

Protecting North America’s Past: The Current (and Ineffective) Laws Preventing the Illicit Trade of Mexican Pre-Columbian Antiquities and How We Can Improve Them^{*}

I. Introduction

We have a problem here in North America. A huge quantity of black-market goods are being smuggled across the border from Mexico into the United States—but they are not what you might think. The smuggled goods are not illegal narcotics, but Mexican pre-Columbian antiquities. The illicit trade of antiquities moves artifacts valued in the billions of dollars annually, making it the most valuable international criminal activity after the drug trade.¹ The United States and Mexico feel the cost of this illicit trade severely, and these two countries have been at the forefront of international efforts to curb smuggling activities and protect the irreplaceable pre-Columbian antiquities put at risk.² But as this Note endeavors to demonstrate, these efforts have not been adequate.

The reasons this problem exists are well explored.³ The United States is what is known as a “market nation”—a nation with many financial

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1. See Kevin F. Jowers, Comment, *International and National Legal Efforts to Protect Cultural Property: The 1970 UNESCO Convention, the United States, and Mexico*, 38 TEX. INT’L L.J. 145, 146 (2003) (explaining that outside of drug trafficking, the illegal trade of antiquities is as large as any international crime).

2. See *infra* subparts II(B)–(C) (discussing the efforts of Mexico and the United States to curb illegal smuggling of pre-Columbian antiquities). The term *pre-Columbian*, for the purposes of this Note, is defined as the period in history prior to the establishment of the Spanish culture in the National Territory of Mexico, Central America, South America, or the Caribbean Islands. The term *pre-Columbian antiquities* therefore references any object that is the product of a pre-Columbian Indian culture. These definitions are based on the definitions found in the 1972 Pre-Columbian Act, 19 U.S.C. § 2095 (2012), and Mexico’s 1972 Cultural Protection Act, Ley Federal Sobre Monumentos y Zonas Arqueológicas, Artísticas e Históricas [LMZAA], Diario Oficial de la Federación [DOF] 06-05-1972, últimas reformas 28-01-2015 [hereinafter Mexico’s 1972 Federal Declaration (Spanish)], translated in UNESCO, COLLECTION OF LEGISLATIVE TEXTS CONCERNING THE PROTECTION OF MOVABLE CULTURAL PROPERTY: MEXICO 1 (1987) [hereinafter MEXICO’S 1972 FEDERAL DECLARATION].

3. See, e.g., Jowers, *supra* note 1, at 146–48 (noting the two primary views of protection of cultural property—cultural internationalism and cultural nationalism—and explaining how these views factor into the fundamental dichotomy of “market nations” and “source nations” (internal quotation marks removed)); John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT’L L. 831, 832 (1986) (recognizing that when “the source nation is relatively poor and the market nation wealthy, an unrestricted market will encourage the net export of cultural property”).

resources and a high demand for antiquities and relics from other countries.⁴ Meanwhile, Mexico is the prototype of a “source nation”—a nation with an abundance of ruins, archaeological sites, and pre-Columbian antiquities, but lacking the financial resources necessary to protect and develop these cultural and historical treasures.⁵ This high demand on the United States’ side of the border creates a strong incentive for impoverished peoples in Mexico to collect and smuggle valuable pre-Columbian antiquities by any means necessary.⁶ And Mexico’s inability to adequately protect the ruins and historical sites only increases the severity of the problem by reducing the likelihood that looters and smugglers will face retribution for their acts.⁷

The theft and illegal trade of Mexican pre-Columbian antiquities harms both the United States and Mexico. It is obvious how Mexico is harmed—its cultural history is being actively stolen and sold piecemeal on the black market.⁸ Many of the artifacts stolen from Mexico come from historical sites and ruins that haven’t even been inventoried and officially discovered yet.⁹ Mexico is denied even the benefit of taxing this illicit trade, valued in the billions of dollars internationally.¹⁰ But the United States is also harmed. Much of the historical significance of a pre-Columbian artifact, such as a Mayan stela, lies in its relative geographic location, positioning, and other clues relative to its surroundings.¹¹ When the object is removed from its resting place without proper cataloging and recording, this historical significance is permanently lost, and we know a

4. See Merryman, *supra* note 3, at 832 (giving examples of market nations that include France, Germany, Japan, the Scandinavian nations, Switzerland, and the United States).

5. See *id.* (listing nations like Mexico, Egypt, Greece, and India as examples of source nations).

6. See Lisa J. Borodkin, Note, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 406 (1995) (stating that “there are strong incentives for citizens in artifact-rich countries to remove artifacts illegally,” including using the artifacts as a source of income and avoiding government interference with land development); Lawrence J. Persick, Comment, *The Continuing Development of United States Policy Concerning the International Movement of Cultural Property*, 4 DICK. J. INT’L L. 89, 91 (1985) (describing some of those involved in the illicit trade of antiquities as local peasants and farmers in need of money).

7. See 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, 670 (1992) (“The Mexican government has not been successful in providing the requisite protection or preservation, primarily because of inadequate financial resources.”).

8. See *id.* at 629 (explaining the significance of cultural property to source nations).

9. See 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, 237 (2005) (“The governments of [source] countries cannot stay abreast of the discoveries, let alone the smuggling.”).

10. See Jowers, *supra* note 1, at 146 (noting that the international illegal trade of antiquities involves billions of dollars each year).

11. See, e.g., Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 279 (1982) (explaining that knowledge of the source and placing of the stela is crucial to deciphering the text thereon).

little bit less about our past as a result of the theft. Additionally, the looters that find the artifacts and the smugglers that transport them are unlikely to be careful to preserve the artifacts in their original state. In many cases the thieves will cut the artifacts into pieces or deliberately deface them to conceal their value in order to export the artifacts without detection.¹² This destruction of irreplaceable historical and cultural relics deprives not only Mexico but all nations of the benefit that comes with a strong knowledge of our past.¹³ Fighting this illicit looting disrupts the delicate economy of Mexico and other source nations, forcing them to spend millions to protect these treasures and putting a strain on international relations between countries by creating disputes over cultural restitution.¹⁴

With the problem at hand, this Note suggests that the current laws and recourses available that protect and deter the theft of Mexican pre-Columbian antiquities and these artifacts' illegal import into the United States are ineffective at their goal of reducing these types of crime. Instead, a new policy is recommended that focuses on the active preservation of these antiquities before they are looted in the first place. This policy will rely primarily on educating the people of Mexico and the United States about the damage that this illicit trade causes and the penalties for those involved in this destruction. Specific groups of people will be targeted for this education, including people living in rural areas who may find or help transport stolen antiquities, border agents and tourists who may discover the antiquities as they are smuggled, museums and dealers who often serve as intentional or unintentional fences for these artifacts, and people involved in international transportation who may witness or take part in the trade.

Part II of this Note covers the current international agreements and laws in the United States and Mexico that attempt to address the illicit trade of Mexican pre-Columbian antiquities. These include the UNESCO Convention of 1970, the Cultural Property Implementation Act, the 1970 Treaty of Cooperation Between the United States and Mexico, Mexico's 1972 Federal Declaration of ownership over Mexican pre-Columbian

12. See, e.g., *id.* at 278 (reporting that stelae can be as tall as forty feet and as heavy as five tons and are thus "sawed, hacked, split apart with crowbars, or simply smashed into moveable pieces—before they are ready for the art market"); Borodkin, *supra* note 6, at 383 (explaining that antiquities traffickers will deface artifacts to make them less recognizable and therefore easier to smuggle).

13. See, e.g., Bator, *supra* note 11, at 278–79 (stating that the inscriptions on stelae are the primary source of historical knowledge of the Mayan culture, but in the artistic realm, they are valued less than the pictorial carvings and are often the parts that are cut off during the process of "thinning" the piece into moveable chunks).

14. Warring, *supra* note 9, at 243.

antiquities, and the National Stolen Property Act. Part III discusses why these attempts to correct the problem have been ineffective and outlines a possible remedial policy for both nations that focuses on education, as outlined in the previous paragraph. Part IV concludes.

II. The Current International Agreements and Laws in the United States and Mexico Protecting Mexican Pre-Columbian Antiquities

There are several legal systems in place designed to aid in the protection and recovery of Mexico's cultural artifacts and antiquities illegally imported into the United States. The UNESCO Convention of 1970 represented the first international agreement to attempt to find a solution to the problem of illicitly traded antiquities, and it shed light on the problem on the global stage.¹⁵ The United States and Mexico, recognizing the great deal of illicit trade already occurring between the two nations, ratified a bilateral treaty in the same year to prevent the destruction of antiquities and provide recourse for the return of these antiquities to Mexico.¹⁶ This treaty proved inadequate to solve the problem, which prompted the U.S. Legislature to pass the Pre-Columbian Act of 1972, strengthening import regulations at the border.¹⁷ Mexico also took action in 1972 by passing the Federal Declaration, effectively converting and vesting ownership of all Mexican pre-Columbian antiquities, discovered or not, to the Mexican Government.¹⁸ In 1983, the United States attempted to implement key elements of the 1970 UNESCO Convention in its federal law under the Cultural Property Implementation Act.¹⁹ Finally, a string of U.S. court cases began applying the National Stolen Property Act to illegally imported stolen artifacts when the source nation had adequate laws nationalizing ownership of those artifacts.²⁰ This jurisprudence, along with Mexico's 1972 Federal Declaration, now allows Mexico to bring an action under this act for the return of any Mexican pre-Columbian antiquity imported into the United States after 1972.²¹ These laws and agreements offer a diverse set of remedies and protections to Mexico, but, as discussed below, each suffers a major flaw—they do not effectively prevent the looting and destruction of the pre-Columbian antiquities they are designed to protect.

15. See *infra* subpart II(A).

16. See *infra* subpart II(C).

17. See *infra* subpart II(E).

18. See *infra* subpart II(D).

19. See *infra* subpart II(B).

20. See *infra* subpart II(F).

21. See *infra* subpart II(F).

A. *The UNESCO Convention of 1970*

In the early part of the 20th century, increases in the efficiency of travel and transportation, the demand for rare antiquities on the world market, and the discoveries of new and fantastic lost artifacts in the heart of Latin America and elsewhere spurred a drastic spike in the looting and smuggling of pre-Columbian antiquities.²² Many nations realized there was an urgent need to protect these priceless treasures and that this need could only be met by a unified action from both market nations and source nations.²³ Source nations were the most immediate victims of this pillaging, and this is what caused Mexico and Peru to petition the United Nations Educational Scientific and Cultural Organization (UNESCO) General Conference to adopt global measures to stem the tide of the unlawful trade in cultural property.²⁴ The subsequent proceedings that came out of this petition led UNESCO to adopt the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property (the “Convention”) in 1970.²⁵ The Convention was the first global agreement concerning the illicit international trade in cultural property and became the starting point for the unified efforts of many nations to stem the tide of illicit trade in antiquities and cultural artifacts.²⁶ Before this instrument had been ratified, the international protection of cultural property had been limited to protection in times of war.²⁷ Though the Convention was an essential step in fostering

22. See Jowers, *supra* note 1, at 149 (discussing how Mexico urged UNESCO to adopt global measures to fight the illicit trade in antiquities in 1960).

23. See Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property pmbl., Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter 1970 UNESCO Convention] (stating that “the protection of cultural heritage can be effective only if organized both nationally and internationally among States working in close co-operation”).

24. PATRICK J. O’KEEFE, COMMENTARY ON THE UNESCO 1970 CONVENTION ON ILLICIT TRAFFIC 5 (2d ed. 2007). The final product of this petition was a nonbinding instrument, ratified in 1964. Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property, Nov. 19, 1964, reprinted in UNESCO, THE PROTECTION OF MOVABLE CULTURAL PROPERTY I: COMPENDIUM OF LEGISLATIVE TEXTS 382 (1984). Several years later, Mexico and several other source nations pushed for a legally binding instrument to replace the 1964 Recommendation. UNESCO, *supra*, at 21.

25. 1970 UNESCO Convention, *supra* note 23; see also Jowers, *supra* note 1, at 149 (stating that UNESCO responded to Mexico’s initiative in 1968 by authorizing a special committee to draft the convention).

26. Potter & Zagaris, *supra* note 7, at 642.

27. James A.R. Nafziger, *Protection of Cultural Property*, 17 CAL. W. INT’L L.J. 283, 283–84 (1987). The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict is an early multinational agreement providing for the preservation of cultural property during armed conflict and military occupation. Warring, *supra* note 9, at 248 (describing the 1954 Hague Convention as “the first multilateral international agreement dedicated solely to the protection of cultural property”). The 1954 Hague Convention allows waiver of the obligation to respect and refrain from hostile acts against cultural property under the Convention only where imperatively required by military necessity. Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 4, May 14, 1954, 249 U.N.T.S. 240. Protocols I and II

the type of international cooperation necessary to combat the illicit trade of antiquities, it was only that: a single step in a prolonged process. The Convention is not self-executing.²⁸ After the adoption of the Convention by UNESCO, each participating nation had to ratify the Convention under its own laws for it to be legally applicable in that nation.²⁹ This took time—the United States did not become a full signatory to the Convention until 1983, with the enactment of the Cultural Property Implementation Act (CPIA).³⁰

B. The Cultural Property Implementation Act

The CPIA is the domestic law implementing the articles of the 1970 UNESCO Convention in the United States. Although the Senate ratified the 1970 UNESCO Convention in 1972, it did not pass the CPIA until eleven years later, in 1983.³¹ The CPIA did not implement every article in the Convention as written but selectively incorporated certain articles to keep with the same overall purposes embodied in the Convention.³² Specifically, the CPIA adopts Articles 7(b) and 9 of the 1970 UNESCO Convention with modifications.

Article 7(b) of the 1970 UNESCO Convention prohibits the importation of cultural property stolen from a museum, a religious or secular public monument, or similar institution.³³ The CPIA implements

Additional to the 1949 Geneva Conventions—the most recent instance of this wartime protection—prohibit acts of hostility directed against historic monuments, works of art, or places of worship that constitute the cultural or spiritual heritage of peoples and the use of such objects in support of the military effort. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 53, Dec. 12, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 16, Dec. 12, 1977, 1125 U.N.T.S. 609. This obligation does not provide for any derogation based on military necessity. INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 647, 1467 (Yves Sandoz et al. eds., 1987).

28. See 1970 UNESCO Convention *supra* note 23, art. 19 (providing that the Convention is subject to ratification or acceptance by states parties in accordance with their respective constitutional procedures).

29. *Id.*

30. Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2602–06 (2012).

31. Convention on Cultural Property Implementation Act, Pub. L. No. 97-446, tit. III, 96 Stat. 2329, 2350 (1983) (codified as amended at 19 U.S.C. §§ 2601–13 (2012)).

32. See S. REP. NO. 97-564, at 23–24 (1982) (discussing the reasons for adopting the CPIA in connection with the objectives of the Convention).

33. 1970 UNESCO Convention, *supra* note 23, art. 7(b).

this article by prohibiting the import into the United States of any cultural object

documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution in any State Party which is stolen from such institution after the effective date of this chapter, or after the date of entry into force of the Convention for the State Party, whichever date is later.³⁴

This article is of limited usefulness in combating the illegal importation of Mexican pre-Columbian antiquities, as many antiquities smuggled into the United States are not taken from museums or monuments but from undiscovered or undeveloped archeological sites.³⁵

Article 9 is the heart of the 1970 UNESCO Convention.³⁶ The purpose of Article 9 is to encourage multilateral action when a state's cultural patrimony is in danger.³⁷ Article 9 of the 1970 UNESCO Convention provides the following:

Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States Parties who are affected. The States Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State.³⁸

This language is intended to provide a mechanism for nations to provide assistance to each other when there is widespread international smuggling of pillaged archaeological and ethnological materials.³⁹ The United States' implementation of Article 9 under the CPIA is quite complex. Generally, the statutory framework allows the President to impose import restrictions on designated categories of archaeological and ethnological materials when requested by another State Party to the 1970

34. 19 U.S.C. § 2607 (2012).

35. See PERNILLE ASKERUD & ETIENNE CLÉMENT, PREVENTING THE ILLICIT TRAFFIC IN CULTURAL PROPERTY 10 (1997) (noting that archaeological sites are prime targets for thieves since these undiscovered artifacts have not yet been cataloged and are therefore easier to trade).

36. Bator, *supra* note 11, at 377–79.

37. *Id.* at 379.

38. 1970 UNESCO Convention, *supra* note 23, art. 9.

39. *Convention on Cultural Property Implementation Act (CPIA) of 1983: Fact Sheet*, ARCHEOLOGICAL INST. AM. (Apr. 1, 2010), <http://www.archaeological.org/news/sitepreservation/75> [<http://perma.cc/Q9CL-4E6X>]. The terms *archaeological* and *ethnological* are not defined in the Convention. However, the CPIA defines these. 19 U.S.C. § 2601(2).

UNESCO Convention.⁴⁰ The CPIA allows the United States to enter into bilateral agreements that are negotiated between the United States and another nation without requiring the Senate to ratify a new treaty.⁴¹ Since the CPIA's ratification, the United States has entered into bilateral agreements with only a handful of nations.⁴² The United States and Mexico never entered into a bilateral treaty under the CPIA because a bilateral treaty in "the spirit" of article 9 already existed between these two nations by the time that the CPIA was passed.⁴³

Because there is no bilateral treaty between the United States and Mexico under the CPIA, the Article 7(b) incorporation is the only part of the 1970 UNESCO Convention that the CPIA statute made effective against the illegal importation of Mexican pre-Columbian antiquities into the United States. Despite this narrow applicability, the CPIA has been used successfully by Mexico to force the return of stolen antiquities. In 1999, a New York District Court found that the CPIA required the forfeiture of a Mexican document from 1778, stolen from the National Archives in Mexico City.⁴⁴ These kinds of victories have the theoretical effect of discouraging theft and illegal importation of Mexican antiquities. However, the very limited scope of the CPIA as applied to Mexico likely nullifies this effect. Thus, the CPIA is not a good instrument to lean on in the battle to preserve and protect Mexican pre-Columbian artifacts.

C. *The 1970 Treaty of Cooperation Between the United States and Mexico*

After the 1970 UNESCO Convention had been drawn up but before it had been finalized, the United States and Mexico entered into the Treaty of Cooperation between the United States of America and the United Mexican States Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties on July 17, 1970.⁴⁵ This treaty was

40. U.S. INFO. AGENCY, CURBING ILLICIT TRADE IN CULTURAL PROPERTY: U.S. ASSISTANCE UNDER THE CONVENTION ON CULTURAL PROPERTY IMPLEMENTATION ACT 1 (1989).

41. 19 U.S.C. § 2602.

42. See *Bilateral Agreements*, U.S. DEP'T ST., BUREAU EDUC. & CULTURAL AFF., <http://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements> [<http://perma.cc/VHB4-N5GR>] (providing a list of fifteen nations with which the United States has bilateral agreements).

43. Jowers, *supra* note 1, at 157–58. See *infra* subpart II(C) for a discussion of the existing treaty with Mexico passed in 1970 and already in place when the CPIA was passed. It had been in existence for thirteen years. 19 U.S.C. § 2602 (showing the CPIA was enacted in 1983).

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

45. Treaty of Cooperation Between the United States of America and the United Mexican States Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, Mex.-U.S., July 17, 1970, 22 U.S.T. 494 [hereinafter Treaty of Cooperation].

designed to “encourage the protection, study and appreciation of properties of archaeological, historical or cultural importance, and to provide for the recovery and return of such properties when stolen.”⁴⁶

One of the treaty's primary goals is deterring the illicit excavations of archaeological sites and their pillaging, a growing problem in Mexico in the 1960s.⁴⁷ The treaty defines the protected properties covered in Article 1 as any government property that is also a pre-Columbian artifact, either a colonial-period art object, a religious artifact that is of outstanding importance to the nation, or an important government document.⁴⁸ The phrase “importance to the national patrimony” in the definition tracks with the language in Article 9 of the 1970 UNESCO Convention, which requires that “cultural patrimony” be in jeopardy from pillage before such affected nation can invoke the Article.⁴⁹ This is one of the ways the treaty is written to follow the spirit and requirements of the Convention, even though it is not technically ratified under the Convention's authority.

The second article of the treaty creates specific requirements for each party nation to

encourage the discovery, excavation, preservation, and study of archaeological sites and materials by qualified scientists and scholars . . . ; to facilitate the circulation and exhibit [of covered properties] . . . in order to enhance the mutual understanding and appreciation of the artistic and cultural heritage of the two countries; and . . . [to ensure] the conservation of national archaeological, historical and cultural properties.⁵⁰

The language in this article is vague and does not provide for any specific action that would immediately protect or preserve endangered pre-Columbian artifacts.⁵¹ However, this agreement has an important function: to encourage future discourse on how to deter the pillaging of these artifacts and archaeological sites.⁵²

The primary mechanism that the treaty provides is the mandate for each state to help the other recover stolen covered property upon request.⁵³ An official request from one state automatically triggers enforcement procedures in the state of which the request is made.⁵⁴ In addition, the

46. *Id.* pmb1.

47. *Id.* art. II; *see supra* note 22 and accompanying text.

48. Treaty of Cooperation, *supra* note 45, art. I.

49. *Compare id.*, with 1970 UNESCO Convention, *supra* note 23, art. 9.

50. Treaty of Cooperation, *supra* note 45, art. II.

51. *See id.* (lacking specific actions and instead imposing duties to “encourage,” “deter,” and “facilitate” certain behaviors, then providing for later coordination among representatives regarding implementation of these duties).

52. *Id.*

53. *Id.* art. III.

54. *Id.*

treaty authorizes the attorney general of the latter state “to institute a civil action in the appropriate district court” if the state is unable to recover and return the stolen object.⁵⁵

The Treaty of Cooperation provided a well-tailored solution for returning illegally smuggled pre-Columbian antiquities to Mexico and contemplated the need for further measures to protect Mexico’s ancient cultural resources. The treaty was initially bound by one very important restriction: it only covered artifacts owned and controlled by “governments or their instrumentalities.”⁵⁶ But as discussed in the next subpart, Mexico dealt with this ownership issue in 1972. Overall, the 1970 U.S.–Mexico Treaty of Cooperation has not been considered successful in deterring the illegal pillage and export of pre-Columbian artifacts.⁵⁷ This is in part due to its focus on the recovery of already lost artifacts,⁵⁸ rather than the preservation of artifacts before they are lost.⁵⁹

D. Mexico’s Federal Law on Archaeological, Artistic and Historic Monuments and Zones

In 1972 Mexico declared all pre-Columbian artifacts to be property of the state with the enactment of the Federal Law on Archaeological, Artistic and Historic Monuments and Zones, removing these artifacts from commerce and export.⁶⁰ This drastic measure was Mexico’s attempt to protect against the destruction of its cultural heritage by providing a legal means to recover any pre-Columbian antiquity that is found in another country, despite any inability by Mexico to establish provenance or previous control over the artifact.⁶¹ Under Article 27 of the declaration, “[a]rcheological monuments, both movable and immovable, are the inalienable and imprescriptible property of the nation.”⁶² The definition of

55. *Id.*

56. *Id.* art. I.

57. Jowers, *supra* note 1, at 161.

58. S. REP. NO. 92-1221, at 2 (1972); H.R. REP. NO. 92-824, at 3 (1972).

59. See Bruce Zagaris & Jessica Resnick, *The Mexico-U.S. Mutual Legal Assistance in Criminal Matters Treaty: Another Step Toward the Harmonization of International Law Enforcement*, 14 ARIZ. J. INT’L & COMP. L. 1, 68 (1997) (criticizing the treaty’s “sole concentration” on recovery); Jowers, *supra* note 1, at 161 (implying that the Treaty of Cooperation lacks a crucial focus on preventing theft before it occurs).

60. Mexico’s 1972 Federal Declaration (Spanish), *supra* note 2, art. 27, translated in MEXICO’S 1972 FEDERAL DECLARATION, *supra* note 2, at 8.

61. See Eduardo Matos Moctezuma, *Las Normas Jurídicas y la Investigación en México*, in ARQUEOLOGÍA Y DERECHO EN MÉXICO 125, 125 (Jaime Litvak King et al. eds., 1980) (explaining that article 27 of the 1972 Federal Declaration seeks to establish that archeological patrimony remains in the hands of Mexico and represents a fundamental improvement over previous laws).

62. MEXICO’S 1972 FEDERAL DECLARATION, *supra* note 2, at 8, translating Mexico’s 1972 Federal Declaration (Spanish), *supra* note 2, art. 27 (“Son propiedad de la Nación, inalienables e imprescriptibles, los monumentos arqueológicos muebles e inmuebles.”). Declaring the monuments inalienable and imprescriptible signifies that the nation’s ownership of such property

archaeological monuments given is expansive and covers nearly all pre-Columbian artifacts originating in Mexico.⁶³ This type of blanket nationalization of artifacts is not foreign to Mexican policy; the nation has historically utilized umbrella laws like this to protect its cultural heritage.⁶⁴ The 1972 Federal Declaration also excludes nearly all private ownership of pre-Columbian artifacts, including artifacts discovered by accident or through exploration.⁶⁵ The laws promulgated under this declaration also attached criminal liability to violations.⁶⁶ This was done in order to increase the deterrent effect of the laws and to expand their applicability abroad under other nations' foreign law recognition schemes, including the National Stolen Property Act in the United States.⁶⁷

This type of blanket nationalization, which completely bans the export of cultural property, has been criticized for its all-inclusive nature.⁶⁸ However, Article 13 of the 1970 UNESCO Convention expressly approves such a declaration,⁶⁹ and the advantages for the Mexican government in their efforts to recover illegally exported artifacts cannot be denied. This declaration expanded the scope and usefulness of the 1970 U.S.–Mexico Treaty of Cooperation by a large margin, making any pre-Columbian artifact crossing the border from Mexico to the United States subject to seizure under United States regulations promulgated under the 1972 Pre-Columbian Act.⁷⁰

cannot be lost through transfer of ownership or lapse of time. KIFLE JOTE, INTERNATIONAL LEGAL PROTECTION OF CULTURAL HERITAGE 154 (1994).

63. Jowers, *supra* note 1, at 162–63.

64. Mexico first utilized umbrella laws to regulate monuments and works of cultural significance and value in 1897, with a statute that proclaimed all archaeological monuments within Mexican territory property of the nation. *See, e.g.*, United States v. McClain (*McClain I*), 545 F.2d 988, 997 (5th Cir. 1977) (recognizing that, since 1897, “Mexican law has been concerned with the preservation and regulation of pre-Columbian artifacts,” and that national ownership of monuments and artifacts by legislation has come in stages since then); Potter & Zagaris, *supra* note 7, at 667 (“[M]any source countries such as Mexico have enacted umbrella statutes which declare that all antiquities of a certain age or older . . . are national property.”).

65. Jowers, *supra* note 1, at 163.

66. *See* Mexico's 1972 Federal Declaration (Spanish), *supra* note 2, arts. 48–52 (establishing sanctions, including fines, imprisonment of up to ten years, or both for violations of the law), translated in MEXICO'S 1972 FEDERAL DECLARATION, *supra* note 2, at 11–12.

67. *See infra* subpart II(F).

68. Borodkin, *supra* note 6, at 392–93.

69. 1970 UNESCO Convention, *supra* note 23, art. 13 (“The States Parties to this Convention also undertake, consistent with the laws of each State: . . . (d) to recognize the indefeasible right of each State Party to this Convention to classify and declare certain cultural property as inalienable which should therefore *ipso facto* not be exported, and to facilitate recovery of such property by the State concerned in cases where it has been exported.”).

70. *See infra* subpart II(E).

It has been suggested that the 1972 Federal Declaration's blanket prohibition on the export of antiquities may have been shortsighted.⁷¹ Although it does make remedial action easier under foreign laws, it also encourages the development of a black market in pre-Columbian antiquities.⁷² The export ban "encourages the desirability" of these artifacts on the international market because their scarcity increases their value.⁷³ This, in turn, creates a strong financial incentive to engage in the illicit trafficking of antiquities.⁷⁴ Additionally, nationalizing the ownership of all pre-Columbian artifacts created an overabundance of these artifacts within Mexico in need of protection and preservation.⁷⁵ Mexico has not been able to provide the requisite protection or preservation for these antiquities due to inadequate financial resources.⁷⁶

E. The Pre-Columbian Act of 1972

In 1972, the United States took its first unilateral action to tackle the illicit import of pre-Columbian artifacts from Mexico.⁷⁷ The Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals Act provides that "[n]o pre-Columbian monumental or architectural sculpture or mural . . . may be imported into the United States unless the government of the country of origin of such sculpture or mural issues a certificate . . . which certifies that such exportation was not in violation of the laws of that country."⁷⁸ This statutory framework and the series of regulations that were promulgated under it served to strengthen the relatively ineffective 1970 U.S.–Mexico Treaty of Cooperation by attacking the problem of illegal exportation at the border, rather than focusing on the retrieval of artifacts already smuggled into the United States.⁷⁹ The Legislature found this added measure necessary after it became clear that the 1970 Treaty of Cooperation not only did not reduce the trade of illegal Mexican pre-Columbian antiquities, but that such trade actually increased after the treaty was ratified.⁸⁰

71. See Potter & Zagaris, *supra* note 7, at 670 (explaining the negative long-term effects of the Pre-Columbian Act of 1972).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 656; see also Regulation of Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals (Pre-Columbian Act), Pub. L. No. 92-587, 86 Stat. 1297 (1972) (codified at 19 U.S.C. §§ 2091–95 (2012)).

78. 19 U.S.C. § 2092.

79. Potter & Zagaris, *supra* note 7, at 658.

80. *Id.* at 656.

Customs officers are the primary enforcers of the Pre-Columbian Act of 1972 and its regulations.⁸¹ The Secretary of the Treasury promulgates a list of artifacts included within the regulation's protection.⁸² Customs only allows importation of items on that list when a valid export certificate accompanies the item from the country of origin.⁸³ If there is no valid certificate, customs officers are authorized to seize the covered pre-Columbian artifact, unless it was exported prior to the effective date of the regulations or the exporter shows sufficient evidence that the item should be excluded from the Act's list of protected artifacts.⁸⁴

Overall, the Pre-Columbian Act has been much more successful than its earlier counterparts. This success may stem from its specific goals, but the zealous enforcement efforts of U.S. customs officers have also helped tremendously.⁸⁵ "Customs officers apply the Act's restrictions even to the smaller[,] non-monumental objects [that] do not fall within the protected list."⁸⁶ This generous application is probably the result of a tradition of border cooperation between the United States and Mexico.⁸⁷ This tradition ensured that the United States would not curtail the regulations' reach even after the expansion of authority by Mexico's 1972 Federal Declaration⁸⁸ and that U.S. customs agents would continue to vigilantly search for artifacts subject to seizure in order to incidentally curb the flow of illegal drugs into the country.⁸⁹

Some recent successes in the recovery of illegally exported pre-Columbian artifacts can be specifically attributed to the 1970 U.S.–Mexico Treaty of Cooperation, Mexico's 1972 Federal Declaration, and the Pre-Columbian Act of 1972. In 2012, U.S. Immigration and Customs Enforcement (ICE) returned more than 4,000 pieces of stolen and looted pre-Columbian cultural artifacts to the government of Mexico.⁹⁰

81. *Id.* at 657.

82. *Id.*

83. *Id.*

84. 19 U.S.C. § 2092(b) (2012).

85. Potter & Zagaris, *supra* note 7, at 658.

86. *Id.*

87. James A. R. Nafziger, *Controlling the Northward Flow of Mexican Antiquities*, 7 *LAW. AM.* 68, 71–73 (1975).

88. *See supra* subpart II(D).

89. Nafziger, *supra* note 87, at 71–72.

90. *ICE Returns Stolen and Looted Archeological Art and Antiquities to Mexico*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Oct. 24, 2012), <http://www.ice.gov/news/releases/1210/121025elpaso.htm> [<https://perma.cc/8P6T-SQHM?type=source>].

F. *The National Stolen Property Act and the McClain Decision*

The National Stolen Property Act (NSPA)⁹¹ has been the basis of nearly every criminal prosecution of art theft in the United States in the last eighty years.⁹² The NSPA was not originally intended for this purpose—it was passed in 1934 as an extension of the National Stolen Motor Vehicle Act of 1919,⁹³ and its primary purpose was to reach those who stole property and moved it across state lines.⁹⁴ Before this statute, neither states nor foreign countries could prosecute individuals after the property had moved across state lines or national borders.⁹⁵ The NSPA prohibits the transportation or receipt, in interstate or foreign commerce, of any goods knowingly stolen and worth \$5,000 or more.⁹⁶ Violators of the NSPA will be subject to fines, imprisonment not to exceed ten years, or both.⁹⁷ The NSPA essentially “makes it illegal for an individual to possess, receive, transfer, or otherwise deal in valuable stolen property that has traveled in interstate or foreign commerce if the individual knows that the property was obtained by theft.”⁹⁸

The application of this law to foreign art theft has been very effective, but only after the sticky issue of proving knowledge is dealt with.⁹⁹ The scienter requirement is a particularly tough hurdle for the successful litigation of stolen-art cases. This difficulty is due to the fact that the exchange of art objects is usually made through art dealers and auction houses, most of which take very few measures to verify the provenance of the artwork.¹⁰⁰ This lack of diligence by intermediaries makes it difficult to show a legitimate chain of title, which means that stolen artwork often resurfaces on the legitimate market with little evidence to point to its illicit

91. 18 U.S.C. §§ 2314–15 (2012).

92. Jennifer Anglim Kreder, *The Choice Between Civil and Criminal Remedies in Stolen Art Litigation*, 38 VAND. J. TRANSNAT'L L. 1199, 1206 (2005).

93. 18 U.S.C. § 2312 (2012).

94. George W. Nowell, *American Tools to Control the Illegal Movement of Foreign Origin Archaeological Materials: Criminal and Civil Approaches*, 6 SYRACUSE J. INT'L L. & COM. 77, 89–90, 89 n.57 (1978).

95. *McClain I*, 545 F.2d 988, 994 (5th Cir. 1977).

96. 18 U.S.C. §§ 2314–15 (2012).

97. *Id.*

98. Katherine D. Vitale, Note, *The War on Antiquities: United States Law and Foreign Cultural Property*, 84 NOTRE DAME L. REV. 1835, 1851 (2009).

99. See *infra* notes 103–21 and accompanying text.

100. Claudia Fox, Note, *The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: An Answer to the World Problem of Illicit Trade in Cultural Property*, 9 AM. U. J. INT'L L. & POL'Y 225, 233 (1993).

background.¹⁰¹ Until 1974, prosecuting possessors of stolen art was only a theoretical deterrent because of the immense challenge of proving scienter.¹⁰²

This all changed with a string of cases applying the federal law of source nations to solve the scienter requirement. The first case to successfully apply the NSPA to international art theft was *United States v. Hollinshead*¹⁰³ in 1974. In this case, the scienter requirement was satisfied by the court's finding that "[t]here was overwhelming evidence that the defendants knew that it was contrary to Guatemalan law to remove the stele [from the country,] and that the stele was stolen."¹⁰⁴ The court went on to posit that "[i]t would have been astonishing if the jury had found that [the defendants] did not know that the stele was stolen," regardless of any confusion over the controlling law.¹⁰⁵ The defendants had bribed officials and used false marks on the stele's packaging to smuggle it into the United States, which was pretty strong evidence that they knew they were smuggling stolen property into the United States.¹⁰⁶ Essentially, the strong export restrictions on the Guatemalan pre-Columbian artifact provided the evidence necessary to satisfy the NSPA's scienter requirement.

The second case to successfully apply the NSPA to a theft of foreign artifacts—and satisfy the scienter requirement by applying the foreign nation's broad antiquities laws—was *United States v. McClain*¹⁰⁷ in 1977.¹⁰⁸ In this case, five defendants were found guilty of violating the NSPA for stealing pre-Columbian artifacts from Mexico, importing them into the United States, and subsequently selling them.¹⁰⁹ The United States government was able to successfully charge the smugglers under the NSPA because Mexico had both a valid patrimony law for pre-Columbian antiquities, the 1972 Federal Declaration,¹¹⁰ and a restriction on exportation of pre-Columbian antiquities—the two requirements for triggering the

101. *Id.*

102. *Id.*

103. 495 F.2d 1154 (9th Cir. 1974).

104. *Id.* at 1155.

105. *Id.* at 1155–56.

106. *Id.*

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

108. *See id.* at 997–98 (evaluating the application of Mexican antiquities law by the trial court).

109. *Id.* at 991–93. The court actually reversed the convictions and remanded for further proceedings in *McClain I*. *Id.* at 1004. It upheld the convictions for conspiracy to violate the NSPA in *United States v. McClain (McClain II)*, 593 F.2d 658, 671–72 (5th Cir. 1979), but reversed the substantive convictions because of the possibility that the jury improperly characterized Mexican statutes earlier than 1972 as ownership laws.

110. *See supra* subpart II(D).

NSPA.¹¹¹ These two requirements took the place of requiring the owner to have been in actual control of the stolen object at some point. Under the definition given for the word “stolen” in *McClain*, one must take without permission and “with the intent to deprive the benefits of ownership and use.”¹¹² Generally, in order to have benefits of ownership and use for the thief to deprive, the owner must have had the ability to exert some control over the item before it was taken.¹¹³ If the illegally exported pre-Columbian artifacts have been looted from an undiscovered archeological site, then this control doesn’t exist. However, the court in *McClain* ruled that Mexico’s unequivocal nationalization of all pre-Columbian antiquities and the complete restriction on export of those antiquities without a license can operate in lieu of actual control to satisfy the NSPA’s requirement that the foreign property be “stolen.”¹¹⁴ The court stated that it is “the sovereign right of Mexico to declare, by legislative fiat, that it is the owner of its art, archaeological, or historic national treasures.”¹¹⁵

This holding meant that all pre-Columbian artifacts that had left Mexico after 1972 were “stolen” for purposes of the NSPA.¹¹⁶ An amicus brief filed with the case expressed concern that the court’s validation of foreign state patrimony laws would result in dealers and museums facing charges of receiving and transporting stolen property “[m]erely by dealing in art work that ha[d] originated—albeit many years earlier—in countries whose laws include broad declarations of national ownership in art.”¹¹⁷ The court put this fear to rest by finding that illegal exportation after Mexico’s 1972 Federal Declaration constituted an act of conversion, so that only exports after that point could be considered a “theft.”¹¹⁸

The third case to deal with the issue of scienter was *United States v. Schultz*.¹¹⁹ In this case, a New York art dealer conspired to smuggle antiquities out of Egypt in contravention of an Egyptian law nationalizing

111. See *McClain I*, 545 F.2d at 996 & n.14 (“The general rule today in the United States . . . is that it is not a violation of law to import simply because an item has been illegally exported from another country.” (quoting Paul M. Bator, *International Trade in National Art Treasures: Regulation and Deregulation*, in *ART LAW: DOMESTIC AND INTERNATIONAL* 295, 300 (Leonard D. DuBoff ed., 1975))).

112. *McClain I*, 545 F.2d at 993–94.

113. See *id.* at 992 (explaining that a sovereign may declare ownership of property within its jurisdiction; however, “possession is but a frequent incident, not the *sine qua non* of ownership”).

114. See *id.* at 996 (rejecting appellants’ argument “that the NSPA cannot apply to illegal exportation of artifacts declared by Mexican law to be the property of the Nation”).

115. *Id.* at 992.

116. Vitale, *supra* note 98, at 1853.

117. *McClain I*, 545 F.2d at 991 n.1.

118. *Id.* at 1003 n.33.

119. 333 F.3d 393 (2d Cir. 2003).

antiquities with provisions similar to Mexico's 1972 Federal Declaration.¹²⁰ The court held that the jury did not have to find scienter for the actual crimes he committed under the NSPA, but allowed the jury to consider the conspirators' knowledge of Egyptian law and expertise in Egyptian antiquities as evidence of knowledge that the antiquities were stolen.¹²¹

The result of these three cases is that because the

NSPA is used to recognize a foreign state's right to its cultural property through patrimony and exportation laws—regardless of whether there is a U.S. importation law in place—it “convert[s] a crime against the people [of a foreign state] into a crime against the people of the United States.”¹²²

This makes the enforcement of these nationalization laws incumbent on the U.S. courts, which increases the effectiveness of the laws, and this in turn makes the return of the nationalized antiquities that much easier. For this reason, the NSPA is actually more effective than any other law currently used to effectuate the return of pre-Columbian antiquities to Mexico. However, this and every other law currently dealing with the protection and return of these artifacts suffers a serious flaw. They focus on return after the damage is done rather than preventative measures that will best protect the scarce and fast-disappearing resources.

III. Why the Current Laws Preventing the Illicit Trade of Mexican Pre-Columbian Antiquities Are Ineffective and How a Policy of Education Can Effectively Improve Them

Each of the laws and remedies discussed in Part II suffers a serious flaw—they do not focus on preventing the destruction of pre-Columbian antiquities directly, but only on remuneration and return of these artifacts. Part I suggests why it is not just Mexico but also the United States that should work to prevent the destruction and looting of these irreplaceable relics. This Part suggests how to do that. The only real way to prevent the looting of these artifacts before it occurs is through education. Both nations must refocus the goals of the laws, regulations, and policies currently in place in order to educate the people of Mexico and the United States about the damage that this illicit trade causes and the penalties for those involved in this destruction. Specific groups of people that are or could be involved

120. *Id.* at 398 (“[Egyptian Law 117] provides for all antiquities privately owned prior to 1983 to be registered and recorded, and prohibits the removal of registered items from Egypt. The law makes private ownership or possession of antiquities found after 1983 illegal.”).

121. *See id.* at 414–16 (noting that “even an ignoramus in this field would know at least about patrimony laws,” and so as “an acknowledged expert in the field of Egyptian antiquities, with many years of experience[,] [i]t would have been natural for Schultz to know about [the Egyptian law]” (internal quotation marks omitted)).

122. Vitale, *supra* note 98, at 1854 (alterations in original).

in the trade should be targeted for this education. Many of the laws and agreements currently in place could be revised to reach a diverse set of people groups under this new educational goal. Under a revised bilateral treaty between the United States and Mexico using the CPIA, an educational directive for both countries could help reach rural people in Mexico who may find or help transport stolen antiquities, looters, and museum personnel in the United States who do not understand the consequences of the illicit trade, and companies involved in transportation in both countries. Regulations promulgated under the Pre-Columbian Act of 1972 could be revised to provide extra education for border agents and tourists on the U.S.–Mexico border in identifying restricted antiquities, and perhaps even provide for specialists at high-risk border stations. Finally, museums and dealers could be educated on the criminal ramifications of fencing stolen pre-Columbian antiquities under the NSPA.

A. *A Revised Bilateral Treaty Using the U.S.–Peru Bilateral Treaty as an Example*

A revised bilateral treaty between the United States and Mexico with an educational directive for both countries could help deter the looting of ruins and historical sites. This hypothetical directive would require both nations to maintain educational programs to reach those people who might be involved in the illicit trade of antiquities to educate them about the destruction caused by actions and the legal ramifications of those actions. The goal of this education would be to stop the destruction and theft of Mexican pre-Columbian antiquities before it occurs by deterring those responsible from taking part. Also, by educating people that otherwise may not understand the illegality of this trade, the program could encourage whistle-blowing and increase the cost of business for those who smuggle the antiquities.

There is precedent for this type of bilateral educational directive. The United States entered into a bilateral agreement with Peru in 1981 with provisions very similar to the 1970 bilateral treaty between the United States and Mexico.¹²³ Mexico and Peru share a similar cultural heritage, they are both considered source nations, and like Mexico, Peru “has also experienced a drastic depletion of its cultural heritage as a result of” looting and smuggling.¹²⁴ However, the U.S.–Peru Agreement of 1981 also provides that the parties are to inform travelers of the laws respecting archaeological, historical, or cultural properties by means of media

123. Agreement Respecting the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, U.S.-Peru, Sept. 15, 1981, 33 U.S.T. 1608 [hereinafter U.S.-Peru Agreement of 1981]; Potter & Zagaris, *supra* note 7, at 640.

124. Potter & Zagaris, *supra* note 7, at 640.

dissemination such as signs, pamphlets, and billboards.¹²⁵ It is difficult to determine whether this clause was implemented effectively or at all, as this language was struck from the next iteration of the treaty, the U.S.–Peru Agreement of 1997.¹²⁶ The educational directive in this updated agreement was softened and made unilateral.¹²⁷ Article II(I) requires that the “Government of Peru will use its best efforts, through education and implementation and enforcement of its laws, to improve protection of its Colonial ethnological patrimony as well as its archaeological patrimony.”¹²⁸ An amendment in 2012 further alters this language to require only that the government of Peru “continue its efforts in public awareness and professional training programs.”¹²⁹ Even with these revisions, the current version of the U.S.–Peru bilateral treaty still treats education and public awareness as a priority. This commitment to the education and awareness of the general public provides an important preventative function that is missing from Mexico’s bilateral agreement. It is commonly accepted that raising public awareness about a criminal activity can lead to a reduction of that crime.¹³⁰

There are several bilateral, cooperative diplomatic programs initiated by the Public Affairs Section of the American Embassy in conjunction with the Ministry of Foreign Affairs of Peru and the Ministry of Culture of

125. U.S.–Peru Agreement of 1981, *supra* note 123, art. II(5).

126. *Compare id.* (requiring both parties to inform persons entering or leaving their territories of the laws of each of the parties with respect to archeological, historical, or cultural properties), with Memorandum of Understanding Between the Government of the United States of America and the Government of the Republic of Peru Concerning the Imposition of Import Restrictions on Archaeological Material from the Prehispanic Cultures and Certain Ethnological Material from the Colonial Period of Peru, art. II(C), U.S.–Peru, June 9, 1997 [hereinafter U.S.–Peru Agreement of 1997] (requiring both parties to encourage various institutions to “cooperate in the interchange of knowledge and information about the cultural patrimony of Peru, and to collaborate in the preservation and protection of such cultural patrimony through appropriate technical assistance, training and resources,” but making no mention of requirements to inform travelers of the laws concerning archaeological, historical, or cultural properties).

127. *Compare supra* note 125 and accompanying text, with *infra* note 128 and accompanying text.

128. U.S.–Peru Agreement of 1997, *supra* note 126, at art. II(I).

129. Memorandum of Understanding Between the Government of the United States of America and the Government of the Republic of Peru Concerning the Imposition of Import Restrictions on Archaeological Material from the Pre Hispanic Cultures and Certain Ethnological Material from the Colonial Period of Peru rev. art. II(J), U.S.–Peru, May 30, 2012.

130. *See Lambert v. California*, 355 U.S. 225, 228–29 (1957) (finding that the requirement of notice is “[e]ngrained in our concept of due process” and that a law cannot stand where people do not have the “opportunity either to avoid the consequences of the law or to defend any prosecution brought under it”). A person cannot avoid a crime that he does not know he is committing. But if a person is put on notice of a crime, that person has the opportunity to avoid the criminal activity and will be less likely to commit the crime as a result. This is the underlying justification for the notice requirement set forth in the U.S. Constitution.

Peru.¹³¹ These collaborative programs have been “aimed at training specialists, improving museum conditions, educating, and creating museum exhibitions.”¹³² It is difficult to quantify how effectively the educational directives in the U.S.–Peru bilateral treaty have been implemented because there is very little data available regarding the relevant programs in Peru. More research is needed in this area to discern the effectiveness of these particular programs.

An educational program that reached people in rural areas of Mexico could be especially effective at prevention by providing information this group of people may not have previously had access to. These people will likely be the first to discover pre-Columbian antiquities or to be a part of these artifacts’ looting and transport, which makes reaching this group important. Also, it is important to educate those people involved in transportation on both sides of the border. A program designed to reach trucking companies, bus drivers, barge operators, and pilots could allow more laypeople to recognize and report the illicit trade of antiquities.

B. Revised Border Regulations Under the Pre-Columbian Act of 1972

Regulations promulgated under the Pre-Columbian Act of 1972 allow border agents to seize Mexican pre-Columbian artifacts that are not accompanied by required export permits.¹³³ These regulations have been effective at screening some of the smuggling of antiquities into the United States—in 2012, ICE was able to repatriate over 4,000 artifacts to Mexico, many of which were seized at the border.¹³⁴ However, increased education along the border could expand this success even further. The customs seizure regulations owe their success at least partly to the fact that the illicit trade of antiquities necessarily bottlenecks at border stations along the U.S.–Mexico border. This bottleneck could also be used for an educational directive to reach more people in a faster manner. An educational program designed to educate tourists and commuters who cross the border would allow more people to recognize and report the illicit trade of antiquities, or deter these people from participating by advertising the penalties they might face if caught. This could be accomplished through the use of pamphlets or flyers, posters, and signage.

131. See Tracey J. Bell, Cultural Heritage and Diplomatic Partnerships Between the United States and Peru 25 (June 7, 2014) (unpublished Master’s capstone project, University of Oregon) (on file with the University of Oregon), https://scholarsbank.uoregon.edu/xmlui/bitstream/handle/1794/18632/Tracey_Bell_mastersresearch2014SB.pdf?sequence=1 [https://perma.cc/2C8N-K2AS] (pointing out that the United States and Peru have “several collaborative programs” and elaborating on one program created by the U.S. Embassy in Lima).

132. *Id.*

133. See *supra* subpart II(E).

134. See *supra* subpart II(E).

C. *An Educational Program Advising Museums and Dealers of Criminal Implications for Receiving and Selling Stolen Property Under the NSPA*

The NSPA, as interpreted under the *McClain* decision, creates criminal liability for any museum or dealer in antiquities that conspires to possess or sell any Mexican pre-Columbian antiquity exported from Mexico after 1972.¹³⁵ A deterrent effect might be realized through an educational program directed at informing these purchasers and intermediaries in the trade of antiquities about the penalties they could face for a violation of the NSPA. Attempting to educate possible smugglers and those complicit in this illicit trade may seem like an ineffective solution, as these people already know they are breaking the law. To some extent, this is true. There will be no deterrent effect for the hardened criminals and stubborn or motivated smugglers. However, education could be very effective at reducing this illicit trade at the margins. For example, by better educating would-be smugglers and fencers that may not have previously understood the criminal implications of their actions, some percentage of these people would choose not to smuggle or fence illicit artifacts. This would serve to shrink the market demand for these antiquities, thus decreasing the incentive for looters and smugglers in Mexico to operate. A program like this might be implemented by circulating the penalties that past violators of the NSPA have suffered for illegally trading in pre-Columbian antiquities. A violator of the NSPA is subject to a fine, up to ten years in jail, or both.¹³⁶ Additionally, circulating advertisements of penalties frequently would create an appearance of vigilance by law enforcement that would also have some deterrent effect on the market for pre-Columbian artifacts. This tactic has been used successfully to deter crime in other areas, such as gun crimes.¹³⁷

IV. Conclusion

The illicit trade of Mexican pre-Columbian antiquities represents a serious threat to the cultural and historical heritage of not only Mexico, but also the United States and ultimately the historical record of the North American continent. The global community recognizes this problem, but past and present efforts to deter and prevent the looting and destruction of

135. See *supra* subpart II(F).

136. 18 U.S.C. § 2314 (2012).

137. Emmanuel Barthe, *Crime Prevention Publicity Campaigns: Response Guide No. 5*, CTR. FOR PROBLEM-ORIENTED POLICING (2006), http://www.popcenter.org/responses/crime_prevention/print/ [<http://perma.cc/8JRU-376K>] (“Boston’s efforts to reduce gun crimes included a publicity component that proved to be quite effective because the campaign’s message ‘delivered a direct and explicit message to violent gangs and groups that violent behavior will no longer be tolerated, and that the group will use any legal means possible to stop the violence.’”).

these antiquities have been less than effective. This is likely due to a misplaced focus on punishment and remediation. Instead, policies to restrict the illicit trade of Mexican pre-Columbian antiquities must focus on prevention through education. The most important goal of any law on this subject is to prevent the destruction of these irreplaceable artifacts. There are many opportunities to encourage this prevention through the education of people at every point in the trade: the education of rural peoples in Mexico, those involved in transportation, those crossing the border, and those involved in purchasing and dealing in antiquities. Public awareness can reduce the illicit trade of Mexican pre-Columbian antiquities, and should be the focus of future reform.

—*Ryan D. Phelps*