSPA under *McClain* provides potential assistance are also treaty partners with the United States in the UNESCO Convention.²¹⁰ A statutory repeal of the *McClain* decision would signal a significant reversal of U.S. policy toward the protection of cultural property.²¹¹ At present, the United States can claim a leadership role as the first major art-importing nation to join the UNESCO Convention. U.S. endorsement of the Convention has already produced some public benefit at home in easing restrictions for foreign exhibits to U.S. museums.²¹² The U.S. desire, encouraged by art dealers, to liberalize export restrictions and to promote cultural exchange can only be realized if the countries who are concerned about the fate of their art see the United States as a genuine ally.²¹³ It would also be incongruous for the United States to prosecute individuals for trafficking in archaeological materials illicitly taken from public and Indian lands at home while refusing to honor the efforts of other countries which seek to prevent similar destruction to their sites.²¹⁴

U.S. efforts to control the illicit art trade also have larger policy implications. Diplomatic relations depend on cooperation in many areas. The U.S. seeks accord with other countries in economic, military, and cultural matters in an increasingly interdependent world.²¹⁵ The CPIA's legislative history expresses U.S. awareness that laws to prevent the destruction of archaeological sites and the looting of artifacts enhance our relations with the countries of origin, many of

209. 16 U.S.C. § 470aa-11. (1985).

210. These countries include Canada, Belize, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Peru, Venezuela. UNESCO Convention, *supra* note 4.

211. *Hearing on S. 605, supra* note 9, at 41 (testimony of Ely Maurer).

212. *See Hearing on S. 605, supra* note 9, at 153 (testimony of Maureen Robinson).

213. *See, e.g.,* Truslow, *supra* note 198:

Development of an appropriate, flexible and cooperative policy toward foreign museums and collectors which recognizes and supports the terms of Peruvian law and the pride of its people, will be a far more subtle task. The chances, however, that Peru will be willing to adopt cooperative and flexible policies without feeling that such policies jeopardize its national objectives is greatly enhanced if its rights are acknowledged and its laws respected by other nations.

Id. at 853.

214. Letter from Secretary of the Interior to Senator Strom Thurmond (undated); *Hearing on S. 605, supra* note 9, at 57 (testimony of Richard H. Abbey, James Knapp).

215. *See Hearing on S. 605, supra* note 9, at 41 (testimony of Ely Maurer).

whom are close allies.²¹⁶ As Congress noted in rejecting the position of dealers opposed to an earlier version of the CPIA:

the United States, as the major art-importing nation in the world [should] exercise moral leadership While United States action alone will not eliminate pillage or prevent illicit traffic in antiquities, closing the American art market to illegal trade should create a significant deterrent and meaningful step toward international cooperative efforts to meet an increasingly serious problem of preserving and protecting national cultural heritage.²¹⁷

The Senate rested its support of the final Cultural Property Bill "on grounds of principle, good foreign relations, and concern for the preservation of the cultural heritage of mankind."²¹⁸

CONCLUSION

The NSPA and the CPIA derive from a consistent U.S. policy to alleviate pillage and preserve cultural patrimony abroad and at home. Complementary statutes, the NSPA and the CPIA define U.S. law and the conditions for its enforcement. The NSPA discourages theft and assists in the return of stolen property. It also supports the commitment of the CPIA to preserve global archaeological sites and deter looting. The NSPA under *McClain* and the CPIA both protect cultural materials that are in jeopardy. The NSPA honors the valid ownership laws of foreign countries, while the CPIA may lead to U.S. import controls to protect the archaeological materials of these countries from destruction. The CPIA, the NSPA under *McClain*, the Pre-Columbian Act, the bilateral agreements, and ARPA all reveal the consistency of U.S. policy and reflect a firm U.S. commitment to international preservation of cultural patrimony.

Barbara B. Rosecrance

216. *See id.* Mark Feldman, the State Department representative at the time of the CPIA's passing, stated:

[G]overnment is not and should not be immune to pressures relating to other important United States interests. Our relations with various countries are a tapestry of many interests. For example, we have an agreement with Mexico for the reciprocal recovery of stolen automobiles. Back in 1969, Mexico told us in fairly blunt terms that a similar arrangement should be considered for cultural property, or they might not be able to continue the law enforcement cooperation.

Proceedings of the Panel on the U. S. Enabling Legislation of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, 4 SYRACUSE J. INT'L L. & COM. 97, 105 (1976).

217. H.R. REP. NO. 615, *supra* note 148, at 4.

218. S. REP. NO. 564, *supra* note 148, at 23.