

ARTICLE

REPOSE LEGISLATION: A THREAT TO THE PROTECTION OF THE WORLD'S CULTURAL HERITAGE

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The more things move, the more they stay in place. This Article will examine proposed legislation that would make it difficult for governments to reclaim stolen or wrongfully exported cultural property "reposing" in foreign jurisdictions. The topic has important implications for many "art rich" countries and for relations between them and the United States. Art thefts, which are a serious threat to national patrimonies and the shared heritage of mankind, are often encouraged by the international art market. Property is all too easily stolen and transported to another country. Even if it is not stolen, strictly speaking, it is too often smuggled out of a country of origin in violation of the latter's antiquities and customs laws. In either event, the result is the same for the country of origin. The international community therefore continues to search for ways to prevent the hemorrhaging and despoliation of national cultural patrimonies and the global heritage.¹ The main objective of a relatively new body of international cultural property law has been to prevent illicit trafficking in cultural property. In addition, however, much attention has turned in recent years to the restitution, forfeiture or return of cultural property once law enforcement measures have failed to prevent its theft or wrongful export. In this process, sovereign claims play a major role.

"Repose" legislation, if enacted by either the United States Congress or a state legislature, would severely handicap a sovereign government from bringing court action to reclaim cultural property illegally taken out of its territory. More precisely, such legislation

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1. See, e.g., Nafziger, *La Regulación del Movimiento Internacional de Bienes Culturales entre Mexico y Estados Unidos*, 16 ANALES DE ANTROPOLOGÍA 123 (UNAM 1979).

would impose prohibitive statutes of limitations whose effect would be to severely limit an important juridical device for protecting the global cultural heritage. Opponents claim that the proposed legislation would convert the United States into a pirate's cove for contraband artifacts. In any event, the proposed legislation raises important issues of international and constitutional law and of legal draftsmanship. This Article will first examine the purpose and content of the proposed legislation, then some of its legal problems and finally a few alternatives. Although the focus will be on a federal proposal, a similar repose bill passed the New York legislature in 1986, but was vetoed by Governor Cuomo.²

I. THE PROPOSED CULTURAL PROPERTY REPOSE ACT

The proposed Cultural Property Repose Act³ responds to the anxieties of some cultural institutions and private collectors in the United States. They fear that courts will require them to forfeit property they acquired long ago that is now claimed by foreign governments either to have been stolen or otherwise to have left their territories in violation of their antiquities or customs laws. The technical problem that seems to have motivated the drafting of the proposed legislation relates to the diversity of procedural rules that govern statutes of limitations among state courts within the United States. Although all statutes of limitations govern the period of time available for bringing a particular form of legal action after it accrues, this accrual is timed according to legal standards that differ among the jurisdictions. Thus, in some states such as New York, replevin laws allow actions to be brought within a stipulated period of time only *after a demand has been refused by the holder of an object* (the "demand and refusal" rule), rather than *after the date of the export or theft* from the claimant foreign states, which often occurs much earlier.⁴ In New York, therefore, a claimant can "sleep" on its rights with impunity, that is, without fear that it has

2. *Museum Repose Bill Vetoed in Albany*, 7 IFAR REPORTS, July/Aug. 1986, at 3.

3. There are four versions of the proposed legislation. Generally, H.R. 2389, 99th Cong., 1st Sess. (1985), and its identical counterpart, S. 1523, 99th Cong., 1st Sess. (1985) [hereinafter proposed legislation], were intended to supersede S. 311 and H.R. 1798, 98th Cong., 1st Sess. (1983). Hearings on S. 1523 were held on January 9, 1986.

4. See generally *Kunstsammlungen zu Weimar v. Elicofon*, 678 F.2d 1150 (2d Cir. 1982); *Menzel v. List*, 49 Misc. 2d 300, 267 N.Y.S.2d 804 (Sup. Ct. 1966), *aff'd and modified per curiam*, 28 A.D.2d 516, 279 N.Y.S.2d 608 (1967); Comment, *The Recovery of Stolen Art: Of Paintings, Statues, and Statutes of Limitations*, 27 UCLA L. REV. 1122 (1980).

delayed bringing a claim until too long after the controverted export or theft has occurred. For example, the government of Peru claims title to *all* pre-Columbian objects on the basis of a 1929 law of cultural patrimony, regardless of how long the objects may have "reposed" in another country—even without Peru's assertion until recently of entitlement to the property.⁵

In response to this technical problem, the proposed legislation seeks to free United States owners of cultural property from civil suit brought by foreign governments. To quote the sponsors of the current bill in Congress, its specific purpose is to protect the "right [of collectors] to acquire items in other countries legally and in good faith, without fear of subsequent seizure by the government of the country of origin."⁶ On its face, this stated purpose would seem to argue for a license to steal. Giving the bill the benefit of the doubt, however, one might reasonably infer that it is intended to immunize from litigation only those claims for material *appropriately reposing* in the United States, that is, to discourage *unreasonable* and *unfair* claims by foreign sovereigns to property. Regardless of which of these presumed purposes is accurate, this Article will attempt to show that the proposed legislation is neither justifiable nor necessary. Supporters of repose legislation also object to claims by foreign sovereigns that refuse to reciprocate in favor of United States-based claims to recover American property in the foreign territory. To supporters of the repose legislation, the issue is one of fairness.

The first repose bills were reportedly drafted and promoted not in Washington, but in the offices of a Houston, Texas, law firm that was serving as a congressional lobbyist on behalf of a local client. The impetus for the legislation seems to have been Rumania's claim of title to an El Greco painting ("Giacomo Bosia") that had been possessed for less than four years by the Kimbell Art Museum in Fort Worth, Texas, and the misplaced fear that the government of Peru actively claims all pre-Columbian artifacts brought into the United States since 1929.⁷ Although the repose legislation has little

5. 130 CONG. REC. E2981 (daily ed. June 25, 1984) (statement of Rep. Gillis Long).

6. 131 CONG. REC. E2249 (daily ed. May 16, 1985) (statement of Rep. Richard A. Gephardt). In the January 9, 1986 hearing on S. 1523, Senator Charles Mathias, the bill's sponsor, rather ambitiously declared that the purpose is "to reduce the uncertainties inherent in the ownership of art, artifacts, and other cultural property."

7. See CONG. REC. E2981, E2249, *supra* notes 5 & 6. For an excellent discussion of this point, including Peru's vigorous denial of an intention to claim the pre-Columbian objects, see Herscher, *Senate Holds Hearings on Cultural Property Repose Act*, 13 J. FIELD

chance of enactment, it raises interesting questions that help reveal features of the legal process in the United States.

A. A Summary

In brief, the proposed legislation would establish a timetable for suits by foreign governments to reclaim cultural property in the United States. It thus bars suits if the claimed property has been in the United States under stipulated circumstances for varying periods of time. The bill applies to all claimed property in the United States and to civil litigation in either federal or state courts.

The proposed legislation is designed to be applied in conjunction with a federal law that implements the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.⁸ Thus, "cultural property" is defined by the UNESCO Convention. Under the Act that implements the UNESCO Convention,⁹ the United States and foreign governments may formally designate significant items and categories of cultural property. This designation then leads to import restrictions to curtail illicit international trade in these specified items. The UNESCO-implementation Act provides for administrative seizure and return of objects imported in violation of those restrictions after its enactment. This provision is subject to a sliding scale of repose periods ranging from three to twenty years, depending on whether interested parties could have determined the item's whereabouts through proper investigation. Neither the Act nor the UNESCO Convention applies retroactively.

Supporters of repose legislation claim, however, that the UNESCO-implementation Act does not offer repose with respect to items exported before the date of specific designation, nor to items that are not specifically designated, nor to any form of action other than a suit by the United States to enforce the import restrictions. Thus, supporters of the proposed legislation claim that the repose section of the UNESCO-implementation Act is a piece of Swiss cheese, full of holes; they claim that the existing law offers little real protection against extravagant claims by foreign sovereigns in

ARCHAEOLOGY, Sept. 1986, at 3.

8. Nov. 14, 1970, 823 U.N.T.S. 231, *reprinted in* 10 INT'L LEGAL MATERIALS 289 (1971).

9. 19 U.S.C. §§ 2601-2613 (1982). For a summary, *see* Kouroupas & Guthrie, *The Cultural Property Act: What It Means for Museums*, MUSEUM NEWS, June 1985, at 47.

United States courts.

Opponents of the proposed legislation respond that if there are holes in the Swiss cheese, they represent gaps in more effective implementation of international cultural property law. Indeed, it is argued, the UNESCO-implementation Act was intended to be applied jointly with common law remedies and is therefore dependent on civil enforcement. In any event, "hardly a show on pre-Columbian art could be mounted anywhere without charges that it contains looted material."¹⁰

B. Details

1. The Proposed Legislation

The proposed legislation for repose of cultural property would bar civil actions by foreign governments, but not individuals or non-governmental entities, to recover artifacts that have been held in the United States for at least five years before the date of the legislation's enactment or under any of several other circumstances. These circumstances involve adequate notice to a foreign government of an artifact's location in the United States. Specifically, a foreign government could not commence a recovery action claiming an artifact which

(2) has been held in the United States for two years irrespective of the date of enactment of this chapter by a recognized museum or religious or secular monument or similar institution, if, for that period, the institution has exhibited the item or has made knowledge of it available through publication, cataloguing, or otherwise; or

(3) has been held in the United States for five years irrespective of the date of enactment of this chapter, if, for three years of that period, the fact of such holding was made public through public exhibition or publication, through consultation by the holder with scholars or experts, through published studies or otherwise; or

(4) has been held in the United States for ten years irrespective of the date of enactment of this chapter unless the foreign state establishes that the United States holder acquired the item with actual knowledge that it had been removed from the possession of the country of origin in violation of the law of the country of origin, in which event the foreign state shall have two years from the date such state acquired knowledge of the identity of the holder in

10. Crossley, *The Mayan Field at the Kimbell*, *The Washington Post*, May 18, 1986, B1, at B11, col. 6.

which to bring such action.¹¹

2. A Comparison of the Proposed Legislation and the Convention on Cultural Property Implementation Act

The proposed legislation differs from the UNESCO implementation Act. The latter generally provides for repose of cultural property from *administrative* seizure, usually by the Customs Service, rather than *adjudicated* seizure of property brought into the United States in violation of the Convention. The Act is only a partial solution to the problem of cultural property violations; a more complete solution relies on the continuing availability of effective judicial enforcement. A summary of the Act and its background follows.

Until the Act became law, a foreign claimant's only legal remedy, after an artifact in which it claimed a property interest had entered the United States, was to bring civil action in a federal or state court for recovery, money damages or both. In these cases, the claimant has the burden of proving a common law property interest greater than that of the United States holder, ordinarily limited to instances of artifacts clearly stolen from known owners abroad. Artifacts are ordinarily immune from claims by foreign governments if they have not been "stolen" in the usual sense, but have been smuggled out of a country in violation of its antiquities or customs laws. The Act added the following remedy: The United States government is authorized to seize artifacts entering the United States that have been wrongfully taken. Authorities may not, however, seize any designated or stolen artifact that has, under certain circumstances and periods of time, reposed in the United States.

This "repose" provision to avoid governmental seizure of artifacts within the UNESCO framework was intended to establish a reasonable period of time during which claimants might have an adequate opportunity to identify and recover illicitly traded cultural property. The provisions of the Act do not, however, affect existing rights of a foreign individual, entity or *government* to bring a federal or state lawsuit for recovery of the property, damages or both. The proposed legislation, on the other hand, would provide for immunity from a foreign governmental claim after a claimed artifact has been held for only a short period of time in the United States. Thus, while both the Act and the proposed legislation provide for repose in different ways, the latter presents a particularly serious

11. Proposed legislation, *supra* note 3, ch. 101(a).

international problem.

Under the Act, artifacts that have been held in the United States by a museum or similar institution for three consecutive years and have been effectively reported, exhibited or publicly catalogued are not subject to administrative seizure. The Act, in contrast to the proposed legislation, requires that all protected artifacts must have been acquired (1) for value, (2) in good faith and (3) without notice of their illegal importation into the United States. The proposed legislation, on the other hand, provides that artifacts held in the United States by a museum for just two years, irrespective of the date of enactment of the proposed legislation, and exhibited or made known by publication, cataloguing "or otherwise" are immune from suit initiated by foreign governments.

With respect to artifacts that have been held in the United States for ten years, the Act provides against administrative seizure if the artifacts have been exhibited in an institution for any five of the years. The corresponding provision in the proposed legislation, on the other hand, would grant repose from civil claims for all artifacts that have been held in the United States for only five years, irrespective of the date of enactment of the proposed legislation, so long as they have been exhibited, publicized, consulted on, written about or otherwise made known to scholars for three of the five years, not necessarily in an institution.

The Act otherwise establishes that artifacts may not be seized that have been held in the United States for ten years where it can be proven that the concerned foreign government had or should have had notice of their locations in the United States. The proposed legislation, by contrast, shifts the burden by barring litigation to recover artifacts that have been held in the United States for ten years, irrespective of the date of enactment of the proposed legislation, unless the claimant can show that the United States holder obtained the artifacts with *actual knowledge* that they were wrongfully taken out of a foreign country either by common theft or contrary to the antiquities legislation of that country. The claimant government must initiate a recovery action within two years of the time it has first learned of the holder's identity. This burden of proof imposed on the foreign government is very heavy. Given that stolen property typically changes hands at least once before it appears in the marketplace, the property thereby becomes removed from the first purchaser who may be the only one to "knowingly" acquire the property. Quite likely, then, a holder against whom the

foreign government asserts a claim will be immune from civil action.

Lastly, if all else fails, the Act, but not the proposed legislation, provides immunity from seizure of artifacts held in the United States for over twenty years. The twenty year repose is legitimized, however, only if the holder can prove that the artifact was purchased "for value and without knowledge or reason to believe that it was imported in violation of the law."

In view of the temporal and evidentiary barriers confronting a claimant, the effect of the proposed legislation, but not the Act, is to nearly bar foreign governments from bringing recovery actions in both federal and state courts. Thus, the proposed legislation provides repose from adjudication for those artifacts that are immune from administrative seizure under the Act by making it nearly impossible for foreign governments to initiate legal action for their recovery, even if the artifacts were taken out of a country in violation of its laws. In sum, the proposed legislation would conflict with, rather than compliment, the implementation Act.

C. *Constitutional Issues*

What are the legal problems? First, the fourteenth amendment of the United States Constitution provides, in part, that no state shall "deny to any person within its jurisdiction the equal protection of the laws."¹² This principle of equal protection applies, arguably, to federal as well as state courts through the fifth amendment's due process clause which by judicial interpretation incorporates the fourteenth amendment that is otherwise applicable only to state action. Under the proposed legislation, foreign governments, but not other plaintiffs, would either be denied their "day in court" before their claims arose or be required to carry a unique burden of proving that a holder of an item knew that it had been stolen. Thus, the law would be applied unequally in violation of the fifth and fourteenth amendments.

The rule of equal protection therefore casts doubt on the constitutional validity of the proposed legislation and invites retaliation by foreign governments against United States nationals who might seek foreign governmental assistance in recovering stolen cultural property within their jurisdictions. Although no federal court has ever held against other forms of repose legislation, some statutes of

12. U.S. CONST. amend. XIV, § 1.

repose have been held to violate state constitutions. An example of a successful challenge is *Overland Construction Co., Inc. v. Sirmons*,¹³ where the Florida Supreme Court held that a Florida statute of repose was unconstitutional. The statute was said to violate a provision of the Florida Constitution because “[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.”¹⁴ Arguably, this clause was written simply to ensure that all citizens had access to Florida courts without regard to race, sex or creed and that it did not bar the legislature from imposing other limitations on causes of action. The Florida court, however, interpreted that state’s constitution broadly so as to guarantee a reasonable access to the court for redress of a wrong and concluded that it would be unreasonable to bar a claimant from access to the court prior to the occurrence of any injury.

The Florida court specifically addressed issues of purely domestic concern involving a statute that would have protected a single class of defendants—manufacturers in products liability cases—against court actions. Nevertheless, the proposed legislation with which this Article deals raises similar constitutional issues. Thus, the distinction between foreign sovereigns, who would be greatly handicapped in bringing litigation to reclaim property, and the individuals and nongovernmental organizations, who could continue to do so, is highly questionable.

A second constitutional problem involves the failure of the proposed legislation to provide due process under the fifth amendment. Due process principles require that legitimate possession of cultural property be open and notorious to defeat the claims of prior owners and adequate and fair notice be given to all property owners before depriving them of their ownership rights. Applying these standards, the requirements for display and notification in the proposed legislation are inadequate. These problems are discussed below as matters of draftsmanship.

Another constitutional problem is that, within the federal system of the United States, federal repose legislation improperly enters a domain that historically has been reserved to the states. Within the federal system, there is no uniform property law, nor are there uniform statutes of limitations, although there are some uniform conflict of laws rules governing the applicability of conflicting statutes

13. 369 So. 2d 572 (Fla. 1979).

14. FLA. CONST. art 1, § 21 (1968 rev. West 1970).

of limitations. Generally, then, both the statutory period for bringing an action and property law dealing with the ownership, disposition and recovery/return of property have been treated as state, not federal, concerns. For example, the federal courts, following the United States Supreme Court, have made it clear in certain procedural contexts that statutes of limitations can be "outcome-determinative" and therefore are generally within the province of state law.¹⁵

Even when foreign affairs are involved, ordinarily matters strictly for the federal government, state law may govern if the underlying interests are essentially matters of property or statutes of limitations and the federal interest is only incidental. Thus, the United States Supreme Court has been willing to permit the states to have juridical control over the disposition of property involving foreign interests so long as that control does not conflict with federal law, including any treaty commitments, or directly interfere otherwise with the normal conduct of foreign affairs. This is an important point. One argument in favor of federal repose legislation is that, because it has an international dimension, it is therefore an exception to the general reservation of authority to the states in matters of property and statutes of limitations. It will be instructive to examine this argument briefly.

It is well established that all state actions within the federal system that may have a significant impact on foreign affairs or may conflict with United States foreign policy are unconstitutional so long as they have not been explicitly authorized by the federal government. For example, in *Zschernig v. Miller*,¹⁶ the United States Supreme Court struck down an Oregon statute which required probate courts to make a three level inquiry "into the type of governments that obtain in particular foreign nations . . ." ¹⁷ before permitting citizens of those nations to receive property left them by Oregon residents. The Court's rationale was that the state had intruded into the field of foreign affairs which the Constitution en-

15. In *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), for example, the United States Supreme Court held that a federal court must apply state statutes of limitations. The Court's rationale was that

in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.

Id. at 109.

16. 389 U.S. 429 (1968).

17. *Id.* at 434.

trusts to the President and to Congress. Justifying repose legislation on this theory is, however, bootstrapping. After all, it is unlikely that any foreign government would favor the repose legislation; thus, the United States government has no foreign interests to protect against state encroachment. The proposed legislation might even harm foreign relations between the United States and other governments. For example, the legislation might bar German museums from recovering cultural property wrongfully taken by the Nazis or other foreign troops during the Second World War. To argue that the mere insertion of a foreign dimension into legislation makes it a federal concern is to argue that there is no objective reality to the constitutionally prescribed division between federal and state jurisdictions. The intended result of the repose legislation is reminiscent of the notorious (and unsuccessful) Bricker Amendments of the 1950's, whose purpose was to try to restrict the powers of the executive branch of the federal government to cooperate with foreign governments.¹⁸

Repose legislation would violate not only these constitutional principles, but also the spirit, if not the specific provisions, of the UNESCO Convention which, as a treaty properly implemented by special legislation, is the "Supreme Law of the Land" under the United States Constitution. One might argue that if the repose exemptions of the UNESCO-implementation Act are acceptable, so are the exemptions in the proposed legislation. That, however, is comparing apples with oranges. It is one thing to define, as the UNESCO-implementation legislation does, the administrative measures by which the United States Customs Service is to implement treaty law, subject to court review, and quite another thing to deny access, as does the proposed legislation, to the courts.

D. Issues of Draftsmanship

The proposed bill also presents problems of draftsmanship. The wording is often vague. Notification or public disclosure provisions, in particular, would be ineffective—as the drafters may well have intended. It would be next to impossible for foreign governments to monitor and thereby know about all exhibitions and publications that might conceivably give notice of the unexpected location of a particular artifact. One of the proposed exemptions refers to cul-

18. For a discussion of these amendments, see W. BISHOP, *INTERNATIONAL LAW: CASES AND MATERIALS* 110-12 (3d ed. 1971).

tural property that has been held in the United States for five years where "for three years of that period, [the fact of the holding of that property] was made public through exhibition or publication, through consultation by the holder with scholars or experts, through published studies or otherwise."¹⁹

This exemption is so broad that it may swallow any principle of cooperation with foreign sovereigns: Who qualifies as a "scholar or expert?" What constitutes adequate "exhibition or publication?" What constitutes acceptable "consultation?" Note, for example, that *any* publication of the possession of the cultural property seems acceptable, even a brief notice placed deliberately in an obscure or unknown publication or perhaps even in a newsletter distributed primarily to an institution's own trustees. There is also an exemption for museums, religious or secular monuments, or similar institutions whenever that institution has exhibited the item—the bill does not say where precisely—or has made knowledge of it available through publication, cataloguing or "otherwise."²⁰

From a constitutional standpoint, the vagueness of such terms as "publication," "cataloguing" and especially "otherwise" is so great that the proposed legislation may be void. In the words of one expert,

[i]t is totally unrealistic to suggest, because an object has been exhibited in a museum for three years or even five, that this is sufficient notice, or if it is published in a museum bulletin or in an obscure archaeological publication, it will thus come to the attention of the officials of those countries from which the object has come.

It is undoubtedly true that in major museums an object could be on exhibit for years and might even be unknown to the senior staff of those museums. How can one expect an illicitly acquired object on view in the corridor of a large museum to come to the attention of the authorities of those countries from which it may have been illicitly exported?²¹

A final question about the repose legislation is whether it would affect the principle *nemo plus juris ad alium transferre potest quam ipse habet* ("one cannot give more than what he has"). Although a statute may qualify the principle that a thief cannot pass

19. Proposed legislation, *supra* note 3, ch. 101(a)(3).

20. *Id.*

21. Letter from Paul N. Perrot to Rep. Gephardt (quoted in Herscher, *Congress Considers "Repose" for Cultural Property: H.R. 2389*, 12 J. FIELD ARCHAEOLOGY 477, 479 (1985) [hereinafter Letter]).

good title, such an action should be taken only in exceptional circumstances that would not seem to exist in the case of the repose legislation.

II. ALTERNATIVES TO REPOSE LEGISLATION

Before considering alternatives to repose legislation, one might ask why cultural property should be treated any differently in the face of claims by foreign sovereigns from any other form of property. If a Rembrandt is stolen from Holland and all but hidden in the United States for five years, why should it then be immune from a claim by the Dutch government, whereas a stolen automobile would not be immune?

Suppose I go to a country and visit the government there. A bureaucrat, to make a little money on the side, sells me some government pencils or office furniture in violation of the country's law which, of course, makes that government property. Suppose these gifts later pass routinely through customs as I leave the country. I have taken property wrongfully out of the country. Now suppose, on the other hand, that after I have left the government area, in the shadows of the national palace, I am offered some rare antique bronzes. Suppose, too, that I am able to get the bronzes out of the country. Why should it be more difficult for the government to bring an action in the courts of my country to reclaim the cultural property—the bronzes—than to reclaim the pencils or the office furniture as a matter of routine intergovernmental cooperation? The proposed legislation is hard to justify in these terms. We should be no less sensitive to foreign claims of wrongfully exported cultural property than we are to any other wrongfully exported property.

What are the alternatives to the proposed legislation? The stated purpose of the bill is to protect institutions and collectors against unfair or unreasonable claims by foreign sovereigns. What, then, is unreasonable? It would seem sensible to prohibit claims where property on truly public display has obviously reposed for extended periods of time. In the most obvious case, the cultural property may have been openly exhibited for long periods of time. For example, the magnificent collection of French impressionist art in Leningrad's Hermitage Museum is as closely identified today with the Soviet Union as it is with France. Permanent repose in Leningrad would seem appropriate. Thus, one alternative to sweeping repose legislation might be to oppose claims by foreign sovereigns for re-

turn of long-reposing, publicly exhibited property, while at the same time encouraging institutions and collectors to cooperate unilaterally or informally in the return of other cultural property.²² That is, after all, a moral or ethical responsibility.

Also, in the contemporary legal world, it may be unreasonable for a foreign state to assert a claim for restitution outside the terms of a multilateral or bilateral treaty such as that between Mexico and the United States.²³ It certainly seems unfair or unreasonable to apply new restrictions on the flow of cultural property retroactively. Statutes of limitations ought to be applied to all property, whether it is "cultural" or not.

Another alternative might be an explicit bar to all claims to property that have reposed before a certain date. The year 1970, when the UNESCO Convention was opened for signature, might be appropriate. From the standpoint of the United States, 1972, when the Senate gave its advice and consent to that treaty by a vote of 83-0, might be preferable. In sum,

objects that have been in this country for fifteen, or preferably twenty years, were exhibited in a prominent location, published in a broadly circulated bulletin and in an appropriate archaeology publication should be protected. The argument advanced by some, that the western industrial world, by acquiring collections has protected a good part of the developing world's patrimony in the past, is certainly valid and no one would question it. The fact is, however, that these countries despoiled in the past, either by wars,

22.

The proposed legislation unwittingly condones that which should be professionally unacceptable and morally reprehensible, and I can see absolutely no need for it. Rather, it seems to me, we should encourage freer exchanges through legitimate means, traveling exhibitions and exchanges among museums, encouraging foreign countries to establish licit markets for the sale of surplus antiquities.

Id.

23 Treaty of Cooperation Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, July 17, 1970, United States—Mexico, 22 U.S.T. 494, T.I.A.S. No. 7088. Paragraph 1 of Article III of the Treaty provides:

Each Party agrees, at the request of the other Party, to employ the legal means at its disposal to recover and return from its territory stolen archaeological, historical and cultural properties that are received after the date of entry into force of this Treaty from the territory of the requesting Party.

See also Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals Act, 19 U.S.C. §§ 2091-2095 (1982). Section 2092(a) of that act provides:

No pre-Columbian monumental or architectural sculpture or mural which is exported . . . from the country of origin after the effective date of the regulation listing such sculpture or mural . . . may be imported into the United States unless the government of the country of origin of such sculpture or mural issues a certificate . . . which certifies that such exportation was not in violation of the laws of that country.

colonial occupation or illicit activity of their own citizens in connivance with foreign buyers, are now beginning to appreciate the importance of this patrimony to the welfare of their culture. I believe that we have an obligation to assist them in this realization, which has enriched our own civilization and our people.²⁴

Much of the fear that has prompted proposals for repose legislation is misplaced. The main problem for legitimate owners of cultural property, including foreign governments, is locating the property; variations among state statutes of limitations are relatively insignificant. Even with the demand-and-refusal type construction of statutes of limitations such as in New York,²⁵ or the somewhat less but still troublesome rule of adverse possession in New Jersey,²⁶ there are equitable doctrines (estoppel, acquiescence, and so on) that can be invoked to deny unreasonable claims. The court in *Kunstsammlungen zu Weimar v. Elicofon* acknowledged that, if a foreign government had simply slept on its rights and had either been negligent or acquiesced in repose of property in this country, that would have ended the matter, regardless of the kinds of statutes of limitations (for example, the demand-and-refuse rule) that seem to be of such great concern to those who support the proposed legislation.²⁷ Also, the principle of reciprocity could be exercised to prevent suit by any foreign state and would similarly bar suits by the United States government.

The International Foundation for Art Research has proposed an institutional response to the spectre of uncertainty in the art market raised by proponents of the legislation.²⁸ This proposal recommends a central registry for museums or collectors. Such a registry, supervised perhaps by the United States government, would be limited to potentially controversial items. Holders of property could file information about them, without which the local statute of limitations would not begin to run; after filing, the statute would begin to run. Prospective claimants would then have the burden only of checking a single listing in order to avoid the adverse running of a demand-and-refusal or similar statute of limitations. Even in the absence of a central registry, collectors and museums can enlist the investiga-

24. Letter, *supra* note 21.

25. See *Kunstsammlungen zu Weimar v. Elicofon*, 678 F.2d 1150 (2d Cir. 1982).

26. See *O'Keeffe v. Snyder*, 170 N.J. Super. 75, 405 A.2d 840 (1979).

27. *Elicofon*, 678 F.2d at 1163 n.23.

28. Letter from William B. Jones, President, International Foundation for Art Research to Senator Charles Mathias (March 26, 1986) (copy on file at offices of *California Western International Law Journal*).

tive assistance of the federal government if they have any doubts about the provenance or title of an object. The federal government may issue a declaration of immunity from public seizure to prevent claims to art or artifacts imported into the United States for exhibition.

CONCLUSION

In sum, no one should fear unreasonable claims for the return of cultural property under the present law. There is thus no need for the highly questionable, and probably unconstitutional, repose legislation. Governments should cooperate in sharing the global cultural heritage, rather than either hoarding or ravaging it.