NEW YORK INTERNATIONAL LAW REVIEW

Summer 2010 Vol. 23, No. 2

Articles

Recent Decisions

NEW YORK STATE BAR ASSOCIATION
INTERNATIONAL SECTION
Published with the assistance of St. John's University School of Law

NEW YORK INTERNATIONAL LAW REVIEW

Summer 2010
Vol. 23, No. 2

NEW YORK STATE BAR ASSOCIATION
INTERNATIONAL SECTION

ISSN 1050-9453 (print) ISSN 1933-849X (online)

INTERNATIONAL SECTION OFFICERS—2010

Chair
Carl-Olof E. Bouveng, Advokatfirman Lindahl KB
P.O. Box 1065, Stockholm SE-101 39 SWEDEN
carl-olof.bouveng@lindahl.se

Chair-Elect
Andre R. Jaglom, Tannenbaum Helpern Syracuse & Hirschtritt LLP, 900 Third Avenue, 12th Fl.
New York, NY 10022-4728
jaglom@thshlaw.com

Executive Vice-Chair
Andrew D. Otis, Curtis, Mallet-Prevost, Colt & Mosle LLP, 101 Park Avenue, New York, NY 10178
aotis@curtis.com

Secretary
Glenn G. Fox, Alston & Bird LLP
90 Park Avenue, New York, NY 10016
glenn.fox@alston.com

Treasurer
Lawrence E. Shoenthal, 6 Dorothy Dr.
Spring Valley, NY 10977
lbirder@aol.com

Executive Committee Liaison
Bernice K. Leber, Arent Fox LLP
1675 Broadway, New York, NY 10019
leber.bernice@arentfox.com

Vice Chairs/International Chapters
Gerald J. Ferguson, Baker Hostetler
45 Rockefeller Plaza, New York, NY 10111
gferguson@bakerlaw.com

Eduardo Ramos-Gomez, Duane Morris LLP
1540 Broadway, New York, NY 10036
eramos-gomez@duanemorris.com

Jonathan P. Armstrong, Duane Morris LLP
10 Chiswell Street, 2nd Fl., London EC1Y 4UQ UK
jparmstrong@duanemorris.com

Vice-Chair/ Liaison w/American Society of International Law
Christopher Joseph Borgen, St. John's University School of Law, 8000 Utopia Parkway,
Belson Hall, Room 4-24, Jamaica, NY 11432
borgenc@stjohns.edu

Vice-Chairs/CLE
Shannon Patricia McNulty
107 West 70th Street, New York, NY 10023
shannonmcnulty@hotmail.com

Daniel J. Rothstein, Law Offices of Daniel J. Rothstein
747 Third Avenue, 32nd Fl., New York, NY 10017
djr@danielrothstein.com

Christopher J. Kula, Phillips Nizer LLP
666 Fifth Avenue, 28th Fl., New York, NY 10103
ckula@phillipsnizer.com

Vice-Chair/Co-Chair Publications Editorial Board
David W. Detjen, Alston & Bird LLP
90 Park Avenue, 14th Fl., New York, NY 10016-1302
david.detjen@alston.com

Vice-Chairs/Committees
Glenn G. Fox, Alston & Bird LLP
90 Park Avenue, New York, NY 10016
glenn.fox@alston.com

Michael J. Pisani
167 Rockaway Avenue, Garden City, NY 11530
mjpisani@optonline.net

Vice-Chair/Diversity
Calvin A. Hamilton, Hamilton Abogades
Espalter, 15 , 1 Izq, E-28014 Madrid SPAIN
chamilton@hamiltonabogados.com

Vice-Chair/Intern Exchanges
John E. Blyth, Law Offices of John E. Blyth
141 Sully's Trail, Ste. 12, Pittsford, NY 14534
blyth.john@gmail.com

Vice-Chair/Law Student Outreach
Howard A. Fischer, Securities & Exchange Commission
3 World Financial Center, New York, NY 10281
FischerH@Sec.gov

Vice-Chair/Liaison U.S. State Bar International Sections
Michael W. Galligan, Phillips Nizer LLP
666 Fifth Avenue, 28th Fl., New York, NY 10103
mgalligan@phillipsnizer.com

Vice-Chair/Liaison w/International Bar Assn
Steven C. Krane, Proskauer Rose LLP
1585 Broadway, New York, NY 10036
skrane@proskauer.com

Vice-Chair/Liaison w/International Law Society
Nancy M. Thevenin, Baker & McKenzie LLP
1114 Avenue of the Americas, 42nd Fl.,
New York, NY 10036
Nancy.M.Thevenin@BAKERNET.com

Vice-Chair/Liaison w/American Bar Assn
Mark H. Alcott, Paul, Weiss, Rifkind, Wharton & Garrison LLP, 1285 Avenue of the Americas, 28th Fl.,
New York, NY 10019-6064
malcott@paulweiss.com

NEW YORK INTERNATIONAL LAW REVIEW

Advisory Board

INTERNATIONAL SECTION COMMITTEES AND CHAIRS

To view full contact information for the Committee Chairs listed below please visit our website at http://www.nysba.org/Intl/CommChairs

Awards
Lester Nelson
Lauren D. Rachlin
Michael M. Maney

Central & Eastern Europe
Daniel J. Rothstein
Serhiy Hoshovsky

Chair's Advisory
Marco A. Blanco
Oliver J. Armas
Michael W. Galligan

Corporate Counsel
Barbara M. Levi
Allison B. Tomlinson

Cross Border Legal Practice
Steven C. Krane

Cross Border M&A and Joint Ventures
Valarie A. Hing
Gregory E. Ostling

Foreign Lawyers
Maria Tufvesson Shuck
Albert Garrofe

Immigration and Nationality
Jan H. Brown
Matthew Stuart Dunn

Insurance/Reinsurance
Chiahua Pan
Howard A. Fischer

Inter-American
Carlos E. Alfaro
Alyssa A. Grikscheit

International Antitrust and Competition Law
Olivier N. Antoine
Boris M. Kasten

International Arbitration & ADR
Nancy M. Thevenin
Guillermo Aguilar-Alvarez

International Banking Securities & Financial Transactions
Eberhard H. Rohm
Joyce M. Hansen

International Chapters
Michael W. Galligan

International Corporate Compliance
Carole L. Basri
Rick F. Morris

International Distribution, Sales & Marketing
Andre R. Jaglom

International Employment Law
Aaron J. Schindel

International Employment Law
Elizabeth I. Hook

International Entertainment & Sports Law
Howard Z. Robbins
Gordon W. Esau

International Environmental Law
John Hanna Jr.
Mark F. Rosenberg
Andrew D. Otis

International Estate and Trust Law
Michael W. Galligan
Glenn G. Fox

International Family Law
Jeremy D. Morley
Rita Wasserstein Warner

International Human Rights
Cynthia Lynn Ebbs
Santiago Corcuera

International Insolvencies and Reorganizations
Garry M. Graber

International Intellectual Property Protection (International Patent Copyright and Trademark)
L. Donald Prutzman
Gerald J. Ferguson
Eric Jon Stenshoel

International Investment
Lawrence E. Shoenthal
Christopher J. Kula

International Law Practice Management
James P. Duffy III

International Litigation
John N. Fellas
Thomas N. Pieper
Jay G. Safer

International Privacy Law
Lisa J. Sotto
Audrey Davidson-Cunningham

International Real Estate Transactions
Meryl P. Sherwood

International Tax
James R. Shorter Jr.
Lodewijk Berger

International Trade
Stuart M. Rosen
Robert J. Leo

International Transportation
William Hull Hagendorn
Neil A. Quartaro

International Women's Rights
Denise Scotto
Shannon Patricia McNulty

Publications Editorial Board
Thomas Backen
Lester Nelson
Dunniela Kaufman
Richard A. Scott

Public International Law
Mark A. Meyer
Christopher Joseph Borgen

United Nations and Other International Organizations
Jeffrey C. Chancas
Edward C. Mattes Jr.

Women's Interest Networking Group
Meryl P. Sherwood
Birgit Kurtz

INTERNATIONAL SECTION CHAPTER CHAIRS

To view full contact information for the Chapter Chairs listed below please visit our website at http://www.nysba.org/Intl/ChapterChairs

CO-CHAIRS
Gerald J. Ferguson
Eduardo Ramos-Gomez
Jonathan P. Armstrong

ALGERIA
Karim Khoukhi

ARGENTINA
Juan Martin Arocena
Guillermo Malm Green

ASIA AND THE PACIFIC REGION
Lawrence A. Darby III

AUSTRALIA
David Graham Russell
Richard Arthur Gelski

AUSTRIA
Otto H. Waechter VI

BAHRAIN
Ayman Tawfeeq Almoayed

BOTSWANA
Edward W. Fashole Luke II

BRAZIL
Isabel C. Franco

BRITISH COLUMBIA
Donald R.M. Bell

COSTA RICA
Hernan Pacheco

CAMEROON
Nchunu Justice Sama

CHILE
Fernando A. Eyzaguirre
Francis K. Lackington

CHINA
Song Huang
Jia Fei
Chi Liu

COLOMBIA
Carlos Fradique-Mendez
Ernesto Cavelier

CYPRUS
Christodoulos G. Pelaghias

CZECH REPUBLIC
Andrea Carska-Sheppard
Jiri Hornik

DUBAI
Peter F. Stewart

ECUADOR
Evelyn L. Sanchez

ESTONIA
Marti Hall

EL SALVADOR
Zygmunt Brett

FINLAND
Ami Kiira Paanajarvi

FLORIDA
Leslie N. Reizes

FRANCE
Yvon Dreano
Pascale Legasse

GERMANY
Mark Devlin
Rudolf F. Coelle
Axel Heck

HUNGARY
Andre H. Friedman

INDIA
Kaviraj Singh Sr.

IRELAND
Eugene P. Carr-Fanning

ISRAEL
Eric S. Sherby

ITALY
Cesare Vento
Marco Amorese

JAPAN
Shirou Kuniya

KENYA
Atiq Saifuddin Anjarwalla

LUXEMBOURG
Alex Schmitt

MALAYSIA
Yeng Kit Leong

MAURITIUS
Devalingum Naiken Gopalla

MEXICO
Santiago Corcuera
Juan Carlos Partida

MONTREAL
David Franklin

NETHERLANDS
Grant M. Dawson

NIGERIA
Amaka Itegboje
Lawrence Fubara Anga

ONTARIO
Stephen J. Maddex
Chris MacLeod

PANAMA
Juan Francisco Pardini
Alvaro J. Aguilar

PERU
Jose Antonio Olaechea
Guillermo J. Ferrero

PHILLIPINES
Efren L. Cordero

PORTUGAL
Pedro Pais De Almeida

RUSSIA
Maxim Barashev

SINGAPORE
Eduardo Ramos-Gomez

SPAIN
Clifford J. Hendel
Calvin A. Hamilton

SWEDEN
Peter Utterstrom
Carl-Olof E. Bouveng

SWITZERLAND
Pablo M. Bentes
Nicolas Pierard
Martin E. Wiebecke

TAIWAN
Ya-hsin Hung

THAILAND
Ira Evan Blumenthal

TUNISIA
Mohammed Zaanouni

TURKEY
Mehmet Komurcu

URUGUAY
Andres Duran-Hareau

VIETNAM
Suong Dao Dao Nguyen

UK
Anne E. Moore-Williams
Randal John Clifton Barker
Jonathan P. Armstrong

UKRAINE
Oleg Samus
Oleh Olexandrovych Beketov

Recapturing Art: A Comprehensive Assessment of the Italian Model for Cultural Property Protection

Lauren Fae Silver*

Excavated "from the bowels of the earth," "deprived of their identity" and "reduced to mere objects of beauty, without a soul," these pieces "conclude their odyssey here today."

—Francesco Rutelli, Italy's former culture minister,
during a press conference on recently
returned looted objects to Italy[1]

I Introduction

Common to almost all countries around the world is the boldly increasing illicit trade in cultural property.[2] Although a precise monetary value is difficult to calculate, the current black market in art and artifacts has been estimated at $5 billion worldwide annually, second only to

1. *See* Elisabetta Povoledo, *After Legal Odyssey, Homecoming Show for Looted Antiquities*, N.Y. TIMES, Dec. 18, 2007, at E1 (covering an exhibition in Rome of numerous ancient artifacts returned to Italy that had been wrongfully taken)

2. A precise definition of "cultural property" is generally accompanied by debate. For the purposes of this article, the term "cultural property" refers to any object which is "highly charged with cultural (or natural) significance . . . [and] removal if this object from its original context irrevocably divests that culture of one of its dimensions." *See* JEANETTE GREENFIELD, THE RETURN OF CULTURAL TREASURES 254 (2d ed. 1996) (quoting Mr. Salah Stétié, delegate of Lebanon and chairman of the UNESCO Intergovernmental Committee for the Return of Cultural Property); *see also* UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property Preamble & art. 1, Nov. 14, 1970, 823 U.N.T.S. 11806 [hereinafter Convention on Cultural Property] (declaring the importance of protecting each country's cultural property); *see also* Bruce Zagaris, *International Criminal and Enforcement Cooperation in the Americas in the Wake of Integration: A Post-NAFTA Transition Period Analysis with Special Attention to Investing in Mexico*, 3 SW. J. L. & TRADE AM. 1, 49 (1996) (describing the international approach to dealing with illicit trade in cultural property).

* **Lauren Fae Silver is an Assistant District Attorney for Kings County, New York and currently serves as an Executive Committee member of the Entertainment, Arts and Sports Law Section (EASL) of the New York Bar Association. Ms. Silver received her B.S. from George Washington University and graduated from St. John's University School of Law. In 2008, Ms. Silver was named a Fulbright Scholar and studied abroad in Italy for a year.** **This article and the entire project from which it stems would not have been possible without the generous support of the Fulbright Program; this opportunity has few equals and my gratitude will last a lifetime. The day-to-day work of the project was conducted at UNIDROIT (Institut International Pour L'unification Du Droit Prive); the resources of this library are unparalleled and coupled with the most productive and collegial working atmosphere. My personal thanks go to Marina Schneider, Daniel Porras, and the rest of the UNIDROIT staff. At the Università degli Studi Roma Tre, the esteemed Professor Vincenzo Zeno-Zencovich, my local sponsor; and General Nistri of the Carabinieri's specialized art theft squad, the *Tutela Patrimonio Culturale*. I am grateful to both of these for their help and guidance. I would also like to thank Professors Patricia Montana, Janai Nelson, Elyse Pepper, and Margaret Turano of St. John's University School of Law for their aid in the developing this project. I owe a special thanks to St. John's University School of Law Professor Luca Melchionna for all of his help—from beginning to end, and from New York to Rome. Between the lines of this article are countless hours of patient looking and talking about the objects in question, and here I have had the full benefit of an ardent art historian, Lynn Catterson, my mother.**

that of drugs and arms.[3] National protectionist laws regulating the ownership and exportation of such objects have increased in recent years, but have proven difficult to enforce,[4] and divergent legal standards "pose considerable problems of their own for cohesive international regulation."[5] International agreements have not only proved to be largely unsuccessful in protecting "source countries,"[6] those rich in art and artifacts,[7] but trafficking in cultural objects has actu-

---

3. *See* Adam Goldberg, *Reaffirming McClain: The National Stolen Property Act and the Abiding Trade in Looted Cultural Objects*, 53 UCLA L. REV. 1031, 1033 (2006) (discussing the business of stolen art and its obvious monetary appeal); *see also* William Lawrence, Laurie McGavin Bachmann & Michael von Stumm, *Tracking Recent Trends in the International Market for Art Theft*, 12 J. CULT. ECON. 51, 51 (1988) (stating that stolen art is valued between $50 million and $5 billion per year); *see also* Roger F. Noriega, *Helping the Hemisphere Recover and Preserve Its Cultural Patrimony*, Press Release, U.S. DEPT. OF STATE (July 1, 2004), http://statelists.state.gov/scripts/wa.exe?A2=ind0408c&L=dossdo&P=177 (stating that in 2004 the illicit trade in art and artifacts was valued at approximately $5 billion). *But see* Interpol, *Stolen Works of Art: Frequently Asked Questions*, http://www.interpol.int/Public/WorkOfArt/woafaq.asp#faq3 (maintaining that from Interpol's point of view, it is unlikely that statistics will be accurate enough to measure the illegal trade in cultural property as art theft is underreported and its value is difficult to measure).

4. *See, e.g.,* Okinawa Dugong v. Rumsfeld, 2005 U.S. Dist. LEXIS 3123, at *18–20 (N.D. Cal. 2005) (comparing Japanese cultural law and U.S. cultural protections and illustrating the difficulty with enforcement); *see also* GREENFIELD, *supra* note 2, at 208 (illustrating the difficulty third world countries have with implementing laws that actually work to protect their cultural treasures); *see also* C. Franklin Sayre, Comment, *Cultural Property Laws in India and Japan*, 33 UCLA L. REV. 851, 857 (1986) (examining the proliferation of national laws protecting cultural goods and their rather limited efficiency).

5. *See* GREENFIELD, *supra* note 2, at 208 (citing Lyndel V. Prott & P.J. O'Keefe, *National Legal Control of Illicit Traffic in Cultural Property*, UNESCO, 1983; UNESCO: THE PROTECTION OF MOVEABLE CULTURAL PROPERTY, 1984; ICOM, 1974, HANDBOOK OF NATIONAL LEGISLATIONS); *see also* ART & LAW 470 (B. Demarsin, E.J.H. Schrage, B. Tilleman & A. Verbeke eds., 2008) (describing the differences between civil law and common law countries' approaches to protecting cultural artifacts both internally and externally); *see also* Arielle Kozloff Brodkey, *The Failure of the Nationalization of Cultural Patrimonies*, *in* 5 LEGAL ASPECTS OF INT'L TRADE IN ART 135, 135–36 (1996) (illustrating the problems inherent in cultural patrimony and how nations ultimately have their own interests at heart).

6. *See* John Henry Merryman, *The Retention of Cultural Property*, 21 U.C. DAVIS L. REV. 477, 479 n.5 (1987–88) (explaining that "'source nations' and 'market nations' have their obvious connotations. The source nations have the cultural property and the retention laws. The market nations are the countries to which the cultural property is likely to be exported if the retention laws did not exist or were evaded.").

7. *See* Convention on Cultural Property, *supra* note 2, at art. 2 (recognizing that illicit trade in cultural property has a detrimental effect on a country's "cultural heritage" and implying that the more that is stolen, the weaker a country will be); *see also* PATTY GERSTENBLITH, ART, CULTURAL HERITAGE, AND THE LAW 635 (2d ed. 2008) (enumerating the problems arising when countries try to place restrictions on exports in order to protect cultural property); *see also* John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 832 (1986), stating that in source countries,

> the supply of desirable cultural property exceeds the internal demand. Nations like Mexico, Egypt, Greece and India are obvious examples. They are rich in cultural artifacts beyond any conceivable local use. In market nations, the demand exceeds the supply. France, Germany, Japan, the Scandinavian nations, Switzerland, and the United States are examples. Demand in the market nation encourages export from source nations. When, as is often (but not always) the case, the source nation is relatively poor and the market nation wealthy, an unrestricted market will encourage the net of export of cultural property.

ally *increased* since the implementation of the seminal 1970 UNESCO Convention on Cultural Property.[8]

While countries around the world are struggling with this problem, Italy has achieved thousands of cultural objects from abroad.[9] Such success is due to Italy's comprehensive approach: a unique combination of national legal strategies, international strategies, and non-legal strategies.[10] This said, it is important to immediately recognize a stinging paradox. Despite its success, and despite the ability to explain the formula, Italy's model is not necessarily one that can be duplicated. The Italian situation is unique in many respects—notably that its history of cultural understanding has evolved into one that not only recognizes the importance of safeguarding its cultural treasures but also one that rigorously defends and protects them.[11] However, in the global environment of both art and media, other countries will no doubt benefit by a collateral increase in awareness, which can be credited to Italy's success.

This article seeks, first, to define the aggregate of methodological approaches as a model for the protection of cultural property and, second, to assess its potential application. Part II of this article describes the background on the illicit trade in cultural property, underscoring the wide scale problems that occur due to looting, with a particular focus on Italy. Part III discusses Italy's national legal strategies in combating the black market in art and artifacts, beginning with historically locating the evolution of national laws. Also discussed are the ways in which

---

8. *See* Alexander A. Bauer, *New Ways of Thinking About Cultural Property: A Critical Appraisal of the Antiquities Trade Debates*, 31 FORDHAM INT'L L.J. 690, 694–95 (2008) (quoting A. Colin Renfrew, Foreword to TRADE IN ILLICIT ANTIQUES: THE DESTRUCTION OF THE WORLD'S ARCHAEOLOGICAL HERITAGE xi, xi (Neil Brodie et al. eds., 2001)); *see also* Megan K. Maher & Jon Michael Thompson, *Intellectual Property Crimes*, 39 AM. CRIM. L. REV. 763, 803–5 (2002) (revealing several instances where the UNESCO convention has proven ineffective in preventing art crimes and abuses); *see also* Derek R. Kelly, Note, *Illegal Tender: Antiquities Protection and U.S. Import Restrictions on Cypriot Coinage*, 34 BROOK. J. INT'L L. 491, 512 (2009) (showing that the UNESCO convention has been effective only in raising public awareness but not stopping any crime).

9. *See* Jeanneret v. Vichey, 693 F.2d 259, 261–62 (2d Cir. 1982) (detailing Italy's laws governing cultural artifacts and their scope with respect to exportation of art); *see also* Aaron Kyle Briggs, *Symposium: Islamic Business and Commercial Law: Consequences of the Met-Italy Accord for the International Restitution of Cultural Property,* 7 CHI. J. INT'L L. 623, 636 (2007) (naming Italy's Carabinieri and the Tutela Patrimonio Culturale "world leaders in catching art and antiquities thieves."); *see also Religious Briefs*, CHARLESTON GAZETTE, May 24, 2009, at P5C (reporting on the recovery of several artifacts by the Italian Carabinieri).

10. *See* Bauer, *supra* note 8, at 691 (demonstrating that one reason Italy succeeds in fighting the antiquities trade is that it utilizes an international strategy by working together with the United States in enforcing anti-export laws); *see also* Aaron Kyle Briggs, Comment, *Consequences of the Met-Italy Accord for the International Restitution of Cultural Property,* 7 CHI. J. INT'L L. 623, 639 (2007) (providing that Italy's national legal strategy in prosecuting dealers and curators in court has been very successful in helping the country reacquire its cultural property); *see also* Sue J. Park, Comment, *The Cultural Property Regime in Italy: An Industrialized Source Nation's Difficulties in Retaining and Recovering Its Antiquities*, 23 U. PA. J. INT'L ECON. L. 931, 939 (2002) (discussing Italy's success in defending its cultural heritage by securing both a special art squad and police force to investigate illegal excavations and art thefts).

11. *See* Dick Jackson, *Cultural Property Protection in Stability Operations*, 10 ARMY LAW. 47, 49 (2008) (describing the great lengths to which Italians will go to defend and protect their cultural property); *see also* Stephanie Doyal, Note, *Implementing the UNIDROIT Convention on Cultural Property Into Domestic Law: The Case of Italy,* 39 COLUM. J. TRANSNAT'L L. 657, 672 (2001) (establishing that Italy's recognition of the need to safeguard its cultural property stems from the idea that it is one of the most culturally rich countries in the world); *see also* Catherine M. Vernon, Note, *Common Cultural Property: The Search for Rights of Protective Intervention*, 26 CASE W. RES. J. INT'L L. 435, 463 (1994) (emphasizing that Italy has the most ambitious art protection administration because it recognizes the importance of safeguarding its cultural heritage and property).

Italy has brought lawsuits in other countries, as well as within its own. Part IV describes the international conventions and bilateral agreements on cultural property protection. Part V examines Italy's non-legal strategies including the establishment of a law enforcement unit specifically dedicated to investigating art looting, the increase in repatriation agreements with museums and its use of public relations as a mechanism for the return of its cultural property. Finally, Part VI briefly analyzes the applicability of the various Italian strategies for countries developing cultural property initiatives.

II. The Trade in Art and Artifacts

Notwithstanding the growing awareness of the illicit trade in art and artifacts and despite the increase in international cooperation in terms of agreements and conventions, trafficking in cultural property has been on the rise.[12] While the UNESCO Convention might be interpreted as a reaction to an already alarming situation, the fact of the matter is that trafficking continues to increase.[13] The trade is pandemic—in Costa Rica, 95 percent of *known* archeological sites have been looted;[14] in the United States, protective legislation has been enacted in

12. *See* Emily C. Ehl, Comment, *The Settlement of Greece v. Ward: Who Loses?*, 78 B.U. L. REV. 661, 661–62 (1998) (remarking that although society is well aware of illegal trading, trafficking of illegal cultural property has not diminished and only continues to flourish); *see also* Leah J. Weiss, Note, *The Role of Museums in Sustaining the Illicit Trade in Cultural Property*, 25 CARDOZO ARTS & ENT. L.J. 837, 837–38 (2007) (noting that awareness of illegal trading has been prevalent since the 1940s, yet the black market continues to grow); *see also* Clemency Coggins, *Archeology and the Art Market*, SCIENCE, Jan. 21, 1972, at 263 (explaining that despite public awareness and a UNESCO convention designed to minimize illegal trading, the number of illicit excavations has risen); *see also Memorandum of Understanding Between the International Criminal Police Organization (INTERPOL) and the International Council of Museums (ICOM) on Countering the Theft of and Trafficking in Cultural Property*, ICOM (Mar. 10, 2010), http://icom.museum/mou-interpol.html (declaring that the worldwide phenomenon of looting cultural property is noted and constitutes a crime).

13. *See* 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, 180 (1992) (showing that illegal trafficking has only continued to increase in the 20 years since the UNESCO Convention was adopted); *see also* James A.R. Nafziger, Comment, *Seizure and Forfeiture of Cultural Property by the United States*, 5 VILL. SPORTS & ENT. L.J. 19, 29–30 (1998) (recognizing that the legal regimes in place to combat illegal trafficking are too weak, and illicit trading continues to soar); *see also* James E. Sherry, Note, *U.S. Legal Mechanisms for the Repatriation of Cultural Property: Evaluating Strategies for the Successful Recovery of Claimed National Patrimony*, 37 GEO. WASH. INT'L L. REV. 511, 515–16 (2005) (stating that the UNESCO Convention has not provided the necessary protections and illicit excavations continue to increase at an alarming rate).

14. *See* JEANETTE GREENFIELD, THE RETURN OF CULTURAL TREASURES 239 (1989) (stating that frequent statistical reports highlight the pandemic state of looting in Costa Rica). *See generally* Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 292–93 (1982) (highlighting the epidemic problem of illegal trading in Central and South America, where jade, in particular, is heavily traded in Costa Rica); *see generally* Anthony J. Del Piano, *The Fine Art of Forgery, Theft, and Fraud: Corruption in the World of Art and Antiquities*, 8 CRIM. JUST. 16, 17 (1993) (stressing that illegal trading has become such a problem in Costa Rica that it loses more than $30 million worth of antiquities each year).

light of a growing demand for Native American artifacts;[15] in Italy, more tombs have been looted than legally excavated;[16] even in China, a tourist company actually runs a course on how to best conduct an illicit excavation.[17] This activity is alarming, especially since the recovery rate of such objects has been estimated as ranging from 5 percent to 12 percent, indicating that nearly all trafficked art will never be recovered.[18]

---

15. To satisfy the demand, "pot hunters" routinely pillage from burial grounds with pickaxes and even backhoes.*See* Ann M. Early, *Profiteers and Public Archaeology: Antiquities Trafficking in Arkansas*, *in* THE ETHICS OF COLLECTING CULTURAL PROPERTY 39, 50 (Phyllis Mauch Messenger ed., 1999) (indicating that the demand for Native American artifacts has prompted Oklahoma to enact a burial protective legislation in an effort to curtail illegal digging); *see also* Merryman, *supra* note 6, at 511–12 (maintaining that the legislation enacted by the United States to protect indigenous sites is inadequate); *see also* Leslie S. Potter & Bruce Zagaris, *Toward a Common U.S.-Mexican Cultural Heritage: The Need for a Regional Americas Initiative in the Recovery and Return of Stolen Cultural Property*, 5 TRANSNAT'L LAW. 627, 666 (1992) (revealing that the United States enacted the Archaeological Resources Protection Act (ARPA) due to an increase in looting of Native American artifacts).

16. *See* PETER WATSON & CECILIA TODESCHINI, THE MEDICI CONSPIRACY: THE ILLICIT JOURNEY OF LOOTED ANTIQUITIES FROM ITALY'S TOMB RAIDERS TO THE WORLD'S GREATEST MUSEUMS 35 (2006) (reporting that six thousand grave site examinations by archeologists reveal more illegal excavations than legal excavations); *see also* Bator, *supra* note 14, at 292 (noting the severity of illegal looting and exportation of art and artifacts in Italy). *See generally* Chauncey D. Steele, Note, *The Morgantina Treasure: Italy's Quest for Repatriation of Looted Artifacts*, 23 SUFFOLK TRANSNAT'L L. REV. 667, 667–68 (2000) (explaining that tomb raiders have stolen so much of Italy's cultural property that, each year, 90 percent of the antiquities that are auctioned off are illegally excavated).

17. *See* WATSON & TODESCHINI, *supra* note 16, at 30 (claiming that He Shuzhong from the National Administration on Cultural Heritage in Beijing has stated that a Chinese tourist company teaches a course on illegal excavation); *see also* He Shuzhong, *Illicit Excavation in Contemporary China*, *in* TRADE IN ILLICIT ANTIQUITIES: THE DESTRUCTION OF THE WORLD'S ARCHAEOLOGICAL HERITAGE 19, 23 (Neil Brodie et al. eds., 2001) (providing that when tourist companies run courses on illegal excavation in China, it becomes very difficult for the customs service to prevent illegal export).

18. *See* Sarah S. Conley, *International Art Theft*, 13 WIS. INT'L L.J. 493, 493 n.6 (1995) (noting that the recovery rate of stolen art is somewhere between 10 percent and 15 percent); *see also* Lisa J. Borodkin, Note, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 377–78 (1995) (asserting that because the recovery rate of stolen art is estimated at 12 percent, nearly all of the stolen art will never be found); *see also* Stacey Falkoff, Note, *Mutually Beneficial Repatriation Agreements: Returning Cultural Patrimony, Perpetuating the Illicit Antiquities Market*, 16 J.L. & POL'Y 265, 270 (2007) (commenting at how bleak recovery prospects remain with only 5 percent to 10 percent of illegally excavated objects recovered).

Indeed, "looting has moved from an occasional, opportunistic activity to a sophisticated, well-funded, well-organized business, including the hiring of looters on retainer so that they work full-time for particular middlemen."[19] Day in and day out, large profits are made from the many objects smuggled from private homes, religious institutions and even museums[20] by local tomb raiders, members of criminal organizations,[21] journalists, art brokers and even diplomats.[22]

---

19. *See* MATTHEW BOGDANOS, THIEVES OF BAGHDAD 213 (2005) (noting that some looting from Baghdad museums bore the marks of knowledgeable, trained professionals); *see also* Patty Gerstenblith, *Controlling the International Art Market in Antiquities: Reducing the Harm, Preserving the Past*, 8 CHI J. INT'L L. 169, 173 (2007) (quoting the aforementioned); *see also* Anthony J. Del Piano, *The Fine Art of Forgery, Theft and Fraud*, 8 CRIM. JUST. 16, 17 (1994) (quoting the president of the International Association of Art Security in New York as saying that art theft is big business and usually involves organized crime).

20. Perhaps the most recent well-known museum theft was in 2004 when the iconic Edvard Munch painting, *The Scream*, was stolen from a museum in Norway; it was fortunately recovered two years later. *See* SIMON HOUPT, MUSEUM OF THE MISSING: A HISTORY OF ART THEFT 153 (2006) (Estimating the value of *The Scream* and *Madonna*, both stolen in an armed daylight robbery of the Munch Museum in 2004, at the time of the theft to have been over $100 million dollars); *see also Stolen Munch Paintings Found Safe*, BBC NEWS, Aug. 31, 2006, http://news.bbc.co.uk/2/hi/entertainment/5303200.stm (providing as an example the looting of the Baghdad museum in Iraq where thousands of artifacts were stolen during the second Gulf War). *See* Frederic Truslow, *Peru's Recovery of Cultural Patrimony*, 15 N.Y.U. J. INT'L L. & POL. 839, 844 (1983) (noting that one Sotheby's auction featured seven paintings stolen from museums in Cuzco and Arequipa); *see also* Jennifer Sultan, Note, *Combating the Illicit Art Trade in the European Union: Europol's Role in Recovering Stolen Artwork*, 18 NW. J. INT'L L. & BUS. 759, 760–61 (1998) (noting that art theft is one of the more profitable criminal enterprises).

21. *See* Norman Palmer, *Statutory, Forensic and Ethical Initiatives in the Recovery of Stolen Art and Antiques*, *in* THE RECOVERY OF STOLEN ART 1, 4 (1998) (indicating that art theft is linked to organized crime); *see also* Robin Morris Collin, *The Law and Stolen Art, Artifacts, and Antiquities*, 36 HOW. L.J. 17, 33 (1993) (noting that the sophisticated, international nature of the illicit trade in cultural objects suggests ties to organized crime); *see also* Joel S. Solomon, Note, *Forming a More Secure Union: The Growing Problem of Organized Crime in Europe as a Challenge to National Sovereignty*, 13 DICK. J. INT'L L. 623, 625 (1995) (stating that organized crime families supplemented their drugs-trade income with trade in stolen art).

22. *See* GREENFIELD, *supra* note 14, at 241 (noting that smuggling could be done using a diplomat's luggage); *see also* Borodkin, *supra* note 18, at 393 (stating that former Greek Prime Minister Constantine Mitsotakis and his deputy chief were implicated in an antiquities smuggling scheme); *see also* Susan Rothstein, *All's Not Fair for Art in War: A Proposal for the Equitable Exchange of Soviet and German Art Pillaged in World War II*, 4 DEPAUL-LCA J. ART & ENT. L. & POL'Y 35, 40 (1993) (alleging that looted art occasionally crosses borders in the baggage of diplomats); *see also* Suliang Tseng, *Art Smuggling and Theft in Taiwan and China*, 89 MUSEOLOGICAL REV. 80, 89 (2002) (noting that Chinese diplomats were suspected of using their diplomatic immunity to smuggle art into Hong Kong).

While opposing arguments continue to fuel the debate on cultural property protection laws,[23] no one can deny the wide-scale irreparable harm caused by the looting of archeological sites.[24] There are two categories of damage: the first is damage to the context; the second is damage to the object itself. With respect to the context, looters show little concern for the integrity of the site, let alone the necessary careful collection of evidence and a photographic record.[25] This is the very archeological record upon which scholarship depends. Objects of immense archeological value but little market value are collateral victims of this kind of

---

23. The debate often manifests itself as being between "cultural nationalism" and "cultural internationalism." Cultural nationalists believe that objects belong *in situ* and often seek repatriation on the basis that the object is inseparable from that nation's cultural heritage. On the other hand, cultural internationalists believe that objects belong to the international community or "mankind" and thus need not be returned. The case of the Elgin Marbles, where Greece has demanded the return of sculpture from the British Museum that had been removed from the Parthenon by Lord Elgin, provides a good example of such debate. The sculpture was removed between 1801 and 1812 with permission from the Ottomans, who ruled Greece for hundreds of years; it was later sold to the British Museum. Greece seeks the return of the sculptural group on the moral grounds that they belong in Athens and were removed illegally. Great Britain has continued to refuse Greece's request, arguing that since the sculptures cannot be reinstalled on the Parthenon due to pollution, they would have been destroyed if it were not for Britain's interventions. *See* JAMES CUNO, WHO OWNS ANTIQUITY? MUSEUMS AND THE BATTLE OVER OUR ANCIENT HERITAGE 153 (2008) (including the Elgin Marbles among "cultural propert[ies]"); s*ee also* John Henry Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881, 1910–23 (1985) (arguing both sides for Britain's return of the Elgin Marbles); *see generally* John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 831 (1986) (discussing international nationalism, internationalism and attitudes toward cultural properties).

    Another contentious issue is the question of whether a museum should refuse to buy or display objects of unknown provenance. Some argue that this is the only way to drive down the black market because if there is no demand, looters will stop pillaging. Others argue that this prevents important objects from ever being studied since they will either sit in museum basements or will never be acquired; they often cite examples of chance finds, such as the Rosetta Stone, which was found accidentally within ruins by a French Officer in Egypt and later sent to Britain. It was the deciphering of the language on the Rosetta Stone that unlocked the understanding of the Egyptian language and the history of Egypt. *See* JAMES CUNO, WHOSE CULTURE? THE PROMISE OF MUSEUMS AND THE DEBATE OVER ANTIQUITIES 8–10 (2008) (arguing that the Rosetta Stone's importance does not derive from the context in which it was discovered); s*ee also* James Cuno, *Museums and the Acquisition of Antiquities*, 19 CARDOZO ARTS & ENT. L.J. 83, 92 (2001) (arguing that museum acquisitions are for the public good, and need not be from pure sources).

24. *See* Convention for the Protection of Cultural Property in the Event of Armed Conflict ¶ 2, May 14, 1954, 249 U.N.T.S. 215 (asserting that damage to the cultural heritage of any people is damage to all mankind); *see also* John Henry Merryman, *The Retention of Cultural Property*, 21 U.C. DAVIS L. REV. 477, 503 (1988) (stating that "[t]here is no serious debate about the proposition that cultural property should be preserved"); *see also* Patty Gerstenblith, *Recent International Cases and Prognosis for the Future, in* PRESENTING ARCHAEOLOGY IN COURT: LEGAL STRATEGIES FOR PROTECTING CULTURAL RESOURCES 216 (Sherry Hutt et al. eds., 2006) (stating that the mere market value of looted artifacts alone does not accurately reflect the harm caused from knowledge lost and damage to the cultural and historical record); *see also* Nancy C. Wilkie, *Cultural Property: The Hard Question of Repatriation: Public Opinion Regarding Cultural Property Policy*, 19 CARDOZO ARTS & ENT. L.J. 97, 97–98 (2001) (explaining the result of a survey showing that large majorities of Americans understood the importance of protecting archeological sites).

25. *See* CUNO, *supra* note 23, at 93–94 (summarizing the debate over whether looted objects with no archeological context have any research value); *see also* Robert J. Mallouf, *An Unraveling Rope: The Looting of America's Past*, AM. INDIAN Q., Spring 1996, at 200–201 (explaining that looting a site results in irreversible harm to the informational value of the site); *see also* Merryman, *supra* note 23, at 846 (stating that removal of a Mayan stela from a site as an example that if it is removed, it would probably result in a loss of the site's integrity).

upheaval.[26] A particularly gruesome example of this may be found with respect to the box of gold rings housed in Geneva by Giacomo Medici where the rings were still connected to the fingers of the deceased.[27] Cambodia provides another example where looters use chain saws to remove the heads of the figures that decorate temple walls at Angkor Wat,[28] a site so archeologically important it is listed as a World Heritage Site.[29]

The level of damage to the stolen objects varies in degrees. Looters often inflicte damage at the site. For example, in remote regions of Guatemala and Mexico, looters first attempt to trim the front surface off of ancient Mayan grave stelae in order to ease the burden of transport through the countryside.[30] When successful, the front of the stela emerges on the black market wholly disconnected from its broader context—it is also irrevocably separated from the back

26. *See* Jonathan S. Moore, *Enforcing Foreign Ownership Claims in the Antiquities Market*, 97 YALE L.J. 466, 469 (1988) (explaining that looting inflicts irreparable damage on the scientific record, since archeologists need even small fragments from a site). *But see* Dan Potter, *Measuring Archaeological Site Survival in Texas*, THE SAA ARCHAEOLOGICAL RECORD, Jan. 2006, at 11 (noting that looting accounted for a surprisingly small portion of causes of damage, and most looters leave few traces).

27. *SEE* PETER WATSON & CECILIA TODESCHINI, THE MEDICI CONSPIRACY: THE ILLICIT JOURNEY OF LOOTED ANTIQUITIES FROM ITALY'S TOMB RAIDERS TO THE WORLD'S GREATEST MUSEUMS 184 (2006) (discussing the looted artifacts discovered in the Geneva warehouse where upon "closer examination, one of the boxes in the cupboards was found to contain gold rings *with the finger of the bones of the dead still attached*") (emphasis in original). *See generally* Aaron M. Boyce, *A Proposal to Combat the Illegal Trafficking of Pre-Columbian Artifacts*, 3 HISPANIC L. J. 91, 97 (1997) (explaining that farmers and peasants loot sites as soon as possible, selling artifacts of great importance for pennies).

28. *See* Jane Perlez, *A Cruel Race to Loot the Splendor That Was Angkor*, N.Y. TIMES, Mar. 21, 2005, at A4 (explaining that looters armed with chain saws slice through the stone leaving headless carvings and statues at Angkor Wat). *See generally* Etienne Clément, *The Looting of Angkor: Keeping Up the Pressure*, 54 MUSEUM INT'L 138, 139 (2002) (stating that post-military-occupation looters systematically destroyed Angkor temples by tearing off apsaras and garudas and removing giant heads); *see generally* Ishizawa Yoshiaki, *Picking Up the Pieces: Japan's Contribution to the Restoration of Angkor Monuments*, JAPAN Q., Jan. 1993, at 44 (indicating that smaller sculptures and bas-reliefs were stolen, and 60 statues were destroyed at Angkor Wat during the civil war).

29. *See* SON SOUBERT & SOUNG LEANG HAY, RACAP SERIES ON CULTURE AND TOURISM IN ASIA 3: CASE STUDY ON THE EFFECTS OF TOURISM ON CULTURE & THE ENVIRONMENT: CAMBODIA 1 (UNESCO 1995) (noting that Angkor was added to the UNESCO World Heritage List in December 1992); *see also* GLOBAL HERITAGE FUND ANNUAL REPORT 2006 9 (2006) (indicating that Angkor is a world-renowned cultural heritage site); *see also* Angkor, UNESCO World Heritage Center, http://whc.unesco.org/en/list/668 (listing Angkor as a world heritage site).

30. *See* Clemency Coggins, *Archeology and the Art Market*, 175 SCIENCE 263, 263–64 (1972) (explaining that stelae are too heavy to transport intact, so looters aim to saw off the face of the stone); *see also* Moore, *supra* note 26, at 466 (stating that the excavation of an abandoned Mayan city built on Mexico's Yucatan Peninsula revealed that looters had sliced stelae into pieces for illegal shipment to the United States); *see also* James A.R. Nafziger, *Controlling the Northward Flow of Mexican Antiquities*, 7 LAW. AM. 68, 69 (1975) (providing that Mayan stelae are often butchered for easier transport).

side of the stela that contained the inscription, so vital for cultural, historical and anthropological understanding.[31] When attempts to trim the relief fail, the looters leave behind a pile of broken rubble minus any small scraps that could potentially reap a profit.[32]

Once removed, looters often transport the stolen objects in less than optimal conditions; they often are damaged by breakage and weather.[33] Mutilation of a more sophisticated kind will often occur at the level of the middleman. Here, the objects are modified for several reasons. In some cases they are repainted in a fairly simple attempt at disguise. For example, in December 2008, a sculpture of a pharaoh was returned to Egypt; 20 years before, it had been disguised as a copy by dipping the stone into plastic and coating it in black paint.[34] In other cases, objects are "de-restored,"[35] or taken apart, while others are amalgamated with other

---

31. *See* Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 279 (1982) (noting that when looters saw into stelae, they slice off the hieroglyphic inscriptions destroying important insights to understanding Maya civilization); *see also* Coggins, *supra* note 30, at 263–64 (asserting that when looters saw off the sculptured face of a stela, the inscription is destroyed, resulting in the loss of valuable information). *See generally* Ivan Šprajc, *Maya Sites and Monuments in SE Campeche Mexico*, 29 J. FIELD ARCHAEOLOGY 385, 386 2004) (expressing that the hieroglyphic inscriptions carved into stelae are extremely relevant to the understanding of the period).

32. *See* Coggins, *supra* note 30, at 263–64 (explaining that when looters' attempts to saw off the face of the stela fail, they destroy the carved images and leave them behind). *See generally* Merryman, *supra* note 24, at 356–57 (stating that after thinning the stela, looters leave behind destroyed matter); *see generally* Asif Efrat, *Protecting Against Plunder: The United States and the International Efforts Against Looting of Antiquities* 7 (Cornell Law Faculty Working Papers, 2009), http://scholarship.law.cornell.edu/clsops_papers/47 (providing that looters destroy and discard objects that lack high market value but offer high archaeological value).

33. *See* Clemency Coggins, *Illicit Traffic of Pre-Columbian Antiquities*, 29 ART J. 94, 94 (1969) (noting that stelae may be mutilated during transport from the jungle). *See generally* Michael L. Dutra, *Sir, How Much Is That Ming Vase in the Window?: Protecting Cultural Relics in the People's Republic of China*, 5 ASIAN-PAC. L. & POL'Y J. 62, 70 (2004) (indicating smuggled ancient artifacts that are stored in warehouses are being destroyed slowly by the elements). *See generally* Nafziger, *supra* note 30, at 70 (explaining the process by which artifacts are transported out of the Mexican jungle and into the market and how the journey may severely damage the artifact).

34. *See Britain to Return Egypt Sculpture*, BBC NEWS, Dec. 19, 2008, ¶ 1–2 http://news.bbc.co.uk/2/hi/uk_news/7791097.stm (indicating that the Pharaoh's head stolen and disguised as a cheap copy was returned to Egypt); *see* also Sarah Knapton, *A Priceless Sculpture Which Was Expertly Smuggled out of Egypt Disguised as a Cheap Souvenir of Itself Is to Be Returned Home*, MUSEUM SECURITY NETWORK, Dec. 19, 2008, ¶¶ 1–4 http://www.museum-security.org/?p=806 (stating that the Pharaoh sculpture being returned to Egypt had been stolen by a British smuggler who had disguised it as a souvenir by covering it in plastic and painting it black). *See generally* Lisa J. Borodkin, Note, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 383 (1995) (noting that smugglers intentionally deface artifacts to make them less recognizable and easier to smuggle).

35. For example, the torso of Mithras was acquired by the Getty Museum in 1982 but later was found to be the missing *Gladiatore Giustiniani* from Bassano, Italy. The torso had previously been restored with a head, raised arms, and a lion, but these details were removed before it was sold to the Getty. The object was returned in 1999. *See* Marion True, *Changing Approaches to Conservation*, *in* HISTORY OF RESTORATION 1, 10 (Getty Publications, 2003) (discussing how the torso was identified as the *Gladiatore Giustiniani*); *see also* Patty Gerstenblith, *The Public Interest in the Restitution of Cultural Objects*, 16 CONN. J. INT'L L.197, 206 (2001) (explaining that a dealer purposely broke a Byzantine mosaic and then restored, it believing that doing so would increase the market value of the artifact); *see also* Alia Szopa, Note, *Hoarding History: A Survey of Antiquity Looting and Black Market Trade*, 13 U. MIAMI BUS. L. REV. 55, 63 (2004) (stating that stolen artifacts often are made unrecognizable, perhaps by disassembling the piece, before sale outside the source nation).

pieces to form a pastiche so as to escape detection. Others are commingled and shipped with blatantly tourist trade objects.[36] Certain damage is more drastic and more permanent, like objects that are trimmed, cut down, or re-carved to make them more marketable or aesthetically pleasing.[37] For example, in 1993, Italian police recovered a 17th-century painting that had been cut in two.[38] This damage is in addition to the enormous problem of the counterfeit paper trail accompanying illicit activity, providing seemingly legitimate bills of sale or other components of evidence of proper provenance.[39]

---

36. This is perhaps the situation with the barrel of Mexican artifacts recently brought to light in New York. Some of the objects are probably actual artifacts, while others are probably forgeries. *See* Mariano Castillo, *Mystery Unfolds Over Discarded Barrel With Mexican Artifacts*, CNN, Jul. 29, 2009, http://edition.cnn.com/2009/WORLD/americas/07/29/newyork.mexico.artifacts (reporting that a barrel of Mexican artifacts discovered in New York likely contains both authentic and non-authentic pre-Columbian artifacts). *See generally* Sophocles Hadjisavvas, *The Destruction of the Archaeological Heritage of Cyprus, in* TRADE IN ILLICIT ANTIQUITIES 133, 137 (Neil Brodie et al. eds., 2001), (asserting that some smugglers' collections include fake artifacts along with authentic ones, in hopes of selling the fakes as authentic); *see generally* Neil Brodie, *Historical and Social Perspectives on the Regulation of the International Trade in Archaeological Objects: The Examples of Greece and India*, 38 VAND. J. TRANSNAT'L L. 1051, 1056 (2005) (noting that because of the nature of the illicit market, there can be an unknown number of fakes in circulation).

37. See Patty Gerstenblith, *Ownership and Protection of Heritage: Cultural Property Rights for the 21st Century: The Public Interest in the Restitution of Cultural Objects*, 16 CONN. J. INT'L L. 197, 206 (2001) (explaining that cultural objects, such as the Byzantine mosaics, have been re-cut or altered for the purpose of making them more "saleable"); see also Catherine Sease, *Conservation and the Antiquities Trade*, 36 J. AM. INST. CONSERVATION 49, 53 (1997) (recognizing that the alteration of stolen cultural artifacts through "treatment" processes to transform them into saleable commodities irreparably diminishes their cultural and archeological significance). *See generally* Jane Warring, Comment, *Underground Debates: The Fundamental Differences of Opinion That Thwart UNESCO's Progress in Fighting the Illicit Trade in Cultural Property*, 19 EMORY INT'L L. REV. 227, 242–43 (2005) (describing the deliberate cultural and archeological destruction and damage that result from the illicit trading of cultural objects).

38. *See* Dalya Alberge, *Unkindest Cuts of the Thieves Who Trade in Stolen Paintings*, THE INDEPENDENT, Jan. 31, 1993, http://www.independent.co.uk/news/uk/unkindest-cuts-of-the-thieves-who-trade-in-stolen-paintings-1481879.html (discussing that the Italian police had recovered a stolen 17th-century painting that was deliberately cut into two pieces). *See generally* Borodkin, *supra* note 34, at 382–83 (noting that deliberate alteration of cultural and art objects by looters is among the various methods by which items are irreversibly damaged). *See generally* David Gill & Christopher Chippendale, *From Malibu to Rome: Further Developments on the Return of Antiquities*, 14 INT'L J. CULTURAL PROP. 205, 227 (2007) (describing how the deliberate breaking apart of pots helps to ensure that dealers of illicit objects make a sale to reputable museums).

39. Forgers, fakers and counterfeiters thrive upon and insinuate themselves into the dynamic of these illegal buyer-seller situations. An unscrupulous middleman, dealer or agent can be just as unscrupulous with documentation, selling a counterfeit alongside a real object. *See* Efrat, *supra* note 32, at 1482–83 (suggesting that the British art market has benefited and profited from the sale of both looted antiquities and counterfeit goods); *see also* Gerstenblith, *supra* note 37, at 246 n.8 (commenting that the interconnection between the flow of undocumented antiquities and the acceptance of fake objects contribute to and benefit the black market). *See generally* Christopher Chippendale & David W.J. Gill, *Material Consequences of Contemporary Classical Collecting*, 10 AM. J. ARCHAEOLOGY 463, 467 (2000) (explaining that the provenance of an object, knowledge of its coming from a particular place, increases its value because it helps buyers establish its authenticity).

Many "market countries"—countries where stolen art and artifacts are sold—have done little to help thwart the trade, often turning a blind eye and being less than rigorous in their review of the acquisition process. For example, an internal review at the J. Paul Getty Museum in Los Angeles in 2006 found that 350 objects in their collection had disputed provenances.[40] Similarly, Thomas Hoving, a former director of the New York Metropolitan Museum of Art, remarked in 1993 that "almost every antiquity that has arrived in America in the past ten to twenty years has broken the laws of the country from which it came."[41]

Switzerland, on the other hand, is a market country whose national policy subverts cultural property initiatives. Under Swiss law, the buyer of a looted object bought in good faith becomes the legal owner five years after purchase.[42] At this point, these objects can leave Switzerland for other market countries where they can then be "legally" sold. Thus, Switzerland provides a regular transit point for objects smuggled out of source countries, which find a home in the notorious "Swiss vault," where they can accrue the patina of legal ownership before being sold to other market countries, such as the United States and Great Britain.[43]

---

40. *See* Michael J. Reppas, *Empty "International" Museums' Trophy Cases of Their Looted Treasures and Return Stolen Property to the Countries of Origin and the Rightful Heirs of Those Wrongfully Dispossessed*, 36 DENV. INT'L L. & POL'Y 93,108 (2007) (illustrating that a large portion of some collections at the Getty Museum have questionable or disputed provenances); *see also* Jason Felch & Ralph Frammolino, *Getty's List of Doubts Multiplies*, L.A. TIMES, June 18, 2006, at 1 (indicating that an internal investigation conducted at the Getty Museum revealed that a significant number of valuable items in its collections were purchased by looters and dealers); *see also* Edward Wyatt, *Museum Workers Are Called Complicit*, N.Y. TIMES, Jan. 26, 2008, at 7 (suggesting that museum employees involved in illicit transactions of looted art turn a blind eye and avoid inquiring about the provenances of artifacts and items that the museum acquire).

41. *See* Thomas Hoving, MAKING THE MUMMIES DANCE: INSIDE THE METROPOLITAN MUSEUM OF ART (1993) ("[A]lmost every antiquity that has arrived in America in the past ten to twenty years has broken the laws of the country from which it came."); *see also* Borodkin, *supra* note 34, at 378 (stressing the need to revise antiquities law to address the destruction caused by traditional art-dealing methods and international laws that conflict with the laws of nations from which the cultural objects are stolen). *See generally* Evangelos I. Gegas, Note, *International Arbitration and the Resolution of Cultural Property Disputes: Navigating the Stormy Waters Surrounding Cultural Property*, 13 OHIO ST. J. ON DISP. RESOL. 129, 144 (1997) (stating that the inability to resolve conflicting international and legal interests in cultural objects has contributed to museums' incentives to buy stolen objects).

42. *See* Kathleen Anderson, Note, *The International Theft and Illegal Export of Cultural Property*, 8 NEW ENG. INT'L & COMP. L. ANN. 411, 442 (2002) (explaining that Switzerland is a civil code nation that gives a bona fide purchaser of a stolen item absolute title to it with no obligation to return it to the rightful owner); *see also* Michele Kunitz, Comment, *Switzerland & the International Trade in Art & Antiquities*, 21 NW. J. INT'L L. & BUS. 519, 532–33 (2001) (describing the difficulties a source country faces in trying to reclaim stolen cultural property from civil law countries which give the bona fide purchaser good title against the world); *see also* Chauncey D. Steele IV, Note, *The Morgantina Treasure: Italy's Quest for Repatriation of Looted Artifacts*, 23 SUFFOLK TRANSNAT'L L. REV. 667, 688 (2000) (establishing that a true owner's proprietary rights to an object are completely extinguished when that object is sold to a bona fide purchaser in a civil law country, even if it was stolen from him).

43. *See* PETER WATSON & CECILIA TODESCHINI, THE MEDICI CONSPIRACY: THE ILLICIT JOURNEY OF LOOTED ANTIQUITIES FROM ITALY'S TOMB RAIDERS TO THE WORLD'S GREATEST MUSEUMS 35 (2006) (explaining that in the trial of Giacomo Medici thousands of looted objects were stored in a warehouse in Switzerland before they were sold to private collectors and museums through auction houses and galleries); *see also* Gerstenblith, *supra* note 37, at 246 n.21 (commenting on how stolen antiquities are intentionally brought through Switzerland to gain a color of legal ownership before they are sold to buyers in other countries); *see also* Sue J. Park, Comment, *The Cultural Property Regime in Italy: An Industrialized Source Nation's Difficulties in Retaining and Recovering Its Antiquities*, 23 U. Pa. J. Int'l Econ. L. 931, 936–39 (2002) (demonstrating the increased sophistication of antique smuggling as sellers deliberately transmit stolen goods through the Swiss hub where buyers gain legal title to them before they are sold to market nations).

The black market in cultural heritage is a particular problem for source countries with underdeveloped economies, which lack resources to combat the large scale looting occurring within their borders.[44] This is also an issue in developed countries.[45] France, Germany and Italy are currently ranked among the highest in the world for trafficked art and artifacts,[46] although this situation changes with the style of the marketplace, that is, consumer demand. Italy is the custodian of a wide range of cultural objects, from pieces of Etruscan and Roman antiquity to the surviving wealth of Medieval, Renaissance and Baroque monuments and objects, and the vast amount of art housed in some of the oldest institutional collections in the world. Other objects lie in unexcavated or unknown locations;[47] the need to protect sites remains a priority for Italy as new and important archeological sites are discovered regularly. For example, the construction of a new metro line in Rome, "linea C," has yielded, among others things,[48] a 15th-century glass factory underneath the busy Piazza Venezia, possibly the Stag-

44. *See* Alexander A. Bauer, *New Ways of Thinking About Cultural Property: A Critical Appraisal of the Antiquities Trade Debates*, 31 FORDHAM INT'L L.J. 690, 712 (2008) (attributing a developing nation's inability to protect valuable cultural property to their lack of resources to monitor illicit activity); *see also* Peter K. Yu, *Cultural Relics, Intellectual Property, and Intangible Heritage*, 81 TEMP. L. REV. 433, 452–53 (2008) (emphasizing that the lack of legal enforcement to prevent illicit trade of cultural relics in developing countries is partly due to their lack of resources); *see also* Park, *supra* note 43, at 933–34 (enumerating the various reasons developing nations are unable to prevent illicit trade of cultural objects as their lack of resources incentivizes locals to sell artifacts because of poverty and lack of legal enforcement).

45. *See* Leo Caffaro, *What's Yours Is Mine: Issues in Private Legal Disputes Regarding Title of Stolen Art and Artifacts*, 8 APPEAL 46, 48 (2002) (noting that developed countries like Italy struggle to monitor the transfer of cultural property within and without its borders); *see also* Lisa J. Borodkin, Note, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 385 (1995) (explaining that developed countries have difficulties in preventing illicit trade of cultural property because traffickers are both well organized and well funded); *see also* Park, *supra* note 43, at 934–35 (positing that even though Italy is a developed country, it is nonetheless a victim of antiquities looting).

46. *See* Derek R. Kelly, Note, *Illegal Tender: Antiquities Protection and U.S. Import Restrictions on Cypriot Coinage*, 34 BROOK. J. INT'L L. 491, 505 (2009) (declaring that France is one of the primary sources of stolen art); *see also* Park, *supra* note 43, at 932 (maintaining that Italy is a leading provider of stolen artifacts); *see also* Interpol, *Stolen Works of Art: Frequently Asked Questions*, http://www.interpol.int/Public/WorkOfArt/woafaq.asp#faq3 (finding that the General Secretariat's information indicates art thieves most frequently target France, Poland, Russia, Germany and Italy).

47. *See generally* Aaron Kyle Briggs, Comment, *Consequences of the Met-Italy Accord for the International Restitution of Cultural Property*, 7 CHI. J. INT'L L. 623, 637 (2007) (noting that half the U.N.-designated heritage sites are located in Italy, a popular target for seekers of hidden antiquities); *see generally* U.S. Department of State Bureau of Educational and Cultural Affairs, International Cultural Property Protection, Information Page for Italy, http://exchanges.state.gov/heritage/culprop/itfact.html (stating that an agreement between Italy and the United States was enacted to protect Italy's archeological sites from current ruthless pillaging).

48. See Gabriel Kahn, *When Rome Builds a Subway, It Trips Over Archaeologists—Tiny Spades and Artifacts Eventually Will Give Way to Massive Earthmovers*, WALL ST. J., Jan. 27, 2007, at A1 (stating that the Line C dig in Rome unearthed ancient tombs and residences); *see also Ancient Marble Staircase Found in Rome*, UNITED PRESS INT'L, Apr. 20, 2008 (indicating that numerous antiquities were discovered during Rome's Line C subway project, including a marble staircase, taverns, medieval kitchens and remains of Renaissance palaces); *see also* Ariel David, *Rome Subway Planners Try to Avoid Relics*, USA TODAY, Feb. 3, 2007, http://www.usatoday.com/news/world/2007-02-03-romesubway_x.htm (reporting that Line C metro excavation in Rome uncovered foundations of an imperial Roman public building, ancient taverns, 16th-century palace cellars, and tombs).

num of Agrippa, a large artificial pool built in 25 B.C. and used by Nero, and part of the Aurelian Wall built by the Emperor Aurelianus between 271 and 275 A.D.[49] All of these finds have changed the understanding of Rome and its history.[50]

From the earliest recorded history, Italy has been plagued by looters, commonly referred to as *tombaroli*, or tomb robbers. They concentrate their activities on undiscovered or unguarded archeological sites, which are plentiful in Italy. In fact, one *tombarolo* estimated that he had plundered "several hundred ancient burial chambers to recover vases, statuettes, mirrors, ornaments, jewellery, and other objects in gold, bronze, and terracotta" from a town fewer than 20 miles southwest of Rome.[51] Sometimes *tombaroli* work on commission, armed with measurements to look for specific pieces or types of antiquities.[52]

---

49. *See* Francesca Haack, *Archaeological Ethics and the Roman Metro Line C*, SAFE: SAVING ANTIQUITIES FOR EVERYONE, http://www.savingantiquities.org/feature_metroC.php#fig5 (noting that during excavation of the Line C subway in Rome, archeologists found a portion of the Aurelian Wall); *see also* Bija Knowles, *Rome's Third Metro Line Delayed Again by Archaeological Discoveries*, HERITAGE KEY, Oct. 23, 2009, http://heritage-key.com/blogs/bija-knowles/romes-third-metro-line-delayed-again-archaeological-discoveries (detailing the numerous ancient treasures discovered during the Roman Line C subway project, including parts of the Aurelian Wall). *See generally Metro Project Provides Look at Rome's Past*, GLOBAL NEWS WIRE, Dec. 4, 2006 (commenting that parts of a 2,000-year-old Roman wall were found during a dig for Rome's Line C subway).

50. *See* Park, *supra* note 43, at 932 (stating that Italy's historical record can be built from proper examination of its archeological artifacts). *See generally* Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 301 (1982) (commenting that the pillaging of archeological sites results in unprovenanced artifacts that provide inadequate historical meaning). *See generally* Jonathan S. Moore, Note, *Enforcing Foreign Ownership Claims in the Antiquities Market*, 97 YALE L. J. 466, 469 (1988) (noting that our understanding of history is permanently damaged through looting, because anthropologists lose the opportunity to study and learn from the stolen artifacts).

51. *See* Geraldine Norman, *Spectrum: Plundering the Underworld*, TIMES (LONDON), Dec. 30, 1986 (quoting the aforementioned *tombarolo* who claims to have looted up to 4,000 Etruscan tombs lavishly furnished with painted terra-cotta vases, bronze ornaments, gold, jewelry and frescoes); *see also* Julian Coman, *Net Closes on Raiders of Etruria's Lost Tombs: Archaeologists Lie in Wait to Ambush Midnight Plunderers*, SUNDAY TELEGRAPH (LONDON), Apr. 8, 2001, at 32 (detailing one *tombarolo*'s theft of vases, jugs, and jewelry); *see also* Cristina Ruiz, *My Life as a* Tombarolo, ART NEWSPAPER, 2002, http://www.museum-security.org/tombarolo.htm (outlining a *tombarolo*'s account of his thievery).

52. *See* Giovanni Pastore, *The Looting of Archaeological Sites in Italy, in* TRADE IN ILLICIT ANTIQUITIES: THE DESTRUCTION OF THE WORLD'S ARCHAEOLOGICAL HERITAGE 155, 156 (Neil Brodie et al. eds. 2001) (emphasizing that the archeological looting in Italy takes place within a complex and refined network that includes studying and surveying sites, utilizing professionals and specialists, employing relatively "scientific" digging methods and selling to middlemen associated with the buyers of stolen art); *see also* John G. Petrovich, *The Recovery of Stolen Art: Of Paintings, Statutes, and Statues of Limitations*, 27 UCLA L. REV. 1122, 1124 n.8 (1980) (defining a movement in stolen art toward custom crimes, where a broker places an order with a fence, who then commissions thieves to steal the particular item). *See generally* Jeffrey Fleishman, *Italy Crusades for Return of Plundered Antiquities,* PHIL. INQUIRER, Aug. 8, 2000 (reporting that in the early 1980s, *tombaroli* were commissioned by the Mafia to steal a 15-piece silver set in Sicily).

The 1995 discovery of Giacomo Medici's warehouse in Switzerland highlighted the severity of Italy's illicit art market. Not only was the warehouse full of looted art and artifacts; it also contained thousands of photographs of objects, some of which were, at the time, located in American museums.[53] More important, it showed that the trade in Italy used a "sophisticated method of laundering" whereby a collector would purchase a looted object then later donate it to a museum.[54] The collector, now ironically considered a philanthropist, reaped the tax benefits of the donation, and the museum acquired items it might not have been able to afford while simultaneously distancing itself from questionable acquisition practices.[55] The evidence discovered in the warehouse led to the 2004 conviction of Giacomo Medici, followed by charges against Marion True, the former curator of the J. Paul Getty Museum, and Robert Hecht Jr., an antiques dealer, which continue to progress in court today. This single event has proved to be a tinderbox in terms of object restitution on the part of many museums across the United States.[56]

---

53. *See* PETER WATSON & CECILIA TODESCHINI, THE MEDICI CONSPIRACY: THE ILLICIT JOURNEY OF LOOTED ANTIQUITIES, FROM ITALY'S TOMB RAIDERS TO THE WORLD'S GREATEST MUSEUMS 68 (2006) (outlining that some photographs showed the objects by the excavation site, others depicted them when they were fully restored and others illustrate the same objects on display at particular museums); *see also* Patty Gerstenblith & Bonnie Czegledi, *International Cultural Property*, 40 INT'L LAW. 441, 449 (2006) (reporting that at least eight U.S. museums, including the Metropolitan Museum of Art, the Getty and the Museum of Fine Arts, hold more than a hundred objects illegally smuggled out of Italy); *see also* Gertrude M. Prescott, *Book Review of The Medici Conspiracy: The Illicit Journey of Looted Antiquities from Italy's Tomb Raiders to the World's Greatest Museum. By Peter Watson and Cecilia Todeschini*, 47 BRIT. J. CRIMINOLOGY 367, 368 (2007) (acknowledging that the Medici warehouse contained 3,800 artifacts and over 4,000 photographs of artifacts that were looted).

54. *See* Patty Gerstenblith, *The Public Interest in the Restitution of Cultural Objects*, 16 CONN. J. INT'L L. 197, 244 n.204 (2001) (illustrating the close relationship between museums and private collectors, where a collector would donate looted objects to a museum to enhance its collection, while the collector would gain tax benefits for the donation); *see also* Christine L. Green, Comment, *Antiquities Trafficking in Modern Times: How Italian Skullduggery Will Affect United States Museums*, 14 VILL. SPORTS & ENT. L.J. 35, 63 (2007) (revealing how Medici successfully laundered the stolen objects by using his companies to auction looted objects and repurchase the objects at the auction, thereby attaining the auction's stamp of approval).

55. *See* Lisa J. Borodkin, Note, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 387 (1995) (explaining that many private collectors donate works of art to U.S. museums because the government offers tax incentives); *see also* Chauncey D. Steele IV, Note, *The Morgantina Treasure: Italy's Quest for Repatriation of Looted Artifacts*, 23 SUFFOLK TRASNAT'L L. REV. 667, 684 (2000) (noting that private collectors acquired artifacts from unscrupulous dealers and donated them to museums, thus getting a tax break and providing the museum with artifacts that it would not have otherwise been able to purchase). *See also* Elisabetta Povoledo, *Italy Defends Treasures (and Laws) With a Show*, N.Y. TIMES, Oct. 7, 2008, at C6 (asserting that a museum gets top-rate works of art and distances itself from questionable pieces in exchange for a full-value tax break to the donor);

56. *See* Patty Gerstenblith, Laina Lopez & Lucille Roussin, *International Art and Cultural Heritage*, 43 INT'L LAW. 811, 815 (2009) (discussing how several U.S. museums and private collectors returned artifacts to Italy after the discovery of Medici's warehouse); *see also* Patty Gerstenblith & Lucille Roussin, *Art and International Cultural Property*, 42 INT'L LAW. 729, 734 (2008) (asserting that after the Metropolitan Museum of Art and the Boston Museum of Fine Arts agreed to return looted artifacts to Italy, the Getty Museum decided to return 40 objects). *See generally* Briggs, *supra* note 47, at 640 (arguing that the True case was part of a tactic to go after the most important players in the art world).

Despite its long history of art trafficking, Italy has emerged as a frontrunner in the global fight against the illicit trade in cultural property as a result of its recent successes. Rigorous litigation, the development and enforcement of national laws and international agreements, the investment of significant resources into its investigative police force and sustained public relations campaigns "[are] proving to be a potent combination."[57]

III. Italian National Legal Strategies

Part of Italy's success lies in the early recognition of the value of its past and subsequent creation of laws to safeguard those cultural objects. One might say that Italy's national and civic identity is inseparable from its past. Indeed, this past is embodied in Italy's art and monuments, which survive as tangible evidence of their heritage. Of the less tangible, yet most critical, factors in Italy's success are its centuries-long history of lamenting the destruction of its monuments and objects, enacting regulations dealing with the preservation of cultural property, and maintaining a long-standing interest in confronting issues of ownership, whether private or institutional, vis-à-vis the public good.[58] By late antiquity, the Western Roman Emperor Majorian, concerned that "[t]he splendid structure of ancient buildings have been overthrown, and the Great has been everywhere destroyed in order to erect the Little,"[59] issued an edict in 428 A.D. for the protection of Roman monuments, commanding "that all buildings which were of

57. *See* Alexander A. Bauer, *New Ways of Thinking About Cultural Property: A Critical Appraisal of the Antiquities Trade Debates*, 31 FORDHAM INT'L L.J. 690, 691–92 (2008) (indicating that the United States aided Italy in its efforts to end smuggling of artifacts by enforcing laws that prohibited the importation of cultural object from Italy); *see also* Aaron Kyle Briggs, Comment, *Consequences of the Met-Italy Accord for the International Restitution of Cultural Property*, 7 CHI. J. INT'L L. 646–47 (2007) (claiming that during negotiations with the United States, Italy hardened its stance against illicit trade of looted art by raising public awareness of looting crises in the United States and Italy); *see also* Sue J. Park, Comment, *The Cultural Property Regime in Italy: An Industrialized Source Nation's Difficulties in Retaining and Recovering its Antiquities*, 23 U. PA. J. INT'L ECON. L. 931, 939 (2002) (stating that Italy has two police units, the *Carabinieri*, which has an art squad, and the *Guardia di Finanza*, which have a department that investigates art thefts and illegal excavations).

58. For several essays that discuss historical approaches to the notion of the "ruin" of antiquity, see Walter Cupperi, ed., *Senso delle Rovine e Riuso dell'Antico* in 4.14 ANNALI DELLA SCULOA NORMALE SUPERIORE DI PISA (Classe di Lettere e Filosofia, 2002).

59. *See* FERDINAND GREGOROVIUS, HISTORY OF THE CITY OF ROME IN THE MIDDLE AGES VOL. I (A.D. 400–568) 228 (G. W. Hamilton Trans., 4th German ed., Italica Press 2000) (quoting Roman Emperor Majorian's decree regarding the need to preserve historic buildings from further harm); *see also* Alan C. Weinstein, *The Myth of Ministry vs. Mortar: A Legal and Policy Analysis of Landmark Designation of Religious Institutions*, 65 TEMP. L. REV. 91, 96 n.25 (1992) (emphasizing that Emperor Majorian tried to stop Romans from using old public buildings as a source of building materials); *see also* Scott H. Rothstein, Comment, *Takings Jurisprudence Comes in From the Cold: Preserving Interiors Through Landmarks Designation*, 26 CONN. L. REV. 1105, 1106 n.2 (1994) (stressing the Emperor Majorian's eagerness to protect the magnificent historical structures in which he sought to live).

old erected for public use or ornament, be they temples or monuments, shall henceforth neither be destroyed nor touched by anyone whomsoever."[60] Punishment for infraction of this law included a "flogging [and] the loss of both his hands, because, instead of protecting the monuments of antiquity, he has damaged them."[61] Slightly later, during the reign of the Ostrogoth King Theodoric (454–526 A.D.), an official entity was formed, *comes nitentium rerum*, in order to safeguard and conserve antiquities.[62]

---

60. *See* GREGOROVIUS, *supra* note 59, at 228–29 (quoting Roman Emperor Majorian's decree regarding the preservation of historic buildings); *see also* EDWARD GIBBON, DECLINE AND FALL OF THE ROMAN EMPIRE 317 (6th ed. 1835) (rebutting the claim that the decay of Rome's monuments was to be blamed on the conquering vandals, and that Emperor Majorian was one the few to check centuries of destruction); *see also* JUKKA JOKILEHTO, A HISTORY OF ARCHITECTURAL CONSERVATION: THE CONTRIBUTIONS OF ENGLISH, FRENCH, GERMAN, AND ITALIAN THOUGHT TOWARDS AN INTERNATIONAL APPROACH TO THE CONSERVATION OF CULTURAL PROPERTY 5 (Elsevier 1999) (quoting Emperor Majorian's decree that "all the buildings that have been founded by the ancients . . . for the public use . . . shall not be destroyed by any person"); *see also* Joseph Alchermes, *Spolia in Roman Cities of the Late Empire: Legislative Rationales and Architectural Reuse*, 48 DUMBARTON OAKS PAPERS 167, 176–77 (1994) (documenting Emperor Majorian's concern for old buildings in Rome and his desire to preserve them).

61. *See* GREGOROVIUS, *supra* note 59, at 228–29 (quoting Roman Emperor Majorian's decree regarding the preservation of historic buildings and the punishment for violating his order); *see also* GIBBON, *supra* note 60, at 317 (listing various punishments, including amputation, for breaking the conservation laws). *See generally* Rothstein, *supra* note 59, at 1106 n.2 (tracing the desire to preserve historic structure as far back as the latter years of the Roman Empire).

62. *See* GREGOROVIUS, *supra* note 59, at 296 (noting King Theodoric's support of preserving Roman antiquities); *see also* S.J.B. Barnish, *The Transformation of Classical Cities and the Pirenne Debate*, 2 J. ROMAN ARCH. 385, 386 (1989) (acknowledging that the Ostrogoth regime made conservation a priority); *see also* M.H. Hoeflich, *Law, Society, and Reception: The Vision of Alan Watson in The Evolution of Law by Alan Watson (Book Review)*, 85 MICH. L. REV. 1083, 1088 (1987) (showing that the Ostrogoths made a point of adopting Roman law in many areas, including rules on monuments). Girolamo Tiraboschi, STORIA DELLA LETTERATURA ITALIANA DI GIROLAMO TIRABOSCHI. TOMO TERZO. DALL ROVINA DELL'IMPERIO OCCIDENTALE FINA ALL'ANNO MCLXXIII 58 (Societa Tipografica, 1773). The text itself is preserved among the *variae* recorded by Cassiodorus (ca. 487–ca. 580), the counsul to Theodoric. The English translation is given in Cassiodorus, *Book VII. Formulae 13: Formula of the Count of Rome*, *in* LETTERS OF CASSIODORUS, BEING A CONDENSED TRANSLATION OF THE VARIAE EPISTOLAE OF MAGNUS AURELIUS CASSIODORUS SENATOR 329, 329–330 (Thomas Hodgkin trans., London, H. Frowde, 1886):

> If even bolts and bars cannot secure a house from robbery, much more do the precious things left in the streets and open spaces of Rome require protection. I refer to that most abundant population of statues, to that mighty herd of horses [in stone and metal] which adorn our City. It is true that if there were any reverence in human nature, it, and not the watchman, ought to be the sufficient guardian of the beauty of Rome. But what shall we say of the marbles, precious both by material and workmanship, which many a hand longs, if it has opportunity, to pick out of their settings? Who when entrusted with such a charge can be negligent? Who venal? We entrust to you therefore for this Indiction the dignity of the Comitiva Romana, with all its rights and just emoluments. Watch for all such evil-doers as we have described. Rightly does the public grief punish those who mar the beauty of the ancients with amputation of limbs, inflicting on them that which they have made our monuments to suffer. Do you and your staff and the soldiers at your disposal watch especially by night; in the day the City guards itself. At night the theft looks tempting; but the rascal who tries it is easily caught if the guardian approaches him unperceived. Nor are the statues absolutely dumb; the ringing sound which they give forth under the blows of the thief seems to admonish their drowsy guardian. Let us see you then diligent in this business, that whereas we now bestow upon you a toilsome dignity, we may hereafter confer an honour without care.

By the 14th century, medieval Italian humanists and poets, including Dante Alighieri (1265–1321 A.D.) and Giovanni Boccaccio (1313–75 A.D.), decried the Church's destruction and subversion of historical objects.[63] By the 15th century, amid a well-developed culture of collecting, which included wealthy cardinals[64] and popes, there was a keen interest in preventing export.[65] One of the chief protagonists of the Italian Renaissance in the 16th century, the painter Rafaello Sanzio de Urbino, better known as Raphael (1483–1520), was himself an ardent admirer of the past as well as a specialist with respect to object and artifacts reclamation and preservation. In a much impassioned letter to Pope Leo X, written shortly before his death, the artist described the ruined state of Rome and its monuments, placing blame on the passage of time, the barbaric invasions, and Christian agenda of the Popes.[66] Raphael suggested mapping the ancient Roman Empire to prevent further destruction of ancient buildings, which were often pillaged for building materials, and to create a proactive plan for conservation.[67] During the 16th century, interest grew in returning to some level to the public domain those objects that had been subsumed into private collections.[68] A greater level of institutionalization

63. *See* Tilmann Buddenseig, *Gregory the Great, the Destroyer of Pagan Idols: The History of a Medieval Legend Concerning the Decline of Ancient Art and Literature*, 28 J. WARBURG & COURTAULD INST. 44, 49 (1965) (quoting the comparison of Filippo Villani, a medieval commentator, of the Church as the destructor of art on the one hand with Dante, as a resurrector of art, on the other).

64. *See* CAROL M. RICHARDSON, RECLAIMING ROME: CARDINALS IN THE FIFTEENTH CENTURY, 180 (2009) (emphasizing the interest of cardinals and the Pope in protecting the integrity of and restoring ancient Roman structures); *see also* Pamela Askew, *Ferdinando Gonzaga's Patronage of the Pictorial Art: The Villa Favorita*, 60 THE ART BULL. 274, 274 (1978) (analyzing one part of the immense collection of the Gonzaga family, of which two were cardinals, and focusing on the efforts of Cardinal Ferdinando Gonzaga). *See generally* ELDER GUSHING BIGGS HASSELL, HISTORY OF THE CHURCH OF GOD, FROM THE CREATION TO A.D. 1855 457 (1886) (describing the claims of John Wycliffe against the Church, particularly that the Church and its cardinals were too materialistic).

65. *See* ROBERTO WEISS, THE RENAISSANCE DISCOVERY OF CLASSICAL ANTIQUITY 192 (Basil Blackwell 1969) (noting the efforts of Cardinal Giuliano della Rovere, later Pope Julius II, to prevent the export of ancient works of art from Rome); *see also* Paul M. Bator, *An Essay on International Trade in Art*, 34 Stan. L. Rev. 275, 313 (1982) (discussing Pope Pius II's prohibition of the export of works from Papal States); *see also* Elizabeth C. Gutman, *Landmarks as Cultural Property: An Appreciation of New York City*, 44 RUTGERS L. REV. 427, 427–28 (1992) (stating that as early as 1530, Rome established an antiques commission).

66. *See* JOHN K. G. SHEARMAN, RAPHAEL IN EARLY MODERN SOURCES (1483–1602) 501–2 (2003) (quoting Raphael's letter to Pope Leo X regarding his concerns about the state of Roman monuments, as well as his belief that many, including the Church, were to blame for the destruction of ancient Roman buildings); *see also* Gutman, *supra* note 65, at 427 (stating that some commentators attribute the beginning of the preservation movement to Raphael's letter to the Pope); *see also* Joseph L. Sax, *Heritage Preservation as a Public Duty: The Abbe Gregoire and the Origins of an Idea*, 88 MICH. L. REV. 1142, 1148–49 (1990) (tracing the origin of conservation to Raphael's letter to Pope Leo X).

67. *See* Shearman, *supra* note 66, at 505–6 (quoting Raphael's letter and his proposed plan to secure ancient Roman buildings); *see also* JUKKA JOKILEHTO, A HISTORY OF ARCHITECTURAL CONSERVATION: THE CONTRIBUTIONS OF ENGLISH, FRENCH, GERMAN, AND ITALIAN THOUGHT TOWARDS AN INTERNATIONAL APPROACH TO THE CONSERVATION OF CULTURAL PROPERTY 32–33 (Elsevier 1999) (claiming that as a result of their correspondence, Pope Leo X placed the public buildings of ancient Rome under Raphael's authority); *see also* Joseph L. Sax, *Is Anyone Minding Stonehenge? The Origins of Cultural Property Protection in England*, 78 Cal. L. Rev. 1543, 1553 n.54 (1990) (crediting Raphael as the inspiration for preservation).

68. *See* William Stenhouse, *Visitors, Display, and Reception in the Antiquity Collections of Late-Renaissance Rome*, 58 RENAISSANCE Q. 397, 398 (2005) (claiming that in the 16th century there was a shift from the idea of private collections to public museums); *see also* Gigliola Fragnito, *Cardinals' Courts in Sixteenth-Century Rome*, 65 J. MOD. HIS. 26, 33 (1993) (listing the requirement that cardinals open their courts to the public as part of their duties).

of art and an increasing awareness and sophistication with respect to preserving the cultural wealth followed.[69] Moreover, in Italy artistic patrimony as a legal theory was first developed in 1820 by the Papal States[70] and by the first half of the 1800s, most Italian States had enacted laws to protect antiques, art and archeological remains.[71]

---

69. *See* Anthony M. Clark, *The Development of the Collections and Museums of 18th Century Rome,* 26 ART J. 136, 136 (1966) (maintaining that the Italians initiated large-scale repatriation efforts after the Austro-Hungarian Empire was forced to relinquish a number of Italian territories and that the Austrio-Italian Treaty of 1866 dealt with those objects that had been removed during the Hapsburg reign); *see also* Wojciech W. Kowalski, *Repatriation of Cultural Property Following Accession of Territory or Dissolution of Multinational States*, 6 ART ANTIQUITY LAW 139, 140 (2001) (discussing the development of the repatriation efforts by the Italians in the mid-1800s). *See generally* Stacey Falkoff, Note, *Mutually Beneficial Repatriation Agreements: Returning Cultural Patrimony, Perpetuating the Illicit Antiquities Market*, 16 J.L. & POL'Y 265, 265 (2007) (observing that repatriation efforts continue today in Italy to regain previously lost cultural property).

70. Cardinal Bartolomeo Pacca issued an edict after the Congress of Vienna in response to Napoleon's wartime pillaging, which "for the first time establishes a state's (as opposed to a private) procedure to catalogue, protect, and preserve artistic properties within the Church territories." *See* TOMASSO ALIBRANDI & PIERGIORGIO FERRI, I BENI CULTURALI E AMBIENTALI, 3–4 (A. Giuffrè 1985) (opining that Cardinal Pacca's Edict was the moving force behind legislation to protect art and history); *see also* WANDA CORTESE, IL PATRIMONIO CULTURALE: PROFILI NORMATIVI 35 (2007) (providing that Cardinal Pacca's Edict of 1820 is considered the primary material on Italian artistic patrimony); *see also* Giovanni Di Geso, *International Council on Monuments and Sites, Organization of the Services of Preservation, Cataloguing and Professional Training*, *in* 6TH GENERAL ASSEMBLY–ROMA, 1981, NESSUN FUTURO SENZA PASSATO 603 (1981) (emphasizing that Cardinal Pacca's Edict was of great importance partly because it stressed the problems with the protection of cultural inheritance); *see also* Marco Grassi, *Who Owns the Past?*, 25 NEW CRITERION 19, 20 (2006) (stating that Cardinal Bartolomeo Pacca issued an edict after the Congress of Vienna in response to Napoleon's wartime pillaging, establishing a state procedure to identify, protect and preserve artistic property in Church territories).

71. However, some export restrictions in Italy could be found even earlier. In the late 1500s, Tuscany prohibited the exportation of art outside of its territory. This was later implemented in Lombardy by Maria Teresa of Austria in the 1700s. While authorization could be obtained for exportation, it was forbidden to export artworks by certain artists like Michelangelo or Rafaello. *See* ALIBRANDI & FERRI, *supra* note 70, at 3–4 (discussing laws protecting art passed in Tuscany, the Lombardy region, Parma and Modena); *see also* CORTESE, *supra* note 70, at 39 (suggesting that most states in Italy had passed laws to protect art, antiquities and archeological remains); *see also* Di Geso, *supra* note 70, at 604 (observing that Tuscany, Lombardy-Veneto and Piedmont had procedures in place for the protection of art and antiquities).

After unification,[72] the first comprehensive law on art protection was adopted in 1909, which laid the foundation for subsequent legislation.[73] The 1909 Law no. 364, whose centennial Italy celebrated in 2009,[74] "finally established a body of regulations which provided a complete and exhaustive ruling on the protection of [Italy's] cultural property."[75] The law regulated all movable and immovable objects with historical, artistic or archeological value, but excluded objects from living artists and objects fewer than 50 years old.[76] In addition, for privately

72. While it took the newly formed Italian government almost 50 years after unification to enact cultural preservation laws, there were many urgent problems in need of resolution that took priority. *See* LUCY RIALL, THE ITALIAN RISORGIMENTO: STATE, SOCIETY, AND NATIONAL UNIFICATION 62 (1994) (emphasizing that Italian political unification was accomplished largely by an appeal to the unique and glorious past of Italy); *see also* Di Geso, *supra* note 70, at 604. *See generally* Elena Cagiano de Azevedo, *Il Progresso del Novecento: Progress in the Twentieth Century, in* ROVINE E RINASCITE DELL' ARTE IN ITALIA, MINISTERO PER BENI CULTURALE 50, 53 (Electa 2008) (observing that during this period there was only one cultural property-protection law, Law No. 2359/25-6-1865, which allowed for State intervention only when the owner failed to maintain the property in a state of good repair, and that the individual states continued to implement their own laws).

73. The exhibition *Ruins and the Rebirth of Art in Italy* took place at the Colosseum in Rome, Italy, from October 3, 2008, to February 15, 2009, for which see ROVINE AND RINASCITE DELL'ARTE IN ITALIA, MINISTERO PER BENI CULTURALE (Electa, 2008). *See* Cagiano de Azevedo, *supra* note 72, at 53 (noting that a comprehensive system of protection was first presented in 1902 in Law. No. 185, later supplemented in 1903 by Law No. 242, which introduced the principle of State interests superseding individual interests in certain works of art and antiquity, provided the right of preemption to the state for those items, and prohibited the export of any property listed in the Official Catalogue. The 1903 law was extended again in 1909 with more regulation of private property); *see also* Stephanie Doyal, *Implementing the UNIDROIT Convention on Cultural Property Into Domestic Law: The Case of Italy*, 39 COLUM. J. TRANSNAT'L L. 657, 679 (2001) (opining that Italian cultural property laws passed in 1909 laid the foundation for more recent laws protecting cultural property). *See generally* Decree-Law No. 364, art. I, Jun. 20, 1909, Gazz. Uff. No. 150, Jun. 28, 1909 (Italy) (outlining the legal framework that would serve as the basis for future legislation on archeological remains).

74. *See* Cagiano de Azevedo, *supra* note 72, at 53 (observing that the exhibition *Ruins and the Rebirth of Art in Italy* took place at the Coliseum in Rome, Italy, from October 3, 2008, to February 15, 2009); *see also* Elisabetta Povoledo, *Italy Defends Treasures (and Laws) With a Show*, N.Y. TIMES, Oct. 7, 2008, at C6 (noting that Italy held an exhibition at the Roman Coliseum celebrating a century-old cultural heritage law aimed at protecting items of historical, archeological and paleo-anthropological interest). *See generally* Decree-Law No. 364, *supra* note 73 (indicating that the decree was in force in 1909, and the centennial occurred at the time of this writing).

75. *See* Decree-Law No. 364, *supra* note 73 (quoting directly from the statute); *see also* Di Geso, *supra* note 70, at 604 (noting that the 1909 law finally established a complete ruling on the protection of cultural property); *see also* Doyal, *supra* note 73, at 679 (commenting that the 1909 Italian law regulating cultural property was the first comprehensive piece of legislation to give the state power to regulate cultural property).

76. *See* Decree-Law No. 364, *supra* note 73 (outlining the laws that regulated the movement of historically significant archeological finds); *see also* ALIBRANDI & FERRI, *supra* note 71, at 7 (stating that the 1909 law regulated both movable and immovable property that was considered of artistic, historic, archeological or architectural interest to the State); *see also* CORTESE, *supra* note 70, at 401 (indicating that the law regulated all valuable historical objects, but not those whose makers were still living or those of very recent creation).

owned objects declared to be of important interest to the State, it required that the State be notified of any transaction so it could exercise a right of first refusal,[77] and prohibited exportation when there could be grave damage to Italian history, archeology and art.[78]

Several laws were enacted in the years immediately following,[79] culminating in 1939 with Law No. 1089,[80] whereby "[t]he new rules for the defense of artistic and historical property came into effect . . . and constituted a conceptual legal refinement of the principles adopted at the beginning of the century."[81] Under the 1939 law, the Ministry became responsible for a broader range of assets, provided for a State right to preemption for "objects of major importance," and

77. *See* Decree-Law No. 364, *supra* note 73, at art. 1 (giving the State the right of first refusal for objects declared to be of interest to the State); *see also* CORTESE, *supra* note 70, at 401 (observing that the 1909 law gave the state a right of first refusal for the disposition of property which the Sate considers to be of great cultural significance); *see also* Di Geso, *supra* note 70, at 604 (indicating that the state was granted a right of first refusal with respect to the disposition of privately held property of interest to the state, assuming certain minimum criteria were met).

78. *See* Jeanneret v. Vichey, 693 F.2d 259, 261 (2d Cir. 1982) (articulating that under article 129 of the 1909 Italian law, the Royal Office had discretion to ban any objects of historical importance from being exported from Italy); *see also* CORTESE, *supra* note 70, at 41 (explaining that the Italian State would direct exportation procedures whenever it saw a potential danger to Italy's history, archeology or art); *see also* James J. Fishman & Susan Metzger, *Protecting America's Cultural and Historical Patrimony*, 4 SYRACUSE J. INT'L L. & COM. 57, 62 (1976) (stressing that it was the Italian government's responsibility to protect all objects of historical, archeological and artistic importance from exportation in order to preserve Italian culture).

79. *See also* CORTESE, *supra* note 70, at 41 (describing the two laws that were passed between 1909 and 1939 and stating that the 1912 law protected natural works of art like monuments and villages); *see also* WAYNE SANDHOLTZ, PROHIBITING PLUNDER: HOW NORMS CHANGE 110–11 (2007) (presenting an example of a cultural protection law proposed by Italy in 1919, which required enemies from World War I to pay for any cultural or historical losses that occurred during the war); *see also* Cagiano de Azevedo, *supra* note 72, at 53 (illustrating that Italy enacted a number cultural protection laws between 1909 and 1939, including Law. No. 778 of 1922, which protected "natural beauties" and instituted natural parks).

80. *See* Decree-Law No. 1089, art. 1, June 1, 1939, Gazz. Uff. No. 184, Aug. 8, 1939 (stating that the law applies to property that has historic or archeological value); *see also* PATRICK J. O'KEEFE & LYNDEL V. PROTT, HANDBOOK OF NATIONAL REGULATIONS CONCERNING THE EXPORT OF CULTURAL PROPERTY 113 (1988) (republishing Law No. 1089 in furtherance of its discussion of Italian restrictions on the exportation of cultural property); *see also* Andrea Boggio, Comment, *From Protections to Protection: Rethinking Italian Cultural Heritage Policy*, 24 COLUM.-VLA J.L. & ARTS 269, 272 (2001) (noting that the underlying principles of the 1939 Italian law were due in large part to the previous Italian laws on cultural heritage protection); *see also* Aaron Kyle Briggs, Comment, *Islamic Business and Commercial Law: Consequences of the Met-Italy Accord for the International Restitution of Cultural Property*, 7 CHI. J. INT'L L. 623, 636 (2007) (arguing that years later, Italy's policy on cultural property protection is still based on Law No. 1089 from 1939); *see also* Allison Carter Jett, Comment, *Domestic, Supranational and International Historical Preservation Legislation: Does It Protect our Cultural Heritage or Restrict Development? Exploring Its Impact on Ancient Roman Monuments*, 31 GA. J. INT'L & COMP. L. 649, 658 (2003) (explaining that Italy's present preservation laws are extensions of its first preservation law of 1939).

81. *See* Adriano La Regina, *L'ultima Rovina: The Last Ruin*, *in* ROVINE E RINASCITE DELL' ARTE IN ITALIA, MINISTERO PER BENI CULTURALE 16 (Electa 2008); *see also* Doyal, *supra* note 73, at 677, 679 (recognizing that Italian Law No. 1089 modified then-existing cultural protection laws, giving the Italian government ultimate claim over property whose ownership could not be verified).

recognized the need to protect important cultural monuments, not only to prevent damage but also to preserve "their setting and decoration."[82] In addition, "[u]nder Article 44 . . . an archaeological item is presumed to belong to the state unless its possessor can show private ownership prior to 1902."[83] These laws remained in full force until the 1999 "Testo Unico" (Unified Text) and the most recent 2004 Code of Cultural Property and the Landscape,[84] which modified and expanded the 1939 law.[85]

---

82. *See* La Regina, *supra* note 81, at16 (quoting the author's proposition that the 1939 law refined and expanded Italy's defense of artistic and historical property); *see also* JEANETTE GREENFIELD, THE RETURN OF CULTURAL TREASURES 111 (2d ed. 1996) (indicating that an export tax between 8 and 30 percent of the value of the item was imposed on citizens to protect objects of historical value important to Italy's culture); *see also* Roberta Geremia Nucci, *Controtendenze: La Tutela Oggi; Countertrends: Conservation Today*, *in* ROVINE E RINASCITE DELL'ARTE IN ITALIA, MINISTERO PER BENI CULTURALE 98, 100 (Electa 2008) (opining that conservation was a primary goal of the 1939 law, because the use of cultural property should be for public enjoyment); *see also* M. Catherine Vernon, Note, *Common Cultural Property: The Search for Rights of Protective Intervention*, 26 CASE W. RES. J. INT'L L. 435, 463 (1994) (asserting that as a result of the 1939 law on cultural protection, the Italian government will not hesitate to preempt private property rights in the interest of cultural heritage).

83. *See* United States v. Antique Platter of Gold, 184 F.3d 131, 134 (2d Cir. 1999) (establishing that article 44 of Italy's 1939 law gives cultural property to the Italian State unless the possessor proves existence of ownership before 1902); *see also* Sue J. Park, Comment, *The Cultural Property Regime in Italy: An Industrialized Source Nation's Difficulties in Retaining and Recovering Its Antiquities*, 23 U. PA. J. INT'L ECON. L. 931, 940 (2002) (reasoning that without article 44 of Italy's 1939 law, objects of historic interest would be traded out of Italy, and Italy would lose its claim to much of its cultural history). *See generally* JOSEPH L. SAX, PLAYING DARTS WITH REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES 185 (2002) (commenting that Italy will forgo its interest in private property rights to protect items of historical importance). *See* Stephanie Doyal, *Implementing the UNIDROIT Convention on Cultural Property Into Domestic Law: The Case of Italy*, 39 COLUM. J. TRANSNAT'L L. 657, 675–76 (2001) (maintaining that no one, not even a good-faith purchaser, may acquire property rights to the cultural property of Italy); *see also* Monique Olivier, Comment, *The UNIDROIT Convention: Attempting to Regulate the International Trade and Traffic of Cultural Property*, 26 GOLDEN GATE U. L. REV. 627, 635–36 (1996) (announcing that Italy has state ownership laws that declare all antiquities to be government property); *see also* Janene Marie Podesta, Note, *Saving Culture, But Passing the Buck: How the 1970 UNESCO Convention Undermines Its Goals by Unduly Targeting Market Nations*, 16 CARDOZO J. INT'L & COMP. L. 457, 476 (2008) (defining Italian ownership laws, which state that any cultural property found within the country, even if on private land, belongs to the Italian government).

84. *See* Decree-Law No. 42, January 22, 2004 Gazz. Uff. No. 45, Feb. 24, 2004 (codifying the law on cultural property and landscape heritage); *see also* Nucci, *supra* note 82, at 99 (examining supplementary and corrective rules, such as the 2006 Laws No. 156 and 157 and the 2008 Laws No. 62 and 63, building on the 1939 law on cultural protection). *See, e.g.*, Decree-Law No. 59, April 8, 2008, Gazz. Uff. No. 84, April 9, 2008 (detailing a subsequent legislative decree expanding on the 1939 law).

85. *See* Decree-Law No. 156, March 24, 2006, Gazz. Uff. No. 119, May 24, 2006 (extending the reach of the 1939 Italian law on cultural protection; *see also* Elena Cagiano de Azevedo, *Il Progresso del Novecento: Progress in the Twentieth Century*, *in* ROVINE E RINASCITE DELL'ARTE IN ITALIA, MINISTERO PER BENI CULTURALE 50, 82, 85 (Electa 2008) (showing that unlike other nations, the scope of the 1939 law was also extended through Article 9 of Italy's Constitution, which stated, "The Republic . . . protects the landscape and the nation's artistic heritage." Indeed, "[f]ew constitutions in the world contain such a reference and the principle of not separating promotion from preservation and knowledge was farsighted."); *see also* Boggio, *supra* note 80, at 272–73 (acknowledging that the 1999 "Testo Unico" was simply a modification of the pre-existing law on cultural protection in Italy intended to both reaffirm and simplify the original law).

In addition to preserving artistic property and monuments, Italy also restricts their export. In particular, the 2004 Code forbids the definitive exit of movable property from the territory defined therein,[86] or the exit, without prior authorization, of movable objects that are more than 50 years old and are the work of deceased artists.[87] It also withholds the temporary export of objects for exhibitions if the properties are susceptible to damage or constitute a principal collection located within the State[88] and limits the time period for which the objects may be out of the country.[89]

The combination of export regulations and state vested ownership laws can prove to be a powerful one.[90] While export regulating laws can be difficult to enforce once the object leaves the territory, as foreign countries are not inclined to enforce such laws absent an international agreement,[91] sanctions imposed on the exporter not only deter violators but also identify those who have acquired the objects through illegal means.[92] Conversely, state vested ownership laws are usually enforced by foreign governments because "[r]uling otherwise would be an unaccept-

---

86. *See* Decree-Law No. 42, *supra* note 84, at art. 10(1) (defining cultural property as "immoveable and moveable things belonging to the State, the Regions, [or] other territorial bodies . . . which possess artistic, historical . . . interest"); *see also id.* at art.10(2)–(4) (indicating that monuments, parks, maps and the book collections at libraries are among the items Italy considers "cultural property"); *see also id.*, at art. 10(3)(d) (identifying other types of cultural property, such as items with reference to political, military, or literary history, that may be included within the Code's definition of "cultural property").

87. *See* Decree-Law No. 42, *supra* note 84, at art. 65(1), 65(2)(a) (addressing items whose export is forbidden).

88. *See id.* at art. 66(2)(a), 66(2)(b) (addressing the instances for temporary exit).

89. *See id.* at art. 74(2) (addressing the cultural property laws in Italy).

90. *See* Patty Gerstenblith & Lucille Roussin, *International Art and Cultural Heritage*, 43 INT'L LAW. 811, 811 (2009) (noting the stronger steps taken to protect Italy's cultural heritage); *see also* Roger W. Mastalir, *A Proposal for Protecting the "Cultural" and "Property" Aspects of Cultural Property Under International Law*, 16 FORDHAM INT'L L.J. 1033, 1034 (1992–93) (noting the combination of state ownership and export regulations to prevent illegal exportation). *But see* Park, *supra* note 83, at 941 (stating that "Italy's export controls are ineffective because, unlike national property laws that address legal questions of ownership rights, export controls attempt to regulate supply and demand though legal means without taking these economic principles into consideration").

91. *See* Jennifer H. Lehman, *The Continued Struggle With Stolen Cultural Property: The Hague Convention, the UNESCO Convention, and the UNIDROIT Draft Convention*, 14 ARIZ. J. INT'L & COMP. L. 527, 548–49 (1997) (noting that the creation of UNIDROIT was a response to disputed resolutions that were not enforced due to the absence of an international agreement); *see also* Lawrence M. Kaye, *Art Wars: The Repatriation Battle*, 31 N.Y.U. J. INT'L L. & POL. 79, 80 (1998) (acknowledging the hesitance to enforce export laws outside of the nation of ownership); *see also* John Henry Merryman, *The Retention of Cultural Property*, 21 U.C. DAVIS L. REV. 477, 484–85 (1987) (noting that courts do not enforce foreign claims on art, absent an international agreement).

92. *See* PATRICK J. O'KEEFE, ANTIQUITIES TRADE OR BETRAYED: LEGAL ETHICAL AND CONSERVATION ISSUES 79 (Kathryn W. Tub ed., 1995) (asserting that in Spain, the antiquity is forfeited to the State if it is illegally exported. The assumption, of course, is that the thief is unlikely to seek an export permit for a stolen antiquity.); *see also* Peter T. Wendel, *Protecting Newly Discovered Antiquities: Thinking Outside the "Fee Simple" Box*, 76 FORDHAM L. REV. 1015, 1040–41 (2007) (acknowledging that state ownership laws deter violators because of the lost of value of the item). *See generally* Decree-Law No. 42, *supra* note 84, at art. 65(1), (2)(a) (acknowledging that the 2004 Code provides for fines, imprisonment and confiscation of cultural properties).

able interference with the prerogative of a sovereign state to determine its respective rights and those of its citizens concerning the ownership of its cultural heritage."[93]

Italian cultural property laws, along with those of other countries,[94] on the other hand, have often been referred to as "blanket laws"[95] and are considered ineffectual[96] and overly retentive.[97] Critics argue that "[l]abeling someone a thief solely because a foreign country has staked a generalized claim to a broad category of property is punishment which seems not only excessive, but drastically over-broad."[98] To this effect, critics point to instances where there have been absurd results due to retentive cultural property laws, such as when a country refuses to allow an artwork by a foreign artist to leave its territory. For example, France refused to allow a privately owned painting by the Dutch artist Van Gogh to leave France.[99] Similarly, Italy prevented the exportation of a privately owned Van Gogh painting, as well as one by the French

93. *See* Kaye, *supra* note 91, at 80 (acknowledging the hesitance to enforce export laws outside of the nation of ownership). *See generally* Mastalir, *supra* note 90, at 1043 (acknowledging a moral obligation to protect citizens' rights in cultural heritage); *see generally* Wendel, *supra* note 92, at 1025–26 (noting that people should have greater rights with respect to cultural property).

94. *See* JAMES CUNO, WHO OWNS ANTIQUITY? 38 (2008) (presenting, as an example, U.S. laws restricting certain cultural pieces based on its cultural heritage); *see also* O'KEEFE, *supra* note 92, at 79 (noting the licensing process that countries including Belize, Brunei, Cyprus, Gibraltar, Greece, Kenya, Kuwait, Sri Lanka, Tanzania, Tunisia and Turkey have for exportation); *see also* Lisa Borodkin, Note, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 392 (1995) (acknowledging the different laws of state pertaining to cultural property).

95. *See* Merryman, *supra* note 91, at 509 (quoting the aforementioned phrase); *see also* CUNO, *supra* note 94, at 38 (acknowledging the use of blanket restrictions by Italy); *see also* Patty Gerstenblith & Lucille Roussin, *Art and International Cultural Property*, 42 INT'L LAW. 729, 733–34 (2007) (positing the ineffectiveness of blanket laws).

96. *See* John Alan Cohan, *An Examination of Archeological Ethics and the Repatriation Movement Respecting Cultural Property (Part Two)*, 28 ENVIRONS ENVTL. L. & POL'Y J. 1, 70–71 (2004) (discussing how American courts have at times refused to return artifacts claimed by foreign states because national ownership statutes are vague and, thus, ineffectual); *see also* Derek Fincham, *Why U.S. Federal Criminal Penalties for Dealing in Illicit Cultural Property Are Ineffective and a Pragmatic Alternative*, 25 CARDOZO ARTS & ENT. L.J 597, 634–35 (2007) (proposing that if we want to preserve archeological context, more specific measures need to be implemented replacing the pre-existing rules, which are vague and overly broad); *see also* Borodkin, *supra* note 94, at 393 (suggesting that due to the existence of "blanket laws," enforcement is virtually impossible because of its breadth).

97. *See* Merryman, *supra* note 91, at 487–88 (comparing the laws regulating antiquities to embargo and preemption laws in that their purpose is to keep cultural objects within a national territory); *see also* Borodkin, *supra* note 94, at 393 (explaining that export restrictions are referred to as blanket laws given their all-inclusive nature). *See generally* Jordana Hughes, Note, *The Trend Toward Liberal Enforcement of Repatriation Claims in Cultural Property Disputes,* 33 GEO. WASH. INT'L L. REV. 131, 132 (2000) (recognizing that overly retentive policies may in reality destroy the works that source nations are seeking to preserve).

98. *See* United States v. McClain, 545 F.2d 988, 1002 (5th Cir. 1978) (articulating the impossibility of explicitly describing every type of theft that would fall within the statute's purview); *see also* Hughes, *supra* note 97, at 148 (criticizing the regulations as overbroad and harsh given their ability to punish those individuals who do not even have the requisite *mens rea*); *see also* Kevin F. Jowers, Comment, *International and National Legal Efforts to Protect Cultural Property: The 1970 UNESCO Convention, the United States and Mexico*, TEX. INT'L L.J. 145, 150–51 (2003) (describing the broad latitude that countries were given in defining "property," which enabled countries to excessively criminalize conduct that was otherwise non-offensible).

99. *See* John Henry Merryman, *The Nation and the Object*, in WHOSE CULTURE? THE PROMISE OF MUSEUMS AND THE DEBATE OVER ANTIQUITIES 183, 189 (James Cuno ed., 2008) (discussing France's refusal to allow a Van Gogh painting to leave the country, even though it was privately owned). *See generally* Stacey Falkoff, Comment, *Mutually Beneficial Repatriation Agreements: Returning Cultural Patrimony, Perpetuating the Illicit Antiquities Market*, 16 J.L. & POL'Y 265, 282 (2007) (rationalizing why countries may be reluctant to return artwork and cultural property).

painter Matisse.[100] The blanket rule allows for the retention of an entire collection whose constituent parts come from several locations, such as a private Italian collection that included watercolors by Adolf Hitler.[101] Criticism aside, it is the very existence of laws such as these that allows for countries to sue in foreign courts.[102]

---

100. *See* Merryman, *supra* note 99, at 189 (asserting that Italy refused to allow a painting by Matisse to be sent out of the country). *See generally* Geoffrey R. Scott, *A Comparative View of Copyright as Cultural Property in Japan and the United States*, 20 TEMP. INT'L & COMP. L.J. 283, 298 (2006) (demonstrating how a country could refuse to turn over a piece of artwork based on the broad definition of cultural property). *But see* Edward, M. Cottrell, Comment, *Keeping the Barbarians Outside the Gate: Toward a Comprehensive International Agreement Protecting Cultural Property*, 9 CHI. J. INT'L L. 627, 646 (2009) (analyzing *Beyeler v. Italy* and stating in dicta that Italy could have prevented exportation by claiming the artwork as cultural property under the statute). *See also* Beate Rudolf, *International Decision: Beyeler v. Italy. Application No. 33202/96*, 94 AM. J. INT'L L. 736, 736 (2000) (applying the cultural protection principles under Italian Law No. 1089 to determine whether the Italian State properly claimed ownership over a Vincent van Gogh portrait).

101. *See* Merryman, *supra* note 99, at 189 (asserting that the Italian government prohibited the owner of watercolors by Adolf Hitler to remove the works from the country); *see also* John Henry Merryman, *Cultural Property, International Trade and Human Rights*, 19 CARDOZO ARTS & ENT. L.J. 51, 55 (2001) (confirming the refusal of Italy to export Hitler's watercolors).

102. *See* PATRICK J. O'KEEFE, ANTIQUITIES TRADE OR BETRAYED: LEGAL ETHICAL AND CONSERVATION ISSUES 79 (Kathryn W. Tub ed., 1995) 39, 73 (positing that despite its drawbacks, the existence of these laws allow countries to sue in foreign courts); *see also* Lawrence M. Kaye, *Art Wars: The Repatriation Battle*, 31 N.Y.U. J. INT'L L. & POL'Y 79, 80 (1998) (citing U.S. v. Pre-Columbian Artifacts and the Republic of Guatemala for the proposition that a U.S. court allowed a foreign party to bring a claim in its court); *see also* Allison Marston Danner & Adam Marcus Samaha, *The Jurisprudence of Justice Stevens: Panel IV: Federalism: Judicial Oversight in Two Dimensions: Charting Area and Intensity in the Decisions of Justice Stevens*, 74 FORDHAM L. REV. 2051, 2060 (2006) (outlining the Supreme Court Case, Austria v. Altman, which held that a party may bring suit against a foreign nation in a U.S. federal court even for an act occurring prior to 1976); *see also* Mark J. Chorazak, Note, *Clarity and Confusion: Did Republic of Austria v. Altman Revive State Department Suggestions of Foreign Sovereign Immunity?*, 55 DUKE L.J. 373, 373–74 (2005) (detailing how a party was allowed to bring suit against Austria in federal court in order to retrieve her stolen artwork pursuant to the Sovereign Immunities Act of 1976).

Italy has brought a number of cases into United States courts under federal statutes, such as the 1934 National Stolen Property Act,[103] and has utilized state law remedies, such as com mon-law replevin,[104] forfeiture actions, and those under the Uniform Commercial Code.[105] Other countries have been successful in this area as well, notably Turkey, which has been compared to Italy in terms of its success rate in reacquiring its cultural properties.[106] Perhaps the

103. *See* United States v. Clark, 957 F.2d 659, 660 (9th Cir. 1992) (recognizing that actions to bring stolen art could be brought under other laws, including the Hobbs Act); *see also* Snider v. Lone Star Art Trading Co., 672 F. Supp. 977, 978 (E.D. Mich. 1987) (acknowledging that one could bring a claim under racketeering in order to recover lost artwork); *see also* Borodkin, *supra* note 94, at 396–97 (describing the numerous statues that one could use to recover stolen artwork, including mail fraud and the Racketeering Influenced and Corrupt Organizations Act [RICO]). The National Stolen Property Act (NSPA) criminalizes the knowing sale or receipt of stolen goods exceeding $5,000 in interstate or foreign commerce. Although it was not specifically enacted for cultural property purposes, it has been successfully utilized in a number of cases despite the difficulty in meeting the scienter requirement. *See* United States v. Schultz, 178 F. Supp. 2d 445, *aff'd,* 333 F.3d (2d Cir. 2003) (finding the defendant guilty of conspiring to deal with antiquities removed from Egypt in violation of its 1983 ownership law); *see also* U.S. v. Antique Platter of Gold, 184 F.3d 131, 136–39 (2d Cir. 1998) (affirming the trial court's order for forfeiture because appellant made material false statements on the customs form and lacked an innocent owner defense); *see also* U.S. v. McClain, 593 F.2d 658, 670–71 (5th Cir. 1979) (holding that the objects were stolen because Mexico's law vests ownership of not-yet-discovered artifacts to Mexico and prohibits removal without permission); *see also* U.S. v. Hollinshead, 495 F.2d 1154, 1156 (9th Cir. 1974) (holding that the defendant was guilty because he had the requisite *mens rea* and knew the objects were stolen from Guatemala). *But see* Peru v. Johnson, 720 F. Supp. 810, 815 (C.D. Cal. 1989) (holding that Peru's 1822 export laws that nationalized both discovered and unexcavated cultural patrimony did not themselves establish ownership over the objects, and, thus, they were not considered stolen under the National Stolen Property Act). Actions to recover stolen art have been brought under other federal statues as well, such as RICO (see, e.g., Snider v. Lone Star Art Trading Co., 672 F. Supp. 977 [E.D. Mich. 1987] and the Hobbs Act (see, e.g., United States v. Clack, 957 F.2d. 659 [9th Cir. 1992]).

104. A plaintiff can bring an action in replevin to recover personal property when it is wrongfully taken or detained. However, these claims are often limited due to statutes of limitations and other forms of equitable estoppel, and depend upon the forum in which it is brought and the choice of law rules applied. *See* Menzel v. List, 267 N.Y.S.2d 804, 809 (App. Div. 1966) (establishing that in New York, the statute of limitations period begins to run when the true owner demands that the property be returned, and the possessor refuses to return it); *Cf.* O'Keeffe v. Snyder, 405 A.2d 840, 850 (N.J. Super. Ct. App. Div. 1979) (establishing that the New Jersey statute of limitations period begins to run when the true owner knew or reasonably should have known the cause of action and the identity of the possessor). *See generally* Lisa Borodkin, Note, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 402 (1995) 402 (discussing how the New York statute of limitations period has been interpreted differently by the federal and state courts).

105. *See* UCC § 2-403(1) (2003) (stating that a purchaser of stolen goods acquires only the title that the seller possessed; a purchaser cannot acquire good title for stolen objects); *see also* Mucha v. King, 792 F.2d 602, 612 (7th Cir. 1986) (finding that since the buyer was not a buyer, in ordinary course of business he could not transfer good title); *see also* Porter v. Wertz, 53 N.Y.2d 696, 698 (1981) (holding that the risk of loss in a fraudulent transfer is on the owner of the goods).

106. *See* Patty Gerstenblith, *Ownership and Protection of Heritage: Cultural Property Rights for the 21st Century: The Public Interest in the Restitution of Cultural Objects*, 16 CONN. J. INT'L L. 197, 220 (2001) (claiming that since the McClain decision, Turkey has been one of the few countries to bring a successful claim of ownership on disputed antiques); *see also* Patty Gerstenblith, *Antiques Law: Controlling the International Market in Antiquities: Reducing the Harm, Preserving the Past*, 8 CHI. J. INT'L L. 169, 177 (2007) (discussing Turkey's successful claim on the Lydian Hoard and Italy's successful claim against the Metropolitan Museum of Art); see also Sue J. Park, Comment, *Cultural Property Regime in Italy: An Industrialized Source Nation's Difficulties in Retaining and Recovering Its Antiquities*, 23 U. PA. INT'L ECON. L. 931, 941–42 (2002) (asserting that Turkey and Italy each have had success in repatriating their antiquities).

most famous case was the "Lydian Horde" suit against the Metropolitan Museum of Art for the recovery of chattel;[107] more than 360 objects were returned before the trial began.[108]

Countries can also bring cases within their own courts, but this usually proves to be difficult due to jurisdictional limitations.[109] However, the internationally covered prosecution of Marion True, as the first prosecution in a foreign court of a museum official for trafficking, marked a turning point not only for Italian cultural property practices, but also for other source countries.[110] Under the Italian penal code, Marion True and Roger Hecht Jr. were each charged with "conspiracy to commit a crime and receiving stolen goods believed to be the result of the

107. *See* The Republic of Turkey v. Metro. Museum of Art, 762 F. Supp. 44, 45 (S.D.N.Y. 1990) (deciding a claim by Turkey against the Metropolitan Museum of Art to recover the Lydian Hoard); *see also* John Alan Cohan, *An Examination of Archaeological Ethics and the Repatriation Movement Respecting Cultural Property*, 28 ENVIRONS. EVNTL. L. & POL'Y J. 1, 87 (2004) (recalling the repatriation effort surrounding the Lydian Hoard, which resulted in settlement); *see also* Kaye, *supra* note 102, at 82 (asserting that the settlement in the Lydian Hoard case was a result of the likelihood of Turkey's success).

108. *See* Lawrence M. Kaye & Carla T. Main, *The Saga of the Lydian Horde: From Uşak to New York and Back Again*, *in* ANTIQUITIES TRADE OR BETRAYED: LEGAL ETHICAL AND CONSERVATION ISSUES 150, 150 (Kathryn W. Tub ed., 1995); *see also* Gerstenblith, *Antiques Law*, *supra* note 106 at 177 (stating that Turkey successfully recovered 360 objects in the Lydian Hoard); *see also* Joshua E. Kastenberg, *Assessing the Evolution and Available Actions for Recovery in Cultural Property Cases*, 6 DEPAUL-LCA J. ART & ENT. L. 39, 41 (1995) (recounting how the Metropolitan Museum of Art returned the Lydian Hoard to Turkey). There are other cases as well. In Hellenic Republic v. Michael Ward, Inc., Greece sued a gallery in New York federal court in 1993. The case was settled before trial whereby the gallery agreed to donate the objects to the Society for the Preservation of Greek Heritage in Washington, D.C., which then returned the objects to Greece. *See* Mary Williams Walsh, *A Grecian Treasure: Back from the Grave?*, L.A.TIMES, Aug. 12, 1996, *available at* http://articles.latimes.com/1997-08-12/news/mn-33617_1_aidoniatreasure.

109. *See* Saby Ghoshray, *Repatriation of the Kohinoor Diamond: Expanding the Legal Paradigm for Cultural Heritage*, 31 FORDHAM INT'L L. J. 741, 756 (2008) (asserting that one legal hurdle in the repatriation of artifacts is the statute of limitations); *see also* Thomas W. Pecoraro, *Choice of Law in Litigation to Recover National Cultural Property: Efforts at Harmonization in Private International Law,* 31 VA. J. INT'L L. 1, 7 (1990) (finding that absent international agreement, courts are unwilling to relinquish control over an object); *see also* Symeon C. Symeonides, *A Choice-of-Law Rule for Conflicts Involving Stolen Cultural Property*, 38 VAND. J. TRANSNAT'L L. 1177, 1187 (2005) (claiming that while ideally the country of origin of an object should apply its laws, this is not always the case).

110. *See* Alexander A. Bauer, *New Ways of Thinking About Cultural Property: A Critical Appraisal of Antiquities Trade Debates*, 31 FORDHAM INT'L L.J. 690, 720 (2008) (arguing that the recent trial of Marion True has forced museums to change their policies); however, this is not the first time charges were made against a foreign museum official. In 1984, the French government issued an arrest warrant for the director of the Cleveland Museum of Art because of his alleged "complicity in exporting contraband" when he purchased a Claude Poussin painting from a private French collector. The French government demanded the return of the painting because it violated a French export law. Eventually the parties came to an agreement whereby the museum lent the painting to the Louvre for 25 years. *See* John H. Merryman, Symposium, *Cultural Property, International Trade, & Human Rights*, 19 Cardozo Arts & Ent. L.J. 51, 59 (2001) (discussing the resolution of the dispute over the Claude Poussin painting). *See also* John Henry Merryman, *The Retention of Cultural Property*, 21 U.C. DAVIS L. REV. 477, 483 n. 15 (1987–88) (detailing the charges brought against the Cleveland Museum of Art).

crime" after evidence revealed that many objects purchased by or donated to the museum were illegally taken from Italy.[111] If convicted, each could receive a prison sentence of two to eight years, and a fine of up to 10,000 euros.[112] While the Marion True case may be a once-in-a-lifetime event, it may have a substantial collateral affect on current practices.

The ability to bring this lawsuit is due, in large part, to the work and early creation of the *Tutela Patrimonio Culturale* (*TPC*), a law enforcement unit in the military police (the *Carabinieri*) specifically dedicated to combating the rampant art theft all over Italy.[113] The importance of this case is already recognized: "The investigations . . . broke new ground in every conceivable way, and the results of the investigations carried out there will change the world of antiquities—and antiquities collecting and antiquities trading—for all time."[114] If the prosecution "succeeds, the case will have profound ramifications for individual collectors and institu-

111. *See* Michael J. Reppas II, *Empty "International Museums" Trophy Cases of Their Looted Treasures and Return Stolen Property to the Countries of Origin and the Rightful Heirs of Those Wrongfully Dispossessed*, 36 DENV. J. INT'L L. & POL'Y 93, 109 (2007) (stating that as a result of a ten-year investigation, Marion True was charged with knowingly receiving stolen goods); *see also* Geoffrey R. Scott, *Spoliation, Cultural Property and Japan,* 29 U. PA. J. INT'L L. 803, 806 (2008) (indicating that Marion True and Robert Hecht were charged with conspiracy to receive and trade in stolen cultural properties); *see also* Carrie Betts, Comment, *Enforcement of Foreign Cultural Patrimony Laws in U.S. Courts: Lessons From Museums From the Getty Trail and Cultural Partnership Agreements of 2006*, 4 S.C. J. INT'L L. & BUS. 73, 76 (2007) (noting that Marion True and Robert Hecht were charged by the Italian chief prosecutor with conspiracy to commit a crime and receipt of stolen goods).

112. *See* Betts, *supra* note 111, at 76 (recounting that the penalties faced by Marion True and Robert Hecht are imprisonment for two to eight years and a maximum fine of 10,000 euros); *see also* Jessica L. Darraby, *To Have and to Hold: A Global Antiquities Scandal Exposes Flawed Acquisition Policies at America's Elite Museums,* CAL. LAW., May 2006 at 22 (stating that True and Hecht each face two to eight years in prison and a 10,000-euro fine if convicted); *see also* Tracy Wilkinson, *Getty Curator's Trial Is Delayed: The Closely Watched Italian Case Alleges Illegal Acquring of Antiquities. It Will Resume in November*, L.A. TIMES, July 19, 2005, at E1 (describing the civil penalty that the Italian prosecutor was seeking against Marion True).

113. Comando Carabinieri per la Tutela del Patrimonio, *available at* http;//www.Carabinieri.it/Internet/Cittadino/Informazioni/Tutela/Patrimonio+Culturale/. *See* Patty Gerstenblith, *From Bamiyan to Baghdad: Warfare and the Preservation of Cultural Heritage at the Beginning of the 21st Century*, 37 GEO. J. INT'L L. 245, 294 (2006) (stating that the Italian Carabinieri have a specially trained squad to combat art theft, fraud, illegal trafficking and looting of archeological sites); *see also* David Gill & Christopher Chippendale, *The Trade in Looted Antiquities and the Return of Cultural Property: A British Parliamentary Inquiry*, 11 INT'L J. CULT. PROP. 50, 52 (2002) (retelling the success of the Carabinieri art unit in recovering 2,537 works of art).

114. *See* PETER WATSON & CECILIA TODESCHINI, THE MEDICI CONSPIRACY: THE ILLICIT JOURNEY OF LOOTED ANTIQUITIES FROM ITALY'S TOMB RAIDERS TO THE WORLD'S GREATEST MUSEUMS 52 (2006) (asserting that the investigation set a precedent because of the involvement of esteemed archeologists in exposing details of the illicit antiquities trade); *see also* JOHN HENRY MERRYMAN, ALBERT E. ELSEN & STEPHEN K. URICE, LAW, ETHICS AND THE VISUAL ARTS 405 (5th ed. 2007) (detailing that the vast breadth of evidence discovered during the Medici investigation led to Italian officials' ability to understand how antiquities were looted, exported and sold). *See generally* Giovanni Pastore, *The Looting of Archaeological Sites in Italy, in* TRADE IN ILLICIT ANTIQUITIES: THE DESTRUCTION OF THE WORLD'S ARCHAEOLOGICAL HERITAGE 155, 158–59 (Neil Brodie et al. eds., 2001) (describing the Carabinieri for the Protection of Cultural Heritage and its methods to preserve antiquities and investigate the illicit antiquities trade).

tions alike. Regardless of outcome, [the] prosecution has created a sea change in operations at America's elite art institutions."[115] Indeed,

> [i]t is really only since *United States v. Schultz*, where a dealer was convicted of conspiring to traffick stolen antiquities, and the recent criminal trials in Italy of Giacomo Medici, Robert Hecht, and Getty Museum curator Marion True, that major museums have been forced to think differently about their collecting practices.[116]

This has led to the return of many objects from museums, a re-evaluation of museum collecting practices and increased public awareness on the topic.

IV. International Strategies

A country's national laws do not always succeed in the return of illegally exported cultural property. Countries are not required to enforce the export controls of another and, thus, source countries usually must instead turn to international agreements for relief.[117]

A. International Conventions

Among the many and varied international conventions, three are most closely connected to the looting of archeological sites: the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, prepared at The Hague ("Hague Convention"); the 1970 Convention of the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, prepared by the United Nations Organization for Edu-

115. *See* Darraby, *supra* note 112, at 22 (quoting an explanation of the importance of recent decisions in cultural property rights); *see also* Jane A. Levine, *The Importance of Provenance Documentation in the Market for Ancient Art and Artifacts: The Future of the Market May Depend on Documenting the Past*, 19 DEPAUL J. ART TECH. & INTELL. PROP. L. 219, 226–28 (2009) (commenting on new, stringent antiquities acquisitions policies set by American museums and museum associations in the aftermath of Marion True's indictment in 2005). *See generally* Reppas, *supra* note 111, at 109, 113–14 (noting the trend of voluntary repatriation of cultural heritage in the wake of international litigation and prosecution over illicit antiquities).

116. *See* Bauer, *supra* note 110, at 719–20, 693 n.88 (quoting the changes in museums practices necessitated by recent developments in case law); *see also* JAMES CUNO, WHO OWNS ANTIQUITY? MUSEUMS AND THE BATTLE OVER OUR ANCIENT HERITAGE 4–5 (2008) (stating that the *Schultz* prosecution and verdict changed museums' collecting practices, resulting in the acquisition of fewer unprovenanced antiquities); *see also* Ildiko P. DeAngelis, *How Much Provenance Is Enough? Post-*Schultz *Guidelines for Art Museum Acquisition of Archeological Materials and Ancient Art*, *in* ART AND CULTURAL HERITAGE: LAW, POLICY, AND PRACTICE 398, 398–99 (Barbara T. Hoffman ed., 2006) (reporting that the United States tightened restrictions on antiquities importation as a consequence of the *Schultz* prosecution, and that museums have increased regulation of its antiquities trade). *See generally* WATSON & TODESCHINI, *supra* note 114, at 52 (positing that aggressive prosecutions for antiquities theft will change future museum antiquities practices).

117. *See* CUNO, *supra* note 116, at 33–37 (describing barriers to enforcing foreign export laws and the use of bilateral agreements to seek repatriation of illicitly acquired antiquities); *see also* Merryman, *supra* note 110, at 484 (finding that export laws of one country are not generally enforced in other countries, with repatriation efforts succeeding through special international agreements). *See generally* Andrea Cunning, *U.S. Policy on the Enforcement of Foreign Export Restrictions on Cultural Property and Destructive Aspects of Retention Schemes*, 26 HOUS. J. INT'L L. 449, 452–53 (2004) (reiterating U.S. policy of recognizing foreign export restrictions through bilateral agreements).

cation, Science, and Culture ("UNESCO Convention"); and the 1995 Convention on Stolen or Illegally Exported Cultural Objects, prepared by the International Organization for the Unification of Private Law ("UNIDROIT Convention").

The Hague Convention, convened in the aftermath of World War II in response to the large scale destruction of cultural sites as a result of bombings and plunder,[118] was the first international agreement to address cultural property protection issues. The convention rests on the notion that "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world."[119] The convention obligates contracting member states to aid an occupied nation in protecting its cultural heritage and "take the most necessary measures of preserva-

118. Since antiquity, the coffers of empires have been padded with plunder, and the spoils of war have been carted home and enlisted in public displays of authority. The classical texts are rich in recorded instances, as in Homer's *Iliad*, where disposition of the spoils forms part of the negotiations between the representatives of Greece and Troy. Likewise, the history of the early modern period is replete with occurrences of plunder and display, among the most notorious being Napoleon, followed by the Nazis. Napoleon accumulated many objects, especially from Germany and Italy, and would often parade the objects through French cities. While some objects were eventually sent back to their countries of origin, such as the Laocoön being sent to the Vatican, other objects were lost, sold or incorporated into structures and never returned. The next great wave of similar plunder was initiated by Hitler during World War II with the intention of placing many of the objects in an art gallery and museum in Austria. Over one million objects were recovered by 1951, and plaintiffs continue to appear in court seeking for the return of Nazi looted art. However, some objects were destroyed during bombings while others remain lost or untraceable. *See* JEANETTE GREENFIELD, THE RETURN OF CULTURAL TREASURES 232–36 (1st ed. 1989) (examining the destruction, theft and loss of art during war by historical figures such as Napoleon and Hitler, and subsequent efforts to recover treasured antiquities); *see also* Robert Posey, *Protection of Cultural Materials During Combat*, 5 COLLEGE ART J. 127, 127–31 (1946) (citing Allied efforts to protect cultural property during World War II, such as repairing damaged art, salvaging sculpture fragments and recovering hidden antiquities).

119. *See* U.N. Educational, Scientific and Cultural Organization, Convention for the Protection of Cultural Property in the Event of Armed Conflict, Preamble, May 14, 1954, 249 U.N.T.S. 215 (hereinafter Convention on Cultural Property in Armed Conflict) (addressing the importance of cultural property and the need to protect cultural heritage for the world's use); *see also* PATTY GERSTENBLITH, ART, CULTURAL HERITAGE, AND THE LAW 475–76 (2004) (explaining that the Convention seeks to preserve cultural property because it belongs to all mankind, regardless of its origin); *see also* David Keane, *The Failure to Protect Cultural Property in Wartime*, 14 DEPAUL-LCA J. ART & ENT. L. 1, 12 (2004) (reasoning that the Convention's goal to protect cultural property was a response to destruction of such property during World War II).

tion."[120] It also requires member countries to prosecute those individuals who commit a breach of the Convention.[121]

However, the Hague Convention is limited in its scope in that it specifically prohibits wartime pillage and damage to cultural objects except in instances of "military necessity," an undefined term, making it difficult to enforce this Convention.[122] It was another 15 years before an international convention would address the wide-scale looting and illicit trade in art and artifacts occurring around the world; the 1970 UNESCO Convention is said to be the peacetime counterpart of The Hague Convention.[123]

---

120. *See* Convention on Cultural Property in Armed Conflict, *supra* note 119 (indicating that parties to the Convention must protect the cultural heritage of another country when the party occupies that country); *see also* Gerstenblith, *supra* note 113, at 263–64 (claiming that occupying countries must defer to the cultural preservation policies of the occupied country and protect the occupied country's cultural property); *see also* John C. Johnson, *Under New Management: The Obligation to Protect Cultural Property During Military Occupation*, 190–91 MIL. L. REV. 111, 127 (2007) (explaining that the Convention maintains guidelines to preserve cultural property in the event of military occupation of another country).

121. *See* Convention on Cultural Property in Armed Conflict, *supra* note 119 (providing for self-regulation of the Convention by allowing member states to prosecute those in violation of the Convention); *see also* Yaron Gottlieb, *Criminalizing Destruction of Cultural Property: A Proposal for Defining New Crimes Under the Rome Statute of the ICC*, 23 PENN ST. INT'L L. REV. 857, 860–61 (2005) (explaining that Article 28 compels state parties to punish individuals who violate the Convention). *But see* Harvey E. Oyer III, *The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict—Is It Working? A Case Study: The Persian Gulf War Experience*, 23 COLUM.-VLA J.L. & ARTS 49, 55 (1999) (remarking that Convention parties must criminally prosecute or sanction persons who breach the treaty, but the possibility of inconsistent criminal judgments amongst countries' varying penal laws may render article 28 ineffective).

122. *See* Convention on Cultural Property in Armed Conflict, *supra* note 119, at 242–44 (allowing destruction of cultural heritage in instances of military necessity); *see also* Erika J. Techera, *Protection of Cultural Heritage in Times of Armed Conflict: The International Legal Framework Revisited*, 4 MACQUARIE J. INT'L & COMP. ENVTL. L. 1, 8–9 (2007) (arguing that the term "military necessity" needs to be defined because countries may violate the treaty under the guise of military necessity). *See generally* Lisa Borodkin, Note, *The Economics if Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 388 (1995) (stating that the Convention does not protect against damage to cultural property during periods of military necessity).

123. *See* Stephanie Doyal, *Implementing the UNIDROIT Convention on Cultural Property into Domestic Law: The Case of Italy,* 39 COLUM. J. TRANSNAT'L L. 657, 664–65 (2001) (distinguishing the Hague Convention, which was produced by the international community during times of destruction and looting in World War II, and the UNESCO 1970 Convention, which addressed cultural property during peace); *see also* David N. Chang, Comment, *Stealing Beauty: Stopping the Madness of Illicit Art Trafficking*, 28 HOUS. J. INT'L L. 829, 855 (2006) (explaining that the UNESCO Convention of 1970 is the correlation to the Hague Convention during times of peace). *See generally* Erin K. Slattery, *Preserving the United States Intangible Cultural Heritage: An Evaluation of the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage as a Means to Overcome the Problems Posed by Intellectual Property Law,* 16 DEPAUL-LCA J. ART & ENT. L. 201, 211 (2006) (discussing that the Hague Convention was created in response to the destruction of artwork and cultural heritage by the Germans during World War II, and the 1970 UNESCO Convention was exemplary of the international community's renewed effort to protect cultural heritage).

The UNESCO Convention declares that signatories "recognize that the illicit import, export and transfer of ownership of cultural property is one of the main cases of the impoverishment of the cultural heritage of the countries of origin."[124] In order to fall within the convention's parameters, the cultural object must be "specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science."[125] In addition,

---

124. *See* United Nations Educational, Scientific and Cultural Organization, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property art. 2, Nov. 14, 1970, 823 U.N.T.S. 231 (hereinafter Convention on Cultural Property) (declaring that parties to the Convention understand that import, export and transfer of cultural property leads to impoverishment of cultural heritage); *see also* John Henry Merryman, *Two Ways of Thinking About Cultural Property,* 80 AM. J. INT'L L. 831, 843 (1986) (explaining the purpose of the 1970 UNESCO Convention and the agreement among its parties to oppose the impoverishment of cultural heritage); *see also* Derek R. Kelly, Note, *Illegal Tender: Antiquities Protection and U.S. Import Restrictions on Cypriot Coinage*, 34 BROOK. J. INT'L L. 491, 504 (2009) (explicating the UNESCO Convention's mission as the recognition that illicit import and export of cultural property is one of the causes of impoverishment of the countries of origin).

125. *See* Convention on Cultural Property, *supra* note 124, at art. 1 (stating the categories of cultural objects, which include:

Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;

(a) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;

(b) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;

(c) elements of artistic or historical monuments or archaeological sites which have been dismembered;

(d) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;

(e) objects of ethnological interest;

(f) property of artistic interest, such as:

(i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);

(ii) original works of statuary art and sculpture in any material;

(iii) original engravings, prints and lithographs; original artistic assemblages and montages in any material;

(g) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;

(h) postage, revenue and similar stamps, singly or in collections;

(i) archives, including sound, photographic and cinematographic archives;

(j) articles of furniture more than one hundred years old and old musical instruments).

See also Gillian Flynn*, The Recovery of Stolen Cultural Property in the State of Maryland,* 38 U. BALT. L.F. 103, 106 (2008) (noting that the Convention covers cultural property, which is important for archaeology, prehistory, history, literature, art and science); *see also* Jason Taylor, *The Rape and Return of China's Cultural Property: How Can Bilateral Agreements Stem the Bleeding of China's Cultural Heritage in a Flawed System?,* 3 LOY. U. CHI. INT'L L. REV. 233, 236 (2006) (explaining that the term cultural property must be designated as important for archaeology, prehistory, history, literature, art and science, but that there are eleven specific categories in which property must also fit).

there is a total ban on importing stolen objects if they are documented in a country's inventory[126] and properties shall be returned in exchange for "just compensation to an innocent purchaser or to a person who has valid title to that property."[127] It also requires that the parties "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."[128]

That Convention now has 117 parties,[129] with the United States leading the way for market countries by adopting the Cultural Property Implementation Act (CPIA) in 1983.[130] Thus,

126. *See* Convention on Cultural Property, *supra* note 124, at art. 7(b)(i) (stating that the Convention prohibits import of cultural property documented in a state's inventory); *see also* Michael Dutra, *Sir, How Much Is That Ming Vase in the Window?: Protecting Cultural Relics in the People's Republic of China,* 5 ASIAN-PAC. L. & POL'Y J. 62, 77–78 (2004) (distinguishing the UNESCO convention with the UNIDROIT convention in that the UNIDROIT convention bans importing stolen objects regardless of whether they are in the country's inventory). *See generally* JEANETTE GREENFIELD, THE RETURN OF CULTURAL TREASURES 188 (2d ed. 1989) (discussing the prohibition on importing an object that is stolen from a museum provided that the object was documented on an inventory of that institution).

127. *See* Convention on Cultural Property, *supra* note 124, at art. 7(b)(ii) (stating that the country of origin can request return of the cultural property if they pay just compensation to an innocent purchaser or another person who has valid title); *see also* James A.R. Nafziger, *International Penal Aspects of Protecting Cultural Property,* 19 INT'L LAW. 835, 835 (1985) (discussing that contraband items are recoverable by the state of origin but only if it pays just compensation to innocent purchasers); *see also* Kathleen Anderson, Note, *The International Theft and Illegal Export of Cultural Property,* 8 NEW ENG. INT'L & COMP. L. ANN. 411, 422 (2002) (explicating that if a state requests return of property, it must pay just compensation to an innocent party or person who has valid title).

128. *See* Convention on Cultural Property, *supra* note 124, at art. 9 (stating that a state party must agree to carry out necessary measures to control the export and import of cultural property); *see also* Aaron Kyle Briggs, Comment, *Consequences of the Met-Italy Accord for the International Restitution of Cultural Property,* 7 CHI. J. INT'L L. 623, 630 n.37 (2007) (explaining that the parties to the convention undertake to participate in a concerted effort to carry out the measures necessary to control the specific materials); *see also* James E. Sherry, Note, *U.S. Legal Mechanisms for the Repatriation of Cultural Property: Evaluating Strategies for the Successful Recovery of Claimed National Patrimony,* 37 GEO. WASH. INT'L L. REV. 511, 515 (2005) (discussing article 9 of the convention and how it provides that state parties must participate in a concerted effort to protect cultural property).

129. *See* Convention on Preventing Import, Export, and Transfer of Ownership, http://portal.unesco.org /la/convention.asp?KO=13039&language=E&order=alpha (listing the countries that are parties to the Convention). *See generally* GREENFIELD, *supra* 126, at 188 (acknowledging that by 1994, 79 states were parties to the UNESCO Convention); *see generally* Jay M. Vogelson, *Section Recommendations and Report,* 30 INT'L LAW. 676, 676 (1996) (stating that most countries of the world are parties to the UNESCO Convention).

130. CPIA implements articles 7(b) and 9 of the UNESCO Convention. It also enables the executive branch to form bilateral agreements with countries regarding cultural property importation into the United States, prohibits the importation of objects stolen after 1983 or after date of entry into the UNESCO Convention, whichever date is later, and allows for the seizure of illegally imported objects. CPIA limits the definition of cultural property because in order to fall under the act, it must be of "cultural significance," at lease 100 years old and be documented in inventories. *See* JOHN HENRY MERRYMAN, THINKING ABOUT THE ELGIN MARBLES: CRITICAL ESSAYS ON CULTURAL PROPERTY, ART AND LAW 32–33 & n.34 (2d. ed. 2009) (asserting that even though the United States implemented the Cultural Property Implementation Act in 1983, cultural property is still being illegally exported); *see also* Patty Gerstenblith, *Controlling the International Art Market in Antiquities: Reducing the Harm, Preserving the Past*, 8 CHI J. INT'L L. 169, 176–77 (2007) (discussing that the Convention on Cultural Property Implementation Act, enacted by the United States in 1983, implements Articles 7(b) and 9 of the UNESCO Convention). *See generally* Daniel W. Eck, Patty Gerstenblith, & Marilyn Phelan, *Public International Law: International Cultural Property,* 36 INT'L LAW. 607, 607 n.4 (2002) (recognizing that the United States ratified the 1970 Convention by way of the Cultural Property Implementation Act).

in the United States, a source country can bring a claim for restitution under CPIA if the object is "stolen" within the meaning of the UNESCO Convention.[131] The only market countries still not parties to the Convention are Belgium, Germany, and the Netherlands.[132]

The UNESCO Convention is not without its shortcomings. The Convention has been called "ineffectual[,] [and] bogged down in rhetoric and with little bearing on cultural realities."[133] It has also been referred to as being largely unsuccessful "in furthering the restitution of stolen works of art,' and sadly, is 'widely viewed as a weak, cumbersome, and unenforceable jumble of rhetoric.'"[134] Specifically, the Convention does not account for property stolen from private individuals or from unknown or unexcavated archeological sites because, under the Convention, property must have been designated as such by the State;[135] nor does it provide a

---

131. *See* BARBARA HOFFMAN, ART AND CULTURAL HERITAGE: LAW POLICY AND PRACTICE 160–61 (2006) (discussing the Cultural Property Advisory Committee and the specific sections of UNESCO that the CPIA allows the United States to control); *see also* JOHN HENRY MERRYMAN, IMPERIALISM, ART AND RESTITUTION 51 (2006) (explaining that the Cultural Property Implementation Act gives the President the authority to restrict the importation of cultural objects where they are in jeopardy from pillage); *see also* Briggs, *supra* note 128, at 632–33 (explaining that in the United States, a country can bring a claim for restitution under CPIA if the object is "stolen" within the meaning of the UNESCO Convention).

132. *See* Merryman, *supra* note 124, at 843 (listing the states that are not parties to the UNESCO Convention); *see also* Peter K. Tompa, *Ancient Coins as Cultural Property: A Cause for Concern?*, 4 J. INT'L LEGAL STUD. 69, 77–78 (1998) (noting which countries had refused to sign the Convention); *see also* Chang, *supra* note 126 at 855 (reiterating those countries mentioned are not parties to the Convention).

133. *See* GREENFIELD, *supra* note 126, at 258 (arguing the ineffectual realities of the signed Convention); *see also* Lakshman Guruswamy, Jason C. Roberts & Catina Drywater, *Protecting the Cultural and Natural Heritage: Finding Common Ground*, 34 TULSA L.J. 713, 726–27 (1999) (claiming that multiple states signed the Convention yet consider it ineffective); *see also* Jennifer H. Lehman, Note, *The Continued Struggle With Stolen Cultural Property: The Hague Convention, The UNESCO Convention, and the UNIDROIT Draft Convention*, 14 ARIZ. J. INT'L & COMP. L. 527, 543 (1997) (asserting that the UNESCO Convention itself is the source of its own downfall).

134. *See* Stacey Falkoff, *Mutually Beneficial Repatriation Agreements: Returning Cultural Patrimony, Perpetuating the Illicit Antiquities Market*, 16 J.L. & POL'Y 265, 295 (2007) (arguing further that the UNESCO Convention is weak and ineffective); *see also* Andrea Cunning, *U.S. Policy on the Enforcement of Foreign Export Restrictions on Cultural Property and Destructive Aspects of Retention Schemes*, 26 HOUS. J. INT'L L. 449, 451 (2004) (concluding that the UNESCO Convention is inconsistent and lacking protective means of cultural property); *see also* Stephanie Doyal, *Implementing the UNIDROIT Convention on Cultural Property into Domestic Law: the Case of Italy*, 39 COLUM. J. TRANSNAT'L L. 657, 665, 700 n.29 (2001) (asserting that the UNESCO Convention has done little in the prevention of stolen artworks); *see also* Lisa Borodkin, *The Economics if Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 389 (1995) (noting that the UNESCO Convention has also been criticized for an "uneven distribution of benefits and burdens among member nations . . . [because] the transaction costs of litigation are allocated almost exclusively to art-purchasing nations," providing little incentive for these nations to become a party to the Convention).

135. *See* GREENFIELD, *supra* note 126, at 259 (demonstrating that the state of origin needs to claim property); *see also* John Henry Merryman, *The Retention of Cultural Property*, 21 U.C. DAVIS L. REV. 477, 488 (1987) (stating that

> an object taken from a museum or church would be "stolen" within the meaning of the Convention. But an object taken from an unprotected Mayan site, or from a site that was protected but undocumented or not inventoried, is not treated as "stolen." Nor obviously is an object held in a private collection and voluntarily sold or taken abroad by its 'owner' considered "stolen."

see also Ian M. Goldrich, Comment, *Balancing the Need for Repatriation of Illegally Removed Cultural Property with the Interests of Bona Fide Purchasers: Applying the UNIDROIT Convention to the Case of the Gold Phiale*, 23 FORDHAM INT'L L.J. 118, 140 (1999) (emphasizing that a state party to the UNESCO Convention must claim property needing protection).

mechanism for the return of objects illegally exported.[136] In addition, for countries not party to the Convention, there is little that can be done to secure the return of stolen objects.

While the UNESCO Convention was a critical step for cultural protection around the world, the United Nations appealed to the International Institution for the Unification of Private Law (UNIDROIT) to produce a new, but analogous, convention to supplement the limitations of the UNESCO Convention.[137] Finalized in 1995, the UNIDROIT Convention[138] adopts UNESCO's definition of cultural property but does not require the properties to be previously designated as such by the State—creating a private right of action as well.[139] The Convention also distinguishes between objects that were stolen, or "unlawfully excavated or lawfully excavated but unlawfully retained,"[140] and those which were illegally exported: "[the] possessor of a cultural object which has been stolen *shall* return it,"[141] but "[a] Contracting State *may*

136. *See* Michael L. Dutra, *Sir, How Much Is That Ming Vase in the Window?: Protecting Cultural Relics in the People's Republic of China*, 5 ASIAN-PAC. L. & POL'Y J. 62, 76–77 (2004) (reasoning that unclaimed property cannot be recovered under the UNESCO Convention); s*ee also* Gillian Flynn, *The Recovery of Stolen Cultural Property in the State of Maryland*, 38 U. BALT. L.F. 103, 106 (2008) (claiming that another difficulty with the UNESCO Convention was its conflict with many civil law countries that permitted the transfer of proper title if a stolen piece was acquired in good faith); *see also* Marina Schneider, *1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: Explanatory Report*, 6 UNIF. L. REV. (N.S.) 476, 479–80 (2001) (reporting that the convention provides no means to return illegally transported materials to their country of origin).

137. *See* Michael J. Kelly, *Conflicting Trends in the Flourishing International Trade of Art and Antiquities: Restitutio in Integrum and Possessio Animo Ferundi/lucrandi*, 14 DICK. J. INT'L L. 31, 44 (1995) (reasoning that the UNIDROIT Convention was produced to counteract the ineffectiveness of the UNESCO Convention); *see also* Schneider, *supra* note 136, at 482 (proclaiming that UNESCO sought the guidance of UNIDROIT when preparing to issue laws enforcing its convention); *see also* Kurt G. Siehr, *Globalization and National Culture: Recent Trends Towards a Liberal Exchange of Cultural Objects*, 38 VAND. J. TRANSNAT'L L. 1067, 1078 (2005) (recognizing that to improve the UNESCO Convention help was needed and asked for from UNIDROIT).

138. *See* International Organization for the Unification of Private Law, Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322 (hereinafter Convention on Stolen Cultural Objects) (acknowledging that the document was signed in 1995); *see also* Marilyn E. Phelan, *The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects Confirms a Separate Property Status for Cultural Treasures*, 5 VILL. SPORTS & ENT. L.J. 31, 37 (1998) (presenting the date on which the convention was signed); *see also* Alan Riding, *Art Theft is Booming, Bringing an Effort to Respond*, N.Y. TIMES, Nov. 20, 1995, at 11 (reporting on the signing of the Convention).

139. *See* Convention on Stolen Cultural Objects, *supra* note 138, at art. 2 (defining what cultural objects are within the Convention); *see also* Jordana Hughes, *The Trend Toward Liberal Enforcement of Repatriation Claims in Cultural Property Disputes*, 33 GEO. WAS. INT'L L. REV. 131, 137 (2000) (proclaiming a merger of sorts between the two conventions to provide countries with further rights); *see also* Geoffrey R. Scott, *Spoliation, Cultural Property, and Japan*, 29 U. PA. J. INT'L L. 803, 869 (2008) (recognizing the intentional connection between the two conventions in order to make them effective).

140. *See* Convention on Stolen Cultural Objects, *supra* note 138, at art. 3(2) (defining when cultural objects shall be considered stolen); *see also* Edward M. Cottrell, *Keeping the Barbarian Outside the Gate: Toward a Comprehensive International Agreement Protecting Cultural Property*, 9 CHI. J. INT'L L. 627, 634 (2009) (claiming there is difficulty in defining what is an illegal export or import of property in general); *see also* Symeon C. Symeonides, *A Choice of Law Rule for Conflicts Involving Stolen Cultural Property*, 38 VAND. J. TRANSNAT'L L. 1177, 1186–87 (2005) (stating that the state of origin has the prevailing law in defining stolen property).

141. *See* Convention on Stolen Cultural Objects, *supra* note 138 (positing that stolen property and illegally exported property are distinguishable for purposes of the Convention); *see also* 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, 526 (1996) (demonstrating that the UNIDROIT Convention distinguishes between stolen and illegally exported goods as a means to reconcile flaws of its predecessor, the UNESCO 1970 Convention).

request the court or other competent authority of another Contracting State to order the return of a cultural object illegally exported from the territory of a requesting State."[142] In addition, the Convention lays out statute-of-limitation periods for bringing a claim to recover property.[143]

The major problem with the UNIDROIT Convention is that it has only 29 contracting countries.[144] While Italy ratified the Convention, along with other source countries such as Cambodia and Peru, not one market country has acceded.[145] The applicability of international conventions depends on whether countries accede to or ratify them;[146] without the participation of market countries, the Convention is of little use.[147]

---

142. *See* Convention on Stolen Cultural Objects, *supra* note 138, at art. 5 (asserting that property claims may be brought by contracting states to request return of property); *see also* Marina Schneider, *1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: Explanatory Report*, 3 UNIF. L. REV. 476, 526 (2001–3) (dictating that contracting states may request return of cultural objects illegally "removed" from its territory); *see also* Derek Fincham, *How Adopting the Lex Originis Rule Can Impede the Flow of Illicit Cultural Property*, 32 COLUM. J.L. & ARTS 111, 133–34 n.126 (2008) (providing that one general objective of the UNIDROIT Convention is the return of illegally exported or stolen objects to their original owner).

143. *See* Convention on Stolen Cultural Objects, *supra* note 138, at art. 3(3)–(5) (maintaining that limitations periods exist for property claims); *see also* BARBARA HOFFMAN, ART AND CULTURAL HERITAGE: LAW, POLICY, AND PRACTICE 12 (2006) (opining that the UNIDROIT Convention discusses legal issues such as statutes of limitations for claims); *see also* Jenya Shanayeva, Note, *Repatriation of Russian Art: The Eggs, the Law, and the Morals: Who Owns Farbergé?*, 36 SYRACUSE J. INT'L L. & COM. 259, 285–86 (2009) (providing that the statute of limitations issue is found in several articles of the UNIDROIT Convention).

144. *See* Status of UNIDROIT Conventions, Convention on Stolen or Illegally Exported Cultural Objects, http://www.unidroit.org/english/implement/i-95.pdf (illustrating that UNIDROIT has not gained as much support as initially intended); *see also* Kimberly L. Alderman, *The Ethical Trade in Cultural Property: Ethics and Law in the Antiquity Auction Industry*, 14 ILSA J. INT'L & COMP. L. 549, 555 (2008) (bemoaning that the UNIDROIT Convention has failed to garner support, with less than 30 participating countries); *see also* Fincham, *supra* note 142, at 133 (asserting that the UNIDROIT convention has merely 29 states as member parties).

145. *See* Status of UNIDROIT Conventions, *supra* note 144 (listing countries that have ratified the Convention); *see also* Inbal Baum, Note, *The Great Mall of China: Should the United States Restrict Importation of Chinese Cultural Property?*, 24 CARDOZO ARTS & ENT. L.J. 919, 924–25 (2006) (arguing that market countries limited in cultural property, as opposed to replete source nations, resist acceding to the UNIDROIT Convention because of self-interest). *But see* Stephanie Doyal, *Implementing the Unidroit Convention on Cultural Property Into Domestic Law: The Case of Italy*, 39 COLUM. J. TRANSNAT'L L. 657, 553 (2001) (reporting that Italy, both a source and market nation, has ratified the Convention, and, therefore, at least one market country has acceded).

146. *See* Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291, 295 (2006) (conceding that the applicability of international conventions is contingent upon those countries becoming legally bound to them); *see also* Baum, *supra* note 145, at 947 (depicting that countries supporting and acceding to the UNIDROIT Convention are obligated to preserve cultural heritage); *see also* Sue J. Park, Note, *The Cultural Property Regime in Italy: An Industrialized Source Nation's Difficulties in Retaining and Recovering Its Antiquities*, 23 U. PA. J. INT'L ECON. L. 931, 947 (2002) (acknowledging that the Convention is ineffective because the vast majority of signatories are source nations).

147. *See* Michael L. Dutra, *Sir, How Much Is That Ming Vase in the Window?: Protecting Cultural Relics in The People's Republic of China*, 5 ASIAN-PAC. L. & POL'Y J. 2, 78–79 (2004) (underscoring that there is "little hope" the Convention will have substantial impact without market countries' involvement); *see also* Bengs, *supra* note 141, at 507 (illuminating that market nations must ratify the UNIDROIT Convention in order to mitigate illegal trafficking of cultural property and preserve cultural heritage); *see also* David Chang, Comment, *Stealing Beauty: Stopping the Madness of Illicit Art Trafficking*, 28 HOUS. J. INT'L L. 829, 859 (2006) (conjecturing that without the cooperation of major market nations, the Convention lacks international muster).

B. Bilateral Agreements

Bilateral agreements often prove to be most beneficial for source countries because they generally provide for the enforcement of export laws which are not usually recognized by other countries, enabling items to be returned more easily while consuming fewer resources from both signatories. Italy has agreements with the United States and Switzerland,[148] both market countries.

In 1983, the United States enacted the Convention on Cultural Property Implementation Act (CPIA), which implements the UNESCO Convention.[149] Among other things, the CPIA allows the United States to enter into bilateral agreements with countries to impose import restrictions on cultural items coming into the United States.[150] Italy petitioned for such restric-

148. The Italy-Switzerland Bilateral Agreement entered into force on April 27, 2008, and categorizes cultural items that cannot be imported into Switzerland if in violation of Italian export laws. The agreement is effective for a five-year period and may be extended. Switzerland became a party to the UNESCO Convention through passage of the Federal Act on the International Transfer of Cultural Property. Similar to the U.S. Convention on Cultural Property Implementation Act (CPIA), the Swiss government can form bilateral agreements with countries party to the UNESCO Convention. Presently the only agreement in effect is with Italy. Agreements with Greece and Peru have been negotiated but are still pending. *See* M. Cottrell, Comment, *Keeping the Barbarians Outside the Gate: Toward a Comprehensive International Agreement Protecting Cultural Property*, 9 CHI. J. INT'L L. 627, 645 (2009) (reiterating that Italy's bilateral agreements buttress its ratification of the UNIDROIT Convention).

149. *See* Convention on Cultural Property Implementation Act, 19 U.S.C. § 2601 (2000) (stating that the law was enacted in 1983).

150. *See id.*, at § 2602 (a)(2)(A) (2010) (asserting that the CPIA prohibits the importation of stolen objects into the United States, specifically objects that previously have been inventoried by a museum, country or other institution); *see also* Patty Gerstenblith, *Controlling the International Art Market in Antiquities: Reducing the Harm, Preserving the Past*, 8 CHI J. INT'L L.169, 178 (2007) (opining that the CPIA, in addition to import restrictions, authorizes U.S. customs to seize objects and the federal government to sue to have them forfeited to the source country); *see also* Howard Spiegler, *The UNESCO Convention's Role in American Cultural Property Law: The Journey to U.S. v. Frederick Schultz*, 57 MUSEUM INT'L 103, 106 (2005) (explaining that the CPIA limited import restrictions to instances where other State Parties have entered into bilateral agreements with the United States concerning cultural property).

tions, leading to the implementation of the memorandum of understanding (MOU) between Italy and the United States in 2001[151] and its extension in 2006.[152]

The MOU agreement between Italy and the United States forbids the import of "archaeological material ranging in date from approximately the ninth century B.C. to approximately the 4th century A.D., including categories of stone, metal, ceramic and glass artifacts, and wall paintings identified on a list to be promulgated by the United States Government."[153] In exchange, the agreement requires Italy to institute more severe penalties along with prompt prosecution of looters, enhance its investigative training for the *Carabinieri* art squad, increase

151. *See* Agreement Between the Government of the United States of America and the Government of the Republic of Italy Concerning the Imposition of Import Restrictions on Categories of Archaeological Material Representing the Pre-Classical, Classical, and Imperial Roman Periods of Italy, Jan. 19, 2001, http://exchanges.state.gov/heritage/culprop/itfact/pdfs/it2001mou.pdf (hereinafter Agreement Between the Government of the USA and Italy) (stating that Italy and the United States signed a MOU on January 19, 2001, which outlined responsibilities for both States implementing import restrictions); *see also* Diplomatic Note from the United States to Italy, Jan. 13, 2006, http://www.state.gov/documents/treaties/129710.pdf (referencing the MOU dated January 19, 2001 between the United States and Italy).

152. *See* Extension and Amendment to the Agreement Between the Government of the United States of America and the Government of the Republic of Italy Concerning the Imposition of Import Restrictions on Categories of Archaeological Material Representing the Pre-Classical, Classical, and Imperial Roman Periods of Italy, Jan. 19, 2006, http://www.state.gov/documents/treaties/129557.pdf (hereinafter Extension of the Agreement Between the United States and Italy) (asserting that the United States and Italy extended the MOU that sought to protect Italy's cultural property); *see also* Alexander A. Bauer, *New Ways of Thinking About Cultural Property: A Critical Appraisal of the Antiquities Trade Debates*, 31 FORDHAM INT'L L.J. 690, 691 (2008) (stating that the United States and Italy agreed to renew their MOU on January 19, 2006); *see also* Edward M. Cottrell, *Keeping the Barbarians Outside the Gate: Toward a Comprehensive International Agreement Protecting Cultural Property*, 9 CHI. J. INT'L L. 627, 645 (2009) (explaining that Italy and the United States renewed their 2001 MOU); *see also* Robert K. Paterson, *Resolving Material Cultural Disputes: Human Rights, Property Rights and Crimes Against Humanity*, 14 WILLAMETTE J. INT'L L. & DISP. RESOL. 155, 166 (2006) (articulating the U.S. decision to extend its agreement with Italy, which seeks to protect Italy's archeological materials).

153. *See* Extension of the Agreement Between the United States and Italy, *supra* note 152, at art. 1(A) (quoting the aforementioned); *see also* John R. Crook, *United States Ends Agreements With Italy and Nicaragua on Protection of Cultural Patrimony*, 100 AM. J. INT'L L. 460, 460 (2006) (explaining that the U.S. Department of Homeland Security published a designated list of restricted Italian artifacts ranging from approximately the ninth century B.C. to the fourth century A.D.); s*ee also* Patty Gerstenblith & Lucille Roussin, *International Cultural Property*, 41 INT'L LAW. 613, 614 (2007) (explaining that article 1(A) restricts the import of archaeological materials from the pre-classical, classical and imperial Roman periods from approximately the ninth century B.C. through the fourth century A.D.).

scientific research for protection, develop Italian tax incentives for private support of legitimate excavation and strengthen cooperation among European nations for the protection of cultural patrimony.[154] It also requires Italy to use its best efforts to facilitate loans and research opportunities with American museums and universities.[155] In November 2009, the U.S. Cultural Property Advisory Committee reviewed the MOU with Italy, specifically looking at Article II and whether the actions taken by Italian authorities to reduce looting were sufficient.[156] Many of those present agreed that Italy's actions, such as the lending of objects to American museums, the collaboration of fieldwork and the generation public awareness with exhibitions, warranted the renewal and further strengthening of the MOU.[157]

While these bilateral agreements are ideal for source countries, the United States has similar agreements with only 11 other countries: Bolivia, Cambodia, China, Colombia, Cyprus, El Salvador, Guatemala, Honduras, Mali, Nicaragua and Peru.[158] In addition, the United States is the only country other than Switzerland with such agreements. Switzerland has just one agree-

154. *See* Extension of the Agreement Between the United States and Italy, *supra* note 152, at art. 2(B), (C) (positing that the bilateral agreement requires Italy to take proactive measures to prevent archeological looting); *see also* Aaron K. Briggs, *Consequences of the Met-Italy Accord for the International Restitution of Cultural Property*, 7 CHI. J. INT'L L. 623, 636–40 (2007) (demonstrating that Italy has instituted measures to protect against looting, such as more severe penalties and strengthened cooperation among many international players); *see also* John R. Crook, ed., *United States Extends Agreements With Italy and Nicaragua on Protection of Cultural Patrimony*, 100 AM. J. INT'L L. 460, 460 (2006) (explaining that the *Carabinieri* is a special unit in Italy created for the protection of artistic heritage).

155. *See* Extension of the Agreement Between the United States and Italy, *supra* note 152, at art. 2(E) (recognizing longer-term loans of archeological artifacts by Italy to the United States). *But see* John R. Schmertz & Mike Meier, *U.S. Extends Its Ban on Importing Ancient Italian Artifacts*, 12 INT'L L. UPDATE 38, 38 (2006) (discussing Italy's lack of cooperation acceding to the MOU provisions calling for long-term lending of cultural property). Advisory Committee Hears Concerned Collectors About Bilateral Agreement With Italy, *available at* http://www.prnewswire.com/news-releases/advisory-committee-hears-concerned-collectors-about-bilateral-agreement-with-Italy-93572794.html.

156. *See* Extension of the Agreement Between the United States and Italy, *supra* note 152 (stating that article 2 of the MOU seeks to increase Italy's efforts to reduce looting); *see also* Geoffrey R. Scott, *Spoliation, Cultural Property, and Japan*, 29 U. PA. J. INT'L L. 803, 805 (2008) (explaining that article 2's efforts to decrease looting may not be effective because the trade in illicit or stolen art and antiquities was recently estimated between $100 million and $4 billion per year).

157. *See* Sebastian Heath, *Politics and Archaeology: A First-Person Account of the CPAC Meeting Reviewing Italian Import Restrictions*, ARCHAEOLOGICAL INST. OF AM., http://www.archaeological.org/webinfo.php?page=10547 (acknowledging that Italy offered to increase enforcement of existing laws, approve loans of pieces to American museums and allow American archeologists to excavate in Italy). *See generally* Inbal Baum, *The Great Mall of China: Should the United States Restrict Importation of Chinese Cultural Property?*, 24 CARDOZO ARTS & ENT. L. J. 919, 945–46 (2006) (proposing that cultural property dilemmas may be resolved with "long-term cooperative loans" and "mechanisms of transfer"). *But see* Edythe E. Huang, *Looting in Iraq, Five Years Later: An Evaluation of the International Protection, Recovery, and Repatriation of Looted Cultural Artifacts*, 10 RUTGERS RACE & L. REV. 183, 223 (2008) (suggesting that there has been little international effort to create a better system to protect cultural property).

158. *See* Patty Gerstenblith & Lucille Roussin, *Art and International Cultural Property*, 42 INT'L LAW. 729, 732 (2008) (stating that the United States has bilateral agreements with 11 countries, including Peru, Cyprus, Mali and Guatemala). *See also* Chart of Emergency Actions and Bilateral Agreements, U.S. DEP'T OF STATE, http://exchanges.state.gov/heritage/culprop/chart2.pdf (depicting cultural property import restrictions imposed by the United States on other countries); *see also* Carol Noonan & Jeffrey Raskin, *Intellectual Property Crimes*, 38 AM. CRIM. L. REV. 971, 1012 n.293 (2001) (asserting that the United States entered into bilateral agreements with at least eight countries, including Mali and El Salvador).

ment—with Italy[159]—although two agreements are currently being negotiated with Greece (pending as of 2007)[160] and Peru (pending as of 2006).[161]

V. Italian Non-legal Strategies

In addition to national laws and international agreements, Italy also employs a variety of non-legal methods to recover its cultural property. Particularly noteworthy are the activities of the special art division of the Italian military (the *Tutela Patrimonio Culturale*), the ability to create repatriation agreements with museums, and the launching of aggressive public relations campaigns.

A. The *Tutela Patrimonio Culturale*

The Italian military, the *Carabinieri*, has been instrumental in investigating cultural property thefts, allowing the government to prosecute individuals in Italy, bring claims in other

---

159. *See* Acuerdo Trae il Consiglio Federale Svizzero e il Governo della Repubblica Italiana sul l'Importazione e il r Impatriodi Beni Culturali (Agreement Between the Swiss Federal Council of the Swiss Confederation and the Government of the Republic of Italy on the Import and Repatriation of Cultural Property), Switz.–Italy, Apr. 27, 2008, [AS] 2008, *translated at* http://www.ifar.org/upload/PDFLink49b7e603825bfItalian-Swiss%20Bilateral%20Agreement.pdf (establishing the existence of a bilateral agreement between Switzerland and Italy regulating the transit, import and repatriation of cultural property); *see also* Patty Gerstenblith, *Protecting Cultural Heritage in Armed Conflict: Looking Back, Looking Forward*, 7 CARDOZO PUB. L. POL'Y & ETHICS J. 677, 696 n.61 (2009) (noting the existence of a bilateral agreement between Switzerland and Italy pursuant to the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property); *see also* Leah J. Weiss, Note, *The Role of Museums in Sustaining the Illicit Trade in Cultural Property*, 25 CARDOZO ARTS & ENT. L.J. 837, 850–51 (2007) (describing the Swiss enactment of the Federal Act on the International Transfer of Cultural Property allowing for bilateral agreements).

160. *See* Acuerdo Trae il Consiglio Federale Svizzero e il Governo della Repubblica Ellenica sul l'Importazione e il r Impatriodi Beni Culturali (Agreement Between the Federal Council of the Swiss Confederation and the Government of the Hellenic Republic on the Import, Transit and Repatriation of Cultural Property), Switz.-Greece, *concluded on* May 15, 2007, [AS] (2007), *available at* http://www.bak.admin.ch/themen/kulturguetertransfer/01985/index.html?lang=en (providing the bilateral agreement as concluded between Switzerland and Greece to regulate the transit, import, and repatriation of cultural property); *see also* Bundesgesetz über den Internationalen Kulturgütertransfer (Federal Act on the International Transfer of Cultural Property), May 3, 2005, [AS] 1869 (2005), art. 7, ¶ 1, *translated at* http://www.unesco.org culture natlaws media.pdf switzerland ch_actintaltrsfertcultproties2005_engtno.pdf (allowing Switzerland to enter into agreements to secure cultural heritage and protect interests in cultural and foreign affairs); *see also* Gerstenblith, *supra* note 159, at 696 n.61 (showing the existence of a bilateral agreement between Switzerland and Greece pursuant to the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property).

161. *See* Acuerdo de Cooperación Entre el Consejo Federal Suizo y el Gobierno de la República del Perú para Impedir el Tráfico Ilícito de Bienes Culturales (Agreement Between the Federal Council of the Swiss Confederation and the Government of the Republic of Peru on the Import, Transit and Repatriation of Cultural Property), Switz.-Peru, *concluded on* Dec. 28, 2006 (RO) 2006 (expressing the terms of a bilateral agreement between Switzerland and Peru to regulate and protect cultural property); *see also* Gerstenblith & Roussin, *supra* note 158, at 731 (mentioning the agreement between Peru and Switzerland pursuant to Switzerland's Federal Act on the International Transfer of Cultural Property); *see also* Gerstenblith, *supra* note 159, at 696 n.61 (stating that Switzerland and Peru entered into an agreement to enforce export laws and protect cultural heritage).

countries and forge agreements with museums. Italy established the Tutela Patrimonio Culturale (TPC) one year before the UNESCO Convention on Cultural Property Protection and thus became the first country to have a specialized unit in art investigations.[162] Since then the TPC has become internationally renowned, helping to train art squads in Hungary, Palestine, and even traveling to Iraq to help train the local police force and to implement programs.[163]

The TPC has been very successful in recovering Italian plundered artifacts both within the country and abroad. Between 1970 and 2008, the TPC recovered 389,188 stolen cultural items and 823,053 archeologically significant objects and seized 252,932 forgeries.[164] Two raids alone yielded more than 40,000 antiquities: the Medici horde in the Swiss warehouse with 10,000 objects and a Sicilian villa with more than 30,000 objects.[165] After years of leads, the TPC was led to a warehouse in Geneva, Switzerland, belonging to Giacomo Medici, where

162. *See* Manus Brinkman, *Reflections on the Causes of Illicit Traffic in Cultural Property and Some Potential Cures*, *in* ART AND CULTURAL HERITAGE: LAW, POLICY, AND PRACTICE 64, 66 (Barbara T. Hoffman ed., 2006) (referring to the start of the special arts unit of the Italian police's conception in 1969); *see also* Martina Calogero, *Italia–Una Tripla Mostra di Reperti Archeologici Recuperati dai Carabinieri* (Italy—A Triple Show of Archeological Finds Recovered by the Carabinieri) (May 19, 2009), http://www.archart.it/rivista-archeologia/mostre-e-convegni/italia-%E2%80%93-una-tripla-mostra-di-reperti-archeologici-recuperati-dai-cara-binieri/ (marking the inception of Italy's special police branch in 1969 to protect Italy's cultural heritage); *see also* Marco Mologni, *Esposte 65 Gigantografie delle Opere Recuperate dai Carabinieri Dalle Sculture a Van Gogh In Mostra L'arte Rubata* (65 Enlargements of Exhibited Works from Sculptures to Van Gogh Recovered Exhibition in Stolen Art), CORRIERE DELLA SERRA (Italy), March 22, 2003 (explaining how Italy's rich culture may have prompted the early formation of a specialized police unit for cultural heritage in Italy though it had not yet become a global movement); *see also* Sue J. Park, Comment, *The Cultural Property Regime in Italy: An Industrialized Source Nation's Difficulties in Retaining and Recovering Its Antiquities*, 23 U. PA. J. INT'L ECON. L. 931, 939 (2002) (stating that the Italian police have a separate squad working solely with art).

163. *See* Ministerio degli Affari Esteri, *La Salvaguardia del Patrimonio Culturale nel Mondo* (The Safeguarding of Cultural Heritage in the World), www.esteri.it/MAE/doc_dossier/dossier_cultura/cultura.pdf at 6, 8 (last visited March 13, 2010) (citing instances in which the Tutela del Patrimonio Culturale has been an instrument of international dialogue in Bosnia-Herzegovina, Afghanistan and Iraq); *see also* Paolo Conti, *Il Getty restituisce tre opere L'Italia: Ridateci I Pezzi Spariti Mercato Clandestino, Primo Passo del Museo Americano Sotto Accusa Buttiglione: Rivogliamo Tutto Il Materiale di Provenienze Illecita* (The Getty Returns Three Works to Italy: Give Back to Us the Pieces that Disappeared on the Black Market, the First Step of the American Museum Under Accusation Buttiglione: They Want All the Material of Unlawful Origin), CORRIERE DELLA SERA (Italy), Oct. 3, 2005, at 23 (commenting on the presence of Italian forces to protect Iraq's cultural heritage); *see also* Robert Suro, *Going Undercover for Art's Sake*, N.Y. TIMES, Dec. 13, 1987, at 43 (acknowledging the Carabinieri's cultural heritage assistance in the return of Renaissance masterpieces to Budapest's Museum of Fine Arts).

164. *See* Calogero, *supra* note 162 (reporting that between 1970 and 2008 the *Tutela del Patrimonio Culturale* recovered 823,053 stolen cultural artifacts and discovered 252,932 forgeries); *see also* Antonio Carioti, *NEL 1909 La Primera Tutela Per L'Arte* (The First Protection for the Arts), CORRIERE DELLA SERA (Italy), May 25, 2004, at 5 (reporting the success rate of the Tutela del Patrimonio Culturale as 364 cases out of 1909 since 2000). *See generally* Christopher Chippendale & David W. J. Gill, *Material Consequences of Contemporary Classical Collecting*, 103 AM. J. ARCHAEOLOGY 463, 495 (2000) (noting the difficult task of finding forgeries, which often can elude detection).

165. *See* NEIL BRODIE, JENNY DOOLE & PETER WATSON, STEALING HISTORY: THE ILLICIT TRADE IN CULTURAL MATERIAL 19 (2002) (noting that between 1970 and 1996 the *Tutela del Patrimonio Culturale* recovered over 300,000 antiques, including 30,000 from a Sicilian villa and 10,000 from four warehouses in Geneva Freeport); *see also* Chippendale & Gill, *supra* note 164, at 493 (commenting on the discovery of around 10,000 antiques in Giacomo Medici's Swiss warehouses); *see also* Ralph Frammolino & Jason Felch, *The World: Greece Vows Legal Action Against Getty*, L.A. TIMES, Nov. 23, 2005, at 10 (pointing to a 1995 raid on a Medici warehouse during which numerous unrestored artifacts were found).

they discovered not only antiquities themselves, but proof that those properties were looted. Medici had kept a good record of his dealings, which included piles of documents and thousands of photographs of the various stages of restoration—from dirt covered to museum quality. Some of these were in the Getty Museum.[166] Particularly damaging was the mere fact that the objects were photographed with a Polaroid camera which was invented only in 1948, nine years after Italy's 1939 law was enacted.[167] According to Watson and Todeschini, "Italian archeologists calculate that 'thousands' of tombs must have been desecrated to provide [the] 'inventory,' suggesting that illicit digs have ruined as many tombs as have been excavated legally and scientifically. In other words, as much has been lost to looters as has been found by reputable archeologists."[168]

---

166. *See* PETER WATSON & CECILIA TODESCHINI, THE MEDICI CONSPIRACY: THE ILLICIT JOURNEY OF LOOTED ANTIQUITIES FROM ITALY'S TOMB RAIDERS TO THE WORLD'S GREATEST MUSEUMS 22, 57 (2006) (commenting on the photographic and documentary evidence discovered in the Medici raid that linked the stolen pieces to the Getty); *see also* Hugh Eakin & Elisabetta Povoledo, *An Odyssey in Antiquities Ends in Questions at the Getty Museum*, N.Y. TIMES, Oct. 15, 2005, at B7 (providing statistics of the findings in Medici's warehouses including a total of around 5,000 photographs); *see also* Frammolino & Felch, *supra* note 165, at 10 (reporting that allegations of illegal excavation hinged on photo evidence); *see also* Cathleen McGuigan, Barbie Nadeau, Eric Pape & Jennifer Ordonez, *A Fine Mess in Malibu: Charges of Smuggling Overshadow the Refurbished Getty Villa*, NEWSWEEK, Jan. 30, 2006, at 61 (citing the 1939 Italian law forbidding the export of antiques and the Italian government's Polaroid evidence against Medici and Getty).

167. *See* WATSON & TODESCHINI, *supra* note 166, at 57 (speculating on the incriminating fact that Polaroid photos were not invented until 1948, nine years after the Italian law that restricted the export of antiquities); *see also* L. Giu. 1939 n. 1089—*Tutela delle Cose di Interesse Artistico e Storico* (Protection of Things of Artistic or Historic Interest), Gazz. Uff. Aug. 8, 1939 n. 184 (declaring the law in 1939 against exporting things that are of historical, archaeological, cultural and artistic interest); *see also* Helmut Erich & Robert Gernsheim, *Photography, Technology of*, ENCYCLOPÆDIA BRITANNICA ONLINE (L. Andrew Mannheim, ed.), Mar. 18, 2010, http://www.search.eb.com/eb/article-36505 at 93 (explaining the process by which a Polaroid photograph was made and marketed in 1948).

168. *See* WATSON & TODESCHINI, *supra* note 166, at 35 (asserting that as many tombs have been ruined illegally as have been legally researched); *see also* Alexander A. Bauer, *New Ways of Thinking About Cultural Property: A Critical Appraisal of the Antiquities Trade Debates*, 31 FORDHAM INT'L L.J. 690, 702 (2008) (describing how clandestine excavations often leave sites in ruin without the requisite documentation and records that accompany legal excavations). *See generally* Inbal Baum, Note, *The Great Mall of China: Should the United States Restrict Importation of Chinese Cultural Property?*, 4 CARDOZO ARTS & ENT. L.J. 919, 940 (2006) (discussing the parallel occurrence in China of tomb raiders disturbing the integrity and placement of cultural objects).

The efforts of the TPC appear to be working. In a 2009 report, the Italian Cultural Ministry reported that compared to 2008, cultural property thefts decreased by 14.5 percent and there was a substantial reduction, approximately 76 percent, in clandestine excavations.[169] In addition, about 60,000 looted artifacts were recovered in the last year, totaling almost 165 ($240) million euros.[170]

Certainly, the success of the TPC derives in large part from the significant amount of money invested in the agency. Headquartered in Rome with 12 other operations throughout the country,[171] the TPC is divided into three sections: Archeology, Antiquities, and Contemporary Art and Counterfeiting. The degree of resources allocated to the TPC is crucial since Italy possesses an immense amount of art and number of artifacts discovered on a daily basis, borne out by the high number of United Nations-designated World Heritage Sites located within its borders.[172] In addition, "[i]t is significant that Italy has invested in the creation of an efficient and effective squad to protect cultural property because it is a statutory prerequisite under the CPIA before the US may employ import controls."[173] In fact, the 2001 MOU between Italy

169. *See* Attivita Operativa 2009, Ministero Per i Beni e le Attivita Culturali, Comando Carabinieri Tutela Patrimonio Culturale (observing a decrease in the level of cultural property theft). *See generally* Park, Comment, *supra* note 162, at 939 (stressing Italy's comprehensive scheme of special police forces and laws regulating the retention and return of cultural property). *But see* Baum, *supra* note 168, at 936–37 (stating that, pursuant to Italy signing a bilateral agreement with the United States in 2001, TPC statistics indicate that recovery of artifacts from clandestine digs has declined 90 percent).

170. *See* Attivita Operativa 2009, *supra* note 169 (stating that thousands of looted artifacts were recovered). *See generally* Aaron Kyle Briggs, Comment, *Consequences of the MET-Italy Accord for the International Restitution of Cultural Property*, 7 CHI. J. INT'L L. 623, 637 (2007) (noting that between 1970 and 1996, the Carabinieri recovered more than 300,000 "unofficially" excavated antiquities, and a 1998 raid on a Sicilian villa yielded more than 30,000 Phoenician, Greek and Roman antiquities). *But see* Stephanie Gruner, Editorial, *Italy's Special Carabinieri Unit Fights Art Looting*, WALL ST. J., Apr. 10, 2006, http://www.opinionjournal.com/a/?id=110008219 (According to TPC figures, between 1970 and 2005, 845,838 objects were reported stolen, while less than a third were recovered.).

171. *See* ANTIQUITIES UNDER SIEGE: CULTURAL HERITAGE PROTECTION AFTER THE IRAQ WAR 136 (Lawrence Rothfield ed., 2008) (declaring that the Carabinieri is headquartered in Rome and has 12 squads with regional or interregional jurisdiction throughout Italy); *see also* Carbinieri: Ministera Della Difensa, http://www.carbinieri.it/Internet/Cittadino/Informazioni/Tutela/Patrimonio+Culturale/Articolazione/01_articolazione.htm (noting *TPC*'s 12 other operations are in Bari, Bologna, Cosenza, Firenze, Genoa, Ancona, Monza, Napoli, Palermo, Sassari, Torino and Venezia). *See generally* Patty Gerstenblith, *From Bamiyan to Baghdad: Warfare and the Preservation of Cultural Heritage at the Beginning of the 21st Century*, 37 GEO. J. INT'L L. 245, 294 (2006) (affirming that the Tutela Patrimonio Culturale is a specially trained squad that deals with art theft, fraud, illegal trafficking and looting of archeological sites throughout Italy).

172. *See* World Heritage List, United Nations Educational, Scientific and Cultural Organization (UNESCO), http://whc.unesco.org/en/list (reporting that Italy has 43 cultural heritage sites, followed by Spain with 40, China with 37, and France and Germany with 33); *see also* Allison Carter Jett, Note, *Domestic, Supranational and International Historic Preservation Legislation: Does It Protect Our Cultural Heritage or Restrict Development? Exploring Its Impact on Ancient Roman Monuments*, 31 GA. J. INT'L & COMP. L. 649, 675 (2003) (stating that Italy has more items on the World Heritage List than any other country).

173. *See* Convention on Cultural Property Implementation Act, Pub. L. No. 97-446, 96 Stat. 2329 (1983), codified at 19 U.S.C. §§ 2601–13 (2000) (hereinafter CPIA) (stating that "the State Party has taken measures consistent with the Convention to protect its cultural patrimony"); *see also* Briggs, *supra* note 170, at 636–37 (emphasizing the importance of Italy's formation of the TPC in light of CPIA requirements). *See generally* Karin E. Borke, Note, *Searching for a Solution: An Analysis of the Legislative Response to the Iraqi Antiquities Crisis of 2003*, 13 DEPAUL-LCA J. ART & ENT. L. 381, 440 (2003) (indicating that trade agreement prerequisites and procedural safeguards that are currently a part of the CPIA ensure that restraints are reasonable and narrowly tailored).

and the United States and its subsequent extension both require Italy to enhance the training of the *TPC*.[174]

B. Museum Repatriation Agreements

Voluntary repatriation agreements, whereby a museum returns certain objects to the source country in exchange for a variety of mutually beneficial conditions, have markedly increased in the last few years.[175] For museums and institutions in possession of ill-gotten objects, it provides a non-legal avenue as well as an opportunity to maintain credibility in the public eye. In addition, a source country such as Italy takes advantage of its duties under the U.S. bilateral agreement and adds as enticement the future possibility of object loans, traveling

174. *See* Agreement Between the Government of the United States of America and the Government of the Republic of Italy Concerning the Imposition of Import Restrictions on Categories of Archeological Material Representing the Pre-Classical, Classical, and Imperial Roman Periods of Italy, U.S.-Italy, art. II(C)(4), Jan. 19 2001, (stating that Italy shall intensify Carabinieri investigations); *see also* Extension and Amendment to the Agreement Between the Government of the United States of America and the Government of the Republic of Italy Concerning the Imposition of Import Restrictions on Categories of Archeological Material Representing the Pre-Classical, Classical and Imperial Roman Period of Italy, U.S.-Italy, art. II(C)(3), Jan. 13, 2006 (enumerating that Italy shall enhance training of the Carabinieri). *See generally* John R. Crook, *United States Extends Agreements With Italy and Nicaragua on Protection of Cultural Patrimony*, 100 AM. J. INT'L L. 460, 460 (2006) (reporting that on January 13, 2006, the United States and Italy extended the bilateral Memorandum of Understanding); *see generally* Patty Gerstenblith & Lucille Roussin, *International Cultural Property*, 41 INT'L LAW. 613, 614 (2007) (describing the procedure for entering into a bilateral agreement with the United States under the CPIA).

175. *See* Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 364 (1982) (positing that "invit[ing] museums [and collectors] to consider the possibility of arrangements with foreign museums and governments that involve reciprocal measures rather than simply the repatriation of objects to their countries of origin"); *see also* Stacey Falkoff, Note, *Mutually Beneficial Repatriation Agreements: Returning Cultural Patrimony, Perpetuating the Illicit Antiquities Market*, 16 J.L. & POL'Y 265, 283 (2007) (arguing that repatriation of select illicit cultural property will decrease the illicit antiquities market). *But see* William G. Pearlstein, *Claims for the Repatriation of Cultural Property: Prospects for a Managed Antiquities Market*, 28 LAW & POL'Y INT'L BUS. 123, 124 (1996) (expressing that an increase in bilateral and multilateral agreements has only a minimal impact on the problem of illicit trade in cultural property).

exhibitions, and research opportunities. For source countries, voluntary repatriation agreements are less costly[176] and less risky than litigation.[177] For example, in the United States, a state may be foreclosed from bringing a suit due to statute-of-limitation periods or because the object was looted before the adoption of the UNESCO convention or bilateral agreement.[178] The source country is then left with trying to meet the difficult scienter requirement under the NSPA.[179] Thus, a repatriation agreement may be the best option.[180]

---

176. *See* Falkoff, *supra* note 175, at 285 (asserting that the expense of repatriation litigation can be extremely costly, even outweighing the object at issue). *See generally* Roger W. Mastalir, *A Proposal for Protecting the "Cultural" and "Property" Aspects of Cultural Property Under International Law*, 6 FORDHAM INT'L L.J. 1033, 1090 (1993) (remarking that a museum in an acquisitive nation that negotiates with a source nation as part of a repatriation agreement gains access to a wider range of cultural property in the source nation); *see generally* Molly L. McIntosh, Note, *Exploring Machu Picchu: An Analysis of the Legal and Ethical Issues Surrounding the Repatriation of Cultural Property*, 17 DUKE J. COMP. & INT'L L. 199, 219 (2006) (viewing shared ownership or a cooperative relationship as a more desirable solution than retention as opposed to repatriation).

177. *See* Peru v. Johnson, 720 F. Supp. 2d 810, 811–12 (C.D. Cal. 1989) (providing an example where litigation did not result in the return of several Peruvian artifacts to the source country of Peru); *see also* Sean R. Odendahl, *Who Owns the Past in U.S. Museums? An Economic Analysis of Cultural Patrimony Ownership*, 2001 U. ILL. L. REV. 475, 493 (2001) (listing self-help, purchase on the open market, repatriation through bilateral agreement and litigation as four possible means of resolving artifact disputes in American courts). *But see* Michael J. Reppas II, *Empty "International" Museums' Trophy Cases of Their Looted Treasure and Return Stolen Property to the Countries of Origin and the Rightful Heirs of Those Wrongfully Dispossessed*, 36 DENV. J. INT'L L. & POL'Y 93, 123 (2007) (concluding that though repatriation agreements are attractive for museums, the threat of litigation is the best way to ensure the return of artifacts to the source country).

178. *See* DeWeerth v. Baldinger, 836 F.2d 103, 108 (2d Cir. 1987) (holding that demand for the return of an object must be made within a reasonable time after the current possessor is identified); *see also* Solomon R. Guggenheim Foundation v. Lubell, 550 N.Y.S.2d 618 (1st Dep't 1990) (discussing the three-year statute of limitations in New York and the requirement of demand from the party claiming ownership before the statute begins to run); *see also* Briggs, *supra* note 170, at 635 (discussing the impact that the U.S. statute of limitations has on source countries and concluding that, in general, litigation is not a valid option).

179. *See* 18 U.S.C. § 2315 (2000) (providing the requirement of knowledge of the item's status as being stolen in order for criminal liability to attach); *see also* United States v. Schultz, 333 F.3d 393, 410 (2d Cir. 2003) (holding that the *mens rea* requirement under the NSPA will protect innocent art dealers from being held criminally liable if they come into possession of the goods "unwittingly"); *see also* Briggs, *supra* note 170, at 635 (stating that source countries, when dealing with the U.S. statute of limitations, must deal with the "messy scienter requirement").

180. *See* Aaron Kyle Briggs, Comment, *Consequences of the MET-Italy Accord for the International Restitution of Cultural Property*, 7 CHI. J. INT'L L. 623, 635 (2007) (suggesting that due to the many flaws involved with litigation and the potential for unfairness to the source country, litigation is not the best means to resolve disputes over artifacts); *see also* Falkoff, *supra* note 175, at 275–76 (discussing some of the benefits of repatriation outside of the procedural arguments and including the moral aspect of returning objects to their source country); *see also* John Henry Merryman, *Cultural Property, International Trade and Human Rights*, 19 CARDOZO ARTS & ENT. L.J. 51, 58 (2001) (providing exportation principles as another source of rationale for adopting repatriation agreements to solve property disputes across borders).

One example can be seen in Italy's request for the Euphronios Krater from the New York Metropolitan Museum of Art ("Met"). The 2,500-year-old krater was purchased by the Met in 1972 from Robert Hecht for more than $1 million.[181] It is the only complete example out of 27 surviving vases signed by the famous sixth century B.C. potter Euphronios.[182] It would have been difficult for Italy to litigate the case because much hinged on whether the Met knew that the object was stolen under the NSPA since the Met acquired the object before the MOU between Italy and the United States was implemented.[183]

---

181. *See* Aaron Kyle Briggs, *Consequences of the Met-Italy Accord for the International Restitution of Cultural Property*, 7 CHI. J. INT'L L. 623, 623 (2007) (asserting that the Euphronios Krater was purchased by the Met in 1972 for $1.2 million); *see also* Neil Brodie, *Pity the Poor Middlemen*, *in* CULTURE WITHOUT CONTEXT 7, 7 (1998) (stating that the Met bought the Euphronios Krater from Robert Hecht in 1972 for one million dollars); *see also* Chauncey D. Steele IV, *The Morgantina Treasure: Italy's Quest for Repatriation of Looted Artifacts*, 23 SUFFOLK TRANSNAT'L L. REV. 667, 670 n.11 (2000) (discussing the terms of a similar exchange between Robert Hecht and the Met involving silver in 1982); *see also Euphronios Chalice Gets Permanent Home*, ANSA, May 13, 2009, http://www.italymag.co.uk/italy/roma/euphronios-chalice-gets-permanent-home (providing a brief history of the Euphronios Krater, including its sale by Robert Hecht to the Met in 1972); *see also* Randy Kennedy & Hugh Eakin, *The Met, Ending 30-Year Stance, Is Set to Yield Prized Vase to Italy*, N.Y. TIMES, Feb. 3, 2006, http://www.nytimes.com/2006/02/03/arts/03muse.html?pagewanted=all (stating that the sale of the item from a questionable American collector to the Met for more than $1 million spurned an immediate investigation from both U.S. and international authorities).

182. *See* Matthew Bogdanos, *Thieves of Baghdad: Combating Global Traffic in Stolen Iraqui Antiquities*, 31 FORDHAM INT'L L.J. 725, 726 (2008) (stating that the Euphronios Krater is one of the Met's most prized possessions); *see also* Briggs, *supra* note 180, at 623 (asserting that the Euphronios Krater was purchased by the Met in 1972 for $1.2 million); *see also Euphronios Chalice Gets Permanent Home*, ANSA, May 13, 2009, http://www.italymag.co.uk/italy/roma/euphronios-chalice-gets-permanent-home (highlighting the krater's status as being the only complete vase in existence that was painted by Euphronios); *see also* Randy Kennedy & Hugh Eakin, *The Met, Ending 30-Year Stance, Is Set to Yield Prized Vase to Italy*, N.Y. TIMES, Feb. 3, 2006, http://www.nytimes.com/2006/02/03/arts/03muse.html?pagewanted=all (describing the krater as being created by Euphronios, one of the "most important Greek vase painters"); *see also* Maryanne Stevens, *"Patterns of Collecting" at the Metropolitan Museum*, THE BURLINGTON MAGAZINE, Apr. 1976, at 261 (speaking of the krater as being one of the best in the world, and as being created by one of Greece's best artists).

183. *See* 18 U.S.C. § 2315 (2000) (requiring that in order for an action to lie under the NSPA, the possessor of the stolen property must have knowledge of its status as being stolen); *see also* United States v. McClain, 545 F.2d 988, 1001 (C.A. Tex 1977) (discussing in detail what the defendants in that case actually knew about the status of the items in question as being stolen, thus highlighting the importance of the scienter requirement); *see also* Briggs, *supra* note 180, at 634–35 (highlighting the fulfillment of the knowledge requirement as being a significant barrier that Italy would have had to overcome if it brought an action against the Met).

In February 2006, the Met and the Italian Ministry of Culture signed an agreement ("Met Agreement")[184] which allowed for the return of 21 allegedly looted objects to Italy, including the Euphronios Krater, in exchange for long-term loans of works of art of equal value.[185] The Italian Ministry waived all legal action and in the agreement the Met rejected "any accusation that it has knowledge of the alleged illegal provenance in Italian territory" and that the decision to return the objects did "not constitute any acknowledgment on the part of the Museum of any type of civil, administrative or criminal liability for the original acquisition of holding of Requested items."[186] The Met retained the Euphronios Krater on loan until January 15, 2008, with the legend "Lent by the Republic of Italy."[187] After a more than 30-years-long battle, it is now on permanent display in the Etruscan museum in Rome at the Villa Giulia[188] alongside other recently returned looted Etruscan artifacts.[189]

---

184. *See* The Metropolitan Museum of Art-Republic of Italy Agreement art. 1(A), Feb. 21, 2006, *reprinted in* 13 INT'L J. CULTURAL PROP. 427, 427 (2006) (hereinafter Met-Republic of Italy Agreement) (providing the date of the agreement as well as the parties involved); *see also* Alexander A. Bauer, *New Ways of Thinking About Cultural Property: A Critical Appraisal of the Antiquities Trade Debate*, 31 FORDHAM INT'L L.J. 690, 691 (2008) (stating that, in 2006, the Met agreed to return several works to Italy); see *also* Falkoff, *supra* note 175, at 265–66 (describing the terms of the Met Agreement as its return of 21 looted objects in exchange for the Republic of Italy's promise to lend certain artifacts over an undefined period of time).

185. *See* Met-Republic of Italy Agreement, *supra* note 184 (listing the terms of the agreement between the Met and the Republic of Italy, including the purpose of the agreement, the requested items and the terms of future loans); *see also* Bauer, *supra* note 184, at 691 (listing the Euphronios Krater as being one of the many looted objects that were to be returned to their source country by way of the Met Agreement); *see* Patty Gerstenblith & Lucille Roussin, *International Cultural Property,* 41 INT'L L. 613, 622 (2007) (stating that the agreement between the Met and Italy recognized the latter's ownership rights in 21 artifacts and called for their immediate return).

186. *See* Met-Republic of Italy Agreement, *supra* note 184 (rejecting acknowledgement on the part of the Museum of any legal liability); *see also* Carrie Betts, Note, *Enforcement of Foreign Cultural Patrimony Laws in U.S. Courts: Lessons for Museums from the Getty Trial and Cultural Partnership Agreements of 2006*, 4 S. C. J. INT'L L. & BUS. 73, 84 (2007) (acknowledging that the agreement explicitly states the Met's purchase was in good faith and disclaims any knowledge that the objects were illicitly excavated or smuggled out of Italy); *see also* Stacey Falkoff, Note, *Mutually Beneficial Repatriation Agreements: Returning Cultural Patrimony, Perpetuating the Illicit Antiquities Market*, 16 J.L. & POL'Y 265, 284 (2007) (noting that the agreement will protect the Met's reputation because it acknowledges that it acquired the artifacts in good faith).

187. *See* Met-Republic of Italy Agreement, *supra* note 184 (acknowledging the parties' agreement that the Euphronios Krater remain at the Met accompanied by the legend "Lent by the Republic of Italy").

188. *See* Janene Marie Podesta, Note, *Saving Culture, but Passing the Buck: How the 1970 UNESCO Convention Undermines Its Goals by Unduly Targeting Market Nations*, 16 CARDOZO J. INT'L & COMP. L. 457, n.3 (2008) (recognizing that the Euphronios Krater was returned to Italy in January 2008 along with 20 other artifacts).

189. *See Antiquities From North American Collections at the Villa Giulia*, LOOTING MATTERS: DISCUSSION OF THE ARCHEOLOGICAL ETHICS SURROUNDING THE COLLECTING OF ANTIQUITIES (Oct. 1, 2009), http://looting-matters.blogspot.com/2009/10/antiquities-from-north-american.html (explaining the Euphronios Krater display includes other items from the Met, the Getty, the Shelby While Collection, the Boston Museum of Fine Art, the Royal-Athena Galleries and a private French collection).

The Met Agreement marked a significant achievement for Italy's cultural property initiatives.[190] Of particular importance, the Met conceded that Italy was the true owner of the objects because they were illegally exported in direct contravention of Italian national laws.[191] In addition, this "novel approach"[192] gave Italy "considerable bargaining power by making it clear it will refuse to lend art and antiquities to uncooperative museums for temporary exhibitions."[193] Indeed, this strategy was specifically acknowledged and utilized by the Italian Ministry of Culture,[194] such as when the Getty's request for a loan was denied at the time Marion True was indicted in Italy.[195]

---

190. *See* Falkoff, *supra* note 186, at 283–84 (recognizing that Italy reaps the benefit of the agreement because it will regain its cultural property and heritage).

191. *See* Aaron Kyle Briggs, Comment, *Consequences of the Met-Italy Accord for the International Restitution of Cultural Property*, 7 CHI. J. INT'L L. 623, 642 (2007) (stating that the Met conceded that ownership of property should lie with the source nation if it had been exported illegally); *see also* Paige S. Goodwin, Comment, *Mapping the Limits of Repatriable Cultural Heritage: A Case Study of Stolen Flemish Art in French Museums*, 157 U. PA. L. REV. 673, 690 (2008) (recognizing that the parties acknowledged some past illegality by barring future litigation in the agreement); *see also* Falkoff, *supra* note 186, at 284–85 (acknowledging a waiver of Italy's legal claims against the Met).

192. *See* Briggs, supra note 191, at 642 (recognizing that the call for cooperation between Italy and the Met was a novel approach to restitution claims); *see also* Goodwin, *supra* note 191, at 690–91 (stating that the Italy-Met Accord set new standards in nations' abilities to make ethical and political claims against museums and would pave the road for new legal and ethical norms); *see also* Melineh S. Ounanian, Note, *Of All the Things I've Lost, I Miss My Marbles the Most! An Alternative Approach to the Epic Problem of the Elgin Marbles*, 9 CARDOZO J. CONFLICT RESOL. 109, 127 (2007) (stating that Italy was at the forefront of voluntary cultural property restitution).

193. *See* Briggs, *supra* note 191, at 643. *See generally* Ounanian, *supra* note 192, 128 (noting that Italian law allows for criminal prosecution for illegal trade of antiquities, but that Italy attempts to use this threat to make out-of-court agreements to restore its cultural property). *See generally* Christine L. Green, Comment, *Antiquities Trafficking in Modern Times: How Italian Skullduggery Will Affect United States Museums*, 14 VILL. SPORTS & ENT. L.J. 35, 66–72 (outlining Italian cultural property initiatives through negotiations with certain American museums).

194. *See* Briggs, *supra* note 191, at 645 (pointing to the Italian minister of culture Rocco Buttiglioni's announcement that Italy would be aggressive in using loans of art to get museums to return antiquities, and Italian official Giuseppe Proietti's announcement that Italy would deny loans to museums that buy illicit works); *see also* Hugh Eakin, *Italy Using Art Loans to Regain Antiquities*, N.Y. TIMES (Jan. 10, 2006) http://www.nytimes.com/2005/12/27/arts/27iht-loans.html?_r=1 (stating a senior official's view that if a museum buys illicit works and then asks for loans for an exhibition, they will certainly say no). *See generally* Green, *supra* note 193, at 66–72 (outlining Italian cultural property initiatives through negotiations with certain American Museums).

195. *See* Briggs, *supra* note 191, at 645 (noting that Italy's denial of Getty's loan request coincided with Marion True's indictment in Italy); *see also* Eakin, *supra* note 194 (stating that Italy denied Getty's request for a loan around the time that Marion True was indicted); *see also* Jason Felch and Livia Borghese, *Italy, Getty End Rift*, L.A. TIMES, Sept. 26, 2007, http://articles.latimes.com/2007sep/26/entertainment/et-getty26 (asserting that Getty's requests for loan art from Italy were ignored during the months leading to their August 2007 agreement, during which time Marion True's trial was in progress).

While the Met Agreement was certainly not the first of its kind,[196] this approach for resolving cultural property disputes was called a "watershed moment for American museums facing newly aggressive claims from source countries for the return of cultural property."[197] These events had "potential to foster a new spirit of cooperation between museums and source nations, spawn stricter museum acquisition and loan policies, reduce the demand for illicit cultural property and permanently alter the balance of power in the international cultural property debate."[198] Changes have already occurred in the form of new museum guidelines and other museum repatriation agreements.[199]

---

196. *See, e.g.,* JEANNETTE GREENFIELD, THE RETURN OF CULTURAL TREASURES 377 (Cambridge University Press 2007) (1989) (stating that in 1986, the M.H. de Young Memorial Museum voluntarily relinquished half of its collection of pre-Columbian murals to Mexico); *see, e.g.,* John Henry Merryman, *The Retention of Cultural Property*, 21 U.C. DAVIS L. REV. 479, 483 n.15 (1988) (noting that the Cleveland Museum of Art agreed to lend the Poussin to the Louvre for 25 years while retaining ownership of the painting). *See* Stacey Falkoff, Note, *Mutually Beneficial Repatriation Agreements: Returning Cultural Patrimony, Perpetuating the Illicit Antiquities Market*, 16 J.L. & POL'Y 26–68 (2007) (emphasizing that the recent willingness of American museums to enter into repatriation agreements is not an unprecedented occurrence).

197. *See* Adam Goldberg, Comment, *Reaffirming McClain: The National Stolen Property Act and the Abiding Trade in Looted Cultural Objects*, 53 UCLA L. REV. 1031, 1045 n.86 (2006) (quoting Randy Kennedy & Hugh Eakin, *The Met, Ending 30-Year Stance, Is Set to Yield Prized Vase to Italy*, N.Y. TIMES, Feb. 3, 2006, http://www.nytimes.com/2006/02/03/arts/03muse.html); *see also* Briggs, *supra* note 191, at 623 (affirming that the signing of the Italy-Met Euphronios Accord permanently transformed the workings of international cultural property trade).

198. *See* Briggs, *supra* note 191, at 623 (stating that the Italy-Met Euphronios Accord has a great potential for shaping the international debate on cultural property); *see also* Michael J. Reppas II, *Empty "International" Museums' Trophy Cases of Their Looted Treasures and Return Stolen Property to the Countries of Origin and the Rightful Heirs of Those Wrongfully Dispossessed*, 36 DENV. J. INT'L L. & POL'Y 93, 112-13 (2007) (explaining the requirement that all museums maintain strict standards in addressing past acquisitions and noting the growing trend toward voluntary repatriation of culturally significant items to source countries); *see also* Molly L. McIntosh, Note, *Exploring Machu Picchu: An Analysis of the Legal and Ethical Issues Surrounding the Repatriation of Cultural Property*, 17 DUKE J. COMP. & INTL'L 199, 204 (2006) (noting that the agreement between Italy and the Met is an example of aggressive demands by source countries for the repatriation of their historical riches).

199. *See* Alexander A. Bauer, *New Ways of Thinking About Cultural Property: A Critical Appraisal of the Antiquities Trade Debates*, 31 FORDHAM INT'L L. J. 690, 691, 718 (2008) (asserting that following the Met Agreement, similar agreements have been made between museums and source countries, and in response to criticisms related to their acquisition policies, museums have established new provisions focusing on cooperation); *see also* Briggs, *supra* note 191, at 623 (illustrating the changes resulting from the Italy-Met Euphronios Accord by noting the development of new museum guidelines and greater understanding of the problems facing source countries); *see also* Reppas, *supra* note 198, at 93, 109 (stating that the voluntary reparation of government, museums and individuals indicate a shift towards mandating the return of unlawfully exported cultural items to source countries and that museums are committed to conforming to ethical rules in their acquisition practices).

Other repatriation agreements have begun to appear between museums and Italy. Negotiations for the agreement between the Museum of Fine Arts in Boston (MFA) and Italy took place just one month after the Met Agreement.[200] In September 2006, the MFA agreed to return 13 items to Italy and received, in exchange:

> [A] partnership in which the Italian government will loan significant works from Italy to the MFA's displays and special exhibitions program, and establishes a process by which the MFA and Italy will exchange information with respect to the Museum's future acquisitions of Italian antiquities. The partnership also envisages collaboration in the areas of scholarship, conservation, archaeological investigation and exhibition planning.[201]

One might say that the agreement is even generous on the part of Italy, since some of the objects returned by the MFA had been trafficked by Giacomo Medici, and identified subsequently in the Polaroid snapshots seized during the raid in Switzerland.[202]

---

200. *See* Falkoff, Comment, *supra* note 196, at 265, 266 (explaining that in April 2006, the Boston Museum of Fine Arts engaged in talks that resulted in an agreement to return 13 Greek and Roman antiquities to their source countries); *see also* Ralph Frammolino & Jason Felch, *Boston Museum Returns 13 Antiquities to Italy*, L.A. TIMES, Sept. 29, 2006, http://articles.latimes.com/2006/sep/29/world/fg-return29 (establishing that approximately one month after the signing of the Met Agreement, Italy and the Boston Museum of Fine Arts commenced negotiation for the repatriation of 13 Greek and Roman antiquities).

201. *See* Press Release, Museum of Fine Arts, Boston, Museum of Fine Arts, Boston and Italian Ministry of Culture Sign Agreement Marking New Era of Cultural Exchange: MFA Transfers 13 Antiquities to Italy (Sept. 28, 2006) (on file with the Museum of Fine Arts, Boston), http://www.mfa.org/press/sub.asp?key=82&subkey=3444 (describing the agreement between Italy and the Boston Museum of Fine Arts as a partnership comprised of Italy loaning significant works to the Museum of Fine Arts, an exchange of information regarding future purchases of Italian relics and cooperation in the pursuit of research and conservation); *see also* Jed Borad, *Art and Cultural Property Theft*, 22 INT'L ENFORCEMENT L. REP. 460 (2006) (noting that the Italian government agreed to loan significant works to the Museum of Fine Arts to compensate for their return of the antiquities).

202. *See* Green, *supra* note 193, at 71–72 (asserting that evidence such as Medici's Polaroids makes it significantly easier for Italy to prosecute U.S. museum officials, yet Italy agreed to allow the Boston Museum of Fine Arts to return artifacts identified by the Polaroids without prosecution); *see also* Erin Thompson, Comment, *The Relationship between Tax Deductions and the Market for Unprovenanced Antiquities*, 33 COLUM. J.L. & ARTS 241, 258 (2010) (noting that the Polaroids allowed Italy to successfully reclaim artifacts from the Boston Museum of Fine Arts); *see also* Geoff Edgers & Sofia Celeste, *Case in Italy Suggests MFA Received Stolen Art*, BOSTON GLOBE, Nov. 4, 2006, at A1 (indicating that the Polaroids are solid evidence that some of the artifacts possessed by the Boston Museum of Fine Arts were looted).

The Getty followed suit by returning two objects to Greece in July 2006,[203] and then in July 2007, agreeing to return 40 objects to Italy—"the largest number of ancient objects to be returned at one time."[204] Many of these objects were also connected to Medici, and included the museum's signature Aphrodite sculpture, ten other masterpieces and other important vases and sculptures.[205] In exchange, Italy agreed to allow the museum to display the sculpture of Aphrodite until 2010, to establish a greater degree of cooperation for borrowing artifacts and, finally, to drop the civil charges against Marion True, its former curator.[206]

In September 2007, the University of Virginia Art Museum in Charlottesville returned two objects to Sicily that had been excavated illegally in the late 1970s: one had been donated to the university while the other had been purchased by the museum at auction.[207] Just one

203. *See* Jill Schachner Chanen, *Art ATTACK: Ownership of Paintings and Other Objects of Value Is Being Challenged on a Number of Legal Fronts*, 92 A.B.A. J. 50 (2006) (explaining that Getty agreed to repatriate two Greek antiquities to Greece); *see also* Patty Gerstenblith & Lucille Roussin, *International Legal Developments in Review: 2006: Public International Law*, 41 INT'L LAW 613 (2007) (asserting that in 2006, the Getty sent two antiquities to Greece); *see also* Falkoff, *supra* note 196, at 267 (stating that the Getty agreed to return to Greece two objects that it had acquired in 1955 and 1993).

204. *See* Patty Gerstenblith & Lucille Roussin, *Art and International Cultural Property*, 42 INT'L LAW 729, 734 (2008) (asserting that the Getty would return 40 objects to Italy); *see also* Alexander MacKintosh Ritchie, *Victorious Youth in Peril: Analyzing Arguments Used in Cultural Property Disputes to Resolve the Case of the Getty Bronze*, 9 PEPP. DISP. RESOL. L.J. 325, 326 (2009) (noting that the Getty Museum decided to return forty objects to Italy); *see also* Falkoff, *supra* note 196, at 267 (showing that Italy was promised a return of 40 objects from the Getty Museum); *see also* Elisabetta Povoledo, *Getty Agrees to Return 40 Antiques to Italy*, N.Y. TIMES, Aug. 2, 2007, http://www.nytimes.com/2007/08/02/arts/design/02gett.html (reporting that the Getty Museum would return 40 items to Italy at a single time).

205. *See* Christine L. Green, Comment, *Antiquities Trafficking in Modern Times: How Italian Skullduggery Will Affect United States Museums*, 14 VILL. SPORTS & ENT. L.J. 35, 67–68 (2007) (reiterating that Medici was linked to the items returned to Italy); *see also* McIntosh, *supra* note 198 at 199, 204–6 (commenting that Medici was related to the objects that are being returned to Italy); *see also* Jason Felch and Ralph Frammolino, *The Return of Antiquities a Blow to Getty—Forty Disputed Artworks That Are Hallmarks of the Museum's Collection Will Be Returned to Italy in End to a Long Legal Fight*, L.A. TIMES, Aug. 2, 2007, http://articles.latimes.com/2007/aug/02/local/me-getty2 (establishing that the objects included the Aphrodite piece as well as ten other objects).

206. *See* SHARON WAXMAN, LOOT: THE BATTLE OVER THE STOLEN TREASURES OF THE ANCIENT WORLD 365 (2009) (asserting that the Aphrodite sculpture is going back to Italy in 2010); *see also* Falkoff, *supra* note 196, at 267 (noting that the accord between Getty and Italy allowed the museum to keep the Aphrodite sculpture until 2010; both parties agreed to cooperate more closely and Italy dropped the charges against the former curator); *see also* Jason Felch, *Charges Are Dropped in Getty Case*, L.A. TIMES, Nov. 27, 2007, http://articles.latimes.com/2007/nov/28/entertainment/et-getty28 (establishing that all charges were dropped against ex-curator Marion True).

207. *See* Patty Gerstenblith, Laina Lopez, & Lucille Roussin, *International Art and Cultural Heritage*, 43 INT'L LAW. 811, 815 (2009) (establishing that two objects were given back to Sicily); *see also* Carrie Betts, Note, *Enforcement of Foreign Cultural Patrimony Laws in U.S. Courts: Lessons for Museums From the Getty Trial and Cultural Partnership Agreements of 2006*, 4 S.C. J. INT'L L. & BUS. 73, 88 (2007) (reiterating that the University of Virginia Art Museum returned two marble sculptures to Sicily); *see also* Elisabetta Povoledo, *Two Marble Sculptures to Return to Sicily*, N.Y. TIMES, Sept. 1, 2007, http://www.nytimes.com/2007/09/01/arts/design/01rest.html (maintaining that two sculptures were returned to Sicily).

month later, in October 2007, the Princeton University Art Museum concluded an agreement with Italy under which it immediately returned four objects to Italy in exchange for the formal recognition of Princeton's title to seven other objects.[208] Princeton also retained four objects under a four-year loan agreement and Italy agreed to lend Princeton other artifacts of equal cultural significance.[209] In addition, under the agreement, Princeton students will be given research opportunities at Italian excavation sites.[210]

Finally, the Cleveland Museum of Art agreed to return 14 objects to Italy in April 2009.[211] While the list originally consisted of more than 40 objects, including objects that passed through the Medici network and materials acquired before the 1970 UNESCO Convention,[212] the parties agreed to the return of 13 antiquities, acquired by gift or purchase between 1975 and 1996, mostly from southern Italy, and a 14th-century Gothic Cross stolen from a church near Siena.[213] Similar to the previous museum repatriation agreements, Italy agreed to loan 13 objects of comparable quality for renewable 25-year periods, to cooperate on future

208. *See* Patty Gerstenblith & Lucille Roussin, *Art and International Cultural Property*, 42 INT'L LAW. 729, 734 (2008) (positing that the Princeton University Art Museum agreed to return four objects to Italy on the grounds that Italy would give formal title for seven other objects to Princeton); *see also* Cass Cliatt, *Princeton University Art Museum and Italy Sign Agreement Over Antiquities,* NEWS AT PRINCETON, Oct. 30, 2007, http://www.princeton.edu/main/news/archive/S19/37/62Q26index.xml?section=topstories,featured(establishing that Italy would receive certain items back from Princeton); *see also* Elisabetta Povoledo, *Princeton to Return Disputed Art to Italy*, N.Y. TIMES, Oct. 27, 2007, http://www.nytimes.com/2007/10/27/arts/design/27prin.html (noting that Princeton agreed to return certain items to Italy).

209. *See* Gerstenblith & Roussin, *supra* note 208, at 734 (stating that Princeton and Italy came to an agreement where Italy would continue to lend Princeton cultural objects and Princeton would keep four artifacts over four years); *see also* Cliatt, *supra* note 208 (affirming the agreement Italy made allowing Princeton to keep four objects over four years and to lend items to them in the future); *see also* Povoledo, *supra* note 208 (reporting some of the terms agreed upon between Italy and Princeton).

210. *See* Gerstenblith & Roussin, *supra* note 208, at 734 (stating that Princeton students will be given extensive researching opportunities); *see also* Cliatt, *supra* note 208 (showing that Princeton students will be allowed to research at Italian excavation sites); *see also* Povoledo, *supra* note 208 (maintaining that Italian excavation sites will be open to Princeton students for research).

211. *See* Gerstenblith, Lopez & Roussin, *supra* note 207, at 815 (acknowledging that 14 articles are being returned to Italy from the Cleveland Museum of Art); *see also* Erin Thompson, *The Relationship between Tax Deductions and the Market for Unprovenanced Antiquities*, 33 COLUM. J.L. & ARTS 241, 258 (2010) (noting that Italy demanded certain objects returned, and the Cleveland Museum obliged); *see also* Michael Norman, *Cleveland Museum of Art Strikes Deal With Italy to Return 14 Ancient Artworks*, PLAIN DEALER, Nov. 19, 2008, http://www.cleveland.com/arts/index.ssf/2008/11/cleveland_museum_of_art_1.html (announcing that 14 objects will be returned to Italy from the Cleveland Museum of Art).

212. *See* Thompson, *supra* note 211, at 258 (asserting that many of the items passed to the Cleveland Museum through the Medici network); *see also* Green, *supra* note 205, at 67–68 (illustrating how many antiquities Medici had came into contact with and sold illegally); *see also* Norman, *supra* note 211 (establishing that the list of Italy's demands originally consisted of more than 40 objects).

213. *See* Norman, *supra* note 211 (reporting that after 18 months of negotiations, the Cleveland Museum of Art agreed to return a number of Italian antiquities, including a 14th-century processional cross); *see also* Elisabetta Povoledo, *Pact Will Relocate Artifacts to Italy From Cleveland*, N.Y. TIMES, Nov. 19, 2008 (announcing that Museum had returned the ancient artworks to Italy, the rightful owner). *See generally* Green, *supra* note 205, at 65, 72 (noting that various looted Italian antiquities were traced to the Cleveland Museum of Art).

special exhibitions and to form a joint scientific commission to research certain objects in the museum's collection.[214]

Italy has made similar requests to other museums, such as the Toledo Museum of Art,[215] the Minneapolis Institute of Arts,[216] and the Virginia Museum of Fine Arts.[217] As in the cases of the other museums, evidence uncovered at the Medici warehouse tends to show that certain objects in these American collections were looted from Italy. Although there is a chance that seizures of this magnitude will happen routinely, even a one-time occurrence has amply demonstrated the prevalence of illegally obtained objects in foreign institutional collections. It is most likely for this reason that, for the first time, a private dealer has agreed to return Roman and Etruscan artifacts to Italy.[218] Likewise, suits for forfeiture of Italian cultural objects will continue to be brought, as in the most recent 2009 and ongoing case against the Getty regarding a bronze "Victorious Youth."[219]

---

214. *See* Aaron Kyle Briggs, *Symposium, Islamic Business and Commercial Law: Consequences of the Met-Italy Accord for the International Restitution of Cultural Property*, 7 CHI. J. INT'L L. 623, 637–38 (2007) (reporting that under the 2001 United States-Italy Memorandum of Understanding, both countries agreed to participate in long-term loans of archeological or artistic items of interest, joint excavation projects and academic exchanges); *see also* Norman, *supra* note 211 (revealing that the terms of the agreement provided for a renewable loan of Italian artworks of equal value to the Cleveland Museum of Art).

215. *See* David Gill & Christopher Chippindale, *From Malibu to Rome: Further Developments on the Return of Antiquities*, INT'L J. CULTURAL PROP. 205, 224 (2007) (informing that the Toledo museum also allegedly acquired art through Giacomo Medici vis-à-vis Robert Hecht and submitted requested documents to the U.S. Department of Justice); *see also* Stacey Falkoff, Note, *Mutually Beneficial Repatriation Agreements: Returning Cultural Patrimony, Perpetuating The Illicit Antiquities Market*, 16 J.L. & POL'Y 265, 274 (2007–8) (discussing potential repatriation claim that Italian government can bring against the Toledo Museum); *see* Christine L. Green, Comment, *Antiquities Trafficking in Modern Times: How Italian Skullduggery Will Affect United States Museums*, 14 VILL. SPORTS & ENT. L.J. 35, 65, 72 (2007) (informing that Italian prosecutors have traced some of the ancient artworks to the Toledo Museum Art).

216. *See* Gill & Chippindale, *supra* 215, at 224 (discussing that the Minneapolis Institute of the Arts was contacted by a Los Angeles Times Journalist about an object that appeared to have come from the Medici warehouse in Geneva); *see also* Falkoff, *supra* note 215, at 274 (suggesting that Italy might bring repatriation claims against the Minneapolis Museum of Art). *See generally* Green, *supra* note 215, at 72 (mentioning that the Minneapolis Institute of Arts owns an antique vase of questionable provenance).

217. *See* Patty Gerstenblith & Bonnie Czegledi, *International Cultural Property*, 40 INT'L LAW. 441, 449 (2006) (indicating the Virginia Museum of Fine Arts as one of the U.S. museums that are in possession of allegedly looted Italian ancient art); *see also* Falkoff, *supra* note 215, at 274–75 (notifying that Italy may bring repatriation claims against the Virginia Museum of Fine Arts). *See generally* Patty Gerstenblith & Lucille Roussin, *International Cultural Property*, 41 INT'L LAW. 613, 622 (2007) (stating that during 2006, several U.S. museums began returning Italian artifacts according to individual agreements reached between Italy and the institutions).

218. *See* Gerstenblith & Roussin, *supra* note 217, at 734 (referring to Jerome Eisenberg of Royal Athena Galleries in New York, who agreed to return eight Roman and Etruscan artifacts worth approximately $500,000); *see also* Briggs *supra* note 214, at 642–43 (analyzing the threat of criminal prosecution as one of the major reasons behind the art dealers' willingness to negotiate and return the artifacts); *see also* Ariel David, *Looted Art Returns to Italy From NY*, WASHINGTON POST, Nov. 6, 2007 (presenting the fact of another victory of the Italian officials in their fight against the illegal antiquities market).

219. *See* Alexander M. Ritchie, *Victorious Youth in Peril: Analyzing Arguments Used in Cultural Property Disputes to Resolve the Case of the Getty Bronze*, 9 PEPP. DISP. RESOL. L.J. 325, 363 (2009) (establishing that the statue is closely associated with the Getty Museum and is well known as the Getty Bronze); *see also* Jason Felch, *Italian Judge Orders Statue Be Seized From Getty*, L.A. TIMES, Feb. 12, 2010 (reporting that an Italian judge ruled against the Getty Museum and ordered the object returned to Italy); *see also* Elisabetta Povoledo, *Italy Presses Its Fight for a Statue at the Getty*, N.Y. TIMES, Jan. 16, 2010 (informing that Italian prosecutors have brought a case against the Getty for the return of the bronze statue).

Since the Met Agreement, other source countries have been successful in negotiating for the return of their cultural properties, such as the agreements between Greece and the Getty Museum,[220] and between Peru and Yale University.[221] Egypt has also requested that objects from the St. Louis Art Museum and the Altes Museum in Berlin, Germany be returned.[222]

Despite these achievements, some commentators have criticized the museum repatriation agreements,[223] maintaining that the cultural artifacts are better left in museums because of inadequate source country resources.[224] Others argue that "[b]y minimizing the inherent risks and padding any possible losses, [repatriation agreements] encourage museums to continue to

---

220. *See* Gerstenblith & Roussin, *supra* note 217 at 613, 622 (stating that the Getty Museum returned two artifacts to Greece in 2006); *see* Falkoff, *supra* note 215, at 266–67 (acknowledging that the Getty Museum voluntarily returned numerous Greek ancient artifacts); *see also* Press Release, Getty Museum, Hellenic Republic Ministry of Culture and the J. Paul Getty Trust Issue Joint Statement (Dec. 11, 2006), http://getty.edu/news/press/center/statement06_getty_greek_joint_ release_121106.html (last visited on March 11, 2010) (announcing that the Ministry of Culture agreed "to work with the Getty Museum to establish a broad framework for cultural cooperation in areas of common interest, including loans of important ancient artifacts and periodical exhibitions").

221. *See* Patty Gerstenblith & Lucille Roussin, *Art and International Cultural Property*, 42 INT'L LAW 729, 735 (2008) (discussing the agreement to return more than 4,000 objects between Yale and Peru, which was later criticized because just 400 objects were returned to Peru and Yale retained the remainder of the collection on a 99-year loan); *see* Falkoff, *supra* note 215, at 275 (stating that Yale University agreed to return thousands of antique artifacts that were illegally removed from Peru nearly a century ago); *see also* Molly L. McIntosh, Note, *Exploring Machu Picchu: An Analysis of the Legal and Ethical Issues Surrounding the Repatriation of Cultural Property*, 17 DUKE J. COMP. & INT'L L. 199, 215 (2006) (claiming that Yale bears an ethical duty to repatriate Peru's cultural property).

222. *See* JAMES B. CUNO, WHO OWNS ANTIQUITY?: MUSEUMS AND THE BATTLE OVER OUR ANCIENT HERITAGE 169 (2008) (reporting that the secretary general of Egypt's Supreme Council of Antiquities threatened to make life "hell" for the St. Louis Art Museum if certain Egyptian pieces were not returned to Egypt's Supreme Council of Antiquities by May 1, 2006); *see also* SHARON WAXMAN, LOOT: THE BATTLE OVER THE STOLEN TREASURES OF THE ANCIENT WORLD 60 (2008) (noting that Egyptian requests for the return of the bust of Nefertiti from the Berlin Museum dated back to the 1920s, and that still, in 2006, the German president refused to allow the artifact to leave Germany, claiming it was too fragile to be moved). *See generally* Falkoff, *supra* note 215, at 275 (stating that numerous repatriation claims have been brought from countries who feel entitled to custody of certain ancient works and who sometimes try to bargain for the artifacts by loaning other comparable pieces to the countries that currently house the desired pieces).

223. *See* WAXMAN, *supra* note 222, at 258 (mentioning, among others, Renfew's criticism of American repatriation as an example of the opposition and debate over looted antiquities); *see also* David Rudenstine, Symposium, *Cultural Property: The Hard Question of Repatriation: The Rightness and Utility of Voluntary Repatriation*, 19 CARDOZO ARTS & ENT. L.J. 69, 70 (2001) (suggesting repatriation of certain cultural pieces would be the morally right thing to do as it remedies what many believe to be an accidentally orphaned work of art). *See generally* Falkoff, *supra* note 215, at 265 (discussing repatriation agreements between countries, illustrating examples of success, failure, criticism, and debate between countries over cultural pieces of art).

224. *See* JOHN HENRY MERRYMAN & ALBERT EDWARD ELSEN, LAW, ETHICS, AND VISUAL ART 416 (2007) (opposing the view that the bust of Nefertiti should be returned to Egypt because it would be taken from the public eye and placed in isolation where no one could appreciate it); *see also* GAIL ANDERSON, REINVENTING THE MUSEUM: HISTORICAL AND CONTEMPORARY PERSPECTIVES ON THE PARADIGM SHIFT 277 (2004) (mentioning that for the sake of their preservation, most artifacts in museums are better left alone once they are in a climate-controlled, restricted-access location); *see also* Falkoff, *supra* note 215, at 278 (pointing out that not all aspects of repatriation are positive and that it may be detrimental to the artifact if it is moved from a location where it is well kept and in the care of a financially wealthier country).

acquire works of questionable provenance . . . [and] detract from the formation of a much-needed legal precedent."[225] However, the agreements encourage collaborative efforts for lending and research.[226] In addition, "[t]here is little chance that source nations will ever possess resources that rival those of market nations if their riches continue to be plundered, and they continue to be forced to spend funds on recovery that otherwise could be spent on preservation and exhibition."[227] Unfortunately, the major problem with replicating repatriation agreements is that they are usually not negotiated until it is believed that litigation will commence with a good chance that the museum will lose in court.[228]

---

225. *See* ROBERT W. PREUCEL & STEPHEN A. MROZOWSKI, CONTEMPORARY ARCHAEOLOGY IN THEORY: THE NEW PRAGMATISM 28 (2010) (illustrating an example of when the provenance of a piece of art was defended by a museum that purchased the work from a dealer claiming there was no evidence that the piece was ever smuggled illegally and later being subjected to scrutiny when proof surfaced that the piece had been looted); *see also* KATE FITZ GIBBON, WHO OWNS THE PAST?: CULTURAL POLICY, CULTURAL PROPERTY, AND THE LAW 64 (2005) (discussing a proposal that could generate a reduction in instances of questionable provenance if an owner were allowed three years from the date of purchase to investigate whether a piece of art had been stolen); *see also* Stacey Falkoff, Note, *Mutually Beneficial Repatriation Agreements: Returning Cultural Patrimony, Perpetuating The Illicit Antiquities Market*, 16 J.L. & POL'Y 288 (2007–8) (disapproving the possible results of repatriation agreements including the increased probability that museums will acquire works of ambiguous origin).

226. *See* BARBARA HOFFMAN, ART AND CULTURAL HERITAGE: LAW, POLICY, AND PRACTICE 50 (2006) (arguing that effective collaboration is vital for museums to preserve cultural heritage and respect the protection of cultural property); *see also* Falkoff, *supra* note 225, at 265, 277 (reflecting on the positive social aspects of repatriation agreements, including the implication of respect toward the agreeing country and potential for improved relations between the parties); *see also* Jane Warring, Comment, *Underground Debates: The Fundamental Differences of Opinion That Thwart UNESCO's Progress in Fighting the Illicit Trade in Cultural Property*, 19 EMORY INT'L L. REV. 227, 289 (2005) (mentioning how the hassle of judicial accommodation is saved by voluntary cooperation and private settlements). *But see* JOHN HENRY MERRYMAN, IMPERIALISM, ART AND RESTITUTION 209 (1996) (acknowledging the difficulty that descendents of aboriginals and tribes have had with repatriation agreements including indecisiveness over whether to return the objects to where they were found (usually underground) and the effect of the reburial on the community).

227. *See* Falkoff, *supra* note 225, at 278 (suggesting that in certain circumstances, it would benefit the artwork and the preservation of the cultural heritage if the artifact were to stay with the nation more financially able to care for it); *see also* Warring, *supra* note 226, at 243 (illustrating the economical impact that illicit trade of cultural property has on source nations as the quest for and protection of artifacts and treasures causes them to lose money and use valuable resources).

228. *See* Lisa Borodkin, *The Economics if Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 404 (1995) (giving examples of when litigation acted as a catalyst for the return of artworks such as Lydian Hoard and a sarcophagus from the Metropolitan Museum and the Brooklyn Museum, respectively.); *see also* Aaron Kyle Briggs, *Consequences of the Met-Italy Accord for the International Restitution of Cultural Property*, 7 CHI. J. INT'L L. 623, 635, 642 (2007) (noting that before the Met Agreement had been made, museums had been reluctant to consider repatriation when they could simply deny any wrongdoing); s*ee also* Patty Gerstenblith, *Controlling the International Art Market in Antiquities: Reducing the Harm, Preserving the Past*, 8 CHI J. INT'L L. 169, 177 (2007). *See generally* 19 U.S.C. §§ 2606–7 (prohibiting stolen pieces of art or cultural property from being imported into the United States and that a violation would subject the property to seizure and forfeiture.

C. Public Relations Campaign

A major source of Italy's success can be attributed to the generation of public awareness to its plight and its struggle for the return of its cultural heritage. Indeed, the issue was not discussed outside of academia until Italy began its negotiations with the Met over the Euphronios Krater.[229] Since then, the number of newspaper articles reporting on looted artifacts has substantially increased, more so since the Marion True trial, along with a continued influx of returned objects to Italy from American museums.[230] In addition, non-profit organizations have formed that are dedicated to art crimes and repatriation.[231] One organization even arranges tours of museums that possess objects alleged to have questionable provenances.[232] All of these efforts have led to a greater awareness by the general public regarding the illicit trade in cultural properties.[233]

---

229. *See* THE HAGUE ACADEMY OF INTERNATIONAL LAW, RECUEIL DES COURS 169 (1990) (recounting Italy's claim that the Euphronios Krater had been excavated by thieves in Tuscany); *see also* Paul Bator, *An Essay on International Trade in Art,* 34 STAN. L. REV. 275, 280 (1982) (referring to highly publicized scandals involving major museums including the Metropolitan Museum's acquisition of the Euphronios Krater, which was allegedly stolen from an Etruscan tomb and sold to the museum through an expatriate American living in Rome); *see also* Briggs, *supra* note 228, at 649 (discussing the Met's negotiations with Italy over the krater).

230. *See* Briggs, *supra* note 228, at 649 (noting an increase in New York Times articles on looted antiquities). *See generally* John O'Hagan & Clare McAndrew, *Restricting International Trade in the National Artistic Patrimony: Economic Reationale and Policy Instruments*, 10 INT'L J. CULTURAL PROP. 32, 48 (2001) (discussing heightened media attention to illicitly acquired museum pieces).

231. *See* Briggs, *supra* note 228, at 649 (noting that non-profit organizations have formed that are dedicated to protecting art and culture). *See, e.g.*, Constance Lowenthal, *The Role of IFAR and the Art Loss Register in the Repatriation of Cultural Property*, 1995 U.B.C. L. REV. 309 (1995) (illuminating the role played by non-profit organizations in protecting stolen artwork); *see e.g.*, Chiara Canzi, Politics of Art Recovery in Italy (May 2008) (unpublished M.A. thesis, University of Southern California) (on file with University of Southern California Library) (intimating that non-profit organizations exist that serve to protect and repatriate artwork).

232. *See* Briggs, *supra* 228, at 635, 649 (examining the issue that some objects in museums are of questionable provenances); *see also* Barbie Nadeau, *The Relics Return*, NEWSWEEK, Oct. 16, 2006, http://www.newsweek.com/id/44907 (alleging that some museums, such as this one in Italy, are displaying artifacts even though they are of questionable provenance); *see also* Maria Puente, *Stolen Art Met With Public Yawn*, USA TODAY, Mar. 30, 2006, http://www.usatoday.com/educate/college/arts/articles/20060409.htm (exposing stolen and forfeit artwork that exists and has been found at museums).

233. *See* Sydney M. Drum, Comment, *Deweerth v. Baldinger: Making New York a Haven for Stolen Art*, 64 N.Y.U. L. REV. 909, 912 (1989) (expounding how efforts have led to a greater awareness in the public regarding stolen artwork); *see also* 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, 432–33 (2001) (chronicling how international law is needed to combat the problem of art crime); *see also* Puente, *supra* note 232 (commenting that theft and forgery of artwork is becoming more well known by the public because of recent counterfeit items being discovered at museums.

In addition to the media coverage, Italy calls attention to its success by displaying returned objects in exhibitions open to the public and accompanied by new scholarly publications. Two major exhibitions were on display in 2009, the first of which was located in the Roman Colosseum, one of the most visually powerful and conspicuous survivors of antiquity. The didactic value of this exhibition cannot be underestimated because object and text were paired throughout the show. Ample text accompanied each object on display and it explained the history of Italian cultural property laws alongside the examples of returned objects.[234] The second major undertaking was in honor of the 40th anniversary of the formation of the *TPC*.[235] It consisted of three different exhibitions at three different venues, each taking a specific topical approach. The first segment, installed in Naples, featured objects recovered from clandestine excava-

234. *See* MINISTERO PER BENI E LA ATTIVITÀ CULTURALI, ROVINE E RINASCITA DELL'ARTE IN ITALIA, (Electa, 2008) (the major exhibition entitled *Ruins and the Rebirth of Art in Italy* that took place at the Colosseum in Rome, Italy from Oct. 3, 2008 to Feb. 15, 2009); *see also* Electa Exhibition Catalog Database, Rovine e Rinascite Dell'Arte in Italia. ROMA (Ruins and Rebirth of Art in Italy), Colosseo at 978883706547, *available at* http://www.electaweb.it/mostre/scheda/rovine-e-rinascite-dellarte-in-italia-roma-colosseo/it (referring to the catalog containing the description of the exhibition at the Colosseum).

235. *See* LISA DELLA VOLPE, L'ARMA PER L'ARTE: ANTOLOGIA DI MERAVIGLIE, (Livorno, 2009) (cataloging the art pieces displayed at the 2009 TPC commemorative exhibit); *see also* 1969–2009: 40 Anni di attività del Comando Carabinieri Tutela Patrimonio Culturale (Forty Years of the Italian Federal Police's Protection of National Culture), http://www.politicamentecorretto.com/index.php?news=11561 (last visited Mar. 12, 2010) (reporting on the art exhibition in celebration of the 40th anniversary of the formation of the Tutela Patrimonio Culturale (TPC)); *see also* Letter from Sebastian Heath, Ph.D., Vice-President for Professional Responsibilities, Archaeological Institute of America, to Madame Chairperson and Members of the Committee, Cultural Heritage Center (Nov. 2, 2009) (on file at Archaeological Institute of America) *available at* http://www.archaeological.org/ pdfs/AIAItaly.pdf (last visited on Mar. 12, 2010) (recounting the exhibition in 2009 that commemorated the 40th anniversary of the formation of the TPC).

tions;[236] the second, in Rome, highlighted the Italian maintenance of its common cultural heritage and the milestones in its history and art;[237] the third, in Florence, focused on the protection of ecclesiastical cultural property.[238] These exhibitions are in addition to many smaller ones throughout the country.[239]

Certainly the increased media attention only helps other countries with large scale looting problems.[240] With increased awareness comes accountability, and museums "will be forced to answer tough questions on provenance and acquisition policies, thus making the acquisition process more transparent, and pressuring museums to tighten their policies."[241]

---

236. *See* CRISTIANA MARCHETTI, L'ARMA PER L'ARTE: ARCHEOLOGIA CHE RITORNA (Sillabe ed., Livorno 2009) (cataloging the art exhibit held in 2009 in Palazzo Reale, Naples, Italy); *see also* MINISTERO PER BENI E LA ATTIVITÀ CULTURALI, L'ARMA PER L'ARTE: ARCHEOLOGIA CHE RITORNA, (Sillabe, 2009) (describing the exhibition that took place in Palazzo Reale in Naples, Italy from May 8 to Sept. 30, 2009); *see also* Press Release Packet, Ministero per i Bene e le Attivita Culturali, 1969–2009: 40 Anni di Attività del Comando Carabinieri Tutela Patrimonio Culturale (Mar. 11, 2009) *transcribed at* http://www.beniculturali.it/mibac/export/MiBAC/sitoMiBAC/Contenuti/Ministero/UfficioStampa/ComunicatiStampa/visualizza_asset.html_1165488558.html (announcing the 2009 exhibitions that will honor the *Tutela Patrimonio Culturale*'s formation).

237. *See* DELLA VOLPE, *supra* note 235 (cataloging the art pieces that were displayed at the 2009 Tutela Patrimonio Culturale commemorative exhibit); *see also* ANTOLOGIA DI MERAVIGLIE, *supra* note 235 (describing the exhibition that took place in Castel Sant'Angelo in Rome, Italy, from Sept. 23, 2009 through Jan. 30, 2010); *see also* Ministero per i Bene e le Attivita Culturali, *supra* note 239 (delineating each of the 2009 exhibitions that will honor the Tuleta Patrimonio Culturale's formation).

238. *See* MINISTERO PER BENI E LA ATTIVITÀ CULTURALI, L'ARMA PER L'ARTE: ASPETTI DEL SACRO RITROVATI (Livorno 2009) (ruminating on the exhibition that took place in Palazzo Pitti in Florence, Italy from Nov. 21, 2009–Apr. 6, 2010); *see also* MINISTERO PER I BENE E LE ATTIVITA CULTURALI, *supra* note 236 (noting the exhibition that took place in Pallazo Pitti and the other 2009 exhibitions that will honor the Tuleta Patrimonio Culturale's formation).

239. *See* Editorial, *Tomb Raiders' Marbles Feted in Rome*, ANSA (Jan. 5, 2010), http://ansa.it/web/notizie/collection/rubriche/english/2010/01/05/visualizza_new.html_1651630463.html (intimating that this exhibition will display the marble artwork recovered from tomb raiders); *see also* Ministero per i Bene e le Attivita Culturali, Il Segreto di Marmo. I Marmi Policromi di Ascoli Satriano (Dec. 14, 2009) *transcribed at* http://www.beniculturali.it/mibac/export/MiBAC/sitoMiBAC/Contenuti/Eventi/EventiInEvidenza/InItalia/visualizza_asset.html_1321822327.html (enumerating the pieces in the marble exhibition at Palazzo Massimo, Rome, Italy).

240. *See* Patty Gerstenblith, Symposium, *War And Peace: Art and Cultural Heritage Law in the 21*st *Century, March 4, 2008: Protecting Cultural Heritage in Armed Conflict: Looking Back, Looking Forward*, 7 CARDOZO PUB. L. POL'Y & ETHICS J. 677, 707 (2009) (noting the capacity of the global community to act to protect the cultural heritage of a country when there is sufficient public media attention); *see also* Aaron Kyle Briggs, Comment, *Consequences of the Met-Italy Accord for the International Restitution of Cultural Property*, 7 CHI. J. INT'L L. 623, 649 (2007) (linking the increase in New York Times articles regarding looted antiquities to the international negotiations concerning Italy's krater); *see also* Joshua M. Zelig, Note, *Recovering Iraq's Cultural Property: What Can Be Done to Prevent Illicit Trafficking*, 31 BROOKLYN J. INT'L L. 289, 323 (2005) (hoping that the increased media attention on Iraq's looting problems could provide an opportunity to address the problems in a constructive way).

241. *See* John O'Hagan & Clare McAndrew, *Restricting International Trade in the National Artistic Patrimony: Economic Rationale and Policy Instruments*, 10 INT'L J. CULTURAL PROP. 32, 48 (2001) (acknowledging that heightened media attention to museum-acquisition controversies has pressured various museums to refrain from illicit transactions); *see also* Briggs, *supra* note 240, at 649 (explaining that increased media attention will stimulate more probing inquiries by museum patrons, increasing the transparency of the acquisition process and thereby pressuring museums to tighten their own policies); *see also* Christine L. Green, Comment, *Antiquities Trafficking in Modern Times: How Italian Skullduggery Will Affect United States Museums*, 14 VILL. SPORTS & ENT. L.J. 35, 50 (2007) (arguing that in the last 15 years, because of Mediterranean government laws concerning antiquities, many U.S. museums have been forced to tighten their acquisition policies).

VI. Applicability of the Italian Cultural Property Initiative as a Model for Other Countries

In analyzing the Italian cultural property model, it is apparent that it is not one or two methods but the combination of strategies that has proved successful for Italy in reclaiming the cultural properties removed from its territories. However, the Italian cultural model is not easily replicable, especially for countries that most need to protect their cultural treasures.

A. National Legal Strategies

Local laws alone do not account for the success of a cultural property protection initiative. Many countries with art trafficking problems have highly retentive cultural property laws, including laws that vest ownership in the State as well as export regulating controls.[242] However, with the exception of Turkey,[243] these countries have not been as successful as Italy. Most countries are not inclined to recognize foreign export laws absent an international agreement, and such laws are often considered to be overly retentive in opposition to the concepts of the free market.

Litigation can be extremely time consuming and costly,[244] with difficult evidentiary burdens to meet and no guarantee of favorable outcomes. For example, in *Peru v. Johnson*,[245] the

242. *See* RALPH E. LERNER & JUDITH BRESLER, ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS, AND ARTISTS 553 (2nd ed. 1992) (noting that Turkey, a country with highly retentive antiquities laws, encountered problems in the 1960s, when artifacts were excavated from burial mounds and exported); *see also* John Alan Cohan, *An Examination of Archaeological Ethics and the Repatriation Movement Respecting Cultural Property (Part Two)*, 28 ENVIRONS ENVTL. L. & POL'Y J. 1, 55 (2004) (attributing the fueling of the black market in looted antiquities in countries with highly retentive laws to those very same laws); *see also* John Henry Merryman, *The Nation and the Object*, 3 INT'L J. OF CULTURAL PROP. 61, 63 (1994) (remarking that despite countries' implementing more retentive laws and attempts to impose their export controls on antiquities, trafficking problems remain).

243. *See* Republic of Turkey v. The Metropolitan Museum of Art, 762 F. Supp. 44, 46–47 (S.D.N.Y. 1990) (denying defendant's motion for summary judgment, finding that Turkish law was violated when artifacts excavated from burial mounds in Turkey were exported to the United States); *see also* Republic of Turkey v. OKS Partners, 797 F. Supp. 64, 70 (D. Mass. 1992) (denying defendant's motion to dismiss, finding that Turkish law was violated when rare, ancient Greek and Lycian coins were unearthed in Turkey and removed from the country); *see also* Laurence A. Marschall, Book Review, *Loot: The Battle Over the Stolen Treasures of the Ancient World*, 118 NATURAL HISTORY 36 (2009) (commenting that while a number holding of major museums are in question, in 1993 Turkey won the return of looted Lydian artifacts); *see also* Alexandra Peers, *New York Museum to Return Works of Art to Turkey*, WALL ST. J., September 23, 1993 at C-25 (reporting that the Metropolitan Museum of Art in New York is returning 200 ancient artifacts to Turkey in response to Turkey's claim that they were stolen).

244. *See* Monica Dugot, *Litigating The Holocaust in U.S. Courts: Perspectives on the Process and Its Aftermath: International Law Weekend Panel on Litigating the Holocaust in U.S. Courts*, 12 ILSA J. INT'L & COMP L. 389, 390 (2006) (criticizing the high emotional and financial costs of litigating the return of property looted by the Nazis); *see also* Stacey Falkoff, Note & Comment, *Mutually Beneficial Repatriation Agreements: Returning Cultural Patrimony, Perpetuating the Illicit Antiquities Market*, 16 J.L. & POL'Y 265, 285 (2007) (stating that the costs of repatriation litigation are "astronomical" and such action should be taken only as a last resort).

245. *See* Peru v. Johnson, 720 F. Supp. 810, 812 (C.D. Cal. 1989) (commenting that "the plaintiff must overcome legal and factual burdens that are heavy indeed" in order to claim title to artifacts alleged to have been converted by the U.S. Customs Service).

court found that Peru did not meet its burden of proving that the objects came from Peru, given that such artifacts from pre-Columbian culture can also be found in Bolivia and Ecuador.[246] The court also held that Peru's 1822 export laws, which nationalized both discovered and unexcavated cultural patrimony, did not establish ownership over the objects and, as such, the objects were not considered stolen under the National Stolen Property Act.[247]

Finally, bringing cases within a country's own borders is certainly easier to do when charging the local tomb raider but more difficult to do the farther down the chain where the object eventually ends up. The mere fact that the Marion True case is the first of its kind demonstrates the difficulty in bringing such cases, such as meeting the difficult scienter requirement and obtaining adequate evidence. Indeed, Italy was fortunate to uncover the evidence in the Medici warehouse; such evidence will be available in other source countries, making it unlikely that the prosecution of foreigners in source countries' courts will become commonplace.

B. International Legal Strategies

While international conventions, such as the UNESCO and UNIDROIT Conventions, can be extremely useful, the applicability of the conventions depends on whether countries accede to or ratify them.[248] The UNESCO Convention has a significant number of signatories but has been criticized for being ineffectual and missing key components such as enforcement

246. *See id.* (concluding that because the artifacts at issue are similar to ones found in Bolivia and Ecuador, the archaeological theory that they were indeed found in Peru is dislodged).

247. *See id.* (declining to take the 1822 laws into consideration due to, *inter alia*, expert testimony to the effect that the first officially recognized law concerning artifacts was not passed until 1929).

248. *See* Jordan C. Kahn, *WATER: II. 1997 United Nations Convention on the Law of Non-Navigational Uses of International Watercourses*, 1997 COLO. J. INT'L ENVTL. L. Y.B. 178, 184–85 (1997) (expressing that a U.N. Convention becomes effective on a country only when that country signs or ratifies it); *see also* Merryman, *supra* note 242, at 63 (stressing that the UNESCO Convention is all but a failure because of the lack of major signatories); *see also* Sue J. Park, *The Cultural Property Regime in Italy: An Industrialized Source Nation's Difficulties in Retaining and Recovering Its Antiquities*, 23 U. PA. J. INT'L ECON. L. 931, 947 (2002) (asserting that international conventions bind only those who have acceded to or ratified them).

mechanisms, and not providing remedies for unexcavated archeological sites.[249] The UNIDROIT Convention attempted to rectify these limitations but, at this point, it has very few signatories, and notably few market countries.[250]

Bilateral agreements are another useful tool for source countries, especially Italy, which has agreements with the United States and Switzerland, two of the most important market countries.[251] However, this is not a possible feat for all source countries. Switzerland has just one

249. *See* United Nations Educational, Scientific and Cultural Organization, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property art. 1, November 14, 1970, 823 U.N.T.S. 231 (outlining that cultural property includes "property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and . . . (c) products of archaeological excavations [including regular and clandestine] or of archaeological discoveries"); *see also* Ian M. Goldrich, *Balancing the Need for Repatriation of Illegally Removed Cultural Property With the Interests of Bona Fide Purchasers*, 23 FORDHAM INT'L L.J. 118, 137–38 (1999) (explaining that the convention protects only those items specified by the member state, which excludes property that is undiscovered or unexcavated); *see also* Park, *supra* note 248 at 947–48 (2002) (commenting that the UNESCO convention protects only "museums, public monuments, or similar institutions" and does not contain procedures to resolve disputes); *see also* United Nations Educational, Scientific and Cultural Organization, *States Parties, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, November 14, 1970, http://portal.unesco.org/la/convention.asp? KO=13039 &language=E&order=alpha (listing the 119 countries that have accepted, ratified or provided notice of succession of the UNESCO convention).

250. *See* International Organization for the Unification of Private Law, Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322 (providing that "[f]or the purposes of this Convention, a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place" and "[a] claim under Chapter II and a request under Chapter III may be brought before the courts or other competent authorities of the Contracting State where the cultural object is located, in addition to the courts or other competent authorities otherwise having jurisdiction under the rules in force in Contracting States"); *see also* Stephanie Doyal, *Implementing the UNIDROIT Convention on Cultural Property Into Domestic Law*, 39 COLUM. J. TRANSNAT'L L. 657, 662–63 (2000) (stating that the UNIDROIT Convention has been ratified by mostly source country signatories as opposed to only a few market country signatories, which has inhibited its possible success); *see also* Goldrich, *supra* note 249, at 139–40 (1999) (declaring that the unsatisfactory results of the UNESCO Convention led the organization to request UNIDROIT to develop a supplementary convention to remedy some of its shortcomings).

251. *See* Agreement Between the Government of the United States of America and the Government of the Republic of Italy Concerning the Imposition of Import Restrictions on Categories of Archaeological Material Representing the Pre-Classical, Classical, and Imperial Roman Periods of Italy, United States-Italy, Jan. 19, 2001, 40 I.L.M. 1031 (agreeing to restrict the importation of certain artifacts into the United States); *see also* Accordo Tra il Consiglio Federale Svizzero e il Governo della Repubblica Italiana Sull'Importazione e il Rimpatrio di Beni Culturali, Italy-Switz., 27 Aprile 2008, RU 2008 2023, *translated in* Agreement Between the Swiss Federal Council of the Swiss Confederation and the Government of the Republic of Italy on the Import and Repatriation of Cultural Property, Italy-Switz., April 27, 2008, http://www.bak.admin.ch/themen/kulturguetertransfer/01985/index.html?lang=en (proclaiming that the parties will seek to preserve the cultural property interests of both countries); *see also* Patty Gerstenblith & Lucille Roussin, *International Cultural Property*, 41 INT'L LAW. 613, 614–15 (2007) (outlining several bilateral agreements that restrict the international trade of certain cultural materials, including one between the United States and Italy and another between Italy and Switzerland).

bilateral agreement, which is with Italy.[252] In addition, while the United States has been forthcoming with bilateral agreements and has agreements with 12 countries, it is unlikely that the Unities States will create such agreements with all countries. These agreements are subject to strict review for renewal and require a concerted effort on the part of the source country to combat the illicit trade—something that may pose a considerable problem for source countries that lack those necessary resources.

C. Non-legal Strategies

Italy's specialized police force has been instrumental for its cultural property model, through investigating and obtaining critical evidence leading to civil sanctions, penal charges and pressure for museums to form repatriation agreements.[253] Indeed, the TPC has been so successful that they have been summoned to other countries, such as Iraq, to help with training and investigative techniques.[254] However, an organization such as this requires considerable resources many countries do not have. In addition, the *TPC*, in some form, has been in existence for 40 years and has had time to modify and change its techniques.

---

252. *See* Accordo Tra il Consiglio Federale Svizzero e il Governo della Republica Italiana Sull'Importazione e il Rimpatrio di Beni Culturali, Italy-Switz., 27 Aprile 2008, RU 2008 2023, *translated in* Agreement Between the Swiss Federal Council of the Swiss Confederation and the Government of the Republic of Italy on the Import and Repatriation of Cultural Property, Italy-Switz., April 27, 2008, http://www.bak.admin.ch/themen/kulturgueter transfer/ 01985/index.html?lang=en (proclaiming that the parties will seek to preserve the cultural property interests of both countries); *see also* Patty Gerstenblith & Lucille Roussin, *International Cultural Property*, 41 INT'L L. 613, 615 (2007) (revealing that Switzerland's first bilateral agreement since its implementation of the UNESCO Convention in 2005 was with Italy). *But see* Patty Gerstenblith, *Protecting Cultural Heritage in Armed Conflict*, 7 CARDOZO PUB. L. POL'Y & ETHICS J. 677, 696 (2008) (remarking that Switzerland has also entered into bilateral agreements with Peru and Greece, although the agreements have not yet entered into effect).

253. *See* Andrew Slayman, *Recent Cases of Repatriation of Antiquities to Italy From the United States*, 7 INT'L J. OF CULTURAL PROP. 456, 456–60 (1998) (enumerating several illustrations of the Carabinieri's retrieval of cultural items from the United States); *see also* Aaron Kyle Briggs, Comment, *Consequences of the Met-Italy Accord for the International Restitution of Cultural Property*, 7 CHI. J. INT'L L. 623, 644 (2006) (discussing the Carabinieri's successful recovery of the Euphronios Krater from the Metropolitan Museum of Art as a result of the considerable evidence collected by the Italian police); *see also* Park, *supra* note 248, at 939 (establishing that Italy has implemented laws and created two specialized police forces to investigate art-related cases).

254. *See* LAWRENCE ROTHFIELD, ANTIQUITIES UNDER SIEGE: CULTURAL HERITAGE PROTECTION AFTER THE IRAQ WAR 136 (2008) (stating that Italy's Carabinieri frequently assist in UNESCO initiatives, including the protection of cultural property in Iraq); *see also* Gaetano Palumbo, *The State of Iraq's Cultural Heritage in the Aftermath of the 2003 War*, 12 BROWN J. WORLD AFF. 225, 229–30 (2005) (commenting that Italian forces patrolled areas where frequent looting of cultural sites occurred to prevent removal of property); *see also* Briggs, *supra* note 253, at 636 (reasoning that the TPC's reputation for successfully retrieving cultural property has led many countries to request their assistance).

Voluntary repatriation agreements are a good method for countries to reclaim cultural objects, and Italy has made such agreements with six museums since 2006, amassing almost 100 important cultural objects. Other countries have also been successful in this area, and the agreements benefit both parties. However, it is unlikely that a museum will return an object until litigation is threatened, and losing the object is likely. Resources are indispensable not only for the litigation of the case but also in acquiring enough evidence. This is demonstrated by the sheer influence of the evidence uncovered from the Medici investigations, which has been the driving force behind all of Italy's recent repatriation agreements.[255]

Finally, a public relations campaign whereby a country uses the media and other events to generate public awareness to reclaim its cultural properties can be very successful. Certainly, Italy's public relations campaign, especially with respect to Marion True and the Getty, has brought the illicit art market into a new light for the general public and has led to the return of many objects without legal action. Other countries have also launched similar campaigns, such as Greece's request for the Elgin Marbles in England, Iraq's request for the Ishtar Gate in Germany, and Iraq's plea for help in maintaining its archeological sites since the Gulf Wars.[256] While a campaign will not always lead to success, it highlights the issues and will hopefully lead to more properties being returned to source countries, while discouraging the black market.

---

255. *See* Paige S. Goodwin, *Mapping the Limits of Repatriable Cultural Heritage: A Case Study of Stolen Flemish Art in French Museums*, 157 U. PA. L. REV. 673, 689 (2008) (showing how the Medici investigation helped Italian claims for repatriation of the Euphronios Krater); *see also* Briggs, *supra* note 253, at 647–48 (breaking down the reasons why evidence4 in the Medici investigation was crucial to Italy's ability to negotiate with the Met); *see also* Gerstenblith & Roussin, *supra* note 252, at 613, 621–23 (describing Italy's repatriation agreements in 2006 following the Medici investigation).

256. *See* JEANETTE GREENFIELD, THE RETURN OF CULTURAL TREASURES 42, 91 (1991) (illustrating in great detail the Elgin Marbles, a part of the original Greek Pantheon); *see also* FRED S. KLEINER, GARDNER'S ART THROUGH THE AGES 33 (34 ed. 2010) (summarizing the Ishtar Gate's history and features); *see also* Kirstin E. Peterson, *Cultural Apocalypse Now: The Loss of the Iraq Museum and a New Proposal for the Wartime Protection of Museums*,16 MINN. J. INT'L L. 163, 185–87 (2007) (noting all the deficiencies of current repatriation agreements as applied to the Iraq Museum's losses).

VII. Conclusion

While Italy has succeeded in combining national, international and non-legal strategies in the protection of its cultural artifacts, it is unlikely that this specific model can be replicated by many source countries, notably because Italy has a long history of developing cultural property laws to protect its rich heritage, a process that has benefitted greatly by the tremendous resources Italy has invested in cultural property.

However, this model does not necessarily need to be exactly replicated for other source countries to be successful. Italy has, in effect, paved the way for countries with fewer resources to accomplish more with less, by collaterally taking advantage of the current momentum, particularly in the forum of global media, which contributes to the rising awareness of the issues of illicit trade in art and artifacts. Likewise, the new understanding of cultural property issues will encourage dealers and collectors to exercise more caution. Indeed this seems to be happening already at least at the institutional level where museums' acquisition policies are evolving towards change. Although it has been suggested in the past, it is perhaps time to revisit the notion of an international tribunal to solve cultural property disputes,[257] taking advantage of Italy's momentum, and directing it toward a more comprehensive and global initiative.

---

257. As early as the 1980s, in view of the apparent inadequacies of the UNESCO convention, Ann P. Prunty proposed the idea of an international tribunal. *See* Ann P. Prunty, *Toward Establishing an International Tribunal for the Settlement of Cultural Property Disputes: How to Keep Greece From Losing Its Marbles*, 72 GEO L. J. 1155 (1984). *See also* John Alan Cohan, *An Examination of Archaeological Ethics and the Repatriation Movement Respecting Cultural Property*, 28 ENVIRONS ENVTL. L. & POL'Y 1, 99–112 (2004); Edward M. Cottrell, *Keeping the Barbarians Outside the Gate: Toward a Comprehensive International Agreement Protecting Cultural Property*, 9 CHI. J. INT'L L. 627, 647–59 (2009); Roger W. Mastalir, *A Proposal for Protecting the "Cultural" and "Property" Aspects of Cultural Property Under International Law*, 16 FORDHAM INT'L L.J. 1033, 1067–68 (1993); Jason C. Roberts, Comment, *The Protection of Indigenous Populations' Cultural Property in Peru, Mexico and the United States*, 4 TULSA J. COMP. & INT'L L. 327, 358–60 (1997); Evangelos I. Gegas, Note & Comment, *International Arbitration and the Resolution of Cultural Property Disputes: Navigating the Stormy Waters Surrounding Cultural Property*, 13 OHIO ST. J. ON DISP. RESOL. 129 151–66 1997; Mehmet Komurcu, *Cultural Heritage Endangered by Large Dams and Its Protection Under International Law*, 20 WIS. INT'L L.J. 233, 286–90 (2002).

The "I" in Indigenous: Enforcing Individual Rights Guarantees in an Indigenous Group Rights Context

Rebecca Gross*

I. Introduction

On November 4, 2007, in the rural foothills of Mexico, a small town of about 1,500 people held what seemed like a routine local election for town mayor.[1] One of the candidates, Eufrosina Cruz, 27, did not fare so well, for the entirety of the ballots cast in her favor were deemed invalid.[2] The all-male town board had a very good reason for disqualifying Cruz: she was a woman, and women were not allowed to stand for or vote in public elections.[3]

Such blatant discrimination may seem contrary in a country whose government the Inter-American Commission on Human Rights has praised for making substantial progress in protecting human rights guarantees.[4] However, this is no ordinary Mexican town; it is ruled by local customary law, which often differs from the national law. Mexico has granted significant

1. *See* Mark Stevenson, *In Mexico, a Gain for Indian Civil Rights Is a Loss for Some Women,* MINN. DAILY, Jan. 28, 2008, at 1 (relating the facts of the election held in the rural Mexican-Indian town of Santa Maria Qiegolani).

2. *See* Stevenson, *supra* note 1 (discussing the election held in the rural Mexican-Indian town of Santa Maria Qiegolani).

3. *See* Stevenson, *supra* note 1 (reporting the town's refusal to let women vote in the elections based on long- held cultural traditions).

4. *See* INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, INTER-AMERICAN YEARBOOK ON HUMAN RIGHTS, 1542 (1996) (finding the Commission on Human Rights met with readiness in Mexico to improve adherence to the American Convention on Human Rights); *see also* KLAAS DYKMANN, HUMAN RIGHTS POLICY OF THE OAS IN LATIN AMERICA: PHILANTHROPIC ENDEAVORS OR THE EXPLOITATION OF AN IDEAL? 161 (2004) (noting that while Mexico has been a supporter of nationalism, it has always supported human rights organizations); *see also* LAWRENCE J. LEBLANC, THE OAS AND THE PROMOTION AND PROTECTION OF HUMAN RIGHTS 23 (1977) (asserting that Mexico took a reservationist approach on a convention for human rights despite its good records on human rights in general).

* **J.D., University of Maine School of Law, 2009; taught English in Japan for five years.**

autonomy to its indigenous populations, allowing them to rule under a parallel system of government.[5]

Legal recognition of indigenous customary law in Mexico is a manifestation of the international principle of the right of "self-determination of peoples."[6] Originally conceived as a tool to facilitate the process of decolonization under a 1960 United Nations resolution,[7] the principle of self-determination was interpreted narrowly by the international community to mean the will of the peoples' "right to form separate states," within the context of resisting external occupation.[8] However, over the last 40 years, as human rights instruments have expanded in scope from protecting individual rights to include protecting the collective rights of indigenous communities across the globe, self-determination has, in some cases, become synonymous with autonomy from state control for indigenous people.[9] For example, the

---

5. *See* MAXINE MOLYNEUX & SHAHRASHOUB RAZAVI, GENDER JUSTICE, DEVELOPMENT AND RIGHTS 384 (2002) (demonstrating the effect of pro-indigenous legislation in Mexico which recognized the rights of indigenous peoples to practice under their own culture and norms); *see also* RACHEL SIEDER, MULTICULTURALISM IN LATIN AMERICA INDIGENOUS RIGHTS, DIVERSITY AND DEMOCRACY 191 (2002) (describing Mexico's recognition of indigenous autonomy in response to the *indigenismo*—a movement which took a stance against exploitation of indigenous people focused in Mexico and Guatemala). *See generally* Mireya Maritza Pena Guzman, *The Emerging System of International Protection of Indigenous Peoples' Rights: Sacred and the Profane: Second Annual Symposium in Honor of the First Americans and Indigenous People Around the World,* 9 ST. THOMAS L. REV. 251, 259 (1996) (describing the various committees established in Mexico which further and ensure indigenous autonomy in Mexico and other Latin countries).

6. *See* JAMES ANAYA, INDIGENOUS PEOPLE IN INTERNATIONAL LAW 111–12 (2004) (claiming self-determination is becoming inextricably linked to the legal recognition of indigenous people globally as a right to form distinct political and cultural groups); *see also* ARACELY BURGUETE CAL Y MAYOR, INDIGENOUS AUTONOMY IN MEXICO 84–85 (2002) (noting that the concept of autonomy is closely related to the new definitions of self-determination); *see also* Curtis G. Berkey, *International Law and Domestic Courts: Enhancing Self-Determination for Indigenous Peoples,* 5 HARV. HUM. RTS. J. 81, 81 (1992) (demonstrating the ways indigenous people are employing the principles of self-determination to preserve their historical, cultural, and political heritage by establishing parallel governmental systems within their territorial regions).

7. *See* Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, at XVXIX, U.N. Doc. A/4684 (Dec. 14, 1960) (purporting that self-determination is a right of all people); *see also* HURST HANNUM, AUTONOMY, SOVEREIGNTY AND SELF-DETERMINATION 27–28 (1990) (positing that the principle of self-determination was a natural corollary to the nationalism which lead to demands for independence by many colonies and nations); *see also* Yehuda Z. Blum, *Reflections on the Changing Concept of Self-Determination*, 10 ISR. L. REV. 509, 511–12 (1975) (noting that the concept of self-determination was used as a tool by the United Nations to allow people to freely determine their own political and national identity).

8. *See* Advisory Opinion on the Western Sahara, 1975 I.C.J. 12 (Oct. 16) (finding that G.A. Resolution 1514 in the "decolonization of Western Sahara" was not affected by territorial claims by Morocco and Mauritania, based on the principle of self-determination through the genuine free will of the people of the Territory); *see also* Rupert Emerson, *Self-Determination*, 65 AM. J. INT'L. L. 459, 463–64 (1971) (highlighting the two definitions of self-determination, the first being the narrow definition which was understood at the close of World War I and World War II to facilitate independence from external authority); *see also* Benedict Kingsbury, *Claims by Non-State Groups in International Law,* 25 CORNELL INT'L L.J. 481, 486–488 (1992), *reprinted in* W. MICHAEL REISMAN ET AL., INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 263 (2004) (listing five principal categories in which state claims to separate statehood were generally favored).

9. *See* HURST HANNUM & EILEEN BABBITT, NEGOTIATING SELF-DETERMINATION 75–77 (2006) (asserting that the concept of self-determination goes beyond the colonial context); *see also* CHRISTIAN TOMUSCHAT, MODERN LAW OF SELF DETERMINATION 102–03 (1993) (noting the debate on the expansion of the principle of self-determination under recent UNESCO proposals); *see also* ALEXANDRA XANTHAKI, INDIGENOUS RIGHTS AND UNITED NATIONS STANDARDS: SELF-DETERMINATION, CULTURE AND LAND 110–11 (2007) (stating that in recent years more nations link self-determination to the protection of indigenous autonomy).

recently enacted Declaration on the Rights of Indigenous Peoples[10] makes this right of autonomy its primary objective.[11] Consequently, the trend toward legal recognition of varying types of indigenous peoples' collective right of autonomy by many nations has created a manifest conflict of rights within the body of human rights law.

If taken to include this new concept of indigenous peoples' right of autonomy from state control, namely the right to observe separate indigenous customary law within a sovereign state, human rights law in the aggregate would place a dual burden on subscribing sovereign nations. Nations must simultaneously protect cultural and political rights of their indigenous communities while adhering to the principle of protecting fundamental individual human rights, which begs the question: in the event of a conflict, which rights take precedence?

Most scholarship on indigenous peoples' legal rights has ignored the twofold legal and moral problem in advocating for collective autonomy for indigenous communities.[12] First, autonomous rule by indigenous groups has, in some countries, created de facto states within states, which effectively shields indigenous communities from any obligation to protect the fundamental rights of their individual members who remain particularly vulnerable to the will of the collective group.[13] Second, states cannot meet both the legal obligations of upholding their duties to protect the rights of individual citizens and the duty to refrain from interfering

---

10. *See* United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) (setting out the particular aims of recognizing and affirming the rights of indigenous peoples).

11. *See* Allen Buchanan, *The Role of Collective Rights in the Theory of Indigenous Peoples' Rights*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 89, 91 (1993) (bringing to the fore the importance of the right of self-determination to indigenous peoples and how collective rights have surfaced as an important group of rights in the debate, but specifically noting that self-determination has been a continuous issue since its inception); *see also* Raidza Torres, *The Rights of Indigenous Populations: The Emerging International Norm*, 16 YALE J. INT'L. L. 127, 141–42 (1991) (explaining the differences between autonomy and full political autonomy of indigenous peoples). *See generally* Elsa Stamatopoulou, *Indigenous Peoples and the United Nations: Human Rights as a Developing Dynamic*, 16 HUM. RTS. Q. 58, 60–61, 70 (concluding that within the scope of international human rights, indigenous groups have been granted a right of self-determination which allows them to decide issues that are peculiar to their cultural practices).

12. *See* Helen Quane, *The Rights of Indigenous Peoples and the Development Process*, 27 HUM. RTS. Q. 652, 654–55 (2005) (surmising that the rights of indigenous peoples are currently in a fluid state in the international community due to the fact that these sets of rights are not concrete and thus present difficult problems in international law); *see also* Siegfried Wiessner, *Rights and Status of Indigenous People: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 127 (1999), *reprinted in* W. MICHAEL REISMAN ET AL., INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 278–82 (2004) (emphasizing the primacy of cultural preservation through greater rights of indigenous autonomy); *see also* Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660, 685–86 (1990) (acknowledging that forums have begun formulating solutions for situations where countries that promulgate state sovereignty deny the "collective cultural rights of the indigenous peoples").

13. *See* INTERNATIONAL HUMAN RIGHTS IN THE 21ST CENTURY: PROTECTING THE RIGHTS OF GROUPS 79 (Gene M. Lyons & James Mayall eds., 2003) (recognizing that in some instances, an assertion of collective rights can result in "potentially dangerous authority" over individual members); *see also* Douglas Sanders, *Collective Rights*, 13 HUM. RTS. Q. 368, 369–70 (1991) (emphasizing the gross disparity between individual rights and collective rights, arguing that collective rights force individual group members to become subordinate and promote only the rights of the group). *But see* S. James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21 ARIZ. J. INT'L & COMP. L. 48, 49 (2004) (arguing that in some instances these de facto states provide "continuity and cohesion" for the members of their indigenous communities).

with the collective right of indigenous groups to govern by separate customary law if those customary laws regarding fundamental individual rights conflict with national laws.[14]

In this article, I will describe how the Declaration on Human Rights and its covenants evolved the concept of self-determination as a means to protect certain human rights of the individual against state abuses, and not, as some claim, as a means for indigenous groups to assert collective group rights. However, I provide examples of how existing human rights conventions may be used to protect minorities who wish to assert human rights violation claims collectively as a group. Second, I will analyze how the right of self-determination has been used as a tool to support the new principle of separate autonomous rule by indigenous groups within sovereign nations, and the subsequent political and legal tension that such expansion of rights has caused, especially for individual members within the group context. I use Mexico's formal recognition of self-rule by customary law for certain indigenous communities, and specifically a case analysis of Eufrosina Cruz's legal battles, as a backdrop to analyze the hierarchy of human rights within the Mexican legal frame work, which has incorporated international treaty obligations. Finally, I attempt to show that indigenous territorial dispute claims brought to the Inter-American Commission on Human Rights have been resolved under existing G.A. Resolutions on the rights of indigenous peoples, and that the Declaration on the Rights of Indigenous Peoples is both unnecessary and may serve to negatively impact future individual human rights claims. I will conclude by suggesting that certain fundamental individual rights must supersede the indigenous peoples' collective right to self-determination, and without a clear and practical enforcement mechanism for protecting these fundamental individual rights by national governments, the personal rights of indigenous members will remain effectively subordinated against the group.

---

14. *See* R. Aída Hernández Castillo, *National Law and Indigenous Customary Law: The Struggle for Justice of Indigenous Women in Chiapas, Mexico*, *in* GENDER JUSTICE, DEVELOPMENT AND RIGHTS 384, 385–87 (Maxine Molyneux & Shahra Razavi eds., 2002) (illustrating how customary laws perpetuating gender inequalities conflict with national laws which can give women greater participation in the political realm); *see also* Robert N. Clinton, *The Rights of Indigenous Peoples as Collective Group Rights*, 32 ARIZ. L. REV. 739, 744–45 (1990) (noting the case of Native Americans in the United States and debating the disparity between their customary laws and those of the larger society). *But see* Raja Devasish Roy, *Challenges for Juridical Pluralism and Customary Laws of Indigenous Peoples: The Case of the Chittagong Hill Tracts, Bangladesh*, 21 ARIZ. J. INT'L & COMP. L. 113, 139–41 (2004) (recognizing that customary laws do not necessarily conflict with those of the larger society).

II. Background on the Development of Human Rights Law

A. From the Rights of the Nation to the Rights of the People

Traditionally, and even today, the broad concept of "human rights" has been viewed within the hierarchy of international legal order (originally coined the "Law of Nations") as rights concerned with "personal sovereignty" to be regarded as "falling within exclusive domestic jurisdiction of the sovereign States."[15] Since the Peace of Westphalia in 1648, the Law of Nations had been built on the nation-state system, with individuals treated as "objects of international law," rather than as subjects,[16] meaning that states held almost "unlimited discretion" over the treatment of its citizens.[17] One of the fundamental principles under the Law of Nations was the concept of national sovereignty,[18] a principle described in the *act of state doctrine*: "[E]very sovereign State is bound to respect the independence of every other sovereign

15. *See* HURST HANNUM & RICHARD B. LILLICH, INTERNATIONAL HUMAN RIGHTS 32–33 (1995) (setting out the jurisdictional parameters concerned in the law of Human Rights and issues of sovereignty); *see also* PAUL GORDON LAUREN, THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN 5, 9 (2003) (enunciating the novel idea that international human rights evolved from social responsibility of ancient societies and from religious theories of a universal moral imperative and obligation to others); *see also* PAUL SIEGHART, THE INTERNATIONAL LAW OF HUMAN RIGHTS 13, 16 (1983) (discussing the precursors of modern international law and formulating the notion that there are three main arms of international human rights law: global, regional and subsidiary which ascribe certain obligations of state parties to their citizens).

16. *See* HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTIONS 14–15 (Richard Pierre Claude & Burns H. Weston eds., 1992) (explaining that the Treaty of Westphalia recognized the equal rights of both Protestants and Roman Catholics, a novel concept during 17th century Europe); *see also* JAMES SUMMERS, PEOPLES AND INTERNATIONAL LAW: HOW NATIONALISM AND SELF-DETERMINATION SHAPE A CONTEMPORARY LAW OF NATIONS 88–89 (2007) (recognizing that the Treaty of Westphalia marked a "watershed" development in history because, not only did it recognize state sovereignty, but it also laid the foundation for international law among other fundamental doctrines); *see also* David Weissbrodt, *Non-State Entities and Human Rights Within the Context of the Nation-State in the 21st Century*, *in* THE ROLE OF THE NATION-STATE IN THE 21ST CENTURY: HUMAN RIGHTS, INTERNATIONAL ORGANISATIONS AND FOREIGN POLICY: ESSAYS IN HONOR OF PETER BAEHR 175, 176 (Monique Castermans-Holleman, Fred Van Hoof & Jacqueline Smith eds., 1998) (reiterating that with the onset of the Treaty of Westphalia, individual rights became secondary to state sovereignty which garnered more protection in international law).

17. *See* PHILIP C. JESSUP, A MODERN LAW OF NATIONS: AN INTRODUCTION 8–9 (1968) (underlining the point that one of the fundamental pitfalls of international law is that the individual is seen as an "object" rather than a "subject" in international law); *see also* Robert A. Dahl, *A Democratic Dilemma: System Effectiveness versus Citizen Participation*, 109 POL. SCI. Q. 23, 25–26 (1994) (suggesting that city-states and individual citizens' autonomy became subsumed in the larger development of the national state, and as a result individual autonomy was curtailed). *See generally* J. Samuel Barkin & Bruce Cronin, *The State and the Nation: Changing Norms and the Rules of Sovereignty in International Relations*, 48 INT'L ORG. 107, 110, 112 (1994) (reiterating the problems with sovereignty and the issues that confront the specific citizens of nation-states).

18. *See* MICHAEL ROSS FOWLER & JULIE MARIE BUNCK, LAW, POWER AND THE SOVEREIGN STATE: THE EVOLUTION AND APPLICATION OF THE CONCEPT OF SOVEREIGNTY 11–13 (1995) (denoting that the concept of national sovereignty is synonymous with "domestic supremacy" and freedom from external interference); *see also* Jack Goldsmith, *Sovereignty, International Relations Theory, and International Law*, 52 STAN. L. REV. 959, 959–60 (2000) (reviewing STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY (1999)) (highlighting the fact that the principle of national sovereignty "defines nationhood"); *see also* Kofi A. Annan, *Two Concepts of Sovereignty*, THE ECONOMIST, Sept. 18, 1999 (rationalizing that the concept of national sovereignty includes both state sovereignty and individual sovereignty, meaning that although states are independent, the citizens are endowed with essential freedoms).

State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."[19]

However, prompted by the "tragic events accompanying the Second World War," the international legal order ascribed to the concept of human rights a more universal character, one that transcended State sovereignty rights.[20] Confronted by the horrific events of the Holocaust, the international community, recognizing the need for stronger legal protections for human rights, adopted the United Nations Charter (the "Charter").[21]

B. Self-Determination: Minority Rights in an Individual Rights Context

The very cornerstone of the Charter is the principle of self-determination for "all peoples,"[22] and this principle is necessarily understood to mean an individually held right. The Charter's mission, as stated in Article 1, is "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples,"[23] which implies

19. *See* Timberland Lumber Co. v. Bank of Am., N.T. & S.A., 549 F.2d 597, 605 (9th Cir. 1976) (quoting Underhill v. Hernandez, 168 U.S. 250, 252 (1897)), *reprinted in* W. MICHAEL REISMAN ET AL., INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 1398 (2004) (clarifying the notion of state sovereignty via the act of state doctrine to explain the reluctance of nations to interfere with the domestic affairs of other nations).

20. *See* MARK GIBNEY, INTERNATIONAL HUMAN RIGHTS LAW: RETURNING TO UNIVERSAL PRINCIPLES 1 (2008) (asserting that the greatest advancement for human rights occurred following WWII when human rights violations became matters of international concern); *see also* WARWICK MCKEAN, EQUALITY AND DISCRIMINATION UNDER INTERNATIONAL LAW 47 (1983) (differentiating the limited reach of post–Word War I treaties with the expanded reach of post–World War II peace agreements, whereby the latter extended human rights protections to *all* persons in signatory states and not just to nationals); *see also* Tom Farer, *Human Rights Before the Second World War, in* INTERNATIONAL HUMAN RIGHTS 35 (Richard B. Lillich & Hurt Hannum eds., Aspen Publishers 3d ed. 1995) (explaining that a primary goal of the U.N. Charter was to create a comprehensive organization to extend and protect basic human rights for *all* individuals from state malfeasance); *see also* Robert D. Sloane, *Outrealizing Relativism: A Liberal Defense of the University of International Human Rights,* 34 VAND. J. TRANSNAT'L L. 527, 532 (2001) (attributing the weakened conception of state sovereignty in the international law arena to the human rights movement following World War II).

21. *See* JOHN S. GIBSON, INTERNATIONAL ORGANIZATIONS, CONSTITUTIONAL LAW, AND HUMAN RIGHTS 30 (1991) (positing that the drafters of the U.N. Charter learned from the failure of the League of Nations that human rights could only be protected on an international scale through international organization and cooperation); *see also* WIKTOR OSIATYNSKI, HUMAN RIGHTS AND THEIR LIMITS 15 (2009) (acknowledging that the international community included human rights language in the U.N. Charter in order to prevent another Hitler-esque figure from committing atrocities in the name of his country); *see also* Nuala Mole, *International Law, the Individual, and A.W. Brian Simpson's Contribution to the Defence of Human Rights, in* HUMAN RIGHTS AND LEGAL HISTORY 13, 17 (Katherine O'Donovan & Gerry R. Rubin eds., 2000) (asserting that Europe adopted various human rights conventions in order to prohibit human rights violators from using state sovereignty as a means of escaping accountability).

22. *See* East Timor (Port. v. Austl.), 1995 I.C.J. 4, at 29–30 (holding that the principle of self-determination for all peoples, enshrined in the U.N. Charter and I.C.J jurisprudence, is an essential principle of modern international law); *see also* Sara E. Allgood, *United Nations Human Rights "Entitlements": The Right to Development Analyzed Within the Application of the Right to Self-Determination,* 31 GA. J. INT'L & COMP. L. 321, 327–30 (2003) (noting that while the concept of self-determination historically only applied to countries, the U.N. Charter re-characterized it as a fundamental human right); *see also* Julie Mertus, *The Imprint of Kosovo on the Law of Humanitarian Intervention*, 6 ILSA J. INT'L & COMP. L 527, 534-536 (2000) (declaring universal respect for self-determination to be a central purpose of the U.N. Charter).

23. *See* U.N. Charter art. 1, para. 2 (declaring that one of the primary purposes of the United Nations is to foster international peace through the recognition of equal rights and self-determination of peoples).

that equality between individuals must be the basis on which the right to self-determination is applied.[24]

Article 1 of the International Covenant on Economic, Social and Cultural Rights ("ICESCR") implies that the right of "self-determination" is exercised in the form of an individual right: "All people have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[25]

Additionally, with the adoption of the Universal Declaration of Human Rights, and the later adoption of the "twin treaties," the International Covenant on Civil and Political Rights ("ICCPR") and the ICESCR, new duties attached to the state to protect the rights of the individual;[26] Article 3 of the ICESCR states: "The state parties to the present covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present covenant."[27]

Despite certain individual protections having a "collective" characteristic, like the "freedom of association," and the "right to practice one's religion" (both rights found in the ICCPR

---

24. *See* Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, Advisory Opinion, 2009 I.C.J. 54 (Apr. 1) (proclaiming that self-determination cannot be a legitimate basis for seceding from a political sovereign that respects the principle of equal rights); *see also* Pius L. Okoronkwo, *Self-Determination and the Legality of Biafra's Secession Under International Law,* 25 LOY. L.A. INT'L & COMP. L. REV. 63, 76–77 (2002) (citing to statements of the rapporteur to the U.N. Charter drafting commission to establish the symbiotic nature of the principles of equality and self-determination in achieving the international peace and security). *See generally* Halim Moris, *Self-Determination: An Affirmative Right or Mere Rhetoric?,* 4 ILSA J. INT'L & COMP. L. 201, 210–211 (1997) (articulating the practical and theoretical limitations to internal self-determination while noting that, at a minimum, it requires a representative government based on equal rights).

25. *See* International Covenant on Economic, Social, and Cultural Rights, art. 1, para. 1, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360 (implying that the right to self-determination has an individualistic element that empowers people to pursue the rights enshrined in the Covenant).

26. *See* GIBSON, *supra* note 21, at 44 (detailing how the principles enunciated in the UDHR led to the creation of the "twin treaties," thereby obligating signatories to respect new codified international norms, such as crimes of genocide and crimes of discrimination); *see also* Symposium, *The Responsibility of Non-State Actors for the Realization of Human Rights,* 30 HAMLINE J. PUB. L. & POL'Y 33, 42–43 (2008) (explaining that the UDHR merely enumerated various human rights without placing any burdens on states while the ICCPR and the ICESCR created the means for implementing and enforcing those rights). *See generally* Richard Wilner, *Nationalist Movements and the Middle East Peace Process: Exercises in Self-Determination,* 1 U.C. DAVIS J. INT'L L. & POL'Y 297, 306–308 (1995) (acknowledging that while self-determination in the ICCPR and ICESCR is necessary in order to practically effectuate the rights therein, the concept remains ambiguous).

27. *See* International Covenant on Economic, Social, and Cultural Rights, *supra* note 25, at art. 3 (declaring that ICESCR signatories are obligated to guarantee their citizens the equal enjoyment of all the rights of the Covenant).

and the ICESCR), these human rights instruments in the aggregate retain an individualistic character.[28] "Group" rights—"rights that pertain to and are exercised by the collectivity as such"—[29] are delineated only in Article 23 of ICCPR[30] and Article 10 of the ICESCR to the extent of recognizing that "the family is the natural and fundamental group unit of society."[31]

Finally, under Article 27 of the ICCPR, minority groups are given the right to enjoy their "own culture, to profess and to practice their own religion, or to use their own language," where the majority culture differs.[32] However, these are still the rights of the individual and such rights may not be subordinated to collective rights of a group.[33] In an essay describing the

---

28. *See* INTERNATIONAL HUMAN RIGHTS IN CONTEXT 153 (Henry J. Steiner et al. eds., 2008) (explaining that collective rights are rarely asserted in the ICCPR or UDHR and that these treaties provide rights to the individual); *see also* Russel Lawrence Barsh, *Indigenous Peoples and the UN Commission on Human Rights: A Case of the Immovable Object and the Irresistible Force*, 18 HUM. RTS. Q. 782, 795 (1996) (explaining that although some rights are enjoyed by individuals in their communities with other members of their groups, human rights in the United States are primarily "individual in character"); *see also* Douglas Sanders, *Collective Rights*, 13 HUM. RTS. Q. 368, 376 (1991) (stating that Article 27 of the ICCPR was written in terms of the rights of the individual, instead of minorities as a collective, due to state resistance to grant minorities collective rights).

29. *See* International Covenant on Civil and Political Rights, art. 23, opened for signature Dec. 16, 1966, S. Treaty Doc. 95–20 (1978), 999 U.N.T.S. 171 (providing that families are entitled to protection because they are the "fundamental group unit of society"); *see also* INTERNATIONAL HUMAN RIGHTS IN CONTEXT, *supra* note 28, at 153 (explaining that some of the individual rights provided under the ICCPR and the UDHR are inherently group rights in that they need to be exercised by the individual in a community with others); *see also* April Adell, *Fear of Persecution for Opposition to Violations of the International Human Right to Found a Family as a Legal Entitlement to Asylum for Chinese Refugees*, 24 HOFSTRA L. REV. 789, 793–94 (1996) (stating that article 23 of the ICCPR identifies the family unit as a "fundamental group" entitled to society's protection).

30. *See* International Covenant on Civil and Political Rights, *supra* note 29 (providing that the family unit is a "group" entitled to protection by society).

31. *See* International Covenant on Economic, Social and Cultural Rights, *supra* note 25, at art. 10 (providing that the greatest protection should be afforded to the family unit, as it is the "fundamental group unit of society" primarily because it is in charge of caring for the children).

32. *See* International Covenant on Civil and Political Rights, *supra* note 29, at art. 27 (providing that minority groups shall not be impeded from practicing their religion, speaking their native language or taking part in the enjoyment of their culture).

33. *See* SARAH PRITCHARD, INDIGENOUS PEOPLES, THE UNITED NATIONS AND HUMAN RIGHTS 113–14 (1998) (explaining that article 27 of the ICCPR provides rights to individuals belonging to minority groups and not to the minority groups themselves); *see also* Barsh, *supra* note 28, at 796 (stating that although some states have acknowledged that collective rights exist, others believe that these rights should remain "subordinate to individual rights"); *see also* Richard H. Thompson, *Ethnic Minorities and the Case for Collective Rights*, 99 AM. ANTHROPOLOGIST 786, 791 (1997) (suggesting that article 27 of the ICCPR provides collective rights indirectly, providing rights to individuals in a group instead).

tension arising from conflicting group interests in multiethnic Guatemala, Trygve Bendiksby describes a potential problem resulting from the current human rights model:

> [W]hile "general human rights put clear limits on the way in which a state can treat its minority groups . . . the protection of minorities is principally within a state's domestic jurisdiction. Where the state is reluctant or unwilling to establish or respect mechanisms for protecting the rights of minorities, minority groups have recourse to few legal or institutional alternatives for protection."[34]

Nevertheless, Bendiksby seemingly ignores the protection Article 27 of the ICCPR affords minority groups.[35] In the *Lubicon Lake Band Case*, a case concerning ethnic minorities in Canada,[36] the Human Rights Committee said that the right to preservation of one's culture under Article 27 of the ICCPR could be claimed collectively by a group of people who are similarly affected.[37]

III. The Rights of Indigenous People:[38] Beyond Traditional Human Rights Law

Unlike the traditional concerns of national minorities in protecting their language, religion, and culture, "assertion of indigenous rights has always involved claims to resources, territory, and governmental powers," or in essence, claims to the right of "self-determination."[39]

---

34. *See* Trygve Bendiksby, *Minority Rights, Justice and Ethnicity in Guatemala,* HUM. RTS. DEV. Y.B., 1999/2000, 163, at 166 (stating that human rights laws dictate the way in which a state can treat minorities, and that the protection of minorities is mainly within the state's power).

35. *See* Geoff Gilbert, *Religion-Nationalist Minorities and the Development of Minority Rights Law*, 25 REV. INT'L STUD. 389, 390 (1999) (stating that, unlike the Universal Declaration of Human Rights, 1948, Article 27 of the ICCPR provides for minority rights); *see also* Hurst Hannum, *Contemporary Developments in the International Protection of the Rights of Minorities*, 66 NOTRE DAME L. REV. 1431, 1436 (1990-1991) (pointing out that Article 27 of the ICCPR addresses the rights of minorities); *see also* Benedict Kingsbury, *Claims by Non-State Groups in International Law,* 25 CORNELL INT'L L.J. 481, 489 (1992), *reprinted in* W. MICHAEL REISMAN ET AL., INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 262 (2004) (explaining that Article 27 is a useful tool of minority groups wishing to assert their collectively held cultural rights because it expressly gives rights to minorities).

36. See Report of the Human Rights Committee, 45 U.N. GAOR Supp. (No.40) at 2, U.N. Doc. A/45/40 (1990) (describing the Lubicon Lake Band as an autonomous Cree Indian band residing in Alberta, Canada that practices its own religion, maintains its traditional culture and has its own political system).

37. *See* PRITCHARD, *supra* note 33, at 79–80 (holding by the ICCPR that Article 27 allows minority groups to bring collective claims where the groups can show that the individuals are similarly affected).

38. *See* Convention Concerning Indigenous and Tribal Peoples in Independent Countries art. 1(b), May 9, 1991, 169 U.N.T.S. 1 (defining the term "Indigenous Peoples" under the ILO Convention as people that inhabited a country at the time of the establishment of present state boundaries and now retain some or all of their own institutions).

39. See ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES *55*–57 (1995) (asserting that under Article 1, indigenous people have the right to self determination which includes claims to resources, territory and power); *see also* HURST HANNUM & RICHARD B. LILLICH, INTERNATIONAL HUMAN RIGHTS 333 (1995) (indicating that indigenous rights has always involved claims to resources, territory and governmental power); *see also* Federico Lenzerni, *Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples,* 42 Tex. Int'l L.J. 155, 163–64 (2006) (noting that indigenous peoples often insist that they should be recognized as a state because of their claims to certain resources, territory and power).

Much controversy has surrounded the inclusion of 'self-determination of peoples' in Article 1 of the U.N. Charter, and included again in Articles 1 of both the ICCPR and the ICESCR.[40] The acuteness of this controversy can be found in the long-standing "conflict of authority-often debated in terms of sovereignty- between national and indigenous governments."[41]

Notwithstanding the holding in *Western Sahara* on "colonial peoples'" right to self-determination,[42] the customary international law principle of self-determination in itself does not grant the right of secession from the nation, as the Canadian Supreme Court held in the *Secession of Quebec*.[43] The Court in *Quebec* noted the U.N. General Assembly's clarification on this point in its "Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, stating: "Continue to reaffirm the right of self-determination of all peoples […]. This shall not be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States…." [44]

Despite the continued controversy surrounding the meaning of "self-determination," indigenous leaders have insisted that the creation of new states is not a primary objective, but rather, the recognition of a right of "high level of autonomy based on the fundamental values of 'co-existence with nature' and 'peace through negotiation,'" is the object of focus.[45] Some lead-

40. *See* PRITCHARD, *supra* note 33, at 79 (providing that the Human Rights Committee says that self-determination is a collective right and cannot be claimed by an individual)*; see also* Christopher J. Fromherz, *Indigenous Peoples' Courts: Egalitarian Juridical Pluralism, Self Determination, and the UN Declaration on the Rights of Indigenous Peoples*, 156 U. PA. L. REV. 1341, 1356–63 (2008) (indicating that there was a lot of controversy surrounding the inclusion of self determination in Article 1 of the U.N. Charter since there was no clear definition of the term); *see also* Jennifer P. Harris, Article, *Kosovo: An Application of the Principle of Self-Determination: Second Article in a Two Part Series on the Kosovo Crisis*, 6 HUM. RTS. BR. 28 (1999) (concluding that there has been a lot of controversy over who has the right to self-determination).

41. *See* HANNUM & LILLICH, *supra* note 39 (maintaining that there was a lot of conflict between state governments and indigenous people over sovereignty because of a conflict in authority); *see also* Peter Manus, *Sovereignty, Self Determination, and Environment-Based Cultures: The Emerging Voice of Indigenous Peoples in International Law,* 23 WIS. INT'L L.J. 553, 560–62 (2005) (illustrating the disagreements in nation-state courts over granting indigenous people sovereignty); *see also* Siegfried Wiessner, *Rights and Status of Indigenous People: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 93 (1999), *reprinted in* W. MICHAEL REISMAN ET AL., INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE (2004) (explaining how nation-states were wary of granting indigenous people sovereignty because a federal structure has not been established).

42. *See* Advisory Opinion on the Western Sahara, 1975 I.C.J. 12 (Oct. 16) (granting indigenous people of Western Sahara the right of self determination after a territorial dispute arose).

43. See Reference Re Secession of Quebec [1998] 2 S.C.R. 217 (Can.) (insisting that self-determination does not allow secession except for extreme circumstances).

44. *See id.* (acknowledging self-determination but denying that indigenous people are allowed to take any action that would destroy a country's unity); see also Fromherz, *supra* note 40 (reaffirming indigenous peoples' right to both internal and external self determination but rejecting their right to secession when minorities are not severely suffering from oppression or discrimination).

45. *See* U.N. Press Release, Representatives of World's Indigenous Peoples Address Assembly at Start of International Year, No. GA/8450 (U.N., New York, NY), Dec. 10, 1992 at 5–6 (expressing the idea of the Ainu of Japan that forming new states is not the goal of the country but insists that peace through negotiations is the main objective); *see also* LAWRENCE WATTERS, INDIGENOUS PEOPLES, THE ENVIRONMENT AND LAW 20 (2004) (showing how secession is a last resort that should only be used if it is impossible to negotiate adequate terms for self determination with the existing government); *see also* Russel Lawrence Barsh, *Indigenous Peoples in the 1990s: From Object to Subject of International Law?,* 7 HARV. HUM. RTS. J. 33, 40–41 (1994) (recognizing that despite the controversy surrounding the meaning of self-determination indigenous leaders of Japan and Greenland want autonomy and peace).

ers have gone further in elucidating their desires for indigenous peoples, like Nobel laureate Rigoberta Menchu in his description of what form the exercise of self-determination should take:

> [T]he right to self-determination is undeniably the right to full political representation, without intermediaries, or limitations of any kind. This representation must be expressed at the local, regional, and national levels, in each country with which indigenous peoples have an historical relationship. Without losing sight of the necessity of national unity, but with mutual respect.[46]

However, incommensurate with Menchu's definition of "self-determination," the right to indigenous representation is not an "actionable right" under Article 25 of the ICCPR, according to the U.N. Human Rights Committee in its 1990 decision in *Mikmaq Tribal Society v. Canada.*[47] *In Mikmaq* the Committee found that Canada did not violate the Mikmaq Tribal Society's Article 25 right to participate in public affairs when the Canadian government failed to invite the Society to constitutional conferences on Aboriginal matters.[48]

A. Collective Land Ownership and Political Rights

One year after *Mikmaq* was decided, the G.A. adopted the International Labor Organization ("ILO") Convention No. 169, which explicitly recognizes "indigenous peoples'" collective rights to internal decision-making, representation in national decision-making, and control of development."[49] The rights of indigenous people enumerated in the Convention appear to echo Menchu's version of self-determination. The Convention not only requires that indige-

---

46. *See* Barsh, *supra* note 45, at 40–41 (outlining that, in countries with indigenous peoples, self-determination requires unlimited direct representation across all levels of government while maintaining a degree of unity and respect).

47. *See* Mikmaq Tribal Society v. Canada, Judgment, U.N. Human Rights Comm., No. 205, at 8, U.N. Doc. CCPR/C/43/D/205 (1990) (holding that Canada did not violate Article 25 of the ICCPR because Canada's conduct did not infringe on the rights of representation and participation of the Mikmaq Tribal Society); *see also* SARAH PRITCHARD, INDIGENOUS PEOPLES, THE UNITED NATIONS AND HUMAN RIGHTS 193 (1998) (noting that the Human Rights Commission found that Canada's actions did not violate the Mikmaq Tribal Society's participatory rights because the Society's right to participation and representation had not been unreasonably restricted).

48. *See* Pritchard, *supra* note 33 (explaining that the Committee found that Canada's failure to invite representatives of the Mikmaq Tribal Society did not violate Article 25 of the ICCPR); *see also* Benedict Kingsbury, *First Amendment Liberalism as Global Legal Architecture: Ascriptive Groups and the Problems of the Liberal NGO Model of International Civil Society*, 3 CHI. J. INT'L L. 183, 186–87 n.11 (2002) (commenting that Article 25 of the ICCPR does not allow affected groups to choose the means of their participation).

49. *See* Convention Concerning Indigenous and Tribal People in Independent Countries art. 6, June 27, 1989, ILO NO. 169, 28 ILM 1382 (holding that indigenous peoples should have adequate means of political representation and participation via legislative or administrative measures, representative institutions, and means of free participation); *see also* Barsh, *supra* note 45 (affirming that ILO Convention No. 169 confirms the right of indigenous peoples to control internal affairs, the right to representation in external affairs, and the right to oversee internal development).

nous peoples be "consulted whenever laws or administrative regulations affecting them are considered," Article 14 of the Convention goes further to recognize "the rights of ownership and possession of its peoples concerned over the lands which they traditionally occupy."[50]

Although only a limited number of countries have ratified the Convention,[51] indigenous claims to territorial rights have gained legitimacy under international law.[52] Worldwide, indigenous groups have reported environmental and cultural exploitation of their lands directly or indirectly by their national governments.[53] For example, Ecuador opened titled land belonging to the "Huaorani hunter-gatherers" to oil companies, whose drilling activity generated "millions of gallons of toxic waste" and caused numerous oil spills.[54] The U.N. Human Rights Commission noted the violent invasions of twelve indigenous Indian tribes' lands within the Amazon Basin by "lumberjacks, gold-panners, fishermen, large landowners, and mining com-

50. *See* Convention Concerning Indigenous and Tribal People in Independent Countries, *supra* note 49, at art. 14 (recognizing that indigenous peoples have rights over land they have traditionally occupied); *see also* HURST HANNUM & RICHARD B. LILLICH, INTERNATIONAL HUMAN RIGHTS 333 (1995) (claiming that indigenous peoples must be consulted when laws or regulations affect particular indigenous interests such as the rights of ownership and possession of traditional lands).

51. *See* U.S. RATIFICATION OF THE INTERNATIONAL COVENANTS ON HUMAN RIGHTS 3 (1993) (explaining that the United States often acts unilaterally or bilaterally in the area of human rights and does not act in concert with international institutions); *see also* Amelia Cook & Jeremy Sarkin, *Who Is Indigenous?: Indigenous Rights Globally, in Africa, and Among the San in Botswana*, 18 TUL. J. INT'L & COMP. L. 93, 96–97 (2009) (emphasizing that, despite an indigenous population, Botswana has not ratified Convention No. 169); *see also* Siegfried Wiessner, *United Nations Declaration on the Rights of Indigenous Peoples*, U.N. AUDIOVISUAL LIBR. INT'L L. 2 (2009), *available at* http://untreaty.un.org/cod/avl/pdf/ha/ga_61-295/ga_61-295_e.pdf (noting that only twenty countries, mainly just countries from Latin America, have ratified Convention No. 169 as of July 2009).

52. *See* S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 70 (2004) (maintaining that international bodies, such as the United Nations, recognize indigenous land claims through the development of international norms of indigenous land rights and the interpretation of human rights treaties); *see also* Danielle M. Conway, *Indigenizing Intellectual Property Law: Customary Law, Legal Pluralism, and the Protection of Indigenous Peoples' Rights, Identity, and Resources*, 15 TEX. WESLEYAN L. REV. 207, 220–21 (2009) (remarking that the United Nations and other international organizations have supported indigenous claims to land and resources); *see also* Eric Dannenmaier, *Beyond Indigenous Property Rights: Exploring the Emergence of a Distinctive Connection Doctrine*, 86 WASH. U. L.R. 53, 69 (2008) (indicating that international institutions have helped strengthen indigenous land claims by demonstrating a greater concern for general indigenous rights).

53. *See* ANAYA, *supra* note 52, at 218 (claiming that indigenous peoples have been subjected to state sanctioned oppression and exploitation); *see also* Angelique A. Eagle, *Re-Establishing the Sisseton-Wahpeton Oyate's Reservation Boundaries: Building a Legal Rationale From Current International* Law, 29 AM. INDIAN L. REV. 239, 258 (2004–05) (alleging that the United States has historically exploited the resources of indigenous peoples by outlawing native practices and restricting native involvement in both external and internal affairs); *see also* Dinah Shelton, *Environmental Rights and Brazil's Obligation in the Inter-American Human Rights System*, 40 GEO. WASH. INT'L L. REV. 733, 749 (2009) (stating that the Inter-American Commission and Court have heard many cases concerning exploitation of lands and resources of indigenous peoples).

54. *See* Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 537 (S.D.N.Y. 2001) (stating that citizens of Peru and Ecuador brought a claim alleging Texaco caused environmental damage to both nations); *see also* James A.S. Musisi, *Cultural Diversity and Environment: The Case for Indigenous* Peoples, *in* INDIGENOUS PEOPLES, THE ENVIRONMENT AND THE LAW 10 (2004) (asserting that Ecuador allowed oil companies to drill on the ancestral lands of the Huaorani, resulting in million of gallons of toxic waste and oil spills); *see also* Judith Kimerling, *Transnational Operations, Bi-National Injustice: ChevronTexco and Indigenous Huaorani and Kichwa in the Amazon Rainforest in Ecuador*, 31 AM. INDIAN L. REV. 445, 446 (2006–07) (examining the negative social and ecological effects of oil drilling on indigenous peoples in Ecuador).

panies," perpetuated by the Brazilian government through both direct action and non-action,[55] and a report by the "U.N. Centre on Transnational Corporations" noted how the pollution caused by "radioactive ore spoils" left on a Navajo reservation by the Kerr-McGee Company caused a severe breakdown in the tribe's "traditional subsistence activities which contribute to proper nutrition and cohesion of the family unit."[56]

Within this territorial and environmental context, agreements between nations and their indigenous peoples to the right of self-determination have taken many forms.[57] In 1997 the Australian government formed the "Native Title Agreement" with the "Opevale and Dingaal" aboriginal clan, demarcating internal land boundaries,[58] and the government of New Zealand

55. *See* U.N. Econ. & Soc. Council [ECOSCO], Sub–Comm'n on Human Rights on Human Rights & Indigenous Issues, *Report of the Special Rapporteur: The Situation of Human Rights and Fundamental Freedoms of Indigenous People*, ¶ 6, U.N. Doc. E/CN.4/2002/97/Add.1 (March 6, 2002) (*prepared by* Rodolfo Stavenhagen) (discussing how economic incentives have brought settlers and loggers into the Amazon Basin which threatens the survival of the indigenous people living there); *see also* Musisi, *supra* note 54, at 10-11 (listing the industries that have invaded indigenous lands by their pursuit of Brazilian government projects); *see also* Samara D. Anderson, Note, *Colonialism Continues: A Comparative Analysis of the United States and Brazil's Exploitations of Indigenous Peoples' Forest Resources*, 27 VT. L. REV. 959, 1012–13 (2003) (addressing the Brazilian government's role in the invasion of indigenous peoples' lands by various groups).

56. *See* Musisi, *supra* note 54, at 11 (attributing the destruction of the Navajo's traditional subsistence activities to multinational corporations, such as the Kerr-McGee Company); *see also* Leonard W. Schroeter, *Human Experimentation, The Hanford Nuclear Site, and Judgment at Nuremberg*, 31 GONZ. L. REV. 147, 225–26 (1996) (noting that the radioactive pollution caused by Kerr-McGee killed livestock and gave people lung cancer on Navajo reservations); *see also* Lisa Young, *What Price Progress? Uranium Production on Indian Lands in the San Juan Basin*, 9 AMER. INDIAN L. REV. 1, 34–35 (1981) (revealing that uranium pollution has eroded traditional Indian culture by contaminating water and killing livestock).

57. See Brenda L. Gunn, *Protecting Indigenous Peoples' Lands: Making Room for the Application of Indigenous Peoples' Laws Within the Canadian Legal System*, 6 INDIGENOUS L.J. 31, 56 (2007) (indicating that indigenous peoples' claims to self-determination occur in many forms, including international treaties, and agreements between indigenous tribes and states, corporations and various non-governmental organizations); *see also* Peter Manus, *Sovereignty, Self-Determination, and Environment–Based Cultures: The Emerging Voice of Indigenous Peoples in International Law*, 23 WIS. INT'L L.J. 553, 570–71 (2005) (citing the evolution of indigenous peoples as causing the definition of self-determination to evolve to include human rights, the environment and technology); *see also* Patrick Cleveland, Comment, *Apposition of Recent U.S. Supreme Court Decisions Regarding Tribal Sovereignty and International Indigenous Rights Declarations*, 12 PACE INT'L L. REV. 397, 410 (2000) (acknowledging that various arrangements between states and indigenous peoples include issues like human rights, self-determination, the environment and territorial rights).

58. *See* Western Australia v. Smith (2000), 163 F.L.R. 32, 54; Smith on Behalf of Gnaala Karla Booja People v. Western Australia (2001) 108 F.C.R. 442, 443 (recognizing the purpose of the Native Title Act is to protect native title and require negotiations between the government and indigenous tribes when indigenous rights are at issue); *see also* Peter D. Rush*, Derrida/America: The Present State of America's Europe: Law: Surviving Common Law: Silence and the Violence Internal to the Legal Sign*, 27 CARDOZO L. REV. 753, 760, 766 n.20 (2005) (stressing the need for a Native Title Agreement between different aboriginal clans because common law has ceased to protect such clans); *see also* Maureen Tehan, *Critique and Comment: A Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the Native Title Act*, 27 MELB. U. L.REV. 523, 565–69 (2003) (reviewing several native title agreements between indigenous tribes and states).

passed the Maori Fisheries Act of 2004 to allocate and transfer fisheries to different Maori tribal bodies. [59]

Indigenous peoples' right to know has legal force under customary international law. In Nicaragua, the Awas Tingni Mayagna community won an important communal land-rights decision in the Inter-American Court of Human Rights in 2001.[60] In that case, indigenous communities claimed that Nicaragua had infringed on their land-use rights when it granted a thirty-year concession to a commercial logging company.[61] The Court read a communal right to property into the American Convention on Human Rights, under Article 21, and ordered Nicaragua to demarcate and title the lands belonging to the indigenous communities.[62]

B. A Move Toward Self-Government

Beyond the protection of collectively held land rights, the indigenous peoples' claim to "self-determination" has expanded to include political autonomy over internal tribal matters in the form of self-government.[63] In a *Columbia Human Rights Law Review* article describing the historical struggle of Mexico's indigenous tribes, Marco Palau concludes the following:

---

59. *See* Maori Fisheries Act 2004, Preamble, 2004 S.N.Z. No. 78 (noting the purpose of the Act is to establish fishing quotas); *see also* Benedict Kingsbury & Kirsty Gover, *Embedded Pluralism: Globalization and the Reappearance of Indigenous Peoples' Cartographies*, 4 Int'l Conf. for the Study of Political Thought, Working Paper, 2005 (reiterating the purpose of the Maori Fisheries Act was to give each Maori tribe a quota share of the Maori Fishery); *see also* PG McHugh, *Treaty Principles: Constitutional Relations Inside a Conservative Jurisprudence*, 39 VICTORIA U. WELLINGTON L. REV. 39, 59–61 (2008) (explaining that the Maori Fishing Act of 2004 is one of many different Fishery Acts intended to allocate fishing shares to indigenous tribes).

60. *See* Mayagna (Sumo) Awas Tingni Community v. Nicaragua, 2001 Inter–Am. Ct. H.R. (ser. C) No. 79 ¶ 173 (2001) (admonishing the Nicaraguan government for violating the property title rights of the Mayagna peoples and ordering the Nicaraguan government to adopt domestic law demarcating and titling indigenous properties); *see also* Raja Devasish Roy, *Challenges for Juridical Pluralism and Customary Laws of Indigenous Peoples: The Case of the Chittagong Hill Tracts, Bangladesh*, 21 ARIZ. J. INT'L & COMP. L. 113, 169–70 (2004) (citing Mayagna (Sumo) Awas Tingni Community v. Nicaragua as another landmark case in the protection of community standards); *see also* Seth Gordon, *Lands, Liberties, and Legacies: Indigenous Peoples and International Law: Theoretical Approaches to International Indigenous Rights: Indigenous Rights in Modern International Law from a Critical Third World Perspective*, 31 AM. INDIAN L. REV. 401, 422–23 (2006) (noting that in Mayagna (Sumo) Awas Tingni Community v. Nicaragua the Awas Tingni claimed that indigenous peoples have property rights as a matter of customary international law).

61. *See* W. MICHAEL REISMAN ET AL., INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 285 (2004) (recognizing the Sumo Indian community of Awas Tingni's claim that their land and resource rights were violated).

62. *See id.* (summarizing the court's determination that the Awas Tingni had a property right under Article 21 of the Inter-American Convention on Human Rights and the court's order to the Nicaraguan government to protect the tribe's land).

63. *See* Manus, *supra* note 57, at 567–71 (illustrating the evolution of indigenous peoples' right to self-determination, which now includes self-governance and political autonomy); *see also* Siegfried Wiessner, *Rights and Status of Indigenous People: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 98-99 (1999), *reprinted in* W. MICHAEL REISMAN ET AL., INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE (2004) (explaining indigenous peoples' basic claims to self-determination as including the protection of traditional lands, the right to practice their religion, traditions, culture, and the right to access welfare, health, education and social services); *see also* Marco Palau, Note, *The Struggle for Dignity, Land, and Autonomy: The Rights of Mexico's Indigenous People A Decade After the Zapatista Revolt*, 36 COLUM. HUM. RTS. L. REV. 427, 450–52 (2005) (defining indigenous peoples' right to self-determination as having an internal government and forms of political, social, economic, and cultural organization).

> [T]he idea of autonomy has now come to the fore, succeeding land as the single most important means through which these populations can secure a better life, as well as minimum standards of respect and dignity. They have understood that rights to land without political power—i.e., a governing apparatus—are hollow.[64]

Nevertheless, despite the G.A.'s adoption of the legally non-binding Declaration on the Rights of Indigenous Peoples ("DRIP") in 2007,[65] indigenous peoples' right to autonomy largely falls under the domestic jurisdiction of the sovereign States.[66] To that end, Mexico has given significant autonomy[67] to its various indigenous Indian tribes by allowing self-rule in the form of indigenous "norms and practices" ("usos y costumbres").[68]

IV. Mexico and Usos y Costumbres

In 1996, after years of protracted violent uprisings against the Mexican State, the Zapatista National Liberation Army (the "EZLN") signed an unprecedented agreement, known as the San Andres Accords (the "Accords"), with the federal government in the state of Chiapas, after substantial international political pressure was placed on the Mexican government.[69]

---

64. *See* Palau, *supra* note 63, at 486 (stating that one way Mexico's indigenous people can have a better life is to obtain political autonomy).

65. *See* United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) (formulating laws on the rights of indigenous peoples that have been ratified by most U.N. member states but rejected by four: the U.S., Canada, New Zealand, and Australia).

66. *See* HENRY MINDE, INDIGENOUS PEOPLES: SELF-DETERMINATION–KNOWLEDGE–INDIGENEITY 178 (2008) (explaining that although the sovereign States control the autonomy of the indigenous people, the United Nations has tried to seek self-determination rights for the indigenous people through the DRIP); *see also* Xanthaki, *supra* note 9, at 119 (commenting that the power of the indigenous people remains subject to the hands of sovereign states and not international law). *Cf.* HURST HANNUM & RICHARD B. LILLICH, INTERNATIONAL HUMAN RIGHTS 332-34 (1995) (describing the role the ILO 169 has played in obligating its signatories to do more to respect indigenous peoples' right to "self-determination," but noting that outside the colonial context, self-determination must not conflict with territorial integrity of the nation).

67. *See* United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 65 (implying that autonomy is defined as collectively having complete control over internal matters relating to the indigenous group).

68. *See* STEPHEN ZAMORA ET AL., MEXICAN LAW 237 (2004) (explaining that the Zapatista rebellion led to the recognition that indigenous communities should practice their own cultural and social traditions); *see also* James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21 ARIZ. J. INT'L & COMP. L. 13, 50–51 (2004) (recognizing that the DRIP and the ILO Convention No. 169 allow indigenous people of Mexico to maintain their customs and practices); *see also* Maia S. Campbell, Note, *The Right of Indigenous Peoples to Political Participation and the Case of Yatama v. Nicaragua*, 24 ARIZ. J. INT'L & COMP. L. 499, 535 (2007) (stating that the Mexican state of Oaxaca allows indigenous people to elect political officials according to their customs and traditions).

69. *See* Jose L. Garcia-Aguilar, *The Autonomy and Democracy of Indigenous Peoples in Canada and Mexico*, 565 ANNALS AM. ACAD. POL. & SOC. SCI. 79, 86–87 (1999) (declaring that the uprising from the Zapatistas and pressure from the Chiapas led the Mexican government to agree to the San Andres Accords); *see also* Lorie M. Graham, *Resolving Indigenous Claims to Self-Determination*, 10 ILSA J. INT'L & COMP. L. 385, 401 (2004) (commenting that the San Andres Accords was a peace agreement between the Zapistas and the Mexican government about the rights of the indigenous people to land and resources); *see also* Palau, *supra* note 63, at 442–43 (2005) (explaining that the violent Zapatista movement led the Mexican government to negotiate an agreement with the EZLN, which became known as the San Andres Accords).

For over 500 years since the Spanish conquest, a festering discord pervaded Mexico's "indigenous Mesoamerican cultures" who struggled as the impoverished peasant class to gain land rights and economic equality.[70] For example, Mexico's International Federation of Human Rights estimates that 45 percent of the land in Chiapas once controlled by indigenous tribes is now owned by one percent of the non-indigenous population.[71]

As post-revolutionary Mexico developed economically after 1917, the government grew increasingly oppressive, and social unrest began to brew among "coalitions of workers unions and indigenous communitie[s]."[72] Complaints included, *inter alia*, government misappropriation of titled farm lands, whereby depriving indigenous communities of their livelihood; military force being employed to halt protests; and a lack of government initiatives to improv "extreme social and economic inequality."[73]Most of these grievances "were channeled through the overarching demand that the state formally recognize indigenous autonomy."[74]

---

70. *See* ZAMORA ET AL., *supra* note 68, at 1–2 (acknowledging that the Spanish conquistadors overshadowed the importance of the indigenous Mesoamerican cultures since the early 16th century); *see also* Russel L. Barsh, *Indigenous Peoples: An Object of International Law*, 80 AM. J. INT'L L. 369, 377 (relating the struggle of Mexico's indigenous people to the Mexican peasants); *see also* Robert P. Maddox, "*Today We Say Enough!" The Zapatista Rebellion, Autonomy and the San Andres Accords*, 1 REGENT J. INT'L L. 47, 52 (2003) (remarking that since the 1500s, the Indians in Chiapas were classified as peasants and peons).

71. *See* Joseph M. Whitmeyer & Rosemary L. Hopcroft, *Community, Capitalism and Rebellion in Chiapas*, 39 SOC. PERSP. 517, 523–24 (explaining that the indigenous tribes in Chiapas have lost their lands to the non-indigenous people due to liberal economic policies); *see also* Palau, *supra* note 63, at 433 (declaring that 45 percent of the land in Chiapas is now owned by Mesoamerican people). *See generally* Andrew Huff, *Indigenous Land Rights and the New Self-Determination*, 16 COLO. J. INT'L ENVTL. L. & POL'Y 295, 307 (remarking that the indigenous people of Chiapas were forced off their land by conquistadors).

72. *See* Shannon Speed & Jane Collier, *Limiting Indigenous Autonomy in Chiapas, Mexico: The State Government's Use of Human Rights*, 33 HUM. RTS. Q. 877, 878 (2000) (comparing the government's treatment of the indigenous people in Chiapas to colonialism); *see also* Lynn Stephen, *The Construction of Indigenous Suspects: Militarization and the Gendered and Ethnic Dynamics of Human Rights Abuses in Southern Mexico*, 26 AM. ETHNOLOGIST 822, 828–30 (depicting the violence and oppression that the indigenous people of Chiapas encounter at the hands of the Mexican government); *see also* Palau, *supra* note 63, at 433 (explaining that the government used oppressive tactics when the indigenous people became more vocal about reformation).

73. *See* Jorge A. Vargas, *NAFTA, the Chiapas Rebellion, and the Emergence of Mexican Ethnic Law*, 25 CAL. W. INT'L L.J. 1, 23 (1994) (explaining that most protests in rural states in Mexico have been organized by indigenous people); *see also* Wiessner, *supra* note 63 at 88 (stating that the reasons for the indigenous revolt in Mexico were outlined in the Declaracion de la Selva Lacandona, which demands autonomy, democratization of the country's political life, the rule of law, and certain aspects of social justice); *see also* Palau, *supra* note 63, at 435–36 (explaining that, because of dissatisfaction with the social and economic inequality of Mexico, indigenous communities and organizations demanded reform from the government).

74. *See* Berta Hernandez-Truyol et al., *Beyond the First Decade: A Forward-Looking History of LatCrit Theory, Community and Praxis,* 17 BERKELEY LA RAZA L.J. 169, 213 (2006) (noting that the Zapitista Army of National Liberation seized several major cities throughout Mexico demanding indigenous rights and declaring their autonomy from the Mexican federal government); *see also* Matthew R. Cleary, *Indigenous Autonomy in Southern Mexico* 2 (2005) (unpublished manuscript, on file with the Ctr. for the Study of Democratic Politics, Princeton University) (arguing that indigenous grievances are related to questions about land reform or land tenure and the government's tendency to neglect the political rights of indigenous people). *See generally* Siegfried Wiessner, *Rights and Status of Indigenous People: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 88–89 (1999), *reprinted in* W. MICHAEL REISMAN ET AL., INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE (2004) (stating the various demands of the indigenous peoples including autonomy).

A change to the Constitution in 1992 emboldened the indigenous movement (the "Zapatistas") to mobilize in greater numbers and with more violent force.[75] Article 27 of the Mexican constitution (commonly known as the "Agrarian Reform Law") "established collective land tenure as one of the protected modalities of ownership,"[76] primarily benefitting indigenous communities, but to prepare for the implementation of NAFTA and to modernize the economy, the government altered the article by allowing individual shareholders in communal lands to sell their shares to buyers outside the community.[77] In addition to the necessity of collective land rights, the Accords presented autonomy as a necessary tool for the survival of the group.[78]

V. Implementation

The Accords, modeled after the ILO Convention 169, committed the government to respect indigenous autonomy in the following terms:

> Indigenous peoples have the right to free self-determination, and, as the means of their expression, autonomy from the Mexican government to . . . [a]pply their own normative systems in the regulation and resolution of

---

75. *See* Marco Palau, *The Struggle for Dignity, Land, and Autonomy: The Rights of Mexico's Indigenous People A Decade After the Zapatista Revolt*, 36 COLUM. HUM. RTS. L. REV. 438 (2005) (explaining that 1992 modifications to Article 27 of the Constitution weakened indigenous peoples' rights). *But see* Vargas, *supra* note 73, at 44 (stating that Mexico's Constitution was amended in 1992 to protect and promote indigenous peoples' development of their languages, cultures, uses, customs, resources and specific forms of social organizations). *See generally* Jorge A. Vargas, *Mexico's Legal Revolution: An Appraisal of Its Recent Constitutional Changes, 1988-1995,* 25 GA. J. INT'L & COMP. L. 497, 497 (1996) (arguing that prior to 1992, Mexico's Constitution did not include any indigenous content).

76. *See* Palau, *supra* note 75, at 427 (stating that Article 27 established collective land tenure for indigenous people, which protected their right of ownership to land that they had historically possessed through government recognition of such right).

77. *See* Enrique R. Carrasco, *Law, Hierarchy, and Vulnerable Groups in Latin America: Towards a Communal Model of Development in a Neoliberal World*, 30 STAN. J. INT'L L. 221, 255 (1994) (explaining that the Mexican government amended Article 27 to permit privatization); *see also* Don M. Mitchell, *The Geography of Injustice: Borders and the Continuing Immiseration of California Agricultural Labor in Era of "Free Trade*," 2 RICH. J. GLOBAL L. & BUS.145, 162 (2001) (stating that in preparation for the implementation of NAFTA, Section X of Article 27 of Mexico's Constitution, which guaranteed communal rights to land, was repealed and thus allowed lands to be mortgaged, sold off, privatized and engrossed); *see also* Palau, *supra* note 63, at 439 (arguing that modifications to Article 27 of the Constitution were made because of NAFTA implementations).

78. *See* Jeffrey N. Gesell, Note, *Customary Indigenous Law in the Mexican Juridical System,* 26 GA. J. INT'L & COMP. L. 643, 650 (1997) (stating that the focus of the Accords is to reform the Mexican Constitution with a view toward greater and more meaningful integration of the indigenous peoples into the democratic process); *see also* Palau, *supra* note 63, at 443–44 (providing that the Accords involved constitutional recognition of Mexico as a multiethnic state requiring implementation of a non-discrimination policy toward indigenous peoples). *See generally* Jose L Garcia-Aguilar, *The Autonomy and Democracy of Indigenous Peoples in Canada and Mexico,* 565 ANNALS 79, 86–87 (1999) (recognizing that the Accords would have been a foundation of a constitutional reform that recognizes the right of self-determination for its ethnic minorities).

> internal conflicts, honoring individual rights, human rights, and specifically, the dignity and integrity of women.[79]

Additionally, in an effort to strengthen recognition of indigenous rights in more absolute terms, Congress imported specific guarantees to "the right of free determination and autonomy for indigenous peoples and their communities (including the rights of women)" into Article 2 of the Constitution.[80] Article 2 requires that the "form of local government" of each state municipality with a majority indigenous population "shall be according to indigenous rules of local governance and customs," rather than the rules dictated by Article 115 of the Constitution.[81]

Over time, as the indigenous autonomy structure developed into many different forms, varying from state to state, a potential problem emerged: "The unequal power relations that exist *within* indigenous communities, particularly gender inequalities."[82] For example, one area where individual liberty is perhaps weakened under "customary law" is political participation by women.[83] One study finds that "women have the right to vote in only 76% of customary-rule municipalities, and the right to hold *cargos* or offices in only 72%."[84] Consequently, "women are

---

79. *See* R. Aída Hernández Castillo, *National Law and Indigenous Customary Law: The Struggle for Justice of Indigenous Women in Chiapas, Mexico*, *in* GENDER JUSTICE, DEVELOPMENT AND RIGHTS 386 (Maxine Molyneux & Shahra Razavi eds., 2002) (stating that because of the indigenous women's movement, the Accords committed the government to respect the integrity and dignity of women); *see also* Gesell, *supra* note 78, at 662 (explaining that the Accords recognized the right of indigenous peoples to self-determination and to apply their normative legal systems in the regulation and resolution of internal conflicts); *see also* Maddox, *supra* note 70, at 59 (explaining that the Accords include a promise to recognize indigenous people in the Constitution and to increase their participation and representation in politics).

80. *See* STEPHEN ZAMORA ET AL., MEXICAN LAW 238 (2004) (providing that, since Article 2 was amended, indigenous people and their communities have guaranteed rights of free determination and autonomy); *see also* Tania Sordo Ruz, *Update: A Surrealist Country,* 15 L. BUS. REV. AM. 443, 447(2009) (stating that Article 2 of the Constitution refers to individual rights of the indigenous people in Mexico); *see also* Jorge A. Vargas, *An Introductory Lesson to Mexican Law: From Constitutions and Codes to Legal Culture and NAFTA,* 41 SAN DIEGO L. REV. 1337, 1357 (2004) (explaining that the amendments to Article 2 of the Constitution provide that the judicial system must take into consideration the legal practices and customs of indigenous peoples).

81. *See* ZAMORA ET AL., *supra* note 80 (explaining the revisions to Article 2 of the Constitution which provide that in states where the majority is of indigenous people, their rules of governance and customs will apply).

82. *See* Castillo, *supra* note 79, at 387 (recognizing the need for universal value systems in order to combat the unequal power structure between men and women within indigenous societies); *see also* Catherine Powell & Jennifer H. Lee, Comment, *Recognizing the Interdependence of Rights in the Discrimination Context through the World Conference Against Racism*, 34 COLUM. HUM. RTS. L. REV. 235, 241–45, 258 (2002) (discussing the relationship between racism and gender inequalities among indigenous cultures). *Cf.* Russel Lawrence Barsh, *Indigenous Peoples' Perspectives on Population and Development*, 21 B.C. ENVTL. AFF. L. REV. 257, 261–62 (1994) (comparing the problems arising from gender inequality in third world countries with those in wealthy countries).

83. *See* Symposium, *Striking the Rock: Confronting Gender Inequality in South Africa*, 3 MICH. J. RACE & L. 307, 319-23 (1998) (discussing the effect of apartheid and colonialism on gender inequalities in South Africa); *see also* Stacey R. Sandusky, Note, *Women's Political Participation in Developing and Democratizing Countries: Focus on Zimbabwe*, 5 BUFF. HUM. RTS. L. REV. 253, 257 (1999) (suggesting that colonialism had a great impact on accelerating gender inequality). *See generally* Cleary, *supra* note 74, at 23 (presenting the gender inequality that exists in Chiapa culture through their suffragette policies).

84. *See* Matthew Cleary, *Indigenous Rights and Democracy in Southern Mexico: Liberalism Laughs Last?* 13 (Nov. 15, 2007) (unpublished manuscript on file with the Ctr. for the Study of Democratic Politics, Princeton University) (documenting the percentage of Mexican municipalities that recognize a woman's right to vote at 76%).

typically not allowed to be members of the communal assemblies nor are they allowed to legally inherit land."[85]

If the prohibition of women from the political process is in accordance with some traditional custom or rule, such a rule would seem to violate indigenous peoples' obligation under the Accords to honor the fundamental individual rights of its members,[86] in conjunction with Mexico's constitutional and treaty obligations to protect its individuals' rights to participate in the political process.[87] Conversely, an evolving body of international law protecting indigenous peoples' collective right puts an obligation on states, including Mexico, to respect indigenous peoples' desires "to exercise control over their own institutions [and] ways of life."[88] In fact, a U.N. Economic and Social Council report stated, "general human rights and freedoms should be recognized in a manner 'consistent with indigenous customs, societal institutions and legal traditions.'"[89]

It is against this backdrop of potentially conflicting body of human rights law that Eufrosina Cruz struggles to assert her own rights as an individual, as a women, and as a member of an autonomous indigenous tribe.

VI. Facts

Six years ago, Eufrosina Cruz's Mexican village, Santa Maria Quiegolani, was given "full legal status" to run its village by "use and customs." In other words, it was allowed to define its

---

85. *See id.* at 17 (illustrating the lack of female rights in indigenous populations with regards to denials of land rights and membership in communal assemblies).

86. *See* Castillo, *supra* note 79, at 386–87 (illustrating the differences between indigenous customary law and national law as it relates to self determination of indigenous peoples); *see also* Eric Engle, *Universal Human Rights: A Generational History*, 12 ANN. SURV. INT'L & COMP. L. 219, 234, 234-35 (2006) (explicating on the conflicts that arise between the indigenous populations and law on gender equality); *see also* Erin E. Goodsell, Note, *Constitution, Custom, and Creed: Balancing Human Rights Concerns with Cultural and Religious Freedom in Today's South Africa*, 21 BYU J. PUB. L. 109, 111 (2007) (elucidating the tensions between the South African Constitution and indigenous traditions with regard to property rights and marriage).

87. *See* Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, Diario Oficial de la Federacion [D.O.], 5 de Febrero de 1917 (Mex.) (stating the individual rights created by the Mexican Constitution); *see also* ROBERT L. MADDEX, CONSTITUTIONS OF THE WORLD 214 (2001) (evaluating the Mexican Constitution and its grant of individual rights); *see also* Part III.i–iv (discussing the rights ensured by the Mexican Constitution).

88. *See* Convention Concerning Indigenous and Tribal Peoples in Independent Countries art.1(b), May 9, 1991, 169 U.N.T.S. 1 (enumerating an indigenous individual's right to control his or her life); *see also* Symposium, *Between Indigenous Nations and the State: Self-Determination in the Balance*, 7 TULSA J. COMP. & INT'L L. 129, 152 (1999) (articulating the importance of restraining interference into indigenous cultural, political, social, and economic lives when attempting to preserve self-determination); *see also* Richard Herz, Note, *Legal Protection for Indigenous Cultures: Sacred Sites and Communal Rights*, 79 U. VA. L. REV. 691, 692, 707-08 (1993) (arguing the impact of the laws of nations on indigenous peoples in the creation of universal individual rights).

89. *See* United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res.61/295, U.N. Doc. A/RES/61/295/ (Sept. 13, 2007) (recognizing that states must implement new systems and mechanisms to preserve the rights of indigenous peoples to practice and revitalize their traditions and customs); *see also* Trygve Bendiksby, *Minority Rights, Justice and Ethnicity in Guatemala*, HUMAN RIGHTS DEVELOPMENT YEARBOOK 1999/2000, 185 (2001) (explaining the U.N.'s demands for indigenous rights and its effect on the recognition of such rights in Guatemala).

own normative state.[90] With a dearth of educational opportunities for girls, Cruz left her town at age eleven to stay with relatives and go to school in a nearby city, eventually attaining an accounting degree.[91] She later returned home and decided, at age 27, to become the first woman in her village to run for mayor, "despite the fact that women [weren't] allowed to attend town assemblies, much less run for mayor."[92]

On the day of the election, the town council, headed by the deputy mayor, Valeriano Lopez, tore up the ballots cast in favor of Cruz.[93] The all-male council claimed that according to tribal custom, women were not "citizens" of the town, and that only citizens were allowed to vote and hold office. Therefore any ballot cast in favor of Cruz was invalid due to her gender.[94] The town-council secretary told a *Miami Herald* newspaper reporter: '"We live differently here . . . than people in the city. Here women are dedicated to their homes, and men work the

90. *See* Mark Stevenson, *Women Lose in Mexican Indian Rights Gain,* MIAMI HERALD, Jan. 27, 2008, at 1 (discussing the abuse of women by the Mexican government permitting the indigenous people to follow their traditions and customs). *See generally* R. Aida Hernandez Castillo, *National Law and Indigenous Customary Law: The Struggle for Justice of Indigenous Women in Chiapas, Mexico, in* GENDER JUSTICE, DEVELOPMENT, AND RIGHTS (Maxine Molyneux & Shahra Razavi eds., 2002) (noting the negative relationship between indigenous women's rights in Chiapas and the law of Mexico).

91. *See* Nikki Craske, *Ambiguities and Ambivalences in Making the Nation: Women and Politics in 20th-Century Mexico*, 79 FEMINIST REV. 116, 122–23 (2005) (considering the role of education for Mexican women when social pressures relegate them to the domestic realm); *see also* Frances Abrahamer Rothstein, *Declining Odds: Kinship, Women's Employment, and Political Economy in Rural Mexico*, 101 AM. ANTHROPOLOGIST 579, 585 (1999) (providing examples on the importance of family ties for women seeking employment such as a larger network and financial support); *see also* Stevenson, *supra* note 90, at 2 (establishing Cruz's background as a self-made college graduate).

92. *See* Stevenson, *supra* note 90, at 2 (demonstrating that women in Quiegolani cannot attend town assemblies or run for office). *See generally* Kelly Hoffman & Miguel Angel Centeno, *The Lopsided Continent: Inequality in Latin America*, 29 ANN. REV. SOC. 363, 376 (2003) (explaining the slow pace of social change within Latin America as being the result of closely held traditional attitudes and limited education). *But see* Diane-Michele Prindeville, *Identity and the Politics of American Indian and Hispanic Women Leaders*, 17 GENDER & SOC'Y 591, 591–93 (2003) (researching the higher rate of Native American and Hispanic women's political activism in the United States).

93. *See* Laura Nader, *Choices in Legal Procedure: Shia Moslem and Mexican Zapotec*, 67 AM. ANTHROPOLOGIST 394, 397–98 (1965) (describing the political organization of a traditional Zapotec village which is run only by men); *see also* Stevenson, *supra* note 90, at 2 (reporting on the mayor's destruction of Cruz's ballots). *See generally* Lynn Stephen, *Negotiating Global, National, and Local "Rights" in a Zapotec Community*, 28 POL. & LEGAL ANTHROPOLOGY REV. 133, 140–41 (2005) (stating that a limited number of elder women were able to achieve power in Zapotec communities prior to the revolution).

94. *See* Sara A. Radcliffe, *Indigenous Women, Rights and the Nation-State in the Andes, in* GENDER AND THE POLITICS OF RIGHTS AND DEMOCRACY IN LATIN AMERICA 149, 150 (Nikki Craske & Maxine Molyneux eds., 2002) (commenting on the lack of citizenship for indigenous women in some Andean States); *see also* Mark Stevenson, *Mexican Human Rights Board: Town Improperly Barred Woman From Seeking Office*, AP WORLDSTREAM, Mar. 7, 2008, at 1 (illustrating the conflict between indigenous rights and gender rights where women are not considered citizens despite federal law to the contrary). *See generally* Guillermo Floris Margadant, *Official Mexican Attitudes Toward the Indians: An Historical Essay*, 54 TUL. L. REV. 964, 982–84 (1980) (tracing the development of independent Native American communities in Mexico where the government tries not to interfere with traditional customs).

fields.'"[95] The council elaborated by explaining that "only men who participate in collective work projects are considered citizens in Santa Maria, according to customs that in some cases predate the Spanish conquest."[96]

Cruz claims that by nullifying the ballots cast for her, on the grounds that women are not citizens, the council violated her right to equal protection and her right to vote under the Mexican Constitution.[97] Cruz says Quiegolani women should have the right to "decide [their] lives, to vote and run for office."[98] On this basis, Cruz first submitted her complaint to the Oaxaca state electoral council, then to the state congress, asking for the election to be annulled, and that a new election be held with women voting.[99]

Both the state electoral council and the state congress upheld the election without comment,[100] but in March 2008, Mexico's National Human Rights Commission (the "CHRC") ruled that the town council had violated Cruz's rights when it tore up ballots cast in her favor.[101] Nevertheless, the CHRC, a federal agency equipped with "quasi-judicial functions," is

---

95. *See* Stevenson, *supra* note 90 (demonstrating the traditional attitude in these communities toward keeping women within the domestic sphere). *See generally* Lynn Stephen, *Negotiating Global, National, and Local "Rights" in a Zapotec Community*, 28 POL. & LEGAL ANTHROPOLOGY REV. 133, 136–38 (2005) (looking at indigenous community rights and independence in Oaxacan communities). *But see* Rosalva Aida Hernandez Castillo & Victoria J. Furio, *The Indigenous Movement in Mexico: Between Electoral Politics and Local Resistance*, 33 LATIN AM. PERSP. 115, 121–22 (2006) (asserting that indigenous groups should be allowed to determine their own social organization).

96. *See* Stevenson, *supra* note 94 (establishing the basis for the council's decision).

97. *See* Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, art. 4, Diario Oficial de la Federacion [D.O.], 5 de Febrero de 1917 (Mex.) (giving equal rights to women); *see also* Stevenson, *supra* note 90 (quoting Cruz, "the constitution says we have these rights," but no exact legal argument has been publicly expressed). *See* Craske, *supra* note 91, at 125 (reviewing historical attitudes toward women in revolutionary Mexico which involved gains in benefits set off by exclusion from public life).

98. *See* Stevenson, *supra* note 90 (referencing Cruz's argument for self-determination of women). *See generally* Jon. L. Olson, *Women and Social Change in a Mexican Town*, 33 J. ANTHROPOLOGICAL RES. 73, 73–74 (1977) (examining the slow liberalization of gender roles in private amongst indigenous Mexicans). *But see* Howard Campbell, *Tradition and the New Social Movements: The Politics of Isthmus Zapotec Culture*, 20 LATIN AM. PERSP. 83, 89–90 (1993) (claiming that women play important visual and symbolic parts in some Zapotec political organizations).

99. *See* Stevenson, *supra* note 90, at 1 (describing Cruz's recourse to the national courts). *See generally* Todd A. Eisenstadt, *Measuring Electoral Court Failure in Democratizing Mexico*, 23 INT'L POL. SCI. REV. 47, 56–57 (2002) (analyzing the growing legitimacy of Mexico's electoral courts in light of past corruption). *But see* Maria Teresa Sierra, *The Revival of Indigenous Justice in Mexico: Challenges for Human Rights and the State*, 28 POL. & LEGAL ANTHROPOLOGY REV. 52, 54–55 (2005) (assessing the growing practice toward allowing indigenous cultures their own justice system).

100. *See* Stevenson, *supra* note 94, at 1 (explaining that the council appealed to state authorities to ensure equal rights rather than overturn the election); *see also* Hector Tobar & Maria Antonieta Uribe, *Refusing to Take Men for an Answer*, L.A. TIMES, Apr. 5, 2008, at A1 (highlighting that the election official upheld the election decision after expressing that it was too late to overturn the decision).

101. *See* Stevenson, *supra* note 94, at 1 (describing that an Indian woman's rights were violated when the board destroyed ballots in favor of her to become mayor of Santa Maria Quiegolani). *See generally* Gregory Bull, *Some Mexican Women Lose Right to Vote,* ASSOCIATED PRESS, Jan. 27, 2008 (discussing that the movement to respect indigenous right open the door to discrimination by males). *See generally* Tobar & Uribe, *supra* note 100, at A1 (explaining that in some rural towns in Mexico, women have no voice and no vote, but an Oaxacan villager didn't accept that, and she took on the system).

specifically prohibited from reviewing "acts and decisions of electoral officials,"[102] and so it appealed to Oaxaca state authorities to enact reforms to ensure equal rights and outlaw such discrimination "even in semi-self-governing Indian communities."[103] While commenting on the ruling to the Associated Press, a CHRC inspector, Mauricio Ibarra, stated:

> Respecting the system of "use and customs" allows us to preserve our nation's varied ethnic and cultural richness, which we are proud of. However, our broad cultural legacy puts the country in the situation of having to reconcile the 'use and customs' systems with the current legal framework.[104]

Bolstered by the CHRC ruling, notwithstanding its lack of enforcement authority, Cruz has since appealed the Oaxaca Electoral Council's decision to state and federal courts, where any rulings have yet to be made.[105]

VII. Addressing the Adequacy of the Current Laws and Remedies

Mexico is party to two treaties that specifically require its signatories to prohibit gender discrimination in the area of political participation.[106]

---

102. *See* STEPHEN ZAMORA ET AL., MEXICAN LAW 224–25 (2004) (discussing Mexican Law with an overview of Mexican history and emphasizing the ways in which historical events have influenced the development of law); s*ee also* Press Release, Human Rights Watch, *Mexico: Effective Action Needed by Human Rights Body* (Feb. 12, 2008) (recommending that Mexico strengthen and expand its National Human Rights Commission's authority, even in election cases). *See generally* Raul M. Sanchez, *Mexico's Governmental Human Rights Commissions: An Effective Response to Widespread Humans Rights Violations*, 25 ST. MARY'S L. J. 1041, 1056 (1994) (presenting a general description of human rights conditions in Mexico).

103. *See* Stevenson, *supra* note 94 (discussing the Human Rights Commission's efforts to reform discrimination policies). *See generally* ZAMORA ET AL., *supra* note 102, at 224–25 (stating that the CNDH has played a role in focusing its attention of the public on the protection of human rights). *See generally* Bull, *supra* note 101 (explaining that Cruz's fight was not for her own personal gain, but for the benefit of other Indian women, so they would never face political segregation).

104. *See* Mark Stevenson, *Mexican Human Rights Board: Town Improperly Barred Indian Woman from Seeking Office,* AP WORLDSTREAM, Mar. 7, 2008, at 1 (quoting a CHRC inspector regarding the dilemma of protecting Indian cultures with upholding Mexico's Constitution).

105. *See* Mark Stevenson, *Women Lose in Mexican Indian Rights Gain,* MIAMI HERALD, Jan. 27, 2008, at 1 (explaining that Cruz took her fight to the Commission in Mexico City after the electoral council and state congress upheld the election). *See generally* Stevenson, *supra* note 104 (explaining that while the ruling by the Human Right Commission was a victory for Cruz, the Commission is barred from making recommendations in election cases).

106. *See* Kelly Barrett, *Women in the Workplace: Sexual Discrimination in Japan*, 11 HUM. RTS. BR. 5, 5–6 (2004) (discussing that in 1979 the United States adopted the Convention on the Elimination of All Forms of Discrimination Against Women which required a state to enact legal measure prohibiting gender discrimination); *see also* Robert Larsen, Note, *Ryousai Kenbo Revisited: The Future of Gender Equality in Japan After the 1997 Equal Employment Opportunity Law*, 24 HASTINGS INT'L & COMP. L. REV. 189, 201–2 (2001) (explaining that all signatories of the U.N. Convention Concerning the Elimination of All Forms of Discrimination Against Women were required to pass national law the that would effectively prohibit gender discrimination). *See generally* Committee on the Elimination of Discrimination Against Women: Exceptional Session, http://www.un.org/womenwatch/daw/cedaw/cedaw25years/content/english/CONCLUDING_COMMENTS/Mexico/Mexico-CO-5.pdf, Aug. 5-23, 2002 (noting that Mexico signed the National Agreement for Equality between Men and Women).

CEDAW (Convention on the Elimination of All Forms of Discrimination against Women) includes Article 6, which requires State Parties take specific steps to "eliminate discrimination against women in the political and public life of the country," and further enumerates three specific rights to which women must be ensured on an equal basis as men: (a) to vote in all publicly held elections; (b) to hold public office and participate in government activity at all levels; and, (c) to participate in non-governmental organizations relevant to political concerns of the country.[107]

Additionally, the American Convention on Human Rights (the "American Convention") stipulates in Article 23 the right of "every citizen" to enjoy taking part in public affairs through "freely chosen representatives," and the right "to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage."[108] Moreover, Article 23 lists the specific bases on which any regulation of the foregoing political rights may be done, and gender is an invalid basis.[109]

Mexico is also a party to the ILO Convention 169,[110] which provides that indigenous peoples "shall have the right to retain their own customs and institutions."[111] The caveat of this provision is that indigenous peoples have the right to retain their own customs "where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights," with the burden being on the State to establish procedures "whenever necessary, to resolve conflicts which may arise in the application of this principle."[112] Although Mexico has stipulated in its agreements with indigenous tribes that

---

107. *See* Convention on the Elimination of All Forms of Discrimination Against Women, Sept. 3, 1981, 1249 U.N.T.S. 13 (discussing the rights State Parties must grant to women to ensure equality with men).

108. *See* Organization of American States, American Convention on Human Rights, art. 23, para. b, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter *American Convention on Human Rights*] (discussing the right of every citizen to vote and be elected in genuine periodic elections).

109. *See id.* at art. 23 para. 2 (explaining that the exercise of rights related to conduct of public affairs, to vote and be elected, and have access to public service are not contingent upon the gender of the individual).

110. *See* David H. Getches, *Indigenous Peoples' Rights to Water Under International Norms*, 16 COLO. J. INT'L ENVTL. L. & POL'Y 259, 274 (2005) (discussing an indigenous tribe that brought suit under the I.L.O. Convention 169 to fight for land legally adjudicated to it by the Mexican Government); *see also* Megan Mooney, *How the Organization of American States Took the Lead: The Development of Indigenous Peoples' Rights in the Americas,* 31 AM. INDIAN L. REV. 553, 568 (2006-2007) (explaining the progression of human rights for indigenous populations where some groups were invited to work on the ILO Convention). *See generally* Deborah Yashar, *Resistance and Identity Politics in an Age of Globalization*, 610 THE ANNALS OF THE AM. ACADEMY OF POL. AND SOC. SCI. 160, 168 (2007) (outlining the pattern of Latin American countries with poor values in human rights to be more willing to sign onto the Convention).

111. *See American Convention on Human Rights*, *supra* note 108, at art. 23, para. 2 (stating that indigenous tribes shall retain their customs and traditions under the convention).

112. *See id.* (discussing the rule that indigenous tribes shall retain their customs as parties to the ILO Convention 169).

customary practices cannot contradict Constitutional rights,"[113] any oversight or procedures to enforce compliance with such stipulations seem to be deficient.

A. Analysis of Legal Remedies Under Mexican Law

The following four parts show how the State institutions and court systems provide a rather byzantine structure for anyone wishing to assert his or her guaranteed individual rights, especially for the individual members of indigenous communities whose rules, even when inconsistent with the Constitution, would seem to be protected by public policy, or a parallel governmental system where there is no clear hierarchy of authorities.

1. Customary Rule in the State of Oaxaca

As stated previously, Mexico reformed Article 2 of its Constitution in 2001, which leaves implementation of the "conversion to indigenous rules of governance to the local legislatures of each state."[114] To date, Oaxaca is the only state to change its "organic law" to allow indigenous "customary rule" at the municipal level,[115] as well as the only state in which indigenous governments are "formally recognized by the federal government."[116]

---

113. *See* STEPHEN ZAMORA ET AL., MEXICAN LAW 234 (2004) (asserting that customary rules are prohibited from conflicting with constitutional rights); *see also* R. Aida Hernandez Castillo, *National Law and Indigenous Customary Law: The Struggle for Justice of Indigenous Women in Chiapas, Mexico, in* GENDER JUSTICE, DEVELOPMENT, AND RIGHTS (Maxine Molyneux & Shahra Razavi eds., 2002) (citing the San Andres Accords that discuss indigenous peoples' rights to free self determination and autonomy); *see also* Thomas T. Ankersen & Thomas K. Ruppert, *Defending the Polygon: The Emerging Human Right to Communal Property,* 59 OKLA. L. REV. 681, 716–19 (2006) (discussing the case of Nicaragua's suit under the Inter-American Convention of Human Rights to preserve their constitutional right to their property).

114. *See* ZAMORA ET AL., *supra* note 113, at 238 (discussing the reformation of the Mexican Constitution to allow for indigenous rule of indigenous states); *see also* James L. Cavallaro & Stephanie Erin Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century the Case of the Inter-American Court*, 102 AM. J. INT'L L. 768, 785–87 (2008) (explaining the implementation of human rights through constitutions in Latin American states); *see also* Philip Dehart, *The NAALC and Mexico's Ley Federal para Prevenir y Eliminar la Discriminacion: Further Failure Under a Flawed Treaty or the Beginning of Meaningful Protection from Employment Discrimination Throughout North America?*, Note, 34 GA. J. INT'L & COMP. L. 657, 677 (2006) (outlining the trend of the Constitution of Mexico to completely prevent discrimination and violation of human rights).

115. *See* Carlos Rios Espinoza, *Redesigning Mexico's Criminal Procedure: The States' Turning Point*, 15 SW. J.L. & TRADE AM. 53, 54–55 (2008) (outlining the variations of procedural rule in criminal law, as adopted by the state of Oaxaca independently); *see also* Maia Sophia Campbell, Note, *The Right Of Indigenous Peoples to Political Participation and the Case of Yatama v. Nicaragua*, 24 ARIZ. J. INT'L & COMP. L. 499, 534-535 (2007) (explaining that the state of Oaxaca allows its indigenous populations to vote and participate in the electoral process, and therefore maintains its organic law); *see also* Matthew Cleary, *Indigenous Autonomy in Southern Mexico* 18–19 (Apr. 28, 2005) (unpublished manuscript, on file with the Ctr. for the Study of Democratic Politics, Princeton University) (explaining that the language of a 1995 state reform law in Oaxaca allows for customary law and most indigenous municipalities had been using such law de facto anyway, which allowed for faster formal recognition).

116. *See* JOHNATHAN A. FOX, ACCOUNTABILITY POLITICS: POWER AND VOICE IN RURAL MEXICO 190 (2007) (finding that that the local government of Oaxaca holds for both municipal and submunicipal jurisdictions); *see also* Shannon Speed & Jane F. Collier, *Limiting Indigenous Autonomy in Chiapas, Mexico: The State Government's Use of Human Rights*, 22 HUMAN RTS. Q. 887, 886–87 (2000) (outlining that the Mexican government has given authority of a governmental role to the state of Oaxaca); *see also* Cleary, *supra* note 115 (discussing that when the municipal system was first created in Oaxaca after independence, large indigenous communities were re-formed as municipalities, and thus maintained a degree of autonomy).

While customary rule varies between each municipality, town representation is generally left to "usos y costombres," and conflict resolution rests on conciliation,[117] rather than resting on the constitutional underpinnings of the national system.[118] In terms of legal jurisdiction,Cleary notes the following in his report on Mexico's indigenous affairs, "[L]ocal justice is often administered by indigenous judges or courts, whose jurisdiction may not coincide with municipal or district boundaries, and whose practices often differ substantially from those of the federal court system."[119]

In some respects, this implies that the final arbitrator will always be the State, but it is unclear on what conditions the State would actually intervene in a civil matter that originally arises under customary law. For criminal matters, the ILO Convention call for State Parties to respect to the fullest extent possible "the methods customarily practiced by the peoples concerned for dealing with offences committed by their members" and for "the customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases."[120] Such requirements are reflected in the amendment to Article 220 of Mexico's Federal Penal Procedures Code that recognizes the validity of expert witness testimony on "cultural context."[121] Article 220 states, "[W]hen the accused belongs to an indigenous ethnic group an effort will be made to follow expert testimony in order that the judge may . . . may . . . better understand [the] cultural difference [of the accused] to the national norm [*sic*]."[122]

---

117. *See* Castillo, *supra* note 113, at 401 (explaining that indigenous law aims for conciliation and achieves this through flexibility); *see also* Todd A. Eisenstadt, *Usos Y Costumbres and Postelectoral Conflicts in Oaxaca, Mexico, 1995–2004 An Empirical and Normative Assessment*, 42.1 LATIN AM. RES. REV. 52, 59 (2007) (asserting that under customary law, political representation was skewed and left primarily to *usos y costumbres*); *see also* Cleary, *supra* note 115, at 7 (explaining that conciliation is based on tradition, defined as being "oral and flexible"). *See, e.g.*, Maria Teresa Sierra, *Revival of Indigenous Justice in Mexico: Challenges for Human Rights and the State*, 28 POLAR 53, 57 (2005) (discussing the role of women in the political process under the *usos y costumbres*).

118. *See* Castillo, *supra* note 113, at 401 (comparing state legal proceedings and indigenous law and analyzing them in relation to their different aims); *see also* Todd A. Eisenstadt & Viridiana Ríos, *Strengthening Indigenous Rights But While Weakening the Rule of Law: Customary Elections, the State and Social Conflict in Mexico 21* (unpublished working paper) (suggesting that the degeneration of elections into turf wars may demonstrate the conflict between indigenous law and national law in the region). *But see, e.g.*, Sierra, *supra* note 117 (describing particular incidents where *Juzgado* traditional customs and authorities are not in opposition to official authorities).

119. *See* Cleary, *supra* note 115, at 10 (describing customary rule in Oaxaca and how its practices differ from those within the federal system).

120. *See* United Nations Convention Concerning Indigenous and Tribal Peoples in Independent Countries, art. 9, para.1, 2, May 9, 1991, 169 U.N.T.S. 1 (demanding that state officials remain respectful of local customs and practices).

121. *See* Código Penal Federal [C.P.F.][Federal Criminal Code], *as amended*, art. 220, Diario Oficial de la Federacion, [D.O.], 14 de Agosto de 1931 (Mex.) (declaring that expert testimony may be valid under the criminal code); *see also* Jorge A. Vargas, *Moral Damages Under the Civil Law of Mexico—Are These Damages Equivalent to U.S. Punitive Damages?* 35 U. MIAMI INTER-AM. L. REV. 183, 193–94 (2003–2004) (discussing the requirements for use of expert testimony under the Código Penal Federal).

122. *See* Código Penal Federal, *supra* note 121 (describing the use of expert testimony in cases involving indigenous people); *see also* Castillo, *supra* note 113, at 387–88 (quoting Article 220 of the Mexican Federal Penal Procedures Code).

Finally, political representation, often in the form of town assemblies, is entirely under the "jurisdiction" of the autonomous municipality, with affairs of the town to be decided by the assembly.[123]

2. Indigenous Citizenship

Mexico's Constitution distinguishes between nationality and citizenship.[124] The former is conferred on the basis of jus soli ("by place of birth"), or through naturalization,[125] and the latter is conferred upon having satisfied the following three conditions enumerated in Article 34 of the Constitution: (1) having the status of a Mexican; (2) having reached a certain age; and (3) having an honest means of livelihood.[126]

The benefits of citizenship are civil and political rights, such as the right to vote for and stand for public office.[127] Upon meeting these conditions, indigenous members of self-govern-

123. See Alejandro Anaya Muñoz, *The Emergence and Development of the Politics of Recognition of Cultural Diversity and Indigenous Peoples' Rights in Mexico: Chiapas and Oaxaca in Comparative Perspective*, 37.2 J. LATIN AM. STUDIES 585, 589–90 (2005) (comparing the indigenous laws of Chiapas and Oaxaca which allow the indigenous peoples to run their communities); *see also* Campbell, *supra* note 115 (explaining that Article 2 of the Mexican Constitution provides indigenous communities with special mechanisms to encourage indigenous political participation to maintain local autonomy); *see also* Cleary, *supra* note 115, at 10 (declaring that the Oaxaca region of Mexico remains within the control of the municipality).

124. *See* Constitución Política de los Estados Unidos Mexicanos [Constitution], *as amended*, arts. 30, 34, Diario Official de la Federacion [D.O.], 5 de Febrero de 1917 (specifying the rights, obligations, and distinctions between Mexican nationality and Mexican citizenship); *see also* David Fitzgerald, *Nationality and Migration in Modern Mexico*, 31.1 J. ETHNIC & MIGRATION STUDIES 171, 172 (2005) (explaining that Mexico is one of the countries that distinguish between citizenship and nationality); *see also* Pablo Lizarraga Chavez, Note, *Creating a United States-Mexico Political Double Helix: The Mexican Government's Proposed Dual Nationality Amendment*, 33 STAN. J. INT'L L. 119, 124 (1997) (discussing the distinction between nationality and citizenship, in that Mexican law allowed those who became naturalized citizens in other countries to retain their Mexican nationality).

125. *See* Constitución Política de los Estados Unidos Mexicanos, *supra* note 124, at art. 34 (specifying that Mexican nationality is acquired through birth or naturalization); *see also* Jorge A. Vargas, *Dual Nationality for Mexicans*, 35 SAN DIEGO L. REV. 823, 839 (1998) (stating that the Mexican Constitution provides for Mexican nationality by birth or naturalization); *see also* Chavez, *supra* note 124, at 121 (explaining that Mexican nationality can be conferred jus soli or by naturalization).

126. *See* Constitución Política de los Estados Unidos Mexicanos, *supra* note 124, at art. 34 (establishing that in order to be considered a Mexican citizen, an individual must have Mexican status, be at least 18 years of age or older, and have an honest means of living).

127. *See* Constitución Política de los Estados Unidos Mexicanos, *supra* note 124, at art. 35 (guaranteeing that as a Mexican citizen, an individual has the right to vote and participate in government elections as well as partake in other political affairs); *see also* Kim Barry, *Home and Away: The Construction of Citizenship in an Emigration Context*, 81 N.Y.U. L. REV. 11, 46–47 (2006) (reiterating the provision established by the Mexican government in its Constitution that unlike Mexican citizens who are able to vote and hold high public office in Mexico, Mexican nationals cannot); *see also* David A. Martin, *New Rules on Dual Nationality for a Democratizing Globe: Between Rejection and Embrace*, 14 GEO. IMMIGR. L.J. 1, 1–2 (1999) (asserting that a Mexican who is a national but not a citizen does not have the same privileges to vote or hold public office that a Mexican citizen would).

ing municipalities should attain both Mexican nationality and Mexican citizenship.[128] In contrast, the policies governing internal "indigenous" citizenship of members within autonomous towns are not as clear. In the case of *Lovelace*, Maliseet Indian chiefs in Canada stripped a female member, Sandra Lovelace, of her Maliseet status when she married a non-member, in accordance with a provision of Canada's Indian Act.[129] Although that provision of the Indian Act applied only to women, the Human Rights Committee did not address the discriminatory nature of the Act, but did hold that "excluding her from the reservation" was a violation of her "individual right to belong to a minority" under Article 27 of the ICCPR, which "guarantees the individual rights of persons belonging to minorities."[130] The Committee held that "[P]ersons who are brought up on a reserve, who have kept their ties with the community and wish to maintain those ties must normally be considered as belonging to that minority."[131]

According to a report on gender conflict within minority and indigenous groups by the NGO, Minority Rights Group International (MRG), the Maliseet chiefs in *Lovelace* had used the "legitimacy" of the Canadian Indian Law as justification to strip Lovelace of her membership rights, whereas Canada claimed to have enacted the Indian Law according to Indian culture- perhaps in the interest of protecting its indigenous peoples' right to self-determination.[132]

---

128. *See* Constitución Política de los Estados Unidos Mexicanos, *supra* note 124 (declaring that indigenous peoples born in Mexico territory will thereby be considered nationals under article 30 and implying that anyone who meets this requirement as well as the requirements of citizenship under Article 34 will be considered a citizen); *see also* Kenneth J. Worthen, *The Grand Experiment: Evaluating Indian Law in the "New World,"* 5 TULSA J. COMP. & INT'L L. 299, 329–30 (1998) (suggesting that the Mexican Constitution has always considered indigenous groups as equal to all others of the Mexican nation; therefore, if they meet the requirements for citizenship they will be recognized as such); *see also* Chavez, *supra* note 124, at 121–22 (implying that any individual who is born in Mexico and satisfies the requirements for Mexican citizenship as set forth in the Constitution will be deemed a citizen).

129. *See* Sandra Lovelace v. Canada, Communication No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) at 166 (1981) (explaining that Lovelace married a non-Indian and consequently lost her rights and status as a Maliseet Indian under Canada's Indian Act provision).

130. *See id.* (discussing that Sandra Lovelace is still ethnically a Maliseet Indian and is still entitled to be regarded as belonging to that minority, thus implying that her rights were violated); *see also* AYELET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS 20 n.8 (2001) (describing how the Committee held that Sandra Lovelace had a right of access to her native culture and language, which would be in accordance with Article 27 of the ICCPR); *see also* Regina M. Buono, Comment, *Delimiting Culture: Implications for Individual Rights in the Basque Country Today,* 39 TEX. INT'L L.J. 143, 160 (2003) (describing how the Human Rights Committee agreed that Lovelace's inability to live on the reservation violated her right to access her native culture and language).

131. *See Lovelace*, No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) at 166 (1981) (proclaiming the idea that individuals born and raised in reservations and who maintain ties must normally be considered as still belonging to that particular group).

132. *See* FAREDA BANDA & CHRISTINE CHINKIN, GENDER, MINORITIES AND INDIGENOUS PEOPLES 25–26 (2004) (describing how the Canadian government invoked Indian culture when it created the Indian Act, yet the Maliseet chiefs manipulated its provisions to justify Lovelace's exclusion).

Interestingly, after Lovelace Canada subsequently repealed many of the Indian Act's provisions to comply with its obligations of the CEDAW,[133] in concert with Article 5 of the ICERD (International Convention on the Elimination of all forms of Racial Discrimination), which delineates 'the right to marry, to choose one's spouse, the right to own property and the right to inherit with a specific impact on Aboriginal women and children.'"[134]

Unlike Canada, Mexico, as previously discussed, has bestowed some indigenous groups the right to rule by "customary law" and leaves enactment procedures to the states.[135] Semantically, "membership" may refer to belonging to a particular group, but "citizenship" suggests the political rights to internal group ordering. It is not clear if the individual "right to minority membership" under Article 27 of the ICCPR is interchangeable with "citizenship" rights, or whether there is more than a semantic difference. In terms of policy or on the principle of comity, Mexican courts would most likely refrain from intervening in conflicts regarding autonomous municipal "membership" or "citizenship," which is similar to the current United States policy on tribal membership disputes. In *Pueblo v. Martinez*, the U.S. Supreme Court held that federal courts *should not* intervene in a membership dispute involving particular Indian tribes, and instead deferred the issue to Congress.[136] In *Pueblo*, the child of a Navajo woman was denied membership because the child's father was a non-Navajo member, and the rights of Navajo membership pass exclusively through paternal lineage.[137]

The Court's ruling in *Pueblo* came almost a decade before the Human Rights Committee's decision in *Lovelace* (which came before the ILO Convention 169) so it would be interesting to

---

133. *See* SHACHAR, *supra* note 130 (citing to Bill C-31 as an amendment to the Indian Act provision and explaining how the Act was changed in 1995,); *see also* Barbara Roberts, *The Beijing Fourth World Conference on Women*, 21 CAN. J. SOC. 237, 238–39 n.5 (1996) (explaining that CEDAW attempts to remove all forms of discrimination and noting that one example of CEDAW's impact on Canada is the 1995 changes made to the provisions of the Indian Act); *see also* Stephanie Palo, Note, *Still Citizens After Marriage: Exploring Violations of Women's Nationality Rights*, 30 WOMEN'S RTS. L. REP. 673, 682–83 (2009) (acknowledging that Canada has upheld its CEDAW obligation, but also noting that more needs to be done).

134. *See* International Convention on the Elimination of All Forms of Racial Discrimination art. 5, Mar. 7, 1966, 660 U.N.T.S. 195 (granting an individual various rights such as the right to marry and choose a spouse, the right to inherit, and the right to own property); *see also* BANDA & CHINKIN, *supra* note 132 (restating the provisions of Article 5 of the ICERD and explaining that the Indian Act has been changed to conform to it); *see also* Gary D. Meyers & Sally Raine, *Australian Aboriginal Land Rights in Transition (Part II): The Legislative Response to the High Court's Native Title Decisions in Mabo v. Queensland and Wik v. Queensland*, 9 TULSA J. COMP. & INT'L L. 95, 163 (2001) (detailing the provisions set forth in Article 5 of the ICERD, including the right to own property and the right to inherit).

135. *See* R. Aida Hernandez Castillo, *National Law and Indigenous Customary Law: The Struggle for Justice of Indigenous Women in Chiapas, Mexico, in* GENDER JUSTICE, DEVELOPMENT, AND RIGHTS (Maxine Molyneux & Shahra Razavi eds., 2002) (recognizing that the Mexican government approved an amendment to the Constitution to grant the right of customary law to some indigenous peoples); *see also* Jorge A. Vargas, *NAFTA, The Chiapas Rebellion, and the Emergence of Mexican Ethnic Law*, 25 CAL. W. INT'L L.J. 1, 50 (1994) (showing that Mexican law allows many indigenous groups to regulate themselves under customary law); *see also* Jorge A. Vargas, *Mexican Law on the Web: The Ultimate Research Guide*, 32 INT'L J. LEGAL INFO. 34, 75 (2004) (explaining that each of Mexico's thirty-one states have their own constitutions and that the local legislatures enact legislation for each state).

136. *See* Pueblo v. Martinez, 436 U.S. 49, 49–50 (1978) (holding that the courts should defer to Congress issues of tribal membership disputes).

137. *See id.* at 52–53 (stating that the Santa Clara Pueblo Tribe passed an ordinance banning membership of the Martinez children because their father was not Santa Claran).

see how the Committee would review the Court's decision today in light of its interpretation of Article 27.

4. Constitutional Guarantees of Individual Rights

Mexican law is based on a civil law tradition, with the Constitution being the "fundamental law of society."[138] However, there are two possible impediments to the assertion of individual liberties under the Constitution. First, the sheer vastness of the heavily amended Constitution (136 Articles and 17 "technical provisions")[139] signifies the document's character as a work-in-progress or a statement of "ideals," rather than serving as an established norm for "political and legal infrastructure to follow," as evidenced by Mexican scholars who have described the document as an "aspiration" on which the law as applied by all levels of the court system is often different than the law as stated.[140] Second, the Mexican courts' power to interpret "constitutional language" is limited to the language of the document itself since the Constitution is considered an "exhaustive" wellspring of rights and duties, only to be amended by

138. *See* STEPHEN ZAMORA ET AL., MEXICAN LAW 78 (2004) (discussing Mexico's civil law tradition and its Constitution as the primary source of law); *see also* Dale Beck Furnish, *Judicial Review in Mexico*, 7 SW. J.L. & TRADE AM. 235, 237 (2000) (remarking that Mexico's legal system is based upon the Romano European tradition of civil law); *see also* Joseph E. Sinnott, *The Classic Civil/Common Law Dichotomy and Its Effect on the Functional Equivalence of the Contemporary Environmental Law Enforcement Mechanisms of the United States and Mexico*, 8 DICK. J. ENVTL. L. & POL'Y 273, 280 (1999) (commenting that Mexican law is a product of the Western European civil law tradition).

139. *See* Constitución Política de los Estados Unidos Mexicanos [Constitution], *as amended*, Diario Official de la Federacion [D.O.], 5 de Febrero de 1917 (codifying the 136 articles and 17 technical provisions); *see also* James F. Smith, *Confronting the Differences in the United States and Mexican Legal Systems in the Era of NAFTA*, 1 U.S.-MEX. L.J. 85, 95 (1993) (explaining that the Mexican Constitution is heavily amended because the amendment process is less restrictive, the Constitution only provides a prescriptive code, and the courts cannot issue binding decisions); *see also* Javier M. Aguirre, Comment, *Constitutional Shift Toward Democracy: Mexico City's Amendment to Grant Elections Gives Rise to a New Constitutional Order*, 21 LOY. L.A. INT'L & COMP. L.J. 131, 136 (1999) (recognizing that the Mexican Constitution has been amended 350 times since it was adopted in 1917 and 37 times between 1992 and 1999).

140. *See* ZAMORA ET AL., *supra* note 138, at 79 (arguing that the Mexican Constitution is constantly changing and is more idyllic than realistic); *see also* Smith, *supra* note 139, at 94 (commenting that the Mexican Constitution is a statement of ideals rather than a realistic system of law); *see also* Gerald D. Prager, Comment, *Pemex at the Crossroads: A National Oil Industry in Crisis*, 15 HOUS. J. INT'L L. 115, 150 (1992) (describing the Mexican Constitution as more of a statement of ideals than an actual system of government).

the Congress.[141] Despite such challenges, the Supreme Court of Justice may hold any regulation or official ruling invalid if it contradicts any provision of the Constitution.[142]

The constitutional right of equal protection is restricted to the prohibitions of "any *governmental* act, either *de jure* or *de facto*" deemed to violate equal protection and does not include *private* acts.[143] Equal protection, which applies to all individuals within the "United Mexican States,"[144] includes the equal treatment of men and women "under the law,"[145] and discrimination against "human dignity or individual rights or liberties," such as gender, civil status, or ethnic origin, is prohibited.[146] Equal protection between men and women should, by extension, apply to political rights guaranteed under Article 35, which confers "the right to vote

141. *See* ZAMORA ET AL., *supra* note 138, at 80 (establishing that the Mexican Constitution is seen as the primary source of rights, duties, and procedures affecting society); *see also* Alexis James Gilman, *Making Amends with the Mexican Constitution: Reassessing the 1995 Judicial Reforms and Considering Prospects for Further Reform*, 35 GEO. WASH. INT'L L. REV. 947, 949 (2003) (noting that the Mexican Constitution may be amended by a two-thirds vote of Congress); *see also* Stephen Zamora & Jose Ramon Cossio, *Mexican Constitutionalism After Presidencialismo*, 4 INT'L J. CONST. L. 411, 421 (2006) (emphasizing that the Mexican Supreme Court's role is to interpret the constitution).

142. *See* ZAMORA ET AL., *supra* note 138, at 235 (acknowledging that the Mexican Supreme Court of Justice may strike down the decision of any public official if it violates the Constitution); *see also* Patrick Del Duca, *The Rule of Law: Mexico's Approach to Expropriation Disputes in the Face of Investment Globalization*, 51 UCLA L. REV. 35, 48 (2003) (indicating that the Mexican Supreme Court has the power to invalidate unconstitutional government action); *see also* Jorge A. Vargas, *The Rebirth of the Supreme Court of Mexico: An Appraisal of President Zedillo's Judicial Reform of 1995*, 11 AM. U. J. INT'L & POL'Y 295, 321–322 (1996) (detailing the process by which the Mexican Supreme Court of Justice issues a declaration of constitutional invalidity).

143. *See* ZAMORA ET AL., *supra* note 138, at 237 (finding that the Mexican Constitution provides equal protection for any government act but not private acts); *see also* Charles A. Beckham, Jr. & Roberto Fernandez, *Cross-Border Insolvency: The Bridge You Never Want to Cross,* 4-WTR NAFTA: L. & BUS. REV. AM. 50, 51 (1998) (citing articles 14 and 16 of the Mexican Constitution as those that provide equal protection for citizens); *see also* Jorge A. Vargas, *Privacy Rights Under Mexican Law: Emergence and Legal Configuration of Panoply of New Rights*, 27 HOUS. J. INT'L L. 73, 102 (2004) (positing that the amparo lawsuit is the most powerful legal instrument in Mexican law to protect against unconstitutional acts of the authorities).

144. *See* Constitutión Política de los Estados Unidos Mexicanos, *supra* note 139, at art. 20 (stating the contents of Article 133 of the Constitution); *see also* Alfred Paul LeBlanc Jr., Comment, *United States v. Alvarez-Machain and the Status of International Law in American Courts*, 53 LA. L. REV. 1411, 1420 n.31 (1993) (indicating that the Political Constitution of the United Mexican States recognizes the right of equal protection); *see also* A. Maria Plumtree, Note, *Maquiladoras and Women Workers: The Marginalization of Women in Mexico as a Means to Economic Development*¸ 6 SW. J.L. & TRADE AM. 177, 190 (1999) (stressing the broad protections of individual rights guaranteed by the equal protection provision of the Mexican Constitution).

145. *See* ZAMORA ET AL., *supra* note 138, at 236 (defining the right of equal protection as precluding laws that discriminates based on age, sex and race); *see also* Michelle Smith, *Potential Solutions to the Problem of Pregnancy Discrimination in Maquiladoras Operated by U.S. Employers in Mexico*, 13 BERKELEY WOMEN'S L.J. 195, 208 n.93 (1998) (finding that the Mexican Constitution guarantees equal employment rights regardless of sex); *see also* Harry F. Chaveriat III, Comment, *Mexican Maquailadoras and Women: Mexico's Continued Willingness to Look the Other Way*, 8 NEW. ENG. INT'L & COMP. L. ANN. 333, 346 (2002) (noting that the Mexican Constitution protects both men and women under its equal protection provision).

146. *See* Constitutión Política de los Estados Unidos Mexicanos, *supra* note 139, at art. 1 (quoting the anti-discrimination provisions of the Constitution); *see also* Jose Luis Soberanes Fernandez, *Mexico and the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, 2002 BYU L. REV. 435, 450 (2002) (demonstrating that the Mexican Constitution expressly prohibits religious discrimination); *see also* John P. Isa, Comment, *Testing the NAALC'S Dispute Resolution System: A Case Study*, 6 AM. U.J. GENDER & LAW 615, 622 (1998) (acknowledging that Mexico recognizes equality between men and women and bans discrimination based on race, sex, religion or social conditions).

in popular elections and the right to stand for election."[147] However, critically affecting these rights is the Supreme Court's interpretation of the separation of powers under Article 49. The Court has ruled that political rights are not 'constitutional protections' and, therefore, any claims involving a violation of such rights are not reviewable by any federal court.[148] Instead, violations of political rights as described in Article 35 may be reviewed by Mexico's Electoral Tribunal of the Federal Judicial Branch (the "tribunal"), which is empowered to review "appeals from judgments resolutions of state electoral officials and protect the political and voting rights of individuals."[149] Further complicating the matter is the prohibition of the Tribunal from considering the "constitutionality of electoral laws or regulations," which is a Supreme Court matter.[150] Therefore, constitutional challenges to an electoral law based on an international treaty in conjunction with the Constitution would most likely be a matter for the Supreme Court to decide.

5. Treaty Law Applied Domestically

Consistent with its obligations under the Vienna Convention on the Law of Treaties,[151] treaties entered into by Mexico, having been approved by the Senate, are the "Supreme Law of

147. *See* ZAMORA ET AL., *supra* note 138, at 249 (noting that voting rights are protected by most legal systems and that such rights should be protected by the Mexican Supreme Court); *see also* Jorge A. Vargas, *Dual Nationality for Mexicans*, 35 SAN DIEGO L. REV 823, 847 (1998) (maintaining that the rights to vote and to run in elections are clearly recognized under the Mexican Constitution); *see also* Jorge A. Vargas, *Freedom of Religion and Public Worship in Mexico: A Legal Commentary on the 1992 Federal Act on Religious Matters*, 1998 BYU L. REV. 421, 447 (1998) (illustrating that Mexico recognizes both the right to vote and the right be voted into office).

148. *See* STEPHEN ZAMORA ET AL., MEXICAN LAW 249-50 (2004) (recognizing that, despite the right to vote under Article 35 of the Constitution, the Supreme Court does not hear cases involving violations of voting rights); *see also* Imer B. Flores, *Reconstituting Constitutions-Institutions And Culture: The Mexican Constitution And Nafta: Human Rights Vis-À-Vis Commerce*, 17 FLA. J. INT'L L. 693, 697 (2005) (opining that Mexico needs to reform its Constitution to empower the courts and tribunals to enforce all human rights); *see also* Jose Gamas Torruco, *The Separation of Powers in Mexico*, 47 DUQ. L. REV 761, 785 (2009) (explaining that the lower courts have the power to hear cases affecting human rights).

149. *See* ZAMORA ET AL., *supra* note 148, at 250 (discussing that Mexicans can contest voting rights violations in the Tribunal Federal Electoral); *see also* Dale Beck Furnish, *Judicial Review in Mexico*, 7 SW. J.L. & TRADE AM. 235, 243 (2000) (providing that the decision on violation of rights without a case or controversy by the lower Circuit Collegiate Tribunals are final); *see also* Robert M. Kossick, Jr., *Litigation in the United States and Mexico: A Comparative Overview*, 31 U. MIAMI INTER-AM. L. REV 23, 28 (2000) (displaying that decisions by the electoral tribunal are not reviewable by a higher court).

150. *See* ZAMORA ET AL., *supra* note 148, at 250 (asserting that the Tribunal lacks authority to determine the constitutionality of electoral laws because such matters are reserved to the Supreme Court); *see also* Jorge Cicero, *International Law in Mexican Courts*, 30 VAND. J. TRANSNAT'L L. 1035, 1070 n.180 (1997) (showing that Article 105 of the Mexican Constitution permits the Supreme Court to overturn election rules); *see also Liberalismo Contra Democracia: Recent Judicial Reform in Mexico*, 108 HARV. L. REV. 1919, 1930 (1995) (reporting that recent reforms have given the Supreme Court greater power to declare government acts unconstitutional).

151. *See* Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331 (requiring parties to observe *pacta sunt servunda*, which means to faithfully perform its treaty obligations).

the Union," where not inconsistent with the any constitutional provisions.[152] Article 133 of the Constitution requires that 'each state's judges . . . follow such Constitution, laws and treaties despite the dispositions in the opposite way that could exist in the Constitutions or laws of the states.'[153] This suggests that where any conflict arises between treaty law and federal or local law, the law of the Treaty should take precedence, on par with the Constitution.[154] However, in practice, scholars note that human rights treaties in particular are rarely enforced by Mexican courts.[155]

b. The Inter-American Human Rights Commission

In addition to the being a party to a multitude of United Nations human rights conventions, Mexico, by ratification of the American Human Rights Convention, has accepted the "adjudicatory jurisdiction of the Inter-American Court of Human Rights," and made a binding obligation upon itself to adhere to the principles listed in the American Convention on Human

152. *See* Antonio Canovas, *Mexico: Law Regarding the Making of Treaties, The American Society of International Law*, 31 I.L.M. 390, 390 (1992) (analyzing that treaties are the supreme law of the land under the structure of the Mexican government); *see also* Alejandro M. Garro, *Ten Years of the United Nations Sales Convention: The U.N. Sales Convention in the Americas: Recent Developments*, 17 J.L. & COM. 219, 219 (1998) (recognizing that Mexico treats international treaties as the supreme law of the land); *see also* Natara Williams, Comment, *Pre-Hire Pregnancy Screening in Mexico's Maquiladoras: Is it Discrimination?*, 12 DUKE J. GENDER L. & POL'Y 131, 136 (2005) (noting that although the courts have claimed that treaties and the Constitution are equal, the prevalent view is that the Constitution supersedes any treaty).

153. *See* Robert S. Barker, *Constitutionalism in the Americas: A Bicentennial Perspective*, 49 U. PITT. L. REV. 891, 904 (1988) (explaining that Article 133 of the Constitution of Mexico requires each judge to follow the Constitution as well as the laws and treaties of the states).

154. *See* Jennifer Hill, *Binational Guestworker Unions: Moving Guestworkers into the House of Labor*, 35 FORDHAM URB. L.J. 307, 335 (2008) (explaining that Article 133 of Mexico's Constitution requires the principles adapted from treaties be adapted as part of the domestic law of Mexico); *see also* Williams, *supra* note 152, at 140 (illustrating that the hierarchy of Mexican law places international treaties on the same or higher level as federal law). *See generally* Jorge Ulises, *The Judicial Application of International Human Rights Treaties*, 7 U.S.- MEX. L.J. 1, 5–7 (2007) (discussing the hierarchy of laws, including treaty law, in Mexico and the problem with lack of consistent judicial application of the laws according to their hierarchy).

155. *See* Raúl González Schmal, *Mexican Legislation on Religion and the 1981 Declaration on Intolerance and Discrimination*, 2007 BYU L. REV. 689, 713 (2007) (highlighting that many aspects of human rights treaties have not been the subject of declarative interpretations in Mexico, making them not part of Mexico's Constitution); *see also* Monica Schurtman, *Los "Jonkeados" and the NAALC: The Autotrim/Customtrim Case and its Implications for Submissions Under the NAFTA Labor Side Agreement*, 22 ARIZ. J. INT'L & COMP. L. 291, 355–70 (2005) (concluding that Mexico has failed to adhere to international human rights treaties and has failed to enforce many of its obligations under its own human rights laws). *See generally* ZAMORA ET AL., *supra* note 148, at 253 (noting that although the Mexican Constitution grants protection of human rights, there are five exceptions to these basic rights).

Rights.[156] In an annual evaluation report on the status of human rights in Mexico,[157] the Inter-American Commission on Human Rights noted that Mexico had made progress in terms of making "greater commitments to international rights instruments," such as the ratification of the Inter-American conventions.[158] Surprisingly, the report cites women's rights and political rights as being two areas of great reform and progress in Mexico's compliance with its human rights obligations.[159]

The report referred to a study submitted by Mexico in 2000 that purported the State had thoroughly evaluated its federal laws in regard to the equality of men and women in order to "verify its consonance with international instruments," and listed proposed areas in need of amending.[160] Not surprisingly, the study specifically proposed laws to strengthen gender equal-

156. *See* Charter of the Organization of the American States, Parts F/G, Dec. 12, 1951 Pan-Am. T.S. Nos. 1-6 & 61 (1951) (highlighting that Mexico has made a binding obligation to improve human rights under the American Convention on Human Rights); *see also* Elizabeth Goergen, *Women Workers in Mexico: Using the International Human Rights Framework to Achieve Labor Protection*, 39 GEO. J. INT'L L. 407, 417 (2008) (mentioning that Mexico has bound itself to improve human rights under the main human rights treaty as a party to the Inter-American Convention); *see also* William A. Wines & Terence J. Lau, *Can You Hear Me Now?—Corporate Censorship and Its Troubling Implications for the First Amendment*, 55 DEPAUL L. REV. 119, 138–39 (describing Mexican efforts to adhere to the principles listed in the American Convention on Human Rights as set forth in Mexico's annual report on human rights).

157. *See* Inter-American Comm. on Human Rights, Follow-up on IACHR Recommendations on its Reports on Member States: Mexico, 1999 Inter-Am. C.H.R. 1501 (1999) [hereinafter *Follow-up on IACHR Recommendations*] (highlighting the annual report that Mexico makes with regard to human rights); *see also* Carlos Rios Espinoza, *Redesigning Mexico's Criminal Procedure: The States' Turning Point*, 15 SW. J. L. & TRADE AM. 53, 75 (2008) (explaining that Mexico makes an annual report on human rights which is prepared on the basis of complaints by citizens and the investigations that follow); *see also* Wines & Lau, *supra* note 156 (mentioning that Mexico issues an annual report on human rights).

158. *See Follow-up on IACHR Recommendations*, *supra* note 157 (illustrating that the Commission remained silent on the lack of enforcement of human rights treaties in the Mexican courts, as previously noted); *see also* Angélica Cházaro & Jennifer Casey, *Getting Away with Murder: Guatemala's Failure to Protect Women and Rodi Alvarado's Quest for Safety*, 17 HASTINGS WOMEN'S L.J. 141, 173 (2006) (noting that Mexico has ratified the Inter-American conventions); *see also* Goergen, *supra* note 156, at 417 (2008) (highlighting that Mexico has made progress in promoting human rights including signing and ratifying the Inter-American conventions).

159. *See Follow-up on IACHR Recommendations*, *supra* note 157 (highlighting that women's rights has been an area of great reform and progress in Mexico with regards to human rights); *see also* U.N. Human Rights Comm., *General Comment 28: Equality of Rights Between Men and Women*, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000) (discussing Mexico's progress in improving equality between men and women); *see also* Andreea Vesa, *International and Regional Standards for Protecting Victims of Domestic Violence*, 12 AM. U. J. GENDER SOC. POL'Y & L. 309, 354 (2004) (illustrating Mexico's adherence to its obligations to protect human rights).

160. *See Follow-up on IACHR Recommendations*, *supra* note 157 (explaining that the 2000 survey listed proposed areas in need of amending to improve gender equality); *see also* U.N. Human Rights Comm., U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000) (discussing the importance of improving equality between men and women and the areas certain countries have improved in); *see also* Jorge A. Vargas, *Concubines Under Mexican Law; With a Comparative Overview of Canada, France, Germany, England and Spain*, 12 SW. J. L. & TRADE AM. 45, 78 (2005) (noting that human rights arrived in Mexico in the 1990s with the establishment of Mexico's National Commission of Human Rights).

ity in the state of Oaxaca, among others, but the report did not specify as to the types of laws proposed.[161] The Commission found Mexico's initiative to strengthen "effective observance" of women's rights as encouraging.[162]

Additionally, the same report praised the transformation of Mexico's political transparency through the creation of the judicially autonomous Federal Electoral Institute and Tribunal.[163] In particular, the Commission highlighted the Institute's decision in 1998 to adopt the "recommendations and observations" made by the Inter-American Human Rights Commission "contained in the Report on the Situation of Human Rights" as far as the law would allow it.[164] The fact that the Electoral Tribunal is willing and authorized to adopt recommendations made by the Commission, and ostensibly any Human Rights Court rulings, suggests that the following cases and report could influence its consideration in matters concerning fundamental rights under international law in election matters.

---

161. *See Follow-up on IACHR Recommendations*, *supra* note 157 (describing the proposed laws in Mexico and specifically Oaxaca with respect to equality between men and women); *see also* Maia Sophia Campbell, Note, *The Right of Indigenous Peoples to Political Participation and the Case of Yatama v. Nicaragua*, 24 ARIZ. J. INT'L & COMP. L. 499, 528–29 (illustrating that several Mexican states, including Oaxaca, have passed laws promoting equality); *see also* Mary C. Wagner, Comment, *Belem Do Para: Moving Toward Eradicating Domestic Violence in Mexico*, 22 PENN ST. INT'L L. REV. 349, 360 (2004) (noting that several laws have been proposed in the State of Oaxaca to promote gender equality).

162. *See Follow-up on IACHR Recommendations*, *supra* note 157, at ¶ 52 (expressing that the Commission received encouraging information with respect to Mexico's commitments to observe women's rights); *see also* Dr. Carlos Ayala Corao, Chairman of the Inter-Am. Comm'n on Human Rights, Annual Report of the Inter-American Commission on Human Rights (Feb. 22, 1999) (expressing content with Mexico's adoption of the Inter-American Court of Human Rights in order to guarantee the "effective observance of human rights"); *see also* Vesa, *supra* note 159, at 354–55 (revealing that in response to the murder of 200 women that occurred after 1993, the Inter-American Commission on Human Rights issued numerous recommendations to ensure Mexico would effectively observe the rights of women).

163. *See Follow-up on IACHR Recommendations*, *supra* note 157, at ¶ 33 (commenting that the judicially autonomous Federal Electoral Tribunal advances the Mexican people toward a fairer political system); *see also* Susana Berruecos, *Electoral Justice in Mexico: The Role of the Electoral Tribunal Under New Federalism*, 35 J. LAT. AM. STUD. 801, 808 (2003) (acknowledging that the creation of the Electoral Tribunal of the Federal Judiciary has strengthened the Mexican political system and its appearance of legitimacy); *see also* Jodi Finkle, *Supreme Court Decisions on Electoral Rules After Mexico's 1994 Judicial Reform: An Empowered Court*, 35 J. LAT. AM. STUD. 777, 781 n.8 (2003) (explaining that the 1996 electoral reforms bestowed significant autonomy upon the Federal Electoral Institute with respect to membership and participation in the electoral process).

164. *See Follow-up on IACHR Recommendations*, *supra* note 157, at ¶ 36 (proclaiming that the General Council of the Federal Electoral Institute has adopted, within legal bounds, the "recommendations and observations" of the Inter-American Commission on Human Rights from the Report on the Situation of Human Rights in Mexico). *See generally* Inter-American Comm. on Human Rights, Consideration Regarding the Compatibility of Affirmative Action Measures Designed to Promote the Political Participation of Women with the Principles of Equality and Non-Discrimination, Inter-Am. C.H.R., OEA/Ser.L/V/II.106, doc. 6 rev. ¶ 3 (1999) [hereinafter *Consideration Regarding the Compatibility of Affirmative Action Measures*] (stating that the Inter-American Commission on Human Rights incorporated a section on "gender-specific human rights issues" in its Report on the Situation of Human Rights in Mexico). *See generally* Organization of the American States, Annual Report of the Inter-American Commission on Human Rights, 1998 Inter-Am. C.H.R. 1284 (1998) (commenting on the Report on the Situation of Human Rights in Mexico).

1. The Case of Maria Eugenia Morales de Sierra

In February of 1995, the Center for Justice and International Law, together with Eugenia Morales de Sierra, a working Guatemalan mother, (collectively, the "Petitioners"), submitted a petition to the Inter-American Commission on Human Rights alleging that the Republic of Guatemala (the "State") had violated Morales de Sierra's rights under four articles of the American Convention.[165] The Petitioners claimed that certain provisions of the Civil Code of Guatemala that established a clear distinction between men and women by prescribing unequal roles for husbands and wives had violated the general principle of equal protection under the American Convention.[166] The disputed provisions of the Civil Code provided, *inter alia*, that a husband is empowered to "represent the marital union," has the sole power to "administer marital property," and has the right to prohibit the wife from working outside the home if doing so appears to "prejudice her role as a mother and homemaker."[167] In 1993, the Guatemalan Court of Constitutionality, the final authority of national law, held that the disputed Civil Code provisions did not conflict with the equal protection clause in the Constitution, nor any international treaty prohibiting gender discrimination.[168] The Court reasoned that protection of the

165. *See* Maria Eugenia Morales de Sierra v. Guatemala, Case 11.625, Inter-Am. C.H.R., Report No. 28/98, OEA/Ser.L/V/II.98, doc. 7 rev. ¶ 1 (1998) (petitioning against Guatemala's violation of Articles 1, 2, 17, and 24 of the American Convention on Human Rights). *See generally* Organization of American States, American Convention on Human Rights, arts. 1, 2, 17, 24, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (defining discrimination against women as "any distinction, exclusion or restriction made on the basis of sex" and setting forth specific guidelines on how member states are to combat such discrimination). *See generally* Richard J. Wilson, *The Index of Individual Case Reports of the Inter-American Commission on Human Rights: 1994-1999*, 16 AM. U. INT'L L. REV. 353, 384 (2001) (discussing articles 1, 2, 17, and 24 of the American Convention on Human Rights).

166. *See Morales de Sierra*, Case 11.625, Inter-Am. C.H.R., Report No. 28/98, OEA/Ser.L/V/II.98, doc. 7 rev. ¶ 2 (1998) (listing various provisions of the Guatemalan Civil Code that petitioner claimed violated the American Convention on Human Rights); *see also* Michael G. Heyman, *Asylum, Social Group Membership and the Non-State Actor: The Challenge of Domestic Violence*, 36 U. MICH. J.L. REFORM 767, 812 (2003) (declaring that the Guatemalan Civil Code represents the "legislative enshrinement of gender based discrimination"); *see also* Michael G. Heyman, *Domestic Violence and Asylum: Toward a Working Model of Affirmative State Obligations*, 17 INT'L J. REFUGEE L. 729, 737 (2005) (asserting that clearly discriminatory gender roles between husbands and wives are embedded in the Civil Code of Guatemala).

167. *See Morales de Sierra*, Case 11.625, Inter-Am. C.H.R., Report No. 28/98, OEA/Ser.L/V/II.98, doc. 7 rev. ¶ 2 (1998) (cataloging the various articles in the Guatemalan Civil including Article 317 providing that a woman may be exempt from exercising some guardianships "by virtue of her sex"); *see also* Elizabeth Abi-Mershed, *Reparations in the Inter-American System: A Comparative Approach*, 56 AM. U. L. REV. 1375, 1445 (2007) (outlining the disputed spousal role allocations of the Guatemalan Civil Code); *see also* Heyman, *supra* note 166 at 737 (enumerating a charge Morales de Sierra asserted against article 114 of the Guatemalan Civil Code which allows a husband to prohibit his wife from working outside the home).

"marital unit" by outlining distinct responsibilities of the respective partners did not conflict with the right to equal protection, but rather enhances protection of the family as a fundamental unit.[169]

In its final report, which was transmitted to the respective parties on November 7, 2000, the Commission decided the State was responsible for "having violated the rights of Mar… Eugenia Morales de Sierra to equal protection, respect for family life…in Articles 24, 17, and 11 in the American Convention of Human Rights."[170] The Commission also found the State responsible for failing to uphold its Article 1 and Article 2 obligations which require the State to adopt enforceable measures protecting such rights.[171] Applying a standard of strict scrutiny,

168. *See Morales de Sierra*, Case 11.625, Inter-Am. C.H.R., Report No. 28/98, OEA/Ser.L/V/II.98, doc. 7 rev. ¶ 3 (1998) (reporting the Guatemalan Court of Constitutionality's holding that these provisions were constitutional since they "provided for judicial certainty in the allocation of roles within marriage"); *see also* Christiana Ochoa, *Guatemala's Gender Equality Reforms: CIL in the Making*, 83 IND. L.J 1333, 1347 (2008) (stating that the Guatemalan Constitutional Court upheld the Civil Code Provisions because it found that contested provisions were not discriminatory but were protectionist in nature); *see also* Jan Perlin & Richard J. Wilson, *The Inter-American Human Rights System: Activities From Late 2000 Through October 2002*, 18 AM. U. INT'L L. REV. 651, 708–09 (2003) (citing that the Guatemalan Constitutional Court upheld the challenged Civil Code provisions, claiming defense of "cultural relativism").

169. *See Morales de Sierra*, Case 11.625, Inter-Am. C.H.R., Report No. 28/98, OEA/Ser.L/V/II.98, doc. 7 rev. ¶ 24 (1998) (highlighting the Guatemalan Court of Constitutionality's holding which found that the disputed provisions distinguish roles of spouses and protect the family unit by allocating rights and responsibilities within marriage); *see also* Heyman, *supra* note 166, at 812 (emphasizing the rationale of the Guatemalan Constitutional Court that these provisions provided "juridical certainty" with respect to roles in marriage); *see also* Christiana Ochoa, *Guatemala's Gender Equality Reforms: CIL in the Making*, 83 IND. L.J. 1333, 1347 (2008) (discussing the Guatemalan Constitutional Court's reasoning that Civil Code provisions protected family values).

170. *See American Convention on Human Rights*, *supra* note 165, at arts. 11, 17, 24 (outlining various provisions in the Convention, such as the obligation of State Parties to take "all appropriate measures to eliminate discrimination against women in the field of employment," and to create a Committee on the Elimination of Discrimination against Women); *see also Morales de Sierra*, Case 11.625, Inter-Am. C.H.R., Report No. 28/98, OEA/Ser.L/V/II.98, doc. 7 rev. ¶ 21 (1998) (setting forth the various provision of the Guatemalan Civil Code that the Commission ultimately found to violate the American Convention on Human Rights); *see also* James L. Cavallaro & Emily J. Schaffer, *Less as More: Rethinking Supernational Litigation of Economic and Social Rights in the Americas*, 56 HASTINGS L.J 217, 256 (2004) (reiterating that the Commission found that certain provisions of the Guatemalan Civil Code violated Article 17 of the Convention).

the Commission found that the rights to "equal protection" and "non-discrimination" underpinning the American Convention to be the "essential bases for the very concept of human rights."[172] Accordingly, any distinction made, statutorily or other, based on the criteria of gender, for example, would require "very weighty reasons."[173] Finding no "weighty reasons" for establishing the Civil Code provisions in dispute, the Commission found the State to have failed in its obligations under the American Convention to:

> respect the rights and freedoms recognized therein and to ensure to all persons…the free and full exercise of those rights and freedoms without discrimination for reasons of…[*inter alia*]…sex…. Any impairment of those rights which can be attributed under the rules of international law to the action or omission of any public authority constitutes an act imputable to the State, which assumes responsibility in the terms provided by the Convention.[174]

---

171. *See American Convention on Human Rights*, *supra* note 165, at arts. 1, 2 (ordering that parties respect the rights and freedoms of the people in their jurisdictions); *see also* American Convention on Human Rights, art. 2, Jan. 1970, 9 I.L.M. 99 (demanding that parties adopt legislative measures to give the rights and freedoms in Article 1 to people in their jurisdictions); *see also Morales de Sierra*, Case 11.625, Inter-Am. C.H.R., Report No. 4/01, OEA/Ser.L/V/II.111, doc. 20 ¶ 55 (2001) (holding that Guatemala had violated Articles 1 and 2 of the American Convention on Human Rights).

172. *See Morales de Sierra*, Case 11.625, Inter-Am. C.H.R., Report No. 4/01, OEA/Ser.L/V/II.111, doc. 20 ¶ 36 (2001) (holding that equal protection and non-discrimination are essential to human rights); *see also* Symposium, *Latinos and Latinas at the Epicenter of Contemporary Legal Discourses: Gender and Human Rights: Guatemala's Gender Equality Reforms: CIL in the Making*, 83 IND. L.J. 1333, 1348–49 (2008) (stating that the Inter-American Commission focused on Maria Eugenia's right to equal protection); *see also* Jo M. Pasqualucci, *The Evolution of International Indigenous Rights in the Inter-American Human Rights System*, 6 HUM. RTS. L. REV 281, 286–87 (2006) (establishing that the American Convention includes broad non-discrimination clauses where all people are entitled to equal protection of the law).

173. *See Morales de Sierra*, Case 11.625, Inter-Am. C.H.R., Report No. 4/01, OEA/Ser.L/V/II.111, doc. 20 ¶ 36 (2001) (holding that very weighty reasons would have to be offered for gender discrimination); *see also* Aaron Baker, *Proportionality and Employment Discrimination in the UK*, 37 INDUS. L.J. 305, 318–19 (2008) (indicating that only very weighty reasons can justify gender discrimination); *see also* Eva Brems, *Human Rights: Minimum and Maximum Perspectives*, 9 HUM. RTS. L. REV. 349, 368 (2009) (concluding that a State must offer very weighty reasons to justify gender discrimination).

174. *See Morales de Sierra*, Case 11.625, Inter-Am. C.H.R., Report No. 4/01, OEA/Ser.L/V/II.111, doc. 20 ¶ 51 (2001) (finding that the State failed its duties under the American Convention).

The Commission recommended that the State amend its Civil Code to reflect "reciprocal duties of men and women in marriage," in "conformity with the norms [established] under the American Convention."[175]

2. "Special Studies" Report on the Political Participation of Women and Affirmative Action

In 1999, the Inter-American Commission on Human Rights (the "Commission") issued a report in response to a request by the Inter-American Commission of Women (the "CIM") asking the Commission to provide a "juridical analysis of the compatibility of affirmative action measures designed to promote the political participation of women, including quota systems, with the principle of non-discrimination on the basis of gender."[176] The Commission emphasized in its report the serious underrepresentation of women in government and public life throughout the world, including in Latin America.[177] Noting the general trend at that time for Latin American governments to implement some sort of quota system designed to ensure that women hold a minimum number of elected offices, the report cites as an example Argentina, where its government claimed that female representation in the Congress increased at least 30% since implementing a quota system.[178]

---

175. *See Morales de Sierra*, Case 11.625, Inter-Am. C.H.R., Report No. 4/01, OEA/Ser.L/V/II.111, doc. 20 ¶ 84 (2001) (quoting the Inter-American Commission's recommendation to amend Guatemala's Civil Code to reflect gender equality in marriage). *See generally* Symposium, *Latinos and Latinas at the Epicenter of Contemporary Legal Discourses: Gender and Human Rights: Guatemala's Gender Equality Reforms: CIL in the Making*, 83 IND. L.J. 1333, 1348–49 (2008) (asserting that the Inter-American Commission requested that the State make amendments to its Civil Code). *See generally* Angel R. Oquendo, *The Solitude of Latin America: The Struggle for Rights South of the Border*, 43 TEX. INT'L L.J. 185, 231–33 (2008) (listing the insufficiencies of the amendments to Article 110 regarding marriage).

176. *See* Inter-American Comm. on Human Rights, Consideration Regarding the Compatibility of Affirmative Action Measures Designed to Promote the Political Participation of Women with the Principles of Equality and Non-Discrimination, Inter-Am. C.H.R., OEA/Ser.L/V/II.106, doc. 6 rev. ¶ I (1999) (expressing that the Inter-American Commission on Human Rights requested an analysis of affirmative action measures for women). *See generally* Committee on the Elimination of the Discrimination of Women, *Concluding Observations: Guatemala*, ¶ 48, U.N. Doc. A/49/38 (1994) (addressing that concerns existed regarding domestic law and that a report was generated including issues of gender discrimination). S*ee generally* Dr. Helio Bicudo, Presentation of the 1999 Annual Report of the IACHR to the Committee on Juridical and Political Affairs of the OAS Permanent Council (May 11, 2000) (chairman of the Inter-American Commission on Human Rights) (discussing affirmative action measures aimed at female political participation).

177. *See Consideration Regarding the Compatibility of Affirmative Action Measures*, *supra* note 176, at ¶ II (concluding that women remain seriously underrepresented throughout the world); *see also* Hilary Charlesworth & Christine Chinkin, *Sex, Gender, and September 11*, 96 AM. J. INT'L L. 600, 600 (arguing that women and their opinions and experiences are considered unimportant to society); *see also* Symposium, *Dueling Fates: Should the International Legal Regime Accept a Collective or Individual Paradigm to Protect Women's Rights?*, 24 MICH. J. INT'L L. 347, 367–68 (2002) (identifying the underrepresentation of women in Latin America and how the Convention for the Elimination of All Forms of Discrimination Against Women was created to address this issue).

178. *See Consideration Regarding the Compatibility of Affirmative Action Measures, supra* note 176, at ¶ II (declaring that female involvement in Argentina's government has increased to 30%); *see also* Nancy Millar, *Envisioning a U.S. Government that Isn't 84% Male: What the United States Can Learn from Sweden, Rwanda, Burundi, and Other Nations*, 62 U. MIAMI. L. REV. 129, 150 (2007) (providing that Argentina has a national law requiring that at least 30% of candidates on party lists be women); *see also* Darren Rosenblum, *Parity/Disparity: Electoral Gender Inequality on the Tightrope of Liberal Constitutional Traditions*, 39 U.C. DAVIS L. REV. 1119, 1122–23 (2006) (presenting that many countries had adopted quota requirements for legislatures and political parties, including Argentina).

In addressing whether increasing political participation by women through means of affirmative action can be reconciled with the rights to equality, the Commission pointed out that even where, "as a matter of law," women are accorded equal treatment as men, "de jure barriers to equality" persist without *affirmative* measures to enforce such laws.[179] Accordingly, the Commission concluded that affirmative action designed to fulfill a state's obligation to protect women's rights to political participation was "in compliance with the principle of non-discrimination and the applicable provisions of human rights law."[180]

3. The Case of Belize

The Belize Supreme Court case of *Cal v. Attorney General,* with remarkably similar facts to the *Maya Indigenous Communities* case,[181] is one of the first indigenous land rights cases to invoke the recently adopted DRIP ("Declaration on the Rights of Indigenous Peoples") in its judicial decision.[182] The claimants in *Cal*, representatives of an indigenous Mayan village in southern Belize, asserted that the Ministry of Natural Resources and Environment had "issued or threatened to issue leases and concessions" to lands the claimants contended were collectively held by them through "traditional land tenure."[183] The Court, encouraged by the recommendations made by the Commission in *Maya Indigenous Communities*, agreed that the claimants had a collective legal interest in customary lands critical to their survival, and ordered the government to properly recognize and demarcate the disputed land.[184]

---

179. *See Consideration Regarding the Compatibility of Affirmative Action Measures*, *supra* note 176, at ¶ III(C) (asserting that even if equality laws existed, there will always be gender inequality issues); *see, e.g.,* Ana Maria Merico-Stephens, *Of Federalism, Human Rights, and the Holland Caveat: Congressional Power to Implement Treaties*, 25 MICH. J. INT'L L. 265, 276–78 (2004) (discussing discrimination and violence against women as a form of inequality that still exists in today's society). *See generally* International Institute for Democracy and Electoral Assistance, *Women in Parliament: Beyond Numbers* 15 (Trydells Tryckeri AB 2005) (2005) (positing that it is difficult for women to participate in politics because of gender inequality).

180. *See Consideration Regarding the Compatibility of Affirmative Action Measures*, *supra* note 176, at ¶ IV (finding that the affirmative measures taken to increase the role of women in the political process are in agreement with all relevant provisions of human rights law); *see also* Athena D. Mutua, *Gender Equality and Women's Solidarity Across Religious, Ethnic, and Class Differences in the Kenyan Constitutional Review Process*, 13 WM. & MARY J. WOMEN & L. 1, 40 (2006) (noting that CEDAW obligated states to take affirmative steps to reduce gender discrimination); *see also* Margaret Plattner, *The Status of Women Under International Human Rights Law and the 1995 UN World Conference on Women, Beijing, China*, 84 KY. L.J. 1249, 1259 (1996) (stating that CEDAW, which calls for states to take affirmative steps to reduce gender discrimination in politics, is legally binding and internationally accepted).

181. *See* Case of Maya Indigenous Communities of Belize, Inter-Am. C.H.R., Case 12.053, Report No. 40/04, October 12, 2004 (holding that Belize violated the American Declaration of the Rights and Duties of Man by violating the property rights of indigenous peoples).

182. *See* Cal v. Attorney General, 46 I.L.M. 1022 (2007) (Belize) (relying on the Declaration in holding that the government was required to respect the indigenous land rights of the Mayan community).

183. *See id.* (noting that the claimants accused the government of Belize of issuing leases without respect to the traditional land tenure of Santa Cruz and Conejo).

184. *See id.* at 1033–34 (holding that, based on the recommendation of the Commission in *Maya Indigenous Communities*, Maya customary land tenure existed in the Toledo District of Belize).

The novelty of this case, however, lies in the Court's importation of the non-binding DRIP into customary international law to further support its conclusions.[185] The Court cited Article 26, concerning indigenous land-use rights, as authoritatively reflecting the "general principles of international law on indigenous peoples and their land and resources."[186]

The significance of the Court's attribution to the DRIP a more binding importance than its non-binding nature suggests may be influential on courts in other jurisdictions, including the Inter-American Commission on Human Rights. In 2006, the Commission issued a press release welcoming the adoption of the DRIP.[187]The press release lauded the DRIP for recognizing the "collective rights of indigenous peoples,"[188] and expressed its firm commitment to formally adopt an American version that reflects the DRIP commitments.[189]

The DRIP is the most expansive instrument in defining both the rights of indigenous peoples and their respective States' obligation to honor these rights.[190] Article 3 reiterates indigenous peoples' right to "self-determination," but Article 4 goes further and includes the right to "autonomy or self-government in matters relating to internal and local affairs," the right to

185. See Leonardo J. Alvarado, *Prospect and Challenges in the Implementation of Indigenous Peoples' Human Rights in International Law: Lessons From the Case of* Awas Tingni v. Nicaragua, 24 ARIZ. J. INT'L & COMP. L. 609, 639 (2007) (stating that the Supreme Court of Belize relied on the Declaration as evidence of customary international law); *see also* Saira Mohamed, Introductory Note to the United Nations Declaration on the Rights of Indigenous Peoples and Cal v. Attorney General, Supreme Court of Belize, 46 I.L.M. 1008, 1010 (2007) (mentioning that the Supreme Court of Belize relied on a non-binding General Assembly Resolution, the Declaration on the Rights of Indigenous Peoples); *see also* Siegfried Wiessner, *Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples*, 41 VAND. J. TRANSNAT'L L. 1141, 1158–59 (2008) (noting that the Belize Supreme Court recognized the rule of customary international law recognizing an indigenous peoples' right to their land).

186. *See Cal*, 46 I.L.M. 1022 at 1048 (citing Article 26 of the Declaration on the Rights of Indigenous Peoples as reflecting the principles of international law regarding indigenous peoples).

187. *See* Press Release, *IACHR Welcomes Adoption of the Universal Declaration of the Rights of Indigenous Peoples* (July 3, 2006) (on file with the Inter-Am. C.H.R. Annex) [hereinafter *Press Release*] (announcing that the Inter-American Commission on Human Rights supports the Universal Declaration on the Rights of Indigenous Peoples).

188. *See Press Release*, *supra* note 187 (stating that the Declaration recognizes the collective rights of indigenous people, especially the rights of self determination and cultural preservation).

189. *See Press Release*, *supra* note 187 (noting that the Inter-American Commission on Human Rights is working toward drafting and adopting an American version of the Declaration on the Rights of Indigenous Peoples).

190. *See* Jorge Contesse & Jeanmarie Fenrich, *"It's Not OK": New Zealand's Efforts to Eliminate Violence Against Women*, 32 FORDHAM INT'L L.J. 1770, 1794–97 (2009) (noting that the DRIP provides stronger human rights standards for indigenous people and obligates states to take "positive measures" to ensure their native peoples' rights and interests in land, resources, self-determination, and social and economic rights); *see also* Wenona T. Singel, *New Directions for International Law and Indigenous Peoples*, 45 IDAHO L. REV. 509, 510–11 (2009) (describing the development of international legal norms and the commitment to indigenous people through the DRIP). *See generally* United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) (stating that States must take effective measures to protect the rights afforded to indigenous people, which are the rights granted to all people, including the right against discrimination, right to self-determination, and right to practice their cultural traditions and customs)

strengthen and maintain their distinct political…institutions,"[191] and finally, "the right to determine their own membership in accordance with their culture."[192]

In a feeble acknowledgment of individual human rights, the DRIP faintly obligates the States to *assist* its indigenous peoples in maintaining respect for fundamental rights, but does not clarify the means of which a State may do so without violating indigenous peoples' rights to autonomy and maintenance of their own political institutions and culture enshrined in the DRIP.[193]

VIII. Conclusion

The supremacy of gender equality and the principle of non-discrimination among the vast body of human rights law appear to have garnered consensus throughout the international legal community, even within most indigenous communities.[194] Accordingly, Mexico seems to have made a firm commitment to the principle of equality for all people within its borders.[195]

---

191. *See* United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 190, at arts. 4, 5 (declaring the right of indigenous peoples to participate in the State's institutions and affairs).

192. *See id.* at art. 33 (stating the protection granted in the DRIP for indigenous peoples' customs and traditions, in which indigenous peoples have the right to choose their customs and traditions).

193. *See* Alessandro Fodella, *International Law and the Diversity of Indigenous Peoples*, 30 VT. L. REV. 565, 577 (2006) (stating that the DRIP grants indigenous peoples a right to self-determination and autonomy, however, this right is not clearly stated or established by customary international law and States seem to be unclear about its content); *see also* Viniyanka Prasad, *The UN Declaration on the Rights of Indigenous Peoples: A Flexible Approach to Addressing the Unique Needs of Varying Populations*, 30 VT. L. REV. 565, 577 (2006) (asserting that the text of the DRIP is meant to be an "evolving articulation of standards," but as a starting point in which States shall consult and cooperate with indigenous peoples in order to determine their needs). *See generally* United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 190, at arts. 17–46 (explaining that States shall consult and cooperate with indigenous peoples when adopting and implementing new laws, however, procedures and guidelines on how to accomplish this are not given).

194. *See* S. James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21 ARIZ. J. INT'L & COMP. L. 13, 16–17 (2003) (stating that the right to equality and non-discrimination has received extensive recognition in international and regional human rights treaties); *see also* Elena A. Baylis, *Minority Rights, Minority Wrongs*, 10 UCLA J. INT'L L. FOREIGN AFF. 66, 75 (2005) (noting that international and regional law has recognized many rights for indigenous peoples over the past 50 years, including the right of equality and non-discrimination); s*ee also* Andrew Huff, *Indigenous Land Rights and the New Self-Determination*, 16 COLO. J. INT'L ENVTL. L & POL'Y 295, 322–23 (2005) (acknowledging that numerous treaties and declarations, including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, are being recognized by the international community as the norm on equality and non-discrimination).

195. *See* Emily Miyamoto Faber, *Pregnancy Discrimination in Latin America: The Exclusion of "Employment Discrimination" from the Definition of "Labor Laws" in the Central American Free Trade Agreement*, 16 COLUM. J. GENDER & L. 297, 306 (2007) (noting that the Mexican Constitution and Mexican Federal Labor Law guarantee equality for both men and women); *see also* Parastoo Anita Mesri, *The Violation of the Human Right to Health as a Factor in the Zapatista Revolution of Chipas, México*, 10 TULSA J. COMP. & INT'L L. 473, 511 (2003) (explaining that the Indigenous Peoples Convention further obligates Mexico to adhere to the principle of equality and close the "socio-economic gaps between indigenous peoples and native peoples"); *see also* Jorge A. Vargas*, NAFTA, The Chipas Rebellion, and the Emergence of Mexican Ethnic Law*, 25 CAL. W. INT'L L.J. 1, 30–31 (2003) (indicating Mexico's intent to promote equality by stating in Chapter I of the Mexican Constitution that all men and women have the right to legal equality).

Appearances, though, can be deceiving; the problem is not a lack of de jure laws protecting gender equality, or the equal right to political participation, but rather, a lack of clear mechanisms by which to enforce those laws.

The creation of a parallel system of law and government in Mexico may shelter autonomous indigenous communities from the burdens of incorporating a modern system of individual human rights protections, especially when the political reality of civil warfare puts a country like Mexico in the precarious position of balancing the rights of individuals without intruding into local indigenous affairs. If a national government were to interfere with towns ruled by customary law, such interference may fan the flames of rebellion and civil unrest.

Conversely, where indigenous customary law is formally recognized by the government, individuals living under such rule would have no formal means of redress for violations of individual rights if the government is de facto barred from monitoring or interfering with local customs. The reality for most indigenous women especially, is that they lack formal education, independence and the financial means to bring the type of claim as Eusofrina Cruz's forward through the national system.

Collective or group autonomy and self-government as conceived in the DRIP and by indigenous communities throughout the world would seem to put a strain on the current body of human rights law that emphasizes fundamental rights for individuals. Indigenous peoples have suffered greatly throughout history, and continue to suffer at the hands of their own national governments,[196] but it seems as if their common plight is related to communal land use and economic rights. Since the right to communal use and protection of indigenous lands has begun to receive legal recognition under existing international customary law,[197] the expanded claims to the right to self-government are unnecessary. It remains unclear to what

196. *See* Amelia Cook & Jeremy Sarkin, *Who Is Indigenous? Indigenous Rights Globally, in Africa, and Among the San in Botswana*, 18 TUL. J. INT'L & COMP. L. 93, 101–05 (2009) (remarking on the many problems faced by indigenous people in rural and urban areas throughout the world); *see also* Lisa J. Laplante & Suzanne A. Spears, *Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector*, 11 YALE HUM. RTS. & DEV. L.J. 69, 94–95 (2008) (addressing the problems indigenous peoples face regarding the loss of their traditional lands and resources, specifically "colonists, commercial companies and State enterprises taking or occupying indigenous peoples' land"); s*ee also* Maia Sophia Campbell, Note, *The Right of Indigenous Peoples to Political Participation and the Case of Yatama v. Nicaragua*, 24 ARIZ. J. INT'L & COMP. L. 499, 514–15 (2007) (acknowledging the past and present suffering of indigenous peoples caused by discrimination, deprivation of human rights and denial of fundamental freedoms).

197. *See* Thomas T. Ankersen & Thomas K. Ruppert, *Defending the Polygon: Emerging Human Right to Communal Property*, 59 OKLA. L. REV. 681, 697–99 (2006) (acknowledging that many international cases and treaties recognize indigenous peoples' right to chose and possess traditional lands and territories under the communal property right); s*ee also* Huff, *supra* note 194, at 304 (stating that communal lands, protected as indigenous territories, are generally inalienable, and the right to such property is recognized in many countries' constitutions); s*ee also* Angela R. Riley, *Indian Remains, Human Rights: Reconsidering Entitlement Under the Native American Graves Protection and Repatriation Act*, 34 COLUM. HUM. RTS. L. REV. 49, 81 (2003) (noting that in the case of *The Mayagna (Sumo) Indigenous Community of Awas Tingni v. Nicaragua*, indigenous communities of Nicaragua successfully argued for the demarcation of traditional lands).

degree existing self-governing indigenous communities are also obligated to respect the fundamental right to personal sovereignty, and if they are, what kind of clear legal mechanism could provide enforcement of such rights.

As indigenous autonomy is achieving greater recognition, Cruz's plight in Mexico provides a good example of an inherent human rights conflict, and should prompt the signatories to the DRIP to consider carefully how they will reconcile individual rights with collective indigenous rights.

Scrutinizing the Shipwreck Salvage Standard: Should a Salvor Be Rewarded for Locating Historic Treasure?

Allison Leigh Richmond*

Introduction

It has been said that "[t]o many, the recovery of artifacts from sunken ships has an air of mystery and romance."[1] Indeed, over the years, "the mystery and excitement of shipwrecks and sunken treasures have captured imaginations and inspired dreams of underwater adventure and discovery."[2] This mystery and excitement even led to the 1994 formation of Odyssey Marine Exploration, an American company led by John Morris and Greg Stemm, that focuses on finding ancient shipwrecks "with the belief" that "[t]he treasures and the knowledge recovered from the deep ocean should be shared with the world."[3] With technological advances in diving technology, treasure hunters like Morris and Stemm are now able to find and access "previ-

1. *See* GEOFFREY BRICE, MARITIME LAW OF SALVAGE 255 (3d ed. 1999) (noting the long-standing fascination with sunken ships and their treasures); *see also* W.C. JAMESON, BURIED TREASURES OF THE ATLANTIC COAST: LEGENDS OF SUNKEN PIRATE TREASURES 9–11 (1998) (discussing the motivation behind the search for sunken ships); *see also* Lawrence J. Kahn, *Sunken Treasures: Conflicts Between Historic Preservation Law and the Maritime Law of Finds*, 7 TUL. ENVTL. L.J. 595, 596 (1993) (reiterating the attraction of the treasures of sunken ships for treasure seekers).

2. *See* RALPH DELAHAYE PAINE, THE BOOK OF BURIED TREASURE 1–2 (1911) (illustrating the desire of individuals to discover sunken ships); *see also* JAMES P. DELGADO, ADVENTURES OF A SEA HUNTER: IN SEARCH OF FAMOUS SHIPWRECKS 1–2 (2004) (describing the motivations of treasure divers). *See generally* Sherri J. Braunstein, note, *Shipwrecks Lost and Found at Sea: The Abandoned Shipwreck Act of 1987 Is Still Causing Confusion and Conflict Rather Than Preserving Historic Wrecks*, 8 WIDENER L. SYMP. J. 301, 301 (2002) (indicating that one of the reasons behind the passage of the Abandoned Shipwreck Act (ASA) was the enthusiasm of uncovering treasures from the deep and protecting these artifacts).

3. *See* Sarah Dromgoole, *Murky Waters for Government Policy: The Case of a 17th Century British Warship and 10 Tonnes of Gold Coins*, 28 MARINE POL'Y 189, 191 (2004) (stating that the Odyssey Marine Company began searching for lost shipwrecks and artifacts in 1995); *see also* Jeffrey T. Scimo, *Raising the Dead: Improving the Recovery and Management of Historic Shipwrecks,* 5 OCEAN & COASTAL L.J. 271, 280 (2000) (positing that Odyssey Marine Exploration was one of the more successful wreck seekers that incorporated archeological concerns into its missions); *see also* Odyssey Marine Exploration, http://www.shipwreck.net/ourapproach.php (last visited Feb. 24, 2010) (recounting the purpose behind the company's formation in 1994).

* **Allison L. Richmond, J.D., Wake Forest University School of Law, 2010; Master of Science in Biomedical Engineering, Virginia Commonwealth University, 2005; Bachelor of Science, Virginia Commonwealth University, 2002.** **I would like to thank Professor George K. Walker for his guidance during the writing of this article. I would also like to thank the New York State Bar Association and Cleary Gottlieb Steen & Hamilton LLP for providing an opportunity for law students like me to submit articles to the Albert S. Pergam Writing Competition. I dedicate this article to my husband, Bobby, and will be forever grateful for his support during the writing of this article and throughout my time in law school.**

ously inaccessible shipwrecks."[4] After these treasure hunters undergo expensive and time-consuming journeys to the depths of the sea, they might not necessarily get to keep the treasure they find.[5] Most likely, these treasure hunters must survive numerous legal battles to have a chance to "reap the benefits of their discoveries."[6] Unfortunately, the law relating to shipwrecks

4. *See* PETER EARLE, TREASURE HUNT: SHIPWRECK, DIVING AND THE QUEST FOR TREASURE IN AN AGE OF HEROES 5 (2007) (describing how technological developments since World War II have enabled treasure seekers to find ships that were previously unreachable); *see also* Roderick Mather, *Technology and Search for Shipwrecks* 30 J. MAR. L. & COM. 175, 182–83 (1999) (discussing some of the new technology available to modern-day underwater treasure seekers, including advanced GPS and deep-sea acoustic systems); *see also* Peter Tomlinson, comment, *"Full Fathom Five": Legal Hurdles to Treasure,* 42 EMORY L.J. 1099, 1100 (1993) (noting the various developments in scuba diving technology that have made wrecks more accessible); *see also* H. Peter Del Bianco, Jr., Note, *Underwater Recovery Operations in Offshore Waters: Vying for Rights to Treasure*, 5 B.U. INT'L L.J. 153, 153–58 (1987) (listing various groups competing for rights to underwater wrecks, and the various technology each is using to discover new wrecks).

5. *See* Kenneth S. Beall, Jr., *State Regulation of Search for and Salvage of Sunken Treasure,* 4 NAT. RESOURCES L. 1, 1–2 (1971) (arguing that state regulation of artifacts and the awards given for the discovery of "lost treasure" by salvors encourages their return to the state); *see also* James Paul IV, *Salvaging Sunken Shipwrecks: Whose Treasure Is It? A Look at the Competing Interests for Florida's Underwater Riches* 9 J. LAND USE & ENVTL. L. 352, 352–54 (1994) (positing that the reason many treasure seekers do not get to keep the wrecks they find is the competing interests of the state in salvaging these treasures); *see also* Tomlinson, *supra* note 4 (noting that treasure seekers may not obtain ownership over the wrecks and artifacts they discover). *See generally* JENNIFER R. RICHMAN ET AL., LEGAL PERSPECTIVES ON CULTURAL RESOURCES 38–41 (2004) (explaining the "finder's fallacy" reflected in the modern rule of "finder's keepers" in sunken ship discovery cases where the discoverers of wrecks will likely not be granted rights in the items they discover).

6. *See* Craig J. S. Forrest, *Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?*, 34 J. MAR. L. & COM. 309, 327 (2003) (illustrating how the law of salvage creates certain difficulties when applied to the discoverers of a "newly discovered" shipwreck); *see also* Tomlinson, *supra* note 4 (highlighting that the two main legal obstacles treasure hunters face when trying to receive a benefit from their discovery are the ASA and the Eleventh Amendment); *see also* David Curfman, Note, *Thar Be Treasure Here: Rights to Ancient Shipwrecks in International Waters—A New Policy Regime*, 86 WASH. U. L.R. 181, 183 (2008) (identifying the numerous parties who may lay claim to the value of a wreck when it is discovered and the challenges this presents for treasure seekers). *See generally* DENNIS M. POWERS, TREASURE SHIP: THE LEGEND AND LEGACY OF THE S.S. BROTHER JONATHAN 290, 291 (2006) (reiterating the extended litigation discoverers go through to gain some benefit from the state as they are more often becoming salvors of ancient artifacts).

and their artifacts has not progressed as quickly as the technology that has allowed these shipwrecks to be found,[7] leading to conflicts over what constitutes the proper procedures to be taken when a historic shipwreck is salvaged.[8]

This article discusses two recent historic shipwreck salvages made by Odyssey Marine Exploration in the context of international law—the *Nuestra Señora de las Mercedes* and the H.M.S. *Victory*. Background information detailing the historical facts relating to the two shipwrecks and the circumstances under which they were found is given below, along with an introduction to the sources of international law that might be relevant in determining to whom any recovered treasure belongs.

---

7. *See* EKE BOESTEN, ARCHAEOLOGICAL AND/OR HISTORIC VALUABLE SHIPWRECKS IN INTERNATIONAL WATERS: PUBLIC INTERNATIONAL LAW AND WHAT IT OFFERS 12–13 (2002) (calling into question the novel legal problems presented by shipwrecks and the need for further development of a body of law to address such issues); *see also* BRICE, *supra* note 1, at 256–57 (indicating that although the technology that allows salvors to "discover" lost treasures has advanced, the laws protecting these artifacts still need further development); *see also* Paul Fletcher-Tomenius & Craig Forrest, *Historic Wreck in International Waters: Conflict or Consensus?*, 24 MARINE POL'Y 1, 1 (2000) (recognizing that while new technology has made it possible for important discoveries, the current UNESCO convention needs to be reworked to better protect artifacts); *see also* James A.R. Nafziger, *Historic Salvage Law Revisited*, 31 OCEAN DEV. & INT'L LAW 81, 81 (2000) (highlighting the lack of a "stable legal regime" within the law of salvage that has prohibited development of the law of salvage, making it unsuitable to deal with disputes over historic shipwrecks); *see also* Curfman, *supra* note 6, at 182 (acknowledging the need for uniformity in international maritime law of salvage and arguing that U.S. federal courts should be allowed to adjudicate matters).

8. *See* Sunken Treasure, Inc. v. Unidentified, Wrecked & Abandoned Vessel, 857 F. Supp. 1129, 1133–34 (D. V.I. 1994) (underscoring the major conflicts that arise from historic shipwrecks and enunciating that the law of salvage previously did not apply to abandoned shipwrecks); *see also* BRICE, *supra* note 1, at 256–57 (indicating the confusion that arises on which state laws or international laws must apply when discovering newly found shipwrecks); *see also* Christopher R. Bryant, *The Archaeological Duty of Care: The Legal, Professional, and Cultural Struggle Over Salvaging Historic Shipwrecks*, 65 ALB. L. REV. 97, 97–100 (2001) (probing the issue of salvage and bringing to the fore the contentious debate between salvors and archaeologists and what care should be taken to recover valuable artifacts); *see also* Dromgoole, *supra* note 3, at 189 (opining that there are conflicting commercial and cultural issues that impede efforts to deal with the historic artifacts recovered from the shipwrecks).

Discussion

I. Background on the Shipwrecks

A. *Nuestra Señora de las Mercedes*

The first shipwreck to be discussed of the two finds by Odyssey Marine Exploration is the *Nuestra Señora de las Mercedes*. Odyssey Marine Exploration found the shipwreck in March 2007 in international waters about 100 miles west of the Strait of Gibraltar.[9] The shipwreck was found 1,100 meters below the surface of the Atlantic Ocean.[10] The Spanish ship, on its way back to Spain from Peru, sank in 1804 after being attacked by British ships.[11] The attack on the ship prompted Spain to declare war on Britain and also resulted in Spain becoming France's ally in the Napoleonic Wars.[12] The shipwreck loot, which has now been taken to Florida from Gibraltar, includes 600,000 gold and silver coins, which are estimated to be worth

9. *See* Craig Forrest, *Historic Wreck Salvage: An International Perspective*, 33 TUL. MAR. L.J. 347, 353 (2009) (articulating the difficulties involved in identifying shipwrecks and further noting that Odyssey Marine acknowledged, only under duress, that the Spanish ship discovered in 2007 was the *Nuestra Señora de las Mercedes)*; *see also* Jim Loney, *U.S. Judge Recommends Returning Treasure to Spain*, REUTERS, June 4, 2009, http://www.reuters.com/article/scienceNews/idUSTRE5537FY20090604 (recognizing that the shipwreck found in 2007 was the sunken historic Spanish ship *Nuestra Señora de las Mercedes*). *See generally* Sean Nicholson, Comment, *Mutiny as to the Bounty: International Law's Failing Preservation Efforts Regarding Shipwrecks and Their Artifacts Located in International Waters*, 66 U. MO-KAN. CITY L. REV. 135, 137 (1997) (underlining the compounded problem that when a shipwreck is found in international waters, no one nation has jurisdiction over the wreck, and so many issues surface).

10. *See* Amended Verified Complaint in Admiralty at 2, Odyssey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel, No. 8:06-CV-1685-T-23MAP (M.D. Fla. 2010) (setting out, as part of the claim, the actual location of the shipwrecked vessel in dispute); *see also* Patty Gerstenblith & Lucille Roussin, *Art and International Cultural Property*, 42 INT'L LAW. 729, 729 (2008) (recognizing that while the Odyssey Marine Exploration company had not fully disclosed the exact details of the location of their lucrative find, the wreck was discovered in international waters "beyond the territorial waters or contiguous zone of any nation"); *see also* Jennifer Tsai, Comment, *Curse of the Black Swan: How the Law of Salvage Perpetuates Indeterminate Ownership of Shipwrecks* 42 INT'L LAW. 211, 211 (2008) (reiterating that the shipwreck was found in the Atlantic Ocean).

11. *See* Answers of Claimant Kingdom of Spain to the Court's Interrogatories at 1, Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel, No. 8:07-CV-00614-SDM-MAP (M.D. Fla. 2010) (asserting that the *Nuestra Señora de las Mercedes* was en route from Montevideo, Peru, laden with gold and treasure, but sank after being intercepted by a British Naval fleet; *see also* Brooke Wright, Comment, *Keepers, Weepers, or No Finders at All: The Effect of International Trends on the Exercise of U.S. Jurisdiction and Substantive Law in the Salvage of Historic Wrecks,* 33 TUL. MAR. L.J. 285, 295 (2008) (enumerating Spain's arguments as to the reasons the discovered shipwreck and cargo belonged to them, one of which was the fact that the ship was one of their lost fleet leaving Peru on the way back to Spain laden with gold coins); *see also* Valentina Sara Vadi, *Investing in Culture: Underwater Cultural Heritage and International Investment Law*, 42 VAND. J. TRANSNAT'L L. 853, 872–74 (2009) (reasoning that given the historical context of war between nations during the 16th through the 18th centuries, Spain has been involved in numerous litigations concerning ships carrying gold and treasure that were attacked by other nations and sank in international waters, including the *Nuestra Señora de las Mercedes*).

12. *See* ALEXANDER GRAB, NAPOLEON AND THE TRANSFORMATION OF EUROPE 125 (2003) (giving a historical overview of Spain's fragile European alliances, including its alliance with Napoleon Bonaparte, which began in 1804); *see also* W. B. Rowbotham, *The Violation of Neutral Waters in the Past*, 85 ROYAL UNITED SERV. INST. J., 483, 487 (1940) (proclaiming that in 1804 four of Spain's treasure ships, which included the *Nuestra Señora de las Mercedes*, were bombarded by a British squadron led by Captain Graham Moore, which contributed to the formation of the Franco-Spanish alliance); *see also* Loney, *supra* note 9 (alleging that the *Nuestra* sank during the Battle of Cape St. Mary's in 1804 and acknowledging the attack on the Spanish ships as a watershed event in European history because it led to the Spanish alliance with France).

around $500 million.[13] Spain, upon learning of the discovery of the shipwreck, which Odyssey Marine Exploration does not admit is the *Nuestra Señora de las Mercedes*, has requested that Odyssey Marine Exploration return the treasure to Spain as rightful owner through proceedings in the United States District Court for the Middle District of Florida.[14] However, to this day, the status of the treasure remains in limbo.[15]

The most recent developments in the dispute between Odyssey Marine Exploration and Spain includes a recommendation by a United States magistrate judge that the case be dismissed for lack of jurisdiction and the treasure be returned to Spain,[16] followed by the filing of objections to this recommendation by Odyssey Marine Exploration.[17] The main objections made by Odyssey Marine Exploration are that there is not definitive proof that the shipwreck is

13. *See* Loney, *supra* note 9 (describing the value of the 600,000 gold and silver coins recovered off the coast of Gibraltar to be worth $500 million); *see also* Russell Ray, *Odyssey Makes Case for Sunken Treasure,* TAMPA TRIBUNE, Nov. 19, 2008, at 8 (highlighting the value of the sunken treasure to be worth an estimated $500 million); *see also* Giles Tremlett, *Divers Told to Hand Over 300m* [euros] *Haul From Sunken Frigate to Spain,* THE GUARDIAN (London), June 5, 2009, at 25 (detailing how Odyssey Marine Exploration secretly flew the treasure into the United States from Gibraltar).

14. *See* Claimant Kingdom of Spain's Unopposed Motion to Vacate at 1-2, Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel, No. 8:07-CV-1685-T23-TBM, (M.D. Fla. 2007) (revealing the relief sought by Spain includes the Odyssey handing over the salvaged treasure and halting future salvage); *see also* Tsai, *supra* note 10, at 211 (stating that Spain filed suit in U.S. District Court in Florida to compel Odyssey to turn over the treasure already salvaged); *see also* Loney, *supra* note 9 (highlighting the protracted legal battle commenced in the United States District Court of Florida in which Spain claimed legal title to the treasure).

15. *See* Loney, *supra* note 9 (explaining that the magistrate judge's recommendation to turn the treasure over to Spain is non-binding); *see also* James Thorner, *Odyssey Seeks Deal for Treasure,* ST. PETERSBURG TIMES (Florida), Sept. 19, 2009, at 4B, 6B (declaring that Odyssey will maintain possession of the coins in Florida until the federal lawsuit is resolved and acknowledging that despite the district court's ruling, the treasure will remain in Florida, pending the federal appeals process); *see also U.S. Firm Appeals Order to Turn $500 Million Treasure Over to Spain,* TENDERSINFO, Jan. 22, 2010 (quoting Odyssey's prediction that the 11th Circuit will not rule on their appeal for months).

16. *See The Judge of Odyssey Case Recognised Spain's Claim Rights Upon Mercedes,* STATE NEWS SERVICE (Madrid), June 4, 2009 (announcing that Federal Magistrate Judge Mark Pizzo recommended that the treasure be returned to Spain for lack of jurisdiction); *see also Odyssey Will Object to Magistrate's Recommendation to Dismiss "Black Swan" Case,* BUSINESS WIRE, June 3, 2009 (stating that the recommendation to dismiss for lack of jurisdiction was filed on June 3, 2009); *see also Canadian Firm Enters Bay Area Housing Scene,* ST. PETERSBURG TIMES (FLORIDA), July 22, 2009, at 7B (noting that the report and recommendation held that the treasure is the sovereign property of Spain); *see also* Press Release, *Odyssey Marine Exploration, Odyssey Will Object to Magistrates Recommendation to Dismiss* Black Swan *Case* (June 3, 2009), http://www.shipwreck.net/pr180.php (detailing the United States magistrate judge's report and recommendation that the case be dismissed for lack of jurisdiction and the treasure be returned to Spain).

17. *See* Plaintiff Odyssey Marine Exploration, Inc.'s Objections to Magistrate Judge's June 3, 2009, Report and Recommendation, Odyssey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel, No. 8:07-CV-614-T-23MAP (M.D. Fla. 2009) (requesting the District Court judge reject the Magistrate's Report and Recommendation); *see also* Press Release, Odyssey Marine Exploration, Odyssey Files Objections to Report and Recommendation in *Black Swan* Admiralty Case (July 22, 2009), http://www.shipwreck.net/pr185.php (listing Odyssey's various objections to the Report and Recommendation); *see also Odyssey Will Object to Magistrate's Recommendation to Dismiss "Black Swan" Case,* BUSINESS WIRE, June 3, 2009 (highlighting Odyssey's plan to file a written objection to the Magistrate's Report and Recommendation); *see also Canadian Firm Enters Bay Area Housing Scene,* ST. PETERSBURG TIMES (Florida), July 22, 2009 at 7B (detailing Odyssey's objection to the Magistrate's recommendation in which they argue the treasure belonged to private parties and Spain has no claim to the loot); *see also* Giles Tremlett, *Divers Told to Hand Over 300m Haul From Sunken Frigate to Spain,* THE GUARDIAN (London), June 5, 2009, at 25 (describing Odyssey CEO's displeasure with the recommendation and his angry promises to appeal).

the *Nuestra Señora de las Mercedes*, and that even if the shipwreck is determined to be the Spanish ship, that there is evidence the ship was being used mainly for commercial purposes and carried commercial cargo, precluding Spain's argument of sovereignty for why it should own the treasure.[18]

B. H.M.S. *Victory*

Another historic shipwreck that Odyssey Marine Exploration has located recently is the H.M.S. *Victory*. Odyssey Marine Exploration announced in February 2009 that it had discovered the British warship in 2008, which sank during a storm in 1744.[19] The warship was the most powerful of its time and consisted of 110 bronze cannon, including one that could fire a 42-pound cannonball.[20] When the ship sank, 900 men were lost, and it is estimated that along with them sank four tons of gold, which could be worth as much as $1 billion today.[21] According to Odyssey Marine Exploration, the ship was found in the English Channel but outside

---

18. *See supra* note 17 (arguing that Spain was acting as engaged in commercial activity and not in its role as a sovereign with respect to the vessel); *see also Odyssey Marine Exploration Responds to Recent Media Reports Following the Spanish Government's "Black Swan" Press Conference,* TRANSPORTATION BUSINESS JOURNAL, May 26, 2008, at 63 (highlighting Odyssey's contention that there is insufficient evidence to conclude that the sunken ship is fact the *Mercedes); see also* Russell Ray, *Odyssey Makes Case for Sunken Treasure,* TAMPA TRIBUNE, Nov. 19, 2008, at 8 (illustrating Odyssey's claims that sovereign immunity does not apply to the vessel since the *Mercedes* was not on an exclusive military mission); *see also* Scott Barancik, *Shipwreck Names Bared,* ST. PETERSBURG TIMES (Florida), April 18, 2008, at 1D (reiterating statements that the evidence is unable to conclusively confirm the shipwreck's identity).

19. *See* William J. Broad, *Treasure Hunters Say They've Found a 1744 Shipwreck*, N.Y. TIMES, Feb. 3, 2009, at A6 (reporting Odyssey Marine Exploration's claim that it had discovered the H.M.S. *Victory* in the English Channel); *see also* Press Release, *Odyssey Marine Exploration, HMS Victory, a First-Rate Royal Navy Warship Lost in the English Channel, 1744. Preliminary Survey and Identification* (2009) at 1, http://www.shipwrecknet/pdf/OMEPapers2-HMS_Victory.pdf (stating that upon examination of the targeted site in the English Channel, Odyssey had concluded that it discovered the H.M.S. Victory); *see also* Kevin Sullivan, *Discovery of British Shipwreck Solves Centuries-Old Mystery,* WASH. POST, Feb. 3, 2009, at A08 (reporting that Odyssey had discovered "one of the most important" vessels in the history of the British Navy, the H.M.S. *Victory*, which sunk in 1744).

20. *See* Broad, *supra* note 19, at A6 (explaining that the *Victory* was equipped with 110 bronze cannons, with the largest cannon weighing four tons, making it the most powerful vessel then in existence); *see also* LIEUT. W. J. L. WHARTON, R.N., A SHORT HISTORY OF H.M.S. "VICTORY" 3–4 (1872) (stating that the *Victory* preceding the one at that time existing, was one of the top rated and "finest" vessels of its time, holding 110 guns; however it sank in 1744); *see also* Press Release, *Odyssey Marine Exploration,* HMS Victory*, a First-Rate Royal Navy Warship Lost in the English Channel, 1744. Preliminary Survey and Identification* (2009) at 2, http://www.shipwreck.net/pdf/OME Papers2HMS_Victory.pdf (describing the *Victory* as one of the biggest and most "impressive" war ships in the world during its time, and the only one found with "its full deployment of bronze cannon"); *see also* Kingsley, *supra note* 19, at 1 (reporting that the *Victory* was one of the most heavily armed ship of its time before it vanished in the English Channel, and the 42-pound cannon was the "smoking gun" for the wreck's identification).

21. *See* Broad, *supra* note 19, at A6 (reporting that the *Victory* sank together with four tons of gold coins, possibly valued today at $1 billion, in addition to losing approximately 900 men); *see also* Kevin Sullivan, *supra* note 19 (stating that the *Victory* had more than 1,000 crew members, tons of gold and more than 100 cannons on board when it sank in 1744); *see also* Lisa Abend, *The* HMS Victory*, Famed Shipwreck, Is Found*, TIME, Feb. 2, 2009, http://www.time.com/time/world/article/0,8599,1876515,00.html (describing how the *HMS Victory* mysteriously vanished together with a crew of 1,100 men from Britain's most "prestigious" families at the time).

Britain's territorial waters, about 62 miles off the coast of the Channel Islands.[22] The shipwreck now rests 330 feet, or about 100 meters, below the English Channel's surface.[23]

As the result of negotiations with the government of the United Kingdom, Odyssey Marine Exploration has at this time reached an agreement whereby it will recover the artifacts from the H.M.S. *Victory* so long as it is compensated with an 80 percent salvage award for doing so.[24] Thus, there is no pending litigation related to this particular shipwreck find as there is relating to the *Nuestra Señora de las Mercedes* shipwreck. However, this shipwreck find can still be looked at as if no agreement had been made between the United Kingdom and Odyssey Marine Exploration on the status of the treasure based solely on the current international law relating to shipwrecks and underwater cultural heritage.

---

22. *See* Broad, *supra* note 19, at A6 (although keeping the exact location a secret, Odyssey disclosed that the *Victory* was found almost 62 miles from the Channel Islands); *see also* Press Release, *Odyssey Marine Exploration,* HMS Victory*, a First-Rate Royal Navy Warship Lost in the English Channel, 1744*. Preliminary Survey and Identification (2009) at 2, http://www.shipwreck.net/pdf/OMEPapers2-HMS_Victory.pdf (placing the wreck site about 100km [62 miles] from the Channel Isles beyond the territorial zone of any country); *see also* Sullivan, *supra* note 21, at A08 (reporting that according to Odyssey, the *Victory* lies approximately 60 miles away from where it was originally believed to have sunk).

23. *See* Broad, *supra* note 19, at A6 (stating that Odyssey claims to have found the *Victory* while exploring the depths of the English Channel); *see also* Thomas H. Maugh II, *The Big Gun of Shipwrecks Is Found*, L.A. TIMES, Feb. 3, 2009, at A1 (conveying that the CEO of Odyssey announced in a press conference that the company had found the H.M.S. *Victory* under 330 feet of water); *see also* Sullivan, *supra* note 19, at 2 (reporting that according to Odyssey, the *Victory* lies 330 feet under water); *see also* Sean Kingsley, *Beneath the Sea: The Threat to* HMS Victory *and other Shipwrecks*, BRIT. ARCHAEOLOGY, May–June 2009 at 1, http://www.britarch.ac.uk/ba/ba106/feat1.shtml (reporting that the *Victory* is about 100 meters under the surface in an enormous wreck site).

24. *See* Broad, *supra* note 19, at A6 (acknowledging that Odyssey Marine Exploration has found a new shipwreck); *see also* Thomas H. Maugh II, *Wreck of* HMS Victory *found in English Channel,* LOS ANGELES TIMES, Feb. 3, 2009, http://www.articles.latimes.com/2009/feb/03/science/sci-victory3 (last visited Feb. 25, 2010) (claiming that American salvagers found the long-lost ship, *HMS Victory*); *see also* Press Release, *Odyssey Marine Exploration, Odyssey Reaches Agreement with UK Government on Dismissal of Admiralty Arrest and Salvage Award for Cannon from* HMS Victory, (Sept. 18, 2009), http://www.shipwreck.net/pr189.php (informing the public that Odyssey Marine Exploration found a new ship).

II. Background on the Sources of International Law

Regarding the two shipwrecks discussed above, how to proceed in distributing treasure found at historic shipwreck sites is essentially determined on the facts of each particular case to which three rules possibly apply: "(1) the salvage rule that the salvor does not create any ownership rights in the property saved; (2) the finders principle . . . at least in the case of abandoned property; or (3) the international law principle that property of historical and archaeological importance should be preserved for the benefit of mankind as a whole."[25] The sources of international law analyzed regarding their application to the two shipwreck finds are the 1958 Convention on the Territorial Sea and the Contiguous Zone,[26] the 1958 Convention on the High Seas,[27] the 1958 Convention on the Continental Shelf,[28] the 1982 U.N. Convention on the Law of the Sea and its corresponding 1994 Agreement,[29] the 1989 International Salvage Convention,[30] the 2004 Convention on the Protection of the Underwater Cultural Heritage Convention,[31] the law of salvage, and the law of finds.[32] Both the 1982 U.N. Convention on the Law of the Sea and the 1989 International Salvage Convention are particularly relevant to this analysis because they both specifically recognize the archeological significance of historic ship-

25. *See* THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW, 31–32 (3d ed. 2004) (noting the different principles of law of salvage and finds that could apply when dividing treasures found on shipwrecks); *see also* David J. Bederman, *Current Development: Congress Enacts Increased Protections for Sunken Military Craft*, 100 AM. J. INT'L. L. 649 (2006) (stating that the reason to protect ship wreckage is for the benefit of mankind); *see also* David Curfman, Note, *Thar Be Treasure Here: Rights to Ancient Shipwrecks in International Waters—A New Policy Regime*, 86 WASH. U. L.R. 181, 193–94 (2008) (explaining how law of salvage and finds governs property found on shipwrecks and the archeological importance of preserving it); *see also* Justin S. Stern, Note, *Smart Salvage: Extending Traditional Maritime Law to Include Intellectual Property Rights in Historic Shipwrecks,* 68 FORDHAM L. REV. 2489, 2498–503 (2000) (discussing the difference between the law of salvage and the finders principle).

26. *See* Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 206 (reporting that an international treaty was signed in order to help various countries know what happens with the property found on a shipwreck).

27. *See* U.N. Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82 (recognizing that the high seas are not subject to any state sovereignty and, therefore, are areas of international freedom).

28. *See* U.N. Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 312 (establishing that a costal state maintains control over its continental shelf for purposes of exploration and exploitation of natural resources).

29. *See* United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 (outlining the laws of the sea); *see also* Agreement Relating to the Implementation of Part XI of the U.N. Convention of the Law of the Sea of 10 December 1982, July 28, 1994, 1836 U.N.T.S. 42 (establishing the Convention's applicability to the mining of minerals from the deep sea bed as they relate to the law of the sea).

30. *See* International Convention on Salvage, Apr. 28, 1989, 1953 U.N.T.S. 193 (applying rules for salvage operations, such as the rights of salvors, performance of salvage operations and the like to state parties).

31. *See* Convention on the Protection of the Underwater Cultural Heritage, Nov. 6, 2001, 41 I.L.M. 40 (hereinafter CPUCH) (delineating the applicable rules that must be followed concerning the protection of underwater cultural heritage and the artifacts that would fall underneath the protection of the convention).

32. *See* R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel, 435 F.3d 521, 524–25 (2006) (differentiating salvage law from law of finds); *see also* Justin S. DuClos, *A Conceptual Wreck: Salvaging the Law of Finds,* 38 J. MAR. L. & COM. 25, 26–29 (clarifying when it is appropriate to use law of salvage instead of law of finds); *see also* Mark A. Wilder, *Application of Salvage Law and the Law of Finds to Sunken Shipwreck Discoveries,* 67 DEFENSE COUNSEL J. 92, 92–93 (2000) (contrasting salvage law with the law of finds).

wrecks.[33] Further, the 2004 Convention on the Protection of the Underwater Cultural Heritage is of great importance to this analysis, despite only having gone into effect on January 2, 2009, since its provisions attempt to protect underwater cultural heritage when treasure hunters find historic shipwrecks.[34] The law of salvage and the law of finds are intertwined in that the law of salvage comes into play if the owner of the shipwreck has been deemed not to have abandoned the property,[35] while the law of finds comes into play when a shipwreck has been deemed abandoned by its owner.[36] Based on the facts and circumstances surrounding the discovery of each shipwreck, including location of the shipwreck and the owner of the ship, many of these sources of law will come into play in determining who has possession or title in the shipwreck treasure.[37]

The delicate balance between private and public interests must be kept in mind throughout the process of determining whether a salvor, such as Odyssey Marine Exploration, should be allowed to keep the treasure recovered from shipwrecks or at least receive a salvage award for

---

33. *See* International Convention on Salvage, Apr. 28, 1989, 1953 U.N.T.S. 193 (presenting new rules on how to deal with property found on shipwrecks); *see also* U.N. Convention on the Law of the Sea, *supra* note 29 (defining the rights and responsibilities of nations in their use of oceans and ship wreckage); *see also* GEOFFREY BRICE, MARITIME LAW OF SALVAGE 180–84 (3d ed. 1999) (indicating how the Secretary of State for the United Kingdom felt that it was important to preserve ship wreckage and passed the Protection of the Wrecks Act in 1973); *see also* David J. Bederman, *Historic Salvage and the Law of the Sea*, 30 U. MIAMI INTER-AM. L. REV. 99, 107–11 (1998) (establishing that the 1982 United Nations Convention on the Law of the Sea and the 1989 International Salvage Convention address the archeological importance of historic shipwrecks).

34. *See* Guido Carducci, *New Developments in the Law of the Sea: The Unesco Convention on the Protection of Underwater Cultural Heritage*, 96 AM. J. INT'L. L. 419, 424–26 (2002) (emphasizing the significance of protecting underwater artifacts found on ships); *see also* Craig J.S. Forrest, *Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?*, 34 J. MAR. L. & COM. 310–12 (2003) (identifying the importance of shipwrecks to the field of archeology); *see also* Robert D. Peltz, *Salvaging Historic Wrecks,* 25 TUL. MAR. L.J. 1, 45–46 (2000) (recognizing that preservation of artifacts found on ships could have an impact on court cases that determine who owns the artifacts); *see also* Brooke Wright, Comment, *Keepers, Weepers, or No Finders at All: The Effect of International Trends on the Exercise of U.S. Jurisdiction and Substantive Law in the Salvage of Historic Wrecks*, 33 TUL. MAR. L.J. 285, 305 (stressing the importance of preserving underwater artifacts found on ships).

35. *See* David J. Bederman & Brian D. Spielman, *Refusing Salvage*, 6 LOY. MAR. L.J. 31, 32–33 (2008) (noting that the law of salvage presumes the owner did not abandon the property); *see also* Justin S. DuClos, *A Conceptual Wreck: Salvaging the Law of Finds*, 38 J. MAR. L. & COM. 25, 35 (2007) (explaining that a claim under the law of salvage is brought when there is non-proof of abandonment); *see also* Valentina Sara Vadi, *Investing in Culture: Underwater Cultural Heritage and International Investment Law,* 42 VAND. J. TRANSNAT'L L. 853, 870–71 (2009) (commenting that the law of salvage applies to ships that have not been abandoned).

36. *See* Bederman & Spielman, *supra* note 35, at 33 (noting that the law of finds has been applied to abandoned shipwrecks); *see also* DuClos, *supra* note 35, at 35 (explaining that a claim under the law of finds is brought when there is proof of abandonment); *see also* Vadi, *supra* note 35, at 870–71 (commenting that the application of the law of finds to historic shipwrecks is based on the presumption of abandonment); *see also* Jennifer Tsai, Comment, *Curses of the* Black Swan*: How the Law of Salvage Perpetuates Indeterminate Ownership of Shipwrecks*, 42 INT'L LAW. 211, 212 (2008) (outlining that the law of salvage applies to ships that have not been abandoned).

37. *See* Forrest, *supra* note 34, at 357 (stating that source of law, location, and cultural significance factor into determinations of possession of historic shipwrecks); *see also* David Curfman, Note, *Thar Be Treasure Here: Rights to Ancient Shipwrecks in International Waters: A New Policy Regime*, 86 WASH. U. L.R. 181, 188 (2008) (emphasizing that legal tests in the area of shipwreck abandonment are ambiguous and determinations of possession require some amount of case-specific facts); *see also* Linsey Gleason, Comment, *"Possession" and the Abandoned Shipwreck Act: Promoting the Discovery of Historic Shipwrecks and Preventing an Unconstitutional Destruction of Federal Admiralty Jurisdiction*, 2007 MICH. ST. L. REV. 1017, 1020 (2007) (reasoning that a court's determination of a party's legal claim to a shipwreck requires particular information about the wreck).

finding shipwrecks and their contents.[38] While a salvor may want to sell recovered artifacts, archeologists may not want the artifacts to be moved or disturbed since doing so could prevent them from learning valuable information about the possible cultural significance of these underwater artifacts.[39] Thus far, there has been no clear international consensus on when to deem a shipwreck protected from salvors, which means there is no clear-cut answer as to whether a salvor can claim ownership over any artifacts he might find after locating a historic wreck.[40] Nevertheless, several attempts have been made to create some sort of uniformity, and these attempts are discussed below in order to determine if Odyssey Marine Exploration has a legal basis for claiming ownership rights to the historic shipwrecks it has recently found and the artifacts contained amongst those shipwrecks.

This article will initially discuss the relevant sections of the sources of international law that pertain to shipwrecks. Next, the possible application of these laws to the two shipwrecks will be discussed to determine who is most likely to have title in the artifacts found at the shipwreck sites—Odyssey Marine Exploration, a United States corporation, Spain in the case of the *Nuestra Señora de las Mercedes* shipwreck, or the United Kingdom in the case of the H.M.S. *Victory* shipwreck.

---

38. *See* BRICE, MARITIME LAW OF SALVAGE, *supra* note 33, at 256 (noting that public and private interests in shipwrecks are often distinct and conflicting); *see also* Forrest, *supra* note 34, at 315–16 (explaining that different user groups value shipwrecks for varied and conflicting reasons); *see also* Marian Leigh Miller, Comment, *Underwater Cultural Heritage: Is the* Titanic *Still in Peril as Courts Battle Over the Future of the Historical Vessel?*, 20 EMORY INT'L L. REV. 345, 346–47 (2006) (analyzing the different treatment of shipwrecks by archeologists and treasure salvagers).

39. *See* Convention on the Protection of the Underwater Cultural Heritage, Nov. 21, 2001, 41 I.L.M. 40 (stating UNESCO's definition of underwater cultural heritage as any trace of human existence possessing cultural, historical or archeological character which has been partially underwater for at least 100 years); *see also* Kuen-chen Fu, *China (Including Taiwan), in* THE PROTECTION OF UNDERWATER CULTURAL HERITAGE: NATIONAL PERSPECTIVES IN LIGHT OF THE UNESCO CONVENTION 2001 17, 26 (Sarah Dromgoole ed., 2d ed. 2006) (reiterating UNESCO's definition of underwater cultural heritage); *see also* Forrest, *supra* note 34, at 523 (identifying UNESCO's definition of underwater cultural heritage); *see also* Liza J. Bowman, Note, *Oceans Apart Over Sunken Ships: Is the Underwater Cultural Heritage Convention Really Wrecking Admiralty Law?*, 42 OSGOODE HALL L.J. 1, 28 (2004) (quoting UNESCO's definition of underwater cultural heritage).

40. *See* Guido Carducci, *New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage*, 96 AM. J. INT'L L. 419, 420–21 (2002) (illustrating UNESCO's failure to express the precise content of underwater cultural heritage); *see also* Forrest, *supra* note 34, at 511–13 (characterizing UNESCO and UNCLOS laws on underwater cultural heritage as vague, ambiguous and in conflict with salvors' capitalist nature); *see also* Rob Regan, *When Lost Liners Become Found: An Examination of the Effectiveness of Present Maritime Legal and Statutory Regimes for Protecting Historic Wrecks in International Waters With Some Proposals for Change*, 29 TUL. MAR. L.J. 313, 319 (2005) (describing UNESCO's general salvage guidelines as ineffective by leaving member coastal States to regulate and execute the rules).

III. 1958 Conventions

A. Convention on the Territorial Sea and the Contiguous Zone

Spain, the United Kingdom, and the United States are all signatories to the 1958 Convention on the Territorial Sea and the Contiguous Zone.[41] In Article 1 of this convention, the parties agree that "[t]he sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea,"[42] although it should be noted that this sovereignty is "subject to the provisions of these articles and other rules of international law."[43] Although this convention says that sovereignty extends from a State's coast to the breadth of the territorial sea, nowhere is the actual breadth of the territorial sea defined.[44] Meanwhile, Article 24 of this convention outlines a State's contiguous zone as extending no more than twelve miles past the breadth of that State's territorial sea.[45] Within this contiguous zone, a State is free to use whatever control it feels necessary to prevent and

41. *See* Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 206 (listing Spain, the United Kingdom and the United States among the signatories to the Convention); *see also* William W. Bishop, Jr., *The 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas*, 62 COLUM. L. REV. 1206, 1220, 1227 n.71 (1962) (stating that the United States, the United Kingdom, and Spain were signatories to the Conventions); *see also* John W. Bolanovich, *The International Association of Independent Tanker Owners (Intertanko) v. Lowry: The Lost Argument*, 7 U. MIAMI INT'L & COMP. L. REV. 27, 51–52 (1998) (citing the United States as a signatory to the 1958 Convention). *See generally* Daniel H. Joyner, *The Proliferation Security Initiative: Nonproliferation, Counterproliferation, and International Law*, 30 YALE J. INT'L L. 507, 526–27 (2005) (finding a number of states, including all major seagoing states, as signatories to the 1958 Conventions).

42. *See* Convention on the Territorial Sea and the Contiguous Zone *supra* note 41, at art. 1 (detailing the sovereignty of states as beyond land, territory, and internal waters to its territorial sea, defined as a belt of sea adjacent to a State's coast).

43. *Id.* (providing that sovereignty of a State is dependent on the articles of the Convention on the Territorial Sea and the rules of international law); *see also* United States v. Maine, 475 U.S. 89, 93–94 (1986) (stating that the Supreme Court has used principles of international law and the Convention on the Territorial Sea to determine the United States' coastline); *see also* United States v. California, 381 U.S. 139 (1965) (using both international law and the Convention on the Territorial Sea to determine the control of submerged lands and mineral rights under the California sea); *see also* United States v. Postal, 589 F.2d 862, 869 (5th Cir. 1979) (acknowledging that the territorial sea is not limited to the Convention on the Territorial Sea and should be examined under international law).

44. *See* Mahealani Krafft, *The Northwest Passage: Analysis of the Legal Status and Implications of Its Potential Use*, 40 J. MAR. L. & COM. 537, 547 (2009) (explaining that the first UN conference on the law of the sea did not ascribe the breadth of the territorial sea); *see also* Keith Miller, *The Implications of UNCLOS for Canada's Regulatory Jurisdiction in the Offshore—the 200-Mile Limit and the Continental Shelf*, 30 DALHOUSIE L.J. 341, 352 n.36 (2007) (stating that the UN conference on the law of the sea established the territorial sea but not the breadth of the territorial sea); *see also* Jason C. Nelson, *The Contemporary Seabed Mining Regime: A Critical Analysis of the Mining Regulations Promulgated by the International Seabed Authority*, 16 COLO. J. INT'L ENVTL. L. & POL'Y 27, 31 (2005) (remarking that the first UNCLOS could not agree on the breadth of the territorial sea).

45. *See* Convention on the Territorial Sea and the Contiguous Zone, *supra* note 41, at art. 24 (stating that the limit of the contiguous zone is 12 miles from the baseline where the breadth of the territorial sea is measured).

punish "infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea."[46]

Based on this convention, which was entered into force on September 10, 1964, it appears that a State had sovereignty within its territorial waters, whatever the breadth of those territorial waters may be.[47] Thus, if a shipwreck was found within the territorial waters of a State, that State could have total control over the shipwreck as long as the State followed other rules in the convention and other rules of international law.[48]

B. Convention on the High Seas

Another 1958 convention, the Convention on the High Seas, also has Spain, the United Kingdom, and the United States as parties.[49] Article 1 of this convention defines the high seas as "all parts of the sea that are not included in the territorial sea of the internal waters of a State."[50] Article 2 states that since the high seas are "open to all nations, no State may validly purport to subject any part of them to its sovereignty."[51]

---

46. *See id.* (explaining that a State has the right to prevent or punish certain violations of its regulations within its territorial sea); *see also* United States v. Postal, 589 F.2d 862, 869 (5th Cir. 1979) (defining the areas in which States may exercise control in their territorial seas); *see also* United States v. De Leon, 270 F.3d 90, 94 (1st Cir. 2001) (stating that under Article 24 of the Convention on the Territorial Sea, a State may exercise control over specific aspects within its territory or territorial sea).

47. *See* United States v. Louisiana, 394 U.S. 11, 22 (1969) (listing the areas in which States have complete sovereignty); *see also* United States v. Ray, 294 F. Supp. 532, 540 (S.D. Fla. 1969) (explaining that the sovereignty of a coastal State ranges from its soil to the airspace above its territorial sea); *see also* Douglas A. Jacobsen, *Admiralty Law Institute: Symposium on American Law of Collision: Technology and Liability*, 51 TUL. L. REV. 1075, 1122 n.308 (1977) (establishing that States have sovereignty over their territorial sea).

48. *See* Deirdre O'Shea, *The Evolution of Maritime Historic Preservation Jurisprudence*, 8 WIDENER L. SYMP. J. 417, 438 (2002) (arguing that since the 1958 Territorial Sea Convention granted a State sovereignty over the territorial sea adjacent to its coast, including the subsoil, a shipwreck found within the 12 miles of a State's shore would belong to that State); *see also* Sean R. Nicholson, Comment, *Mutiny as to the Bounty: International Law's Failing Preservation Efforts Regarding Shipwrecks and Their Artifacts Located in International Waters*, 66 UMKC L. REV. 135, 143 (1997) (stating that the 1958 Territorial Sea Convention provides that sovereignty of a State extends beyond its borders, and if an object is found within the territorial sea, the coastal State may exercise jurisdiction over the object). *See generally* David J. Bederman, *Congress Enacts Increased Protections for Sunken Military Craft*, 100 AM. J. INT'L L. 649, 650 (2006) (explaining that States have territorial control over sunken ships within their contiguous zone—a 12-mile limit from the coast).

49. *See* Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82 (listing various countries that have signed on as parties to the Convention).

50. *See id.* (explaining that other than the territorial sea of a State, all other parts of the sea are considered high seas).

51. *See id.* at art. 2 (providing that States may not claim sovereignty over the high seas); *see also* Yehuda Z. Blum, *Current Development: The Gulf of Sidra Incident*, 80 AM. J. INT'L L. 668, 671 (1986) (explaining that certain portions of the high seas are considered common domain of the international community, and the Convention provides that no State can claim them as part of their sovereignty); *see also* W. Michael Reisman, *The Regime of Straits and National Security: An Appraisal of International Lawmaking*, 74 AM. J. INT'L L. 48, 57 (1980) (stating that Article 2 of the 1958 Convention on the High Seas mentions the freedoms of the high seas that are exercised with regard to the interests of other States but not subjected to State sovereignty).

Thus, according to the 1958 Convention on the High Seas, no State can assert sovereignty on the high seas outside its own territorial waters unless there is some other rule of international law that provides for such sovereignty to be asserted. This concept is important to keep in mind when shipwrecks are located on the high seas and not within the State's territorial waters because unless there is another applicable rule of international law, the State claiming ownership of a shipwreck may not actually have such ownership. Sovereign immunity of warships and other government ships is one such exception and is discussed in Section VIII of this article.

C. Convention on the Continental Shelf

A third 1958 convention to which Spain, the United Kingdom, and the United States are parties is the Convention on the Continental Shelf.[52] Under this convention, a State's continental shelf is defined as the "seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres, or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas."[53] Throughout its own continental shelf, a coastal State has sovereign rights "for the purpose of exploring it and exploiting its natural resources."[54] In addition, if another State besides the coastal State wants to conduct research on the coastal State's continental shelf, the coastal State must consent to the research first,[55] although "the coastal State shall not normally withhold its consent if the request is submitted by a qualified institution with a view to purely scientific research into the physical or biological characteristics of the continental shelf."[56]

---

52. *See* Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 312 (stating that United Kingdom, Spain and the United States are parties to the Convention on the Continental Shelf).

53. *Id.* at art. 1 (providing that a State's continental shelf extends beyond the area of the territorial sea to a depth of 200 meters where there may be exploitation of natural resources).

54. *Id.* at art. 2 (stating Article 2 of the Convention as ratified by the United States); *see also* U.N. Convention on the Law of the Sea art. 246, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter LOS] (describing UNCLOS III's provisions concerning state sovereignty over the continental shelf); *see also* LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW 136 (1989) (expressing the extent of state sovereignty past its territorial lands); *see also* R.R. CHURCHILL & A.V. LOWE, THE LAW OF THE SEA 153 (3d ed. 1999) (discussing the rights afforded to a sovereign nation); *see also* Donat Pharand & Bob Applebaum, *Rights of the Coastal State over Fisheries in the EEZ: Canadian Perspective, in* THE CONTINENTAL SHELF AND THE EXCLUSIVE ZONE 291–92 (Donat Pharand & Umberto Leanza eds., 1993) (articulating the limits of state sovereignty over the continental shelf).

55. *See* LOS, *supra* note 54, at art. 246 (claiming the right of consent in UNCLOS III); *see also* Warren Wooster, *Sea Law and Ocean Research: View from the Northwest*, 63 OR. L. REV. 121, 128–30 (1984), *reprinted in* THOMAS A. CLINIGAN, JR., THE LAW OF THE SEA: OCEAN LAW AND POLICY, 451–52 (1994) (maintaining the consequences of being able to withhold consent); *see also* Patricia Birnie, *Law of the Sea and Ocean Resources: Implications for Marine Scientific Research*, 10 INT'L J. MARINE & COASTAL L. 229, 246–47 (1995) (discussing the distinction between types of research in other international conventions, specifically LOS).

56. *See* Convention on the Continental Shelf, *supra* note 52, at art. 5 (establishing the standard of consent as outlined in LOS); *see also* R.R. CHURCHILL & A.V. LOWE, THE LAW OF THE SEA 402 (3d ed. 1999) (acknowledging the differing interpretations of consent); *see also* Craig H. Allen, *Protecting the Oceanic Gardens Of Eden: International Law Issues in Deep-Sea Vent Resource Conservation and Management*, 13 GEO. INT'L ENVT'L. L. REV. 563, 642 (2001) (debating the consequences of using the term "biological" and what constitutes "pure" scientific research in describing the consent regime outlined in Article (5)(8) of the convention).

This convention may be considered when a shipwreck is found embedded on the continental shelf of a State, and the finder wants to explore the shipwreck, so long as the shipwreck is considered part of the physical or biological characteristics of the continental shelf.[57] Based on Article 8, if the exploration is for research only, the coastal State should generally allow the explorer to research the wreck.[58] However, the implications of the finder wanting to explore the shipwreck for economic gain are not discussed in this convention.[59]

D. A Summary of the Impact of the 1958 Conventions

Ultimately, a total of only forty countries ratified the 1958 Conventions and the Convention on Fishing and Conservation of the Living Resources on the High Seas.[60] This means that "it is a moot point, therefore, whether these conventions which passed into law with so

57. *See* LOS, *supra* note 54, at art. 246 (outlining the physical and biological standards to come within the provisions of the Convention); *see also* THOMAS A. CLINIGAN, JR., THE LAW OF THE SEA: OCEAN LAW AND POLICY 191 (1994) (citing Report of the International Law Commission to the General Assembly, U.N. Doc. A.3159 (1956)) (declaring that "[i]t is clearly understood that the rights in question do not cover objects such as wrecked ships and their cargo"); *see also* Anthony Clark Arend, Note, *Archaeological and Historical Objects: The International Legal Implications of UNCLOS III*, 22 VA. J. INT'L L. 777, 784–86 (1981) (expounding on the fundamental argument that shipwrecks are a part of marine archeology and, thus, different and separate from the biological shelf).

58. *See* CLINIGAN, *supra* note 57 (citing Report of the International Law Commission to the General Assembly, 11 GAOR Supp. (No. 9) at 42, U.N. Doc. A.3159 (1956)) (expanding on the applicability of Convention to shipwrecks); *see also* Anne M.P. Cottrell, Comment, *The Law of the Sea and International Marine Archaeology: Abandoning Admiralty Law to Protect Historic Shipwrecks*, 17 FORDHAM INT'L L.J. 667, 703–11 (1994) (discussing an interpretation of UNCLOS III that places shipwrecks in a special category of marine archeology not requiring consent); *see also* Arend, *supra* note 57, at 784 (commenting on the differences between marine scientific research and archeological exploration of the continental shelf and whether the consent requirement should carry over to archeological research, such as shipwrecks); *see also* Peter H. Del Bianco, Jr., Note, *Underwater Recovery Operations in Offshore Waters: Vying for Rights to Treasure*, 5 B.U. INT'L L.J. 153, 168–70 (1987) (expounding on the possibilities for application of the rules to shipwrecks).

59. *See* Convention on the Continental Shelf art. 2, Apr. 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 312 (excluding an examination of the potential economic gains in its discussion of sovereignty); *see also* LOS at art. 246 (examining the various points a state must consider, such as economic potential, when evaluating a grant of consent); *see also* JAMES B. MORELL, THE LAW OF THE SEA: THE 1982 TREATY AND ITS REJECTION BY THE UNITED STATES 895–99 (1992) (expanding on the consent requirement in the Convention without discussing economic gain). *See generally* Ricardo J. Elia, *U.S. Protection of Underwater Cultural Heritage Beyond the Territorial Sea: Problems and Prospect,* THE INT'L J. OF NAUTICAL ARCHAEOLOGY 43, 45–49 (2000) (discussing the cultural aspects of a State's decision to give consent).

60. *See* H. Shirley Amerasinghe, *Statement: The Third United Nations Conference on the Law of the Sea*, in CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 3 (Myron H. Nordquist ed., 1985) (pointing out the problem of establishing international norms when few nations have ratified the treaties); *see also* Bernard H. Oxman, *United States Interests in the Law of the Sea Convention*, 88 AM. J. INT'L L. 167, 173 (1994) (commenting on the need for widespread ratification of the laws of the sea). *See generally* George K. Walker, *Filling Some of the Gaps: The International Law Association (American Branch) Law of the Sea Definitions Project*, 32 FORDHAM INT'L L.J. 1336, 1337–45 (2009) (tracing the codification of maritime law leading to the 1958 Conventions).

few ratifications can be regarded as representing the will or reflecting the interests of the great majority of the peoples in the world."[61] Further, it is important to note that Article 311 of the 1982 U.N. Convention on the Law of the Sea states that it "shall prevail, as between States Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958."[62]

IV. 1982 U.N. Convention on the Law of the Sea

The next major source of international law to be considered when determining a party's rights with respect to a historic shipwreck is the 1982 United Nations Convention on the Law of the Sea (UNCLOS). One hundred nineteen countries signed UNCLOS on the very first day it was open for signature, which was "a remarkable fact."[63] UNCLOS went into effect in 1994 after the 60th State to sign UNCLOS also ratified it.[64] UNCLOS has been called a "comprehensive constitution for the oceans,"[65] and although the United States has signed but not yet ratified UNCLOS, both Spain and the United Kingdom have ratified it.[66]

---

61. *See* Amerasinghe, *supra* note 60 (indicating that the lack of overall consensus detracts from the enforceability of the convention); *see also* Jon L. Jacobson, *International Fisheries in the Year 2010*, 45 LA. L. REV. 1161, 1169–73 (1985) (considering the Convention of Fishing and Conservation of the Living Resources of the High Seas a failure because of ratification issues). *But see* Philip C. Jessup, *The United Nations Conference on the Law of the Sea*, 59 COLUM. L. REV. 234, 264–65 (1958) (asserting that the Geneva Conference on the Law of the Sea was a success regardless of subsequent individual treaty ratification).

62. LOS, *supra* note 54 (declaring that the U.N. Convention overtakes the previous Geneva Conventions on the Law of the Sea).

63. *See id.* at art. 305 (listing entities eligible to sign the Convention, including sub-state entities); *see also* Tommy T.B. Koh, *Statement: A Constitution for the Oceans*, *in* 1 CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 11 (Myron H. Nordquist ed., 1985) (remarking on the unprecedented number of signatories); *see also* George K. Walker, *Professionals' Definitions and States' Interpretative Declarations (Understandings, Statements, or Declarations) for the 1982 Law of the Sea Convention*, 21 EMORY INT'L L. REV. 461, 485–88 (2007) (discussing the signatories of the treaty in the context of each of the States' interpretative statements).

64. *See* LOS, *supra* note 62, at art. 308 (establishing requirements for the treaty's entry into force); *see also* Walker, *supra* note 60, at 1345 (remarking on the ratification of the treaty in 1994). *But see* Michael A. Becker, *International Law of the Sea*, 42 INT'L LAW. 797, 797–800 (2008) (explaining the United States' failure to ratify the treaty).

65. *See* Koh, *supra* note 63, at 11 (stating that LOS is a comprehensive oceanic law); *see also* David Freestone, *A Decade of the Law of the Sea Convention: Is It a Success?*, 39 GEO. WASH. INT'L L. REV. 499, 499–500 (2007) (assessing the success of the Convention in light of the changes necessary for ratification); *see also* Vladimir Jares, *The Continental Shelf Beyond 200 Nautical Miles: The Work of the Commission on the Limits of the Continental Shelf and the Arctic*, 42 VAND. J. TRANSNAT'L L. 1265, 1267 (2009) (affirming the Convention as the ultimate law of the sea).

66. *See* LOS, art. 246, Dec. 10, 1982, 1833 U.N.T.S. 397 (including Spain and the United Kingdom as ratifying parties); *see also* Tim Eichenberg & Mitchell Shapson, *The Promise of Johannesburg: Fisheries and the World Summit on Sustainable Development*, 34 GOLDEN GATE U.L. REV. 587, 603 (2004) (remarking that the United States has not ratified UNCLOS); *see also* George K. Walker, *Information Warfare and Neutrality*, 33 VAND. J. TRANSNT'L L. 1079, 1202 n.44 (2000) (asserting that the United Kingdom was a signatory to UNCLOS).

A reason that the United States did not initially ratify UNCLOS was the objection it had to Part XI, which pertains to deep seabed mining in the "Area."[67] It should be noted, however, that the 1994 Agreement Relating to the Implementation of Part XI of the U.N. Convention on the Law of the Sea of December 10, 1982, which cured the United States' objection to UNCLOS relating to the "Area," was signed by President Clinton; thus, UNCLOS and the 1994 Agreement will become effective in the United States once the Senate gives advice and consent, and the President approves ratification.[68]

It is also important to note that President Ronald Reagan did issue a proclamation that the United States would follow UNCLOS's 12-nautical-mile breadth of a nation's territorial sea, discussed below.[69] In Proclamation 5928, President Reagan recognized that the United States' extension of its territorial sea to 12 nautical miles would be "in accordance with interna-

67. *See* Kieran Dwyer, Note, *UNCLOS: Securing the United States' Future in Offshore Wind Energy*, 18 MINN. J. INT'L L. 265, 283 (2009) (examining how the United States' ratification of UNCLOS will secure U.S. interests in the development of offshore wind power); *see also* Howard S. Schiffman, *U.S. Membership in UNCLOS: What Consequences for the Marine Environment: U.S. Membership in UNCLOS: What Effects for the Marine Environment*, 11 ILSA J. INT'L & COMP. L. 477, 480 (2005) (highlighting some of the key issues surrounding U.S. accession to UNCLOS, particularly with respect to the marine environment); *see also* Andrew Van Wagner, Note, *It's Getting Hot in Here, So Take Away All the Arctic's Resources: A Look at a Melting Arctic and the Hot Competition for Its* Resources, 21 VILL. ENVTL. L.J. 189, 205 (2010) (explaining that the United States has not ratified UNCLOS partially because of the sections pertaining to seabed mining).

68. *See* U.S. v. Jho, 534 F.3d 398, 406–7 (5th Cir. 2008) (positing that the U.S. Senate has not ratified UNCLOS, but it has been signed by the President).

69. *See* Proclamation No. 5928 of December 27, 1988, 54 FED. REG. 777 (Jan. 9, 1989) (outlining President Reagan's proclamation of the extension of the territorial sea of the United States of America); *see also* John T. Oliver, *Legal and Policy Factors Governing the Imposition of Conditions on Access to and Jurisdiction over Foreign-Flag Vessels in U.S. Ports*, 5 S.C. J. INT'L L. & BUS. 209, 209 n.292 (2009) (citing that President Reagan issued a proclamation that extended the U.S. territorial sea to 12 miles); *see also* Rachael E. Salcido, *Rough Seas Ahead: Confronting Challenges to Jump-Start Wave Energy*, 39 ENVT'L. L. 1073, 1108 n.130 (2009) (stating that although the United States did not ratify UNCLOS, President Reagan declared that the U.S. territorial sea would be extended from three nautical miles to 12 nautical miles).

tional law" and that the United States was adopting UNCLOS' navigational articles as customary law.[70] As the United States already recognizes UNCLOS's navigational provisions as embodying customary international law,[71] as noted above, it is possible that the Senate will give advice and consent and that UNCLOS and the 1994 Agreement soon will be ratified by the President of the United States.[72]

Turning to the substance of UNCLOS, the Convention supersedes the 1958 conventions on the law of the sea discussed above for States who are parties to UNCLOS.[73] UNCLOS

---

70. *See* Proclamation No. 5928 of December 27, 1988, *supra* note 69 (outlining President Reagan's proclamation of the extension of the territorial sea of the United States of America); s*ee also* Mayaguezanos por la Salud y el Ambiente v. United States, 38 F. Supp. 2d 168, 175 n.3 (D.P.R.), *aff'd,* 198 F.3d 297 (1st Cir. 1999) (stating that the United States is bound to the "purpose and principles" of UNCLOS because it contains "customary international law" that the United States is bound to observe, regardless of whether it ratifies UNCLOS); *see also* Deirdre Goldfarb, Comment, *NEPA: Application in the Territorial Seas, the Exclusive Economic Zone, The Global Commons, and Beyond*, 32 SW. U. L. REV. 735, 750 (2003) (asserting that this proclamation has been adopted by the United States as international customary law).

71. *See* George K. Walker, *Filling Some of the Gaps: The International Law Association (American Branch) Law of the Sea Definitions Project*, 32 FORDHAM INT'L L.J. 1336, 1345 (2009) (discussing the history of the movement, the 1958 and 1982 Law of the Sea Conventions tracing the history of the definition project, and offering observations on the utility of the project); *see also* Dinmukhamed Eshanov, *The Role of Multinational Corporations from the Noninstitutionalist and International Law Perspectives: The Concept of the Three-Level Game*, 16 N.Y.U. ENVT'L L.J. 110, 141 (2008) (illustrating that the United States recognizes UNCLOS's navigational provisions as customary international law).

72. *See* Walker, *supra* note 71, at 1350 (outlining that other issues such as the economy held most of Congress's attention in 2008 and continues to occupy the Senate's time, therefore hampering it from ratifying UNCLOS); s*ee also* George K. Walker, *Professionals' Definitions and States' Interpretative Declarations (Understandings, Statements or Declarations) for the 1982 Law of the Sea Convention*, 21 EMORY INT'L L. REV. 461, 462–63 (2007) (describing that in May 2007, President George W. Bush urged that the Senate act favorably on the Convention during the Congressional session at the time the UNCLOS was on the Senate floor); *see also* John A. Duff, *The United States and The Laws of The Sea Conventions: Sliding Back from Accession and Ratification*, 11 OCEAN AND COASTAL L.J., 1, 8, 8–9 (2006) (discussing that the United States is not bound by UNCLOS because the United States has yet to ratify it as of 1994); *see also* Craig H. Allen, *Federalism in the Era of International Standards: Federal and State Government: Federal and State Government Regulation of Merchant Vessels in the United States (Part II)*, 29 J. MAR. L. & COM. 565, 566 (1998) (discussing that despite President Reagan's 1983 declaration that most of the Convention's provisions codified customary international law, and that the United States would follow it, the United States would not sign the Convention due to its deep seabed mining regime. However, in 1994, after the United Nations General Assembly approved an agreement amending the seabed mining provisions of the Convention, President Clinton presented the Convention to the Senate for its advice and consent).

73. *See* United Nations Convention on the Law of the Sea art. 311(1), Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS] (discussing that the Convention will supplant the Geneva Conventions on the Law of the Sea of 1958); *see also* Bruce P. Dalcher, *Fifty Years of the Law of the Sea With a Special Section on the International Court of Justice, by Shigeru Oda*, 35 J. MAR. L. & COM. 451, 455–56 (2004) (discussing the 11th session of UNCLOS III in 1982 where 151 States, almost twice the number as in 1958, voted on adopting what became the 1982 Convention on the Law of the Sea); *see also* Bernard H. Oxman, *Complementary Agreements and Compulsory Jurisdiction,* 95 A.J.I.L. 277 (2001) (discussing the 1995 agreement that facilitated the ratification of the Law of the Sea Convention by addressing the precise threat to the acceptance and stability of the regimes established by the Convention on the Law of the Sea of 1958).

addresses major flaws in the 1958 Conventions, such as the absence of a maximum limit on the breadth of a State's territorial sea and the "indeterminate boundary of a coastal state's continental shelf."[74] However, under article 311, it is of great importance to note that UNCLOS does "not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performances of their obligations under this Convention[,]" but that it does supersede the 1958 Conventions, as discussed above.[75] Further, although the 1982 UNCLOS "governs virtually all aspects of the law of the sea," it only skims the surface of underwater cultural heritage and historic shipwrecks.[76]

---

74. *See* H. Shirley Amerasinghe, *The Third United Nations Conference on the Law of the Sea*, *in* 1 CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 1, 2 (Myron H. Nordquist ed., 1985) (discussing a major flaw of UNCLOS as being too vague in measuring a State's sovereignty over its continental shelf); *see also* Nathan Read, Note, *Claiming the Strait: How U.S. Accession to the United Nations Law of the Sea Convention Will Impact the Dispute Between Canada and the United States Over the Northwest Passage*, 21 TEMP. INT'L & COMP. L.J. 413, 441–42 (2007) (describing the challenge of Article 311 between Canada and the United States in defining the coastline); *see also* Dwyer, *supra* note 67, at 271 (describing that the Geneva Conventions allow for a limitation of 12 miles which would belong to a coastal State).

75. *See* UNCLOS, *supra* note 72, at art. 311(2) (discussing that while the treaty supersedes the 1958 conventions, it does not alter the rights of the States that are parties to it); *see also* John T. Oliver, *Implications of U.S. Acceptance of the 1982 Law of the Sea Convention and the 1994 Agreement: National Security and the U.N. Convention on the Laws of the Sea: U.S. Coast Guard Perspectives*, 15 ILSA J. INT'L & COMP. L. 573 at 575 (2009) (describing that UNCLOS replaces the four "out-of-date" conventions up to 1958); *see also* Walker, *supra* note 72, at 473 (acknowledging that it is possible for one international treaty to replace another altogether once it goes into effect).

76. *See* David J. Bederman, *Symposium: Building New Regimes And Institutions For The Sea: Article: Historic Salvage and the Law of the Sea*, 30 U. MIAMI INTER-AM. L. REV. 99, 2506 (1999) (discussing that the UNCLOS has yet to address the issue of shipwrecks to the degree that it would help in resolving disputes of such kind); *see also* Justin S. Stern, *Smart Salvage: Extending Traditional Maritime Law To Include Intellectual Property Rights In Historic Shipwrecks*, 68 FORDHAM L. REV. 2498 (2000) (describing that the minimalistic approach to the governing of shipwrecks by UNCLOS makes the clause nearly unenforceable); *see also* Valentina Sara Vadi, *Investing in Culture: Underwater Cultural Heritage and International Investment Law*, 42 VAND. J. TRANSNAT'L L. 853, 861 (2009) (discussing that UNCLOS governs virtually all aspects of international law of the sea, but only covers underwater shipwrecks in a limited capacity).

A. UNCLOS: Major Revisions and Additions to the 1958 Conventions

One improvement from the 1958 Convention on the Territorial Sea and the Contiguous Zone is that UNCLOS, in Article 3, defines the breadth of the territorial sea to be up to twelve miles from a State's baseline[77] and, in Article 33, defines the breadth of the contiguous zone to be up to twenty-four miles.[78] In addition, UNCLOS also specifies the reach of a coastal State's continental shelf as extending to the continental margin, or to 200 miles beyond the State's territorial sea if the continental margin extends to less than 200 miles from the edge of the State's territorial sea.[79] Moreover, UNCLOS delineates an exclusive economic zone (EEZ) that also extends 200 miles beyond a State's territorial sea.[80] Within this zone, a coastal State exercises "sovereignty over the living and non-living resources of those areas, including the sea-bed and the subsoil thereof."[81] It should be noted that under UNCLOS, these living and non-living resources do not specifically include historical artifacts and underwater cultural heritage, thus

77. *See* UNCLOS, *supra* note 73, at art. 3 (regulating the contiguous zone to be 12 miles from the coastline of a State that is a party to UNCLOS); *see also* John Norton Moore, *The Regime of Straits and the Third United Nations Conference on the Law of the Sea*, 74 A.J.I.L. 77, 86 (1980) (discussing that the 1958 Conventions left the Contiguous zone at 12 miles off of the coastline, and UNCLOS embedded this regulation into Article 3); *see also* Carol Elizabeth Remy, *U.S. Territorial Sea Extension: Jurisdiction And International Environmental Protection*, 16 FORDHAM INT'L L.J. 1208, 1221–22 (1993) (outlining the inconsistencies of UNCLOS throughout the treaty but indicating that it can be inferred that the nautical contiguous zone is twelve miles off of the coast of a State).

78. *See* UNCLOS, *supra* note 73, at art. 33 (defining the limits of the contiguous zone as up to 24 miles); *see also* HUI-GWON PAK, THE LAW OF THE SEA AND NORTHEAST ASIA: A CHALLENGE FOR COOPERATION 36 (2000) (stating that UNCLOS permits States to extend the continuous zone up to 24 miles from the sea baselines); *see also* Michael Carr, *China and the Law of the Sea Convention*, 9 AUSTL. J. CHINESE AFFAIRS 35, 41 (1983) (declaring that according to Article 33, a continuous zone may not exceed 24 nautical miles).

79. *See* UNCLOS, *supra* note 73, at art. 76 (specifying that the limit of a State's continental shelf is either the continental margin or 200 miles from the State's territorial sea if the margin is less than 200 miles from the territorial sea); *see also* Shawn Denstedt & R.J. Thrasher, *The Accord Acts Twenty Years Later*, 30 DALHOUSIE L.J. 340, 355–57 (2007) (explaining that the reach of the State's continental shelf is either the continental margin or 200 miles from the State's territorial sea); *see also* Ted L. McDorman, *The New Definition of Canada Lands and the Determination of the Outer Limit of the Continental Shelf*, 14 J. MAR. L. & COM. 195, 199 (1983) (defining the reach of the continental shelf as no more than 200 miles beyond the territorial sea).

80. *See* UNCLOS, *supra* note 73, at art 57 (declaring that the EEZ must not extend beyond 200 miles from the coastal baseline); *see also* Derek J. Dostal, Comment, *Global Fisheries Subsidies: Will the WTO Reel in Effective Regulations?*, 26 U. PA. J. INT'L ECON. L. 815, 823 (2005) (asserting that in creating EEZs, UNCLOS gave States exclusive right and jurisdiction over resources within 200 miles of the coastal baseline). *See generally* ROBERT W. SMITH, EXCLUSIVE ECONOMIC ZONE CLAIMS: AN ANALYSIS AND PRIMARY DOCUMENTS 27 (1986) (declaring that the 1982 Convention on Law of the Sea continues to maintain a 200-mile exclusive economic zone).

81. *See* Amerasinghe, *supra* note 74, at 7 (quoting United Nations Convention on the Law of the Sea art. 56, Dec. 10, 1982, 1833 U.N.T.S. 397); *see also* Michael Carr, *China and the Law of the Sea Convention*, 9 AUSTL. J. CHINESE AFFAIRS 35, 41 (1983) (declaring that Article 56 of UNCLOS provides States with sovereignty over living and non-living resources within the exclusive economic zone); *see, e.g.*, Charles Douglas Bethill, *Peoples of China and the Law of the Sea,* 8 INT'L L. 724, 740 (1974) (explaining that China would exercise sovereignty over the living and non-living resources within its economic zone in accord with Article 56).

coastal States may not have jurisdiction over artifacts that might be found within this zone, and a proposal to include such artifacts was rejected during UNCLOS's negotiations.[82] However, an argument can be made that salvage of artifacts typically involves disturbing the seabed and digging for objects, which does affect natural resources, meaning that a coastal State might be able to argue for control over recovery of underwater cultural heritage out of concern for its natural resources.[83]

Also of importance is that UNCLOS specifically refers to sovereign immunity of warships and other government ships,[84] which is relevant for historic shipwrecks that may have been warships or may have been involved in some other type of government service.[85] Articles 95 and 96 both set out the concept of sovereign immunity for warships and other government

82. *See* UNCLOS, *supra* note 73, at art. 303 (declaring that actions, including the removal of historical artifacts within a State's contiguous zones without prior approval by the coastal State constitutes an infringement of the State's rights); *see also* K. Russell Lamotte, *Introductory Note to UNESCO: Convention on the Protection of the Underwater Cultural Heritage*, 41 I.L.M. 37, 37 (2002) (declaring that a proposal to extend State coastal jurisdiction to the limits of the continental shelf was considered but rejected by the convention); *see also* David J. Bederman, *Historic Salvage and the Law of the Sea*, 30 U. MIAMI INTER-AM. L. REV. 99, 107 (1998) (explaining the UNCLOS's rejection of a proposal by Mediterranean countries to make 200 miles the limit of a coastal State's jurisdiction and the adoption of the contiguous zone as the limit).

83. *See* Ole Varmer, *United States of America*, *in* THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: NATIONAL PERSPECTIVES IN LIGHT OF THE UNESCO CONVENTION 2001 380 (Sarah Dromgoole, ed., 2d ed. 2006) (noting that the seabed digging caused by salvaging is actually destroying a natural resource and should be protected under International Law). *See generally* United States v. Fisher, 977 F. Supp. 1193, 1196 (S.D. Fla.1997) (discussing damage caused to the seabed in the process of salvaging three vessels and the prosecution of salvors for the damage); *see generally* Ole Varmer, *The Case Against the "Salvage" of the Cultural Heritage*, 30 J. MAR. L & COM. 279, 292 (1999) (stating that the salvaging of shipwrecks causes damage to the seabed, and underwater habitats).

84. *See* United Nations Convention on the Law of the Sea arts. 95–96, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS] (setting forth that "warships and ships owned or operated by a State and used only on government non-commercial service, on the high seas, have complete immunity from the jurisdiction of any State other than the flag state").

85. *See* Rob Regan, *When Lost Liners Become Found: An Examination of the Effectiveness of Present Maritime Legal and Statutory Regimes for Protecting Historic Wrecks in International Waters with Some Proposals for Change*, 29 TUL. MAR. L.J. 313, 334 (2005) (recognizing that warships and other crafts in government service have been accorded sovereign immunity via Articles 95 and 96, and that these articles have been used to address policy concerns regarding the sovereign immunity of sunken vessels); see also Stephen Paul Coolbaugh, Comment, *Raiders of the Lost . . . Sub? The Potential for Private Claims of Ownership to Military Shipwrecks in International Waters: The Case of Japanese Submarine* I-52, 49 BUFF. L. REV. 929, 963–66 (2001) (proposing that because there is no international treaty that currently governs the treatment of sunken ships beyond coastal State jurisdiction for sunken warships, Articles 95 and 96 of the UNCLOS addressing sovereign immunity are relevant to fill in this gap). *But see* Jerry E. Walker, *A Contemporary Standard for Determining Title to Sunken Warships: A Tale of Two Vessels and Two Nations*, 12 U.S.F. MAR. L.J. 311, 321–22 (1999) (suggesting that Articles 95 and 96 of the UNCLOS as providing sovereign immunity for warships and other government ships, but not necessarily applying to such vessels that are sunken).

ships, respectively.[86] Article 95 states that "[w]arships on the high seas have complete immunity from the jurisdiction of any State other than the flag state."[87] Meanwhile, Article 96 states that "[s]hips owned and operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State."[88] Although UNCLOS does not mention this idea of sovereign immunity in the articles applicable to other areas of the sea like the territorial sea, contiguous zone, continental shelf, or exclusive economic zone,[89] the doctrine of sovereign immunity "has been accepted as customary law by the courts in most jurisdictions."[90]

---

86. *See* UNCLOS, *supra* note 84, at arts. 95–96 (stating that warships and ships owned or operated by a State and used only on government non-commercial service, on the high seas, have complete sovereign immunity); *see also* Regan, *supra* note 85, at 22 (reiterating that sovereign immunity exempts a warship or other ship in the service of its flag State for non-commercial purposes from the jurisdiction of any other State, and explaining that under Articles 95 and 96 of the Convention on the Law of the Sea the immunity of warships and governmental crafts is absolute while they are on the high seas); *see also* Jeffrey S. Dehner, Note & Comment, *Vessel-Source Pollution and Public Vessels: Sovereign Immunity v. Compliance, Implications for International Environmental Law*, 9 EMORY INT'L L. REV. 507, 515 (1995) (asserting that there are guarantees of sovereign immunity that appear under Articles 95 and 96 of the Convention which address warships and other government vessels).

87. *See* UNCLOS, *supra* note 84, at art. 95 (stating that warships have complete immunity from the jurisdiction of any State except for the flag State when on the high seas).

88. *See id.* at art. 96 (establishing that ships owned or operated by a State and used only on non-commercial, government service will be granted complete immunity from the jurisdiction of any State other than the flag State when on the high seas).

89. *See id.* at art. 96, (codifying that ships owned or operated by a State that are used only on government non-commercial service will have complete sovereign immunity while on the high seas, but not addressing this concept of sovereign immunity regarding other areas of the sea like the territorial sea, contiguous zone, continental shelf, or exclusive economic zone).

90. *See* Regan, *supra* note 85, at 334 (stating that the traditional practice of granting sovereign immunity to warships and other noncommercial crafts is still recognized by most jurisdictions); *see also* Rob Regan, *Sovereign Immunity and the Lost Ships of Canada's Historic Merchant Fleet*, 64 U. TORONTO FAC. L. REV. 1, 21 (2006) (explaining that granting sovereign immunity to warships and noncommercial ships is a longstanding principle of international law that is still in practice); *see also* James R. Van de Velde, *"Neither Confirm nor Deny" Still Alive and Consistent with International Law*, 45 NAVAL L. REV. 268, 268 (1998) (recognizing that sovereign immunity has been a key feature of international law for two centuries).

Beyond revising the existing conventions relating to the sea and discussing sovereign immunity of warships, UNCLOS also sets out provisions relating to the seabed, ocean floor, and subsoil outside a State's national jurisdiction.[91] The only two articles of UNCLOS that specifically mention underwater cultural heritage are Articles 149 and 303.[92] Although these articles are "vague and ambiguous"[93] so that some sort of international consensus could be reached, they "do represent substantive international law applicable to historic wrecks and contain general applicable principles."[94] It should be noted that although Article 149 is a provision within Part XI of UNCLOS, which was altered by the 1994 Agreement, the 1994 Agreement does not affect article 149 since the 1994 Agreement pertains to procedures solely with respect to natural resources and mining in the "Area."[95]

---

91. *See* UNCLOS, *supra* note 84, at Preamble ¶ 6 (declaring that the seabed, ocean floor and subsoil outside a State's national jurisdiction are to be shared by the international community); *see also* H. Shirley Amerasinghe, *Statement: The Third United Nations Conference on the Law of the Sea*, *in* CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 1, 4 (Myron H. Nordquist ed. 1985) (noting that UNCLOS developed provisions to govern the seabed, ocean floor and subsoil outside a State's national jurisdiction); *see also* John E. Noyes, *The International Tribunal for the Law of the Sea*, 32 CORNELL INT'L L.J. 109, 114 (1998) (recognizing that the topic of mining the seabed outside national jurisdiction was a topic of much contention before UNCLOS and that its finalization led to many compromises on the matter).

92. *See* UNCLOS, *supra* note 84, at arts. 149, 303 (establishing that articles 149 and 303 deal with matters relating to underwater cultural heritage); *see also* Anne M. Cottrell, *The Law of the Sea and International Marine Archeology: Abandoning Admiralty Law to Protect Shipwrecks*, 17 FORDHAM INT'L L.J. 667, 680 (1994) (remarking that articles 149 and 303 of UNCLOS are the only parts of the treaty that deal with archeological resources found at sea); *see also* Craig Forrest, *Historic Wreck Salvage: An International Perspective*, 33 TUL. MAR. L.J. 347, 367 (2009) (indicating that there are no articles in UNCLOS that address the issue of sunken vessels with regard to underwater cultural heritage besides Articles 149 and 303).

93. *See* Christopher R. Bryant, *The Archeological Duty of Care: The Legal, Professional and Cultural Struggle Over Salvaging Historical Shipwrecks*, 65 ALB. L. REV. 97, 132 (2001) (declaring that Articles 149 and 303 of UNCLOS are weak because they are inapplicable when a salvor invokes the law of finds or the law of salvage); *see also* Craig Forrest, *supra* note 92, at 367 (positing that articles 149 and 303 of UNCLOS are vague because they were inconsequential matters at the time); *see also* Jason R. Harris, *The Protection of Sunken Warships as Gravesites at Sea*, 7 OCEAN & COASTAL L.J. 75, 87 (2001) (showing that articles 149 and 303 of UNCLOS are vague and weak because they conflict with other admiralty laws).

94. *See* Forrest, *supra* note 92, at 368 (commenting that although Articles 149 and 303 of UNCLOS are vague, they do contain principles that are applicable to wrecks); *see also* James A.R. Nafziger, *The Titanic Revisited*, 30 J. MAR. L. & COM. 311, 319 (opining that articles 149 and 303 of UNCLOS provide only "a sketchy foundation of duties" pertaining to preserving underwater heritage although it was a significant achievement between the maritime States); *see also* Valentina Sara Vadi, *Investing in Culture: Underwater Cultural Heritage and International Investment Law*, 42 VAND. J. TRANSNAT'L L. 853, 862 (2009) (showing that articles 149 and 303 of UNCLOS sets out definite provisions relating to the protection of historical wrecks even though the provisions are largely undefined).

95. *See* Agreement Relating to the Implementation of Part XI of the United Nations Convention of the Law of the Sea of 10 December 1982, G.A. Res. 48/263, at ¶ 1, U.N. Doc. A/RES/48/263 (entered into force July 28, 1996) (declaring that a consensus was reached on Part XI of the Convention by limiting the agreement to only mining of minerals from the deep-sea bed); *see also* Jean Allain, *Maritime Wrecks: Where the Lex Ferenda of Underwater Cultural Heritage Collides With the Lex Lata of the Law of the Sea Convention*, 38 VA. J. INT'L L. 747, 763 (1998) (recognizing that the 1994 Agreement revisions to UNCLOS do not affect article 149); *see also* Charlotte de Fontaubert, David R. Downes & Tundi S. Agardy, *Biodiversity in the Seas: Implementing the Convention on Biological Diversity in Marine and Coastal Habitats*, 10 GEO. INT'L ENVT'L. L. REV. 753, 758 (1998) (explaining that the specific focus of Part XI was deep seabed mining in areas outside national jurisdiction).

B. Article 149

Article 149 of UNCLOS, which is within Part XI, governs archeological and historical objects found in the "Area," and states:

> All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.[96]

The "Area" mentioned in Article 149 is defined in Article 1 as "the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction."[97] The intent of UNCLOS was to restrict a State's claim to title of a historic shipwreck to 24 miles from its baseline, but many States have not abided by this restriction in practice.[98] Thus, many States have extended their claim to shipwrecks contrary to international law, which has the effect of enlarging the size of the Area to which Article 149 applies. These States argue that since States have some jurisdictional rights as far out as the edge of the Exclusive Economic Zone,[99] applying

---

96. *See* United Nations Convention on the Law of the Sea art. 149, Dec. 10, 1982, 1833 U.N.T.S. 397 (1982) (stating the proper treatment of archeological and historical objects found on the seabed floor outside of a state's jurisdiction).

97. *See id.* at art. 1 (defining "area"); *see also* M. June Harris, *Who Owns the Pot of Gold at the End of the Rainbow?: A Review of the Impact of Cultural Property on Finders and Salvage Laws*, 14 ARIZ. J. INT'L & COMP. L. 223, 244 (1997) (stating that Article 149 of UNCLOS encompasses many areas of maritime concerns and requires that historic wrecks in international waters are to be treated as for the benefit all humanity); *see also* M. Catherine Vernon, Comment, *Common Cultural Property: The Search for Rights of Protective Intervention*, 26 CASE W. RES. J. INT'L L. 435, 473 (1994) (expressing that under Article 149 of UNCLOS, archeological remains beyond a 12-mile zone are the common property of mankind for which the international community should have access for the purposes of identification and research).

98. *See* David J. Bederman, *Building New Regimes and Institutions for the Sea: Historic Salvage and the Law of the Sea*, 30 U. MIAMI INTER-AM. L. REV. 99, 111–12 (1998) (noting that nations including Denmark, Jamaica and Morocco have made claims on historic shipwrecks beyond their coastal waters despite such practices being banned by UNCLOS); *see also* Drew F.T. Horrell, *Telepossession is Nine-Tenths of the Law: The Emerging Industry of Deep Ocean Discovery*, 3 PACE Y.B. INT'L L. 309, 349 (1991) (positing that the United States and other nations have enacted their own legislation to protect shipwrecks within their territorial waters and are likely to enact additional legislation to expand this reach even further). *See generally* Andrew Van Wagner, Comment, *It's Getting Hot in Here, So Take Away All the Arctic's Resources: A Look at a Melting Arctic and the Hot Competition for Its Resources*, 21 VILL. ENVT'L L.J. 189, 206 (2010) (demonstrating by example that Russia has sought to extend its EEZ up to 350 miles off its coastline and into the Arctic).

99. *See* UNCLOS, *supra* note 96, at art. 56 (stating that in the EEZ of a coastal State, that State has sovereign rights "for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living" and has jurisdiction for "(i) the establishment and use of artificial islands, installations and structures; (ii) marine scientific research; (iii) the protection and preservation of the marine environment"); *see also* Wen-chen Shih, *Conflicting Jurisdictions Over Disputes Arising From the Application of Trade-Related Environmental Measure*, 8 RICH. J. GLOBAL L. & BUS. 351, 362–63 (2009) (illustrating that Chile has used the EEZ provision of UNCLOS to prevent other nations from capturing swordfish within this area); *see also* George T. Williamson, Comment, *A Tail of Hope: Canada's North Atlantic Straddling and Highly Migratory Fish Stocks*, 40 U. MIAMI INTER-AM. L. REV. 383, 399 (2009) (noting that Canada intends to use the EEZ to manage and exploit marine resources).

Article 1 to Article 149 allows these states to go as far as to "have linked their claim to historic shipwrecks to the Exclusive Economic Zone (EEZ) regime."[100] However, it does not appear that the United States or the United Kingdom have construed Article 149 in view of Article 1 to extend their claims to title that far; meanwhile, Spain has gone as far as to claim historic shipwrecks on its continental shelf.[101]

In addition to problems in interpreting where Article 149 actually applies, there have also been problems in interpreting what Article 149 specifically means as some of the terms in Article 149 "were left vague and ambiguous."[102] First, there is some question as to the reach of Article 149 regarding historic shipwrecks as part of underwater cultural heritage since it refers to protecting objects rather than wrecks specifically.[103] It is presumed that this terminology was used to protect "sunken cities and other nonmaritime property," although it could be possible that the terminology also protects property that is no longer on a sunken ship, like cargo.[104]

---

100. *See* Bederman, *supra* note 93, at 111–12 (assessing that States have claimed jurisdiction over cultural property found in the economic exclusive zone); *see also* Rob Regan, *Sovereign Immunity and the Lost Ships of Canada's Historic Merchant Fleet*, 64 U. TORONTO FAC. L. REV. 1, 10 (2006) (concluding that UNCLOS provides only general guidelines for States to access the extent of protection granted to shipwrecks and delegates the actual regulation and execution of UNCLOS to coastal States); *see also* Vadi, *supra* note 94, at 862 (stating that the lack of clarity in the UNCLOS and the EEZ provision allows States to justify claiming cultural artifacts).

101. *See* Bederman, *supra* note 93, at 112 (listing China, Norway and Spain as among the States that have made claims to shipwrecks located on their continental shelves); *see also* Cottrell, *supra* note 92, at 674 n.34 (noting that while the United States recognizes that it has control of natural resources in its continental shelf, shipwrecks are not included in this category of natural resources); *see also* Terence P. McQuown, Comment, *An Archaeological Argument for the Inapplicability of Admiralty Law in the Disposition of Historic Shipwrecks,* 26 WM. MITCHELL L. REV. 289, 308 n.71 (2000) (suggesting that the United States does not deem shipwrecks on its continental shelf as property of the U.S. government).

102. *See* Cottrell, *supra* note 92, at 701–02 (illustrating that the terms and definitions used in Article 149 of UNCLOS are vague); *see also* Craig Forrest, *Historic Wreck Salvage: An International Perspective*, 33 TUL. MAR. L.J. 368 (1994) (mentioning that it has been very difficult to reach a consensus as to the exact interpretation of Article 149 of UNCLOS); *see also* M. June Harris, *Who Owns the Pot of Gold at the End of the Rainbow? A Review of the Impact of Cultural Property on Finders and Salvage Laws,* 14 ARIZ. J. INT'L & COMP. L. 223, 244–45 (1997) (discussing that there is vagueness and uncertainty when interpreting Article 149 of UNCLOS).

103. *See* Rob Regan, *When Lost Liners Become Found: An Examination of the Effectiveness of Present Maritime Legal and Statutory Regimes for Protecting Historic Wrecks in International Waters with Some Proposals for Change*, 29 TUL. MAR. L.J. 313, 318 (2005) (explaining that UNCLOS is not limited by the legal definition of the term "wreck" by protecting other items not specifically know as "wrecks," including sunken cities and non-maritime property such as cargo); *see also* David Curfman, Note, *Thar Be Treasure Here: Rights to Ancient Shipwrecks in International Waters—A New Policy Regime*, 86 WASH. U. L.R. 181, 193–94 (2008) (highlighting that because the term "wreck" in Article 149 of UNCLOS it is not clearly defined and vague, it leaves questions as to when it applies); *see also* Harris, *supra* note 102, at 244–45 (illustrating that the vagueness in the reach and application of Article 149 of UNCLOS with regard to protecting items not specifically known as wrecks, specifically the definition of the word "historical").

104. *See* Stephen M. De Luca, *Grupp Protexa, S.A. v. All American Marine Slip*, 7 PACE INT'L L. REV. 129, 146–47 (1995) (illustrating that there are a great deal of sunken vessels littering the Gulf of Mexico, and that many of these items, including nonmaritime property, are protected under UNCLOS); *see also* Regan, *supra* note 103, at 318 (2005) (discussing that UNCLOS uses more vague terminology so that it will apply to sunken cities and other non-maritime property); *see also* Anne M. Cottrell, Comment, *The Law of the Sea and International Marine Archaeology: Abandoning Admiralty Law to Protect Historic Shipwrecks*, 17 FORDHAM INT'L L.J. 667, 701 (1994) (highlighting that many of the terms regarding marine archeology in Article 149 of UNCLOS are very vague).

Second, UNCLOS does not mention how historical and archeological objects should be "preserved or disposed of,"[105] or who pays for such preservation or disposal.[106] Further, preservation itself is not specifically defined, and could mean in situ preservation on the seabed, while, on the other hand, it could mean that the objects need to be brought to the surface and preserved in a museum, which is a costly undertaking.[107]

Yet another aspect of Article 149 that is not clear is the phrase "preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin."[108] Based on the wording of Article 149, it appears that preferential rights could

105. *See* UNCLOS, *supra* note 96, at art. 149 (omitting any mention of how historical and archeological objects should be disposed or preserved); *see also* Marian Leigh Miller, *Underwater Cultural Heritage: Is the Titanic Still in Peril as Courts Battle Over the Future of the Historical Vessel*, 20 EMORY INT'L L. REV. 345, 363–64 (2006) (highlighting that UNCLOS only indirectly explains how states are supposed to preserve or dispose of archeological or historical areas); *see also* Valentina Sara Vadi, *Investing in Culture: Underwater Cultural Heritage and International Investment Law*, 42 VAND. J. TRANSNAT'L L. 853, 861–62 (2009) (illustrating that UNCLOS only states that all archeological and historical areas found should be preserved and disposed of for the benefit of mankind).

106. *See* Forrest, *supra* note 102, at 347, 366 (highlighting that UNCLOS only provides general guidelines as to who pays for preservation or disposal of wrecks, and discretion is often given to the member States in this regard); *see also* Daud Hassan, *Climate Change and the Current Regimes of Arctic Fisheries Resources Management: An Evaluation*, 40 J. MAR. L. & COM. 511, 523 (2009) (explaining that UNCLOS does not explicitly state who pays for preservation or disposal of a wreck); *see also* Regan, *supra* note 103, at 319 (discussing that while UNCLOS mentions all archeological and historical areas should be preserved, it does not explain how, which leaves much discretion to the member States).

107. *See* Curfman, *supra* note 103, at 194 (illustrating that UNCLOS does discuss preservation of wrecks but fails to define its application); *see also* Forrest, *supra* note 102, at 367 (contending that UNCLOS does not expressly define preservation of historical objects, allowing many countries to give them little or no protection); *see also* Douglas John Steding, Note, *Russian Floating Nuclear Reactors: Lacunae in Current International Environment and Maritime Law and the Need for Proactive International Cooperation in the Development of Sustainable Energy Sources*, 13 PAC. RIM L. & POL'Y J. 711, 734 (2004) (explaining that UNCLOS only includes general obligations to protect and preserve the marine environment).

108. *See* United Nations Convention on the Law of the Sea art. 149, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS] ("All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin"); *see also* Christopher R. Bryant, *The Archaeological Duty of Care: The Legal, Professional, and Cultural Struggle Over Salvaging Historic Shipwrecks*, 65 ALB. L. REV. 97, 132 (2001) (stressing that the provisions of article 149 are largely ambiguous); *see also* James A.R. Nafziger, *Finding the Titanic: Beginning an International Salvage of Derelict Law as Sea*, 12 COLUM.-VLA J.L. & ARTS 339, 346 (1988) (asserting that the language of article 149 is vague with respect to the definition of "objects of an archaeological and historical nature" and that it is unclear which State the term "preferential rights" applies to).

potentially be given to three different States—the State of origin, the State of cultural origin, and the State of historical or archeological origin.[109] It turns out that these three choices were only three possibilities for discussion during the UNCLOS negotiations, but they never were discussed during those negotiations,[110] making unclear which State of the three State options listed does in fact get preferential rights.[111] The lack of clarity regarding some of the terms and phrases in Article 149 has thus contributed to some of the confusion about which State's rights are preferred in handling historic shipwrecks as well as how the preservation process can best be carried out upon finding a historic shipwreck.[112]

C. Article 303

Another article of UNCLOS that is pertinent to historic shipwrecks is Article 303, which is within the general provisions in Part XIV and governs archeological and historical objects found at sea, states:

> 1. States have the duty to protect objects of an archeological and historical nature found at sea and shall co-operate for this purpose.
> 2. In order to control traffic in such objects, the coastal State may, in applying Article 33, presume that their removal from the sea-bed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.

---

109. *See* UNCLOS art. 311(1) ("All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin."); *see also* Liza J. Bowman, *Oceans Apart Over Sunken Ships: Is the Underwater Cultural Heritage Convention Really Wrecking Admiralty Law?*, 42 OSGOODE HALL L.J. 1, 25 (2009) (acknowledging that preferential rights could apply to the three different States specified in Article 149); *see also* Forrest, *supra* note 102, at 368–69 (providing that the language of Article 149 potentially gives preferential rights to three different States).

110. *See* Forrest, *supra* note 102, at 367 (reiterating that discussion on three different State options was glossed over in an effort to attain agreement and generate a convention); *see also* Nafziger, *supra* note 108, at 345 (identifying that article 149 was composed of Greek and Turkish proposals as opposed to negotiations between States). *But see* Bernard H. Oxman, *Marine Archaeology and the International Law of the Sea*, 12 COLUM.-VLA J.L. & ARTS 353, 360 (1988) (suggesting that the extent of negotiations over the formation of Article 149 is unclear as opposed to nonexistent).

111. *See* Forrest, *supra* note 102, at 368–69 (emphasizing the ambiguity with regard to which of the three mentioned States in fact have preferential rights to the sunken artifact); *see also* Nafziger, *supra* note 108, at 346 (discussing the lack of clarity with respect to which State, either the "State of origin" or the "State of cultural origin" specifically, may claim preferential rights over the archeological or historical artifact discovered); *see also* Oxman, *supra* note 110, at 361 (revealing potential conflict in situations where an object found has its origins from a State that precedes the modern nation-state system and current demographics).

112. *See* Vadi, *supra* note 105, at 862 (indicating how Article 149 not only fails to define an archeological or historical object, but also neglects to specify the process by which States are to preserve and protect these underwater objects); *see* David Curfman, Note, *Thar Be Treasure Here: Rights to Ancient Shipwrecks in International Waters—A New Policy Regime*, 86 WASH. U. L.R. 193 (2008) (highlighting the lack of guidance provided by Article 149, which fails to identify an alternative ownership principle, and so the law of finds with respect to historic shipwrecks probably applies); *see also* M. June Harris, *Who Owns the Pot of Gold at the End of the Rainbow? A Review of the Impact of Cultural Property on Finders and Salvage Laws,* 14 ARIZ. J. INT'L & COMP. L. 245 (1997)at 245 (noting that Article 149 failed to implement any international guidelines or standardized procedures for salvaging shipwrecks).

> 3. Nothing in this article affects the rights of identifiable owners, the law of salvage, or other rules of admiralty, or laws and practices with respect to cultural exchanges.
> 4. This article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.[113]

Since Article 33 is referenced, which sets the maximum breadth of the contiguous zone at 24 miles,[114] Article 303 therefore only gives a coastal State jurisdiction over shipwrecks and other archeological finds up to 24 miles from its baseline, rather than to the edge of the 200-mile EEZ, as some States wanted.[115] A coastal State being limited to exercise authority only up to a distance of 24 miles from its baseline to the contiguous zone maximum was the result of the United States' negotiations during the drafting,[116] even though the United States has not yet ratified UNCLOS. In summary, UNCLOS Article 303 appears to bar coastal States from "claiming title to or asserting regulatory authority over historic shipwrecks beyond a States' contiguous zone."[117]

Viewing Article 303 in light of Article 33, taking into account that the United States negotiated for the specific 24-mile limit of a coastal State to exercise authority over archeological finds, and considering that the United Kingdom and Spain are both parties to UNCLOS, in both of these shipwreck cases, the coastal State likely cannot exercise authority over the shipwrecks since both were found more than 24 miles from a coastal State. Despite the 24-mile limit of authority imposed by Article 303, however, some States, including Spain, as mentioned in the discussion of Article 149, have claimed title to shipwrecks resting on their conti-

---

113. *See* United Nations Convention on the Law of the Sea art. 303, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS] (identifying the agreement regarding archeological and historical objects found at sea).

114. *See id.* at art. 33 (setting the maximum span of the contiguous zone at 24 miles); *see also id.*, at art. 303 (identifying the agreement regarding archeological and historical objects found at sea).

115. *See id.* at art. 303 (identifying the agreement regarding archeological and historical objects found at sea); *see also* THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 16-7 (4th ed. 2010) (indicating that UNCLOS grants authority to coastal States over archeological and historic objects discovered at sea within 24 nautical miles from the coast); *see also* David J. Bederman, *Building New Regimes and Institutions for the Sea: Historic Salvage and the Law of the Sea,* 30 U. MIAMI INTER-AM. L. REV. 99, 107–8 (1998) (stating that coastal State authority over archeological and historical objects found at sea is 24 miles).

116. *See* Candace L. Bates, *U.S. Ratification of the U.N. Convention on the Law of the Sea: Passive Acceptance Is Not Enough to Protect U.S. Interests*, 31 N.C. J. INT'L L. & COM. REG. 745, 771–73 (2005) (showing that the United States has challenged countries opposing territorial seas limitations and that a coastal State can exercise authority no more than 24 miles from its baseline); *see also* Bederman, *supra* note 115, at 107–8 (establishing that limitations to coastal States' exercise of authority was first discussed in the 1980 session of negotiations); *see also* James Carlson, *Presidential Proclamation 7219: Extending the United States' Contiguous Zone—Didn't Someone Say This Had Something to Do With Pollution?*, 55 U. MIAMI L. REV. 487, 522 (2001) (asserting that there were negotiations between the United States and other nations regarding the 12-mile territorial sea limit).

117. *See* UNCLOS, *supra* note 113, at art. 303 (identifying the agreement regarding archaeological and historical objects found at sea); s*ee also* Bederman, *supra* note 115, at 107–8 (quoting the aforementioned article); *see also* Curfman, *supra* note 112, at 192–94 (claiming that Article 303 addresses rights to wrecks found in high seas)

nental shelves, and others have even made claims to shipwrecks in their EEZs all without reference to any source of international law.[118]

Like some of the provisions in Article 149, some of the provisions in Article 303 are vague and ambiguous as well.[119] Section 3 "maintains the status quo in terms of salvage law,"[120] yet Section 4 allows for "other international agreements and rules of international law regarding the protection of objects of an archaeological character."[121] Thus it is unclear under UNCLOS whether salvage law or a new convention to preserve historic shipwrecks would prevail in determining how the shipwreck treasure should be protected.

D. Role of Articles 149 and 303 in Preserving Shipwrecks

The true extent of the reach of a State's authority over historic shipwrecks beyond the territorial sea is unclear, with some writers stating that there is no customary international law that allows for expanding the reach of jurisdiction of historic shipwrecks to include the conti-

---

118. *See* Bederman, *supra* note 115, at 111–12 (stating that several States have made claims to shipwrecks that are over 24 miles from their shores without any specific reference to international law); *see also* Sean D. Murphy, Editor, *Jurisdiction Over Salvage Claims Outside U.S. Territory:* RMS Titanic, 94 AM. J. INT'L LAW. 102, 125 (2000) (noting that U.S. courts allow those who salvage shipwrecks outside of U.S. territory to obtain a maritime lien over the shipwreck by bringing pieces of the vessel into U.S. waters); *see also* Jennifer Tsai, Comment, *Curse of the* Black Swan*: How the Law of Salvage Perpetuates Indeterminate Ownership of Shipwrecks*, 42 INT'L L. 211, 217 (2008) (stating that Spain claimed ownership of the *Black Swan*, a shipwreck that is beyond Spain's territorial limits).

119. *See* Craig Forrest, *Historic Wreck Salvage: An International Perspective*, 33 TUL. MAR. L.J. 347, 367 (2009) (claiming that Articles 149 and 303 were intentionally left vague and ambiguous in order to gain greater consensus); *see also* Valentina Sara Vadi, *Investing in Culture: Underwater Cultural Heritage and International Investment Law*, 42 VAND. J. TRANSNAT'L L. 853, 862 (2009) (arguing that the language of Article 303 leaves unclear the rights of coastal States); *see also* Anne M. Cottrell, Comment, *The Law of the Sea and International Marine Archaeology*, 17 FORDHAM INT'L L.J. 667, 672 (1994) (claiming that because UNCLOS provisions on marine archeology are ambiguous, they have been subject to several different interpretations).

120. *See* UNCLOS, *supra* note 113, at art. 303, ¶ 3 (stating that nothing in article 303 affects the law of salvage); *see also* John A. Duff, *The United States and the Law of the Sea Convention: Sliding Back From Accession and Ratification*, 11 OCEAN & COASTAL L.J. 1, 13 (2005) (arguing that UNCLOS simply restates the already existing customary international laws with regard to salvage law); *see also* Forrest, *supra* note 119, at 371 (noting that Article 303(a) maintains the status quo of salvage law, including the rights of owners); *see also* Harris, *supra* note 112, at 223, 245 (claiming that due to its vague language, UNCLOS does not affect salvage laws).

121. *See* UNCLOS, *supra* note 113, at art. 303, ¶ 4 (stating that Article 303 does not affect international agreements regarding historical and archaeological objects); *see also* George K. Walker & John E. Noyes, *Definitions for the 1982 Law of the Sea Convention*, 32 CAL. W. INT'L L.J. 343, 378 (2002) (noting that article 303 is subject to future international agreements and future rules of international law); *see also* Jean Allain, Comment, *Maritime Rex: Where the Lex Ferenda of Underwater Cultural Heritage Collides with the Lex Lata of the Law of the Sea Convention*, 38 VA. J. INT'L L. 747, 767–68 (1998) (stating that the rules of Article 303 are not prejudicial to other international agreements).

nental shelf and the EEZ due to the small number of States that have done so, while other writers do seem to believe there is such a customary law.[122] Further, although it is assumed here that a historical shipwreck is an archeological or historical object falling under the scope of Articles 149 and 303, UNCLOS does not ever define exactly what an archeological or historical object is, and other terms relating to treatment of historic shipwrecks are undefined or vague as well.[123] Recalling that Article 311 allows for States to enter into other agreements so long as they are compatible with UNCLOS, the uncertainty regarding protection of underwater cultural heritage and historic shipwrecks through UNCLOS has "left room for specific international instruments to elaborate a more detailed protection of UCH [underwater cultural heritage]."[124]

V. Law of Salvage

Another aspect of international law to take into account when determining how to proceed in distributing property from historic shipwrecks is the law of salvage. First, the background on the law of salvage is discussed, followed by a discussion on the Salvage Convention, which was an attempt to create uniformity among States' application of salvage law.[125]

---

122. *See* Bederman, *supra* note 115, at 112 (noting that scholars disagree on whether the claims of various States to shipwrecks on their continental shelves and within their EEZs have created a rule of customary international law); *see also* Cottrell, *supra* note 119, at 707 (stating that the United States disagreed with the expansion of a coastal State's sovereign rights to the EEZ and the continental shelf). *See generally* Marian Leigh Miller, Comment, *Underwater Cultural Heritage: Is the Titanic Sill in Peril as Courts Battle Over the Future of the Historical Vessel?*, 20 EMORY INT'L L. REV. 345, 369 (2006) (claiming that the UNESCO Convention, which expanded the jurisdiction of a coastal State, is in conflict with established rules of customary international law).

123. *See* Harris, *supra* note 120, at 244–45 (noting that UNCLOS Article 149 neither defines the terms "archeological" and "historic" or explains how to interpret these terms); *see also* Justin S. Stern, *Smart Salvage: Extending Traditional Maritime Law to Include Intellectual Property Rights in Historic Shipwrecks*, 68 FORDHAM L. REV. 2489, 2506–07 (2000) (discussing the protections afforded to "archaeological and historic objects" by the UNCLOS III, but that the Convention does not define what qualifies as such); *see also* Vadi, *supra* note 119, at 862 (stating that UNCLOS Articles 149 and 303 protect all objects of an "archaeological and historical nature" but do not define archeological and historical objects).

124. *See* Vadi, *supra* note 119, at 862–63 (explaining that UNCLOS fails to clarify regulation of underwater cultural heritage ("UCH"), and therefore it allows future international agreements to institute greater protection and regulation of UCH); *see also* Miller, *supra* note 122, at 346 (recognizing that the international community has a duty to cooperate with each other and develop agreements that will increase protection for underwater cultural heritage); *see also* Richard T. Robol, *Legal Protection for Underwater Cultural Resources: Can We Do Better?*, 30 J. MAR. L. & COM. 303, 305 (1999) (stating that the lack of international protection of underwater cultural heritage calls for an international treaty implementing procedures to improve protection of underwater cultural heritage).

125. *See* International Convention on Salvage Preamble, Apr. 28, 1989, 1953 U.N.T.S. 193 (indicating the need for uniform international rules for salvage law and establishing how the International Convention on Salvage can encourage uniform international protection of vessels and other property in danger at sea); *see also* Forrest, *supra* note 119, at 370–71 (stating that the adoption of international agreements, such as the 1910 International Convention for the Unification of Certain Rules of Law Respecting Assistance and Salvage at Sea and the 1989 Salvage Convention, were efforts to create international uniformity of salvage law); *see also* William L. Nielson, *The 1989 International Convention on Salvage*, 24 CONN. L. REV. 1203, 1207–08 (1992) (noting that the development of a salvage industry increased the need for uniformity of salvage law among nations, and this was accomplished with the passing of the 1910 Brussels Convention on Salvage).

A. Basic Principles of the Law of Salvage

In general, salvage law refers to "the concept of the saving of life and property from the perils of the sea."[126] Under salvage law, courts have provided rewards to private individuals who have recovered "treasures and artifacts" from historic shipwrecks, and the rewards are generally a percentage of the total value of the salvaged property or, if the artifacts are sold, part of the proceeds from the sale.[127] This compensation scheme for recovering objects from the sea varies from the general common law rule where a person has no duty to rescue a person or his property and thus will not receive compensation when the person decides to undertake the rescue.[128] The reason for the variation between the common law scheme and the maritime scheme for rescues is the desire "to promote solidarity among mariners and shipowners."[129] Traditionally, the reward was to be based on the time and effort spent by the salvor in rescuing property, but in modern times, a reward to allow the salvor to profit is also generally given.[130]

---

126. *See* Peninsular & Oriental Steam Navigation Co. v. Overseas Oil Carriers, Inc., 553 F.2d 830, 835–36 (2d Cir. 1977) (explaining that traditional admiralty law on salvage awards a person who rescues property in danger at sea; however, a person may recover expenses incurred for rescuing a life and property from the dangers of sea); *see also* Rob Regan, *When Lost Liners Become Found: An Examination of the Effectiveness of Present Maritime Legal and Statutory Regimes for Protecting Historic Wrecks in International Waters With Some Proposals for Change*, 29 TUL. MAR. L.J. 313, 321 (2005) (noting that the principle of salvage is to save a life or maritime property from the dangers of the sea); *see also* Simon W. Tache, *The Law of Salvage: Criteria for Compensation of Public Service Vessels*, 9 MAR. LAW. 79, 82–84 (1984) (stating that salvage traditionally is the saving of vessel, cargo or freight property from the dangers of sea; however, more recently, salvage includes human life saved from the danger of death at sea).

127. *See* Columbus-America Discovery Group v. Atlantic Mutual Ins. Co., 974 F.2d 450, 459 (4th Cir. 1992) (stating that salvors are "entitled to a very liberal salvage award" and that the award could be greater than the services provided by the salvor in rescuing the salvaged property, or if property is not claimed by original owner, salvor may be awarded total value of such property); *see also* Vadi, *supra* note 119, at 867–68 (explaining that salvage law rewards rescuers of ancient ships and artifacts from the sea with a percentage of the salvaged property's value or part of the proceeds from sale of such property); s*ee also* Christopher R. Bryant, *The Archaeological Duty of Care: The Legal Professional, and Cultural Struggle Over Salvaging Historic Shipwrecks*, 65 ALB. L. REV. 97, 121–22 (2002) (noting that salvage rewards include a percentage of value of rescued property or full value if no owner claims property, with property including the vessel, cargo, and the contents of cargo).

128. *See* Baker v. Hoag, 7 N.Y. 555, 622 (1853) (stating when a rescue of persons or property takes place on the sea, it is a salvage, and the rescuer is entitled to compensation); *see also* Saul Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, 72 VA. L. REV. 879, 909 (1986) (discussing incentives, such as compensation, given to salvors as opposed to the lack of incentives for rescuers on land); s*ee also* Vadi, *supra* note 119, at 867 (comparing common law duty to rescue to maritime salvage law that offers a "reward" for salvaged items and saved lives).

129. *See* International Convention on Salvage, *supra* note 125, at Preamble & art. 1 (declaring, among other goals, the incentivizing of rescues at sea); *see also* Valentina Sara Vadi, *Investing in Culture: Underwater Cultural Heritage and International Investment Law*, 42 VAND. J. TRANSNAT'L L. 867 (2009) (asserting that by rewarding salvors, admiralty law seeks to join sailors in a common goal); *see also* The Blackwall, 77 U.S. 1, 10 (1869) (specifying several reasons justifying awards for salvage, including incentives to "save life and property" as well as disincentives to commit crimes against other seamen).

130. *See* Reiss v. One Schat-Harding Lifeboat No. 120776, 444 F.Supp. 2d 553, 557 (D.S.C. 2006) (noting that salvage awards encourage others to salvage); *see also* MICHAEL WILFORD, TERENCE COGHLIN & JOHN D. KIMBALL, TIME CHARTERS 420 (3d ed. 1989) (reporting an 1899 decision liberally allowing "expenses" to be deducted from the salvage before a net salvage award is calculated); *see also* Regan, *supra* note 126, at 321 (explaining how awards for salvage originally had been calculated according to the amount of time taken and work done to salvage, but that profit is now allowed).

To have a successful salvage claim, the three elements of voluntariness, danger, and success in recovering the property at sea must be present.[131] The requirement for voluntariness means that the salvor must not have already had a legal duty via contract or otherwise to assist the ship; if there was such a legal duty, compensation for any items recovered will be precluded.[132] It is important to note that professional salvors like Odyssey Marine Exploration are considered to be acting voluntarily under this salvage claim element.[133] Next, the requirement for danger is satisfied if the salvor proves that the recovered vessel was in actual danger, that the salvors or their property were in actual danger, or the salvaged property was in actual danger.[134] The final element to be proven under traditional salvage law is success, so if the potential salvor

131. *See* Cope v. Vallette Dry Dock Co., 119 U.S. 625, 628–29 (1887) (enumerating the elements of a salvage to include "enterprise," "danger," and "value," which can be realized only if the salvage is successful); *see also* THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 16-1, (4th ed. 2004) (listing and discussing the elements of a successful salvage claim to consist of a successful retrieval done voluntarily and in the face of danger); *see also* Regan, *supra* note 126, at 322–23 (confirming the three elements of salvage claims and explaining each).

132. *See* International Convention on Salvage, *supra* note 125, at art. 17 (stipulating that if a salvage is done under contract, no salvage payment is due unless the salvage could be deemed beyond the contract); *see also* DAVID W. STEEL & FRANCIS D. ROSE, KENNEDY'S LAW OF SALVAGE ¶ 431 (5th ed. 1985) (reasoning that "voluntariness" is necessary to any claim of salvage); *see also* Regan, *supra* note 126, at 322 (2005) (differentiating between voluntariness, which qualifies for salvage, and a duty to protect or rescue under contract, which bars salvage awards).

133. *See* SCHOENBAUM, *supra* note 131, at 834 (explaining that a professional salvor is always considered a volunteer unless he or she already had a preexisting legal duty to assist); *see also* Regan, *supra* note 126, at 322 (establishing that passengers and crew members, acting out of self-preservation, are precluded from receiving a salvage award), *see also* Taryn L. Rucinski, Comment, *Twenty-First Annual Pace National Environmental Law Moot Court Competition: 2009 Judges' Edition Memorandum*, 26 PACE ENVT'L. L. REV. 541, 557–58 (2009) (expressing that a salvor's motives are irrelevant, and that he or she would still be entitled to a salvage award as long as he or she renders voluntary services).

134. *See* Regan, *supra* note 126, at 322–23 (asserting that salvors must demonstrate there was reasonable apprehension of danger to the recovered vessel); *see also* Brooke Wright, Comment, *Keepers, Weepers, or No Finders at All: The Effect of International Trends on the Exercise of U.S. Jurisdiction and Substantive Law in the Salvage of Historic Wrecks*, 33 TUL. MAR. L. J. 285, 303–04 (2008) (revealing that although salvage law traditionally applied to property and lives in immediate peril, U.S. admiralty courts now apply the law to sunken vessels); *see also* Jean F. Rydstrom, Annotation, *Nature and Extent of Peril Necessary to Support Claim for Marine Salvage*, 26 A.L.R. FED. 858, §2[a] (1976) (noting that in order to satisfy the danger requirement, where the ship must be in imminent danger of being lost, the courts merely require a real apprehension of danger).

does not recover or rescue any property, even though he spent a great deal of time, effort, and expense, he is not entitled to a salvage reward.[135] These three elements were initially codified as part of the 1910 Assistance and Salvage Convention in Article 7 and 8,[136] although this Convention, which contained no provisions relating to shipwrecks or artifacts, has since been superseded by the 1989 Salvage Convention.[137]

Before discussing the Salvage Convention, the special circumstances surrounding the salvage of historic shipwrecks as opposed to current wrecks must be discussed. First, it is far more expensive to search for a historic shipwreck when compared to a more recent, modern shipwreck.[138] This is due to the uncertainty of the exact location of a historic wreck on the ocean floor, which means potential salvors must spend more time researching possible wreck locations before they can even begin to attempt to salvage any of the historic artifacts.[139] More time and effort is also required during the actual salvage process, since historic shipwrecks' artifacts

135. *See* Tache, *supra* note 126, at 91 (explaining that a salvor must actually save or assist in saving property to be successful even though actual physical assistance to the vessel is not necessary for this determination); *see also* Regan, *supra* note 126, at 313, 323 (showing that a salvor's best efforts do not necessarily entitle him or her to a reward); *see also* Vickey L. Quinn, Comment, *Hard Aground: A Primer on the Salvage of Recreational Vessels*, 19 U.S.F. MAR. L.J. 321, 337 (2007) (illustrating the difference between voluntary salvage and contract salvage to be that voluntary salvage requires success while contract salvage does not).

136. *See* Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea, Sept. 23, 1910, 37 Stat. 1658 (stating that the 1910 Convention's bases for remuneration are considerations such as a salvor's success, danger to the salvor, and voluntary risks taken by a salvor); *see also* Drew F.T. Horrell, Note, *Telepossession Is Nine-Tenths of the Law: The Emerging Industry of Deep Ocean Discovery*, 3 PACE Y.B. INT'L L. 309, 320 n.39 (1991) (recognizing that the purpose of the 1910 Assistance and Salvage Convention was to unite particular rules of law regarding assistance salvage at sea), *see also* Rob Regan, *When Lost Liners Become Found: An Examination of the Effectiveness of Present Maritime Legal and Statutory Regimes for Protecting Historic Wrecks in International Waters With Some Proposals for Change*, 29 TUL. MAR. L.J. 323 (2005) (providing that the purpose of the Assistance and Salvage Convention was to codify the three elements of a successful salvage claim).

137. *See* International Convention on Salvage, Apr. 28, 1989, 1953 U.N.T.S. 193 (providing that the desire to have uniform international rules regarding salvage operations led to the 1989 Convention's review of the international rules contained in the 1910 Convention); *see also* David J. Bederman, *Building New Regimes and Institutions for the Sea: Historic Salvage and the Law of the Sea*, 30 U. MIAMI INTER-AM. L. REV. 99, 110 (1998) (indicating that although the 1989 Convention does not contain provisions on historic shipwrecks, shipwrecks still qualify for salvage under the general maritime law). *But see* Patrick J.S. Griggs, *Obstacles to Uniformity of Maritime Law: The Nicholas J. Healy Lecture*, 34 J. MAR. L. & COM. 191, 193–94 (2003) (suggesting that the lack of universal support of the 1989 Convention indicates that it has not actually replaced the 1910 Convention as intended).

138. *See* Regan, *supra* note 136, at 325 (stating that searching for historic wrecks costs more than for modern wrecks). *See generally* Shelly R. McGill, *Are Criticisms of the Abandoned Shipwreck Act Anchored in Reality?*, 29 ENVT'L. L. & POL'Y J. 105, 120 (2005) (stating that research and equipment necessary for raising any portion of a wreck or its cargo can be exorbitantly expensive); *see generally* Paul Hallwood & Thomas J. Miceli, *Salvaging Historic Shipwrecks* 12 (Univ. Conn., Dep't Econ. Working Paper No. 2004-01) (explaining that historic wrecks present two particular problems: the difficulty of finding them, and much of their value is non-monetary).

139. *See* Regan, *supra* note 136, at 325 (explaining that the high cost of finding historic wrecks is due to the lack of accurate last positions for the ships); s*ee also* Treasure Hunters of the Deep, NEW SCIENTIST, June 29, 1996 at 38 (stating that due to the high running costs of salvage operations, false leads can be costly); *see also* Mathew McClearn, *Arr, Matey, Find Any Gold Yet?*, CAN. BUS., Sept. 30, 2002 at 58 (stating that the amount of gold or silver in wrecks rarely justifies relying on highly problematic records of the ship's location).

are more likely to be spread over a wide area on the ocean floor because such wrecks have likely broken up over time.[140] Because of these factors, when historic shipwrecks are concerned, "the customary scale of salvage awards may be insufficient for the salvors to recover their costs, and so larger rewards . . . are required."[141]

In the United States, it has been noted that the extra time required to recover artifacts from a historic wreck, as well as the amount of effort taken to preserve such wrecks, should be taken into account in determining salvage awards.[142] Although only applicable as precedent in the United States, it could signal a possible trend in international law of rewarding salvors additional compensation based on the difficulty in salvaging historic wrecks and on the salvor's preservation efforts.[143]

---

140. *See* Regan, *supra* note 136, at 325 (asserting that historic wrecks have often broken up and scattered across the ocean floor). *See generally* MDM Salvage, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel, 631 F. Supp. 308, 310 (S.D.Fla.1986) (quoting a text describing the destruction of the 1733 Spanish Fleet in a hurricane spread over a large area); s*ee generally* R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943, 954 (4th Cir. Va. 1999) (describing the area of the wreckage of the Titanic as encompassing 168 square miles).

141. *See* Regan, *supra* note 136, at 325 (stating that often larger rewards are required for salvors of historic shipwrecks); *see also* Hallwood & Miceli, *supra* note 138, at 1 (stating that "the doctrines of admiralty law do not provide efficient incentives for salvagers to seek historic wrecks whose value is largely historical."). *But see* Christopher R. Bryant, *The Archeological Duty of Care: The Legal, Professional and Cultural Struggle Over Salvaging Historic Shipwrecks*, 65 ALB. L. REV. 97, 106 (2001) (stating that the monetary value of many historic shipwrecks is one more reason why the salvage industry is growing).

142. *See* The Blackwall, 77 U.S. 1, 13–14 (1869) (including the labor, skill and risk required of the salvors as among the factors in the reward for salvage); *see also* Columbus-America Discovery Group v. Atlantic Mut. Ins. Co., 974 F.2d 450, 468 (4th Cir. 1992) (stating that "the degree to which the salvors have worked to protect the historical and archeological value of the wreck and items salved" should be taken into account when determining salvage awards for historic wrecks); *see also* MDM Salvage, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 631 F.Supp. 308, 310 (S.D. Fla. 1986) (stating that preservation, photography, and the marking of sites are factors when exclusive salvage rights are sought).

143. *See* Regan, *supra* note 136, at 326–27 (maintaining that other jurisdictions may be persuaded to adopt this factor in determining salvage awards); *see also* Christopher Z. Bordelon, *Saving Salvage: Avoiding Misguided Changes to Salvage and Finds Law*, 7 SAN DIEGO INT'L L.J. 173, 206 (2005) (noting that in determining salvage awards, some courts have considered the salvor's efforts to protect the historical and archeological value of the item). *See generally* Bryant, *supra* note 141, at 122–23 (stating that in determining salvage awards, courts have consistently considered the six factors outlined by the Supreme Court in its 1869 *Blackwall* opinion, which include the salvor's skill, energy displayed, and labor expended in saving the property).

Other problems to consider with historic shipwrecks that are not as likely to arise with modern shipwrecks are a wreck might be abandoned, or "there may be no owner successor-in-interest from whom the salvor can obtain a reward" for finding and locating a shipwreck and its artifacts.[144] In such cases, the law of finds may come into play, which will be discussed later in Section VI.[145]

In summary, the law of salvage does have potential for application to historic shipwrecks depending on the circumstances and the elements being met. Further, there is a possibility for additional rewards to be gained based on the efforts of preserving the historical nature of the artifacts found and for the additional time and expense of salvaging historic wrecks as compared to modern wrecks. The law of salvage, although a common law concept,[146] has become a part of international law via the 1989 Salvage Convention, discussed below, meaning that it can be used to "govern the recovery of ancient shipwrecks."[147]

---

144. *See* Regan, *supra* note 136, at 325 (explaining that a historic wreck is different from modern salvage because many historic wrecks have been abandoned, and no owner may be available to compensate the salvor); *see also* Jerry E. Walker, *A Contemporary Standard for Determining Title to Sunken Warships: A Tale of Two Vessels and Two Nations*, 12 U.S. F. MAR. L.J. 311, 312 (1999) (providing that settling disputes over title to sunken vessels is difficult, time-consuming, and costly for commercial salvors). *See generally* Jeffery W. Yeates, *Clearing Up the Confusion: A Strict Standard of Abandonment for Sunken Public Vessels*, 12 U.S. F. MAR. L.J. 359, 361 (1999) (indicating that modern salvage techniques have led to new discoveries and, as a result, issues surrounding the ownership of sunken vessels have become increasingly problematic).

145. *See* Marex Int'l, Inc. v. Unidentified, Wrecked and Abandoned Vessel, 952 F. Supp. 825, 828–29 (S.D. Ga. 1997) (applying the law of finds to an abandoned 1840s shipwreck)*; see also Chance v. Certain Artifacts Found and Salvaged from the Nashville*, 606 F. Supp. 801, 804 (S.D. Ga. 1984) *aff'd,* 775 F.2d 302 (11th Cir. 1985) (employing the law of finds to a vessel that has been unclaimed by its owner since 1863); *see also* Regan, *supra* note 135, at 325–26 (expressing that under the law of finds the salvor of an abandoned wreck may seek to obtain title to the property).

146. *See* Admiralty Commissioners v. Valverda, (1938) A.C. 173, 200 (Australia) (explaining that the law of salvage is a common law principle that has developed through court decisions); *see also* Valentina Sara Vadi, *Investing in Culture: Underwater Cultural Heritage and International Investment Law*, 42 VAND. J. TRANSNAT'L L. 853, 868 (2009) (noting that the law of salvage has developed under the common law); *see also* Jeffery T. Scrimo, Note, *Raising the Dead: Improving the Recovery and Management of Historic Shipwrecks*, 5 OCEAN & COASTAL L.J. 271, 277 (2000) (stating that the law of salvage was introduced into the American colonies from the common law of England).

147. *See* Patrick J.S. Griggs, *Obstacles to Uniformity of Maritime Law*, 34 J. MAR. L. & COM. 191, 194 (2003) (noting that the Salvage Convention of 1989 took effect internationally in 1996); *see also* Vadi, *supra* note 146, at 868–69 (explaining that the internationally recognized Convention incorporates the general principles of salvage law, including those regarding historic shipwrecks). *But see* Martin Davies, *Whatever Happened to the Salvage Convention 1989*? 39 J. MAR. L. & COM. 463, 463 (arguing that although the Convention is a part of American law, it has almost never been applied in American salvage cases).

B. 1989 International Convention on Salvage

Since UNCLOS does not alter other agreements that are compatible with it and allows States to modify provisions of UNCLOS via other agreements,[148] and since Article 303(4) allows for future agreements relating to underwater cultural heritage,[149] one such agreement to consider when the issue of ownership of historic shipwreck property arises is the 1989 Salvage Convention. Spain, the United Kingdom, and the United States are all parties to the Salvage Convention,[150] but since the Convention included significant changes to prior international law, it cannot be considered a "codification of customary international law."[151] The goal of the Salvage Convention was to "make the application of salvage law uniform from state to state."[152]

---

148. *See* United Nations Convention on the Law of the Sea arts. 311, ¶ 8, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS] (stating that UNCLOS does not alter state agreements that are compatible with its provisions); *see also* George K. Walker, *Professionals' Definitions and States' Interpretative Declarations (Understandings, Statements, or Declarations) for the 1982 Law of the Sea Convention*, 21 EMORY INT'L L. REV. 461, 488 (2007) (describing how article 311(3) of the treaty allows states to create agreements that modify or suspend the Convention so long as their terms are compatible with the purpose of the Convention); *see also* Leah Sturtz, Comment, *Southern Bluefin Case: Australia and New Zealand v. Japan*, 28 ECOLOGY L.Q. 455, 466 (2001) (explaining that UNCLOS avoids conflict by deferring to other treaties and agreements).

149. *See* UNCLOS, *supra* note 148, at art. 303, ¶ 4 (stating that Section 4 of Article 303 does not have prejudicial effect on other international agreements relating to underwater cultural heritage); *see also* Bryant, *supra* note 141, at 133 (asserting that the terms of the Convention are ineffective because the salvage laws weakly impose ambiguous duties set by UNCLOS); *see also* Craig Forrest, *Historic Wreck Salvage: An International Perspective*, 33 TUL. MAR. L.J. 347, 370 (2009) (discussing how Article 303(4) of UNCLOS allows for "specific agreements on underwater cultural heritage" to allow for harmonization of the rules of the sea with emerging laws of "cultural heritage").

150. *See* International Convention on Salvage art. 13, Apr. 28, 1989, 1953 U.N.T.S. 193 (listing Spain, the United Kingdom and the United States as the respective host countries of the representatives that compose the Drafting Committee); *see also* William Tetley, *Maritime Law as a Mixed Legal System (With Particular Reference to the Distinctive Nature of American Maritime Law, Which Benefits From Both Its Civil and Common Law Heritages)*, 23 TUL. MAR. L.J. 317, 338 (1999) (explaining that the United Kingdom and the United States are parties to the Salvage Convention which may signal the beginning of a "modern ius commune" in salvage vessels). *See generally* Thomas L. Nummey, Note, *Environmental Salvage Law in the Age of the Tanker*, 20 FORDHAM ENVT'L L.R. 267, 287 (2009) (discussing how the United Kingdom's Parliament has incorporated the text of the 1989 Salvage Convention into its statutory body of law).

151. *See* Forrest, *supra* note 149, at 371 (indicating that the 1989 Salvage Convention introduces significant modern changes to international law and therefore cannot be considered a codification of existing international law); *see also* Mary L. Miller, Comment, *Underwater Cultural Heritage: Is the Titanic Still in Peril as Courts Battle Over the Future of the Historical Vessel?*, 20 EMORY INT'L L. REV. 345, 368 (2006) (claiming that the 1989 Salvage Convention's requirement to apply salvage law to underwater cultural heritage, which contradicts the UNESCO Convention on the Protection of Underwater Cultural Heritage, can be interpreted as eliminating such application). *See generally* Davies, *supra* note 147, at 465 (indicating the Salvage Convention's attempt to codify existing law has contributed to significant changes in United States law that may be applied by its courts).

152. *See* Davies, *supra* note 147, at 465 (revealing that the Salvage Convention rules are to be applied over and above any state's own salvage laws regardless of whether the salvage took place); *see also* Forrest, *supra* note 149, at 371 (describing the Salvage Convention's efforts to make the application of salvage law consistent from State to State); *see also* Geoffrey Brice Q.C., *Salvage and the Underwater Cultural Heritage*, MARINE POL'Y (1996), at 342 (suggesting that the one of the main goals of the Salvage Convention is to create a uniform salvage law system that can be easily amended into national legislatures' domestic laws)

The Salvage Convention superseded the 1910 Assistance and Salvage Convention for parties that ratified it, including Spain, the United Kingdom, and the United States, and it made some key changes to international salvage law because of two key concerns.[153] First, there was a need to address the increased risk of accidents that potential salvors faced because of the increased shipping traffic after World War II, which caused hesitation on the part of potential salvors to attempt to complete salvage missions out of fear that their reward might not cover any liability in the case of an accident.[154] Second, there was concern amongst potential salvors that they might do more harm to the environment during their recovery or rescue attempts, and it was felt that provisions needed to be put in place to protect potential salvors from such liability to ensure that they would act more quickly in responding to pollution disasters.[155] Thus, the 1989 Salvage Convention was negotiated.[156]

---

153. *See* Liza J. Bowman, *Oceans Apart Over Sunken Ships: Is the Underwater Cultural Heritage Convention Really Wrecking Admiralty Law?*, 42 OSGOODE HALL L.J. 1, 4 (2004) (noting that the 1989 Salvage Convention replaced the 1910 Salvage Convention and has the force of law in numerous territories, including the United Kingdom, Canada, and the United States); *see also* Rob Regan, *When Lost Liners Become Found: An Examination of the Effectiveness of Present Maritime Legal and Statutory Regimes for Protecting Historic Wrecks in International Waters with Some Proposals for Change*, 29 TUL. MAR. L.J. 313, 325 (2005) (stating that the 1989 Salvage Convention supplanted the 1910 Convention); *see also* William L. Neilson, Comment, *The 1989 International Convention on Salvage*, 24 CONN. L. REV 1203, 1203 (1993) (commenting that the 1989 Salvage Convention ratified by the United States replaced the 1910 Brussels Convention on Salvage and was seen as an improvement for salvors).

154. *See* E. Jane Ellis, *International Law and Oily Waters: A Critical Analysis*, 6 COLO. J. INT'L ENVT'L L. & POL'Y 31, 43 (1995) (emphasizing that under the old regime, salvors would abandon risky operations because the potential for reward was significantly diminished); *see also* Regan, *supra* note 153, at 324 (commenting that along with an increased number of accidents came a greater risk that the rescued salvage would not adequately cover salvors' potential liability); *see also* Brian F. Binney, Comment, *Protecting the Environment With Salvage Law: Risks, Rewards, and the 1989 Salvage Convention*, 65 WASH. L. REV. 639, 653 (1990) (stating that while the 1910 Convention law discouraged salvors due to potential liability and lack of reward, the 1989 Convention encourages salvage by increasing rewards for environmental protection efforts and transferring liability from salvors to shipowners).

155. *See* Davies, *supra* note 147, at 479 (stating that the most noteworthy improvement of the 1989 Salvage Convention was obliging ship owners to pay special compensation to salvors who operate to mitigate environmental damage); *see also* Nicholas J.J. Gaskell, *The 1989 Salvage Convention and the Lloyd's Open Form* [LOF] *Salvage Agreement 1990*, 16 TUL. MAR. L.J. 1, 15 (1991) (noting that the second purpose of the 1989 Convention is to set forth obligations to avoid or reduce environmental harm, such as requiring shipowners to compensate salvors).

156. *See* Binney, *supra* note 154, at 647 (reporting that the diplomatic convention to amend salvage law hailed 66 nations and observers from 19 non-governmental international organizations); *see also* Gaskell, *supra* note 155, at 18 (remarking that the writers of the 1989 Convention struggled with negotiating how to address the environmental protection duties imposed on salvors and shipowners); *see also* Regan, *supra* note 153, at 324 (stating that the 1989 Salvage Convention was a response to extensive apprehension regarding potential liability among salvors and shipowners).

In interpreting the provisions of the Salvage Convention that concern historic shipwrecks and other cultural heritage, definitions that apply to terms in any articles that relate to cultural heritage or property need to be considered. Article 1(c) of the Salvage Convention provides the definition for "property," which is described as "any property not permanently and intentionally attached to the shoreline and includes freight at risk."[157] Thus, it can be inferred that a shipwreck would be included in the term "property" since a wreck is not "permanently and intentionally attached to the shoreline."[158]

During the negotiation process for the treaty, Spain and France tried to have historic shipwrecks excluded from the reach of the Convention, and although they were not successful in completely excluding historic shipwrecks, the Convention, under Article 30(1)(d), does allow States to make reservations in order to exclude historic shipwrecks from the reach of the Salvage Convention.[159] Article 30(1)(d) states: "Any State may, at the time of signature, ratification, acceptance, approval or accession, reserve the right not to apply the provisions of this Convention when the property involved is maritime cultural property of prehistoric, archaeological or historic interest and is situated on the sea-bed."[160]

---

157. *See* International Convention on Salvage art. 1(c), Apr. 28, 1989, 1953 U.N.T.S. 193 (defining property as any "property not permanently and intentionally attached to the shoreline and includes freight at risk"); *see also* Martin Davies, *Whatever Happened to the Salvage Convention 1989?* 39 J. MAR. L. & COM. 482 (reiterating the definition of property in Article 1(c) as any "property not permanently and intentionally attached to the shoreline and includes freight at risk"); *see also* Anne M. Cottrell, Comment, *The Law of the Sea and International Marine Archaeology: Abandoning Admiralty Law to Protect Historic Shipwrecks*, 17 FORDHAM INT'L L.J. 667, 689 (1994) (maintaining that salvage is limited to "maritime property" and that courts employ a broad definition of this property).

158. *See* GEOFFREY BRICE, MARITIME LAW OF SALVAGE 255, 262 (3d ed. 1999) (discussing the meaning of maritime property and its application to shipwrecks); *see also* Bowman, *supra* note 153, at 8 n.28 (recognizing that even though a shipwreck may become permanently attached to the shoreline, it is doubtful that it was attached intentionally); *see also* Martin Davies, *Whatever Happened to the Salvage Convention 1989?*, 39 J. MAR. L. & COM. 463, 483 (2008) (arguing that the Salvage Convention applies to both abandoned shipwrecks and shipwrecks claimed by their original owners).

159. *See* Craig Forrest, *Historic Wreck Salvage: An International Perspective*, 33 TUL. MAR. L.J. 371 (2009) (maintaining that Article 30(1)(d) of the Salvage Convention shows that the attempt to have historic wrecks excluded from the Convention by France and Spain was partially successful because it allows countries to elect against the application of the Convention); *see also* Craig Forrest, *Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?*, 34 J. MAR. L. & COM. 309, 347 (2003) (reiterating that France and Spain's effort to exclude underwater cultural heritage was incorporated into Article 30(1)(d) of the Salvage Convention); *see also* Gaskell, *supra* note 155, at 38 (noting that a French proposal to exclude historical wrecks from the Salvage Convention was withdrawn when it was pessimistically received).

160. *See* International Convention on Salvage, *supra* note 157, at art. 30(1)(d) (explaining that a country that elects not to apply the Convention to historic shipwrecks must do so at the time of ratification of the Convention).

Spain and the United Kingdom, but not the United States, have entered such reservations as provided for in Article 30(1)(d), although the United Kingdom's reservation stated it was merely reserving the right to make a reservation in the future, meaning it does not necessarily exclude historic shipwrecks from the reach of the Salvage Convention as it has not yet made a reservation to that effect.[161] A few key Articles of the Salvage Convention that are relevant to determining if a salvage reward should be given are discussed in the following sections.

1. Salvage Convention Exclusion of State-Owned Vessels

One important exclusion to note about the reach of the Salvage Convention is that it does not apply to state-owned vessels, as outlined in Article 4, which states that the "Convention shall not apply to warships or other non-commercial vessels owned or operated by a State and entitled, at the time of salvage operations, to sovereign immunity under generally recognized principles of international law unless that State decides otherwise."[162] The extent that sovereign immunity applies to a historic wreck to preclude salvage claims will be discussed in more detail in Section VIII.

---

161. *See* OLIVIER CACHARD, CODE MARITIME: DROIT INTERNATIONAL ET DROITS EUROPEENS 143 (2006) (reporting that Spain has chosen not to apply the provisions of the Convention when the salvage operation takes place in inland waters or when the property is of historical value and located on the seabed); *see also* David J. Bederman, *Historic Salvage and the Law of the Sea*, 30 U. MIAMI INTER-AM. L. REV. 99, 110 (1998) (emphasizing that the United States was among the majority of the countries who rejected the right to reserve against the Salvage Convention's application to historic shipwrecks); *see also* Forrest, *supra* note 161, at 347, 371 n.160 (illustrating that the United Kingdom reserved their right to enter into a reservation under Article 30(1)(d) at some time in the future).

162. *See* International Convention on Salvage, *supra* note 157, at art. 4 (announcing that the provisions of the Convention do not apply to state-owned warships or other non-commercial ships); *see also* Lathrop v. Unidentified, Wrecked & Abandoned Vessel, 817 F. Supp. 953, 963–64 (M.D. Fla. 1993) (holding that a wrecked and abandoned sailing vessel found in the National Park at Cape Canaveral could not be salvaged without a permit because the United States owned the submerged lands in a national park, which gave them ownership rights to the vessel); *see also* Jerry E. Walker, *A Contemporary Standard for Determining Title to Sunken Warships: A Tale of Two Vessels and Two Nations*, 12 U.S.F. MAR. L.J. 311, 338 (1999–2000) (indicating that items found on a Japanese warship were deemed property of Japan, even though the ship was located in Chinese waters).

2. Articles Relevant to Salvage Reward Determination

Articles 12, 13, and 14 are all relevant in determining if a salvage reward should be given and how much reward should be given.[163] Article 12 of the Salvage Convention states that there must be a "useful result" in order for a salvor to be eligible for a salvage reward.[164] Article 13 then lists the criteria used in setting the value of the reward, in order of importance.[165] Criteria that must be taken into account in the amount of the reward include:

1. the salved value of the vessel and other property;

2. the skill and efforts of the salvors in preventing or minimizing damage to the environment;

3. the measure of success obtained by the salvor;

4. the nature and degree of the danger;

5. the skill and efforts of the salvors in salving the vessel, other property and life;

6. the time used and expenses and losses incurred by the salvors;

7. the risk of liability and other risks run by the salvors or their equipment;

8. the promptness of the services rendered;

9. the availability and use of vessels or other equipment intended for salvage operations;

10 the state of readiness and efficiency of the salvor's equipment and the value thereof.[166]

---

163. *See* International Convention on Salvage, *supra* note 157, arts. 12–14 (laying out the process of, and factors for, determining salvage rewards); *see also* William L. Nielson, Comment, *The 1989 International Convention on Salvage*, 24 CONN. L. REV. 1203, 1244 (1992) (tracing the Convention's approach to compensation as embodied in Articles 12, 13 and 14); *see, e.g.,* Vickey L. Quinn, Comment, *Hard Aground: A Primer on the Salvage of Recreational Vehicles*, 19 U.S.F. MAR. L.J. 321, 355 (2007) (demonstrating how an arbitrator used the factors provided in Articles 13 and 14 to arrive at a salvage value).

164. *See* International Convention on Salvage, *supra* note 157, at art. 12 (requiring a useful result before an award will be granted); *see also* Gaskell, *supra* note 155, at 26 (stating that whether or not the Convention's requirement of a useful result will be judged by the courts); *see also* Jason Parent, *No Duty to Save Lives; No Reward for Rescue: Is That Really the Current State of International Salvage Law?*, 12 ANN. SURV. INT'L & COMP. L., 87, 93 (2006) (discussing the useful result rule imposed by the Convention and analyzing its applications and implications).

165. *See* International Convention on Salvage, *supra* note 157, at art. 13 (stating the criteria used when setting the value of a salvage award); *see also* Trico Marine Operators, Inc. v. Dow Chemical Co., 809 F. Supp. 440, 443 (E.D. La. 1992) (using the criteria provided in Article 13 of the Convention to determine the salvage value); *see also* THOMAS J. SCHOENBAUM, ADMIRALTY & MAR. LAW § 16-5 (4th ed. 2009 & Supp. 2010) (identifying how the Convention updates the traditional criteria for a salvage award).

166. *See* International Convention on Salvage, *supra* note 157, at art. 13 (listing the factors to be considered when granting a salvage award); *see also* Royal Ins. Co. of America v. BHRS, LLC, 333 F. Supp. 2d 1293, 1294 (S.D.Fla. 2004) (granting summary judgment and upholding a salvage contract where compensation was to be made as per Articles 13 and 14 of the Convention); *see also* SCHOENBAUM, *supra* note 165, at App. C (identifying the international conventions that impact the laws of salvage).

After taking these criteria into account, the salvage reward cannot exceed the value of the salved wreck and artifacts.[167] Further, under Article 14, special additional compensation of up to 30 percent of the value of the salvaged property can be provided to the salvor if the salvor takes measures to reduce or prevent environmental damage during salvage operations, although the additional compensation should not allow the salvor to recover more than the value of the salvaged property.[168] Another consideration outlined in Article 18 is that a salvor can be deprived of compensation "if the salvor has been guilty of fraud or other dishonest conduct."[169] Finally, Article 19 states that a salvor shall not be entitled to compensation under the Salvage Convention if the owner of the shipwreck has expressly and reasonably prohibited salvage operations by the salvor.[170]

---

167. *See* International Convention on Salvage, *supra* note 157, at art. 12 (capping the recovery amount at the value of recovery); *see also* Westar Marine Services v. Heerema Marine Contractors, S.A., 621 F. Supp. 1135, 1141 (D.C. Cal.1985) (limiting the salvage award to the recovered value); *see also* Thomas L. Nummey, Note, *Environmental Salvage Law in the Age of the Tanker*, 20 FORDHAM ENVT'L. L. REV. 267, 273 n.18 (2009) (noting that the Convention's criteria retain the common law's salvaged value limitation).

168. *See* International Convention on Salvage art. 14, Apr. 28, 1989, 1953 U.N.T.S. 193 (providing that a salvor can receive up to 30 percent of additional compensation if proper environmental safety measures are taken); *see also* Liza J. Bowman, *Oceans Apart Over Sunken Ships: Is the Underwater Cultural Heritage Convention Really Wrecking Admiralty Law?*, 42 OSGOODE HALL L.J. 1, 5 (2004) (maintaining that Article 14 provides salvors an economic incentive to attempt the salvage of vessels which threaten to pollute the marine environment); *see also* Thomas L. Nummey, Note, *Environmental Salvage Law in the Age of the Tanker*, 20 FORDHAM L. REV. 267, 286 (2009) (illustrating how Article 14 works in practice through the use of a hypothetical describing how absent the provision there would be no economic incentive to contain oil spills coming from old tanker ships).

169. *See* International Convention on Salvage, *supra* note 168, at art. 18 (stating that a salvor can be deprived of compensation when through his own misconduct or negligence a salvage operation is made more difficult); *see also* Geoffrey Brice, *Salvorial Negligence in English and American Law*, 22 TUL. MAR. L.J. 569, 572 (1998) (describing how a salvor may be deprived of compensation under article 18 of the international convention on salvage when he makes salvage more difficult through his own misconduct or negligence); *see also* Martin Davies, *Whatever Happened to the Salvage Convention 1989?*, 39 J. MAR. L. & COM. 463, 493 (2008) (recognizing that a salvor's fault may lead to a reduction of an award even if it does not cause damage to the vessel and even if it does not amount to gross negligence or willful misconduct).

170. *See* International Convention on Salvage, *supra* note 168, at art. 19 (providing that a salvor is not entitled to compensation if the owner of the vessel to be salvaged has expressly and reasonably prohibited salvage operations); *see also* Nicholas J.J. Gaskell, *The 1989 Salvage Convention and the Lloyd's Open Form* [LOF] *Salvage Agreement 1990*, 16 TUL. MAR. L.J. 1, 63 (1991) (asserting that under Article 19, a salvor may be denied compensation for disobeying an express and reasonable prohibition); *see also* Richard F. Southcott, *Canadian Maritime Law Update: 2002*, 34 J. MAR. L. & COM. 391, 394 (2003) (noting that under certain limited circumstances a salvor may be denied compensation under article 19).

In summary, the Salvage Convention does apply to historic shipwrecks concerning the United States and the United Kingdom, as they have not yet made reservations excluding such wrecks, although Spain has made such a reservation.[171] Thus, the Salvage Convention should be applied to salvage operations between the United States and the United Kingdom, although the Salvage Convention's application to salvage operations between the United States and Spain is more questionable in light of Spain's reservation under Article 30(1)(d), discussed above.[172]

VI. Law of Finds

The law of finds may become relevant as opposed to the law of salvage in cases where salvors find historic shipwrecks that could be considered abandoned, meaning there are no owners or successors-in-interest that can make claim to the property.[173] In such cases, the title to the shipwreck and its artifacts will be awarded to whoever locates the shipwreck.[174] In order for a finder of a shipwreck to be granted title, however, the finder must prove abandonment on the part of the original owner[175] and must also have "intent to acquire the property and take actual

171. *See* International Convention on Salvage, *supra* note 168, at art. 30 (allowing any nation who wishes to exclude the salvage of historic shipwrecks from the coverage of the Convention the ability to do so); *see also* David J. Bederman, *Historic Salvage and the Law of the Sea*, 30 U. MIAMI INTER-AM. L. REV. 110 (1998) (opining that in the absence of a State making a reservation under article 30(1)(d) the Convention would apply to historical shipwrecks); *see also* Craig Forrest, *Historic Wreck Salvage: An International Perspective*, 33 TUL. MAR. L.J. 371 (2009) (observing that a State may make a reservation to exclude the salvage of historic shipwrecks from the coverage of the Convention act).

172. *See* International Convention on Salvage, *supra* note 168, at art. 30 (noting that any nation that wishes may exclude historic wreck salvage from the coverage of the Convention); *see also* David J. Bederman, *Maritime Preservation Law: Old Challenges, New Trends*, 8 WIDENER L. SYMP. J. 163, 171 (2002) (indicating that the United States did not make a reservation against the applicability of the Convention to historic shipwrecks and that in fact only a handful of nations had); *see also* Forrest, *supra* note 171 at 33 (positing that the reservation provision of the Convention makes it so that the law of salvage is not a true "law of nations").

173. *See* Rob Regan, *When Lost Liners Become Found: An Examination of the Effectiveness of Present Maritime Legal and Statutory Regimes for Protecting Historic Wrecks in International Waters with Some Proposals for Change*, 29 TUL. MAR. L.J. 313, 325 (2005) (comparing the law of salvage with the law of finds and determining that under the law of finds, there can be no successor-in-interest to the abandoned property); *see also* Columbus-America Discovery Group v. Atlantic Mutual Ins. Co., et al., 974 F.2d 450, 461 (4th Cir. 1992) (confirming that the law of finds applies, with regard to sunken property, only to property that has been abandoned); *see also* Terence P. McQuown, *An Archaeological Argument for the Inapplicability of Admiralty Law in the Disposition of Historic Shipwrecks*, 26 WM. MITCHELL L. REV. 289, 293 (2000) (emphasizing that the first element in establishing whether the law of finds or law of salvage applies to a shipwreck is determining whether that property has been abandoned).

174. *See* Christopher Z. Bordelon, *Saving Salvage: Avoiding Misguided Changes to Salvage and Finds Law*, 7 SAN DIEGO INT'L L.J. 173, 177–78 (2005) (reasoning that title in property vests to the finder because by the time the sunken wreck is recovered, the owner may have given up interest in that property); *see also* M. June Harris, *Who Owns the Pot of Gold at the End of the Rainbow? A Review of the Impact of Cultural Property on Finders and Salvage Law*, 14 ARIZ. J. INT'L & COMP. L. 223, 229 (1997) (arguing that title is awarded to finders of abandoned property so that the finder will bring it back into the public's awareness); see also Valentina Sara Vadi, *Investing in Culture: Underwater Cultural Heritage and International Investment Law*, 42 VAND. J. TRANSNAT'L L. 853, 870 (2009) (stating that under maritime law, the finder of an abandoned shipwreck will receive title to the discovered property).

possession or control of it."[176] It is of great importance to note, however, that there are "strong political and diplomatic motives that discourage the application of the law of finds to military vessels."[177]

Further, the application of the law of finds to abandoned shipwrecks, as well as the application of the law of salvage, discussed above, is criticized by those who have concerns for the preservation of historical artifacts and the environment.[178] These critics say that application of such common law principles to historic shipwrecks has given potential salvors the wrong motives to go out and find shipwrecks and artifacts, thus putting the environment and underwater cultural heritage at risk.[179] One attempt on the international level to promote preservation of underwater cultural heritage such as historic shipwrecks has been the United Nations' Economic and Social Council's Convention on the Protection of Underwater Cultural Heritage (CPUCH), discussed below.[180]

---

175. *See* Friedman v. U.S., 347 F.2d 697, 704 (8th Cir. 1965) (finding that abandonment, and thus title, must be proved by the facts of a given circumstance); *see also* Vadi, *supra* note 174, at 870 (asserting that under the law of finds, it is vital that the finder prove abandonment since he will receive ownership and title of the property); *see also* Sherri J. Braunstein, Note, *Shipwrecks Lost and Found at Sea: The Abandoned Shipwreck Act of 1987 Is Still Causing Confusion and Conflict Rather Than Preserving Historic Shipwrecks*, 8 WIDENER L. SYMP. J. 301, 304 (2002) (expressing that title is earned by being the first person to take dominion and control over an abandoned shipwreck).

176. *See* Hener v. United States, 525 F. Supp. 350, 356 (S.D.N.Y 1981) (indicating that to obtain title, the finder must show intent to keep the property and exert control over it); *see also* Jance R. Hawkins, Note, *Reconsidering the Maritime Laws of Finds and Salvage: A Free Market Alternative*, 30 GEO. WASH. J. INT'L L. & ECON. 75, 91 (1996) (illustrating that if the finder fails to establish intent or control, the finder will not obtain title to the abandoned shipwreck); *see also* Jennifer Tsai, Comment, *Curse of the* Black Swan*: How the Law of Salvage Perpetuates Indeterminate Ownerships of Shipwrecks*, 42 INT'L. LAW. 211, 211 (2008) (explaining that to gain title over an abandoned shipwreck, the finder must "(1) show intent to acquire the property and take actual possession or control of it; and (2) establish that the property has been abandoned").

177. *See* Sea Hunt, Inc. and Commonwealth of Virginia v. The Unidentified Shipwrecked Vessel or Vessels, et al., 221 F.3d 634, 647 (4th Cir. 2000) (demonstrating that a finding of abandonment "would be improper" in situations involving military vessels, because it would exploit sovereign ships and the honored graves of those people lost at sea); *see also* David J. Bederman, *Congress Enacts Increased Protections for Sunken Military Craft*, 100 AM. J. INT'L L. 649, 654 (2006) (referring to the United States Sunken Military Craft Act, which prohibits any sunken military ship from being claimed under the law of finds); *see also* Vadi, *supra* note 174, at 870 (quoting Greg Stemm, who noted that the law of finds does not apply to military ships, because those ships were not abandoned but rather were acknowledged as maritime graves).

178. *See* Bordelon, *supra* note 174, at 179 (acknowledging the opposition to salvage because of environmental concerns); *see also* Forrest, *supra* note 172, at 370–71 (detailing the pollution that would occur when salvaging); *see also* Ole Varmer, *The Case Against the "Salvage" of the Cultural Heritage*, 30 J. MAR. L. & COM. 279, 280–81 (1999) (detailing the negative impact of removing shipwreck materials).

179. *See* Bederman, *supra* note 172, at 99 (detailing the interest in recovering shipwreck materials); *see also* Bordelon, *supra* note 174, at 179 (acknowledging the opposition to salvage because of environmental concerns); *see also* Davies, *supra* note 169, at 476–77 (acknowledging the failure to reward salvors who avert environmental damage).

180. *See* Bordelon, *supra* note 174, at 199 (acknowledging the creation of the Convention on the Protection of the Underwater Cultural Heritage).

VII. 2001 Convention on the Protection of the Underwater Cultural Heritage

A. Summary of CPUCH

CPUCH was introduced out of several countries' concerns that the salvage law discussed previously did not sufficiently protect their historic shipwrecks and cultural artifacts.[181] CPUCH was based on the International Law Association's Buenos Aires Draft Convention on the Protection of the Underwater Cultural Heritage, which was introduced "to provide basic legal protection in the entire maritime area beyond the territorial seas of coastal States for shipwrecks and other sensitive and precious artifacts that are subject to increasing levels of damage and destruction."[182] There were three mains reasons that these countries felt the need to negotiate CPUCH: first, advances in technology have allowed for human artifacts resting at the bottom of the sea to be more accessible; second, there is now increased awareness about the historical and archeological value of shipwrecks; third, there has been recognition that these shipwrecks and artifacts "lack sufficient protection under existing rules of maritime law."[183] In addition to the reasons stated above, shortcomings in UNCLOS regarding the sovereign rights of coastal States over underwater cultural heritage, as compared to living and non-living

181. *See* SARAH DROMGOOLE, THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: NATIONAL PERSPECTIVES IN LIGHT OF THE UNESCO CONVENTION xxvii, xxxi, (2001) (acknowledging the past failures to protect salvage); *see also* Forrest, *supra* note 172, at 372 (2009) (restating that the 2001 convention provided additional protection to preserve historical shipwrecks); *see also* Brooke Wright, Comment, *Keepers, Weepers, or No Finders at All: The Effect of International Trends on the Exercise of U.S. Jurisdiction and Substantive Law in the Salvage of Historic Wrecks*, 33 TUL. MAR. L.J. 285, 304 (2008) (affirming that the purpose of CPUCH was to preserve underwater cultural heritage, preferably the salvage of historical wrecks).

182. *See* International Law Association Buenos Aires Conference, 66 INT'L L. ASS'N REP. CONF. 432 (1994) (stating that the Committee prepared the Convention to address the need to protect underwater cultural heritage and prevent its destruction); *see also* James A.R. Nafziger, Symposium, *Sunken Treasure: Law, Technology, and Ethics: Fourth Session: Future Directors: The Titanic Revisited*, 30 J. MAR. L. & COM. 311, 319 (1999) (quoting the Buenos Aires Draft Convention and its purpose in providing for the protection of underwater cultural heritage); *see also* Regan, *supra* note 173, at 319 (noting how the Conventions took steps towards shipwreck preservation by requiring all parties to the agreement to take reasonable measures to preserve underwater cultural heritage).

183. *See* K. Russell LaMotte, *Introductory Note*: *Convention on the Protection of the Underwater Cultural Heritage*, 47 I.L.M. 37, 37 (2002) (explaining that there were three primary reasons to negotiate CPUCH, including the lack of sufficient protection under existing rules and advances in technology); *see also* Morag Kersel & Christina Luke, *A Retrospective and a Look Forward*, 30 J. ARCHEOLOGY 1, 192 (2005) (discussing how the looting of shipwrecks is destroying our archeological record and also our cultural heritage); *see also* Wright, *supra* note 181, at 306 (describing how increased technological capabilities coupled with a lack of sufficient legal protection are imminent threats to preserving heritage sites).

resources, in the EEZ, the area from 24 miles off a State's baseline up to 200 miles off the baseline led to the negotiation of CPUCH.[184] Incidentally, this area is precisely where many historic shipwrecks and artifacts have been found.[185] Thus, in this zone, it has been said that "the coastal State's rights and obligations regarding UCH [underwater cultural heritage] are essentially governed only by general international law."[186] Thus, CPUCH was negotiated in an attempt to address a coastal State's sovereignty and ability to protect underwater cultural heritage in this zone.[187]

First, CPUCH defines underwater cultural heritage in Article 1(a) as "all traces of human existence having a cultural, historical[,] or archaeological character which have been partially or

184. *See* LaMotte, *supra* note 183, at 37 (declaring that coastal States have sovereign rights and regulatory authority up to 200 miles); *see also* Bederman, *supra* note 177, at 650 (reiterating that UNCLOS denies the coastal State any regulatory authority beyond the 200-mile limit); *see also* David J. Bederman, Symposium, *Sunken Treasure: Law, Technology, and Ethics: Fourth Session: Future Directions: The UNESECO Draft Convention on Underwater Cultural Heritage: A Critique and Counter-Proposal*, 30 J. MAR. L. & COM. 331, 339 (1999) (defining a cultural heritage zone as the area beyond the territorial sea of the State up to the outer limit of its continental shelf).

185. *See* LaMotte, *supra* note 183, at 37 (alleging that most accidents occur in the economic zone, notably in the Mediterranean sea); *see also* Bederman, *supra* note 177, at 650 (describing the history of the number of shipwrecks that have occurred within a nation's contiguous zone); *see also* Helene Lefebvre-Chalain, *Fifteen Years of Particularly Sensitive Sea Areas: A Concept in Development*, 13 OCEAN & COASTAL L.J. 47, 49 (2007) (addressing how a substantial number of maritime accidents occurred off the Brittany coast, including the ship *Olympic Bravery*).

186. *See* LaMotte, *supra* note 183, at 37 (commenting that general international law applies in the economic zone); *see also* Bederman, *supra* note 177, at 650 (noting that when matters are not left to the sovereign State, they are to be governed by the centuries-old maritime law of salvage); *see also* Stephen Paul Coolbaugh, Comment, *Raiders of the Lost . . . Sub? The Potential for Private Claims of Ownership to Military Shipwrecks in International Waters: The Case of Japanese Submarine I-52*, 49 BUFF. L. REV. 929, 959 (2001) (asserting that because the wreck of the I-52 was over 800 miles away from Cape Verde, a district court applying old maritime salvage law could hear the case).

187. *See* LaMotte, *supra* note 183, at 37 (explaining that one of the main motivations for the adoption of CPUCH was to address the jurisdictional ambiguities left by UNCLOS regarding the protection of underwater cultural heritage); *see also* Lowell B. Bautista, *Gaps, Issues, and Prospects: International Law and the Protection of Underwater Cultural Heritage*, 14 DALHOUSIE J. LEGAL STUD. 57, 76 (2005) (reporting that UNCLOS does not contain any provisions on the protection of underwater cultural heritage in the EEZ or the continental shelf); *see also* Margaret Beukes, *Underwater Cultural Heritage: Archeological Preservation or Salvage?*, 26 S.AFR. Y.B. INT'L L. 62 (2001) (noting that preservation of underwater cultural heritage was not a priority during the 1982 UNCLOS negotiations).

totally under water, periodically or continuously, for at least 100 years," including artifacts, human remains, and "vessels . . . , their cargo, [and] other contents."[188] Next, Article 2 states that "[u]nderwater cultural heritage shall not be commercially exploited."[189] Rule 2 of the Annex explains that "[u]nderwater cultural heritage shall not be traded, sold, bought, or bartered as commercial goods,"[190] although Rule 2 does allow for sale of such heritage to an institution such as a museum.[191] In addition, Rule 1 of the Annex to CPUCH states that "[t]he

188. *See* United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Protection of the Underwater Cultural Heritage, 41 I.L.M. 40, art. 1(a)(i)–(ii), Nov. 2, 2001 [hereinafter CPUCH] (defining underwater cultural heritage to include objects that have cultural, historical or archaeological significance); *see also* BARBARA T. HOFFMAN, ART AND CULTURAL HERITAGE: LAW, POLICY AND PRACTICE 13 (Barbara Hoffman ed., 2006) (examining whether admiralty law should apply to objects that meet the definition of "underwater cultural heritage"); *see also* James A.R. Nafziger, *The Evolving Role of Admiralty Courts in Litigation Related to Historic Wreck*, 44 HARV. INT'L L.J. 251, 252 (2003) (finding that the definition of underwater cultural heritage has become synonymous with historic wreck).

189. *See* CPUCH, *supra* note 188, at art. 2(7) (mandating that underwater cultural heritage not be commercially exploited); *see also* Guido Carducci, *New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage*, 96 A.J.I.L. 419, 424 (2002) (stating that CPUCH's position that underwater cultural heritage should not be exploited builds on the principle that in situ preservation is the first option); *see also* John Henry Merryman, *A Licit International Trade in Cultural Objects, in* WHO OWNS THE PAST?: CULTURAL POLICY, CULTURAL PROPERTY AND THE LAW 269, 271 (Kate Fitz Gibbon ed., 2005) (arguing that CPUCH's rule that underwater cultural heritage not be commercially exploited is evidence of anti-market bias).

190. *See* CPUCH, *supra* note 188, at annex R. 2 (stating the general principle that commercial exploitation of underwater cultural heritage is incompatible with its protection); *see also* Sarah Dromgoole, *2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage*, 18 INT'L J. MARINE & COASTAL L. 59, 66 (2003) (providing the general principle of CPUCH that sale of underwater cultural heritage is incompatible with its protection); *see also* Paul Hallwood & Thomas J. Micelli, *Murky Waters: The Law and Economics of Salvaging Historic Shipwrecks*, 35 J. LEGAL STUD. 285, 298 (2006) (explaining that CPUCH's general principle against commercial exploitation of underwater cultural heritage discounts salvage value completely).

191. *See* CPUCH, *supra* note 188, at annex R. 2(b) (stating that CPUCH does not prevent the sale of underwater cultural heritage as long as it does not result in irretrievable dispersal); *see also* SARAH DROMGOOLE, THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: NATIONAL PERSPECTIVES IN LIGHT OF THE UNESCO CONVENTION 313, 341 (2001) (discussing the controversy that occurred when the British Government entered into a contract for the recovery of coins from a 17th-Century ship); *see also* Sarah Dromgoole, *Murky Waters for Government Policy: The Case of a 17th Century British Warship and 10 Tonnes of Gold Coins*, 28 MARINE POL'Y 194 (2004) (arguing that sale of recovered artifacts is allowed under CPUCH if it is possible to reconstitute an entire collection).

protection of underwater cultural heritage through in situ preservation shall be considered as the first option."[192] Moreover, Rule 5 of the Annex to CPUCH requires that the "disturbance of human remains or venerated sites" shall be avoided.[193]

Further, Article 4 states that the law of salvage and law of finds will be superseded by CPUCH unless application of such laws is authorized, is in conformance with CPUCH, and will protect underwater cultural heritage to the maximum extent possible, meaning that a shipwreck generally will not be excluded from protection under CPUCH even if the shipwreck has been abandoned.[194] The rationale made for excluding historic shipwrecks and other underwater cultural heritage from salvage law was that salvage law evolved to encourage the rescue of

192. *See* CPUCH, *supra* note 188, at 40 (stating that in situ preservation of underwater cultural heritage is the first option during activity directed at underwater cultural heritage); *see also* Christopher Z. Bordelon, *Saving Salvage: Avoiding Misguided Changes to Salvage and Finds Law*, 7 SAN DIEGO INT'L L.J. 173, 200 (2005) (noting that CPUCH's stance that in situ preservation should be the first option in activities directed at underwater cultural heritage leaves little room for the law of finds and salvage); *see also* Valentina Sara Vadi, *Investing in Culture: Underwater Cultural Heritage and International Investment Law*, 42 VAND. J. TRANSNAT'L L. 853, 864 (2009) (stating that the purpose of having in situ preservation as a first option is to foster tourism related to archeological discoveries).

193. *See* CPUCH, *supra* note 188, at 52 annex R. 5 (asserting that actions regarding cultural heritage should not disturb underwater remains); *see also* Gwenaelle Le Gurun, *France*, *in* THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE 59, 66–67 (Sarah Dromgoole ed., 2006) (discussing Article 2 of CPUCH and its emphasis on the importance and sanctity of human remains, which are considered underwater cultural heritage); *see also* Craig Forrest, *A New International Regime for the Protection of Underwater Cultural Heritage*, 51 INT'L & COMP. L.Q. 511, 530–32 (2002) (maintaining that Rule 5 was drafted to protect against activities such as treasure hunting and not activities such as underwater oil drilling).

194. *See* CPUCH, *supra* note 188, at art. 4(a)–(c), Nov. 2, 2001, 41 I.L.M. 40, 43 (establishing that acts affecting underwater cultural heritage are generally regulated by CPUCH unless specific provisions require such acts to be regulated by the law of salvage or finds); *see also* K. Russell LaMotte, *Introductory Note to UNESCO: Convention on the Protection of the Underwater Cultural Heritage*, 41 I.L.M. 37, 38 (2002) (stating that CPUCH applies to underwater cultural heritage, whether or not it is abandoned); *see also* Forrest, *supra* note 193, at 524–25 (asserting that the Convention considers all shipwrecks, including abandoned wrecks, to be underwater cultural heritage).

objects in danger of being lost at sea, and that historic artifacts do not fall into such a category because they have already been lost.[195] Further, danger to an artifact could be increased by attempting to bring it to the surface instead of just leaving it where it is.[196] This provision has been disfavored by the United Kingdom and the United States, which may explain their refusal to sign CPUCH.[197]

Next, the protection of underwater cultural heritage in various areas of the sea must be discussed. Article 7 gives a State sovereignty over shipwrecks within its territorial sea, stating that the State should inform the flag State or other States that might have a link to the shipwreck of such a discovery.[198] Meanwhile, Article 8 gives a State the ability to "regulate and authorize activities" related to historic shipwrecks within its contiguous zone.[199] Article 9 sets out who is allowed to regulate underwater cultural heritage in the area beyond a coastal State's territorial sea and contiguous zone, providing that "[a]ll States Parties have a responsibility to

---

195. *See* Carducci, *supra* note 189, at 425 & n.40 (reporting that Article 4 distinguishes among salvage law, the rescue of objects on endangered ships, and underwater cultural heritage); *see also* Forrest, *supra* note 193, at 373 (explaining that salvage law applies to saving artifacts imperiled by the sea, whereas underwater cultural heritage applies to recovering artifacts already lost in the sea). *See generally* David J. Bederman, *Maritime Preservation Law: Old Challenges, New Trends*, 8 WIDENER L. SYMP. J. 163, 198 (2002) (recognizing that sunken vessels are already lost at sea and, therefore, Article 4 excludes such vessels from the ambit of salvage law).

196. *See* Dromgoole, *supra* note 190, at 59, 65 (stating that certain preservation must comport with archeological standards, and that the excavation should occur only if the underwater cultural heritage area is endangered or if the excavation is for or authorized research); *see also* Forrest, *supra* note 193, at 373 (noting that retrieving cultural heritage may cause more harm than allowing it to remain underwater because of the economic motivations of salvors); *see also* Hallwood & Miceli, *supra* note 190, 298 n.22 (commenting that the rationale for in situ preservation is that the underwater cultural heritage will be damaged unless improved technology for excavation exists).

197. *See* Forrest, *supra* note 193, at 374 (indicating that the United States and United Kingdom were critical of Article 4 of CPUCH, which states that salvage law does not apply to underwater cultural heritage); *see also* Tullio Scovazzi, *The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage*, *in* ART AND CULTURAL HERITAGE: LAW, POLICY, AND PRACTICE 285, 285, nn.3–4 (Barbara T. Hoffman ed., 2006) (reporting that the United States only observed CPUCH negotiations and would have voted against adoption, and that the United Kingdom abstained). *See generally* PATTY GERSTENBLITH, ART, CULTURAL HERITAGE, AND THE LAW 792 (2004) (remarking that the United States, not a member of UNESCO, sat as an observer delegate during CPUCH negotiations and did not support its adoption).

198. *See* CPUCH art. 7, Nov. 2, 2001, 41 I.L.M. 40 (stating that sovereign States have the exclusive right to regulate activities within their territorial waters that involve underwater cultural heritage); *see also* David J. Bederman, *Congress Enacts Increased Protections for Sunken Military Craft*, 100 AM. J. INT'L L. 649, 651 & n.14 (2006) (explaining that according to Article 7, when a foreign ship is found within coastal internal waters, the coastal State has a duty to inform the flag State). *See generally* PATRICK J. O'KEEFE & LYNDEL V. PROTT, LAW AND THE CULTURAL HERITAGE VOLUME 1, DISCOVERY & EXCAVATION 94–5 (1984) (discussing the continental shelf doctrine as customary law, which grants jurisdiction to a coastal State over its continental shelf but does not endow the same jurisdictional advantage to shipwrecks).

199. *See* CPUCH, *supra* note 198, at art. 7 (stating that sovereign States may authorize activities regarding underwater cultural heritage within their contiguous zone in accordance with the United Nations Convention on the Law of the Sea); *see also* Carducci, *supra* note 189, at 429 (explicating that Article 8 of UNESCO and Article 303 of UNCLOS are similar in that they both grant a State the authority to regulate activities within its contiguous zone). *See generally* Bederman, *supra* 198, at 649 (discussing the Convention on the Law of the Sea, and how it similarly gives coastal States authority over shipwrecks located in the contiguous zone and territorial sea).

protect underwater cultural heritage in the exclusive economic zone and on the continental shelf in conformity with this Convention [CPUCH]."[200] Under Article 9 of CPUCH, when on the continental shelf or EEZ of another State Party, a master of a vessel must report any discovery of a historic shipwreck or other underwater cultural heritage to the other State Party.[201] Further, Article 10 allows a coastal State to "prohibit or authorize any activity" on its continental shelf of EEZ related to underwater cultural heritage but also requires that the coastal State consult with other States that may have an interest in the historic shipwreck or other underwater cultural heritage that has been found.[202]

Next, the handling of underwater cultural heritage in the Area, which is the area outside a nation's jurisdiction, as mentioned previously in the discussion of UNCLOS, is discussed in Articles 11 and 12. Under Article 11, when a historic shipwreck is located in the Area, the discovery must be reported to the State who controls the Area, who then must report the discovery to the Director-General and Secretary-General of the International Seabed Authority, who in turn must provide notice to any State Parties and give them an opportunity to become a part of the discussion on protection of the wreck as long they can show "a verifiable link" to the wreck, with preference being given to the "State of cultural, historical[,] or archaeological origin."[203] Article 12 then requires that affected parties meet and discuss how to best protect the historic wreck and must appoint a State Party to be coordinator of the project.[204] Moreover,

200. *See* CPUCH, *supra* note 198, at art. 7 (asserting that a State Party must protect underwater cultural heritage existing in its EEZ and on the continental shelf); *see also* THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 1118 (4th ed. 2004) (discussing Article 9 of the Convention on the Protection of Underwater Cultural Heritage); *see also* Symposium, *Maritime Preservation Law: Old Challenges, New Trends*, 8 WIDENER L. SYMP. J. 163, 201 (2002) (emphasizing the clear language of Article 9 of UNESCO that allows States to regulate activities within their exclusive economic zones and continental shelves).

201. *See* CPUCH, *supra* note 198, at art. 7 (stating that when a vessel discovers underwater cultural heritage or engages in activities involving underwater cultural heritage, it must notify and report the activity to the State Party); *see also* Sean D. Murphy, *U.S Concerns Regarding UNESCO Convention on Underwater Heritage,* 96 AM. J. INT'L L. 468, 469 (2002) (discussing that Article 9 requires a flag State to give notification to any coastal State of underwater activity on its EEZ or continental shelf); *see also* Vadi, *supra* note 192, at 865 & n.51 (explaining that CPUCH, specifically Article 9, requires a State to report any discovery of underwater cultural heritage).

202. *See* CPUCH, *supra* note 198, at art. 7 (stating that for underwater cultural heritage located within the EEZ or continental shelf, activity may be authorized or prohibited only by the State Party, as provided in the United Nations Convention Law of the Sea); *see also* Liza Bowman*, Oceans Apart Over Sunken Ships: Is the Underwater Cultural Heritage Convention Really Wrecking Admiralty Law?*, 42 OSGOODE HALL L.J. 1, 33 & n.132, (2004) (quoting Article 10 as allowing a State to prohibit or authorize any activity related to underwater cultural heritage on its continental shelf or EEZ and explaining that this provision may be problematic because the Convention is binding only upon those States that agree to be bound by it); *see also* Murphy, *supra* note 201, at 469 (explicating that Article 10 of UNESCO entitles a State to take action against certain activities of underwater cultural heritage in its EEZ or continental shelf).

203. *See* CPUCH, *supra* note 198, at 11(1)–(4) (outlining the procedure concerning States and abandoned shipwrecks); *see also* Guido Carducci, *New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage*, 96 AM. J. INT'L L. 419, 431 (2002) (reinforcing the procedural steps in discovery within an underwater cultural site); *see also* Scovazzi, *supra* note 197, at 154 (asserting that in essence there is a step-by-step process to be followed under the Convention).

204. *See* CPUCH, *supra* note 198, at art. 12(2) (explaining that discussions about protection and selection of a coordinator are to be implemented); *see also* Liza J. Bowman, *supra* note 202, at 34 (affirming that a coordinating State is chosen within certain zones); *see also* Rob Regan, *Sovereign Immunity and the Lost Ships of Canada's Historic Merchant Fleet*, 64 U. TORONTO FAC. L. REV. 1, 13-14 (2006) (asserting the States' procedural and technical conformity requirements under the Convention).

Article 12 clearly specifies that "[n]o State Party shall undertake or authorize activities directed at State vessels . . . in the Area without the consent of the flag state."[205]

As noted earlier, Spain is a party to CPUCH, although the United Kingdom and the United States are not. Explanations of each State's opinions on CPUCH are addressed below and will be useful in determining their positions regarding the artifacts and wrecks at issue in this paper.

B. Spain

Spain kept a low profile regarding its position during CPUCH negotiations, except that it did make clear that when sunken State shipwrecks were at issue,[206] regardless of the location of such shipwrecks or how much time had passed, title to those shipwrecks was "lost only by an express act of abandonment, gift or sale by the sovereign in accordance with relevant principles of international law and the law of the flag State governing abandonment of public property, or by international agreement or by capture or surrender during battle before sinking."[207] During the negotiation process, Spain "firmly supported" provisions that would require the flag State of a State shipwreck to be consulted prior to the recovery of any underwater cultural heritage

---

205. *See* CPUCH, *supra* note 198, at art. 12(7) (proclaiming the requirements necessary to undertake activities within the underwater area); *see also* Bederman, *supra* note 198, at 651 (claiming that the State's procedure must provide that the State approve any vessel activities); *see also* Craig Forrest, A *New International Regime for the Protection of Underwater Cultural Heritage*, 51 INT'L & COMP. L.Q. 511, 529 (2002) (reaffirming the declarations made within the convention concerning vessel activity and flag States).

206. *See* Mariano J. Aznar-Gómez, *Spain*, *in* THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: NATIONAL PERSPECTIVES IN LIGHT OF THE UNESCO CONVENTION 2001 271, 285 (Sarah Dromgoole, ed., 2d ed. 2006) (describing Spain's withdrawn presence during the UNESCO Convention). S*ee generally* United Nations, Educational, Scientific and Cultural Organization, Convention on the Protection of the Underwater Cultural Heritage, Meeting of States Parties, Second Session Paris, UCH/09/2.MSP/220/11 (2009) (acknowledging the general resolutions concerning the Convention to which Spain participated minimally).

207. *See* Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels, 221 F3.d 634, 642 (4th Cir. 2000) (reiterating the U.S. standard of express abandonment in dealing with shipwrecks); *see also* Aznar-Gómez, *supra* note 206, at 275 (quoting from the aforementioned contribution). *See generally* Abandoned Shipwreck Act, 42 U.S.C. §§ 2101–106 (1988) (providing congressional findings and guidelines concerning shipwreck status within the United States).

and that would require the flag State to give permission "to begin activities directed at UCH [underwater cultural heritage]."[208] Spain also supported providing some rights to "those States that could prove a cultural, historical[,] or archaeological link with a particular wreck."[209]

Again, Spain's overall focus during CPUCH was to have the sovereign immunity of State shipwrecks recognized and to prevent the addition of new rights to coastal States other than those already granted in UNCLOS.[210] However, in deciding to ratify CPUCH, Spain had to compromise in regard to Article 7 and agreed that coastal States, within their territorial seas, just "should" inform flag States or other States with a verifiable link to a shipwreck of any discovery rather than demanding that coastal States "shall" inform flag States or other States with a verifiable link to a shipwreck of any discovery.[211]

---

208. *See* Aznar-Gómez, *supra* note 206, at 286 (stating that one of the Spanish delegation's main goals was supporting a provision expressly recognizing special rights for flag States over sunken State vessels); *see also* Carlos Espósito & Cristina Fraile, *The UNESCO Convention on the Underwater Cultural Heritage: A Spanish View, in* BRINGING NEW LAW TO OCEAN WATERS 201, 204 (David D. Caron & Harry N. Scheiber eds., 2004) (explaining that among three stances taken by interested countries throughout CPUCH negotiations, Spain shared its position with a "so-called like-minded group" of 11 countries, including Great Britain, the United States, and Norway). *Cf.* David J. Bederman, *Current Development: Congress Enacts Increased Protections for Sunken Military Craft*, 100 AM. J. INT'L L. 649, 663 (2006) (implying that Spain's endorsement of consultation and subsequent permission for underwater cultural heritage recovery is synonymous with "continuous ownership and nonabandonment," is supported by great maritime powers).

209. *See* Aznar-Gómez, *supra* note 206, at 286 (discussing how Spain tried to balance its need for a universal convention with the need to have flexibility for bilateral and regional agreements); *see also* Craig Forrest, *Historic Wreck Salvage: An International Perspective*, 33 TUL. MAR. L.J. 347, 351 (2009) (explaining how other States' salvaging activities in their waters motivated Spain to argue for the provision of such rights to States linked to wreckage); *see also* Valentina Sara Vadi, *Investing in Culture: Underwater Cultural Heritage and International Investment Law*, 42 VAND. J. TRANSNAT'L L. 853, 857 & 857 n.10 (2009) (uncovering Spain's incentive to endorse such rights through reference to its paradigmatic cultural shipwreck).

210. *See* Aznar-Gómez, *supra* note 206, at 286 (emphasizing the Spanish delegation's two main points during the negotiation of the Convention); *see also* ROBERTA GARABELLO, THE NEGOTIATING HISTORY OF THE CONVENTION ON THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE, IN THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: BEFORE 2001 UNESCO CONVENTION 150, 151 (Roberta Garabello & Tullio Scovazzi eds., 2003) (buttressing Spain's assertion during CPUCH negotiations that flag States, not coastal States, maintain the primary role in underwater cultural heritage recovery). *See generally* Vadi, *supra* note 209 (suggesting that Spain's politically driven judicial intervention in Sea Hunt aroused its advocacy for the categorization of shipwrecks under sovereign immunity).

211. *See* Aznar-Gómez, *supra* note 206, at 287 & n.86 (Sarah Dromgoole ed., 2d ed. 2006) (reporting how pressure from a large contingent of Latin American nations drove Spain and other classical maritime powers to a position of compromise regarding Article 7); *see also* Garabello, *supra* note 210, at 150, 151 (reiterating that Spain conceded its initial position on coastal-flag State consultation); *see also* Bederman, *supra* note 208, at 663 (clarifying how coastal States' exploitation of valuable shipwrecks threatened Spain and catalyzed the CPUCH debate over sunken ships).

Regarding historic shipwrecks in general, it should be noted that Spanish legislation comports with Article 4 of CPUCH in that it does not consider underwater cultural heritage like shipwrecks to be subject to the law of salvage or law of finds because it considers such items to be outside the "stream of commerce" to which such laws apply.[212] However, Spanish legislation does not comport with Article 10 of CPUCH, which gives coastal States rights over discoveries on their continental shelves and EEZs, because Spanish legislation states that Spain has control over all of its underwater artifacts, regardless of where such items are found, including in the territorial sea or on the continental shelf of another State.[213]

C. The United Kingdom

Although the United Kingdom was an active participant in the CPUCH negotiation process, it abstained from adopting the Convention for two main reasons. First, the United Kingdom did not become a party to CPUCH because the Convention failed to sufficiently restrict what qualified as underwater cultural heritage in the definition for the term in Article 1, which is discussed in Section VII.A, above.[214] In Article 1(a)(iii), the United Kingdom believed that the word "character" was too broad and stated that anything over 100 years old had some archeological or cultural character, while the United Kingdom believed only those items having some kind of significance should be protected under CPUCH.[215]

---

212. *See* Aznar-Gómez, *supra* note 206, at 286 (noting that Spanish law does not consider historic wrecks to be controlled by the law of salvage and the law of finds); *see also* James A.R. Nafziger, *Historic Salvage Law Revisited*, 31 OCEAN DEVEL. & INT'L L. 81, 91 n.18 (2000) (positing that Spain is among the States that generally do not apply salvage law to underwater cultural heritage recovery); *see also* Vadi, *supra* note 209, at 864–65 (articulating how Article 4 retains only an attenuated relationship to the law of salvage and the law of finds).

213. *See* Aznar-Gómez, *supra* note 206, at 291 (asserting that Spain's Article 40(1) of the HHA differs from Article 10 in that Spain reserves its rights to archeological heritage regardless of whether it has been extracted, found on the surface or underground, in territorial seas or on the continental shelf); *see also* David J. Bederman, *Maritime Preservation Law: Old Challenges, New Trends*, 8 WIDENER L. SYMP. J. 163, 202–03 (2002) (stating that the most contentious issue raised by Spain was the legal status and title over warships that sunk on the property of other States); *see also* Forrest, *supra* note 209, at 365–66 (explaining that Spain, like other common law States, does not apply the law of finds and, instead, vests ownership of abandoned wrecks in the State).

214. *See* Sarah Dromgoole, *United Kingdom*, *in* THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: NATIONAL PERSPECTIVES IN LIGHT OF THE UNESCO CONVENTION 2001 313, 338 (Sarah Dromgoole, ed., 2d ed. 2006) (explaining that the United Kingdom abstained from adopting the UNESCO Convention because it believed the Convention should only apply to significant remains rather than all remains over 100 years old and because of the substantial number of wreck sites in United Kingdom territorial waters); *see also* David J. Bederman, *Maritime Preservation Law: Old Challenges, New Trends*, 8 WIDENER L. SYMP. J. 163, 194 (2002) (discussing that UNESCO participants criticized the broad definition of underwater cultural heritage set out in Article 1 because it does not include any criteria to assess archeological or historic significance). *See generally* Liza J. Bowman, *Oceans Apart Over Sunken Ships: Is the Underwater Cultural Heritage Convention Really Wrecking Admiralty Law?*, 42 OSGOODE HALL L.J. 1, 28–29 (2004) (proposing that the major criticism of Article 1 concerns its supposed all-inclusive definition of underwater cultural property).

215. *See* Dromgoole, *supra* note 214, at 338 (illustrating that the United Kingdom believed that cultural significance was more important than the age of the remains). *See generally* Bederman, *supra* note 213, at 194 (criticizing Article 1 as overinclusive, vague, and ambiguous with regard to the term "underwater cultural heritage"). *See generally* Rob Regan, *Sovereign Immunity and the Lost Ships of Canada's Historic Merchant Fleet*, 64 U.T. FAC. L. REV. 1, 11–14 (2006) (criticizing Article 1 as overly vague with regard to defining cultural significance and omitting shipwrecks outside of the 100-year period).

Second, the United Kingdom objected to CPUCH's limit on sovereign rights of shipwrecked State vessels, including "warships and other State vessels."[216] The United Kingdom believes that warships and other State vessels should have absolute sovereignty regardless of where they happen to be shipwrecked. This is contradictory to CPUCH, which gives coastal States some control over shipwrecks in their territorial seas, contiguous zones, continental shelves, and exclusive economic zones.[217]

A third distinction between CPUCH and law in the United Kingdom is in relation to the law of salvage.[218] Article 4 of CPUCH, discussed above, puts limitations on the law of salvage such that it is "virtually irrelevant," which is distinguished from law in the United Kingdom where salvage law applies to all wrecks, whether they are modern or historic, under the Merchant Shipping Act of 1995.[219]

---

216. *See* Dromgoole, *supra* note 214, at 339 (explaining that the United Kingdom opposed the Convention's limit on the treatment of sunken warships and other State vessels); *see also* UNESCO Doc. Report by the Chairman of Commission IV, at 12–14 (Nov. 2, 2001) (including comments by the United Kingdom and those in opposition to the warship provisions). *See generally* Guido Carducci, *New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage*, 96 Am. J. Int'l L. 419, 423 (2002) (illustrating that one of the most heavily debated issues was the legal status of State vessels).

217. *See* CPUCH art. 7-10, Nov. 2, 2001, 41 I.L.M. 40 (providing coastal States specific means of control over shipwrecks in territorial seas, contiguous zones, exclusive economic zones, and continental shelves); *see also* Dromgoole, *supra* note 214, at 339 (drawing attention to the United Kingdom's belief in sovereign immunity and exclusive jurisdiction over warships and other State vessels); *see also* Forrest, *supra* note 209, at 518 (noting that the United Kingdom opposed an extension of coastal jurisdiction).

218. *See* Sir Ian Barker, *The Protection of Cultural Heritage Items in New Zealand*, *in* ART AND CULTURAL HERITAGE: LAW, POLICY, AND PRACTICE 145, 146–47 (Barbara T. Hoffman ed., 2006) (showing the history of British jurisprudence has been reluctant to act in opposition to the law of salvage without any diplomatic agreement between the involved States); *see also* Dromgoole, *supra* note 214, at 340 (highlighting the current disparate treatment of the law of salvage as between the Convention and the United Kingdom's Merchant Shipping Act); *see also* Paul Hallwood and Thomas J. Miceli, *Murky Waters: The Law and Economics of Salvaging Historic Shipwrecks*, 35 J. LEGAL STUD. 285, 299 (2006) (indicating that the United Kingdom expressed opposition to the law of salvage espoused by the Convention).

219. *See* CPUCH *supra* note 217, at art. 4 (declaring that the law of salvage only applies subject to conditions including competent authorization and maximum protection of cultural heritage); *see also* Dromgoole, *supra* note 214, at 340 (purporting that the Convention's limitations render salvage law inoperable but that the United Kingdom applies salvage law to all wrecks); *see also* Craig Forrest, *Historic Wreck Salvage: An International Perspective*, 33 TUL. MAR. L.J. 347, 366 (2009) (explaining that the Merchant Shipping Act allows the British Crown to take title to any unclaimed wreck in its waters regardless of the vessel's registration).

Another important difference between CPUCH and the law in the United Kingdom is that, as discussed above, Article 2 of CPUCH does not condone the commercial exploitation of underwater cultural heritage. Meanwhile, the law in the United Kingdom does not specifically prohibit such commercial activity, as evidenced by the contract between the United Kingdom and Odyssey Marine Exploration to sell coins recovered from a British warship and then split the proceeds of the sale.[220] It is important to note, however, that the decision to enter into the contract was controversial and was made by the Department of Treasury because of the estimated value of the treasure; as a result, the United Kingdom "may hesitate before entering into a similar agreement in the future."[221]

D. The United States

Like the United Kingdom, the United States also declined to become a party to CPUCH,[222] but many of CPUCH's provisions are still consistent with principles of U.S. law.[223] First, the main goal of CPUCH is to promote in situ preservation of shipwrecks above all other options in an effort to protect historic shipwrecks and other artifacts from being plun-

220. *See* Dromgoole, *supra* note 214, at 340 (citing the international controversy caused by the United Kingdom's contract with an exploration company allowing the sale of 17th-century coins); *see also* Sarah Dromgoole, *Murky Waters for Government Policy: The Case of a 17th Century British Warship and 10 Tonnes of Gold Coins*, 28 MARINE POL'Y 189, 190, 192 (2004) (examining reports that excavators of the ship were to keep a share of the treasure and the British government's apparent rationale for such an allowance); *see also* Odyssey Marine Exploration, H.M.S. *Sussex*—Partnering Agreement Memorandum, http://www.shipwreck.net/pam (last visited February 25, 2010) (stipulating as to the proper division of the aggregate amount of selling prices and/or appraised values of artifacts found in the excavation).

221. *See* Dromgoole, *supra* note 214, at 340 (recognizing the Treasury Department's involvement with the contract and the State's potential future hesitation to make another such contract); *see also* ART AND CULTURAL HERITAGE: LAW, POLICY, AND PRACTICE 284 (Barbara T. Hoffman ed., 2006) (suggesting that the agreement between the British government and Odyssey Marine Exploration over the excavation for profit of the *HMS Sussex* was not entered into lightly); *see also* Brian Reyes, *Search for Sussex: A Diving Odyssey: Salvaging a Sunken Treasure Ship in One of the World's Busiest Shipping Lanes Is an Operation of Political and Practical Delicacy*, Lloyd's List, April 8, 2005, at 6 (demonstrating the caution and effort the British government requires to maintain its partnering agreement with Odyssey Marine Exploration in this excavation).

222. *See* David J. Bederman, *Preservation Law Symposium: Re-inventing the Past, Article, Maritime Preservation Law: Old Challenges, New Trends*, 8 WIDENER L. SYMP. J. 163, 200–201 (2002) (asserting that the United States and the United Kingdom went on record with their opposition to the ILA Draft Convention); *see also* John D. Kimbal & Alan M. Weigel, *Problems Ahead: The UNESCO Convention on the Protection of Underwater Cultural Heritage*, 1 MAINBRACE 8, 8 (2009) (emphasizing that the United States and other maritime nations do not support the Convention); *see also* Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law, Law of the Sea: U.S. Concerns Regarding UNESCO Convention on Underwater Heritage*, 96 AM. J. INT'L L. 468, 469 (2002) (noting that the United States participated in the negotiation of the Convention but did not support its adoption).

223. *See* Ole Varmer, *United States of America*, *in* THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: NATIONAL PERSPECTIVES IN LIGHT OF THE UNESCO CONVENTION 2001 351, 376 (Sarah Dromgoole ed., 2d ed. 2006) (declaring that U.S. underwater cultural heritage laws are consistent with the Convention, even though they lack a bright line); *see also* Brooke Wright, Comment, *Keepers, Weepers, or No Finders at All: The Effect of International Trends on the Exercise of U.S. Jurisdiction and Substantive Law in the Salvage of Historic Wrecks*, 33 TUL. MAR. L.J. 285, 305 (2008) (describing how the United States' Abandoned Shipwreck Act is parallel with the UCH Convention). *See generally* Sea Hunt, Inc. v. The Unidentified Shipwrecked Vessel or Vessels, et al., 221 F.3d 634, 638, 640–41 (4th Cir. 2000) (discussing the ASA and its application to two Spanish Royal Naval vessels lost off the shores of present-day Virginia in 1750 and 1802).

dered by commercial salvors. Similarly, the United States has enacted statutes and polices that also focus on preservation."[224] Further, just as CPUCH prohibits the application of the law of salvage and the law of finds to underwater cultural heritage, the United States, through statutes and admiralty cases, has also "prohibit[ed] the commercial exploitation of UCH [underwater cultural heritage] under the law of salvage and finds."[225]

Since it has been shown that much of United States law is consistent with CPUCH provisions, the two primary reasons that the United States did not become a party to CPUCH must be discussed.[226] The United States decided not to support CPUCH, despite the consistency of some of its provisions with United States law, because it "create[d] expansive new coastal State jurisdiction over UCH-related activities in wide areas outside of the traditional limits of national jurisdiction and fail[ed] to provide adequate protection for military shipwrecks consistent with customary international law."[227] The United States did not approve CPUCH's expansion of rights over historical shipwrecks and artifacts to the continental shelf and EEZ.[228] Also, with regard to coastal State jurisdiction, the United States felt that the CPUCH provi-

224. *See* Varmer, *supra* note 223, at 376–77 (listing the National Marine Sanctuaries Act, the Archaeological Resources Protection Act, the National Historic Preservation Act, the Antiquities Act, and the Abandoned Shipwreck Act as favoring preservation and protection of archeological heritage); *see also* Bederman, *supra* note 222, at 195 (declaring that the prime directive of CPUCH is in situ preservation). *But see* Christopher R. Bryant, *The Archeological Duty of Care: The Legal, Professional, and Cultural Struggle Over Salvaging Historic Shipwrecks*, 65 ALB. L. REV. 97, 136 (2001) (remarking that during the 2001 Convention, the United States strongly opposed the extension of coastal State sovereignty into international waters).

225. *See* Varmer, *supra* note 223, at 379–80 (proclaiming that U.S. statutes and admiralty court cases prohibit the commercial exploitation of underwater cultural heritage under the law of salvage and finds); *see also* John Alan Cohan, *An Examination of Archeological Ethics and the Repatriation Movement Respecting Cultural Property (Part One)*, 7-SPG ENVIRONS ENVT'L. L. & POL'Y 349, 369 (2004) (indicating that in the United States, the law of finds and the law of salvage have been superseded by the Abandoned Shipwreck Act of 1987); *see also* Peter Tomlinson, Comment, *"Full Fathom Five": Legal Hurdles to Treasure*, 42 EMORY L.J. 1099, 1114 (1993) (revealing that congressional sponsors of the Abandoned Shipwreck Act criticized the commercial focus of admiralty law).

226. *See* Forrest, *supra* note 219 at 347, 379 (remarking how a large part of United States law and practice is consistent with developments of the 2001 underwater cultural heritage Convention, including the federal Abandoned Shipwreck Act of 1987 and the statutes of a number of states); *see also* Murphy, *supra* note 222, at 469–70 (discussing how the United States believes the Convention's provisions to be unsatisfactory because they create new rights for coastal States, and because the text is ambiguous).

227. *See* CPUCH, Nov. 2, 2001, 41 I.L.M. 40 (listing the signatory nations, which did not include the United States); *see also* Kimbal & Weigel, *supra* note 222, at 8 (providing reasons, such as inadequate protection for military shipwrecks, why the United States as well as other maritime nations have not adopted CPUCH); *see also* Marian Leigh Miller, *Underwater Cultural Heritage: Is the Titanic Still in Peril as Courts Battle Over the Future of the Historical Vessel?*, 20 EMORY INT'L L. REV. 345, 363 (2006) (stating that the United States refused to become a member of CPUCH due to the number of "problematic passages" it contains).

228. *See* 43 U.S.C. § 2101 (1988) (providing an example of the difference in policy between U.S. law and the CPUCH rules, namely that sovereign States have the responsibility of managing non-living resources in their waters, not an international body); s*ee also* Kimbal & Weigel, *supra* note 222, at 11 (summarizing the reasons why the United States did not support CPUCH, including the concern for the Convention's inadequate protection of sunken ships). *But see* Forrest, *supra* note 219, at 379 (noting that portions of United States law, including the Federal Abandoned Shipwreck Act of 1987, are consistent with the Convention).

sions and rules relating to protection of underwater cultural heritage within a State's territorial sea should be just "guidelines" rather than "requirements" out of respect for the coastal State's sovereignty.[229]

The United States also had concerns regarding a situation when a sunken warship or another State ship is found.[230] The United States' policy on sunken warships is as follows:

> Sunken warships . . . remain the property of the flag nation until title is formally relinquished or abandoned, whether the cause of the sinking was through accident or enemy action (unless the warship . . . was captured before it sank). As a matter of policy, the U.S. Government does not grant permission to salvage sunken U.S. warships or military aircraft that contain the remains of deceased service personnel or explosive material. Requests from foreign countries to have their sunken warships . . . , located in U.S. waters, similarly respected by salvors, are honored.[231]

The United States was concerned that CPUCH "would alter customary international law" when warships and other State ships are found, as far as title to those ships is concerned.[232] The United States was also concerned that since coastal States are given more rights regarding underwater cultural heritage within their territorial seas under CPUCH, that a coastal State would be allowed to recover warships and other State ships from another State in the coastal State's territorial sea "without the consent of the flag State or even an obligation to notify

---

229. *See* CPUCH, *supra* note 227, at art. 9 (requiring certain reporting practices for member States upon the discovery of underwater cultural heritage if located in the State's EEZ or continental shelf); *see also* Varmer, *supra* note 224, at 381 (highlighting the United States' disagreement with CPUCH, namely that, due to the principle of sovereignty, States should not be required to follow its rules but, rather, use them as guidelines); *see also* Kimbal & Weigel, *supra* note 223, at 11 (stating that the United States disagrees with CPUCH's intrusion on a State's jurisdiction over its internal waters).

230. *See* Sea Hunt, Inc. *supra* note 224, at 692 (discussing the effect on abandonment in relation to the United States' policy on sunken warships); *see also* Varmer, *supra* note 224, at 381 (stating that the Unites States has a fundamental disagreement with CPUCH's policy on sunken warships); *see also* Wright, *supra* note 224, at 308 (explaining the United States' policy on sunken warships specifically through the Abandoned Ship Act of 1987).

231. *See* Resort to War: War Vessels: Abandoned or Sunken Vessels, 1980 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW § 1, at 999 (describing the policy of the United States with regard to sunken warships and stating that aside from ships that contain human remains or explosives, the United States will grant permission to foreign countries to salvage their vessels); *see also* THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ¶ 2.1 (A.R. Thomas & James C. Duncan eds., 2007) (discussing the U.S. policy on sunken warships, specifically that the United States will not grant permission for salvage efforts of vessels that contain human remains or explosives). *But see* CPUCH, *supra* note 227, at art. 2 (providing protection for human remains located in maritime waters but not prohibiting salvage of vessels containing these human remains).

232. *See* Kimbal & Weigel, *supra* note 223, at 11 (recognizing the United States' view that the Convention would alter customary international law regarding title to sunken warships); *see also* Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law, Law of the Sea: U.S. Concerns Regarding UNESCO Convention on Underwater Heritage*, 96 AM. J. INT'L L. 469 (2002) (stating the United States' concerns that provisions of the Convention would alter customary international law by creating new rights for coastal States); *see also* Robert C. Blumberg, U.S. Observer Delegate to the 31st UNESCO General Conference, Statement Before Commission IV of the General Conference (Oct. 29, 2001) (stating that provisions of the draft Convention are unsatisfactory because they create new rights for coastal States that could alter the delicate balance of rights and interests set up under UNCLOS).

them," which would go against the United State's policy when sunken warships are concerned.[233] In summary, when sunken warships or other State ships are found, the United States believes that the title to a State warship or other ship is vested in that flag State unless the flag State abandons the ship expressly, regardless of how much time has passed since the ship sank and believes that salvage of such a ship is prohibited unless permission is granted to do so by the flag State, which is a reason why the United States did not sign CPUCH.[234]

VIII. Sovereign Immunity of War and Merchant Shipwrecks

Since the United Kingdom and United States did not become parties to CPUCH because they felt, in part, its provisions did not provide exclusive jurisdiction to the flag State of warships and other State vessels, and because Spain voiced a similar opinion despite later compromise and ratification of CPUCH, the ideas of sovereign immunity over shipwrecks as well as what ships qualify for this immunity each merit further discussion. Traditionally, warships and other ships under government control not used for commercial purposes have been excluded from the jurisdiction of any other State under the concept of sovereign immunity.[235] One reason to protect the sovereign immunity of such ships is that they are underwater gravesites of naval or military personnel that should be respected.[236] Overall, most maritime States have

---

233. *See* John D. Kimball & Alan M. Weigel, *Problems Ahead: The UNESCO Convention on the Protection of Underwater Cultural Heritage*, 1 MAINBRACE 8, 11 (2009) (highlighting the United States' concern that the Convention would permit coastal States to recover vessels located in internal waters and territorial seas without the consent of the flag State); *see also* Jean Allain, *Maritime Wrecks: Where the Lex Ferenda of Underwater Cultural Heritage Collides With the Lex Lata of the Law of the Sea Convention*, 38 VA. J. INT'L L. 747, 770 (1998) (recognizing the United States' view that the Convention should not apply to warships and other non-commercial vessels); *see also* Blumberg, *supra* note 232 (stating that "[t]he United States is very concerned that the provisions of the convention. . . are also inadequate, because they do not provide a regime under which the flag State must consent before its vessels can be the subject of recovery.").

234. *See* Kimbal & Weigel, *supra* note 233, at 11 (stating the United States' position that the Convention should codify provisions that restrict salvage or recovery of vessels without consent of the flag State and should also establish title for the original flag State unless expressly abandoned); *see also* Murphy, *supra* note 232, at 468, 470 (stating the concerns of the United States and providing hope that the specific provision can be revisited and later ratified); *see also* Blumberg, *supra* note 232 (stating the United States' concerns, and that it opposes adoption of the draft Convention in its present form).

235. *See* United Nations Convention on the Law of the Sea art. 95–96, Dec. 10, 1982, 1833 U.N.T.S. 397 (stating warships and other non-commercial ships shall have complete immunity from the jurisdiction of any State other than the flag State); *see also* Jerry E. Walker, *A Contemporary Standard for Determining Title to Sunken Warships: A Tale of Two Vessels and Two Nations,* U.S.F MAR. L.J. 311, 312 (2000) (recognizing that warships and other governmental vessels in noncommercial service have historically been accorded sovereign immunity from the jurisdiction of any other State); *see also* Jason R. Harris, *Protecting Sunken Warships as Objects Entitled to Sovereign Immunity*, 33 U. MIAMI INTER-AM. L. REV. 101, 110–11 (2002) (establishing the historical codification of sovereign immunity).

236. *See* Harris, *supra* note 235, at 86 (acknowledging that the sovereign immunity of vessels should be protected by an assumption that war graves and sunken warships are symbols of nationalism); *see also* Notice No. 4614, Protection of Sunken Warships, Military Aircraft and other Sunken Government Property, 69 Fed. Reg. 5647 (Feb. 5, 2004) (setting forth the policies of the United States, France, Germany, Japan, Russia, and Spain that recognize every sunken warship enjoys sovereign immunity and should be respected as a maritime grave); Rob Regan, *When Lost Liners Become Found: An Examination of the Effectiveness of Present Maritime Legal and Statutory Regimes for Protecting Historic Wrecks in International Waters With Some Proposals for Change*, 29 TUL. MAR. L.J. 313, 334–35 (2005) (recognizing other policy concerns that support sovereign immunity including the desire to guard military technology to protect national security and the concern for salvor safety because of the potential for explosive material to be detonated during salvage).

used the doctrine of sovereign immunity to prevent their sunken warships from being subjected to salvage claims by others.[237] It should be noted that time does not preclude a flag State from utilizing the doctrine of sovereign immunity for its sunken vessels so long as the State does not expressly abandon, sell, or give the rights to another entity.[238] Sovereign immunity can be lost, however, if the State ship is captured by another State before sinking.[239] It is important to emphasize that to "assure itself of adequate protection for its wrecks under the concept of sovereign immunity," a government must express its intent to maintain ownership of the shipwreck.[240]

Now that the doctrine of sovereign immunity has been explained, the extension of the doctrine to vessels other than warships, such as merchant ships, must be discussed since there is some question about the status of the Spanish shipwreck, *Nuestra Señora de la Mercedes*.[241] Oftentimes, governments utilized merchant ships via subsidies in order to compete for "ship-

237. *See* Harris, *supra* note 235, at 116 (emphasizing that the United States is committed to protecting its shipwrecks by way of sovereign immunity); *see also* Regan, *supra* note 236, at 335 (explaining that coastal States have utilized the sovereign immunity doctrine to deflect salvage claims by others); *see also* Stephen Paul Coolbaugh, Comment, *Raiders of the Lost . . . Sub? The Potential for Private Claims of Ownership to Military Shipwrecks in International Waters: The Case of Japanese Submarine I-52*, 49 BUFF. L. REV. 929, 965 (2001) (establishing that the use of the doctrine of sovereign immunity to protect ownership over a shipwreck is customary international law).

238. *See* J. ASHLEY ROACH & ROBERT W. SMITH, UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS 474 (Shigeru Oda ed., 1996) (asserting it is a well-established rule that title to a sunken shipwreck is lost by an express abandonment, gift, or sale by the flag State); *see also* Regan, *supra* note 236, at 336 (stating that unless there exists express abandonment, gift, or sale of a sunken warship, the doctrine of sovereign immunity preserves ownership despite the passing of time); *see also* Coolbaugh, *supra* note 237, at 929, 966 (explaining that a State may lose title over its shipwreck by international agreement or by express and lawful abandonment, gift, or sale of the vessel, but not by the passing of time).

239. *See* ROACH & SMITH, *supra* note 238 (stating that one way to lose title over a sunken warship is capture or surrender of the warship during battle and prior to sinking); *see also* Harris, *supra* note 235, at 116 (explaining that sovereign immunity may be lost if the warship was captured before sinking); *see also* Regan, *supra* note 236, at 336 (noting that the doctrine of sovereign immunity may not apply where the warship is captured in battle prior to sinking).

240. *See* Roberto Iraolo, *The Abandoned Shipwreck Act of 1987*, 25 WHITTIER L. REV. 787, 811–12 (2004) (stating when a State openly asserts rights over the shipwreck, evidence of express abandonment is required to prove otherwise); *see also* Rob Regan, *Sovereign Immunity and the Lost Ships of Canada's Historic Merchant Fleet*, 64 U.T. FAC. L. REV. 1, 22 (2006) (noting that States assert their title over warship wrecks by making formal declarations to the world of their "intent to assert control over their property"); *see also* Regan, *supra* note 236, at 337 (establishing the requirement that a State must "unequivocally manifest" its intention of retaining title over the sunken warship in order to ensure protection under the sovereign immunity doctrine).

241. *See History as It Happens: Snapshots From the Past*, HISTORY TODAY, July 1, 2008 (discussing the contrary views of Spain and Odyssey over the ownership of cargo found at the site of the *Nuestra Señora de la Mercedes*). *See generally* Press Release, Odyssey Marine Exploration, Odyssey Files Objections to Report and Recommendation in *Black Swan* Admiralty Case (July 22, 2009) (on file with Odyssey Marine Exploration, Inc.), *available at* http: // www.shipwreck.net/pr185.php. (illustrating the disagreement over the ownership status of the *Nuestra Señora de la Mercedes*). *But see* Odyssey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel, 2010 WL 427433, at *1 (M.D. Fla. 2010) (holding that because the shipwreck was abandoned for such an extended period of time, this case fell within the category of "extraordinary cases," where the maritime law of salvage and law of finds vests title in Odyssey over the objects it already recovered from the wreck and reduced to possession).

ping supremacy on the high seas."[242] Because of these government subsidies, an argument can be made that a merchant ship should be protected under the doctrine of sovereign immunity if the merchant ship was operating under its government capacity when it sank.[243] However, there is no international consensus on the status of merchant ships subsidized by a government.[244]

IX. Application of Law to the *Nuestra Señora de la Mercedes* Shipwreck

In analyzing the rights to the gold and other treasure found by Odyssey Marine Exploration, it should be reiterated that Spain argues that the treasure "was taken from a Spanish sovereign ship in Spanish waters, and is therefore the property of Spain."[245] Meanwhile, Odyssey argues that the recovery efforts were in compliance with salvage law and with UNCLOS provisions that apply "beyond the territorial waters or contiguous zone of any country."[246] This means that the various provisions discussed above relating to a coastal State's right to oversee any activities relating to underwater cultural heritage in these areas does not apply in this case.

---

242. *See* Alan Cafruny, *Class, State, and World Systems: The Transformation of International Maritime Relations*, 2 REV. OF INT'L POL. ECON. 285, 301–2 (1995) (asserting that different governments used strategies like providing subsidies to strengthen their shipping trade); *see also* R. Meeker, *Shipping Subsidies*, 20 POL. SCI. Q. 594, 595 (1905) (discussing the fact that different countries used subsidies with merchant ships in an attempt to increase commerce); *see also* Regan, *supra* note 236, at 337 (establishing that governments commonly used merchant ships to struggle for superiority upon the open waters).

243. *See* EKE BOESTEN, ARCHAEOLOGICAL AND/OR HISTORIC VALUABLE SHIPWRECKS IN INTERNATIONAL WATERS: PUBLIC INTERNATIONAL LAW AND WHAT IT OFFERS 862 (2002) (stating that a government has a right to its sunken ship when it is in international waters); *see also* Regan, *supra* note 236, at 338 (asserting that if a merchant ship sank while working for its government, that ship should be protected by sovereign immunity); *see also* Valentina Sara Vadi, *Investing in Culture: Underwater Cultural Heritage and International Investment Law*, 42 VAND. J. TRANSNAT'L L. 853, 862 (2009) (declaring that due to a ship's cultural origin and support from a State, the rights of salvage or preservation belong to that State).

244. *See* David J. Bederman, *Maritime Preservation Law: Old Challenges, New Trends*, 8 WID. L. SYMP. J. 163, 165 (2002) (exemplifying that U.S. law regarding shipwrecks differs from those of other countries, indicating that there is no worldwide agreement on this matter); *see also* Regan, *supra* note 236, at 344 (indicating that there is no general agreement on the position of sunken merchant ships that are supported by the government); *see also* James A.R. Nafziger, *Foreword to* THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: NATIONAL PERSPECTIVES IN LIGHT OF THE UNESCO CONVENTION 2001, at x–xi (Sarah Dromgoole ed. 2006) (asserting that there are significant differences among salvage laws of various countries); *see also* Brooke Wright, Comment, *Keepers, Weepers, or No Finders at All: The Effect of International Trends on the Exercise of U.S. Jurisdiction and Substantive Law in the Salvage of Historic Wrecks*, 33 TUL. MAR. L.J. 285, 310–11 (2008) (recognizing that there is no international consensus about laws regarding historic wrecks).

245. *See* Odyssey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel, Spain, 22 FLA. L. WEEKLY FED. D 127, 7 (M.D. Fla. 2009) (declaring that any cargo found in the shipwreck at the site of the *Black Swan* belongs to Spain since it came from a Spanish ship); *see also* Wright, *supra* note 244, at 295–96 (demonstrating that Spain argued the cargo removed from the *Black Swan* site was from a Spanish ship and therefore belonged to Spain); *see also* Odyssey Marine Exploration: Shipwrecks: "*Black Swan*" Project Overview, http://www.shipwreck.net/blackswan.php (last visited Feb. 25, 2010) (noting that Spain argued the *Black Swan* site belonged to her since it was found in Spanish waters).

246. *See* Odyssey Marine Exploration, Inc. *supra* note 245, at 5–6, 35–37 (affirming that Odyssey followed the proper laws of salvage, and that Spain has no sovereign immunity over the shipwreck site); *see also* David Curfman, Note, *Thar Be Treasure Here: Rights to Ancient Shipwrecks in International Waters—A New Policy Regime*, 86 WASH. U. L.R. 181, 186 (2008) (asserting that Odyssey has every right to salvage the ship and is the sole owner); *see also Black Swan*, *supra* note 245 (establishing that Odyssey's argument was that it followed the relevant law regarding recovery of a sunken vessel, and there was no sovereign immunity).

It is also important to note that Spain has since conceded that the treasure was not found in Spanish waters.[247] In this case, the main controversy is Spain argues that the ship is the Spanish warship *Nuestra Señora de la Mercedes*, yet Odyssey argues that the ship it found is a commercial ship, and that "there is no coherent vessel at the site to know for sure" what ship really sank there.[248]

The first step in determining if Odyssey Marine Exploration should be required to return the treasure it salvaged from the shipwreck site is to determine exactly what type of shipwreck was found. If the shipwreck is in fact the *Nuestra Señora de la Mercedes*, which is a Spanish warship, then applying the doctrine of sovereign immunity means that the treasure must be returned to Spain.[249] This would be so regardless of where the ship is located, since both the United States and Spain have objected to any additional new coastal State rights over underwa-

247. *See* United Nations Convention on the Law of the Sea art. 303, Dec. 10, 1982, 1833 U.N.T.S. 397 (granting a coastal State complete control over the removal of objects of archeological and historical nature found in its territorial waters); *see also* Dean Irvine, *Plundering the Oceans: Who Rules the Waves?*, CNN WORLD WKLY, Oct. 19, 2007, http://www.cnn.com/2007/WORLD/europe/10/19/ww.treasurehunters/index.html?iref=newsearch (last visited on Feb. 25, 2010) (discussing Spain's original claim that the shipwreck was located in Spanish waters); *see also* "*Black Swan*" Project Overview, *supra* note 245 (asserting that Spain accepted Odyssey's claim that the vessel was found outside the territorial waters of Spain).

248. *See* Odyssey Marine Exploration Inc., *supra* note 245, at 8 (rejecting Odyssey's argument because of the persuasive evidence found on board the shipwreck); *see also* Wright, *supra* note 245, at 295 (discussing Spain's claim that the treasure was removed from a Spanish-flagged vessel); *see also* "*Black Swan*" Project Overview, *supra* note 245 (noting that there was no apparent hull or other feature of a ship that could be used to identify the vessel that originally held the treasure).

249. *See* Odyssey Marine Exploration Inc., *supra* note 245, at 2 (explaining that a U.S. court cannot adjudicate a claim against cargo protected by sovereign immunity); *see also* Brief for Claimants at 2, Odyssey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel, 22 FLA. L. WEEKLY FED. D 128, 8 (M.D. Fla. 2009) (arguing that Spanish sunken vessels must be protected from unauthorized exploration); *see also* GEORGE RUTHERGLEN, BENEDICT ON ADMIRALTY, vol. 8, ch. IV, § 4.02 (stating that sovereign immunity extends to the sovereign's instrumentalities such as a vessel unless there is an exception).

ter cultural heritage in areas such as its territorial sea and EEZ when a warship or other government vessel is involved,[250] although Spain did compromise on this view to some extent by becoming a party to CPUCH.[251] Moreover, the 1989 Salvage Convention, to which both Spain and the United States are parties, does not apply to State warships under the provisions of Article 4, meaning no salvage reward has to be given when a State warship is involved.[252] Spain also made a reservation in the 1989 Salvage Convention, stating that it would not apply the law of salvage to wrecks of a historic nature under Article 30(1)(d).[253]

---

250. *See* CPUCH art. 12, Nov. 21, 2001, 41 I.L.M 40 (requiring the signatories to obtain consent of the flag State before undertaking any activities at the site of that State's shipwreck); *see also* Marian Nash Leich, *Legal Regulation of Use of Force*, 1980 DIG. U.S. PRAC. INT'L LAW 996, 999 (1980) (describing the U.S. presumption against abandonment of the sunken warships); *see also* David J. Bederman, *The UNESCO Draft Convention on Underwater Cultural Heritage: A Critique and Counter-Proposal*, 30 J. MAR. L. & COM. 331, 348–49 (1999) (naming Spain as one of the few countries that exempted its shipwrecks from the application of the Salvage Convention).

251. *See* Tulio Scovazzi, *The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage*, 11 ITALIAN Y.B. INT'L L. 9, 22 (2001) (informing that Spain was one of the States that voted in favor of CPUCH despite the language of the Convention that does not impose an affirmative obligation on the member States to inform the flag State upon the discovery of the flag State vessel); *see also* Ole Varmer, *Second Newport Symposium: "Sunken Treasure: Law, Technology, and Ethics": Third Session: Non-Salvor Interests: The Case Against the "Salvage" of the Cultural Heritage*, 30 J. MAR. L. & COM. 279, 291 (1999) (admitting that even though CPUCH provides the States the power to preclude any recovery from a shipwreck site, the Convention overall advocates for the multiple use of the shipwreck site). *See generally* Robert D. Peltz, *Salvaging Historic Wrecks*, 25 TUL. MAR. L.J. 1, 108–9 (2000) (concluding that adoption of CPUCH will result in abolition of the entire body of maritime law).

252. *See* International Convention on Salvage art. 4, Apr. 28, 1989, 1953 U.N.T.S. 193 (giving States the freedom not to apply the Convention to warships or other non-commercial vessels); *see also* EKE BOESTEN, ARCHAEOLOGICAL AND/OR HISTORIC VALUABLE SHIPWRECKS IN INTERNATIONAL WATERS 145 (2002) (identifying the debate over the definition of a warship for purposes of the Salvage Convention); *see also* ANASTASIA STRATI, THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: AN EMERGING OBJECTIVE OF THE CONTEMPORARY LAW OF THE SEA 221 (1995) (restating that warships are immune from control by any other State besides the flag State and are thus exempt from various international treaties granting jurisdiction of other States over warships that are not their own).

253. *See* International Convention on Salvage, *supra* note 252, at art. 30 (allowing a State to enter a reservation which reserves the right not to apply the Salvage Convention when property underwater of archaeological or historic interest are involved, such as a sunken warship); *see also* MARIANO J. AZNAR-GÓMEZ, THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE, 283 (Sarah Dromgoole ed., 2006) (seeking to preserve special, non-commercial sunken vessels by passing legislation or making reservations, like the one in the International Salvage Convention, to ensure their protection and proper salvage); *see also* Craig J. S. Forrest, *Has the Application of Salvage Law to Underwater Cultural Heritage Become a thing of the Past?*, 34 J. MAR. L. & COM. 309, 347 (2003) (discussing Spain's attempt to have underwater cultural history, in the form of either sunken vessels or their cargoes, excluded from the Convention through Article 30(1)(d), which allows a State to reserve the right not to apply the 1989 Salvage Convention).

To further support Spain's argument that the shipwreck is protected under sovereign immunity if it is indeed found to be a warship, the United States has already sided with Spain in a similar situation in the *Sea Hunt* case, although no one disputed the fact that the shipwrecked vessels were indeed Spanish warships.[254] In that case, the Fourth Circuit found, because of the 1902 Treaty of Friendship between the United States and Spain, that the Commonwealth of Virginia and Sea Hunt Incorporated, a salvage company, could not assert rights to two Spanish warships since Spain had not expressly abandoned them.[255] The Fourth Circuit stated:

> The United States has strenuously defended Spain's ownership over these vessels. The government maintains that this is required by our obligations under the 1902 Treaty as well as general principles of international comity. . . . Protection of the sacred sites of other nations . . . assists us in preventing the disturbance and exploitation of our own. Here the government's interest is rooted in customary international law.[256]

Further, the Fourth Circuit said that "[c]ourts cannot just turn over sovereign shipwrecks of other nations to commercial salvors where negotiated treaties show no sign of an abandonment, and where the nations involved all agree that title to the shipwrecks remains with the original owner."[257] Thus, if Spain can show that the shipwreck in this case really is that of the warship *Nuestra Señora de la Mercedes*, and that it did not expressly abandon the ship, it should be able to assert its sovereign rights over the ship. In fact, a U.S. magistrate judge involved in

---

254. *See* Sea Hunt, Inc. v. Unidentified Shipwreck Vessel or Vessels, 221 F.3d 634, 638 (4th Cir. 2000) (denying Sea Hunt a salvage award for *La Galga* as Sea Hunt could not show by clear and convincing evidence that Spain had abandoned the vessel); *see also* Columbus-America Discovery Group v. Atlantic Mutual Ins. Co., 974 F.2d 450, 464–65 (4th Cir. 1992) (permitting the salvage of another State's ship only where that other State has expressly abandoned the ship); *see also* H.R. Rep. No. 100-514(I), at 2 (1988), reprinted in 1988 U.S.C.C.A.N. 365, 366 (citing legislative history where abandonment of a vessel may be implied, rather than expressly stated, where an owner has never asserted any control over or otherwise indicated possession of the vessel).

255. *See* Abandoned Shipwreck Act §§ 2–7, 43 U.S.C. §§ 2101–2103 (1987) (delegating responsibility to States of management of shipwrecks of vessels to which the "owner has relinquished ownership rights with no retention"); *see also* Sea Hunt, Inc., *supra* note 254, at 647 (denying a salvage award for *La Galga* to a salvage company since it was unable to show that Spain had abandoned the vessel); *see also* Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed to be *SB Lady Elgin*, 755 F. Supp. 213, 216 (N.D. Ill. E. Div. 1990) (holding that the insurer had not abandoned the vessel, despite not participating in search efforts to find it, because the insurer had documents that specifically stated that the vessel was not abandoned).

256. *See* Sea Hunt, Inc., *supra* note 254, at 647 (rejecting Sea Hunt's argument for a salvage award for *La Galga*, as Spain had not expressly abandoned this vessel); *see also* Forrest, *supra* note 253, at 350 (noting that salvage law is not applied to historic shipwrecks when a State, like Spain, chooses not to apply it due to cultural importance). *See generally* Treaty of Friendship and General Relations, U.S.-Spain, July 3, 1902, 33 Stat. 2105 (requiring that Spain consent before the U.S. attempts to salvage a Spanish vessel that has been shipwrecked).

257. *See* Sea Hunt, Inc., *supra* note 254, at 647 (asserting that Spain had not shown any indication of abandoning the two ships and thus retained an interest in them); *see also* Jason R. Harris, *Protecting Sunken Warships as Objects Entitled to Sovereign Immunity*, 33 U. MIAMI INTER-AM. L. REV. 101, 102–3 (2002) (explicating U.S. policy to respect foreign titles to unabandoned foreign ships); *see also* Michael White, *Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels, 221 F.3d 634*, 95 AM. J. INT'L L. 678, 678–79 (2001) (delineating the 1902 Treaty of Friendship between the United States and Spain that governs returning the ship to Spain in such a case).

this case has suggested just that and has recommended that the treasure be returned to Spain.[258]

The decision to hand the treasure over to Spain becomes trickier if the shipwreck found by Odyssey Marine Exploration is not in fact the *Nuestra Señora de la Mercedes*, as Spain contends.[259] One way for Spain to assert its rights over the treasure if the shipwreck is not deemed to be a warship is again through the doctrine of sovereign immunity if the ship was a merchant

258. *See* Odyssey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel, 221 F.3d 634, 16–17 (2009) (recounting the Court's opinion coinciding with the magistrate in determining that the ship is the Mercedes and should be returned to Spain); *see also* Brooke Wright, Comment, *Keepers, Weepers, or No Finders at All: The Effects of International Trends on the Exercise of U.S. Jurisdiction and Substantive Law in the Salvage of Historic Wrecks*, 33 TUL. MAR. L.J. 285, 295–97 (2009) (elucidating the possible outcomes for the Mercedes ship regarding Spain and the salvage company's interests); *see also* Press Release, Odyssey Marine Exploration, Odyssey Will Object to Magistrate's Recommendation to Dismiss *Black Swan* Case (June 3, 2009), http://www.shipwreck.net/pr180.php (chronicling the magistrate's opinion regarding the identity and thus sovereign immunity of the ship).

259. *See* John Paul Jones, *The United States Supreme Court and Treasure Salvage: Issues Remaining After Brother Jonathan*, 30 J. MAR. L. & COM. 205, 208 (1999) (ruminating on the issues that arise when more than one party asserts claim to a salvaged vessel); *see also* David Curfman, Note, *Thar Be Treasure Here: Rights to Ancient Shipwrecks in International Waters—A New Policy Regime*, 86 WASH. U. L.R. 181, 181–84 (2008) (expounding on the issues of uncertainty when a salvage vessel is discovered). *See generally* Raymond Canzoneri Jr, *Admiralty Jurisdiction with Respect to Salvage, Shipwreck, and Treasure Litigation*, 2 AM. MARINER J. 17, 17–34 (2000) (intimating the issues that arise when a vessel is found, which creates the need to determine ownership).

ship being used under the control of the government, since some scholars believe that the doctrine of sovereign immunity should apply to such ships.[260] However, this involves determining exactly what type of ship has been found, and since there is no "coherent vessel"[261] at the wreck site, as Odyssey Marine Exploration has argued, this could prove difficult.[262] Support for allowing Spain to have control of the treasure can also be found in UNCLOS Articles 149 and 303, where preferential rights over archeological objects are to be given to the State of origin[263] so long as Spain can prove that the treasure is in fact from Spain. Although Odyssey Marine Exploration might have an argument that UNCLOS does not apply since the United States has not yet signed UNCLOS, the fact that President Clinton signed the 1994 Agreement, and that the United States is waiting on the Senate's advice and consent and the President's ratification, could bolster Spain's argument that these articles do give Spain rights to the treasure.[264]

---

260. *See* Timothy T. Stevens, *The Abandoned Shipwreck Act of 1987: Finding the Proper Ballast for the States*, 37 VILL. L. REV. 573, 573–75 (1992) (commenting on the legislation that arose due to the growing need to protect historic shipwrecks); *see also* Jeffrey W. Yeates, *Clearing Up the Confusion: A Strict Standard of Abandonment for Sunken Public Vessels*, 12 U.S.F. MAR. L. J. 359, 380–85 (2000) (edifying the differences in standards between kinds of vessels and the immunity they should receive). *See generally* Joseph C. Sweeney, *An Overview of Commercial Salvage Principles in the Context of Marine Archaeology*, 30 J. MAR. L. & COM. 185, 185–88 (1999) (expatiating on the dearth of answers provided for commercial vehicles by salvage legislation).

261. *See* Wright, *supra* note 258, at 295 (recapitulating that the ship was attacked in 1804 by the British and therefore scattered on the seabed); *see also* Lisa Abend, *Spain Claims Sunken Treasure*, TIME, May 8, 2008, http://www.time.com/time/world/article/0,8599,1738445,00.html (apprising how the ship exploded in the 1804 battle thus leaving no intact vessel); *see also* Al Goodman, *Spain's Lost Treasure Battle in U.S. Court*, CNN, June 8, 2008, http://www.cnn.com/2008/WORLD/europe/06/08/spain.treasure/index.html (divulging why there is no coherent vessel because the ship exploded at sea during a battle).

262. *See* Plaintiff Odyssey Marine Exploration, Inc's Objections to the Magistrate Judge's June 3, 2009, Report and Recommendation at Odyssey Marine Exploration, Inc. v. The Unidentified Shipwrecked Vessel, 2009 WL 4932724, 21–22 (M.D. Fla. 2009) (No. 8:07-cv-614) (asserting that because "neither a vessel nor cohesive remnants of a vessel's hull" were found at the site, Spain's claim of ownership under the doctrine of sovereign immunity is unfounded). *But see* California v. Deep Sea Research, Inc., 523 U.S. 491, 507-8 (1998) (concluding that possession of the vessel is not a prerequisite for asserting a claim of ownership on Eleventh Amendment sovereign immunity). *See generally* Rob Regan, *When Lost Liners Become Found: An Examination of The Effectiveness of Present Maritime Legal and Statutory Regimes for Protecting Historic Wrecks in International Waters With Some Proposals for Change*, 29 TUL. MAR. L.J. 313, 336-45 (2005) (examining UNCLOS and questioning the notion of whether sovereign immunity could be applied to merchant marine shipwrecks that were owned and chartered by the State of origin).

263. *See* Christopher R. Bryant, *The Archaeological Duty of Care: The Legal, Professional, and Cultural Struggle Over Salvaging Historic Shipwrecks*, 65 ALB. L. REV. 97, 105 n.55 (2001) (noting that Article 149 of UNCLOS grants the nation of origin special priority over the fate of a shipwreck); *see also* James A.R. Nafziger, *Second Newport Symposium: "Sunken Treasure: Law, Technology, and Ethics": Fourth Session: Future Directions: The Titanic Revisited*, 30 J. MAR. L. & COM. 311, 319 (1999) (commenting that Articles 149 and 303 of UNCLOS were established in order to "govern underwater heritage in fairly broad terms"); *see also* Anastasia Strati, *Deep Seabed Cultural Property and the Common Heritage of Mankind*, 40 INT'L & COMP. L.Q. 859, 886 (1991) (examining the three formulae of identification of the States of origin to whom preference is to be given within Article 149 of UNCLOS).

264. *See* United States v. Jho, 534 F.3d 398, 406 (5th Cir. 2008) (asserting that the articles of UNCLOS that reflect customary international law are binding under 33 U.S.C. § 1912, even though the Senate has not yet ratified the agreement); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 312 cmt. l (1987) (commenting that where the Senate has not yet given its consent to ratification of an international agreement, effect on a provisional basis rests upon the President); *see also* Mark Jarashow, Michael B. Runnels & Tait Svenson, *UNCLOS and the Arctic: The Path of Least Resistance*, 30 FORDHAM INT'L L.J. 1587, 1642 (2007) (remarking that UNCLOS, although signed by President Clinton and sent to the Senate for consent, has encountered a deadlock in the Senate).

One more argument in support of Spain having rights over the treasure is that Spain made a reservation under Article 30(1)(d) in the 1989 Salvage Convention that it would exclude the law of salvage from applying to historic shipwrecks. Although the United States did not make such a reservation, it generally has declined to apply the law of salvage and finds to historic shipwrecks under its statutory scheme, meaning it is unlikely that Odyssey Marine Exploration could obtain a salvage award for its efforts. Moreover, Spain has signed CPUCH, which states that preservation of underwater cultural heritage is the main goal, and the United States has also enacted statutes to that effect, as discussed above.[265] Thus, although the United States has not signed CPUCH, and the treaty entered into force only in January 2009, there is still support that the artifacts should have been preserved, meaning Odyssey Marine Exploration should not have taken the gold and silver from the shipwreck without first considering preservation efforts

X. Application of Law to the H.M.S. *Victory* Shipwreck

The decision in the case of the H.M.S. *Victory* shipwreck is much simpler on its face compared to that of the alleged *Nuestra Señora de la Mercedes* shipwreck since there was proof that the ship located by Odyssey Marine Exploration was in fact the British warship H.M.S. *Victory.* The 41 cannon found at the shipwreck site positively identified the vessel as belonging to the United Kingdom.[266] Also making this case much simpler is the fact that Odyssey Marine Exploration contacted the United Kingdom's Ministry of Defense and worked closely with the

265. *See* Ole Varmer, *United States of America*, *in* THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: NATIONAL PERSPECTIVES IN LIGHT OF THE UNESCO CONVENTION 2001 351, 376–77 (Sarah Dromgoole ed., 2nd ed. 2006) (pointing to various Acts passed by the United States that are consistent with the primary purpose of CPUCH, which is protecting underwater cultural heritage from "unscientific commercial salvage"); *see also* 43 U.S.C. § 2101 (1988) (codifying State responsibility for management of living and non-living resources in State waters, including certain abandoned shipwrecks); *see also* Marilyn Phelan, *A Synopsis of the Laws Protecting Our Cultural Heritage*, 28 NEW ENG. L. REV. 63, 79–86 (1993) (discussing the Abandoned Shipwreck Act of 1987 in the context of legislative attempts to preserve "sunken treasures").

266. *See Odyssey Marine Exploration Announces 2008 Financial Results*, J. OF TRANSPORTATION (2009) at 14 (reporting that the Odyssey Marine Exploration team was able to verify the identity of the H.M.S. *Victory* by the presence of 41 bronze cannon, among other indicia); *see also* William J. Broad, *Treasure Hunters Say They've Found a 1744 Shipwreck*, N.Y. TIMES, Feb. 3, 2009, at A6 (reporting a statement of Gregory P. Stemm, head of the discovery mission, that his team confirmed the identity of the shipwreck as the H.M.S. *Victory* by close examination of 41 bronze cannons visible on the seabed); *see also* Neil Cunningham Dobson & Sean Kingsley, *HMS Victory, A First-Rate Royal Navy Warship Lost in the English Channel*, 174: Preliminary Survey and Identification, 2 ODYSSEY PAPERS 1, 46 (2009), *available at* http://www.shipwreck.net/pdf/OMEPapers2-HMS_Victory.pdf (concluding that the shipwreck found by the Odyssey team is indeed the *H.M.S. Victory* because no other British warship having 41 or more bronze cannon featuring the coat of arms of King George I and II was wrecked in or near the English Channel); *see also World's Mightiest Ship Lost Without a Trace in 1744—Now Found*, OCEAN NEWS AND TECHNOLOGY, March 2009, at 15 (reporting that the Odyssey team raised two bronze cannon from the wreck to confirm the identity of the ship as the *H.M.S. Victory*).

Ministry to conduct salvage operations.[267] Clearly, considering the sovereign rights of flag States over warships mentioned in UNCLOS and the 1989 Salvage Convention, the treasure found at the site of the H.M.S. *Victory* belongs to the United Kingdom. It should be noted that the fact that this shipwreck was found outside the United Kingdom's territorial sea and contiguous zone, specifically, 62 miles off the coast of the Channel Islands,[268] does not affect the United Kingdom's rights to the treasure since a British warship is the type of ship found. Thus, no discussion of a coastal State's rights within its territorial sea or contiguous zone under UNCLOS Article 303 is necessary in this case since the shipwreck falls outside that 24-mile area. However, Article 149 does apply since it notes that in preserving historical artifacts, preference must be given to the State of origin to items found outside national jurisdiction, which further supports the United Kingdom's right to the artifacts and Odyssey Marine Exploration's conduct in cooperating with the United Kingdom during the salvage process.

Next, regarding any rewards to be paid to Odyssey Marine Exploration, although the United Kingdom reserved a right to make a reservation to not apply the 1989 Salvage Convention to historic shipwrecks under Article 30(1)(d), it has not yet made such a reservation, meaning Odyssey Marine Exploration is not automatically precluded from obtaining a salvage reward from the United Kingdom. Therefore, in deciding to reward Odyssey Marine Exploration for its efforts in locating the H.M.S. *Victory*, the United Kingdom was abiding by its stance regarding salvage rewards in the international realm. As a result, Odyssey Marine Exploration has been awarded 80 percent of the value of items recovered thus far, which amounts to $200,000, and it has donated $75,000 of that reward "to provide support to the National

267. *See* Cunningham Dobson & Kingsley, *supra* note 266, at 46 (stating that the determination that the shipwreck is the remains of the H.M.S. *Victory* has been communicated to various organizations, including the UK Ministry of Defence); *see also* Press Release, Odyssey Marine Exploration, Odyssey Reaches Agreement with UK Government on Dismissal of Admiralty Arrest and Salvage Award for Cannon from HMS Victory (Sept. 18, 2009) (on file with author), *available at* http://www.shipwreck.net/pr189.php (declaring that Odyssey informed the United Kingdom's government upon discovery of the HMS *Victory*); *see also Beneath the Sea*, BRITISH ARCHAEOLOGY, May/June 2009, *available at* http://www.britarch.ac.uk/ba/ba106/feat2.shtml (explaining that the Odyssey contacted the UK Ministry of Defense as owner of the *Victory* and conducted the survey of the site by agreement with the Ministry).

268. *See* Complaint in Admiralty, Odyssey Marine Exploration, Inc. v. Unidentified, Wrecked and (for Finders-Right Purposes) Abandoned Sailing Vessel, No. 8:08-cv-01045-RAL-MAP (M.D. Fla. 2008) (requesting a declaratory judgment pursuant to 28 U.S.C. § 2201(a) to prevent government interference with Odyssey's site activity based upon its location 25 to 40 miles off the English coast and outside the territorial or contiguous zone of any sovereign nation); *see also* Broad, *supra* note 266, at A6 (affirming that the warship was located nearly 62 miles from the Channel Islands, the site originally believed to be where the ship sunk); *see also* Lisa Abend, *The HMS Victory, Famed Shipwreck, Is Found*, TIME, Feb. 2, 2009, *available at* http://www.time.com/time/world/article/0,8599,1876515,00.html (last visited March 14, 2010) (outlining that Odyssey found the sunken warship 62 miles from where the public believed it went down near the Casquets, the rocks off the Channel Islands). *See generally* D.H. Anderson, *British Accession to the UN Convention on the Law of the Sea*, 46 INT'L & COMP. L.Q. 761, 768–71 (1997) (proclaiming that the United Kingdom has acceded to UNCLOS, accepted the terms of the 12-nautical-mile territorial waters limitation and opted not to declare a contiguous zone).

Museum of the Royal Navy to assist in realizing the historical, educational and cultural opportunities that the discovery of this important shipwreck offers to the public."[269]

Conclusion

In summary, the location and status of a shipwreck are crucial to determine who obtains the rights to any items salvaged from a shipwreck site. Neither of these shipwrecks were found within a coastal State's territorial sea or contiguous zone, which would make the determination of who had the rights to the underwater cultural heritage much more difficult, since UNCLOS and CPUCH give coastal States more rights over activities in these areas. As noted above, the *Nuestra Señora de la Mercedes* shipwreck poses more difficult questions than the H.M.S. *Victory* shipwreck, which clearly gave sovereign rights to the United Kingdom and will not be discussed further.

The controversy between Spain and Odyssey Marine Exploration mostly centers around the lack of cooperation between the two parties due to their dispute regarding the status of the shipwreck. While Spain believes the wreck is that of a warship, Odyssey Marine Exploration believes that the shipwreck is that of a commercial ship that lacked any governmental involvement. Depending on the classification, the doctrine of sovereign immunity may or may not apply. From the recent court decisions and evidence, it does appear that the ship was the warship that Spain claims it to be, meaning that Spain has jurisdiction over the ship, not the United States, and this matter should be decided in Spain. Based on past dealings of this nature, the sovereign rights of Spain should prevail over the rights of Odyssey Marine Exploration. Since Spain excludes historic wrecks from its salvage law, this means that Odyssey Marine Exploration will not receive a salvage reward under international law, which does seem unfair given the time and effort it has spent locating the wreck and bringing the artifacts to the surface. However, Odyssey Marine Exploration does have a chance at obtaining rights to the property if it can prove the wreck is really not that of a warship or a merchant ship under governmental control.

The moral of the story is that cooperation in this type of salvage effort is key, as is knowledge of the international law concerning shipwrecks of each country's stance on such issues. The main goal in many countries is that of preservation, as outlined in both UNCLOS and CPUCH. Before a salvage company spends a great deal of money recovering artifacts from a shipwreck, it should carefully consider the international laws and customs implicated; if it does not, it could suffer a huge loss.

---

269. *See* Press Release, Odyssey Marine Exploration, Odyssey Reaches Agreement with UK Government on Dismissal of Admiralty Arrest and Salvage Award for Cannon from *HMS Victory* (Sept. 18, 2009) (on file with author), *available at* http://www.shipwreck.net/pr189.php (proclaiming that the British government has awarded Odyssey 80 percent of the $200,000-artifact value and, in return, Odyssey intends to make a $75,000 donation toward the National Museum of the Royal Navy); *see also* Mitch Stacy, *Fla. Explorers, UK Reach Agreement on Shipwreck*, THE GUARDIAN, Sept. 18, 2009, *available at* http://www.guardian.co.uk/world/feedarticle/8715107 (announcing that Odyssey's CEO confirmed his company donated $75,000 to the National Museum of the Royal Navy to preserve the shipwreck); *see also* Christopher Catling, *A Tale of Two Ships: The Future of* HMS Victory *and* HMS Victory, SOCIETY OF ANTIQUITIES OF LONDON ONLINE NEWSLETTER, Nov. 2, 2009, http://www.sal.org.uk/salon/index_html?id=1138 (reporting that the UK Government has given Odyssey a salvage award of $160,000 for the bronze cannon, leading Odyssey to terminate proceedings in U.S. court for the salvage rights).

The controversy between Spain and Odyssey Marine Exploration possibly could have been avoided had both parties been open to negotiations like those that took place between the United Kingdom and Odyssey Marine Exploration concerning the H.M.S. *Victory* shipwreck and its artifacts. One example of such cooperation is when a joint venture involving the United States and France found the *Titanic*.[270] There, Titanic Ventures, a U.S. company, and Infremer, a French entity, worked together to recover 1800 artifacts from the *Titanic* wreck site.[271] The French government gained possession of all artifacts, allowed owners of the artifacts to claim the property during a period of three months after public notice, then handed over any unclaimed property to Titanic Ventures.[272] Although the *Titanic* shipwreck was still mired in litigation,[273] at least some effort was made to cooperate, and such an attempt to cooperate with potential owners and other interested parties should be the first step a salvor takes before beginning the recovery of valuable underwater cultural heritage.

---

270. *See* ROBERT D. BALLARD, THE DISCOVERY OF THE TITANIC 55–56 (1987) (purporting that the search of the *Titanic* resulted from the support of the U.S. Navy and the French National Institute of Oceanography); *see also* JOHN P. EATON & CHARLES A. HAAS, TITANIC: DESTINATION DISASTER 133 (1987) (claiming that the joint venture between the French and American companies resulted in the discovery of over 1,800 artifacts on the *Titanic*); *see also* Nafziger, *supra* note 263, at 311, 312 (asserting that a joint mission by French and American organizations resulted in the discovery of the *Titanic* shipwreck).

271. *See* ROBERT D. BALLARD, RETURN TO TITANIC 73 (2004) (explaining that the joint venture between the French and a U.S. company, Titanic Ventures, resulted in the removal of over 1,800 artifacts from the *Titanic*); *see also* SUSAN WELS, *TITANIC*: LEGACY OF THE WORLD'S GREATEST OCEAN LINER 132 (1997) (suggesting that since the discovery of the *Titanic*, several expeditions to the site were conducted in order to obtain materials from the shipwreck); *see also* Nafziger, *supra* note 263, at 313 (1999) (asserting that the joint mission resulted in the procurement of around 1,800 artifacts from the Titanic).

272. *See* R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel, 924 F. Supp. 714, 718 (E.D. Va. 1996) (finding that the successor in interest to Titanic Ventures had been the best caretaker of the historical site and preserved and maintained the *Titanic*'s artifacts well); *see also* Rachael J. Lin, *Salvage Rights and Intellectual Property: Are Copyright and Trademark Rights Included in the Salvage Rights to the* R.M.S. Titanic, 23 TUL. MAR. L. J. 483, 496 (1999) (describing the relationship between Infremer and Titanic Ventures and how Titanic Ventures and the French government agreed not to sell any of the salvaged artifacts); *see also* Nafziger, *supra* note 263, at 313 (summarizing how Titanic Ventures teamed up with the French government, which ultimately resulted in the transfer of the remaining items to Titanic Ventures).

273. *See* R.M.S. Titanic, Inc., v. Haver, 171 F.3d 943, 969 (4th Cir. 1999) (holding that Titanic Ventures' successors in interest held exclusive rights to record images of the wreck against other salvors); *see also* Lindsay v. Wrecked & Abandoned Vessel R.M.S. Titanic, 1998 WL 557591 (S.D.N.Y. 1998) (stating that Titanic Ventures' successors of interest, RMST, had rights to videotape images of the wreck, and the court denied plaintiff's claim for the recovery of a salvage award against RMST); *see also* R.M.S. Titanic, Inc., *supra* note 272, at 723 (depicting how successful RMST has been in recovering the salvage, and how RMST's success lends itself to give RMST sole ownership and salvage rights against competing salvagers).

Another example of cooperation between the United States and France that concerns the *CSS Alabama* should be a guide in the future to avoid disputes like the one between Spain and Odyssey Marine Exploration.[274] Although between two States and not between a State and a professional salvor company, the *CSS Alabama* Agreement could provide a solid framework for professional salvors and States to work together to protect underwater cultural heritage while keeping the interests of both parties in mind as well. The *CSS Alabama* was a Confederate ship that sank in France's territorial waters in 1864 and was located by the French in 1988; thus it had historical value to both the United States and France.[275] It has been said that "[r]atification of the agreement established a precedent for international cooperation as it applies to archaeological research, as well as the protection of unique historic shipwrecks."[276] In maintaining this precedent and considering the cooperation that has occurred in the past, such as with the *Titanic* shipwreck, it does not seem too heavy a burden to impose on professional salvors a requirement that they determine ownership of the artifacts they find, then attempt to cooperate with the owners to protect the underwater cultural heritage and the interests of all parties involved.

---

274. *See* Agreement Between the Government of the United States of America and the Government of the French Republic Concerning the Wreck of the *CSS Alabama*, U.S.-Fr., Oct. 3, 1989, T.I.A.S. No. 11,687 (detailing the agreement between the United States and France whereby the two countries agreed to work together to salvage and protect the *CSS Alabama* wreck); *see also* J. Lawrence Kahn, *Sunken Treasure: Conflicts Between Historic Preservation Law and the Maritime Law of Finds*, 7 TUL. ENVTL. L. J. 595, 631 (1994) (asserting that the archeological integrity of sunken vessels depends on international agreements such as the *Alabama* Agreement between the United States and France); *see also* J. Ashley Roach, *France Concedes United States Has Title to* CSS Alabama, 85 AM. J. INT'L L 381, 381–83 (1991) (chronicling the negotiations between the United States and the French government before reaching a final agreement).

275. *See* MICHAEL L. LANNING, THE CIVIL WAR 100: THE STORIES BEHIND THE MOST INFLUENTIAL BATTLES, PEOPLE, AND EVENTS IN THE WAR BETWEEN THE STATES 315–18 (Sourcebooks 2006) (2006) (noting the *CSS Alabama*'s battle against the *USS Kearsarge* as one of the most influential battles in the Civil War); *see also* Susan Poser & Elizabeth R. Varon, *United States v. Steinmetz: The Legal Legacy of the Civil War, Revisited*, 46 ALA. L. REV. 725, 725–40 (1995) (illustrating the *CSS Alabama*'s historical significance to the United States through anecdotes of the famous Confederate ship's journeys and victories during the Civil War); *see also* CSS Alabama—*History of the Ship*, http://www.history.navy.mil/branches/org12-1.htm (last visited Nov. 21, 2009) (timelining the *CSS Alabama*'s life and the history of its salvage). *See generally* Mark Thompson, *Finders Weepers Losers Keepers: United States of America v. Steinmetz*, 28 CONN. L. REV. 479, 531–38 (1996) (laying out the French government's historical contact with the *CSS Alabama*).

276. *See* David K. Linnan, *Iran Air Flight 655 and Beyond: Free Passage, Mistaken Self-Defense, and State Responsibility*, 16 YALE J. INT'L. 245, 383 (1991) (using arbitration principles in *Alabama* to analyze and hypothesize what Iran's obligations should be in the matter regarding Iran Air Flight 655); *see also* Sean D. Murphy, *U.S.-France Agreement Regarding the Sunken Vessel* La Belle, 97 AM. J. INT'L L. 688, 688 (2003) (applying the principles in the *Alabama* Agreement to the negotiations over the sunken ship *La Belle*); *see also* David Curfman, Note, *Thar Be Treasure Here: Rights to Ancient Shipwrecks in International Water—A New Policy Regime*, 86 WASH. U. L.R. 181, 184 & n.26 (2008) (citing to the *Alabama* Agreement as a recent treaty that provides the most effective means of redress regarding the deposition of shipwrecks). *See generally CSS Alabama—History of the Ship*, http://www.history.navy.mil/branches/org12-1.htm (last visited Nov. 21, 2009) (listing the organizations and governments that took part in carrying out the landmark agreement).

Figueiredo Ferraz Consultoria e Engenharia e Projeto Ltda. v. Peru

665 F. Supp. 2d 361 (S.D.N.Y. 2009)

The court held that it had jurisdiction to enforce an arbitration award against the Republic of Peru in favor of a Brazilian corporation, under the Foreign Sovereign Immunities Act and the Inter-American Convention on International Commercial Arbitration.

I. Holding

In *Figueiredo Ferraz Consultoria e Engenharia de Projeto Ltda. v. Peru*,[1] the court held that it had personal and subject matter jurisdiction to enforce an arbitration award against the Republic of Peru and in favor of Figueiredo, a Brazilian consulting corporation.[2] In making its determination, the court looked to the Foreign Sovereign Immunities Act[3] and the Inter-American Convention on International Commercial Arbitration ("Inter-American Convention"),[4] as well as federal common law.[5] Specifically, the court found that the government program in question was not a separate entity from the Peruvian government under Peruvian law and should, therefore, be treated as the same entity for purposes of enforcing the award.[6] It also found that the program's core functions were governmental rather than commercial in nature, thereby supporting the court's finding that the program was a political organ of the Peruvian government, as opposed to an independent agency or instrumentality.[7] In addition, the court held that Peru's business activities in the United States amounted to the minimum contacts required for due process in order to establish personal jurisdiction.[8] It further held that a U.S. court, but not a Peruvian court, was an adequate forum to enforce the award, because only the U.S. court could attach Peru's property in the United States.[9] Also, the court weighed the public and private interest against the dismissal of the claim for forum non conveniens, finding that both interests weighed against dismissing the claim.[10] Finally the court concluded that the

1. 655 F. Supp. 2d 361 (S.D.N.Y 2009) [hereinafter *Figueiredo*].
2. *Id.* at 371–74.
3. 28 U.S.C. § 1602 *et seq*.
4. Jan. 30, 1975, 1975 O.A.S.T.S. no. 42, 14 I.L.M. 336 (1975).
5. *Figueiredo,* 655 F. Supp. 2d at 369–74.
6. *Id.* at 369.
7. *Id.* at 370.
8. *Id.* at 373–74.
9. *Id.* at 375–76.
10. *Id.* at 376–77.

forum selection clause in the agreement did not preclude the corporation from invoking the Inter-American Convention to enforce the arbitration award in the United States.[11]

II. Facts and Procedural History

Figueiredo, a Brazilian corporation, entered into an agreement with the Programa Agua para Todos ("Program") for consulting services in Peru.[12] However, after a dispute over fees, Figueiredo commenced arbitration proceedings against the Program in accordance with the arbitration clause in the agreement, which provided that arbitration or litigation among the parties would be conducted in the city of Lima, Peru.[13] Figueiredo was successful in obtaining an award in its favor, against the Program, for $21,607,003.[14] Subsequently, the Ministry of Housing, Construction and Sanitation of the Republic of Peru ("Ministry"), filed an appeal to nullify the award in the court of appeals in Peru, but the court dismissed its appeal. This decision, under Peruvian law, was final and could not be appealed further.[15] Thereafter, the Ministry paid only $1,414,884 of the award and conferred the obligation for payment under the award on the Ministry of Economy and Finance in Peru.[16]

Figueiredo brought this action in the United States seeking confirmation of the award against the Republic of Peru ("Peru"), the Ministry, and the Program (collectively, "Defendants").[17] Figueiredo claimed that it was entitled to do so under the Inter-American Convention or, alternatively, under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[18] ("New York Convention").[19] In turn, Defendants moved to dismiss the action, claiming that the court lacked subject matter jurisdiction and personal jurisdiction, and that the complaint failed to state a claim upon which relief could be granted.[20] It also argued that the court should dismiss the case under the forum non conveniens doctrine.[21]

---

11. *Id.* at 377.
12. *Figueiredo*, 655 F. Supp. 2d at 366.
13. *Id.*
14. *Id.*
15. *Id.* at 366.
16. *Id.*
17. *Id.* at 365.
18. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, T.I.A.S. No. 6997, 21 U.S.T. 2517.
19. *Figueiredo*, 655 F. Supp. 2d at 366. The court did not address this issue further in its decision.
20. *Id.*
21. *Id.*

III. Discussion

A. Plaintiff's Failure to State a Claim for Which Relief Could Be Granted

In their motion to dismiss, Peru and the Ministry argued that the court could not confirm the arbitration award against them, because they were not parties to the original agreement. Figueiredo claimed that Peru, the Ministry, and the Program were one and the same for award-confirmation purposes, because the Program was a subdivision of Peru.[22]

In order to decide a motion to dismiss, the court must analyze the facts alleged in the complaint in favor of the plaintiff.[23] However, in order to withstand a motion to dismiss, the plaintiff must allege sufficient facts on the face of the complaint that, if accepted as true, would allow the court to conclude that the defendant wronged the plaintiff.[24] In making this analysis, the court is limited to the facts as alleged in the complaint and to any documents annexed thereto or referenced therein.[25] It may also make judicial notice when applicable.[26] Furthermore, the court may, under Federal Rule of Civil procedure 44.1, when making determinations on foreign law, look to any materials which may help it in its analysis, even if these materials were not originally submitted by either party to the litigation.[27]

Accordingly, the court looked to the Second Circuit decision in *Compagnie Noga D'Importation et D'Exportation S.A. v. Russian Federation*.[28] In *Noga*, the court held that an "arbitration award can be confirmed and enforced against a sovereign nation [even] where the arbitration agreement was signed by an organ of that nation's central government and where that organ—and not the nation itself—participated in the underlying arbitration proceedings."[29] The main question posted by the court of appeals in that case was whether the party who signed the agreement was "an instrumentality" independently established from the nation, or whether it was "a political organ" of the nation.[30]

Applying the aforesaid standard to the present case, the court had to decide whether the Program was "an instrumentality" independently established from Peru, or whether the Program was "a political" organ of Peru, thereby allowing the court to enforce the award against Peru, even if it was not a signatory to the original agreement.[31]

---

22. *Id.* at 367.
23. *Id.* (citing Grandon v. Merrill Lynch & Co., 147 F.3d 184, 188 (2d Cir. 1998)).
24. *Id.* (quoting Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949, 173 L.Ed. 868 (2009), (Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007)).
25. *Figueiredo*, 655 F. Supp. 2d at 367 (quoting Allen v. Westpoint-Pepperell, Inc., 945 F.2d 40, 44 (2d Cir. 1991).
26. *Id.*
27. *Id.* (quoting FED. R. CIV. P. 44.1).
28. 361 F.3d 676, 677 (2d Cir. 2004) (hereinafter *Noga*).
29. *Figueiredo,* 655 F. Supp. 2d at 368 (quoting *Noga*, 361 F.3d at 676, 677).
30. *Id.* (quoting *Noga*, 361 F.3d at 685, 688).
31. *Id.*

In order to make this determination, the court looked to the law of Peru.[32] It found that under the Peruvian Constitution, matters relating to Peru's services were assigned to the Council of Ministers, which in turn assigned the matters to the Ministry most adequate to handle each matter.[33] Further, programs, such as the one involved in the present case, may be created to perform certain functions on behalf of the Ministries and were thereafter administered by a particular "Ministry or a Political body."[34] Additionally, the court found that under the law of Peru, Executive Branch, the Program was further considered a public entity, and as such, the Program may perform a number of functions on behalf of the Ministry, including entering into contracts.[35]

Peru had been working on a national project to improve its national drinking water and sanitation since the 1990s.[36] To that end, Peru established an Executive Unit, the Program, to develop this project.[37] The Program was organized "as an organ of the Ministry of the Presidency, attached to the Deputy Minister of Infrastructure, with technical and administrative independence."[38] In 2007, the "current version" of said Program was created under the name Agua para Todos ("Water for All") in order to further administer sanitation programs funded by the public.[39]

Lastly, under Peruvian law, a monetary award against a governmental body must be paid out of the budget of the particular government body that created that debt.[40] In the event that the award surpasses the governmental body's budget, the administrative office of that governmental body must allocate 3 percent of its own budget to pay for said award.[41]

Based on these facts, the court concluded that the Program was not an instrumentality independent from Peru, but rather that it was a political organ of Peru "performing a quintessential governmental function," and, as in *Noga*, it should be considered the same party for confirmation purposes.[42]

The court also looked to federal common law to support its conclusion that the Program and Peru should be treated as the same entity for purposes of confirming the arbitration award. It stated that courts have, under the Foreign Sovereign Immunities Act,[43] differentiated between "instrumentality or agents" of a foreign nation, which are treated as being separate from that nation, and governmental "organs or subdivisions" of that nation, which were treated

32. *Id.*

33. *Id.*

34. *Id.* (citing Declaration of Jorge Avendano, dated Mar. 24, 2009 ¶ 15 (hereinafter Avendano Decl.)).

35. *Figueiredo,* 655 F. Supp. 2d at 368 (citing Avendano Decl. ¶ 16).

36. *Id.* (citing Avendano Decl. ¶ 18).

37. *Id.* at 368–69 (citing Avendano Decl. ¶ 19).

38. *Id.* at 369 (citing Avendano Decl. ¶ 23).

39. *Id.* (citing Avendano Decl. ¶ 28).

40. *Id.* (citing Avendano Decl. ¶ 64).

41. *Figueiredo,* 655 F. Supp. 2d at 369.

42. *Id.* (quoting *Noga*, 361 F.3d at 686).

43. 28 U.S.C. § 1602 *et seq.*

as the foreign nation itself.[44] It noted that the aforementioned distinction, as well as the "core functions test" used to establish this distinction, can be applied to foreign arbitrational awards confirmation.[45] In applying the "core functions test, the court must determine whether the "core function of the foreign entity are predominantly governmental or commercial."[46]

Based on the aforementioned, the court concluded that the Program was clearly furthering a core governmental function. It supported its conclusion by noting that the Program was an Executive Unit administered by the Executive branch of Peru and created to further Peru's national drinking water and sanitation project, which was clearly a "quintessential governmental function." Therefore, there was no distinction between the Program and Peru for purposes of confirming the arbitration award. As a result, the court denied Defendants' motion to dismiss for failure to state a claim.

B. Lack of Subject Matter Jurisdiction Claim

In determining whether it had subject matter jurisdiction, the court looked to the provisions of the Foreign Sovereign Immunities Act (FISA).[47] Under FISA, a U.S. court has enforcement jurisdiction over any foreign nation that has agreed to arbitration with private parties where "the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards."[48] Further, the FISA defines a "foreign state" to include "an instrumentality or agency of a foreign state."[49]

Defendants argued that the court lacked subject matter jurisdiction because Figueiredo had become a domicile of Peru for purposes of the arbitration proceedings in that country, and that the Inter-American Convention[50] did not permit enforcement of arbitration awards between parties of the same nation.[51] However, the court could not find any legal basis under the Inter-American Convention for refusing to enforce an arbitration award for lack of subject matter jurisdiction based on the parties sharing a domicile.[52] Instead, the Inter-American Convention requires that "arbitral decisions or awards made in the territory of a foreign State shall, on the basis of reciprocity, be recognized and enforced under this chapter . . . if that State has ratified or acceded to the Inter-American Convention."[53] This section appears, when read plainly, to preclude only the enforcement of arbitration awards among nations that are not part

44. *Figueiredo*, 655 F. Supp. 2d at 369–70 (quoting Garb v. Republic of Poland, 440 F.3d 579, 590 (2d Cir.2006)).

45. *Id.* at 370 (quoting *Garb*, 440 F.3d at 592).

46. *Id.* (quoting *Garb* 440 F.3d at 591).

47. *Id.* at 371.

48. *Id.* (quoting *In re* Arbitration Between Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine, 311 F.3d 488, 494 (2d Cir. 2002)).

49. *Id.*

50. *See* 9 U.S.C. § 305(1).

51. *Figueiredo,* 655 F. Supp. 2d at 372.

52. *Id.*

53. *Id.*

of the Inter-American Convention.[54] Further, the court noted that the Inter-American Convention refers to the parties' citizenship status and not their domicile.[55] Indeed, under FSIA, the citizenship of a foreign corporation must be established according to 28 U.S.C. § 1332(c), which states that citizenship of a corporation is based upon it being incorporated in that State or have its principal place of business therein.[56]

Applying the citizenship requirements under FSIA to this case, the court noted that Figueiredo was a Brazilian corporation that did not have its principal place of business in Peru.[57] Accordingly, it concluded that Figueiredo was not a citizen of Peru, and, therefore, the court did not have to address Defendants' claim that FISA did not apply to arbitration proceeding between a foreign nation and one of its citizens.[58] Thus, the court denied Defendants' motion to dismiss for lack of subject matter jurisdiction.[59]

C. Lack of Personal Jurisdiction

Figueiredo had the burden of proving whether or not the court had personal jurisdiction over Defendants.[60] The court found statutory support in FSIA to establish personal jurisdiction over Defendants.[61] It noted that under FSIA, establishing personal jurisdiction is simply done by first establishing subject matter jurisdiction and effectuating proper service of process.[62] Accordingly, because the court had previously established subject matter jurisdiction over the Defendants, and it was undisputed that Figueiredo properly effectuated service of process, it was clear that the court also had personal jurisdiction over the Defendants under FSIA.[63]

Notwithstanding the aforementioned, the court noted that it must also take into account the Due Process Clause when exercising personal jurisdiction under FSIA.[64] The Due Process Clause allows a court to exercise personal jurisdiction over a non-resident if that non-resident had minimal contact with the state where that court is located.[65] In order to determine mini-

54. *Id.* (quoting Produtos Mercantiles E Industriales, S.A. v. Faberge USA, Inc., 23 F.3d 41, 44 (2d Cir. 1994)).

55. *Id.*

56. *Id.* at 372 (quoting Bailey v. Grand Trunk Lines New England, 805 F.2d 1097, 1100 (2d Cir. 1986)).

57. *Figueiredo*, 655 F. Supp. 2d at 372.

58. *Id.*

59. *Id.*

60. *Id.* (citing Seetransport Wiking Trader Schiffahrtsgesellschaft mbH & Co. v. Navimpex Centrala Navala, 989, F.2d 572, 580 (2d Cir. 1993)).

61. *Id.* at 373.

62. *Id.* (quoting Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 308 (2d Cir. 1981)).

63. *Figueiredo,* 655 F. Supp. 2d at 373.

64. *Id.*

65. *Id.* (quoting U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co. Ltd., 241 F. 3d 135, 152 (2d Cir. 2001)).

mal contact, the court must look at the Defendants' contact with the forum to establish whether the contact is enough to constitute a "continuous and systematic" presence.[66] Once the court establishes that the minimal-contact requirement has been met, it must then decide if it is reasonable to exercise jurisdiction under the particular circumstances of that case.[67]

Peru was in the process of issuing debt securities in the United States when this decision was rendered.[68] To that end, it had filed several registrations with the Securities and Exchange Commission.[69] According to the registrations, Peru had agreed to be subject to the federal and state courts of the state of New York, as well as appoint an agent to remain in New York on behalf of Peru until the securities are paid, form a New York corporation to act as its agent for service of process, retain a New York law firm to represent it, and have a person in the Peruvian General Consulate of New York act as its representative.[70]

Based on these facts, the court found that Peru's issuance of debt was enough to establish minimal contact because Peru had "regularly and significantly availed itself of the privileges of United States banking and financial laws."[71] Therefore, the court also denied Defendants' motion to dismiss for lack of personal jurisdiction.[72]

D. Forum Non Conveniens

The federal court has great discretion in dismissing a case on the basis of forum non conveniens.[73] When exercising this discretion, the court usually considers: (1) the amount of deference given to plaintiff's choice of forum; (2) whether another forum is more adequate; (3) balance of private and public interest; and (4) the public and private interest implicated in the choice of forum.[74] As a matter of course, a domestic plaintiff's forum selection receives greater deference than a foreign plaintiff's forum selection.[75] However, the more that it seems that the plaintiff is merely forum shopping in order to receive an unfair advantage over the defendant, the easier it is for the defendant to succeed on a motion to dismiss on the grounds of forum non conveniens.[76]

---

66. *Id.* (quoting Frontera Res. Azerbaijan Corp. v. State Oil Co. of Azerbaijan, 479 F. Supp. 2d 376, 385 (S.D.N.Y. 2007)).
67. *Id.*
68. *Id.* at 366.
69. *Figueiredo,* 655 F. Supp. 2d at 366.
70. *Id.* at 366–67.
71. *Id.* at 373–74 (quoting Walpex Trading Co. v. Yacimientos Petroliferos Fiscales Bolivianos, 712 F. Supp. 383, 391 (S.D.N.Y. 1989)).
72. *Id.* at 374.
73. *Id.* (quoting *Norex Petroleum*, 416 F.3d at 153).
74. *Id.*
75. *Figueiredo,* 655 F. Supp. 2d at 375 (quoting *Monegasque*, 311 F.3d at 498).
76. *Id.* (quoting Iragorri v. United Tech. Corp. 274 F.3d 65, 71–72 (2d Cir. 2001)).

Figueiredo was a foreign plaintiff, and as a result, its choice of the United States as a forum received less deference.[77] However, because of Peru's assets in the United States, Figueiredo's choice was given more weight.[78] In addition, there was no proof that Figueiredo was forum shopping, considering that all Figueiredo was seeking was the enforcement of an arbitral award.[79] As a result, the court found that Figueiredo should be granted deference in this case.

A court may decide that another forum is more appropriate if the defendants accept service of process there, and the forum court has subject matter jurisdiction.[80] Although the Peruvian courts were allowed to execute the arbitral award in favor of Figueiredo, the U.S. courts were the only ones that "may attach the commercial property of a foreign nation located in the United States."[81] Therefore, there was no alternate forum that could provide Figueiredo with access to Peru's assets in the United States.[82]

E. Public- and Private-Interest Factors

In determining whether the plaintiff or defendant should get its chosen forum, the courts must consider the public and private interest in forum selection.[83] The private-interest factors relate to the "convenience of the litigants, the relative ease of access to sources of proof, and the availability of compulsory process for attendance of unwilling witnesses."[84] The public-interest factors, on the other hand, "include the administrative difficulties associated with court congestion; the imposition of jury duty upon those whose community bears no relationship to the litigation; the local interest in resolving local disputes; and the problems implicated in the application of foreign law."[85]

After balancing these two interests, the court decided that the private interest did not weigh in favor of dismissing the claim based on forum non conveniens.[86] Defendants argued that confirmation of the award would require the parties to engage in extensive discovery and would involve complex analysis of Peruvian law.[87] Nevertheless, Defendants provided the

77. *Id.* at 375.

78. *Id.*

79. *Id.*

80. *Id.* (quoting *Monegasque*, 311 F.3d at 499).

81. *Figueiredo,* 655 F. Supp. 2d at 376 (quoting TMR Energy Ltd. v. State Property Fund of Ukraine, 411 F.3d 296, 303 (D.C. Cir. 2005)).

82. *Id.*

83. *Id.* at 376.

84. *Id.* (citing *Monegasque*, 311 F.3d at 500).

85. *Id.*

86. *Id.*

87. *Figueiredo,* 655 F. Supp. 2d at 376.

courts with various declarations in support of their argument that Peru was a separate entity from the Program, so in essence, they had proven that the court could indeed answer the question of whether or not to confirm the award without excessive discovery.[88] Thus, the private-interest factor in this case weighed against the dismissal of the claim based on the theory of forum non-conveniens.[89]

The court also decided, for similar reasons, that the public-interest factor also weighed against dismissal.[90] The court noted that the courts in the United States had an interest in enforcing arbitration agreements in an international contract.[91] Furthermore, this action was not merely an action brought in the United States by parties with no connection to it.[92] In this case, Peru had substantial assets in the United States, and the purpose of the action was to collect a debt owed by Peru.[93] In addition, Peru should not be allowed to use the doctrine of forum non conveniens to avoid its obligations to pay a debt when it has become a member of the International Convention and has assets in the United States.[94] Therefore, the court did not allow the dismissal of Figueiredo's claim based on the theory of forum non conveniens.

F. Forum-Selection Clause

In order for the court to dismiss an action based on forum-selection clause, the party seeking to enforce the clause must show that the parties involved in the proceedings are subject to said forum-selection clause.[95] Accordingly, unless the forum-selection clause states that the parties may not bring action in a particular forum, plaintiff should not be precluded from commencing an action there.[96] Defendants argued that the agreement provided that the parties would be subject to the courts of Peru.[97] However, the court noted that the language of the agreement provided for arbitration proceedings in Peru "as applicable."[98] Therefore the agreement did not prohibit Figueiredo from availing itself of the Inter-American Convention to enforce the award against Defendants once it had no other recourse in Peru.[99] Accordingly, the court decided that the forum selection clause in the agreement did not warrant a dismissal of the case.[100]

---

88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* (citing Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15, (1974)).
92. *Id.*
93. *Figueiredo*, 655 F. Supp. 2d at 377.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Figueiredo*, 655 F. Supp. 2d at 377 (citing Andros Compania Maritima, S.A. v. Andre & Cie.,S.A., 430 F. Supp. 88, 94–95 (S.D.N.Y. 1977)).
100. *Id.*

G. Comity and Abstention

Defendants also argued that the action should be dismissed based on international comity and abstention.[101] However, Defendants did not come forth with any legal authority to support this claim; therefore, dismissal upon these grounds was also denied.[102]

IV. Conclusion

As previously discussed, the court concluded that it had personal and subject matter jurisdiction to enforce an arbitration award against Peru.[103] In reaching its decision, the court first noted that the Program was not a separate entity from Peru and should, therefore, be treated as the same entity for purposes of enforcing the award.[104] Further, the court identified that the Program's core functions were governmental rather than commercial in nature, so as to make the Program a political organ of Peru and not an independent agency.[105] The court also noted that Peru's continuous business activities in the United States secured minimum contacts sufficient to establish personal jurisdiction.[106] In addition, it found that because Peru's business assets were in the United States, the United States was an appropriate forum for enforcement purposes.[107] The court also took into consideration the public and private interest against the dismissal of the claim for forum non conveniens and found that both interests were better served by allowing the claim.[108] Lastly, the court stated that although the forum selection clause in the contract provided that arbitration proceedings must take place in Peru, it did not preclude Figueiredo from seeking to enforce the award in the United States as per the Inter-American Convention.[109] As a result, Defendants' motion to dismiss for failure to state a claim, lack of personal jurisdiction, and lack of subject matter jurisdiction was denied;[110] however, the court did not decide whether or not the award should be confirmed.[111]

Subsequent to this decision, Defendants filed a motion to certify an interlocutory appeal, and this motion was granted.[112]

Suleida Arias

---

101. *Id.*

102. *Id.* at 378.

103. *Id.* at 371–74.

104. *Id.* at 369.

105. *Figueiredo*, 655 F. Supp. 2d at 370.

106. *Id.* at 373–74.

107. *Id.* at 376.

108. *Id.* at 376–77.

109. *Id.* at 377.

110. *Id.*

111. *Figueiredo,* 655 F. Supp. 2d at 377.

112. Figueiredo Ferraz Consultoria e Engenharia de Projecto Ltda. v. Peru, 2009 WL 5177977 (S.D.N.Y.).

CSL Australia Pty. Ltd. v. Britannia Bulkers PLC

2009 U.S. Dist. LEXIS 81173 (S.D.N.Y. Sept. 8, 2009)

The court exercised its discretion by vacating a maritime attachment order against an insolvent defendant in the name of international comity. Courts are encouraged to defer to the laws and procedures of contemporaneous foreign bankruptcy proceedings that are consistent with the principles of U.S. bankruptcy law and are procedurally fair.

I. Holding

In *CSL Australia Pty. Ltd. v. Britannia Bulkers PLC*,[1] the U.S. District Court for the Southern District of New York granted defendant Britannia Bulkers A/S's ("Britannia A/S") motion to vacate the maritime attachment that plaintiff CSL Australia Pty. Ltd. (CSL) had used as security for its arbitration award.[2] Invoking principles of international comity, the court deferred to Britannia A/S's contemporaneous bankruptcy proceedings in Denmark.[3] Under Danish law, all pre-bankruptcy attachments against an insolvent automatically lapse upon filing for bankruptcy and become part of the estate.[4] The court concluded that extending comity was proper because Danish bankruptcy proceedings are procedurally fair and consistent with the laws and public policy of the United States,[5] and because CSL would be able to pursue its claim in the Danish proceedings without prejudice.[6] The court ultimately dismissed the lawsuit without prejudice, because the maritime attachment was the court's sole basis for jurisdiction.[7]

II. Facts and Procedural History

Both parties are foreign corporations—CSL is incorporated under Australian law, and Britannia A/S is incorporated under Danish law.[8] CSL initiated arbitration proceedings in Singapore against Britannia Bulkers PLC ("Britannia") for an alleged breach of a time charter.[9] In order to obtain security for its potential arbitration award, CSL commenced the instant action on September 26, 2008, and received a maritime attachment order pursuant to Admiralty Rule B against Britannia in the amount of $2.4 million.[10] Shortly thereafter, $2.4 million in

1. 2009 U.S. Dist. LEXIS 81173 (S.D.N.Y Sept. 8, 2009) [hereinafter *CSL Australia*].
2. *Id.* at *22.
3. *Id.* at *12.
4. *Id.* at *13–14.
5. *Id.* at *12.
6. *Id.* at *17–18.
7. *CSA Australia*, at *22.
8. *Id.* at *2.
9. *Id.*

electronic transfer funds belonging to Britannia's foreign subsidiary, Britannia A/S, was restrained pursuant to the attachment order.[11] CSL then filed an amended complaint, naming Britannia A/S and Britannia Bulk PLC ("Bulk") as additional alter-ego defendants.[12]

On January 10, 2009, CSL obtained an arbitration award in the amount of $1.037 million against Britannia.[13] However, Britannia A/S had filed for bankruptcy in Denmark on November 20, 2008, and a trustee had been appointed to manage its estate.[14] On January 30, 2009, the Bankruptcy Court for the Southern District of New York acknowledged Britannia A/S's foreign bankruptcy as a foreign main proceeding, invoking the U.S. Bankruptcy Code's automatic stay provision.[15] The amount of funds restrained under the maritime attachment was significantly higher than CSL's arbitration award, so both parties consented to amending the attachment, thereby reducing the amount to $1.008 million.[16] The court subsequently ordered the more than $1.3 million of oversecurity transferred to the Trustee of Britannia A/S's bankruptcy proceeding.[17]

Britannia A/S and its Trustee in bankruptcy filed a motion to vacate the Rule B attachment, so the remaining attached funds could be turned over to the Trustee of the Danish bankruptcy proceedings and become part of Britannia A/S's estate.[18] Specifically, Britannia A/S contended that (1) the recognition of its foreign bankruptcy as a foreign main proceeding under Chapter 15 of the U.S. Bankruptcy Code amounted to a statutory bar to the ongoing attachment of the $1.008 million, and (2) the court should extend comity to the parallel bankruptcy proceeding in Denmark, in which all pre-bankruptcy attachments become nullified upon filing.[19] CSL opposed Britannia A/S's motion and argued that the Bankruptcy Court should lift the automatic stay, thereby providing CSL with the ability to pursue its alter ego claims against Britannia A/S and Bulk and to satisfy its arbitration award against Britannia.[20]

---

10. *Id.*

11. *Id.* Despite the fact that A/S was not a named defendant at the time the funds were restrained, CSL argued that the electronic fund transfers were for the benefit of Britannia. *Id.* at *2–3.

12. *Id.* at *2–3. CSL argued that Bulk and A/S were merely alter egos of Britannia, and their operations were intertwined to the point where they were separate companies in name only. *Id.* at *3.

13. *CSA Australia*, at *4.

14. *Id.* Bulk initiated bankruptcy proceedings in its home jurisdiction of London on Oct. 31, 2008. *Id.*

15. *Id. See In re* Britannia Bulkers A/S, 2009 Bankr. LEXIS 2648 (Bankr. S.D.N.Y. 2009).

16. *Id.* at 5–6.

17. *Id.*

18. *Id.* at *6.

19. *CSA Australia*, at *9.

20. *Id.* at *6.

III. Applicable Law

A. Standard of Review

Maritime attachments are used to obtain personal jurisdiction of a defendant in U.S. district courts through his property and to guarantee compensation for any judgment in favor of a plaintiff.[21] When a defendant moves to vacate a Rule B attachment, the plaintiff bears the burden of showing that certain procedural requirements were adhered to in the issuance of the attachment, and (1) it has a valid prima facie admiralty claim against the defendant; (2) the defendant cannot be found within the district; (3) the defendant's property may be found within the district; and (4) there is no statutory or maritime law bar to the attachment.[22] The defendant is able to challenge the various possible deficiencies surrounding the attachment, including the complaint, the arrest, and the amount of security demanded.[23] Furthermore, district judges are given wide latitude to fashion equitable remedies insofar as the circumstances require.[24]

B. International Comity

Comity is the recognition that one nation gives to the "legislative, executive or judicial acts of other nations" within its own jurisdiction while cognizant of such factors as international duty and convenience and the rights of its own citizens.[25] In the context of foreign bankruptcy proceedings, the Second Circuit has continually stressed the need to defer to such proceedings.[26] By declining to adjudicate creditor claims subject to contemporaneous proceedings abroad, the Second Circuit seeks to assemble all such claims into a single forum to ensure the efficient and equitable distribution of the debtor's assets.[27] This presumption of comity is further supported by Chapter 15 of the U.S. Bankruptcy Code, which governs cross-border solvencies.[28] Upon such a matter being classified as a foreign main proceeding, Chapter 15 specifically encourages courts to adjudicate it in a manner consistent with principles of comity and international cooperation.[29] While the party asserting international comity bears the burden of establishing comity, the ultimate decision of whether or not to grant it lies in the sound discretion of the court.[30] However, courts should extend comity to foreign bankruptcy proceedings

21. *Id.* at *7 (citing Seawind Compania, S.A. v. Crescent Line, Inc., 320 F.2d 580, 581–82 (2d Cir. 1963)).

22. *Id.* at *7–8 (citing Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd., 460 F.3d 434, 445 (2d Cir. 2006)).

23. *Id.* at *8 (citing FED. R. CIV. P SUPP. RULE E(4)(F), advisory committee's note).

24. *CSA Australia* (citing Greenwich Marine, Inc. v. S.S. Alexandra, 339 F.2d 901, 905 (2d Cir. 1965)).

25. *Id.* at *9 (quoting Hilton v. Guyot, 159 U.S. 113, 164, 16 S. Ct. 139, 40 L. Ed. 85 (1895)).

26. *Id.* at *9–10. *See* Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B., 825 F.2d 452, 458 (2d Cir. 1985).

27. *Id.* at *10. *See* JP Morgan Chase Bank v. Altos Hornos de Mexico S.A. de C.V., 412 F.3d 418, 424 (2d Cir. 2005).

28. *Id.* at *11 (citing In re Atlas Shipping A/S, 2009 Bankr. LEXIS 893, at *9–10 (Bankr. S.D.N.Y. Apr. 27, 2009)).

29. *Id.* at *11–12 (citing In re Atlas Shipping A/S, 2009 Bankr. LEXIS 893, at *9–10 (Bankr. S.D.N.Y. Apr. 27, 2009)).

30. *CSA Australia*, at *11 (citing Maersk, Inc. v. Neewra, Inc., 2008 U.S. Dist. LEXIS 37209, at *4 (S.D.N.Y. May 6, 2008)).

only in situations where (1) the proceedings are consistent with the laws and public policy of the United States,[31] and (2) the proceedings are procedurally fair.[32]

IV. Discussion

A. Danish Bankruptcy Proceedings Are Consistent With U.S. Law and Policy and Are Procedurally Fair

The court determined that Danish bankruptcy proceedings are procedurally fair and do not violate U.S. law or policy.[33] Both systems share the same underlying philosophy: the equality of distribution among creditors.[34] Similar to U.S. bankruptcy proceedings, a trustee is appointed to manage an insolvent's estate immediately upon filing for bankruptcy.[35] The duties of the trustee parallel U.S. bankruptcy procedures and include continuing the debtor's business operations, asset sales, investigating and approving claims against the estate, investigating voidable transactions, and assembling a distribution plan for the estate subject to Danish court approval.[36] Moreover, allowing the instant action to proceed would violate two tenets of Danish bankruptcy law: (1) the prohibition against unsecured creditors pursuing claims outside of the bankruptcy arena[37] and (2) the automatic dissolution of any and all pre-bankruptcy attachments.[38] The court noted that permitting CSL to proceed with the instant action and effectively allowing it to contravene explicit Danish prohibitions would flout principles of international comity.[39] The Danish proceedings were fair and consistent with U.S. law and were, therefore, eligible for considerations of comity.

B. The Reasoning of *In re Atlas* Is Persuasive

The Bankruptcy Court for the Southern District of New York recently invoked international comity in a remarkably similar case, *In re Atlas*.[40] The court vacated Rule B attachments against Atlas Shipping and ordered the funds transferred to Atlas's estate in Denmark.[41] The bankruptcy court extended comity and voided the pre-bankruptcy attachments, pursuant to Danish law, to enable the foreign bankruptcy proceedings to serve as the sole forum in which

31. *Id.* at *10–11 (citing Cunard S.S. Co. v. Salen Reefer Servs. AB, 773 F.2d 452, 457 (2d Cir. 1985)).

32. *Id.* at *11 (citing *Altos Hornos*, 412 F.3d at 424).

33. *Id.* at *12.

34. *Id.*

35. *Id.* at *12–13.

36. *CSA Australia*, at *13.

37. *Id.*

38. *Id.* at *13–14.

39. *Id.* at *14.

40. *In re Atlas,* 2009 Bankr. LEXIS 893 (S.D.N.Y. Apr. 27, 2009).

41. *CSL Australia*, at *15 (citing *In re Atlas,* 2009 Bankr. LEXIS 893, at *9).

creditors could file their claims against Atlas.[42] The bankruptcy court was also persuaded that foreign creditors would not be prejudiced in asserting their claims in Denmark, because the Danish proceedings do not distinguish between foreign and domestic creditors in the distribution of the estate.[43]

The court, in the present case, observed that many of the same facts that convinced the bankruptcy court to grant comity in *In re Atlas* were present here.[44] Both parties were foreign claimants, and the only basis for jurisdiction was the garnishment of the electronic fund transfers passing through New York banks.[45] Furthermore, there was no evidence that CSL would be unfairly prejudiced in attempting to assert its alter ego claim and enforce the arbitration award in Denmark.[46] CSL attempted to distinguish the case from *In re Atlas* by arguing that the Danish court would likely decline to exercise jurisdiction over Britannia and Bulk based on its alter ego theory.[47] CSL believed the only venue in which it would be able to pursue its claim without prejudice was the Southern District of New York, which had personal jurisdiction over each of the defendants.[48] The court was not persuaded by CSL's argument and concluded that the Danish court was arguably the ideal forum for CSL to bring its alter ego claim and enforce its judgment against Britannia A/S's funds.[49]

C. The "*Koreag* Exception" Is Inapplicable, Because There Are No Bona Fide Questions Regarding the Ownership of the Restrained Funds

CSL tried to cast doubt on the true ownership of the restrained funds in an attempt to qualify for the "*Koreag* exception."[50] In *In re Koreag*,[51] Refco deposited U.S. currency into Mebco's bank account to exchange the funds for foreign currency.[52] Instead of exchanging the funds, Mebco filed for bankruptcy, and Refco filed suit, claiming ownership of the funds.[53] The appointed liquidator in Mebco's foreign bankruptcy proceeding convinced the District Court to dismiss the case in the interest of international comity.[54] The Second Circuit vacated the ruling and created a limited exception to comity, which gave U.S. courts the capacity to

42. *Id.* at *15–16 (citing *In re Atlas,* 2009 Bankr. LEXIS 893, at *20).

43. *Id.* at *16 (citing *In re Atlas,* 2009 Bankr. LEXIS 893, at *36).

44. *Id.*

45. *Id.*

46. *Id.*

47. *CSA Australia*, at *17.

48. *Id.*

49. *Id.* at 17–18.

50. *Id.* at 18–19.

51. Koreag, Controle et Revision S.A. v. Refco F/X Assocs., Inc., 961 F.2d 341, 348 (2d Cir. 1992) [hereinafter *In re Koreag*].

52. *CSL Australia*, 2009 U.S. Dist. LEXIS 81173, at *19 (citing *In re Koreag*, 961 F.2d at *344–45).

53. *Id.* at *19 (citing *In re Koreag*, 961 F.2d at *344–46).

54. *Id.* at *19–20 (citing *In re Koreag*, 961 F.2d at *346–47).

resolve bona fide questions of property ownership without deferring to contemporaneous foreign bankruptcy proceedings.[55] The Second Circuit believed that adjudicating valid ownership disputes did not raise the same policy considerations that justify extending comity to foreign bankruptcy proceedings, because the claimant was asserting his rights as the owner of the currency.[56]

The court, in the present case, viewed CSL's attempt to invoke the "*Koreag* exception" as disingenuous and a "thinly veiled attempt to extract partial payment from the debtor . . . outside a foreign bankruptcy proceeding."[57] Unlike Refco, CSL did not claim to be the true owner of the attached funds, and neither the defendants nor any third parties had disputed Britannia A/S's ownership.[58] Furthermore, CSL's argument was undermined by the fact it failed to raise the issue of ownership when the court ordered the oversecurity transferred to Britannia A/S's estate.[59] The court concluded that because CSL was asserting its rights as a bankruptcy creditor, the "*Koreag* exception" did not apply.[60]

V. Conclusion

The district court exercised its discretion by vacating the maritime attachment order used by CSL to restrain Britannia A/S's funds. Rather than attacking the order on substantive or procedural grounds, Britannia A/S convinced the court to vacate the order and dismiss the case in the interests of international comity. Pursuant to Second Circuit case law, the court deferred to Britannia A/S's parallel foreign bankruptcy proceedings upon finding that those proceedings were fair and consistent with laws of the United States, and that CSL would not be prejudiced in pursuing its claim in Denmark. The Rule B attachment was the court's sole basis for jurisdiction, so the case was dismissed.

Brian M. Andrews

---

55. *Id.* at *20 (citing *In re Koreag*, 961 F.2d at *349).

56. *Id.*

57. *Id.* at *21 (quoting *Altos Hornos*, 412 F.3d at 427).

58. *CSA Australia,* at *21.

59. *Id.* at *21–22.

60. *Id.* at *21.

LBA International Ltd. v. C E Consulting LLC

2010 WL 305355 (S.D.N.Y. Jan. 26, 2010)

Although 28 U.S.C. § 1332 does not expand diversity jurisdiction and is not applicable in cases where an alien and a permanent resident alien are parties, Federal Rules of Civil Procedure 19 (Fed. R. Civ. P.) allowed this court to dismiss a non-diverse party to preserve diversity of citizenship.

I. Holding

In *LBA International Ltd. v. C E Consulting LLC*,[1] the U.S. District Court for the Southern District of New York evaluated plaintiff's motion for summary judgment and, sua sponte, raised a question whether the court had subject matter jurisdiction.[2] Both LBA International Ltd. (LBA), plaintiff, and C E Consulting LLC ("C E Consulting"),[3] defendant, are aliens.[4] Under 28 U.S.C. § 1332, the parties do not have diversity of citizenship, and the court may dismiss the action for lack of subject matter jurisdiction.[5]

Upon review, the court chose to preserve the instant action by applying Fed. R. Civ. P. 19 and dismissed C E Consulting.[6] The court determined that C E Consulting was a dispensable, non-diverse defendant.[7] The court held that LBA, the alien plaintiff, and Patricia Burns ("Burns"), a New York defendant, satisfied diversity jurisdiction and allowed LBA's summary judgment motion to proceed.[8]

---

1. 2010 WL 305355 (S.D.N.Y. Jan. 26, 2010) [hereinafter *LBA Int'l*].
2. *Id.* at *1.
3. *Id.* at *1 & n.1 (The correct spelling of defendant is "C E Consulting LLC," not "C.E. Consulting LLC.").
4. *Id.* at *1.
5. 28 U.S.C. § 1332(a) (2005) which states in its entirety:

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—
>
> 1. citizens of different States;
> 2. citizens of a State and citizens or subjects of a foreign state;
> 3. citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
> 4. a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.
>
> For purposes of this section, § 1335, and § 1441, an alien admitted to the United States for permanent residence shall be deemed a citizens of the state in which such alien is domiciled. (Emphasis added.).

6. *LBA Int'l*, at *4.
7. *Id.*
8. *Id.*

II. Facts and Procedural History

LBA was incorporated in the United Kingdom.[9] C E Consulting was a limited liability company whose citizenship is determined by its members.[10] Paul Burns, recently deceased, was the company's only member and was both a citizen of the United Kingdom and a permanent resident of New York State.[11] Burns was an individual defendant with New York State citizenship.[12] LBA brought a breach of contract claim in the United States against C E Consulting and Burns for the sale and purchase of body armor.[13] LBA sought a judgment of $265,119.10, including the cost of the body armor, which C E Consulting and Burns allegedly owed, plus interest and costs allowed by law.[14]

On October 20, 2009, LBA moved for summary judgment, the instant motion.[15] C E Consulting and Burns had not yet opposed.[16] When LBA's motion was reviewed, a question arose regarding the court's subject matter jurisdiction, as both LBA and C E Consulting were U.K. citizens, and, therefore, non-diverse parties, which is in violation of 28 U.S.C. § 1332.[17] The court issued an order to show cause, seeking an explanation from LBA as to whether the court should dismiss the suit for lack of subject matter jurisdiction.[18] LBA answered with a memorandum of law in response to the court's order to show cause dated January 11, 2010 ("Response").[19] On January 26, 2010, Judge Scheindlin delivered the memorandum opinion in regard to the parties' diversity of citizenship and the court's subject matter jurisdiction.[20]

III. The Court's Analysis

A. Diversity Jurisdiction Under 28 U.S.C. § 1332

It is stated in 28 U.S.C. § 1332 that federal district courts have jurisdiction over civil cases between citizens of different states or citizens of a state and citizens or subjects of a foreign state, and requires parties to have complete diversity.[21] In the instant action, both plaintiff LBA and defendant C E Consulting were citizens of the United Kingdom and were non-diverse parties.[22] In its Response, LBA argued that the parties were diverse, claiming that C E Consulting's per-

9. *Id.* at *1.
10. *Id.*
11. *Id.*
12. *LBA Int'l*, at *1.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at *1–2.
18. *LBA Int'l*, at*1.
19. *Id.*
20. *Id.*
21. 28 U.S.C. § 1332(a) (2005).
22. *LBA Int'l*, at *1.

manent residency status in New York State satisfied § 1332's diverse citizenship requirements.[23] LBA cited the last sentence of § 1332(a), which states, "[A]n alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled."[24] Paul Burns was an alien, was admitted in the United States as a permanent resident, and was domiciled in New York State.[25] LBA interpreted this clause to mean that Paul Burns could be "deemed a citizen" of New York State under § 1332(a).[26] Further, if Paul Burns was a citizen of New York State, C E Consulting was also a citizen of New York State, because a limited liability company has the citizenship of its members.[27] According to LBA's interpretation of § 1332(a), its suit satisfied the requirement of complete diversity.[28]

The court found LBA's argument unpersuasive; it noted that LBA's interpretation of the statute was in discord with the majority interpretation within the Southern District of New York.[29] Citing legislative intent, the court addressed the 1988 amendment of 28 U.S.C. § 1332, when Congress added the above-quoted clause in order to remove diversity jurisdiction in suits where one party is a citizen of a state and the opposing party is a permanent resident domiciled in the same state.[30] Courts have consistently interpreted that particular phrase to mean no diversity exists in suits where, for example, a citizen of New York State is sued by a permanent resident domiciled in New York State.[31] However, courts have not agreed on whether § 1332 allows diversity jurisdiction in suits where a permanent resident alien domiciled in a state opposes another alien.[32]

Section 1332 is clear and unambiguous on its face and can be read to allow permanent resident aliens to bring suit in federal court against other aliens.[33] However, the plain meaning of this clause leads to an absurd result.[34] LBA's interpretation of § 1332 would subvert the rule of complete diversity, which has been applied consistently for over two hundred years.[35] The court held that § 1332, as revised in 1988, did not allow for diversity jurisdiction where a permanent resident alien opposes another alien.[36] It was not Congress's intent to expand diversity jurisdiction when it included a provision stating that permanent resident aliens are considered

23. *Id.* at *1–2.
24. *Id.* at *1.
25. *Id.*
26. *Id.*
27. *Id.*
28. *LBA Int'l*, at *1.
29. *Id.* at *2.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *LBA Int'l*, at *2.
35. *Id.*
36. *Id.* at *3.

citizens of the state in which they are domiciled.[37] Therefore, the court found that the suit lacked diversity of citizenship and subject matter jurisdiction.[38]

B. Dispensable Parties Under Fed. R. Civ. P. 19

Aside from its statutory interpretation argument regarding 28 U.S.C. § 1332, LBA argued that the court retained subject matter jurisdiction under Fed. R. Civ. P. 19. In its Response to the court's order to show cause, LBA argued that C E Consulting was a dispensable party and should be dismissed.[39] LBA argued that its suit would fulfill the requirement of complete diversity if C E Consulting were dropped from the case.[40] Federal Rules of Civil Procedure 19 allows the court to dismiss dispensable parties from litigation.[41] In the instant case, the court applied the two-step test described in Fed. R. Civ. P. 19 to determine whether C E Consulting was a dispensable party that could be dismissed to preserve LBA's suit.[42]

Under Fed. R. Civ. P. 19(a), the first step of the test was determining whether an absent party must be joined to the lawsuit, guided by two factors: (A) complete relief is unavailable if the party is absent, or (B) the absent party has an interest in the proceedings and may (i) be negatively impacted if not joined in the lawsuit or (ii) negatively impact another party if not joined in the lawsuit.[43] This court found that C E Consulting was not a necessary party to this lawsuit.[44] C E Consulting's only member, Paul Burns, was deceased.[45] The limited liability company did not conduct business and had no assets or employees.[46] Removing C E Consult-

37. *Id.* at *2–3.
38. *Id.* at *3.
39. *LBA Int'l*, at *3–4.
40. *Id.*
41. *Id.*
42. *Id.*
43. FED. R. CIV. P. 19.
44. *LBA Int'l*, at *4.
45. *Id.* at *3.
46. *Id.*

ing from the instant action would not have affected LBA's ability to seek relief, nor would it have affected C E Consulting or another party in the lawsuit negatively.[47]

After the court determined that C E Consulting was not a necessary party, the second step of the test under Fed. R. Civ. P. 19(b) was to determine whether the action should proceed without the absent party.[48] The court found that C E Consulting was dispensable, and that dismissal would not prejudice itself, Burns, or LBA.[49] C E Consulting no longer was conducting business, nor did it have any assets or employees.[50] Although the limited liability company had not been officially dissolved, there would have been no negative effect or prejudice arising out of a judgment rendered between LBA and Burns, the remaining parties to the suit.[51] Thus, the court dismissed C E Consulting from this lawsuit pursuant to Fed. R. Civ. P. 19, because it was not an indispensable or necessary party.[52] By dismissing C E Consulting, the court preserved LBA's action against Burns, as those remaining parties have complete diversity, and the court had subject matter jurisdiction over the matter.[53]

Upon dismissing C E Consulting, the court also vacated the December 3, 2008, default judgment against C E Consulting for the amount of $344,632.17.[54]

---

47. *Id.* at *4.

48. FED. R. CIV. P. 19(b), which states four factors that may be considered:

    1. the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
    2. the extent to which any prejudice could be lessened or avoided by:
        (A) protective provisions in the judgment;
        (B) shaping the relief; or
        (C) other measures;
    3. whether a judgment rendered in the person's absence would be adequate;
    4. and whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

    FRCP 19 uses these factors to determine whether the action should proceed.

49. *LBA Int'l*, 2010 WL 305355, at *4.

50. *Id.* at *3.

51. *Id.* at *3–4.

52. *Id.* at *4.

53. *Id.*

54. *Id.*

C. Discussion of Service of Summary Judgment Motion

The court found that LBA's summary judgment motion against Burns, the individual defendant, raised an issue of service.[55] Burns had not yet opposed the instant motion and claimed that she had not received LBA's summary judgment papers.[56] On October 21, 2009, LBA served Burns the motion papers, which were signed for by "Julio," said to be a front-desk clerk at Burns's apartment building.[57] Upon the court's order to show cause, dated January 19, 2010, Burns informed the court that she was unaware of a "Julio" and never received the papers.[58]

To resolve the summary judgment motion quickly, the court directed LBA to serve its motion papers, among other notices, by January 29, 2010.[59] LBA must have had to send the papers by messenger and must have obtained Burns's signature at the time of delivery.[60] Further, the court set dates for the parties to return opposing papers and replies and stated additional guidelines.[61]

IV. Conclusion

The U.S. District Court for the Southern District of New York held that § 1332 did not expand diversity jurisdiction and, therefore, did not grant diversity of citizenship in a suit between an alien and a permanent resident alien. The court ruled that LBA's lawsuit lacked complete diversity, because C E Consulting was a non-diverse party. Further, the court ruled that it did not have subject matter jurisdiction over the instant action and could have dismissed the case. However, under FRCP 19, the court dismissed C E Consulting, because it was a dispensable party, and ruled that the suit survived diversity jurisdiction with the remaining parties: LBA International, an alien, and Burns, a citizen of New York State. Burns had yet to oppose LBA's instant motion, so the summary judgment motion remained to be decided in a separate order.

Cathy Ng

---

55. *LBA Int'l*, at *4.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *LBA Int'l*, at *4.

Elsevier B.V. v. UnitedHealth Group, Inc.

2010 WL 150167 (S.D.N.Y. Jan. 14, 2010)

The court held that the Berne Convention is not a self-executing treaty, and as a result, the limited relief available to unregistered copyrights under § 412 of the Copyright Act of 1976 is not superseded by Article Five of the Berne Convention under Article VI of the United States Constitution.

I. Holding

In *Elsevier B.V. v. UnitedHealth Group, Inc.*,[1] the U.S. District Court for the Southern District of New York held that no preemption claim based on the Supremacy Clause existed, because the Berne Convention is not a self-executing treaty,[2] and the Berne Convention Implementation Act of 1988 was not intended as legislation to carry the provisions of the Convention into effect.[3]

II. Facts and Procedural History

Elsevier, a copyright owner and licensor of scientific journals and books that operates an on-line database, brought a claim against UnitedHealth Group, Inc., a subscriber to the database, and several others for violating the terms of the subscriber agreement and illegally accessing the database.[4] Elsevier claimed that UnitedHealth violated several copyrights, including a number of unregistered foreign copyrights.[5]

Elsevier argued that the conditions imposed by § 412 of the Copyright Act of 1976 ("Act")[6] conflict with the terms of article 5 of the Berne Convention for the Protection of Literary and Artistic Works ("Convention") in violation of the Supremacy Clause.[7] Specifically, § 412 permits the recovery of statutory damages and attorney's fees for a copyright infringement

---

1. 2010 WL 150167 (S.D.N.Y. Jan. 14, 2010).
2. *Id.* at *4.
3. *Id.* at *2.
4. *Id.* at *1.
5. *Id.*
6. 17 U.S.C. § 412 (2008), which states:

> [N]o award of statutory damages or of attorney's fees, as provided by sections 504 and 505, shall be made for (**1**) any infringement of copyright in an unpublished work commenced before the effective date of its registration; or (**2**) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work.0

7. U.S. CONST. art. VI, cl. 2, which declares:

> [The] Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

only if the copyright is registered in the United States.[8] Therefore, under § 412, a plaintiff claiming a violation of unregistered foreign copyrights is not entitled to recover statutory damages or attorney's fees.[9] Article 5 of the Convention, the allegedly superseding treaty provision, states that "the enjoyment and the exercise of [rights under the Convention] shall not be subject to any formality."[10] In this suit, Elsevier contended that the recovery of these damages and fees were integral to the exercise and enjoyment of foreign copyrights.[11]

III. Discussion

A. Grounds for Standing to Challenge the Constitutionality of a Statute

In order to challenge the constitutionality of a statute, the plaintiff must establish that he suffered personal injury.[12] The court held that Elsevier had standing to challenge the statute that prohibited its recovery of damages resulting from the infringement of unregistered copyrights.[13] Such restrictions on Elsevier's right to recovery were sufficient to demonstrate harm and support Elsevier's standing in a case where attorney's fees and statutory damages were sought.[14]

B. The Berne Convention

Article Five of the Convention refers to the "exercise and enjoyment" of copyrights without the burden of "any formality."[15] Elsevier maintained that the enjoyment and exercise of these rights were threatened by § 412 of the Act, which limits the damages available to unregistered foreign copyrights.[16] Specifically, Elsevier sought to determine whether an inability to recover statutory damages and attorney's fees interfered with the "exercise and enjoyment" of the unregistered copyrights.[17]

1. Treaties as Domestic Law

Before discussing whether such a conflict existed, the court examined whether the Convention held the power of domestic law to sustain a Supremacy Clause claim.[18] Treaties do not

8. *Elsevier*, 2010 WL 150167, at *1.

9. *Id.*

10. Berne Convention for the Protection of Literary and Artistic Works art. 5, Sept. 9, 1886, S. Treaty Doc. No. 99–27 (1986), 1161 U.N.T.S. 3 (declaring, "The enjoyment and the exercise of these rights shall not be subject to any formality.").

11. *Elsevier*, 2010 WL 150167, at *1.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Elsevier*, 2010 WL 150167, at *1.

18. *Id.* at *1–*4.

become domestic law unless they are self-executing, or Congress enacts the provisions through implementing statutes.[19] The court looked to the terms of the treaty, legislative intent, and judicial interpretation in order to determine whether the relevant treaty provisions had indeed been implemented into the domestic law of the United States.[20]

a. Self-Executing Treaties

Self-executing treaties operate independently, without the need for legislative action.[21] This occurs when the treaty itself states that it is self-executing, and the treaty provisions are ratified on that understanding.[22] If a treaty is not self-executing, Congress must enact a statute implementing the treaty provisions to bring them into effect as domestic law.[23]

i. Legislative History

When Congress adopted the Implementation Act of 1988 ("Implementation Act"),[24] it specifically declared that the Convention was not self-executing.[25] Additionally, Congress held that, pursuant to the Implementation Act, the United States was in conformity with the terms of the treaty, and any obligations under the Convention may be pursued only in conformity with domestic law.[26]

The Implementation Act amended individual statutes that were determined to be incompatible with the Convention's provisions.[27] According to the Senate Report,[28] § 412 was specifically discussed and held to be "not inconsistent" with the Convention's provision for the "enjoyment and exercise" of copyright.[29] In other words, Congress determined that the elimination of some forms of recovery under § 412 did not prevent meaningful relief for unregis-

---

19. *Id.* at *1.
20. *Id.* at *1–*4.
21. *Id.* at *1.
22. *Elsevier*, 2010 WL 150167, at *1.
23. *Id.*
24. The Berne Convention Implementation Act of 1988, Pub.L. 100-568, 102 Stat. 2853 (1988) (codified as amended in scattered sections of 17 U.S.C.).
25. *Elsevier*, 2010 WL 150167, at *2.
26. *Id.*
27. *Id.*
28. S. REP. NO. 100-352, at 14 (1988).
29. *Id.*

tered copyrights. Here, the court noted that it need not decide the issue of whether § 412 and article 5 were "not inconsistent," as asserted by the Senate.[30]

Congress passed the Implementation Act to ensure that U.S. copyright law fulfilled the country's obligations under the Berne Convention.[31] This supported the court's conclusion that the Berne Convention is not self-executing.[32]

ii. Judicial Interpretation

The US. District Court for the Southern District of New York has consistently decided that the Convention is not self-executing.[33] Although the Court of Appeals has not made a decision on whether the Convention is self-executing, several circuits have found that similar language in other treaties is indicative of a non-self-executing treaty.[34] For example, the International Convention for the Protection of Industrial Property,[35] a non-self-executing treaty,[36] contains two provisions analogous to those of the Convention: (1) a country that is a party to the Convention undertakes to adopt its terms in accordance with its constitution; and (2) upon ratification, the country is situated to bring the provisions into effect under its domestic law.[37]

iii. Text of the Berne Convention

The court held that the text of the treaty itself indicated that it is not self-executing.[38] Article 26 of the Convention states that a country that is party to the Convention will adopt the necessary measures to apply the terms of the Convention in accordance with its constitution.[39] Additionally, this section states that once the country is bound, it will be able to bring the terms into effect under its domestic law.[40]

---

30. *Elsevier*, 2010 WL 150167, at *2
31. *Id.*
32. *Id.*
33. *Id.*
34. *Elsevier*, 2010 WL 150167, at *3.
35. Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 305.
36. In re Rath, 402 F.3d 1207, 1210 (Fed. Cir. 2005) (holding that it is "plain" that the Paris Union is not self-executing based on the two provisions of Article 25).
37. Paris Convention for the Protection of Industrial Property art. 25, March 20, 1883, 21 U.S.T. 1583 828 U.N.T.S. 305.
38. *Elsevier*, 2010 WL 150167, at *3.
39. 17 U.S.C. § 412 (1976).
40. *Id.*

The court distinguished the text of the Convention from that of the General Inter-American Convention for Trademark and Commercial Protection,[41] a self-executing treaty[42] Elsevier used for support.[43] The court found that the provisions that outlined the procedure through which the treaty would come into force differed considerably.[44] Unlike the Convention, the General Inter-American Convention lacked any provision stipulating the need for subsequent legislation to enforce the provisions under domestic law.[45]

C. Congressional Consideration of Conflict

The court held that the Convention was not self-executing.[46] As a result, it cannot be used to sustain a Supremacy Clause claim under Article VI of the United States Constitution.[47] Therefore, the court did not decide the issue of whether the relief limitations for unregistered copyrights under § 412 of the act actually conflicted with the "enjoyment and exercise" of copyrights provision under article 5 of the Convention.[48]

IV. Conclusion

The court held that the Convention was not a self-executing treaty, and the applicable provisions were not amended by Congress.[49] Because the treaty does not have effect as domestic law, the Convention terms could not supersede the Act, which limits the recovery of damages and attorney's fees for holders of unregistered copyrights.[50] Unregistered foreign copyrights are not afforded the right to statutory damages or attorney's fees.[51]

Cecilia Stacom

---

41. General Inter-American Convention for Trademark and Commercial Protection, Feb. 20, 1929, 46 Stat. 2907 (1929).
42. *See* Bacardi Corp. of Am. v. Domenech, 311 U.S. 150, 160–61 (1940) (finding that Article 35 provided that the treaty would have "force of law" upon ratification in States where international treaties "possess such character").
43. *Elsevier*, 2010 WL 150167, at *3.
44. *Id.*
45. *Id.*
46. *Id.* at *4.
47. *Id.*
48. *Id.*
49. *Elsevier*, 2010 /WL 150167, at *2, *4.
50. *Id.*
51. *Id.*

Ancile Investment Co. Ltd. v. Archer Daniels Midland Co.

2009 WL 3049604 (S.D.N.Y. Sept. 23, 2009)

The court denied defendant's motion to dismiss for forum non conveniens, holding that plaintiff should be given deference in its forum choice, and defendant failed to present facts that strongly supported dismissal. Finding it unnecessary, the court denied both the plaintiff's request for a 56(f) continuance and the defendant's motion to strike the declaration of plaintiff's expert on Brazilian law.

I. Holding

In *Ancile Investment Co. Ltd. v. Archer Daniels Midland Co.*,[1] the U.S. District Court for the Southern District of New York denied the defendant's motion to dismiss plaintiff's complaint on forum non conveniens grounds.[2] The court held that while defendant's choice of Brazil would be an adequate forum, this fact was not enough to warrant dismissing the case in New York.[3] The court maintained that deference should be shown to plaintiff's choice of forum.[4] The court then balanced the necessary factors in deciding whether to adjudicate the case in New York and held that defendant failed to establish a sufficient reason to dismiss plaintiff's forum.[5]

The court further held that plaintiff's cross-motion for summary judgment must be denied, because there were genuine issues of material fact that must be determined in discovery.[6] Since the motion for summary judgment was denied, the court found no reason to strike the declaration of plaintiff's expert on Brazilian law or grant the Federal Rules of Civil Procedure 56(f) continuance for additional limited discovery.[7] Instead, the court held that both parties should move forward with discovery in accordance with the Federal Rules of Civil Procedure.[8]

II. Facts

In July 2007, Ancile Investment Co. Ltd. ("Ancile") entered into a contract with Solo Vivo Industria e Comercio Fertilizantes Ltda. ("Solo Vivo").[9] Under the credit facility agreement between the two companies, Ancile was to provide short-term loans to Solo Vivo so that

---

1. 2009 WL 3049604 (S.D.N.Y. Sept. 23, 2009) [hereinafter *Ancile*].
2. *Id.* at *1.
3. *Id.* at *3.
4. *Id.*
5. *Id.*
6. *Id.* at *9.
7. *Ancile*, at *10.
8. *Id.*
9. *Id.* at *1.

Solo Vivo could import materials to make fertilizer.[10] In return, Solo Vivo would give Ancile security interests in the fertilizer materials.[11]

Also in 2007, Solo Vivo entered into a series of contracts with Archer Daniels Midland Co. (ADM), under which Solo Vivo was to purchase fertilizer material from ADM.[12] Ancile was to finance Solo Vivo's purchases by providing 83.33 percent of the invoice price and would receive a security interest in the materials.[13] Once Ancile paid the amount due, ADM would endorse and return a bill of lading to Ancile's representatives in Brazil.[14]

In August 2007, Solo Vivo and ADM contracted for two more shipments of fertilizer materials.[15] These agreements were to operate under the same guidelines detailed in the prior contracts. The first was a shipment of muriate of potash, which was held under Bill of Lading No. 10.[16] Ancile wired $1,606,545.11, which was over $600,000 more than its 83.33 percent financing agreement, to an ADM account located at a Citibank in New York.[17] ADM never repaid the surplus and never endorsed this bill. As a result, Ancile had no security interest in the material.[18] Solo Vivo used the fertilizer material without ever repaying Ancile.[19]

The second contract was for a shipment of monoammonium phosphate, which was held under Bill of Lading No. PGU-04.[20] Ancile paid 83.33 percent of the invoiced amount, but ADM also failed to endorse this contract.[21] Solo Vivo subsequently sold some of the material and put the rest in a Brazilian warehouse owned by ADM, leaving Ancile without any interest in the material or the money.[22]

Ancile sued ADM in New York, seeking reimbursement of funds for overpayment and for failure to endorse bills of lading.[23] Ancile made eight specific claims.[24] Two claims fell under Brazilian law, and the remaining six claims fell under New York law.[25] ADM moved to dismiss Ancile's claims for forum non conveniens.[26] At issue in this motion for dismissal was whether the chosen forum, the Southern District of New York, was so inconvenient as to warrant dis-

10. *Id.*
11. *Id.*
12. *Id.*
13. *Ancile*, at *1.
14. *Id.*
15. *Id.* at *2.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Ancile*, at *2.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at *1.
24. *Id.* at *2.
25. *Ancile*, at *3.
26. *Id.* at *1.

missal.[27] ADM contended that because Brazilian employees handled the order summaries and bills of lading in Brazil, and since most of the witnesses and documents were in Brazil, the case should be heard there.[28] Ancile claimed that it was not the acts of failing to return the surplus funds or to endorse the Bills of Lading, but rather the decision to act in that way that led to Ancile's injuries, and because all of the decisions were made in New York, the forum was appropriate.[29] Judge Paul A. Crotty delivered the opinion of the court.

III. The Court's Analysis

A. Denial of Motion to Dismiss for Forum non Conveniens

When it decides whether to dismiss a claim based on forum non conveniens, the court examines "(1) the degree of deference to be afforded to the plaintiff's choice of forum; (2) whether there is an adequate alternative forum for adjudicating the dispute; and (3) whether the balance of private and public interests tips in favor of adjudication in one forum or the other."[30] Plaintiffs are given deference in their forum decisions, and unless these factors weigh strongly in defendant's favor, the claim should not be dismissed.[31]

1. The Degree of Deference to Be Afforded to the Plaintiff's Choice of Forum

The court listed six factors to examine in determining the degree of deference a plaintiff should receive in its choice of forum:[32]

> (1) whether the plaintiff is a U.S. citizen; (2) the chosen forum's convenience for the plaintiff; (3) the availability of witnesses in the chosen forum; (4) the defendant's amenability to suit in the plaintiff's chosen forum; (5) the availability of appropriate legal assistance in the chosen forum; and (6) evidence of forum shopping on the part of the plaintiff.[33]

---

27. *Id.* at *3.
28. *Id.* at *6.
29. *Id.* at *3.
30. *Id.* at *3 (citing Norex Petroleum Ltd. v. Access Indus. Inc., 416 F.3d 146, 153 (2d Cir. 2005)).
31. *Ancile*, at *3 (citing Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947)).
32. *Id.* at *4.
33. *Id.* (citing BFI Group Divino Corp. v. JSC Russian Aluminum, 298 Fed. Appx. 87, 90 (2d Cir. 2008)).

First, Ancile is a Cayman Islands corporation with its parent company in Switzerland.[34] The court noted that deference was not awarded only when a claim was brought in the plaintiff's home district.[35] The court determined that while slightly less deference may be given to Ancile's chosen forum, the claim should not be automatically dismissed.[36]

Second, the court examined the convenience of litigation in New York. ADM argued that litigation in New York would be inconvenient for all parties.[37] The court held that not only was ADM based in the United States, but also a forum's convenience was based on the perspective of the plaintiff.[38] Brazil was no more convenient a forum for the Cayman Islands entity than New York would be, so the court found that Ancile's decision should be given more deference under this element.[39]

Third, ADM argued that all of the acts in question, as well as most of the witnesses and documents, were located in Brazil.[40] Ancile maintained that the harmful decisions made by ADM's management took place in New York, and the surplus funds were never in Brazil.[41] The court acknowledged both arguments but agreed with Ancile and found that both parties would have to call witnesses and transfer documents from multiple jurisdictions.[42] Making witnesses available for trial would not be eased by adjudicating the case in Brazil.[43] Deference, then, was given to plaintiff's choice of forum.

Fourth, ADM claimed that it was amenable to suit in Brazil but not in New York.[44] The court immediately rejected this argument, stating that, because ADM was a corporation with its headquarters in America, and because it did business in the Southern District of New York, it could not justify a claim that it was not amenable to suit there.[45]

Fifth, the court found that, because all parties had "highly competent" New York law firms representing their interests, appropriate legal assistance was available, so deference should be given to Ancile's choice of forum.[46]

---

34. *Id.* at *1.
35. *Id.* at *4 (citing Iragorri v. United Techs. Corp., 274 F.3d 65, 73 (2d Cir. 2001)).
36. *Id.*
37. *Ancile*, at *4.
38. *Id.*
39. *Id.*
40. *Id.* at *5.
41. *Id.*
42. *Id.*
43. *Ancile*, at *5.
44. *Id.*
45. *Id.*
46. *Id.* at *6.

Finally, ADM argued that Ancile had three other related proceedings in Brazil, so its sudden and random venue choice in this action must indicate that Ancile was engaged in forum shopping.[47] ADM also argued that Ancile was attempting to recover a windfall by bringing claims in multiple courts.[48] The court rejected these arguments, as well holding that there could be no windfall, because the value of Ancile's overpayment was not disputed, and ADM, not Ancile, would have the "home court advantage" in New York.[49] Weighing each of these six factors in favor of the plaintiff, the court held that great deference should be given to Ancile's choice of forum.[50]

2. Whether There Is an Adequate Alternative Forum for Adjudicating the Dispute

Courts have held that an alternative forum is adequate if the defendants may be subject to service there, the forum allows litigation of the subject matter in question, and the forum is not unsatisfactory for any other reason.[51] In this case, ADM had the burden of showing an adequate alternative forum.[52] While it was noted that Ancile agreed Brazil would be an adequate alternative forum, the court found that the existence of an alternative forum alone did not make the current forum inadequate.[53] Here, too, Ancile was afforded deference in its decision.

3. Whether the Balance of Private and Public Interests Tips in Favor of Adjudication in One Forum or the Other

The court must consider and compare the hardships ADM would suffer as a result of the action in New York against the hardships Ancile would suffer from a dismissal of the action here.[54] Ancile's forum should be upheld unless the potential hardships *"strongly* justify a transfer."[55] Here, the court must examine both public- and private-interest factors to determine whether transfer is justified.

In considering private-interest factors, the court must examine the ease of access to evidence, getting witnesses to the court, the cost of travel and accommodations for witnesses, and any other problems that may make the trial longer and more expensive.[56] ADM argued that witnesses cannot be forced to testify in New York, and the cost to keep available witnesses would be too great.[57] The court disagreed with this argument, finding that given today's society and the number of jurisdictions involved in this suit, evidence could be transferred easily from

---

47. *Id.*
48. *Id.*
49. *Ancile*, at *6.
50. *Id.* at *4.
51. *Id.* at *6 (citing BFI Group, 232 Fed. Appx. at 91).
52. *Id.* (citing Usha (India) Ltd. v. Honeywell Int'l. Inc., 421 F.3d 129, 135 (2d Cir. 2005)).
53. *Id.* at *7.
54. *Id.*
55. *Ancile*, at *7 (citing Manu. Int'l. S.A. v. Avon Prods., Inc. 641 F.2d 62, 65 (2d Cir. 1981)).
56. *Id.* (citing Scottish Air Int'l v. British Caledonian Group, PLC, 81 F.3d 1224, 1232 (2d Cir. 1996)).
57. *Id.*

one place to another, and expenses for travel and accommodations would be high regardless of the jurisdiction.[58]

The court then considered the public-interest factors, including court congestion, unfairness to those who must participate in jury duty, the interest in having local issues decided locally, and the attempt to avoid conflicts of law in deciding foreign law issues.[59] Finding that New York had an interest in this action because ADM is a U.S. corporation, and it would not be unduly burdensome to apply Brazilian law, the court rejected ADM's claims, holding that the public-interest factors did not weigh heavily in favor of moving the dispute.[60]

The court balanced all of the necessary factors in light of the facts of the case and awarded deference to Ancile when it found there was no sufficient reason to dismiss the complaint for forum non conveniens.[61]

B. Denial of Cross-Motion for Summary Judgment on the Issue of Liability

The court also dismissed Ancile's cross-motion for summary judgment without prejudice, which allowed for the possibility of renewal at the close of discovery, pursuant to the Federal Rules of Civil Procedure.[62]

Courts generally have held that summary judgment will be granted when there are no issues of material fact that could change the outcome of the case.[63] The moving party, in this case Ancile, must present specific evidence that there is no issue of material fact.[64] Here, the court noted that while Ancile came forward with specific evidence that supported its motion, ADM rebutted that evidence with its own claims.[65] The court further noted that not only was the record incomplete, neither party had started the discovery process.[66] Therefore, the court held that summary judgment must be denied for lack of evidentiary support.[67]

The court also denied ADM's motions to strike the declaration of plaintiff's expert on Brazilian law and for a Rule 56(f) continuance.[68] The court did not use the declaration in support of its summary judgment denial, and a formal discovery period pursuant to the Federal Rules of Civil Procedure would ensue, so the court did not have reason to grant either of these motions.[69]

---

58. *Id.*

59. *Id.* at *8 (citing Aguinda v. Rexaco, Inc., 303 F.3d 470, 480 (2d Cir. 2002)).

60. *Id.*

61. *Ancile*, at *9.

62. *Id.* at *1

63. *Id.* at *9 (citing Federeal Rules of Civil Procedures 56(c)).

64. *Id.* (citing Niagara Mohawk Power Corp. v. Jones Chem. Inc., 315 F.3d 171, 175 (2d Cir. 2003)).

65. *Id.*

66. *Id.*

67. *Ancile*, at *9.

68. *Id.* at *10.

69. *Id.*

IV. Conclusion

The court was correct in holding that the forum was proper for this action. The court evaluated and balanced a specific set of factors, which have been developed over years of international and domestic disputes in the United States. The court provided a detailed analysis of each issue and held, giving deference to the plaintiff's choice of forum, that Ancile's choice was acceptable. While ADM's argument that the forum should be moved to Brazil, because all of the events and witnesses were located there, did have merit, the court correctly applied the law of forum non conveniens to this particular set of facts. A plaintiff chooses the forum. Only in extreme cases, where there is evidence of forum shopping or strong evidence in support of transfer, should the forum be held invalid. In this case, none of the parties involved in the action was based in Brazil, and many of the factors that led to Ancile's action took place outside of Brazil. Brazil was considered a proper forum, but that did not make New York an improper forum; therefore, ADM failed to establish a sufficient reason to dismiss the case for forum non conveniens.

Additionally, the court dismissed Ancile's motion for summary judgment for lack of evidentiary support without prejudice. Here, the court also correctly applied the law, because there were genuine issues of material fact as to defendant's liability. Moreover, since summary judgment was denied, it naturally followed that the motions to strike the declaration of plaintiff's expert on Brazilian law and the discovery request should be denied as well. Ancile would have the right, upon completion of discovery, to submit a summary judgment motion.

Courtney McManus

Walters v. People's Republic of China

2009 WL 4641810 (S.D.N.Y. Dec. 2, 2009)

The court held that under the Foreign Sovereign Immunities Act, the sovereign immunity exception applies to the property of a foreign state that is located in the United States.

I. Holding

In *Walters v. People's Republic of China*,[1] the U.S. District Court for the Southern District of New York adjudicated the plaintiffs' attempt to enforce a judgment against the People's Republic of China (PRC). The plaintiffs filed a restraining notice and subpoenas concerning assets owned by the PRC and held by New York branches of the Industrial and Commercial Bank of China, Ltd., Bank of China, Ltd., and China Construction Bank Corp ("Banks").[2] The Banks filed a motion to preclude the restraining notice and quash the subpoenas. They argued that the property at issue was located outside the United States[3] and, therefore, was not covered by the limited sovereign immunity exception of the Foreign Sovereign Immunities Act (FSIA).[4]

In granting the Banks' motion, the court agreed that the PRC property located outside the United States was immune from attachment and execution of a judgment.[5] The court reasoned that even though U.S. courts have the power to place a levy on the property of a foreign state where the foreign state is subject to the exception,[6] that power is limited to property located inside the United States.[7]

---

1. 2009 WL 4641810 (S.D.N.Y. Dec. 2, 2009).
2. *Id.* at *1.
3. *Id.*
4. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 (2000).
5. *Walters*, 2009 WL 4641810 at *2.
6. *See* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605(a)(2) (2008) which provides in its entirety:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

7. *Walters*, 2009 WL 4641810 at *2.

II. Facts and Procedural History

In December 1993, the plaintiffs, Mr. and Mrs. Walters, filed a products liability suit in the U.S. District Court for the Western District of Missouri. They named the PRC as one of the defendants after their 13-year-old son was killed as a result of an alleged manufacturing defect in an SKS semiautomatic rifle that was made in China.[8] The PRC raised sovereign immunity as a defense, but the court held that under the commercial activity exception of the FSIA, it had a limited jurisdiction over the PRC.[9] The court entered a default judgment against the PRC for $10 million in October 1996.[10]

In October 2009, after 13 years of unsuccessful attempts to collect the judgment, the plaintiffs served restraining notices and subpoenas on the Banks, which were believed to hold property of the PRC.[11] The plaintiffs demanded that the Banks produce any and all documentation that would disclose any property in which the PRC had an interest as well as refrain from transferring any such property.[12] The Banks filed a motion to vacate those orders, arguing that the property could not be restrained under the FSIA because it was not located in the United States and, therefore, was immune from attachment and execution.[13]

The plaintiffs agreed that the property they were seeking was outside the U.S. but claimed that it was not covered by the FSIA, and so it was not immune.[14] Also, the plaintiffs argued that the Banks lacked the standing to raise the sovereign immunity defense on the PRC's behalf.[15]

In November 2009, the PRC responded to the plaintiffs' action by sending a letter to the U.S. Department of State, expressing its strong belief that, as a sovereign state, it was protected from any attempt to exercise control over its property.[16]

---

8. *Id.* at *1.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Walters*, 2009 WL 4641810 at *1.
14. *Id.*
15. *Id.*
16. *Id.*

III. Discussion

A. Legal Standard

Under § 1602 of the FSIA, U.S. courts have limited jurisdiction over a foreign state in cases where the foreign state is participating in commercial activities.[17] Under 28 U.S.C. §§ 1610 and 1611, this exception applies to the full extent of a foreign state's commercial property,[18] which generally is not immune from attachment and execution of a judgment.[19] But the power of the U.S. courts to place a levy upon property of a foreign state is limited by the requirement that the property must be located in the United States.[20] Property located outside of the United States is not subject to the exception, and, therefore, is immune under the FSIA.[21]

B. Analysis

The court reiterated the lower court's position that the FSIA was the sole source of jurisdiction over the PRC, a foreign sovereign, in U.S. courts.[22] According to the FSIA, only property located in the United States is subject to the sovereign immunity exception.[23] The plaintiffs' position, which was indicated clearly in their statement as well as during the oral argument, was that they sought to enforce the judgment against the PRC's assets held by the Banks outside the United States.[24] That property fell outside the limited sovereign immunity exception, because it was not located within the United States.[25] Therefore, the court granted the Banks' motion to dismiss the restraining notices and to quash the subpoenas. The court

---

17. *See* Foreign Sovereign Immunity Act of 1976, 28 U.S.C. § 1602 (2008) (stating that foreign states are not immune from the jurisdiction of foreign courts when they are involved in commercial activities).

18. *See* Foreign Sovereign Immunity Act of 1976, 28 U.S.C. §§ 1610(a)(2)–11 (2008) (exempting the property in the United States of a foreign state from the immunity if such a property is or was used for the commercial activity upon which the claim was based); *see also* Foreign Sovereign Immunity Act of 1976, 28 U.S.C. § 1602 (2008) (empowering U.S. Courts to put a levy on the foreign sovereign's property for the satisfaction of judgment); *see also Walters*, 2009 WL 4641810 at *2 (citing Elliott Associates, L.P. v. Banco de la Nacion, No. 96 Civ. 7916, 2000 WL 1449862, at *3 (S.D.N.Y. Sep. 29, 2000)).

19. *Walters*, 2009 WL 4641810 at *2.

20. *Id.* (citing Kensington Intern. Ltd. V. Republic of Congo, 461 F.3d 238, 243 (2d Cir. 2006)).

21. *Id.* (citing Fidelity Partners, Inc. v. Philippine Export & Foreign Loan Guarantee Corp., 921 F. Supp. 1113, 1119 (S.D.N.Y. 1996)).

22. *Id.*

23. *Id.*

24. *Id.*

25. *Walters,* 2009 WL 4641810 at *2.

further observed that both the notices and the subpoenas were precluded, because the Second Circuit Court of Appeals requires courts to limit any "requests for discovery to correspond to the FSIA's substantive reach,"[26] meaning that, because the plaintiffs did not have a right to reach the property located outside the U.S., they lacked the power to request the production of documents related to that property.[27] Finally, the court noted that the Banks have standing to claim the sovereign immunity defense, because the PRC itself raised the affirmative defense in both the original action and the current case before the court.[28]

IV. Conclusion

The FSIA is the exclusive basis for U.S. courts exercising jurisdiction over a foreign state.[29] It governs all aspects of litigation against a foreign sovereign in the U.S. courts.[30] The plain language of the FSIA states that property that is located inside the United States and used for a commercial activity will not be immune from the attachment or execution of a judgment issued by the U.S. courts.[31] It is silent on the status of property located outside the United States, but the mere absence of a provision does not create another exception to the general rule of sovereign immunity.

Olga Shestova

26. *Id.*
27. *Id.* (citing EM Ltd. v. Republic of Argentina, 473 F.3d 463, 486 (2d Cir. 2007)).
28. *Id.*
29. *Id.* at *1.
30. *Id.*
31. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §1610(a)(2) (2008) (declaring that the property of a foreign state in the United States that is used for a commercial activity will not be immune).