

NOTE

U.S. LEGAL MECHANISMS FOR THE REPATRIATION OF  
CULTURAL PROPERTY: EVALUATING STRATEGIES  
FOR THE SUCCESSFUL RECOVERY OF CLAIMED  
NATIONAL PATRIMONY

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I. INTRODUCTION

Although the illicit importation of stolen cultural property<sup>1</sup> is not a phenomenon unique to the United States,<sup>2</sup> this country is widely recognized as home to one of the world's most voraciously acquisitive markets for art, antiquities, and plundered national patrimony.<sup>3</sup> According to the United Nations Educational, Scientific, and Cultural Organization (UNESCO), "[n]et imports [of 'collectibles and antiquities'] to the United States (\$1.1 billion) exceeded those of any other country by more than 20 times in 1998."<sup>4</sup> Of course, the immediate victims of this illegal traffic in artifacts, antiquities, and *objets d'art* are the nations and peoples

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1. The term "cultural property" as it is used in this Note refers to the "diverse and manifold art[i]facts that are an expression of a specific culture and which stand out either because there are not many others like them, because of the superior artistry with which they are fashioned, or because they are uniquely characteristic to that culture." See PERNILLE ASKERUD & ETIENNE CLÉMENT, UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION, PREVENTING THE ILLICIT TRAFFIC IN CULTURAL PROPERTY 5 (1997). Similar definitions are provided in the Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, S. TREATY DOC. NO. 106-1, at 16-17 (1999), 240 U.N.T.S. 240, 242 [hereinafter Hague Convention], and the 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, 234-36 [hereinafter UNESCO Convention].

2. Although the United States is not the sole importer of foreign cultural property, the international art market is primarily limited to industrialized nations. See ASKERUD & CLÉMENT, *supra* note 1, at 11.

3. See S. REP. NO. 97-564, at 23 (1982) ("[T]he United States is a principal market for articles of archaeological or ethnological interests [sic] and of art objects.").

4. PHILLIP RAMSDALE, UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION, INTERNATIONAL FLOWS OF SELECTED CULTURAL GOODS 1980-98, at 54 (2000), <http://unesdoc.unesco.org/images/0012/001213/121362eo.pdf> (last visited Nov. 5, 2004).

thereby divested of important pieces of their cultural heritage.<sup>5</sup> It is equally true, however, that the illicit acquisition of foreign national patrimony by U.S. citizens strains the United States' relations with source countries.<sup>6</sup> As the U.S. Department of State, testifying before the U.S. Senate Committee on Finance, noted:

The governments which have been victimized [by the illicit traffic in objects of cultural interest] have been disturbed at the outflow of these objects to foreign lands, and the appearance in the United States of objects has often given rise to outcries and urgent requests for return by other countries. The United States considers that on grounds of principle, good foreign relations, and concern for the preservation of the cultural heritage of mankind, it should render assistance in these situations.<sup>7</sup>

In response to such concerns, U.S. domestic law has developed a patchwork of remedies available to foreign governments seeking recovery of cultural property located in the United States.<sup>8</sup> Part II of this Note describes each of the remedies currently available under U.S. federal law and considers court cases in which these remedies have been pursued successfully by foreign governments. As discussion of these cases suggests, the likelihood that a foreign government will recover the claimed property depends upon a number of factual variables. Part III of this Note therefore focuses on applying the remedies described in Part II to a hypothetical fact pattern in which a foreign government attempts to recover an article of cultural property located in the United States. This method of analysis—in which the available remedies are evaluated in light of simplified variations on a common theme—attempts to reveal

5. See *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 297 (7th Cir. 1990) (Cudahy, J., concurring) (condemning "greed and callous disregard for the property, history and culture of others"); *Gov't of Peru v. Johnson*, 720 F. Supp. 810, 811–12 (C.D. Cal. 1989) (noting that the smuggling of pre-Columbian artifacts out of Peru "is destructive of a major segment of the cultural heritage of Peru").

6. See S. Rep. No. 97-564, at 23 (1982) ("[T]he discovery [in the United States] of stolen or illegally exported artifacts in some cases severely strains our relations with the countries of origin, which often include close allies.").

7. *Id.*

8. See generally Kevin F. Jowers, Comment, *International and National Legal Efforts to Protect Cultural Property: The 1970 UNESCO Convention, the United States, and Mexico*, 38 TEX. INT'L L.J. 145, 148–70 (2003); Claudia Fox, Note, *The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: An Answer to the World Problem of Illicit Trade in Cultural Property*, 9 AM. U. J. INT'L L. & POL'Y 225, 232–46 (1993); John E. Bersin, Note, *The Protection of Cultural Property and the Promotion of International Trade in Art*, 13 N.Y.L. SCH. J. INT'L & COMP. L. 125, 143–48 (1992); Judith Church, Note, *Evaluating the Effectiveness of Foreign Laws on National Ownership of Cultural Property in U.S. Courts*, 30 COLUM. J. TRANSNAT'L L. 179, 194–227 (1992) (all discussing various remedies available in U.S. courts for the recovery of stolen cultural property).

the combinations of factual predicate and legal remedy that offer the best chance for successful recovery of claimed cultural property.

## II. DISCUSSION

### A. *International Legal Efforts to Assist States in the Recovery of Stolen Cultural Property*

This Note primarily focuses on U.S. federal law as it relates to the recovery of the national patrimony of foreign states. Domestic law, however, has developed concurrently with the international law of cultural property,<sup>9</sup> and the complex relationship between the domestic and international law of cultural property has led to competing academic evaluations of the compatibility of national and international cultural property regimes.<sup>10</sup> Some commentators, such as Judith Church, have noted the concurrent “proliferation” of international, regional, and domestic legal efforts to stanch illicit trafficking in cultural property.<sup>11</sup> Others, such as Claudia Fox, have argued that competing national and international interests have created inconsistency and incoherence within the body of transnational cultural property law. Fox explained as follows:

[R]ules of common law nations, such as the United States, which protect the rights of the original owner, conflict with the civil law of other nations which favor the rights of the bona fide purchaser. In an effort to strike a balance between these competing interests, the courts have created inconsistencies in the body of law governing stolen cultural property.

9. See *Autocephalous Greek-Orthodox Church*, 917 F.2d at 295 (Cudahy, J., concurring) (“The United States has both acceded to international agreements and enacted its own statutes regarding the importation of cultural property.”); accord *United States v. An Original Manuscript Dated Nov. 19, 1778*, No. 96 Civ. 6221(LAP), 1999 WL 97894, at \*3 (S.D.N.Y. Feb. 22, 1999).

10. Compare, e.g., Stephanie O. Forbes, Comment, *Securing the Future of Our Past: Current Efforts to Protect Cultural Property*, 9 TRANSNAT’L LAW. 235, 252 (1996) (arguing that “recent federal legislation” reflects the increasing compatibility of U.S. domestic law with the “retentive policies of other nations”) with, e.g., Brian Bengs, Note, *Dead on Arrival? A Comparison of the Unidroit Convention on Stolen or Illegally Exported Cultural Objects and U.S. Property Law*, 6 TRANSNAT’L L. & CONTEMP. PROBS. 503, 504 (1996) (quoting Alexis de Tocqueville for the proposition that “in no country in the world . . . does the majority display less inclination for those principles which threaten to alter, in whatever manner, the laws of property,” including cultural property, than in the United States).

11. Church, *supra* note 8, at 180.

[These] competing policies and inconsistent standards governing stolen property cases have created roadblocks to international cooperation.<sup>12</sup>

Whether U.S. and international law are considered harmonious or irreconcilable, a full understanding of U.S. domestic law cannot be achieved without some knowledge of the international legal efforts to stem the traffic in stolen national patrimony.<sup>13</sup>

The problems of plunder, pillage, and illicit trafficking in objects of cultural importance have existed since time immemorial.<sup>14</sup> International awareness of the need for a unified,<sup>15</sup> comprehensive, and effective legal regime for the protection of national patrimony did not coalesce, however, until after World War II.<sup>16</sup> The U.S. Department of State has accordingly described the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict (the Hague Convention)<sup>17</sup> as "the first comprehensive treaty for the protection of cultural property during armed conflict."<sup>18</sup> In the half-century since the Hague Convention was adopted, concerned states have enacted a number of bilateral and

12. Fox, *supra* note 8, at 229-30 & n.19.

13. Some commentators indicate that the converse is also true. See Bengs, *supra* note 10, at 516 (focusing on U.S. law because the U.S. has the largest illicit property trade in the world and noting that "as a major world power, the participation or nonparticipation of the United States in any international effort to control the cultural property trade is ultimately determinative of its success or failure").

14. See Patty Gerstenblith, *The Public Interest in the Restitution of Cultural Objects*, 16 CONN. J. INT'L L. 197, 197 (2001) ("The looting of archaeological sites has persisted for centuries . . .").

15. See Hague Convention, *supra* note 1, pmb. (noting that "protection [of cultural property] cannot be effective unless both national and international measures have been taken to organize it").

16. See, e.g., Letter of Submittal from Strobe Talbot, U.S. Department of State, to the President (May 12, 1998), reprinted in S. TREATY DOC. NO. 106-1, at VII (1999) [hereinafter Letter to the President] ("A number of provisions for the protection of cultural property were included in law of war agreements prior to World War II, but the experience of that war clearly demonstrate[d] a need for more effective and comprehensive protections."); JESSICA L. DARRABY, ART, ARTIFACT, AND ARCHITECTURE LAW § 6:77, at 6-54 (2003) ("Since World War II members of the international community disseminated the idea that some objects are so important that the costs and responsibilities of protection and preservation should be borne by all nations, regardless of the source or site of the objects."). But cf. *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 296 (7th Cir. 1990) (Cudahy, J., concurring) (noting that the Hague Convention was "but the most recent multilateral agreement in a 200-year history of international attempts to protect cultural property during wartime").

17. Hague Convention, *supra* note 1.

18. Letter to the President, *supra* note 16, at VII.



multilateral agreements providing for the protection and, in the event of plunder, repatriation of stolen cultural property.<sup>19</sup>

Among the most important of the post-World War II multilateral agreements is the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (the UNESCO Convention).<sup>20</sup> Article 9 of the UNESCO Convention provides that “[a]ny State Party to th[e] Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States Parties who are affected,” and requires “States Parties . . . 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 the specific materials concerned.”<sup>21</sup>

Since the UNESCO Convention’s adoption, a scholarly consensus has emerged that the convention, although well-intentioned, has failed to provide the effective protections envisioned by its framers.<sup>22</sup> The director-general of UNESCO himself noted that “[t]hirty years after the adoption [of the UNESCO Convention] . . . [t]heft, looting, and illicit excavation continue on an appalling scale, thereby causing an endless depletion of peoples’

19. See, e.g., Convention on the Protection of the Underwater Cultural Heritage, Nov. 6, 2001, 41 I.L.M. 40; UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1330 [hereinafter UNIDROIT Convention]; Agreement Between the United States of America and the Republic of Peru for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, Sept. 15, 1981, U.S.-Peru, 33 U.S.T. 1607 [hereinafter U.S.-Peru Agreement]; Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151; UNESCO Convention, *supra* note 1; Treaty of Cooperation Between the United States of America and the United Mexican States Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, July 17, 1970, U.S.-Mex., 22 U.S.T. 494 [hereinafter U.S.-Mexico Agreement]; Council Directive 93/7/EEC of 15 March 1993 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State, 1993 O.J. (L 74).

20. See *United States v. An Original Manuscript Dated Nov. 19, 1778*, No. 96 Civ. 6221(LAP), 1999 WL 97894, at \*3 (S.D.N.Y. Feb. 22, 1999) (referring to the UNESCO Convention as “[o]ne of the more significant international agreements” concerning cultural property); Fox, *supra* note 8, at 248–49 (“The UNESCO Convention is the major international treaty for the protection of cultural property during peacetime and is a cornerstone of United States policy regarding stolen international art.”) (footnotes omitted).

21. UNESCO Convention, *supra* note 1, art. 9, 823 U.N.T.S. at 242.

22. See, e.g., Church, *supra* note 8, at 180 (“In the more than twenty years since the passage of the [UNESCO Convention], the trafficking in stolen and illegally exported items covered by its provisions has continued to increase . . . from an estimated \$1 billion in 1972 to \$2 billion by 1990.”) (footnotes omitted); Fox, *supra* note 8, at 250–51.

cultural treasures.”<sup>23</sup> One commentator has argued that excessive reservations, restrictive implementing legislation, non-participation by key art-importing countries, and vague language in the convention itself have taken “much of the bite out of the UNESCO Convention, making it largely ineffective.”<sup>24</sup> Others have leveled similar charges at the Convention on Cultural Property Implementation Act (CPIA),<sup>25</sup> the U.S. legislation implementing the UNESCO Convention.<sup>26</sup> As of this writing, very few cases have been decided in U.S. courts pursuant to the CPIA,<sup>27</sup> and in only one of those cases has a U.S. court published an opinion ordering the return of an object claimed by a foreign government.<sup>28</sup> Nevertheless, as discussed below, the UNESCO Convention and its domestic implementing legislation may yet prove useful to foreign governments seeking to recover cultural property in U.S. courts.<sup>29</sup>

More recently, a number of states seeking more effective protection for cultural property have signed the International Institute on the Unification of Private Law Convention on Stolen or Illegally Exported Cultural Objects (UNIDROIT Convention).<sup>30</sup> Although the UNIDROIT Convention improves on the UNESCO Conven-

23. Koïchiro Matsuura, Director-General of UNESCO, Appeal for Contribution to the International Fund for the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Illicit Appropriation, at [http://www.unesco.org/culture/legalprotection/committee/html\\_eng/appeal.shtml](http://www.unesco.org/culture/legalprotection/committee/html_eng/appeal.shtml) (last visited Nov. 6, 2004).

24. Fox, *supra* note 8, at 250–55; accord ASKERUD & CLÉMENT, *supra* note 1, at 37 (“The 1970 UNESCO Convention has been criticized on the grounds that some of its legal provisions are not sufficiently specific.”); Jowers, *supra* note 8, at 171 (“A significant shortcoming of the UNESCO Convention is the lack of market nation participation.”).

25. Convention on Cultural Property Implementation Act (CPIA), Pub. L. No. 97-446, 96 Stat. 2350 (codified as amended at 19 U.S.C. §§ 2601–13 (2000)).

26. See Bengs, *supra* note 10, at 523 (“[D]ue to the successful lobbying efforts of parties in the art market, [the CPIA] significantly reduced the effectiveness of the actual [UNESCO] Convention.”).

27. See Jowers, *supra* note 8, at 158–59 (discussing two cases that have been decided under CPIA since its enactment).

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

29. Cf. *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 296 (7th Cir. 1990) (Cudahy, J., concurring) (“[T]he judicial branch should certainly attempt to reflect in its decisionmaking the spirit as well as the letter of [the UNESCO Convention].”).

30. See UNIDROIT Convention, *supra* note 19, pmb. (“DETERMINED to contribute effectively to the fight against illicit trade in cultural objects by taking the important step of establishing common, minimal legal rules for the restitution and return of cultural objects between Contracting States”).

tion,<sup>31</sup> the United States has not yet signed or ratified the UNIDROIT Convention.<sup>32</sup>

### B. *Recovery of Cultural Property Under U.S. Domestic Law*

States seeking to recover national patrimony found in the United States have a number of legal remedies at their disposal.<sup>33</sup> These remedies have developed on an ad-hoc basis as the result of diplomatic practice and principles of comity,<sup>34</sup> the adoption and implementation of international agreements regulating the international trade in cultural property,<sup>35</sup> and the creative application and extension of U.S. domestic law to international disputes over the control of objects of national patrimony.<sup>36</sup> While the sheer number of available remedies may suggest a basic disorder in U.S. domestic law as it relates to the recovery of cultural property,<sup>37</sup> a comparative evaluation of the available remedies clarifies the suitability of particular remedies to particular factual predicates. This Note, therefore, considers three of the most important remedies

31. See United Nations Educational, Scientific and Cultural Org. (UNESCO), INTERNATIONAL CODE OF ETHICS FOR DEALERS IN CULTURAL PROPERTY, at [http://www.unesco.org/culture/legalprotection/committee/html\\_eng/ethics6.shtml](http://www.unesco.org/culture/legalprotection/committee/html_eng/ethics6.shtml) (last visited Feb. 19, 2005) (describing the increased protections provided by the UNIDROIT Convention, including the guarantees "that private owners have direct access to the courts of another country where cultural property stolen from their owners is found" and that "States [shall be able] to sue in the courts of such a country for important cultural property belonging to certain categories which has been illegally exported").

32. See Int'l Institute for the Unification of Private Law (UNIDROIT), STATUS REPORT, UNIDROIT CONVENTION ON STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS, at <http://www.unidroit.org/english/implement/i-95.htm> (last visited Feb. 19, 2005).

33. See generally Bersin, *supra* note 8, at 143–48; Church, *supra* note 8, at 194–227; Fox, *supra* note 8, at 232–46; Jowers, *supra* note 8, at 148–70 (all discussing various remedies available in U.S. courts for the recovery of stolen cultural property).

34. See CPIA, 19 U.S.C. § 2609(c)(1)(B) (applying the principle of reciprocity to compensation for innocent purchasers whose property is forfeited).

35. See S. REP. NO. 97-564, at 21 (1982) (noting that CPIA was enacted in order to meet the United States' "essential obligations" under the UNESCO Convention).

36. Jowers, *supra* note 8, at 167–68 (noting that the National Stolen Property Act, "although not specifically designed for the protection of cultural property" has nonetheless been successfully used to "prosecute individuals involved in theft or illegal transport of foreign cultural property" and to recover the property stolen).

37. See DARRABY, *supra* note 16, § 6:77, at 6-55 ("In the United States, acts of Congress, executive agreements and bilateral treaties during the last twenty years have produced a body of cultural property regulation, the efficacy of which is in dispute and the revision of which is contemplated."). Some commentators have critically assessed the efficacy of any and all of the remedies available to claimant states under U.S. law. See James A.R. Nafziger, *Seizure and Forfeiture of Cultural Property by the United States*, 5 VILL. SPORTS & ENT. L.J. 19, 29–30 (1998) (criticizing the current legal regime as "weak" and noting that "[i]llegal trafficking in cultural property is rampant," but acknowledging that "[t]he trend . . . is somewhat encouraging").

available to foreign governments in U.S. courts: (1) the CPIA; (2) bilateral treaties; and (3) the National Stolen Property Act.

Before turning to an examination of those remedies, it is worth mentioning other available remedies that this Note does not address. Because this Note focuses solely on *judicial* remedies, it does not analyze two of the most promising avenues for the recovery of stolen patrimony—executive enforcement actions<sup>38</sup> and extra-judicial diplomatic negotiation.<sup>39</sup> This Note similarly avoids discussion of paralegal codes of professional ethics,<sup>40</sup> which have been recommended and in some cases adopted by groups of dealers and collectors of cultural property.<sup>41</sup> Nor does this Note discuss the 1954 Hague Convention,<sup>42</sup> because its coverage is limited to cultural property stolen or destroyed during periods of armed conflict,<sup>43</sup> and because no judicial action has ever been brought before a U.S. court based on a violation of this treaty.<sup>44</sup> Finally, because this Note focuses on U.S. federal law, common law actions

38. See generally *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 296 (7th Cir. 1990) (Cudahy, J., concurring) (“[T]he UNESCO Convention seems to contemplate primarily measures to be implemented by the executive branch of government through its import and export rules and policies.”); Jowers, *supra* note 8, at 157–58 (noting that “CPIA is primarily designed to operate through actions taken by the executive branch” and that “[o]bjects have . . . been returned under [CPIA’s] stolen property provisions to Greece, Italy, Mexico, Guatemala, and Turkey, although overall statistics are not kept for objects seized and returned under the CPIA”).

39. See DARRABY, *supra* note 16, § 6:86, at 6-68 (noting that before the UNESCO Convention and its domestic implementing legislation, “political compromise and diplomatic negotiations resulted in return of cultural objects to claimant countries”).

40. See, e.g., INT’L COUNCIL OF MUSEUMS, ICOM CODE OF ETHICS FOR MUSEUMS (2002), available at [http://icom.museum/ethics\\_rev\\_engl.html](http://icom.museum/ethics_rev_engl.html) (last visited Feb. 19, 2005).

41. For a thorough discussion of the utility and feasibility of such ethical codes, see PATRICK J. O’KEEFE, UNESCO, FEASIBILITY OF AN INTERNATIONAL CODE OF ETHICS FOR DEALERS IN CULTURAL PROPERTY FOR THE PURPOSE OF MORE EFFECTIVE CONTROL OF ILLICIT TRAFFIC IN CULTURAL PROPERTY (1994), available at <http://unesdoc.unesco.org/images/0009/000985/098554eo.pdf> (last visited Nov. 5, 2004).

42. For a discussion of the Hague Convention, see Sarah Eagen, Comment, *Preserving Cultural Property: Our Public Duty: A Look at How and Why We Must Create International Laws That Support International Action*, 13 PACE INT’L L. REV. 407, 422–28 (2001).

43. See Letter of Transmittal from President William J. Clinton, to the Senate of the United States (Jan. 6, 1999), reprinted in S. TREATY DOC. NO. 106-1, at III (1999) (noting that the Hague Convention “establishes a regime for special protection of a highly limited category of cultural property” and “provides both for preparations in peacetime for safeguarding cultural property against foreseeable effects of armed conflicts, and also for respecting such property in time of war or military occupation”).

44. See Eagen, *supra* note 42, at 427 (noting that the Hague Convention lacks “a way to implement its guidelines”).

for replevin or conversion under the laws of various U.S. states are not considered here.<sup>45</sup>

### 1. Convention on Cultural Property Implementation Act

Congress passed the Convention on Cultural Property Implementation Act (CPIA)<sup>46</sup> in 1983, eleven years after the United States acceded to the UNESCO Convention,<sup>47</sup> in order to meet the United States' "essential obligations" under the 1970 agreement.<sup>48</sup> Among the obligations assumed by the United States upon accession to the UNESCO Convention were duties "to prohibit the import of cultural material identified as stolen from an institution in another State Party (i.e., a party to the Convention), and to assist in its recovery if it is imported."<sup>49</sup> To date, U.S. authorities have interpreted the first of these "essential obligations," prohibiting importation of certain stolen cultural material, as the primary duty imposed by the UNESCO Convention.<sup>50</sup>

The CPIA, however, not only enacts increased import controls<sup>51</sup> but also establishes two legal mechanisms for the repatriation of stolen national patrimony imported into the United States.<sup>52</sup> The simplest of these mechanisms, at least in theory, is a forfeiture action pursuant to the CPIA under section 2607 of Title 19 of the United States Code.<sup>53</sup> According to the Senate Committee on Finance, section 2607 "declares illegal the importation into the United States of cultural property identified as appertaining to the inventory of a museum, a religious or public monument, or a similar institution in a State Party."<sup>54</sup> Section 2607 also "creates a jurid-

45. See DARRABY, *supra* note 16, § 6:117, at 6-94 to 6-98 (providing a list of common law court actions for the recovery of cultural property).

46. CPIA, 19 U.S.C. §§ 2601-13.

47. For a discussion of the reasons for Congress's delay in enacting CPIA, see *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 296-97 (7th Cir. 1990) (Cudahy, J., concurring) (noting that the eleven-year "delay in the enactment of [CPIA] apparently was caused, in part, by pressure from art dealers and traders, who argued that if the United States undertook unilateral import controls, illegal cultural property would simply be sold to those art market countries lacking similar import controls").

48. S. REP. NO. 97-564, at 21 (1982).

49. *Id.* at 22.

50. See *supra* note 21 and accompanying text.

51. See CPIA, 19 U.S.C. §§ 2602-04, 2606-07.

52. See *id.* §§ 2607-08.

53. See *id.* § 2607.

54. S. REP. NO. 97-564, at 22 (1982); see also the CPIA, which provides that [n]o article of cultural property documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution in any State Party which is stolen from such institution after the effective date of this

ical basis for actions, authorized in section [2609], to recover the property."<sup>55</sup> Under section 2609,<sup>56</sup> articles of cultural property imported in violation of section 2607 are made subject to seizure and forfeiture,<sup>57</sup> with the exception that "U.S. museums or similar institutions may retain the articles, subject to certain protections, until their final disposition is determined."<sup>58</sup> The CPIA thus empowers the federal government to commence *in rem* forfeiture proceedings against certain kinds of cultural property claimed as part of the national patrimony of a foreign government. At the time of this writing, only one published case has been decided pursuant to section 2607.<sup>59</sup>

In addition to those articles of cultural property identified by Section 2607, section 2609 also authorizes seizure and forfeiture of articles imported in violation of the CPIA under section 2606.<sup>60</sup> Section 2602 prohibits the importation of articles of cultural property identified as being "in jeopardy [of] . . . pillage"<sup>61</sup> either in a bilateral agreement between the United States and the claimant state under section 2606<sup>62</sup> or in an executive "emergency condition" under section 2603.<sup>63</sup> The Senate Finance Committee summarized the operation of these CPIA provisions as follows:

Sections [2602–2604] and [2606] implement article 9 of the [UNESCO] Convention. [These] sections authorize the President, subject to certain conditions and limitations, to enter into bilateral or multilateral agreements or to invoke emergency import regulations to control the importation of archaeological or ethnological materials that have been illegally exported from another State Party or are in danger thereof. The exercise of this authority is contingent upon a request from a State Party, the cultural patrimony of which is in jeopardy from pillage.<sup>64</sup>

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title, or after the date of entry into force of the Convention for the State Party, whichever date is later, may be imported into the United States.

19 U.S.C. § 2607.

55. S. REP. NO. 97-564, at 22; *see also* CPIA, 19 U.S.C. § 2609 (authorizing seizure and forfeiture of articles designated contraband under Sections 2606 and 2607).

56. CPIA, 19 U.S.C. § 2609.

57. *Id.* § 2609(a).

58. S. REP. NO. 97-564, at 22.

59. *See* United States v. An Original Manuscript Dated Nov. 19, 1778, No. 96 Civ. 6221 (LAP), 1999 WL 97894, at \*3 (S.D.N.Y. Feb. 22, 1999); *see also* DARRABY, *supra* note 16, § 6:96, at 6-78 (noting that, as of July 2003, "no appellate cases have been reported, but a district court recently interpreted these provisions," citing *Original Manuscript*).

60. CPIA, 19 U.S.C. § 2609.

61. *Id.* § 2602.

62. *Id.* § 2602(a)(2)(A).

63. *Id.* § 2603(c).

64. S. REP. NO. 97-564, at 22 (1982).

Since the enactment of the CPIA, the United States has entered into bilateral agreements pursuant to section 2602 with Bolivia, Cambodia, Canada, Cyprus, El Salvador, Guatemala, Honduras, Italy, Mali, Nicaragua, and Peru,<sup>65</sup> and the president has exercised the “emergency action” power of section 2603 seven times.<sup>66</sup> Despite this proliferation of bilateral agreements and emergency actions, however, no published judicial opinion has been decided pursuant to section 2606 since the CPIA’s enactment.

In *United States v. Original Manuscript Dated November 19, 1778*, the U.S. District Court for the Southern District of New York granted summary judgment to the United States on its claim for the forfeiture of a manuscript identified as stolen from the collection of the Mexican National Archives in Mexico City.<sup>67</sup> Finding that the United States had established “probable cause to believe that the seized defendant-in-rem Manuscript is the same one which has been reported stolen from the Mexican National Archives,”<sup>68</sup> the court held that the requirements for forfeiture pursuant to CPIA section 2607<sup>69</sup> were satisfied.<sup>70</sup> The court rejected the claim of the U.S. purchaser of the manuscript that he was an “innocent owner”<sup>71</sup> entitled to compensation under CPIA section 2609.<sup>72</sup> The court accepted as dispositive an affidavit of the general director of litigation and advice in the Office of the Attorney General of the Republic of Mexico affirming Mexico’s willingness to forfeit and return to the United States, without compensation to the purchaser, similar property found in Mexico under similar circumstances.<sup>73</sup> Thus, in the first and, to date, only published judicial decision pursuant to CPIA section 2607,<sup>74</sup> the court set very low standards for proving both that the claimed property is subject to forfeiture and that the U.S. purchaser is entitled to no compensa-

65. See BUREAU OF EDUCATIONAL AND CULTURAL AFF., U.S. DEP’T OF STATE, CHART OF CURRENT AND EXPIRED IMPORT RESTRICTIONS UNDER THE CONVENTION ON CULTURAL PROPERTY IMPLEMENTATION ACT (2004), at <http://exchanges.state.gov/culprop/chart.html> (last visited Feb. 19, 2005).

66. See *id.* (charting seven instances of “emergency action”).

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

68. *Id.* at \*6.

69. CPIA, 19 U.S.C. § 2607.

70. See *Original Manuscript*, 1999 WL 97894, at \*6.

71. See *id.* at \*6–\*8.

72. CPIA, 19 U.S.C. § 2609(c)(1).

73. See *Original Manuscript*, 1999 WL 97894, at \*8.

74. But see Nafziger, *supra* note 37, at 19 (describing an unpublished opinion of the U.S. District Court for the Southern District of New York ordering the return of a stolen sculpture of Artemis to a convent in Italy as the “first such order” under CPIA).



tion, leading some commentators to expect increased litigation under CPIA section 2607.<sup>75</sup>

## 2. Bilateral Treaties

In addition to the bilateral agreements the United States has negotiated under CPIA section 2602, the United States is also party to a number of bilateral treaties negotiated prior to the CPIA's enactment the purpose of which is to regulate the traffic in cultural property between foreign states and American collectors.<sup>76</sup> The 1970 Treaty of Cooperation Between the United Mexican States and the United States of America Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties (the U.S.-Mexico Treaty)<sup>77</sup> and the 1981 Agreement Respecting the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties signed by the United States and Peru (the U.S.-Peru Agreement)<sup>78</sup> are examples of such treaties.<sup>79</sup> Among these bilateral agreements, the U.S.-Mexico Treaty is unique in that it specifically authorizes the U.S. attorney general to commence a judicial action for the recovery of property claimed by the Government of Mexico to constitute part of its national patrimony.<sup>80</sup> The parties to the U.S.-Mexico Treaty, however, clearly envisioned executive action and diplomatic negotiation as the principle means for the repatriation of stolen patrimony.<sup>81</sup> Article III of the U.S.-Mex-

75. See Jowers, *supra* note 8, at 170-71 (concluding that the UNESCO Convention is likely to "continue to increase in membership and effectiveness" provided that "the United States . . . broaden[s] its protection by actively negotiating with other countries to implement additional agreements under [CPIA]"); cf. Nafziger, *supra* note 37, at 29-30 ("Illegal trafficking in cultural property is rampant and the legal regime is still weak. The trend, however, is somewhat encouraging, as courts and government agencies gradually learn to apply the law more effectively.").

76. See DARRABY, *supra* note 16, § 6:114, at 6-90 to 6-91 (listing four such agreements, between the United States and Ecuador, Guatemala, Mexico, and Peru).

77. U.S.-Mexico Agreement, *supra* note 19.

78. U.S.-Peru Agreement, *supra* note 19.

79. Other examples include: Agreement Between the United States of America and the Republic of Guatemala for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, May 21, 1984, U.S.-Guat., T.I.A.S. No. 11,077 [hereinafter U.S.-Guatemala Agreement] and Agreement Between the United States of America and the Republic of Ecuador for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, Nov. 17, 1983, U.S.-Ecuador, T.I.A.S. No. 11,075 [hereinafter U.S.-Ecuador Agreement].

80. Compare U.S.-Mexico Agreement, *supra* note 19, art. III, with U.S.-Guatemala Agreement, *supra* note 79, art. II, and U.S.-Ecuador Agreement, *supra* note 79, art. II, and U.S.-Peru Agreement, *supra* note 19, art. II.

81. See Jowers, *supra* note 8, at 161 (noting that "application [of the U.S.-Mexico Agreement] has been limited," though artifacts have been repatriated pursuant to it "without resort to a judicial proceeding").

ico Treaty authorizes the attorney general to institute judicial proceedings only “[i]f the requested Party cannot *otherwise* effect the recovery and return of a stolen archaeological, historical or cultural property located within its territory.”<sup>82</sup> To date, the U.S.-Mexico Treaty has been invoked in a number of executive actions for the recovery of stolen cultural property, but no U.S. judicial actions have been brought pursuant to the Treaty.<sup>83</sup> It is therefore unsurprising that no judicial actions have been brought pursuant to the other pre-CPIA bilateral agreements,<sup>84</sup> none of which provides for the judicial remedy set out in the U.S.-Mexico Treaty.<sup>85</sup> Possible explanations for this under-use of the U.S.-Mexico Treaty’s judicial remedy are discussed below.

### 3. National Stolen Property Act

The National Stolen Property Act (NSPA)<sup>86</sup> provides that “[w]hoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud” shall be subject to certain criminal sanctions.<sup>87</sup> Federal civil and criminal forfeiture statutes further subject property stolen in violation of NSPA to seizure and forfeiture by the federal government.<sup>88</sup> Prior to the CPIA’s enactment, forfeiture pursuant to the NSPA constituted the primary legal means for the return of claimed national patrimony.<sup>89</sup> Unlike the CPIA, however, the NSPA applies only to “stolen” goods.<sup>90</sup> For the NSPA to apply, it must therefore be shown that the claimed property was “owned” by the claimant state prior to its

82. U.S.-Mexico Agreement, *supra* note 19, art. III (emphasis added).

83. See Jowers, *supra* note 8, at 161.

84. See DARRABY, *supra* note 16, § 6:114, at 6-91 (“If any property has been returned by the United States under these agreements, it has not been publicly reported.”).

85. See, e.g., U.S.-Guatemala Agreement, *supra* note 79, art. II; U.S.-Ecuador Agreement, *supra* note 79, art. II; U.S.-Peru Agreement, *supra* note 19, art. II.

86. National Stolen Property Act (NSPA), 18 U.S.C. §§ 2314–15 (2000).

87. *Id.* § 2314.

88. See 19 U.S.C. § 1595(a) (2000) (providing that stolen merchandise imported into the United States in violation of the law shall be seized and forfeited).

89. See *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 297 (7th Cir. 1990) (Cudahy, J., concurring) (noting that CPIA was enacted, at least in part, to restrain customs officers who had “deemed all archaeological materials that a foreign country had claimed were ‘stolen’ to be subject to seizure under [the NSPA]”).

90. See NSPA, 18 U.S.C. § 2314.

"theft" by the defendant.<sup>91</sup> U.S. courts have held that articles of cultural property claimed by a foreign government to constitute part of that state's national patrimony are "owned" by the foreign state and will be considered "stolen" if acquired in violation of the state's domestic patrimony laws.<sup>92</sup> Criminal prosecution of traffickers in stolen cultural property, therefore, provides another means by which the federal government may seize and forfeit national patrimony for the purpose of securing its repatriation to a complaining state.<sup>93</sup> Limitations on this powerful tool for the repatriation of cultural property are discussed below.

In the most recent case to apply the NSPA to cultural patrimony, the U.S. Court of Appeals for the Second Circuit upheld the conviction of a U.S. art and antiquities dealer for purchasing certain Egyptian artifacts that the defendant knew were removed from Egypt in violation of an Egyptian umbrella patrimony statute.<sup>94</sup> The case of *United States v. Schultz* is important for resolving an apparent dispute among the federal courts regarding the efficacy of such umbrella statutes in establishing state ownership over the claimed property within the meaning of the NSPA.<sup>95</sup> After *Schultz*, it is clear that criminal prosecutions—and subsequent forfeiture actions<sup>96</sup>—may be brought pursuant to a charge of theft predicated on a foreign government's umbrella patrimony statute, provided that the foreign law clearly asserts national ownership over the property.<sup>97</sup>

91. See *United States v. Schultz*, 333 F.3d 393, 399 (2d Cir. 2003) (noting that goods are considered "stolen" only if they "belong to a person or entity and are taken from that person or entity without its consent").

92. See *id.* at 404 (holding that Egyptian patrimony law was sufficient to establish ownership of antiquities in the government of Egypt); *United States v. McClain*, 545 F.2d 988, 996 (5th Cir. 1977) (holding that NSPA could apply to "artifacts declared by Mexican law to be the property of the Nation"); *United States v. Hollinshead*, 495 F.2d 1154, 1156 (9th Cir. 1974) (finding that Guatemalan patrimony law establishing ownership in the government of Guatemala was sufficient to sustain a prosecution for theft under the NSPA). But see *Gov't of Peru v. Johnson*, 420 F. Supp. 810, 814 (C.D. Cal. 1989) (holding that Peru's statutes did not clearly establish ownership in the government of Peru of pre-Columbian artifacts imported into the United States prior to 1929 for purposes of NSPA).

93. See UNESCO, INTERGOVERNMENTAL COMMITTEE FOR PROMOTING THE RETURN OF CULTURAL PROPERTY TO ITS COUNTRIES OF ORIGIN OR ITS RESTITUTION IN CASE OF ILLICIT APPROPRIATION; SECRETARIAT REPORT, U.N. Doc. CLT-2003/CONF.204/2, at 3 (2003) (noting that the prosecution in *Schultz* resulted in the "return [of] an ancient Old Kingdom relief to Egypt as restitution") [hereinafter SECRETARIAT REPORT].

94. See *Schultz*, 333 F.3d at 410, 416.

95. See *supra* note 92 and accompanying text.

96. See *Schultz*, 333 F.3d at 410, 416.

97. See *id.* at 403–04.

### III. ANALYSIS

This Part evaluates the remedies discussed in Part II in light of variations on a simplified hypothetical case in which a foreign government seeks to recover cultural property located in the United States. The basic elements of the hypothetical are as follows.

The state of Helenica was once home to a flourishing ancient civilization. Although ancient Helenican culture eventually declined and disappeared, modern Helenica is rich with artifacts from this earlier era. In order to protect these treasures, the Helenican government has enacted an umbrella statute declaring all artifacts of ancient Helenican civilization to be national patrimony and property of the state. Eager to strengthen the international legal regime for the protection of cultural property, Helenica has acceded to the 1970 UNESCO Convention and has entered into a bilateral treaty with the United States identical to the U.S.-Mexico Treaty discussed above.<sup>98</sup>

Despite the Helenican government's best efforts, impoverished Helenican peasants sometimes supplement their meager incomes by selling ancient Helenican artifacts to wealthy U.S. tourists. Some of these artifacts are discovered innocently, as when a Helenican peasant tilling his fields unearths a shard of ancient Helenican pottery. Other artifacts are deliberately stripped from ancient Helenican monuments or stolen from Helenican museums.

In 1998, during a period of political unrest, rioters looted the Helenican National Museum. Numerous pieces of priceless ancient Helenican art were stolen from the museum and eventually sold to foreign collectors. All of the stolen pieces had previously been catalogued as part of the permanent collection of the Helenican National Museum. At the request of the Helenican prime minister, the president of the United States has issued an executive emergency action identifying the entire catalogue of the Helenican National Museum as being in jeopardy of pillage and imposing import restrictions on those items identified by the Helenican authorities as stolen from the museum.<sup>99</sup> The president also concluded a temporary bilateral agreement with Helenica under CPIA in which the stock of the Helenican National Museum is identified as being in danger of plunder.<sup>100</sup>

98. *See supra* Part II.B.2 and accompanying discussion.

99. It is assumed here that the rather complex limitations placed on the President's discretion by CPIA Section 2603 have been satisfied. *See* CPIA, 19 U.S.C. § 2603.

100. It is assumed here that the rather complex limitations placed on the President's discretion by CPIA Section 2602 have been satisfied. *See id.* § 2602.

Recently it has come to the attention of the government of Helenica that a prominent U.S. collector of ancient art, Dr. Alistair Pince-Nez, has consigned to Slotheby's auction house two ancient Helenican artifacts. The Helenican government takes the position that both of these artifacts constitute part of the national patrimony of Helenica and must be returned. The first artifact is an undifferentiated shard of pottery, identifiable as Helenican only because of its distinctive reddish hue, which is characteristic of Helenican clay. The second piece is an expertly carved alabaster bust of Beres, the ancient Helenican god of wine and revelry. This bust is listed in the catalogue of the Helenican National Museum and has been identified by Helenican authorities as stolen from that institution. The Helenican Foreign Minister has communicated to the U.S. Secretary of State Helenica's demand that the items be repatriated. The Secretary of State must now determine which of the available legal mechanisms offers the surest chance for recovery of the items.

A. *Recovery of the Claimed Items Under the CPIA*

1. Recovery of the Bust under CPIA Section 2607

The factual scenario outlined above presents a promising case for recovery of the stolen bust through a forfeiture action by the United States pursuant to CPIA section 2607.<sup>101</sup> Here, the claimed property has been "documented as appertaining to the inventory of a museum" in a State Party to the 1970 UNESCO Convention.<sup>102</sup> The hypothetical case is thus similar to the *Original Manuscript* case discussed above.<sup>103</sup> In both cases the claimed property had been catalogued as part of the collection of a museum of the claimant state.<sup>104</sup> Where such documentation exists, it remains only for the government to show probable cause<sup>105</sup> to believe that the claimed property is identical to the catalogued property and that it was stolen from a museum in the claimant state after April 12, 1983, the "effective date" of the CPIA.<sup>106</sup> If this threshold showing is made,

101. See *id.* § 2607.

102. See *id.*

103. See *United States v. An Original Manuscript Dated Nov. 19, 1778*, No. 96 Civ. 6221 (LAP), 1999 WL 97894, at \*1 (S.D.N.Y. Feb. 22, 1999) (manuscript claimed by Mexico was "contained in Volume II, Folio 365, of the 'Californias' collection at the Mexican National Archives").

104. See *id.*

105. See *id.* at \*5 ("To establish a prima facie case for forfeiture, the government need only demonstrate probable cause.").

106. See *id.* at \*6 (citing CPIA, 19 U.S.C. § 2607).

the burden will pass to Dr. Pince-Nez to prove by a preponderance of the evidence<sup>107</sup> that he is an innocent owner.<sup>108</sup> As *Original Manuscript* indicates, the persuasiveness of an “innocent owner” defense may depend upon whether the purchaser requested or was provided with credible documentation establishing the artifact’s legitimate provenance.<sup>109</sup> Given that “willful blindness” to an artifact’s questionable provenance can defeat a claim of innocent ownership,<sup>110</sup> Dr. Pince-Nez is unlikely to prevail on such a defense because the claimed article constitutes part of the catalogued collection of a state’s national museum.<sup>111</sup>

Even if Dr. Pince-Nez were able to establish by a preponderance of the evidence that he was an innocent owner, Helenica could still recover the bust if it agrees to “pay[ ] [Dr. Pince-Nez] an amount equal to the amount which [Dr. Pince-Nez] paid for the article,” or if the “United States establishes that [the state of Helenica] . . . would in similar circumstances recover and return an article stolen from an institution in the United States without requiring payment of compensation.”<sup>112</sup> As *Original Manuscript* demonstrates, the burden of proof for the second standard is exceedingly low and may be established by the affidavit of a single government official of the claimant state.<sup>113</sup> Helenica is therefore likely to recover the bust of Beres through a forfeiture action by the United States under section 2607.

As the foregoing discussion suggests, however, the likely success of a forfeiture action to recover the claimed bust of Beres under section 2607 depends upon the convergence of a number of circumstances. Most significant, a forfeiture action has a probable

107. See *id.* (requiring proof by a preponderance of the evidence of the affirmative defense of innocent ownership).

108. See *id.* (finding that because “the Government has made its probable cause showing, the onus now lies on the claimant” to establish the affirmative defense of innocent ownership).

109. See *id.* at \*7 (finding that purchaser was “willfully blind to the suspicious nature of the Manuscript transaction” by failing to request documentation supporting the seller’s representations as to the manuscript’s legitimate provenance).

110. See *id.*

111. Cf. *id.* at \*1 (rejecting an innocent owner defense where a manuscript claimed by Mexico was “contained in Volume II, Folio 365, of the ‘Californias’ collection at the Mexican National Archives”). The court in *Original Manuscript* considered a number of other factors before rejecting the defendant’s claim of innocent ownership, including the defendant’s experience as a manuscript trader, the circumstances surrounding the exchange of the manuscript for money, and the defendant’s inability to demonstrate that he had made reasonable inquiries into the legitimacy of the manuscript’s provenance. *Id.* at \*7.

112. CPIA, 19 U.S.C. § 2609.

113. See *Original Manuscript*, 1999 WL 97894, at \*8.

chance of success on the present hypothesis because the bust has been "documented as appertaining to the inventory of a museum" of a State Party to the 1970 UNESCO Convention.<sup>114</sup> As written, the CPIA also subjects to forfeiture "article[s] of cultural property documented as appertaining to the inventory of a . . . religious or secular public monument or similar institution."<sup>115</sup> How broadly courts might interpret this provision remains to be seen.<sup>116</sup> Chances for a successful forfeiture would decrease, however, if the claimed property were not so catalogued, since the plain language of the statute makes the protections of section 2607 inapplicable to articles of cultural property that cannot fairly be described as appertaining to an inventory of a museum, monument, or similar institution.<sup>117</sup> As one scholar has noted, "cultural property of a foreign country is not subject to American cultural property law under [CPIA]" if such property fails to "conform to [CPIA's] cultural property classifications."<sup>118</sup>

Dr. Pince-Nez's chances of prevailing on his innocent owner defense would likewise increase if the facts were modified to show that Dr. Pince-Nez was new to the business of art trading, that he made reasonable inquiries into the provenance of the bust, and that the circumstances of the transaction were not such as to raise a red flag of possible illegitimacy.<sup>119</sup>

In short, although the hypothesis presented offers a fair chance of successful recovery, the various requirements of CPIA section 2607 limit its utility to a fairly narrow range of circumstances.<sup>120</sup>

## 2. Recovery of the Bust Under CPIA Section 2606

The facts of the hypothetical also present a promising case for recovery under section 2606,<sup>121</sup> since the bust has been identified

114. CPIA, 19 U.S.C. §§ 2607, 2609.

115. *Id.*

116. See *supra* note 59 and accompanying text.

117. CPIA, 19 U.S.C. § 2607.

118. DARRABY, *supra* note 16, § 6:116, at 6-92; see also Nafziger, *supra* note 37, at 27 ("[A]n item may be seized under the Act only if it has been specifically identified in [an emergency import restriction or temporary bilateral agreement] or if it is already inventoried property stolen from a museum, religious or secular public monument, or similar institution in a requesting party to the agreement.").

119. See *supra* note 109 and accompanying text.

120. See DARRABY, *supra* note 16, § 6:116, at 6-92 (noting that CPIA's limited coverage requires "practitioners . . . to be familiar with alternative legal routes for recovery of personal property located in the United States").

121. CPIA, 19 U.S.C. § 2606.



in an executive emergency action under section 2603<sup>122</sup> and an emergency bilateral agreement has been concluded under section 2602.<sup>123</sup> Although no court has yet decided a case pursuant to section 2606, nothing in the CPIA suggests that the burden or method of proof in such a case would be different than in a case commenced under section 2607. Accordingly, the government would first have to show probable cause to believe that the claimed property is identical to property identified in the executive emergency action or emergency bilateral agreement.<sup>124</sup> Unlike an action brought under section 2607, however, the CPIA provides no “innocent owner” defense<sup>125</sup> for cases brought under section 2606.<sup>126</sup> It therefore appears that the bust would be returned to Helenica so long as Helenica agrees to “bear[ ] the expenses incurred incident to [its] return and delivery.”<sup>127</sup>

As with recovery under section 2607, however, the likelihood of recovery under section 2606 would decrease if certain facts of the hypothetical were modified. Most fundamental, section 2606 would not permit recovery absent an emergency executive action under Section 2603 or a temporary bilateral agreement under section 2602.<sup>128</sup> The fact that very few such agreements have been concluded or emergency actions taken suggests that section 2606 will be of limited utility as a mechanism for recovering cultural property in most circumstances.<sup>129</sup>

### 3. Recovery of the Pottery Shard under CPIA Sections 2606 and 2607

The state of Helenica is unlikely to recover the claimed shard of pottery through a CPIA action. Whether Helenica’s “umbrella” statute would suffice to establish Helenican ownership of the shard

122. CPIA, 19 U.S.C. § 2603.

123. CPIA, 19 U.S.C. § 2602.

124. *Cf. United States v. An Original Manuscript Dated Nov. 19, 1778*, No. 96 Civ. 6221 (LAP), 1999 WL 97894, at \*6 (S.D.N.Y. Feb. 22, 1999) (requiring a showing of probable cause to believe that the claimed property appertained to a museum in the claimant state in an action brought under CPIA Section 2607).

125. *See* CPIA, 19 U.S.C. § 2609(c)(1) (providing innocent owner defense only for forfeiture actions pursuant to Section 2607).

126. *See* DARRABY, *supra* note 16, § 6:104, at 6-85 (noting that federal regulations implementing Section 2606 provide for summary forfeiture of property designated under that section); *see also* 19 C.F.R. § 12.104e(a) (2003) (requiring that “the material shall be seized and summarily forfeited to the U.S.”).

127. CPIA, 19 U.S.C. § 2609(b).

128. *See id.* § 2606.

129. *See supra* notes 65–66 and accompanying text.

is irrelevant for purposes of a CPIA action,<sup>130</sup> which requires that the claimed property be “documented as appertaining to the inventory of a museum or religious or secular public monument” of the claimant state.<sup>131</sup> Of course, if it were established that there exists probable cause to believe that the shard is identical to some item in the catalogue of the National Museum or identified in an executive emergency action or bilateral treaty, analysis would proceed as described above in the case of the bust of Beres.<sup>132</sup> If, however, the shard were merely an undifferentiated piece of ancient Helenican pottery, the CPIA would provide no basis for recovery.<sup>133</sup>

#### B. *Recovery of the Claimed Items Under a Bilateral Treaty*

The hypothetical scenario provides that the United States and Helenica have entered into a bilateral treaty identical to the U.S.-Mexico Treaty discussed above.<sup>134</sup> The treaty between the United States and Helenica thus authorizes the U.S. attorney general to institute a judicial forfeiture proceeding to recover property claimed by Helenica, provided that the United States “cannot otherwise effect the recovery and return of [the] stolen archaeological, historical or cultural property” located in its territory.<sup>135</sup> Unfortunately, no judicial precedent exists to guide analysis of how a judicial action under a treaty such as the U.S.-Mexico Treaty might proceed.<sup>136</sup> The very absence of such precedent may suggest that non-judicial enforcement mechanisms—which have proved sufficient in the past<sup>137</sup>—would prove sufficient here. Nevertheless, the hypothetical U.S.-Helenica treaty, like the actual U.S.-Mexico Treaty, provides for judicial enforcement,<sup>138</sup> and it is fair to ask how such an enforcement action might proceed.

As a forfeiture action, the suit itself would presumably proceed according to the familiar principles of civil forfeiture, which require only that the government show probable cause to believe

130. *But see* United States v. Schultz, 333 F.3d 393, 402 (2d Cir. 2003) (holding that Egyptian umbrella patrimony law was sufficient to establish ownership of antiquities in the government of Egypt).

131. CPIA, 19 U.S.C. § 2607.

132. *See supra* notes 105–106 and accompanying text.

133. *See supra* note 118 and accompanying text.

134. *See supra* Part II.B.2.

135. *See* U.S.-Mexico Agreement, *supra* note 19, art. III.

136. *See supra* note 83 and accompanying text.

137. *See supra* note 83 and accompanying text.

138. *See* U.S.-Mexico Agreement, *supra* note 19, art. III.

that the property proceeded against is subject to forfeiture.<sup>139</sup> Because the treaty provides that “stolen” property is subject to forfeiture, the government would have to show first that the claimed objects were legally owned by Helenica at the time of their export.<sup>140</sup> In the case of the bust of Beres, which Helenica has catalogued as part of the collection of its national museum, this threshold would almost certainly be satisfied.<sup>141</sup> In the case of the shard of pottery, in contrast, the decisions in *United States v. Schultz*, *United States v. McClain*, and *Government of Peru v. Johnson* suggest that the Helenican “umbrella” statute will suffice to establish Helenican ownership of the shard only if ownership is clearly asserted.<sup>142</sup> If the Helenican “umbrella” statute appears to impose no more than an export restriction, these decisions indicate that the shard will not be considered “stolen” even if it was exported illegally.<sup>143</sup> Thus, whether the shard is recoverable under the bilateral treaty will depend in part on the language of the Helenican domestic patrimony law.<sup>144</sup> Assuming that the law of Helenica unambiguously asserts national ownership over the claimed objects, recovery under the bilateral treaty would stand a fair chance of success.

A number of considerations, however, would likely dissuade the state of Helenica from pursuing recovery under a bilateral treaty where a remedy is available under the CPIA.<sup>145</sup> First, no judicial

139. *Cf. United States v. An Original Manuscript Dated Nov. 19, 1778*, No. 96 Civ. 6221 (LAP), 1999 WL 97894, at \*6 (S.D.N.Y. Feb. 22, 1999) (requiring a showing of probable cause to believe that the claimed property appertained to a museum in the claimant state in an action brought under CPIA Section 2607).

140. DARRABY, *supra* note 16, § 6:117, at 6-97 (“U.S. courts require proof of ownership as a predicate to recovery” of claimed cultural property.).

141. *See United States v. McClain*, 545 F.2d 988, 1000–01 (5th Cir. 1977) (finding that the combination of a declaration of national ownership with restrictions on the export of the claimed object was sufficient to establish ownership of the object in the state of Mexico).

142. *Compare United States v. Schultz*, 333 F.3d 393, 403–04 (2d Cir. 2003) (finding that an Egyptian umbrella patrimony statute “made a clear declaration of national ownership”), and *McClain*, 545 F.2d at 1000–01 (finding that a series of statutes asserting national ownership of pre-Columbian artifacts sufficed to establish ownership of such artifacts in the state of Mexico), with *Gov’t of Peru v. Johnson*, 720 F. Supp. 810, 814 (C.D. Cal. 1989) (finding that the “laws of Peru concerning its artifacts could reasonably be considered to have no more effect than export restrictions,” and thus were insufficient to establish ownership of the artifacts in the government of Peru).

143. *See Johnson*, 720 F. Supp. at 814 (“[E]xport restrictions constitute an exercise of the police power of a state; [t]hey do not create ‘ownership’ in the state.”) (quoting *McClain*, 545 F.2d at 1002).

144. *See supra* note 92 and accompanying text.

145. *See supra* Part III.A.

precedent exists to guide the attempted recovery.<sup>146</sup> Second, the bilateral treaty applies only to property "stolen" within the meaning of the domestic law of the claimant state,<sup>147</sup> and at least one U.S. court has interpreted the word "stolen" to apply to a limited class of claimed cultural property.<sup>148</sup> Finally, because judicial proceedings may be brought pursuant to the U.S.-Helenica treaty only if the United States "cannot otherwise effect the recovery and return of [the] stolen archaeological, historical or cultural property,"<sup>149</sup> a court hearing a forfeiture claim under the U.S.-Helenica treaty could *require* the government to pursue a CPIA action if one were available. Thus, in the case of the hypothetical bust of Beres, which is likely recoverable through a CPIA action,<sup>150</sup> a forfeiture action under a bilateral treaty probably does not present the best strategy for successful recovery. On the other hand, in the case of the claimed pottery shard, no recovery under the CPIA is likely.<sup>151</sup> A forfeiture action under the bilateral treaty may therefore provide the best chance for recovery of the shard, provided that the domestic law of Helenica unambiguously asserts national ownership of such objects.<sup>152</sup> In short, as with recovery under the CPIA, the chances for successful recovery under a bilateral treaty of the type currently in force between the United States and Mexico will depend in large part upon a convergence of circumstances that may not obtain in many cases.<sup>153</sup>

### C. *Recovery of the Claimed Items Under the NSPA*

Prosecution of Dr. Pince-Nez under the NSPA<sup>154</sup> and forfeiture of the claimed property pursuant to that statute imposes a significantly higher burden on the party seeking recovery of the claimed property, since forfeiture of the property can proceed only after a criminal conviction has been obtained.<sup>155</sup> In order to secure the predicate criminal conviction of Dr. Pince-Nez, the United States

146. See *supra* note 83 and accompanying text.

147. See U.S.-Mexico Agreement, *supra* note 19, art. III.

148. See *Gov't of Peru v. Johnson*, 720 F. Supp. 810, 814 (C.D. Cal. 1989).

149. See U.S.-Mexico Agreement, *supra* note 19, art. III.

150. See *supra* Part III.A.1-2.

151. See *supra* Part III.A.3.

152. See *supra* note 142 and accompanying text.

153. See DARRABY, *supra* note 16, § 6:121, at 6-101 to 6-102 (listing eight separate factors that "should ordinarily be considered by sovereigns bringing an action in American courts for return of property" claimed as stolen patrimony).

154. NSPA, 18 U.S.C. §§ 2314-15.

155. See Jowers, *supra* note 8, at 168 (noting that forfeiture of contested property may proceed pursuant to the NSPA "[i]f a conviction results").

would have to prove beyond a reasonable doubt that Dr. Pince-Nez had “transport[ed], transmit[ed], or transfer[ed] in interstate commerce . . . goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud.”<sup>156</sup> Assuming both of the items claimed in the hypothetical are worth in excess of \$5,000, the United States still would have to produce evidence sufficient to establish that Dr. Pince-Nez *knew* that the items were stolen during the period that he possessed them.<sup>157</sup> As the decision of the Second Circuit in *Schultz* indicates, moreover, the defendant may raise a defense of mistake as to the foreign patrimony law establishing the fact of ownership by the claimant state.<sup>158</sup> Thus, the prosecution in a case predicated on a foreign patrimony law bears the heavy burden of proving the defendant’s knowledge of the foreign patrimony law beyond a reasonable doubt.<sup>159</sup> Finally, as in the case of the bilateral treaty, Hellenic law would have to be sufficient to establish state ownership over the items,<sup>160</sup> since ownership by another is a prerequisite to any finding of theft.<sup>161</sup> Although it may be presumed that ownership of the bust of Beres could be readily established,<sup>162</sup> it is unclear whether the Hellenic “umbrella” statute would suffice to establish state ownership over the shard of pottery as a matter of U.S. law.<sup>163</sup> If, however, it is assumed that the evidentiary record is sufficient to obtain a conviction of Dr. Pince-Nez, Hellenic law might find it desirable to deter other potential trad-

156. NSPA, 18 U.S.C. § 2314.

157. *Id.*

158. See *United States v. Schultz*, 333 F.3d 393, 411 (2d Cir. 2003) (“A defendant charged with violating the NSPA may argue that he did not know a certain *fact* that made his conduct criminal, that is, that he did not know the objects in question were stolen. Schultz’s ‘mistake of Egyptian law’ defense goes to that issue.”) (emphasis in original). The decision of the U.S. Court of Appeals for the Ninth Circuit in *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974), is not to the contrary. In *Hollinshead*, the court determined that there existed no independent requirement for “the government to prove that appellants knew the law of the place of the theft” for purposes of the NSPA. *Id.* at 1156. The court held, however, that the defendants’ “knowledge of Guatemalan law is relevant . . . to the extent that it bears upon the issue of their knowledge that the [claimed item] was stolen.” *Id.* The court could find no prejudicial error where “[t]here was . . . overwhelming evidence that the defendants knew that it was contrary to Guatemalan law to remove the [claimed object].” *Id.* at 1155.

159. See *Schultz*, 333 F.3d at 411.

160. See *supra* note 142 and accompanying text.

161. See *supra* note 92 and accompanying text.

162. See *supra* note 141 and accompanying text.

163. See *supra* note 142 and accompanying text.

ers in illicit cultural property by prosecuting Dr. Pince-Nez.<sup>164</sup> In all, though, it is unlikely that the state of Helenica would pursue such a demanding course if it appeared that recovery were possible either under the CPIA or under a bilateral treaty.<sup>165</sup>

#### IV. CONCLUSION

U.S. domestic law provides a number of potential remedies to foreign governments seeking to recover objects considered by those governments to constitute part of their states' national patrimony. Although the reach of some of these remedies produces a certain degree of redundancy,<sup>166</sup> certain remedies offer a greater chance of recovery than others depending upon the circumstances of the case. The CPIA is most useful to states party to the 1970 UNESCO Convention seeking to recover property identified in either a catalogue of some cultural institution of the claimant country, a bilateral agreement between a State Party and the United States negotiated pursuant to CPIA section 2602, or an emergency executive action pursuant to CPIA section 2603.<sup>167</sup> Pre-CPIA bilateral treaties have proved to be of limited utility in judicial actions even prior to the enactment of the CPIA remedies,<sup>168</sup> and it may be expected that they will be used less as CPIA actions proliferate.<sup>169</sup> The NSPA provides a particularly powerful tool to states with explicit national patrimony laws seeking not only to recover stolen property but also to secure the punishment of traffickers in stolen cultural property.<sup>170</sup> Ultimately, though, judicial resolution of patrimony claims remains exceptional in the United States, and extrajudicial diplomatic negotiation still provides the

164. See Jowers, *supra* note 8, at 170 (noting that "the NSPA provides an additional deterrent to the traffic in stolen cultural property by attaching criminal punishment to such activities").

165. Cf. *id.* (noting that "the prosecution of lawsuits under the NSPA can be slow and expensive, and cases may be difficult to prosecute").

166. See, e.g., *United States v. Schultz*, 333 F.3d 393, 409 (2d Cir. 2003) (noting that CPIA and the NSPA may converge in particular cases to provide for both civil and criminal penalties).

167. See CPIA, 19 U.S.C. §§ 2601-13.

168. See *supra* notes 83-85 and accompanying text.

169. See *United States v. An Original Manuscript Dated Nov. 19, 1778*, No. 96 Civ. 6221(LAP), 1999 WL 97894, at \*1 (S.D.N.Y. Feb. 22, 1999) (relying on CPIA in forfeiture action against property claimed by Mexico rather than on the pre-CPIA U.S.-Mexico Agreement).

170. See SECRETARIAT REPORT, *supra* note 93, at 3 (reporting that as a result of the decision in *Schultz*, "Mr[.] Schultz . . . was sentenced to 33 months in prison and a fine of \$50,000 was imposed, along with the requirement to return an ancient Old Kingdom relief to Egypt as restitution").

best, and in some cases the only, option for states seeking to recover national patrimony.<sup>171</sup>

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171. See DARRABY, *supra* note 16, § 6:86, at 6-68 (noting that “the difficulty of conforming cultural property cases to substantive, procedural, and evidentiary requirements of litigation” causes some parties to pursue negotiation as an alternative); see also *supra* notes 38–39 and accompanying text.