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

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SUMMARY: I. *The Cultural Property Repose Act.* 1. *Summary.* 2. *Details.* 3. *Constitutional Issues.* 4. *Issues of Draftmanship.* II. *Alternatives to Repose Legislation.*

This essay honors the work of our distinguished colleague, Dr. Héctor Fix-Zamudio. It addresses three spheres of his expertise: comparative law, constitutional law, and procedural law. In particular, the essay will focus on one of Dr. Fix-Zamudio's abiding interests: the role of legal institutions in protecting fundamental, democratic processes. Dr. Fix-Zamudio has written authoritatively about the positive role of such important Institutions as the *amparo* and Ombudsman, whereas this essay will examine a threat to the positive role of the courts, namely, a proposal to curb their jurisdiction in the United States to hear certain claims by foreign sovereigns. Specifically, the focus will be on proposed legislation whose effect would be to make it difficult for governments to reclaim wrongfully exported cultural property "reposing" in foreign jurisdictions. Although this topic may seem narrow, it has important implications for Mexico and for United States-Mexican relations. Also, such repose legislation raises a number of issues concerning the role of governmental plaintiffs in foreign courts. Most importantly, a discussion of the proposed legislation provides an unusual opportunity to focus on constitutional, comparative, and processoriented issues of the sort that have been so expertly considered in other contexts by Dr. Fix-Zamudio. Although this essay will challenge proposed legislation of the author's own country, the central issue of limiting the access of foreign sovereigns to municipal judicial remedies is universal. Thus, this essay merely uses the United States proposal, with which the author is familiar, as an example of a kind of restrictive legislation that is by no means unique in the world.

Several years ago, while Dr. Fix-Zamudio was serving as Director

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of the Institute of Legal Research at UNAM, I had the memorable experience of working there as a visiting lecturer under the Fulbright program. At that time I undertook two research projects and gave several seminars. One of these concerned illicit trafficking in national art treasures. It seems appropriate, then, to examine that subject again, this time as a tribute to Héctor Fix-Zamudio.

While I was in Mexico the main objective of international cultural property law was to prevent illicit trafficking. This objective remains important today. The tragic theft in 1985 of priceless objects on display at the National Museum of Anthropology in Chapultepec Park is a painful reminder that art thefts are a serious threat to national patrimonies and are often encouraged by the international art market. Property is all too easily stolen and transported to another country or even it it is not stolen, strictly speaking, it is too often smuggled out of a country of origin in violation of the latter's antiquities and customs laws. In either event the result is the same for the country of origin. The international community therefore continues to search for ways to prevent the hemorrhaging of national cultural patrimonies.[1] The main objective of a relatively new body of international cultural property law has been to prevent illicit trafficking in cultural property. In addition, however, much attention has turned in recent years to the restitution, forfeiture, or return of cultural property once law-enforcement measures have failed to prevent theft or wrongful export of such property. In this process sovereign claims play a major role.

"Repose" legislation, if enacted by the United States Congress, would severely handicap a sovereign government from bringing court action in the United States in order to reclaim cultural property illegally taken out of its territory in violation of its laws. More precisely, the legislation would impose prohibitive, nationwide statutes of limitations whose effect would be to severaly limit an important juridical device for protecting the global cultural heritage. Opponents claim that the proposed legislation would convert the United States into a pirate's cove for contraband artifacts. In any event, the proposed legislation raises important issues of international and constitutional law and of legal draftsmanship. What follows will first examine the purpose and content of the proposed legislation, then some of its legal problems, and finally, a few alternatives.

[1] See *e.g.*, Nafziger, *La regulación del movimiento internacional de bienes culturares entre México y Estados Unidos,* 16 Anales de Antropología 123, UNAM, 1979.

I. The Proposed Cultural Property Repose Act

The proposed Cultural Property Repose Act [2] responds to the anxieties of some cultural institutions and private collectors in the United States that courts will require them to forfeit property they acquired long ago that is now claimed by foreign governments either to have been stolen, strictly speaking, or otherwise to have left their territories in violation of their antiquities or customs laws. The technical problem that seems to have motivated the drafting of the proposed legislation relates to the diversity of procedural rules that govern statutes of limitations govern the period of time available for bringing a particular form of legal action after it accrues, the accrual of a cause of action is timed according to legal standards that differ among the jurisdictions. Thus, in some states such as New York, replevin laws allow actions to be brought within a stipulated period of time only *after a demand has been refused by the holder of an object* (the "demand and refusal" rule), rather than (often much earlier) *after the date of the export or theft* from the claimant foreign state.[3] In New York, therefore, a claimant can "sleep" on its rights with impunity, that is, without fear that it has delayed bringing a claim until too long after the controverted export or theft has occurred. The government of Perú claims title, for example, to *all pre*-Columbian objects on the basis of a 1929 law of cultural patrimony, regardless of how long the objects may have "reposed" in another country, even without Peru's assertion until recently of entitlement to the property.[4]

In response to this technical problem, the proposed legislation seeks to free United States owners of cultural property from civil suit by foreign governments. To quote the sponsors of the current bill in Congress, its specific purpose is to protect the "right [of collectors] to acquire items in other countries legally and in good faith, without fear of subsequent seizure by the government of the country of origin".[5] On

[2] There are four versions of the proposed legislation. Generally, H.R. 2389, 99th Cong. Ist Sess. (1985) and its identical counterpart, S. 1523, *id.* [hereinafter cited as proposed legislation], were intended to supersede S. 311 and H.R. 1798, 98th Cong., Ist Sess. (1983). Hearings on S. 1523 were held Jan. 9, 1986.

[3] See generally Comment, "The Recovery of Stolen Art: Of Paintings, Statues, and Statutes of Limitations, 27 *U.C.L.A. L. Rev.*, 1122 (1980); Kunsssammlungen zu Weimar v. Elicofon, 678 F.2d 1150 (2d Cir. 1982); Menzel v. List, 49 Misc. 2d 300, 267 N.Y.S. 2d 804 (Sup. Ct. 1966), *aff'd per curiam*, 28 App. Div. 2d 516, 279 N.Y.S. 608 (1967).

[4] CONG. REC. E2981 (daily ed. June 25, 1984) (statement of Rep. Long).

[5] CONG. REC. E2250 (daily ed. May 16, 1985) (statement of Rep. Gephardt).

its face, this stated purpose would seem to argue for a license to steal. Giving the bill the benefit of the doubt, however, one might reasonably infer that it was intended to immunize from litigation only those claims for material *appropriately reposing* in the United States, that is, to discourage *unreasonable and unfair* claims by foreign sovereigns to property. Regardless of which of these presumed purposes is accurate, this essay will attempt to show that the proposed legislation is neither justifiable nor necessary. Supporters of repose legislation also object to claims by foreign sovereigns that refuse to reciprocate in favor of United States-based claims to recover American property in the foreign territory.[6] To supporters of the repose legislation, the issue is one of fairness.

The first repose bills were reportedly drafted and promoted not in Washington, but in the offices of a Houston, Texas law firm that was serving as a Congressional lobbyist on behalf of a local client. That in itself is an interesting point concerning the legislative process. The impetus for the legislation seems to have been Rumania's claim of title to an El Greco painting ("Giacomo Bosia") that has been possessed for less than four years by the Kimbell Art Museum in Fort Worth, Texas, and the (misplaced) fear that the Government of Peru claims all pre-Columbian artifacts brought into the United States since 1929.[7] Although the repose legislation has little chance of enactment, it raises interesting questions that help reveal features of the legal process in the United States.

1. *A Summary*

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

The proposed legislation is designed to be applied in conjunction

In the Jan. 9, 1986 hearing on S. 1523, Senator Mathias, the bill's sponsor, rather ambitiously declared the following purpose: "to reduce the uncertainties inherent in the ownership of art, artifacts, and other cultural property."

[6] CONG REC. E2981, *supra* note 4.

[7] See CONG. REC. E2981, 2250, *supra* notes 4. 5. For an excellent discussion, including Peru's vigorous denial of an intention to claim the pre-Colombian objects; see Herscher, "Senate Holds Hearings on Cultural Property Repose Act", 13 *J. of Field Archaeology*, Sept. 1986, at 3.

with a federal law that implements the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property.[8] Thus, "cultural property" is defined by the UNESCO Convention. Under the Act that implements the UNESCO Convention, the United States and foreign governments may formally designate significant items and categories of cultural property; this designation then leads to import restrictions to curtail illicit international trade in the designated items. The UNESCO-implementing Act provides for administrative seizure and return of objects imported in violation of those restrictions after its enactment, subject to a sliding scale of repose periods ranging from three to twenty years, depending on whether interested parties could have determined the itm's whereabouts through proper investigation. Neither the Act nor the UNESCO Convention applies retroactively. Supporters of repose legislation claim, however, that the UNESCO-implementing Act does not offer repose with respect to items exported before the date of specific designation, nor to items that are not specifically designated, nor to any form of action other than a suit by the United States to enforce the import restrictions. Thus, supporters of the proposed legislation claim that the UNESCO-implementing Act is a piece of Swiss cheese, full of holes; they claim that the existing law offers little real protection against extravagant claims by foreign sovereigns in United States courts. Opponents of the proposed legislation respond, however, that the holes in the Swiss cheese represent gaps in more effective implementation of international cultural property law. In any event, "hardly a show on pre-Columbia art could be mounted anyhere without charges that it contains looted material".[9]

2. *Details*

A. The Proposed Legislation

The proposed legislation for repose of cultural property would bar the initiation of civil actions by foreign governments to recover artifacts that have been held in the United States for at least five years before the date of the legislation's enactment or under any of several other

[8] Oct. 23-Nov. 14, 1970, 823 U.N.T.S. 231 (1972), *reprinted in* 10 Int'l Legal Materials 289 (1971).

[9] Crossley, "The Mayan Field at the Kimbell", *The Washington Post,* May 18, 1986, at B1, B11, col. 6.

circumstances. The latter provisions are designed to bar claims by foreign governments whenever they are deemed to have adequate notice of an artifact's location in the United States. The proposed legislation would, however, preserve the right of foreign individuals or non-governmental entities to bring civil actions.

Enactment of the proposed legislation on October 1, 1987, for example, would mean that a foreign government could not commence a recovery action, claiming an artifact that had entered the United States more than five years earlier (before October 1, 1982), or which:

> (2) has been held in the United States for two years, irrespective of the date of enactment of this Act by a recognized museum or religious or secular monument or similar institution, if, for that period, the institution has exhibited the item or has made knowledge of it available through publication, cataloguing or otherwise; or
> (3) has been held in the United States for five years, irrespective of the date of enactment of this Act, if, for three years of that period, that fact of such holding was made public through public exhibition or publication, through consultation by the holder with scholars or experts, through published studies or otherwise; or
> (4) has been held in the United States for ten years, irrespective of the date of enactment of this Act, unless the foreign state establishes that the United States holder acquired the item with actual knowledge that it had been removed from the possession of the country of origin in violation of the law of the country of origin, in which event the foreign state shall have two years from the date such state acquired knowledge of the identity of the holder in which to bring such action.[10]

B. A Comparison Between the Proposed Legislation and the Convention on Cultural Property Implementation Act

The proposed legislation differs from the UNESCO-related Convention on Cultural Property Implementation Act ("the Act").[11] The latter generally provides for repose of cultural property from *administrative* seizure, usually by the Custom Service, rather than *adjudicated* seizure of property brought into the United States in violation of the Convention. A summary of the Act and its background follows.

[10] Proposed legislation, *supra* note 2.

[11] 19 U.S.C. §2601 *et seq.* For a summary, *see* Kouroupas & Guthrie, *The Cultural Property Act: What it Means for Museums,* Museum News, June 1985, at 47.

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

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

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

With respect to artifacts that have been held in the United States for ten years, the Act provides against administrative seizure if they

have been exhibited in a museum for any five of the years. The corresponding provision in the proposed legislation, on the other hand, would grant repose from civil claims for all artifacts that have been held in the United States for only five years, irrespective of the date of enactment of the proposed legislation, so long as they have been exhibited, catalogued, publicized, or otherwise made known to scholars for three of the five years, not necessarily in a museum or similar institution.

The Act otherwise establishes that artifacts are immune from seizure that have been held in the United States for ten years where it can be proven that the concerned foreign government received or should have received fair notice of their location. The proposed legislation, by contrast, shifts the burden by barring litigation to recover artifacts that have been held in the United States for ten years, irrespective of the date of enactment of the proposed legislation, unless the foreign government can prove that the United States holder acquired the artifact with *actual knowledge* that it had been exported illegally, and initiates a recovery action within two years of the time it has first learned of the holder's identity. This burden of proof imposed on the foreign government is very heavy. Given that stolen property typically changes hands at least once before it appears in the marketplace, the property thereby becomes removed from the first purchaser, who may be the only one to "knowlingly" acquire the property. Quite likely, then, the holder against whom the foreign government asserts a claim will be immune from civil action by the claimant government.

Finally, if all else fails, the Act, but not the proposed legislation, provides immunity from seizure of artifacts held in the United States for the long period of 20 years if the holder can establish that it had purchased the artifact "for value and without knowledge or reason to believe that it was imported in violation of the law".

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

3. *Constitutional Issues*

What are the legal problems? Let us begin with the United States Constitution. The Fourteenth Amendment provides, in part, that no state shal "deny to any person within its jurisdiction the equal protection of the law".[12] This principle of equal protection applies, arguably, to federal as well as state courts because of the Fifth Amendment's Due Process Clause, which by judicial interpretation incorporates the Fourteenth Amendment (otherwise applicable only to state action). Under the proposed legislation, foreign governments, but not other plaintiffs, would either be denied their "day in court" before their claims arose, or be required to carry a unique burden of proving that a holder of an item knew that it had been stolen. Thus, the law would be applied unequally.

The rule of equal protection therefore casts doubt on the constitutional validity of the proposed legislation, and invites retaliation by foreign governments against United States nacional who might seew foreign governmental assistance in recovering stoles cultural property within their jurisdiction. Although no federal court has ever held against other forms of repose legislation, some statutes of repose have been held to violate state constitutions. An example of a successful challenge is *Overland Construction Co., Inc. v. Sirmons*,[13] where the Florida Supreme Court held that a Florida statute of repose was unconstitucional. The statute was said to violate a provision of the Florida Constitution, as follows: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."[14] It is arguable that this clause was written simply to ensure that all citizens had access to Florida courts without regard to race, sex or creed, and that it did not bar the legislature from imposing other limitations on causes of action. The Florida court, however, interpreted that state's constitution broadly so as to guarantee a reasonable access to the court for redress of a wrong, and concluded that it would be unreasonable to bar a claimant from access to the court prior to the occurrence of any injury. The Florida court was specifically addressing issues of purely domestic concern involving a statute that would have protected a single class of defendants —manufacturers in products liability cases— against court actions. Neverthe-

[12] U. S. CONST. amend. XIV, §1.
[13] 369 So. 2d 572 (Fla. 1979).
[14] Fla. Const. art 1, §21.

less, the proposed legislation with which this essay deals raises similar constitutional issues. Thus, the distinction between foreign sovereigns, who would be greatly handicapped in bringing litigation to reclaim property, and the individuals and non-governmental organizations who could continue to do so, is highly questionable.

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

Another constitutional problem is that, within the federal system of the United States, federal repose legislation improperly enters a domain that has been reserved to the states historically and for good reason. Within the federal system there is no uniform property law, nor are there uniform statutes of limitations, although there are some uniform conflict-of-law rules governing the applicability of conflicting statutes of limitations. Generally, then, both the statutory period for bringing an action and property law desling with the ownership, disposition and recovery/return of property have been treated as state, not federal, concerns. For example, the federal courts, following the United States Supreme Court, have made it abundantly clear in certain procedural contexts that statutes of limitations can be "outcome-determinative" and therefore are generally within the province of state law.[15]

Even when foreign affairs are involved, ordinarily a matter strictly for the federal government, state law may govern if the underlying interests are essentially matters of property or statutes of limitations and the federal, foreign affairs interest is only incidental. Thus, the United States Supreme Court has been willing to permit the states to have juridical control over the disposition of property involving foreign interests so long as that control does not conflict with federal law, including any treaty commitments, or directly interfere otherwise with the normal conduct of foreign affairs. The is an important point. An

[15] In Guaranty Trust Co. v. York, 326 U.S. 99 (1945), for example, the United States Supreme Court held that a federal court must apply state statutes of limitations. The court's rationale was that, "in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court".

argument in favor of federal repose legislation is that, because it has an international dimension, it is therefore an exception to the general reservation of authority to the states in matters of property and statutes of limitations. Let us briefly examine this argument.

It is well established that all state actions within the federal system that may have a significant impact on foreign affairs or may conflict with United States foreign policy are unconstitutional so long as they have not been explicitly authorized by the federal government. For example, in *Zschernig v. Miller,*[16] the Supreme Court struck down an Oregon statute which required probate courts to make a three-leveled inquiry "into the type of government that obtain in particular foreign nations"[17] before permitting citizens of those nations to receive property left them by Oregon residents. The Court's rationale was that the state had intruded into the field of foreign affairs which the Constitution entrusts to the President and the Congress. To justify repose legislation on this theory is, however, bootstrapping. After all, it is unlikely that any foreign government would favor the repose legislation; thus the United States government has no foreign interests to protect against state encroachment by means of the proposed legislation. The legislation might even harn foreign relations between the United States and other governments. For example, the legislation might bar German museums from recovering cultural property wrongfully taken by the Nazis or foreign troops during the Second World War. To argue that the mere insertion of a foreign dimension into legislation makes it a federal concern is to argue that there is no objective reality to the constitutionally prescribed division between federal and state jurisdiction. The intended result of the repose legislation is reminiscent of the notorious (and unsuccessful) Bricker Amendments of the 1950's, whose purpose was to try to restrict the powers of the executive branch of the federal government to cooperate with foreign governments.[18]

Repose legislation would violate not only these constitutional principles, but also the spirit, if not the specific provisions, of the UNESCO Convention, which as a treaty properly implemented by special legislation is the "Supreme Law of the Land" under the United States Constitution. One might argue that, if the repose exemptions of the UNESCO Convention's implementing legislation are acceptable, so are the exemptions in the proposed legislation. That, however, is comparing

[16] 389 U.S. 429 (1968).
[17] *Ibidem.*
[18] For a discussion of these, see W. Bishop, International Law: Cases and Materials 110 (3d ed. 1971).

apples with oranges. It is one thing to define, as the implementing legislation does, the administrative measures by which the United States Customs Service is to implement treaty law, subject to court review, and quite another thing to deny access, as this bill does, to the courts.

4. *Issues of Draftmanship*

The proposed bill also presents problems of draftsmanship. The wording is often vague. Notification or public disclosure provisions, in particular, would be ineffective —as the drafters may well have intended. Is would be next to impossible for foreign governments to monitor and thereby know about all exhibitions and publications that conceivably give notice of the unexpected location of a particular artifact. One of the proposed exemptions refers to cultural property that has been held in the United States for five years where, "for three years of that period, [the fact of the holding of that property] was made public through exhibition or publication, through consultation by the holder with scholars or experts, through published studies or otherwise".[19] Thisexemption is so large as to swallow any principle of cooperation with foreign sovereigns. Who qualifies as a "scholar or expert"? What constitutes adequate "exhibition or publication"? What constitutes acceptable "consultation"? Note, for example, that *any* publication of the possession of the cultural property seems acceptable, even a brief notice placed deliberately in an obscure or unknown publication, perhaps even a newsletter distributed primarily to an institution's own trustees. There is also an exemption for museums, religious or secular monuments, or similar institutions whenever that institution has exhibited the item —the bill does not say where presisely— or has made knowledge of it available through publication, cataloguing or "otherwise".[20] Constitutionally, the vagueness of such terms as "publication", "cataloguing", and especially "otherwise" is so great that the proposed legislation may be void. In the words of one expert:

> It is totally unrealistic to suggest, because an object has been exhibited in a museum for three years or even five, that this is sufficient notice,. or if it is published in a museum bulletin or in an obscure archaeological publication, it will thus come to the atten-

[19] Proposed legislation, *supra* note 2, ch. 101(a)(3).
[20] *Ibidem.*

tion of the officials of those countries from which the object has come.

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

A final question about the repose legislation is whether it would affect the principle, *nemo plus juris ad alium transferre potest quam ipse habet* ("one cannot give what he does not have"). Although a statute may qualify the principle that a thief cannot pass good title, such action ought to be taken only in exceptional circumstances that would not seem to exist to justify the repose legislation.

II. Alternatives to reposet legislation

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

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

[21] Letter from Paul N. Perrot to Rep. Gephardt, *quoted in* 12 J. Field Archaeology 479 (1985) [hereinafter cited as Letter].

less sensitive to foreign claims of wrongfully exported cultural property than they are to any other wrongfully-exported property.

What are the alternatives to the proposed legislation? Let us first accept the stated purpose of the bill. It is to protect institutions and collectors against unfair or unreasonable claims by foreign sovereigns. What, then, is unreasonable? it would seem to be sensible to prohibit claims where property on truly public display has very clearly reposed for extended periods of time. In the most obvious case, the cultural property may have been openly exhibited for extended periods of time. For example, the magnificent collection of French impressionist art in Leningrad's Hermitage Museum is as closely identified today with the Soviet Union as it is with France, Permanent repose in Leningrad would seem to be apropriate. Thus, one alternative to sweeping repose legislation might be to oppose claims by foreign sovereigns for return of long-reposing, publicly-exhibited property, while at the same time encouraging institutions and collectors to cooperate unilaterally or informally in the return or restitution of some cultural property.[22] That is, after all, a moral or ethical responsibility.

Also, in the contemporary legal world it may be unreasonable for a foreign state to assert a claim for restitution outside the terms of a multilateral or bilateral treaty such as that between Mexico and the United States.[23] It certainly seems unfair or unreasonable to apply new restric-

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

[23] Treaty of Cooperation Providing for the Recovery and Return of Stolen archaeological, Historical and Cultural Properties, July 17, 1970, United States-Mexico, 22.1 U.S.T. 494, T.I.A.S. No. 7088. Article III of the Treaty provides:

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

See also Act of the Regulation of Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals, 19 U.S.C. §§ 2091-2095 (1976).

Section 2092(a) of that Act provides as follows:

> No pre-Columbian monument or architectural sculpture or mural which is exported... from the country of origin after the effective date of the regulation listing such sculpture or mural... may be imported into the United States unless the government of the country of orign of such sculpture or mural issues

tions on the flow of cultural property retroactively. Normal statutes of limitations ought to be applied to all property, whether it is "cultural" or not.

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

> Objects that have been in this country for fifteen, or preferably twenty, years, were exhibited in a prominent location, published in a broadly circulated bulletin and in an appropriate archaeology publication should be protected. The argument advanced by some, that the western industrial world, by acquiring collections has protected a good part of the developing world's patrimony in the past, is certainly valid and no one would question it. The fact is, however, that these countries despoiled in the past, either by wars, colonial occupation or illicit activity of their own citizens in connivance with foreign buyers, are now beginning to appreciate the importance of this patrimony to the welfare of their culture. I believe that we have an obligation to assist them in this realization, which has enriched our own civilization and our people.[24]

Much of the fear that has prompted proposals for repose legislation is misplaced. The main problem for legitimate owners of cultural property, including foreign governments, is to locate the property; variations among state statutes of limitations are relatively insignificants. Even with the demand-and-refusal-type construction of statutes of limitations such as in New York,[25] or the somewhat less but still troublesome rule of adverse possession in New Jersey,[26] there are equitable doctrines (estoppel, acquiescence, and so on) to deny unreasonable claims. The *Elicofon* opinion acknowledged that, if a foreign government had simply slept on its rights and had either been negligent or acquiesced in repose of property in this country, that would have ended the matter,[27] regardless of the kinds of statutes of limitations (for

> a certificate... which certifies that such exportation was not in violation of the laws of the country.

[24] Letter, *supra* note 21.
[25] See Kunstsammlungen zu Weimar v. Elicofon, 678 F.2d 1150 (2d Cir. 1982).
[26] See O'Keeffe v. Snyder, 170 N.J. Super. 75 (1979).
[27] 678 F2d 1150, 1163, n. 23.

example, the demand-and-refuse rule) that seem to be of such great concern to those who support the proposed legislation. Also, the principle of reciprocity could be exercised to prevent suit by any foreign state that would similarly bar suits by the United States Government.

The International Foundation for Art Research has proposed an institutional response to the spectre of uncertainty in the art market raised by proponents of the legislation.[28] This proposal recommends a central registry for museums or collectors. Such a registry, supervised perhaps by the United States government, would be limited to potentially controversial items. Holders of property could file information about them, without which the local statute of limitations would not begin to run; after filing, the statute would begin to run. Prospective claim ants would then have the burden only of checking a single listing in order to avoid the adverse running of a demand-and-refusal or similar statute of limitations. Even in the absence of a central registry, collectors and museums can enlist the investigative assistance of the federal government if they have any doubts about the provenance or title of an object. The federal government may issue a declaration of immunity from public seizure to prevent claims on art or artifacts imported into the United States for exhibition.

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

[28] Letter from William B. Jones, President, International Foundation for Art Research to Senator Charles Mathias (March 26, 1986) (copy in author's files).