

# WILL THE STOP ACT STOP ANYTHING? THE SAFEGUARD TRIBAL OBJECTS OF PATRIMONY ACT AND RECOVERING NATIVE AMERICAN ARTIFACTS FROM ABROAD

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## INTRODUCTION

From 2012 until the present, there have been multiple auctions of sacred Native American artifacts in France.<sup>1</sup> Among these artifacts have been numerous Katsinam masks,<sup>2</sup> a crow mother mask,<sup>3</sup> a ceremonial shield,<sup>4</sup> and other artifacts considered intimately sacred by Native Americans.<sup>5</sup> French auction houses have sold these artifacts despite protests by Native American tribes and organizations, the U.S. State Department, non-governmental organizations, and others.<sup>6</sup> The Hopi Nation<sup>7</sup> was the most outspoken of the tribes and appeared in French courts multiple times attempting to prevent these sales.<sup>8</sup> However, the

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<sup>1</sup> See J. Weston Phippen, *The Auction of Native American Artifacts*, ATLANTIC (May 27, 2016), <http://www.theatlantic.com/international/archive/2016/05/native-american-auction/484316>; see also Nadya Masidlover, *Native American Artifacts Sold at Paris Auction Despite Opposition*, WALL ST. J. (June 1, 2015, 4:16 PM), <http://www.wsj.com/articles/native-american-artifacts-sold-at-paris-auction-despite-opposition-1433189811>. For an instructive timeline of the auctions that occurred from 2013–2014, see Laetitia Nicolazzi, Alessandro Chechi & Marc-André Renold, *Case Hopi Masks—Hopi Tribe v. Nèret-Minet and Estimations & Ventes aux Enchères*, ARTHEMIS (2015), <https://plone.unige.ch/art-adr/cases-affaires/hopi-masks-2013-hopi-tribe-v-neret-minet-and-estimations-ventes-aux-encheres>.

<sup>2</sup> The masks are made of wood, leather, and horsehair and painted with geometric designs. The Hopi Tribe consider them similar to tombs and believe that the masks house the spirits of their ancestors. See Thomas Adamson, *French Auction House Ignores Pleas to Stop Sale of Sacred Hopi Masks*, HUFFINGTON POST (Dec. 9, 2013, 9:28 AM), [http://www.huffingtonpost.com/2013/12/09/hopi-masks\\_n\\_4412206.html](http://www.huffingtonpost.com/2013/12/09/hopi-masks_n_4412206.html); THE HOPI TRIBE, <http://www.hopi-nsn.gov> (last visited Dec. 31, 2017).

<sup>3</sup> The mask depicts a geometric face flanked by crow feathers and dates from the 1880s. See Tom Mashberg, *Auction of Hopi Masks Proceeds After Judge's Ruling*, N.Y. TIMES: ARTSBEAT (Apr. 12, 2013, 8:20 AM) [hereinafter Mashberg, *Auction of Hopi Masks*], [http://artsbeat.blogs.nytimes.com/2013/04/12/french-judge-rules-that-auction-of-hopi-masks-can-proceed/?\\_r=0](http://artsbeat.blogs.nytimes.com/2013/04/12/french-judge-rules-that-auction-of-hopi-masks-can-proceed/?_r=0); see also Adamson, *supra* note 2.

<sup>4</sup> The Acoma Shield was a ceremonial shield that was stolen from the Acoma. The United States recently obtained a warrant for its removal from France. Peggy McGlone, *Native Americans Protest Planned Auction in France of Sacred Objects and Human Remains*, WASH. POST (May 24, 2016), <https://www.washingtonpost.com/news/arts-and-entertainment/wp/2016/05/24/native-americans-protest-planned-auction-in-france-of-sacred-objects-and-human-remains>.

<sup>5</sup> See Mashberg, *Auction of Hopi Masks*, *supra* note 3 (“In a statement, the Hopi tribal chairman, LeRoy N. Shingoitewa, said: ‘Given the importance of these ceremonial objects to Hopi religion, you can understand why Hopis regard this—or any sale—as sacrilege, and why we regard an auction not as homage but as a desecration to our religion.’”); see also Adamson, *supra* note 2 (stating the artifacts are considered so sacred that the Hopi Nation asked the Associated Press to refrain from presenting images of the artifacts); Phippen, *supra* note 1.

<sup>6</sup> Even the U.S. Ambassador to the United Nations Educational, Scientific and Cultural Organization (UNESCO), David Killion, wrote a letter calling on France and other countries to strengthen their laws preventing the sale of cultural property. See Adamson, *supra* note 2.

<sup>7</sup> The Hopi Nation is a tribe and sovereign nation that consists of the Hopi people living in the northeastern region of Arizona. The reservation where the tribe is located covers more than 1.5 million acres and contains twelve villages. See THE HOPI TRIBE, *supra* note 2.

<sup>8</sup> See Tom Mashberg, *Despite Legal Challenges, Sale of Hopi Religious Artifacts Continues in France*, N.Y. TIMES (June 29, 2014) [hereinafter Mashberg, *Sale of Hopi Religious Artifacts Continues*], <http://www.nytimes.com/2014/06/30/arts/design/sale-of-hopi-religious-items->

French courts refused to stop the auctions or seize the artifacts.<sup>9</sup> The Hopi attempted to appear before the French government agency responsible for auction houses, the Conseil des Ventes, but the agency held that the Hopi could not bring a claim of repatriation because the tribe had no legal existence under French law.<sup>10</sup>

Unfortunately, international law has failed to provide a comprehensive solution for the repatriation of cultural property, such as Native American objects.<sup>11</sup> To address the issue, New Mexico Senator Martin Heinrich introduced the Safeguard Tribal Objects of Patrimony Act of 2017 (STOP Act)<sup>12</sup> which would amend the Native American Graves Protection and Repatriation Act (NAGPRA) to explicitly prohibit the export of Native American artifacts out of the United States.<sup>13</sup> The Hopi Nation and other Indian tribes and organizations

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continues-despite-us-embassys-efforts.html?\_r=0.

<sup>9</sup> *Id.*

<sup>10</sup> See Pierre Ciric, *Opinion: Hopi and Navajo Masks Auction Precedent in France is Dangerous*, ARTNET NEWS (July 25, 2014), <https://news.artnet.com/market/opinion-hopi-and-navajo-masks-auction-precedent-in-france-is-dangerous-66975>.

<sup>11</sup> See *infra* Section I.A. For the purposes of this Note, Native American sacred and archaeological artifacts will be classified as cultural property. For a discussion of Native American legislation protecting these artifacts as sacred objects rather than as cultural property, see Mariam Hai, *Selling the Sacred: An Examination of Sacred Objects in Legal Contexts*, 24 DEPAUL J. ART, TECH. & INTELL. PROP. L. 193 (2013).

<sup>12</sup> Safeguard Tribal Objects of Patrimony Act of 2017 (STOP Act), S. 1400, 115th Cong. (2017). Senator Heinrich initially introduced the bill in 2016 but it did not pass so he reintroduced the bill in 2017. See Press Release, Martin Heinrich, U.S. Senator for N.M., Heinrich Introduces Bipartisan Legislation to Safeguard Tribal Items (June 21, 2017) [hereinafter Press Release, Martin Heinrich], <https://www.heinrich.senate.gov/press-releases/heinrich-introduces-bipartisan-legislation-to-safeguard-tribal-items>; see also U.S. Senator Martin Heinrich, *Press Conference: Heinrich Introduces Legislation to Prohibit Exporting Sacred Native American Items*, YOUTUBE (July 6, 2016) [hereinafter U.S. Senator Martin Heinrich, *Press Conference*], <https://www.youtube.com/watch?v=6x35ZNUsdgc>; Andrew Westney, *NM Sen. Refloats Bill to Protect Sacred Tribal Objects*, LAW360 (June 22, 2017, 7:41 PM), <https://www.law360.com/articles/937366/nm-sen-refloats-bill-to-protect-sacred-tribal-objects>.

Heinrich was not the only representative fighting for reform related to the export of Native American artifacts. New Mexico U.S. Congressman Steve Pearce had introduced the Protection of the Right of Tribes to Stop the Export of Cultural and Traditional Patrimony Resolution (PROTECT Patrimony Resolution) just a few months prior to Heinrich's announcement. The PROTECT Patrimony Resolution calls on the Government Accountability Office to investigate the nature of the theft of Native American artifacts in the United States and how the illegal export of these items can be prevented. H.R. Con. Res. 122, 114th Cong. (2016); Press Release, Steve Pearce, U.S. Congressman for N.M., Congressman Pearce, Chairman Goodlatte, and Chairman Sensenbrenner Initiate Investigation into Illegal Theft and Sale of Tribal Artifacts (July 5, 2016), <https://pearce.house.gov/press-release/congressman-pearce-chairman-goodlatte-and-chairman-sensenbrenner-initiate>.

<sup>13</sup> The bill also increases the maximum incarceration penalty for trafficking Native American artifacts and establishes a committee to propose methods to decrease the trafficking of Native American artifacts. See Safeguard Tribal Objects of Patrimony Act of 2017 (STOP Act), S. 1400, 115th Cong. (2017). This Note will not address the bill's increased maximum incarceration penalty. However, it is unlikely that this increased maximum incarceration penalty will be an effective deterrent for those illegally exporting Native American objects. For a discussion on the effectiveness of increased incarceration penalties, see David S. Abrams, *The*

have endorsed the bill, hoping that it will decrease the sale of sacred Native American artifacts abroad.<sup>14</sup> As currently drafted, the STOP Act would be effective in those countries that recognize foreign cultural property export restrictions.<sup>15</sup> However, many countries do not recognize foreign cultural property export restrictions, making the STOP Act ineffective in those countries.<sup>16</sup>

In contrast, national patrimony laws are more successful in foreign courts because the petitioning country can claim ownership of the cultural property in question.<sup>17</sup> Theft is a universally recognized crime, making a foreign court more likely to recognize the petitioning country as the lawful owner of the object and return the object to the petitioning country.<sup>18</sup> Unfortunately, many countries do not recognize Native American tribes as sovereigns and will not permit the tribes to bring repatriation claims.<sup>19</sup>

To address these issues, Congress should amend NAGPRA to: (1) increase NAGPRA's strength as an export restriction and (2) permit a NAGPRA committee to advise the U.S. Attorney General to initiate civil proceedings in foreign courts on behalf of Native Americans.<sup>20</sup> The first provision (the export license) would curb the illegal export of Native American objects and align U.S. cultural property law with that of most other nations.<sup>21</sup> The second provision would help Native Americans

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*Imprisoner's Dilemma: A Cost-Benefit Approach to Incarceration*, 98 IOWA L. REV. 905, 916 (2013); Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 200–01 (2013). For an account and analysis of recent enforcement and sentencing for trafficking in Native American artifacts in the Four Corners Region, see Derek Fincham, *Social Norms and Illicit Cultural Heritage*, in ENFORCING INTERNATIONAL CULTURAL HERITAGE LAW 206, 222–26 (Francesco Francioni & James Gordley eds., 2013); Jennifer Goddard, *Anticipated Impact of the 2009 Four Corners Raid and Arrests*, 56 CRIME L. & SOC. CHANGE 175 (2011).

<sup>14</sup> See Press Release, Martin Heinrich, *supra* note 12 (Both the Navajo Nation and the Eight Indian Pueblos Council passed resolutions supporting the STOP Act. Additionally, multiple Native American tribes endorsed the bill, including the Jicarilla Apache Nation, the Pueblos of Acoma, Santa Ana, Isleta, Zuni, Laguna, Nambé, Jemez, and Ohkay Owingeh. The All Pueblo Council of Governors, the National Congress of American Indians, and the United South and Eastern Tribes Sovereignty Protection Fund have also endorsed the bill.); see also U.S. Senator Martin Heinrich, *Press Conference*, *supra* note 12.

<sup>15</sup> See *infra* Section II.A.

<sup>16</sup> See John Gribble & Craig Forrest, *Underwater Cultural Heritage at Risk: The Case of the Dodington Coins*, in ART AND CULTURAL HERITAGE: LAW, POLICY AND PRACTICE 313, 316 (Barbara T. Hoffman ed., 2006) (“A fundamental principle of international law is the recognition of the equality of States and respect for the sovereignty of each State. From this concept derives the principle that no State will require another State to enforce its public laws. This would include not only penal and revenue laws, but also exportation laws, including those that prohibit the exportation of cultural heritage.”); *infra* Section II.A.

<sup>17</sup> See *infra* Section II.B.

<sup>18</sup> See *infra* Section II.B.

<sup>19</sup> See *infra* Section III.B.

<sup>20</sup> See *infra* Part III.

<sup>21</sup> See *infra* Section III.A; see also PATTY GERSTENBLITH, ART, CULTURAL HERITAGE, AND THE LAW: CASES AND MATERIALS 548 (2004).

recover their artifacts in foreign courts that do not recognize Native American tribes as legal entities.<sup>22</sup>

Cultural property law varies from country to country and makes the results of repatriation claims unpredictable. These amendments to NAGPRA would not guarantee the successful repatriation of Native American objects from foreign countries in every instance.<sup>23</sup> It is possible that a foreign court would refuse to recognize Native American tribes as the owners of these objects regardless of their claim of ownership or representation by the Department of Justice.<sup>24</sup> However, some courts have recognized foreign national ownership claims.<sup>25</sup> In fact, they have demonstrated greater willingness to recognize foreign national ownership claims rather than foreign export restrictions.<sup>26</sup> Thus, these amendments to NAGPRA would be more successful than a pure export restriction (like the STOP Act as currently drafted). It is in the best interest of the United States and the Native American tribes to create the most thorough legislation possible. This will increase the likelihood of the tribes receiving a favorable outcome in foreign courts that are closely scrutinizing U.S. law.

Part I of this Note analyzes the international treaties and U.S. domestic laws that govern and influence the sale of Native American artifacts. This analysis demonstrates that both current international law and current U.S. law are inadequate to prevent the sale of Native American artifacts abroad. Part II analyzes how countries attempt to protect their cultural property by passing export restrictions and cultural patrimony laws. Part III proposes that Congress should amend NAGPRA to require an export license process for legally owned Native American artifacts and permit a NAGPRA committee to advise the U.S. Attorney General to initiate civil proceedings in foreign courts on behalf of Native Americans. By so doing, Congress would increase the likely effectiveness of NAGPRA in combating and preventing the sale of Native American artifacts abroad.

## I. INTERNATIONAL AND U.S. CULTURAL PROPERTY LAW

### A. 1970 UNESCO Convention and 1995 UNIDROIT Convention

There currently exists no binding international law requiring the repatriation of indigenous cultural property, such as Native American

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<sup>22</sup> See *infra* Section III.B.

<sup>23</sup> See *infra* Section III.B.

<sup>24</sup> See *infra* Section III.B.

<sup>25</sup> See *infra* Section II.B.

<sup>26</sup> See *infra* Section II.B.

sacred and archaeological objects.<sup>27</sup> However, the international community has addressed the issue by passing various multilateral treaties and declarations.<sup>28</sup> Though none are binding on the signatories, all aspire to protect cultural property from illegal trafficking.<sup>29</sup> The relevant treaties include the 1970 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property,<sup>30</sup> and the 1995 International Institute for the Unification of Private Law (UNIDROIT) Convention on Stolen or Illegally Exported Cultural Objects.<sup>31</sup> When analyzing the cultural property of indigenous populations, it is also relevant to discuss the 2007 U.N. Declaration on the Rights of Indigenous People.<sup>32</sup>

In 1970, UNESCO adopted a treaty prohibiting the illicit trafficking of tangible objects of cultural property.<sup>33</sup> Scholars, governments, and individuals were concerned about the illicit trafficking of cultural property and the damage it was causing to archaeological and cultural heritage sites throughout the world.<sup>34</sup> Frequently, this was a result of museums and individuals in the United States and Western Europe purchasing antiquities that had been illegally excavated or looted from other countries rich in cultural property.<sup>35</sup> The treaty went through multiple versions as the drafters attempted to create a document that art market nations, such as the United States and Western European countries, would agree to.<sup>36</sup>

The treaty was named the Convention on the Means of Prohibiting

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<sup>27</sup> See KAROLINA KUPRECHT, *INDIGENOUS PEOPLES' CULTURAL PROPERTY CLAIMS: REPATRIATION AND BEYOND* 124 (2013) ("Several international conventions have tried to facilitate the complex legal, political, and cultural challenges of international cultural property repatriation claims in general and increasingly introduce indigenous people's distinct interests. However, the effects of such law on the legal assessment of indigenous peoples' cultural property repatriation claims have been minimal so far.").

<sup>28</sup> See Matthew H. Birkhold, *Cultural Property at Auction: The Trouble with Generosity*, 39 *YALE J. INT'L L. ONLINE* 87, 91 (2014) ("Domestically and internationally, a developing legal framework provides indigenous groups with tools to restore their cultural property.").

<sup>29</sup> See *id.*

<sup>30</sup> Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter 1970 UNESCO Convention].

<sup>31</sup> UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 2421 U.N.T.S. 457.

<sup>32</sup> G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) [hereinafter UNDRIP].

<sup>33</sup> See Katherine D. Vitale, *The War on Antiquities: United States Law and Foreign Cultural Property*, 84 *NOTRE DAME L. REV.* 1835, 1840 (2009). The work of both Clemency Coggins (researcher on the plunder of Maya artifacts) and Karl E. Meyer (author of *The Plundered Past*) on the trafficking of cultural property were particularly important contributions in bringing the issue to the attention of the global community. See GERSTENBLITH, *supra* note 21, at 552.

<sup>34</sup> See generally GERSTENBLITH, *supra* note 21, at 552.

<sup>35</sup> See generally *id.* at 549, 552.

<sup>36</sup> See *id.* at 552.

and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention or Convention).<sup>37</sup> To date, 135 countries have signed the Treaty, including the United States and France.<sup>38</sup> The Convention places three main responsibilities upon a State Party<sup>39</sup>: (1) to prevent the illegal export of the state's cultural property<sup>40</sup>; (2) to return the stolen cultural property of other States<sup>41</sup>; and (3) to strengthen international cooperation when cultural property is in jeopardy.<sup>42</sup>

Concerning this first responsibility, the Convention requires each State to attempt to prevent the illicit export of its own cultural property.<sup>43</sup> The Convention lists various methods for accomplishing this, such as legislation regulating exports, export licenses, and educational campaigns.<sup>44</sup> The export preventative measures most relevant for this Note are export regulations and export licenses. As will be discussed below, the STOP Act is an export regulation.<sup>45</sup>

Secondly, the Convention requires each State to take “appropriate steps” to return cultural property that was illicitly exported from its country of origin.<sup>46</sup> However unlike the provision contained in Article 5,

<sup>37</sup> 1970 UNESCO Convention, *supra* note 30.

<sup>38</sup> See *States Parties: Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*. Paris, 14 November 1970., UNITED NATIONS EDUC., SCI. & CULTURAL ORG., <http://www.unesco.org/eri/la/convention.asp?KO=13039&language=E> (last visited Jan. 1, 2018).

<sup>39</sup> See *1970 Convention: Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property—1970*, UNITED NATIONS EDUC., SCI. & CULTURAL ORG., <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1970-convention> (last visited Jan. 1, 2018) [hereinafter 1970 Convention] (“The 1970 Convention requires its State Parties to take action in these main fields: Preventive measures, . . . [r]estitution provisions, . . . [and i]nternational cooperation framework . . .”).

<sup>40</sup> 1970 UNESCO Convention, *supra* note 30, at art. 5.

<sup>41</sup> *Id.* at art. 7(b)(ii).

<sup>42</sup> *Id.* at art. 9; see 1970 Convention, *supra* note 39 (“In cases where cultural patrimony is in jeopardy from pillage, Article 9 provides a possibility for more specific undertakings such as a call for import and export controls.”).

<sup>43</sup> See *Text of the Convention: Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property—1970*, UNITED NATIONS EDUC., SCI. & CULTURAL ORG., [http://portal.unesco.org/en/ev.php-URL\\_ID=13039&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html) (last visited Jan. 1, 2018) (“[I]t is incumbent upon every State to protect the cultural property existing within its territory against the dangers of theft, clandestine excavation, and illicit export . . . [T]o avert these dangers, it is essential for every State to become increasingly alive to the moral obligations to respect its own cultural heritage and that of all nations.”); 1970 UNESCO Conference, *supra* note 30, at art. 5.

<sup>44</sup> See 1970 UNESCO Conference, *supra* note 30, at art. 5; 1970 Convention, *supra* note 39 (“The 1970 Convention requires its State Parties to take action in . . . Preventive measures: Inventories, export licenses, monitoring trade, imposition of penal or administrative sanctions, educational campaigns, etc.”).

<sup>45</sup> See *infra* Section II.B.

<sup>46</sup> See 1970 UNESCO Conference, *supra* note 30, at 7(b)(ii); 1970 Convention, *supra* note 39 (“Per Article 7(b)(ii) of the Convention, States Parties undertake, at the request of the State Party ‘of origin’, to take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned . . .”).

this provision does not list examples of these mechanisms.<sup>47</sup> Each State Party is left to determine what constitutes “appropriate steps” for the return of illicitly exported cultural property.<sup>48</sup> As was seen when the Hopi Nation attempted to reclaim its sacred objects, diplomatic channels were not adequate, and the Hopi Nation had to go to court to attempt to reclaim their cultural property.<sup>49</sup>

The third main responsibility in the Convention is for States to strengthen international cooperation when cultural property is in jeopardy.<sup>50</sup> States have adopted a variety of ways to implement this. For example, the United States passed the Cultural Property Implementation Act (CPIA).<sup>51</sup> The CPIA permits the United States and foreign countries to enter into cultural property bilateral agreements prohibiting the import into the United States of certain categories of cultural property.<sup>52</sup>

As demonstrated by these three main responsibilities, the Convention requires both source nations and market nations to assist in preventing the trafficking of cultural property.<sup>53</sup> A source nation cannot

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<sup>47</sup> See 1970 UNESCO Conference, *supra* note 30, at art. 7(b)(ii).

<sup>48</sup> See *id.*

<sup>49</sup> See *supra* notes 1–3.

<sup>50</sup> See 1970 UNESCO Conference, *supra* note 30, at art. 9; 1970 Convention, *supra* note 39 (“In cases where cultural patrimony is in jeopardy from pillage, Article 9 provides a possibility for more specific undertakings such as a call for import and export controls.”).

<sup>51</sup> Convention on Cultural Property, 19 U.S.C. §§ 2601–13 (2012).

<sup>52</sup> See Daniel A. Klein, *Construction and Application of Convention on Cultural Property Implementation Act (CPIA)*, 19 U.S.C.A. §§ 2601 *et seq.*, 54 A.L.R. Fed. 2d 91 (2011); *Foreign Government Requests*, U.S. DEP’T OF STATE, <https://eca.state.gov/cultural-heritage-center/cultural-property-protection/process-and-purpose/foreign-government> (last visited Jan. 1, 2018). To date, the United States has bilateral agreements with the following sixteen countries: Belize, Bolivia, Bulgaria, Cambodia, China, Colombia, Cyprus, Egypt, El Salvador, Greece, Guatemala, Honduras, Italy, Mali, Nicaragua, and Peru. *Bilateral Agreements*, U.S. DEP’T OF STATE, <https://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements> (last visited Jan. 1, 2018). There are also import restrictions for objects originating in Syria and Iraq, but these import restrictions are a result of emergency restriction provisions in the CPIA, not the bilateral agreement provisions of the CPIA. See Convention on Cultural Property, 19 U.S.C. § 2603 (2012). However, the bilateral agreements under the CPIA fail to establish responsibilities in the other state party to return any cultural property originating from the United States. It does not require the other state party to prohibit the import of Native American artifacts or other cultural property originating from the United States. See Samantha Anderson, Note, *Do as I Say, Not as I Do: Inconsistencies in International Cultural Property Repatriation*, 24 CARDOZO J. INT’L & COMP. L. 315, 337 (2016).

<sup>53</sup> Typically, in cultural heritage law, countries with an abundance of cultural property are referred to as “source nations” and include countries such as Mexico, Egypt, Greece, and India. Countries that receive a high percentage of this property are referred to as “market nations” and include countries such as the United States, France, and Switzerland. For purposes of this Note though, the United States is also considered a source nation because cultural property, specifically Native American artifacts, within its borders are being exported. See John Henry Merryman, *Two Ways of Thinking About Cultural Property*, in THINKING ABOUT THE ELGIN MARBLES: CRITICAL ESSAYS ON CULTURAL PROPERTY, ART AND LAW 82 (John Henry Merryman ed., 2d ed. 2009) [hereinafter *Cultural Property Internationalism*].



rely solely upon a market nation to return its cultural property.<sup>54</sup> The source nation must implement measures to prevent the export of its cultural property, such as export restrictions.<sup>55</sup> Article 7(a) of the Convention requires States to recognize the export restrictions of other countries.<sup>56</sup> Some States have passed domestic legislation recognizing foreign export restrictions, such as France,<sup>57</sup> Germany,<sup>58</sup> and the United Kingdom.<sup>59</sup> However, many States, such as Israel, United Arab Emirates, Singapore, Thailand, and the United States, do not recognize foreign export restrictions.<sup>60</sup> Due to this lack of ratification of Article 7(a), the 1970 UNESCO Convention has not yet created a global system for the return of cultural property.

This shortcoming prompted many UNESCO States Parties to convene in 1995 to pass a new treaty under UNIDROIT called the Convention on Stolen or Illegally Exported Cultural Objects.<sup>61</sup> However, the States Parties were unable to reach a strong consensus on the issues and the resulting compromised draft is arguably even less effective than the 1970 UNESCO Convention.<sup>62</sup> The United States and many other states with strong art and cultural property markets are not parties to the UNIDROIT Convention.<sup>63</sup>

#### B. *United Nations Declaration on the Rights of Indigenous People*

The United Nations Declaration on the Rights of Indigenous People (UNDRIP or Declaration) is another international treaty relevant to the repatriation of Native American artifacts.<sup>64</sup> In 2007, 143

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<sup>54</sup> See 1970 UNESCO Convention, *supra* note 30.

<sup>55</sup> See *id.*

<sup>56</sup> See *Cultural Property Internationalism*, *supra* note 53, at 126.

<sup>57</sup> Loi 2016-925 du 7 juillet 2016 relative à la liberté de la création, à l'architecture et au patrimoine [Law 2016-925 of July 7, 2016 on the Freedom of Creation, Architecture and Heritage], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 8, 2016, p. 158.

<sup>58</sup> Kulturgutschutzgesetz [KGSG] [Cultural Property Protection Act], July 31, 2016, BGBl I at 1914, § 21 (Ger.), <http://www.gesetze-im-internet.de/kgsg/BJNR191410016.html>.

<sup>59</sup> Dealing in Cultural Objects (Offences) Act 2003, c. 27, § 2(3)(b).

<sup>60</sup> See United Nations Educ., Sci. & Cultural Org. [UNESCO], *Evaluation of UNESCO's Standard-Setting Work of the Culture Sector: Part II-1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, UNESCO Doc. IOS/EVS/PI/133 REV.2 (Apr. 2014) [hereinafter UNESCO, *Evaluation*], <http://unesdoc.unesco.org/images/0022/002269/226931E.pdf>.

<sup>61</sup> See Jennifer H. Lehman, Note, *The Continued Struggle with Stolen Cultural Property: The Hague Convention, the UNESCO Convention, and the UNIDROIT Draft Convention*, 14 ARIZ. J. INT'L & COMP. L. 527, 543-44 (1997).

<sup>62</sup> See *id.* at 544.

<sup>63</sup> See *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Rome 1995)—Status*, UNIDROIT, <http://www.unidroit.org/status-cp> (last updated Sept. 1, 2017).

<sup>64</sup> UNDRIP, *supra* note 32.

states ratified UNDRIP,<sup>65</sup> and as the name implies, its purpose is to promote and preserve the rights of indigenous people across the globe.<sup>66</sup> Article 11(2) of the Declaration requires States to implement mechanisms facilitating the return of indigenous cultural property.<sup>67</sup> However, it would be difficult for a country or an individual to bring a cultural property repatriation claim under the Declaration because it is not binding.<sup>68</sup> Rather than a binding treaty, the Declaration is best characterized as a set of ideals and goals that the member States commit to work towards.<sup>69</sup> It identifies issues concerning the rights of indigenous people and commits the State signatories to resolve these issues.<sup>70</sup> However, it lacks binding power and enforcement mechanisms.<sup>71</sup>

Among the UNDRIP States Parties is France.<sup>72</sup> Many in the global cultural, indigenous, and diplomatic community were upset when France's judicial system was unsympathetic to the Hopi Nation's plight as it tried to recover its artifacts from auctions.<sup>73</sup> Critics claimed that as an UNDRIP signatory, France should have been more cooperative with the Hopi Nation and their repatriation claim.<sup>74</sup> In 2013, the Hopi Nation's lawyer argued before a French judge that under UNDRIP, the

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<sup>65</sup> See *Declaration on the Rights of Indigenous People*, UNITED NATIONS HUMAN RIGHTS, <http://www.ohchr.org/EN/Issues/IPeoples/Pages/Declaration.aspx> (last visited Jan. 1, 2018); *United Nations Declaration on the Rights of Indigenous Peoples*, UNITED NATIONS, <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html> (last visited Jan. 1, 2018) (Four of the attending states voted against the declaration. These were the United States, Canada, New Zealand, and Australia. However, since 2007, all four countries have signed the declaration).

<sup>66</sup> UNDRIP, *supra* note 32.

<sup>67</sup> *Id.* at art. 11(2) ("States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.").

<sup>68</sup> See Marie Cornu, *About Sacred Cultural Property: The Hopi Masks Case*, 20 INT'L J. CULTURAL PROP. 451, 454 (2013); KUPRECHT, *supra* note 27, at 111.

<sup>69</sup> See Megan Davis, *To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years on*, 19 AUSTL. INT'L L.J. 17 (2012); Birkhold, *supra* note 28, at 92 ("UNDRIP is widely considered little more than an aspirational policy statement.").

<sup>70</sup> See *Declaration on the Rights of Indigenous People*, *supra* note 65.

<sup>71</sup> See Roxanne T. Ornelas, *Implementing the Policy of the U.N. Declaration on the Rights of Indigenous Peoples*, 5 INT'L INDIGENOUS POL'Y J. 1, 11 (2014) ("[T]here is no real enforcement mechanism in place to enforce UNDRIP on national or international levels."); Birkhold, *supra* note 28, at 92 ("[UNDRIP] is non-binding, has no enforcement mechanisms, and a majority of signatories have made no meaningful effort at domestic implementation.").

<sup>72</sup> See Press Release, Gen. Assembly, General Assembly Adopts Declaration on Rights of Indigenous Peoples; 'Major Step Forward' Towards Human Rights for All, Says President, U.N. Press Release GA/10612 (Sept. 13, 2007), <https://www.un.org/press/en/2007/ga10612.doc.htm>.

<sup>73</sup> Adamson, *supra* note 2 ("[T]he judge highlighting that France does not possess laws to protect indigenous peoples.").

<sup>74</sup> See Mashberg, *Sale of Hopi Religious Artifacts Continues*, *supra* note 8 (reporting that the Holocaust Restitution Project released a statement criticizing France for its failure to properly address the Hopi's situation in light of the Declaration on the Rights of Indigenous Peoples).

court should halt the sale of the artifacts.<sup>75</sup> The court disagreed and held that UNDRIP could not be grounds for halting the sale.<sup>76</sup>

As discussed above, the 1970 UNESCO Convention, 1995 UNIDROIT Convention, and UNDRIP, are unable to effectively address the issue of the repatriation of Native American artifacts. Each of these international agreements articulates an ideal the signing States claim to prioritize. However, the agreements lack the binding power needed to convince foreign courts to return Native American artifacts to Native American tribes.<sup>77</sup>

### C. U.S. Domestic Law Protecting Native American Artifacts

Fortunately, the protection of Native American artifacts does not lie solely with the international agreements discussed above. Within the United States, cultural property legislation is much more effective in protecting Native American cultural property, because U.S. law is binding and enforceable within the United States. The two primary U.S. statutes protecting Native American cultural property are the 1979 Archaeological Resources Protection Act (ARPA)<sup>78</sup> and the 1990 NAGPRA.<sup>79</sup>

Congress passed ARPA in 1979 to protect archaeological sites and artifacts within the United States.<sup>80</sup> ARPA prohibits the removal of archaeological materials from federal and tribal lands, which constitutes approximately one-third of the land mass in the United States.<sup>81</sup> The statute vests ownership of these artifacts in the United States (besides those Native American artifacts protected under NAGPRA) and prohibits the sale or trafficking of these artifacts.<sup>82</sup>

Congress passed NAGPRA in 1990 after recognizing the human rights violations that had occurred due to the looting of Native American graves.<sup>83</sup> Its passage came at a time when the federal government was giving greater recognition to Native Americans and

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<sup>75</sup> See Cornu, *supra* note 68; see also KUPRECHT, *supra* note 27, at 111.

<sup>76</sup> See Cornu, *supra* note 68; see also KUPRECHT, *supra* note 27, at 111.

<sup>77</sup> See Cornu, *supra* note 68, at 454 (“[T]hese agreements need to prove effective in terms of both time and space. In that respect, and more particularly with regard to the notion of the sacred, international texts are not always of great assistance.”).

<sup>78</sup> Archaeological Resources Protection Act (ARPA), 16 U.S.C. §§ 470aa–mm (2012).

<sup>79</sup> Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§ 3001–13 (2012).

<sup>80</sup> 16 U.S.C. §§ 470aa–mm.

<sup>81</sup> *Id.*; see also Patty Gerstenblith, Schultz and Barakat: *Universal Recognition of National Ownership of Antiquities*, 14 ART ANTIQUITY & L. 21, 23 (2009).

<sup>82</sup> 16 U.S.C. §§ 470aa–mm.

<sup>83</sup> 25 U.S.C. §§ 3001–13; See Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 58–59 (1992).

their civil rights.<sup>84</sup> Among other things, NAGPRA regulates the removal of Native American archaeological and cultural artifacts from federal and tribal lands.<sup>85</sup> The statute prohibits the removal of these artifacts unless certain requirements are met, such as approval by the appropriate tribe.<sup>86</sup> Subsequent related legislation prohibits the trafficking of any objects obtained in violation of NAGPRA.<sup>87</sup>

NAGPRA has proved effective in providing a means whereby Native Americans can bring a claim in U.S. courts for artifacts that were illegally trafficked within the United States.<sup>88</sup> One of NAGPRA's strongest aspects is its cultural affiliation prong.<sup>89</sup> This provision is significant because it permits a Native American tribe to assert a claim of communal ownership over an object if the tribe can prove a cultural affiliation between the tribe and the object.<sup>90</sup> The provision acknowledges and accommodates the communal property aspect that is common in Native American culture.<sup>91</sup> For example, the U.S. government may prosecute an individual under NAGPRA if the individual purchased a communal artifact from a member of a Native American tribe.<sup>92</sup> According to NAGPRA, the object cannot be owned by an individual because it is the communal property of the tribe.<sup>93</sup>

A weakness of NAGPRA is that the statute is not retroactive.<sup>94</sup> The law would be of no effect against an individual who obtained a Native

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<sup>84</sup> See Steve Russell, *Law and Bones: Religion, Science, and the Discourse of Empire*, 2007 RADICAL HIST. REV. 214, 218 (2007). Some have even characterized NAGPRA as "human rights legislation." Trope & Echo-Hawk, *supra* note 83, at 37.

<sup>85</sup> 25 U.S.C. § 3002.

<sup>86</sup> *Id.* (stating that an individual wishing to excavate an artifact from federal or tribal land must obtain an archaeology permit as described in the ARPA and obtain permission from the appropriate Indian tribe or Hawaiian organization).

<sup>87</sup> 18 U.S.C. § 1170(b) (2012) ("Whoever knowingly sells, purchases, uses for profit, or transports for sale or profit any Native American cultural items obtained in violation of the Native American Grave Protection and Repatriation Act shall be fined in accordance with this title, imprisoned not more than one year, or both, and in the case of a second or subsequent violation, be fined in accordance with this title, imprisoned not more than 5 years, or both.")

<sup>88</sup> See, e.g., *United States v. Tidwell*, 191 F.3d 976, 979 (9th Cir. 1999); *United States v. Corrow*, 119 F.3d 796 (10th Cir. 1997).

<sup>89</sup> See Karolina Kuprecht, *The Concept of "Cultural Affiliation" in NAGPRA: Its Potential and Limits in the Global Protection of Indigenous Cultural Property Rights*, 19 INT'L J. CULTURAL PROP. 33, 48 (2012).

<sup>90</sup> *Id.* at 38.

<sup>91</sup> *Id.*

<sup>92</sup> See, e.g., *Tidwell*, 191 F.3d at 981; *Corrow*, 119 F.3d at 798, 805 (finding that a set of sacred Navajo robes that defendant had purchased were cultural patrimony and could therefore not be sold for profit).

<sup>93</sup> See, e.g., *Tidwell*, 191 F.3d at 981; *Corrow*, 119 F.3d at 800–01.

<sup>94</sup> See *Geronimo v. Obama*, 725 F. Supp. 2d 182, 185–87 (D.D.C. 2010). The alleged descendants of the historical Apache warrior Geronimo brought suit under NAGPRA against the federal government for the return of Geronimo's remains. Among various conclusions, the court held that NAGPRA only applied to discoveries of Native American remains or objects after the 1990 enactment of the statute. *Id.*

American artifact prior to the enactment of the statute in 1990.<sup>95</sup> Artifacts obtained prior to 1990 fall beyond NAGPRA's reach and an individual may freely sell, trade, or export these artifacts.<sup>96</sup>

## II. LEGISLATION PROTECTING CULTURAL PROPERTY

Most countries have adopted legislation prohibiting the export of their cultural property.<sup>97</sup> Reasons for this are varied and often the result of cultural,<sup>98</sup> economic,<sup>99</sup> and political motivations.<sup>100</sup> They can include an interest in using cultural property to form a national heritage<sup>101</sup> or making the objects accessible to local researchers.<sup>102</sup> Additionally, a country may believe that limiting its cultural property in the international market will decrease the incentive for looters to illegally excavate the cultural property.<sup>103</sup> For the STOP Act, one of its main motivations is to preserve Native American religion and culture.<sup>104</sup>

Legislation protecting cultural property typically takes the form of an export restriction or a cultural patrimony statute.<sup>105</sup> The distinction

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<sup>95</sup> See *id.* at 185.

<sup>96</sup> See *id.*

<sup>97</sup> See Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 286 (1982).

<sup>98</sup> See LYNDEL V. PROTT & P.J. O'KEEFE, LAW AND THE CULTURAL HERITAGE 465 (1989) ("For a State which has had major losses of its cultural heritage it may be necessary to retain a minimum of examples of cultural tradition in order to provide inspiration and models for contemporary and future creators in that artistic tradition.").

<sup>99</sup> *Id.* at 466 ("Many developing States are also aware of the economic implications of the export of cultural property from their territory. They feel that some of the tourists flocking to museums, primarily in Europe and North America, would bring their foreign exchange to the countries where the objects they so admire originated, if a fine collection were built up there.").

<sup>100</sup> *Id.* at 467 (stating that the "items act as a focal point for national unity or have been important symbols political struggles").

<sup>101</sup> See JANET BLAKE, INTERNATIONAL CULTURAL HERITAGE LAW 16–17 (2015). But see John Henry Merryman, *The Retention of Cultural Property*, in THINKING ABOUT THE ELGIN MARBLES: CRITICAL ESSAYS ON CULTURAL PROPERTY, ART AND LAW 170, 181–90 (John Henry Merryman ed., 2d ed. 2009) [hereinafter, *Retention of Cultural Property*] (arguing that justifying the retention of cultural property for nationalism should rest on two criteria: first, that the culture that gave the object its significance must be alive; and second, that the object is currently being used for the purpose for which it was created. Merryman argues that most nations attempting to retain or reclaim their cultural heritage fail to meet these two criteria. In the case of an export restriction on Native American artifacts, it would fulfill both of Merryman's criteria since Native American tribes still exist and function today and the artifacts are still used for the purpose for which they were created.).

<sup>102</sup> See John Henry Merryman, *A Licit International Trade in Cultural Objects*, in THINKING ABOUT THE ELGIN MARBLES: CRITICAL ESSAYS ON CULTURAL PROPERTY, ART AND LAW 244, 254 (John Henry Merryman ed., 2d ed. 2009) [hereinafter *A Licit International Trade in Cultural Objects*].

<sup>103</sup> *Id.* at 255.

<sup>104</sup> See Press Release, Martin Heinrich, *supra* note 12.

<sup>105</sup> See ALESSANDRO CHECHI, THE SETTLEMENT OF INTERNATIONAL CULTURAL HERITAGE DISPUTES 66–67 (2014).

between these two types of legislation can have a significant impact when a country attempts to recover its cultural property abroad.<sup>106</sup> As explained below, the STOP Act is best characterized as an export restriction because it seeks to regulate the export of Native American artifacts.<sup>107</sup> However, the STOP Act should be modified to also strengthen the cultural patrimony claims of Native American tribes.<sup>108</sup>

### A. *Export Restrictions*

An export restriction regulates the cultural property that an individual may export from a country.<sup>109</sup> The breadth of the restriction varies from country to country.<sup>110</sup> For example, Mexico and Egypt have enacted broad restrictions that prohibit the export of entire classes of cultural property.<sup>111</sup> On the other hand, Canada and the United Kingdom have adopted cultural property export restrictions that are narrower and prohibit the export of only a select type of cultural property.<sup>112</sup> It is important to note that export restrictions do not vest ownership of the object with the state.<sup>113</sup> The legislation simply restricts the export of the object.<sup>114</sup>

Unlike most countries, the United States does not currently have explicit cultural property export restrictions.<sup>115</sup> Possible reasons include pressure by art collectors and dealers to keep the art market unrestrained.<sup>116</sup> It may also be due to a perception that there are

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<sup>106</sup> See *id.* at 67.

<sup>107</sup> See *infra* Section II.A.

<sup>108</sup> See discussion *infra* Part III.

<sup>109</sup> See Robert K. Paterson, *Moving Culture: The Future of National Cultural Property Export Controls*, 18 SW. J. INT'L L. 287, 287 (2011).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* (referring to certain cultural property export restrictions as “embargoes on the export of whole categories of tangible property (such as those in place in Egypt and Mexico)”).

<sup>112</sup> See *id.* (referring to certain cultural property export restrictions as “more selective systems that only limit the export of objects perceived to be significant properties (such as the systems operative in the United Kingdom and Canada)”).

<sup>113</sup> CHECHI, *supra* note 105, at 66 (“In contrast to patrimony laws, export controls do not affect the title to objects . . .”).

<sup>114</sup> CHECHI, *supra* note 105, at 66–67.

<sup>115</sup> See LEONARD D. DUBOFF & CHRISTY O. KING, *ART LAW IN A NUTSHELL* 14 (4th ed. 2006); see also ROBERT C. LIND ET AL., *ART AND MUSEUM LAW: CASES AND MATERIALS* 291 (2002); MARA WANTUCH-THOLE, *CULTURAL PROPERTY IN CROSS-BORDER LITIGATION: TURNING RIGHTS INTO CLAIMS* 56–57 (2015); GERSTENBLITH, *supra* note 21, at 568; Paterson, *supra* note 109.

<sup>116</sup> See Paterson, *supra* note 109 (“The United States is notable for being the only important art market country that has never had a comprehensive system of cultural property export controls. There are several possible explanations for this. These include opposition from dealers and collectors and perhaps a perception that there are adequate resources available inside the United States to acquire objects about to be sold abroad which might be seen as nationally important.”).

sufficient resources within the United States to prevent significant cultural objects from leaving the country.<sup>117</sup> However, the United States does have a limited form of cultural property export restriction by way of ARPA and NAGPRA.<sup>118</sup> As previously discussed, neither statute explicitly prohibits the export of archaeological or Native American artifacts.<sup>119</sup> These two statutes effectively act as export restrictions though because they prohibit the sale or transfer of these artifacts.<sup>120</sup> Though neither statute contains the word “export,” both statutes act as export restrictions.<sup>121</sup>

The STOP Act would add language to ARPA and NAGPRA explicitly prohibiting the export of protected Native American artifacts.<sup>122</sup> The Act would be the United States’ first explicit export restriction on cultural property. However, critics of the STOP Act (such as the Antique Tribal Art Dealers Association, Inc.<sup>123</sup> and the Committee for Cultural Policy<sup>124</sup>) have claimed that the STOP Act is redundant and unnecessary.<sup>125</sup> They argue that ARPA and NAGPRA already effectively prohibit the export of protected Native American artifacts and archaeological objects.<sup>126</sup> They correctly claim that the

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<sup>117</sup> See Paterson, *supra* note 109.

<sup>118</sup> See GERSTENBLITH, *supra* note 21.

<sup>119</sup> See ARPA, 16 U.S.C. § 470ee(c) (2012) (“No person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange, in interstate or foreign commerce, any archaeological resource excavated, removed, sold, purchased, exchanged, transported, or received in violation of any provision, rule, regulation, ordinance, or permit in effect under State or local law.”); Illegal Trafficking in Native American Human Remains and Cultural Items, 18 U.S.C. § 1170(b) (2012) (“Whoever knowingly sells, purchases, uses for profit, or transports for sale or profit any Native American cultural items obtained in violation of the Native American Grave Protection and Repatriation Act shall be fined in accordance with this title, imprisoned not more than one year, or both, and in the case of a second or subsequent violation, be fined in accordance with this title, imprisoned not more than 5 years, or both.”).

<sup>120</sup> See GERSTENBLITH, *supra* note 21.

<sup>121</sup> See *id.* (“The United States does not have any export controls specifically for cultural objects. If, however, an object is obtained in violation of another law, such as the Archaeological Resources Protection Act, the Native American Graves Protection and Repatriation Act or any state law, then its export is also prohibited.”).

<sup>122</sup> Safeguard Tribal Objects of Patrimony Act of 2017, S. 1400, 115th Cong. § 2(b) (2017).

<sup>123</sup> The Antique Tribal Art Dealers Association, Inc. is an association of antique tribal art dealers and galleries that promote trade in antique Native American art and set ethical and professional standards in the industry. See *About ATADA*, ATADA.ORG, <https://www.atada.org/about-atada> (last visited Jan. 1, 2018).

<sup>124</sup> The Committee for Cultural Policy is an organization that promotes “transparent, accountable, and consistent” cultural policies within the United States. See *Mission*, COMM. FOR CULTURAL POLICY, <https://www.committeeforculturalpolicy.org/mission> (last visited Jan. 1, 2018).

<sup>125</sup> See *infra* note 126.

<sup>126</sup> See *Unintended Consequences: S. 3127, The Safeguard Tribal Objects of Patrimony Act of 2016*, ANTIQUE TRIBAL ART DEALERS ASSOC., INC., <https://static1.squarespace.com/static/56e89d039f7266c5a6811f78/t/57e6d20a197aea5186db85c8/1474744842486/2016-08-30+Summary+of+Issues+STOP+Act.pdf> (last visited Jan. 31, 2018) (“The STOP Act is unnecessary because export for sale of unlawfully acquired artifacts is already illegal. Several US laws including ARPA penalize illicit trafficking. NAGPRA already enables both civil and

STOP Act would be redundant since NAGPRA and ARPA already prohibit the export of Native American artifacts by prohibiting the trade or transfer of these objects.<sup>127</sup> Furthermore, legislation already exists criminalizing the removal of objects whose export would violate another U.S. law or regulation, such as NAGPRA or ARPA.<sup>128</sup>

Regardless of redundancy, export restrictions like the STOP Act are often ineffective in foreign courts because the doctrine of territoriality states that the laws of one country are not enforceable in another country.<sup>129</sup> U.S. courts are not obligated to enforce foreign laws and foreign courts are not obligated to enforce U.S. laws. In fact, the United States typically does not even expect foreign courts to enforce U.S. laws due to the application of the “presumption against extraterritoriality” of these statutes.<sup>130</sup>

Scholars are divided on whether the cultural property export restrictions of one country should be enforced in another country.<sup>131</sup> Many scholars argue that a country should not be expected to enforce foreign export restrictions due to the doctrine of territoriality.<sup>132</sup> John H. Merryman, a respected cultural property law scholar, goes even further by arguing that the treaties of both the World Trade Organization and European Communities explicitly state that countries are not required to enforce the export restrictions of other State Parties.<sup>133</sup> Courts tend to be in accord with scholars on this issue and typically will not enforce the export restrictions of foreign states.<sup>134</sup>

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criminal remedies for abuse.”); *STOP Act Introduced to Penalize Exporting Indian Artifacts*, COMM. FOR CULTURAL POLICY, <https://www.committeeforculturalpolicy.org/stop-act-introduced-to-penalize-exporting-indian-artifacts> (last visited Jan. 1, 2018) (arguing that both ARPA and NAGPRA provide adequate protection for Native American artifacts).

<sup>127</sup> See GERSTENBLITH, *supra* note 21.

<sup>128</sup> See 18 U.S.C. § 554 (2012).

<sup>129</sup> See *Apollon*, 22 U.S. 362, 370 (1824) (“The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction.”); see also *Territoriality*, BLACK’S LAW DICTIONARY (10th ed. 2014); Cornu, *supra* note 68, at 454 (“[I]n French courts, as in most other national courts, judges refuse to take foreign public law into account on the grounds of the territoriality principle, which discourages most people from taking legal action.”).

<sup>130</sup> 44B AM. JUR. 2d *International Law* § 84 (2017) (“[T]he presumption against extraterritoriality provides that, absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application.” (internal quotation marks omitted)).

<sup>131</sup> See GERSTENBLITH, *supra* note 21 (“There is some disagreement in the scholarly literature whether export controls of one country are enforced in another country.”).

<sup>132</sup> See *Retention of Cultural Property*, *supra* note 101, at 177.

<sup>133</sup> See *Cultural Property Internationalism*, *supra* note 53, at 138–39 (referring to Article 140 of the World Trade Organization and Article 30 of the European Communities).

<sup>134</sup> See PROTTE & O’KEEFE, *supra* note 98, at 612 (“Some states have an announced policy of not applying foreign export controls: indeed, that their citizens have every right to ignore those controls.”); Gribble & Forrest, *supra* note 16, at 317 (“The United Kingdom has long refused to enforce foreign public law. Although the determination of exactly what constitutes public law is



Other scholars argue that a country should be expected to enforce foreign export restrictions because this would support the primary goals of the 1970 UNESCO Convention.<sup>135</sup> Some countries have begun to do this, such as France,<sup>136</sup> Germany,<sup>137</sup> and the United Kingdom.<sup>138</sup> These countries have passed legislation recognizing the cultural property export restrictions of states that are party to the 1970 UNESCO Convention.<sup>139</sup> These laws prohibit the import of cultural property whose export from its country of origin was illegal.<sup>140</sup> The STOP Act, as currently drafted, would clarify that the export of Native American artifacts is illegal as defined under NAGPRA. This articulated export restriction would presumably assist in the return of Native American artifacts in these countries. The STOP Act is a clearly articulated export restriction, unlike NAGPRA and ARPA, neither of which explicitly prohibits the export of Native American artifacts. Though the addition of the word “export” may seem insignificant, Senator Heinrich claims

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uncertain, in cases of cultural property illegally exported from the source State, UK courts would appear to be opposed to repatriating them on these grounds.”); *see also* John Henry Merryman, *Cultural Property Ethics*, in THINKING ABOUT THE ELGIN MARBLES: CRITICAL ESSAYS ON CULTURAL PROPERTY, ART AND LAW 376, 379 (John Henry Merryman ed., 2d ed. 2009) [hereinafter *Cultural Property Ethics*] (“The law will help the foreign owner recover a stolen work of art, but it will not help the foreign nation recover the illegally exported work.”); P.J. O’Keefe, *Export and Import Controls on Movement of the Cultural Heritage: Problems at the National Level*, 10 SYRACUSE J. INT’L L. & COM. 352, 362 (1983) (“It is well established that courts of one country will not enforce certain laws of another country although they may be prepared to recognize them.”). Indeed, U.S. courts have cited cultural heritage law scholar Paul Bator to support their opinions in two of the most significant U.S. cases in which foreign cultural property export restrictions were not enforced. *See Jeanneret v. Vichey*, 693 F.2d 259, 267 (2d Cir. 1982); *United States v. McClain*, 545 F.2d 988, 996 (5th Cir. 1977).

<sup>135</sup> *See* James Gordley, *The Enforcement of Foreign Law: Reclaiming One Nation’s Cultural Heritage in Another Nation’s Courts*, in ENFORCING INTERNATIONAL CULTURAL HERITAGE LAW 110, 117 (Francesco Francioni & James Gordley eds., 2013) (“[A]n American court should refuse to acknowledge title to property acquired by violation of a foreign export law when it constitutes conduct which the United States condemned when it signed the UNESCO Convention, conduct which impoverishes the cultural heritage of the country of origin.”); *see also Cultural Property Ethics*, *supra* note 134, at 382–84. Surprisingly, Merryman himself, a notorious opponent to any form of export restrictions, states that there could be an ethical exception to this doctrine of not enforcing foreign export restrictions. Merryman presents the possibility that a State should enforce a foreign export restriction of another State if the restriction regulates an object that is an essential part of the living culture of a group. If foreign courts were to adopt this exception as Merryman proposes, the United States would have a strong argument that these courts should enforce NAGPRA as an export restriction. Native American artifacts play a significant role in the culture of Native Americans today and therefore NAGPRA would qualify under this exception. Despite this proposed exception by Merryman, courts have demonstrated great reluctance to enforce foreign cultural property export restrictions. *See* sources cited *supra* note 134.

<sup>136</sup> *See* Law 2016-925 of July 7, 2016 on the Freedom of Creation, Architecture and Heritage, *supra* note 57.

<sup>137</sup> *See* Cultural Property Protection Act, *supra* note 58.

<sup>138</sup> *See* Dealing in Cultural Objects (Offences) Act 2003, c. 27, § 2(3)(b).

<sup>139</sup> *See supra* text accompanying notes 57–59.

<sup>140</sup> *See supra* text accompanying notes 57–59.

that French authorities identified this gap in U.S. law as hindering France's efforts to return Hopi artifacts.<sup>141</sup>

As demonstrated above, foreign courts are reluctant to enforce foreign cultural property export restrictions<sup>142</sup> unless the domestic law of the court's country recognizes foreign export restrictions.<sup>143</sup> As currently constituted, the STOP Act would function as an export restriction and therefore only assist in recoveries of Native American artifacts from a few countries. As discussed below, a more effective legislation would be one that strengthens the Native American tribes' claim of cultural patrimony.

### B. *Cultural Patrimony Laws*

The second type of legislation that countries often pass to protect their cultural property is a cultural patrimony law.<sup>144</sup> This law vests ownership of the cultural property with the state and gives the state property rights over the designated cultural property.<sup>145</sup> Like export restrictions, these laws are intended to prevent the export of the country's cultural property.<sup>146</sup> However, unlike export restrictions, the cultural patrimony law vests ownership of the object with the state.<sup>147</sup>

This distinction is critical because by vesting ownership in the state, patrimony laws can avoid the issue of territoriality that plagues export restrictions.<sup>148</sup> As discussed above, courts are unlikely to enforce foreign export restrictions.<sup>149</sup> However, they are more likely to penalize theft since theft is universally recognized as a crime.<sup>150</sup> Thus, a country is more likely to be successful in a foreign court if it can establish ownership over the disputed object through its own patrimony law.<sup>151</sup> As the owner of the object, the country can argue that the object was stolen from it and should be returned.<sup>152</sup> The country would be in the

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<sup>141</sup> See U.S. Senator Martin Heinrich, *Press Conference*, *supra* note 12.

<sup>142</sup> See *supra* text accompanying note 134.

<sup>143</sup> See *supra* text accompanying notes 57–59.

<sup>144</sup> See CHECHI, *supra* note 105, at 66.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 67 (“The formal distinction between patrimony laws and export regulations is critical because only the former category enjoys extraterritorial effect.”).

<sup>149</sup> See sources cited *supra* note 134.

<sup>150</sup> See CHECHI, *supra* note 105, at 67. (“[T]heft is universally recognized as a crime to be subject to criminal sanction.”).

<sup>151</sup> See Gordley, *supra* note 135, at 119 (“A legal alternative for a country that does not wish objects belonging to its cultural heritage to be exported is to expropriate them. The country can then try to claim the return of such an object in a foreign court, not because its export laws have been violated, but because it owns the object.”).

<sup>152</sup> *Id.*

same position as an individual who no longer had possession of their property.<sup>153</sup> For this reason, patrimony laws grant a country a stronger claim for recovery than basing its claim on its export restriction legislation.<sup>154</sup> This makes patrimony laws an attractive alternative to export restrictions because they are more effective, politically popular, and financially inexpensive.<sup>155</sup>

The strength of patrimony laws as compared to export restrictions is demonstrated in the historic case of *King of Italy v. De Medici Tornaquinci*.<sup>156</sup> In this 1918 case, Christie's auction house was planning to sell historic documents that the famous Florentine Medici family had collected.<sup>157</sup> Italy sought an injunction in a British court to stop the sale, claiming that half of the documents were owned by the state of Italy and that the other half of the documents had left Italy in violation of Italy's export restriction.<sup>158</sup> The court granted the injunction for the documents owned by the State of Italy, but it refused to grant the injunction for those documents that had only violated Italy's export restriction.<sup>159</sup> This demonstrates the advantage of cultural patrimony laws as compared to export restrictions.

A U.S. court came to a similar decision in *United States v. McClain*.<sup>160</sup> The American defendants had looted pre-Columbian antiquities in Mexico and transported them into the United States.<sup>161</sup> Rather than claiming a violation of an export restriction, the prosecution claimed that according to Mexican law, all pre-Columbian antiquities were the property of the State of Mexico.<sup>162</sup> As such, the defendants were in possession of stolen property and the U.S. government could prosecute the defendants under the National Stolen Property Act.<sup>163</sup>

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<sup>153</sup> See CHECHI, *supra* note 105, at 67 ("Therefore, the State whose patrimony has been impoverished due to theft is treated as a dispossessed individual collector.").

<sup>154</sup> See PROTTE & O'KEEFE, *supra* note 98, at 614 ("The strongest claim which a litigant can make to an object is a claim of ownership."); *id.* at 627 ("States generally find themselves in a weaker position if they seek to enforce their laws on export without basing their claim on ownership.").

<sup>155</sup> See John Henry Merryman, *The Nation and the Object*, in THINKING ABOUT THE ELGIN MARBLES: CRITICAL ESSAYS ON CULTURAL PROPERTY, ART AND LAW 206, 206–10 (John Henry Merryman ed., 2d ed. 2009).

<sup>156</sup> *King of Italy v. Marquis Cosimo de Medici Tornaquinci* [1918] 34 TLR 623 (Ch) (Eng.).

<sup>157</sup> See O'Keefe, *supra* note 134, at 352.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* ("The other papers were subsequently sold at auction, despite the judge's warning that this might expose the vendors and the purchasers to an action for damages. It appears that the decision, which was interlocutory only, was arrived at without detail.").

<sup>160</sup> *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977).

<sup>161</sup> *Id.* at 991–92.

<sup>162</sup> *Id.* at 993.

<sup>163</sup> *Id.* at 992 (The Fifth Circuit found for the defendants because the district court had not permitted the jury to determine whether all the contested artifacts had been exported prior to Mexico's 1972 law vesting ownership of all cultural property with the government of Mexico);

The STOP Act cannot be characterized as a cultural patrimony law because it does not vest ownership of Native American artifacts with the U.S. federal government.<sup>164</sup> Furthermore, the rhetoric and events surrounding the bill do not connote an interest in protecting cultural heritage for the United States as a nation but instead in protecting the religious objects of the Native American tribes and organizations. When considering the events prompting this bill (the sale of Native American artifacts in France), none of the comments made by Senator Heinrich nor by the tribes endorsing the bill indicate that they see the STOP Act as a method to preserve the cultural heritage of the United States.<sup>165</sup> Instead, they base their rationale and comments on the fact that they wish to prevent these sales because of the sacred nature of the objects, not their importance as objects of U.S. cultural property.<sup>166</sup>

Even if the STOP Act could be characterized as a cultural patrimony law, it would not guarantee the recovery of Native American artifacts in a foreign court. Though a cultural patrimony law is a more effective alternative to an export restriction, it is not guaranteed that a foreign court will recognize ownership solely due to a patrimony law.<sup>167</sup> This is especially true when the court sees the statute as an export restriction masquerading as a patrimony law.<sup>168</sup>

This was demonstrated in the seminal British case of *Attorney General of New Zealand v. Ortiz*.<sup>169</sup> A pair of Maori carved doors were for sale at a London auction house and New Zealand filed a suit against the alleged owner of the doors, claiming that the doors were the property of the State of New Zealand.<sup>170</sup> New Zealand based its claim on its patrimony statute that declared any illegally exported cultural property the property of the state upon moment of export.<sup>171</sup> Though the trial court found for New Zealand, the appellate court reversed on the grounds that the New Zealand patrimony law failed to vest ownership in the State because New Zealand never had possession of the doors.<sup>172</sup> The court instead considered the law to be an export

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see National Stolen Property Act, 18 U.S.C. § 2314 (2012) (“Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud . . . Shall be fined under this title or imprisoned not more than ten years, or both.”).

<sup>164</sup> See Safeguard Tribal Objects of Patrimony Act of 2017, S. 1400, 115th Cong. (2017).

<sup>165</sup> See U.S. Senator Martin Heinrich, *Press Conference*, *supra* note 12.

<sup>166</sup> See *id.*

<sup>167</sup> See *Cultural Property Internationalism*, *supra* note 53, at 233 (“This clear distinction between theft and illegal export becomes cloudy in the face of national ownership laws.”).

<sup>168</sup> See *Gov’t of Peru v. Johnson*, 720 F. Supp. 810 (C.D. Cal. 1989); *Attorney Gen. of N.Z. v. Ortiz* [1983] 2 All ER (EC) 93 (Eng.).

<sup>169</sup> *Ortiz* [1983] 2 All ER (EC) 93.

<sup>170</sup> See Gerstenblith, *supra* note 81, at 32.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

restriction veiled in the language of a patrimony law and declined to enforce New Zealand's export restriction.<sup>173</sup>

A U.S. court came to a similar decision in *Government of Peru v. Johnson*.<sup>174</sup> The U.S. Customs Service seized eighty-nine pre-Columbian artifacts that Benjamin Johnson, an American citizen, had purchased.<sup>175</sup> Peru brought a civil suit against Johnson, claiming that Peru was the rightful owner of the objects due to a Peruvian statute vesting ownership of all pre-Columbian artifacts in the state.<sup>176</sup> The court refused to recognize the patrimony law as giving Peru ownership though because the law permitted private individuals to possess cultural property that was supposedly owned by the government of Peru.<sup>177</sup>

However, a U.S. court came to a different result in the case of *United States v. Schultz* in which an antiquities dealer was accused of selling stolen Egyptian artifacts.<sup>178</sup> Egypt's cultural patrimony law made all antiquities discovered after 1983 the property of Egypt, and it prohibited the private ownership of these artifacts.<sup>179</sup> The prosecutor claimed that under this statute, the artifacts in possession of the defendant were the property of the Egyptian State.<sup>180</sup> The Second Circuit upheld Egypt's ownership claim after determining that Egypt regularly enforced its patrimony law.<sup>181</sup> The court considered Egypt's claim of ownership valid since its national patrimony law functioned as more than an export restriction.<sup>182</sup>

These three cases and others indicate that courts are sometimes reluctant to recognize foreign ownership claims that are based on foreign patrimony laws. These courts required that the petitioning country not only claim ownership of the object, but that the country exercise its rights associated with ownership.<sup>183</sup> In both *Ortiz* and *Johnson*, the petitioning country failed to establish itself as the true owner of the artifacts because the State did not treat the cultural property as being owned by the State.<sup>184</sup> In *Schultz*, the petitioning country, Egypt, was successful in establishing ownership because it regularly claimed, enforced, and exercised its property rights.<sup>185</sup>

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<sup>173</sup> *Id.* at 32–33.

<sup>174</sup> *Gov't of Peru v. Johnson*, 720 F. Supp. 810 (C.D. Cal. 1989).

<sup>175</sup> *Id.* at 811.

<sup>176</sup> *Id.* at 814.

<sup>177</sup> *Id.*

<sup>178</sup> *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003).

<sup>179</sup> *Id.* at 396.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 407–08.

<sup>182</sup> *Id.*

<sup>183</sup> See *Attorney Gen. of N.Z. v. Ortiz* [1983] 2 All ER (EC) 93 (Eng.); *Gov't of Peru v. Johnson*, 720 F. Supp. 810 (C.D. Cal. 1989).

<sup>184</sup> See *Ortiz* [1983] 2 All ER (EC) 93; *Johnson*, 720 F. Supp. 810.

<sup>185</sup> See *Schultz*, 333 F.3d 393. This standard of what qualifies as national property has been

## III. PROPOSAL

As demonstrated above, international law has addressed, but not solved the issue of recovering cultural property abroad.<sup>186</sup> This leaves countries to formulate their own laws to protect and recover their cultural property.<sup>187</sup> Export restrictions have proved largely ineffective in facilitating the return of cultural property abroad due to the doctrine of territoriality.<sup>188</sup> Thus, the STOP Act would be effective in only those few countries that recognize foreign cultural property export restrictions.<sup>189</sup> Congress should modify the STOP Act to establish a cultural property export license system and a committee to advise the Attorney General to pursue civil litigation in foreign courts on behalf of Native American tribes.

A. *Export License*

Under current U.S. legislation, a person may freely sell, trade, or export Native American objects purchased prior to the 1990 enactment of NAGPRA.<sup>190</sup> This proposed amendment to NAGPRA would regulate the export of these objects by requiring an owner to obtain an export license prior to exporting these objects.<sup>191</sup> This would prevent these

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criticized for adopting too narrow a definition of what constitutes ownership. James Gordley argues that, instead, courts should be willing to recognize a State's claim of ownership when the country is acting as a custodian of a public good, such as cultural property. Gordley uses the example of rivers and harbors that have been recognized since Roman law as areas that can be owned by a state or individual, but freely shared and accessible to the public. Gordley proposes that courts and governments should adopt a similar approach with cultural property. The State would claim title to the cultural property as owner but grant possession (not ownership) of the property to its citizens. An Italian court hearing a case involving Ecuadorian artifacts adopted this theory of ownership. Ecuador claimed ownership over the artifacts using an Ecuadorian law that made the state owner of all cultural property without disturbing the rights of the private citizens who owned the artifacts. The Italian court recognized and upheld Ecuador's ownership claim even though Ecuador was not exercising the standard rights of ownership required by the United Kingdom (U.K.) and U.S. courts in *Ortiz* and *Johnson*. However, this interpretation of cultural patrimony laws has not been adopted in recent major cases dealing with foreign cultural patrimony laws. See Gordley, *supra* note 135, at 110, 120–23.

<sup>186</sup> See *supra* Section I.A.

<sup>187</sup> See *supra* Section II.A.

<sup>188</sup> See *supra* Section II.A.

<sup>189</sup> See *supra* text accompanying notes 57–59 (referring to statutes of France, Germany and the U.K. that recognize foreign cultural property export restrictions).

<sup>190</sup> See *Geronimo v. Obama*, 725 F. Supp. 2d 182, 185 (D.D.C. 2010).

<sup>191</sup> This would also bring the United States in closer alignment with UNESCO recommendations which advise countries to implement export licensing programs. See *Why is the UNESCO—WCO Model Export Certificate Needed?*, UNITED NATIONS EDUC., SCI. & CULTURAL ORG., <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/legal-and-practical-instruments/unesco-wco-model-export-certificate/faqs/#c163827> (last visited Jan. 1, 2018).

Native American objects from freely leaving the United States.

The legislation would require a person to apply for an export license if they wish to export a Native American object purchased prior to 1990. A committee would review the application and determine from which Native American tribe or nation the object originated. The committee would then provide the appropriate tribe the opportunity to purchase the object at its fair market price. If a tribe was uninterested in purchasing the work, or was unable to obtain a grant or pay the fair market price for the object, the committee would offer the work to museums and private individuals within the United States for purchase. If no individual or institution came forward to purchase the object, the committee would issue an export license to the owner.

The United Kingdom has implemented a similar program, and it has succeeded in striking a balance between preserving the United Kingdom's cultural heritage while still permitting the trade and flow of cultural objects.<sup>192</sup> A similar export license program for Native American artifacts would be relatively inexpensive and simple to implement within the United States. UNESCO provides a sample export license application for countries to use as a model in creating their own export license applications.<sup>193</sup> The United States could adapt this sample application for Native American artifacts.

Furthermore, a committee to review export license applications would be inexpensive and simple to establish. Under NAGPRA, there already exists a committee to review and determine the origin of newly

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<sup>192</sup> The U.K. statute regulates the export of cultural property without completely restricting it. Under the legislation, a person must apply for an export license prior to exporting an object of cultural property that is over fifty years old and valued above a certain monetary amount. A government committee reviews the application and determines whether the artifact represents a significant aspect of the nation's cultural heritage. If the committee determines that the artifact does not represent a significant aspect of the nation's cultural heritage, the applicant is granted an export license and may legally export the object from the country. If the committee determines that the artifact does represent a significant aspect of the nation's cultural heritage, the applicant's export license will be deferred for a period of time. During this period of time, the committee will determine the fair market value of the work and individuals, and institutions within the U.K. will have the opportunity to purchase the work. If no parties come forward with an adequate offer, the applicant will be issued an export license and may export the object. The legislation strikes a balance between preserving the U.K.'s cultural heritage while still permitting the trade and flow of cultural objects. *See* Import, Export and Customs Powers (Defence) Act 1939, 2 & 3 Geo. 6 c. 69, § 1 (U.K.) (Implemented by the Import of Goods (Control) Order 1954 and later amended by Statutory Instrument 1987, Number 2070.); *see also* JEANETTE GREENFIELD, *THE RETURN OF CULTURAL TREASURES* 110 (1996); Simon Halfin, *The Legal Protection of Cultural Property in Britain: Past, Present and Future*, 6 *DEPAUL J. ART & ENT. L.* 1, 29–32 (1995); ARTS COUNCIL ENGLAND, *UK EXPORT LICENSING FOR CULTURAL GOODS: PROCEDURES AND GUIDANCE FOR EXPORTERS OF WORKS OF ART AND OTHER CULTURAL GOODS* (2016), [http://www.artscouncil.org.uk/sites/default/files/download-file/Guidance\\_for\\_exporters\\_issue\\_1\\_2016.pdf](http://www.artscouncil.org.uk/sites/default/files/download-file/Guidance_for_exporters_issue_1_2016.pdf).

<sup>193</sup> *See* UNITED NATIONS EDUC., SCI. & CULTURAL ORG. [UNESCO], *UK Export Licensing for Cultural Goods*, CLT Doc. 2005/WS/5, <http://unesdoc.unesco.org/images/0013/001396/139620E.pdf>.

discovered Native American artifacts: the Native American Graves Protection and Repatriation Review Committee.<sup>194</sup> This committee could be tasked with also reviewing export permit applications in addition to their current duties. If the committee was unable to handle the volume of additional work created by the license program, a separate review committee, modeled on the current committee, could be formed.

This legislation would help preserve the cultural heritage of the United States and increase the likelihood that Native American objects return to their tribes of origin. If the tribes of origin are unable or uninterested in purchasing the work, the legislation creates a second filter preventing the export of Native American objects by allowing museums and private individuals to purchase the objects. This two-step process would decrease the number of Native American objects leaving the United States. Furthermore, the legislation would act as an additional filter because customs officials will be expecting an export license for any Native American object leaving the country. This is in the best interests of the United States because it will increase the amount of cultural property that remains within the country.

There are weaknesses to this export license legislation though. This includes situations in which a tribe may wish to purchase an object but lacks the necessary funds. Currently under NAGPRA, Native American tribes may apply to the Secretary of the Interior for grants to assist in the repatriation of their cultural property.<sup>195</sup> Though these grants are currently only given for repatriations from museums, this rule could be expanded so that tribes could apply for grants to purchase objects that are in danger of being exported.

Another weakness of this export license legislation is that it would be classified as an export restriction because the law would not vest ownership of the object with the United States. As established above, courts tend to be reluctant to enforce export restrictions unless their domestic law recognizes foreign export restrictions.<sup>196</sup> Thus, if a Native American object not protected by NAGPRA leaves the United States without an export license, a foreign court would not be obligated to return the object. However, many countries have enacted export license legislation, such as China, Cambodia, some European Union nations, and others.<sup>197</sup> It is likely that these and other foreign courts would be

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<sup>194</sup> See 25 U.S.C. § 3006 (2012); see also *Native American Graves Protection and Repatriation Review Committee*, U.S. DEP'T OF THE INTERIOR, <https://www.nps.gov/nagpra/REVIEW/INDEX.HTM> (last visited Jan. 1, 2018).

<sup>195</sup> See *Frequently Asked Questions*, U.S. DEP'T OF THE INTERIOR, <https://www.nps.gov/nagpra/FAQ/INDEX.HTM> (last visited Jan. 1, 2018).

<sup>196</sup> See sources cited *supra* note 134.

<sup>197</sup> See *supra* text accompanying note 194; see also JOSEPH L. SAX, *PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES* 64 (1999); A *Licit International Trade in Cultural Objects*, *supra* note 102; UNESCO, *Evaluation*, *supra* note 60.



willing to at least consider U.S. export license legislation when making their determinations. These courts would not be obligated to enforce the U.S. export license legislation, due to the doctrine of territoriality, but it is possible that a court would consider the lack of an export license as a factor favoring the Native American tribes' claim to the artifact. It can be hoped that these countries' familiarity with export license legislation (due to their own similar legislation) would be a supporting factor in a U.S. claim.<sup>198</sup>

### B. *The Department of Justice Acting as Trustee*

This proposed amendment to NAGPRA would expressly give the Native American Graves Protection and Repatriation Review Committee power to advise the U.S. Attorney General to pursue civil litigation in foreign courts on behalf of Native American tribes seeking to recover their cultural property. The current language of NAGPRA vests ownership of undiscovered Native American cultural property and cultural property discovered after 1990 with Native American tribes.<sup>199</sup> As a sovereign recognized by the United States, the tribes are theoretically in a position in which foreign courts would recognize the tribes as owning all cultural property originating from their territory.<sup>200</sup> It would be the equivalent of a foreign court recognizing a country with a national patrimony law as the owner of all cultural property originating from the country's territory.<sup>201</sup>

However, this becomes problematic when the tribes attempt to bring a claim in a foreign country that does not recognize Native American tribes as sovereign nations. This occurred when the Hopi Nation appeared before the French government agency responsible for auction houses, the Conseil des Ventes.<sup>202</sup> The Agency held that neither the Hopi Nation, nor any other Native American tribe, could bring a claim of repatriation in France because the tribes had no legal existence under French law.<sup>203</sup> Thus, the tribes would be unable to assert

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<sup>198</sup> See sources cited *supra* note 197.

<sup>199</sup> 25 U.S.C. § 3002(a) (2012).

<sup>200</sup> See *infra* Section II.B.

<sup>201</sup> See *infra* Section II.B.

<sup>202</sup> See Ciric, *supra* note 10.

<sup>203</sup> *Id.*

[T]he Board denied the Hopi tribe's ability to bring a cultural claim by holding that it failed to establish a legal existence and capacity to sue. This decision has extreme ramifications, since it means that neither the Hopi tribe nor any Native American tribe has any legal existence under French law. The Board held that the Hopi tribe's 1936 Constitution was "insufficient to establish the tribe as a legal entity under French law." If the Board holds that the Hopi Constitution is lacking in establishing its legal existence, then no Native American tribe will be able to bring cultural claims

ownership over the objects because the tribes were not recognized under French law. To appear before the court, the Hopi had to be represented by another organization that was recognized as a legal entity, in this case, Survival International.<sup>204</sup>

To address this issue, Congress should amend NAGPRA to give the Native American Graves Protection and Repatriation Review Committee power to advise the U.S. Attorney General to pursue civil litigation in foreign courts on behalf of Native American tribes seeking to recover their cultural property. This amendment to NAGPRA would be similar to the provision in the Indian Arts and Crafts Act, which states that the Indian Arts and Crafts advisory committee may recommend that the U.S. Attorney General initiate civil action to enforce the statute.<sup>205</sup>

The Department of Justice has the power to represent Native Americans in litigation under 28 U.S.C. § 516.<sup>206</sup> Specifically, the Indian Resources Section of the Department of Justice is responsible for pursuing civil litigation on behalf of Native American tribes and individuals, including the protection of tribal assets and the assertion of Indian rights to property.<sup>207</sup> In cultural property repatriation claims, Native American tribes are asserting ownership rights to their cultural property. The Indian Resources Section representing tribes falls squarely within the Department of Justice's power. The Department of Justice is equipped to represent the tribes in foreign courts (such as France)

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on French soil.

*Id.*; see Nicolazzi, Chechi, & Renold, *supra* note 1 (“[T]he Board answered that . . . neither the Hopis nor any other Native American group had the legal standing to challenge a sale on French soil.”).

<sup>204</sup> See Nicolazzi, Chechi, & Renold, *supra* note 1 (“The [Court’s] second and third orders dismissed the tribe’s claim on the ground that it lacked legal personality. However, the Court found that the association Survival International France had legal grounds to defend the Hopis’ interests.”). Survival International is a non-profit organization with the mission of preventing the annihilation of indigenous people and giving these groups the opportunity to be heard in society. See *About Us*, SURVIVAL INT’L, <http://www.survivalinternational.org/info> (last visited Jan. 1, 2018).

<sup>205</sup> See 25 U.S.C. § 305d(d) (2012) (“In lieu of, or in addition to, any criminal proceeding under subsection (c), the Board may recommend that the Attorney General initiate a civil action under section 6 [15 U.S.C.S. § 305e of this title].”).

<sup>206</sup> 28 U.S.C. § 516 (2012); Ann C. Juliano, *Conflicted Justice: The Department of Justice’s Conflict of Interest in Representing Native American Tribes*, 37 GA. L. REV. 1307, 1367 (2003) (“This provision authorizes the Justice Department to litigate as trustee for tribes.”).

<sup>207</sup> U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 5-14.001 (1997), <https://www.justice.gov/usam/usam-5-14000-indian-resources-section> (“The Indian Resources Section was created . . . to conduct litigation . . . for the United States as trustee for the protection of the resources and rights of federally recognized Indian tribes and members of such tribes.”); *Id.* § 5-14.100 (“The Indian Resources Section’s docket includes protection of tribal assets or jurisdiction, assertion of Indian rights to property including hunting, fishing, land, water rights and the protection of tribal sovereignty in such areas as taxation, alcoholic beverage control, law enforcement and reservation boundaries.”).

through its Office of Foreign Litigation.<sup>208</sup> Acting as a trustee for the tribes, the Department of Justice would be a powerful resource for Native American tribes attempting to recover their cultural property from abroad, especially in those countries that do not legally recognize the tribes.

Congress has the power to pass this amendment to NAGPRA under the Indian Trust Doctrine, which gives the federal government the right and responsibility to act as a trustee or guardian for Native American tribes.<sup>209</sup> The government is to use this power to protect the interests of Native American tribes.<sup>210</sup> Recovering Native American cultural property from abroad is an interest of Native American tribes that the tribes are unable to protect, as demonstrated by the Hopi in France.<sup>211</sup> Therefore, it would be within Congress's power to pass this amendment to NAGPRA.

It may seem simpler to pass national patrimony legislation that is more akin to that of Egypt, Italy, and other countries that grants the government ownership over all cultural property within the country.<sup>212</sup> However, these countries do not have indigenous populations like the United States. Claiming ownership over all cultural property by the U.S. federal government could be viewed as the latest violation of human rights of Native American tribes by the U.S. government.<sup>213</sup> It would be more intuitive to look to the cultural property legislation of other countries in a similar situation as the United States, such as Canada, Australia, and New Zealand, all of which are common law countries with indigenous populations.<sup>214</sup> However, the cultural property

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<sup>208</sup> See *Office of Foreign Litigation*, U.S. DEP'T JUSTICE, <https://www.justice.gov/civil/office-foreign-litigation> (last visited Jan. 1, 2018).

<sup>209</sup> See *Cherokee Nation v. Georgia*, 30 U.S. 1, 10 (1831) (holding that Indian tribes "may more correctly perhaps be denominated domestic dependent nations . . . in a state of pupillage" and that "[t]heir relations to the United States resemble that of a ward to his guardian"); see also FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 220–21 (Rennard Strickland et al. eds., 1982); Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1220 (1975) ("The federal guarantee recognizes a sort of 'protectorate' status in the tribes, securing to them the power of managing their internal affairs in an autonomous manner . . . . Moreover, tribal autonomy is supported by a federal duty to protect the tribe's land and resource base."); Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 651–52 (1995).

<sup>210</sup> See Gerstenblith, *supra* note 209.

<sup>211</sup> See Ciric, *supra* note 10.

<sup>212</sup> See *supra* Section II.B.

<sup>213</sup> See WALTER R. ECHO-HAWK, IN THE LIGHT OF JUSTICE: THE RISE OF HUMAN RIGHTS IN NATIVE AMERICA AND THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 176–81 (2013) (describing ten cases that the author considers the worst Indian law cases ever decided and analyzing the accompanying human rights violations in the context of UNDRIP).

<sup>214</sup> See Theresa Simpson, Note, *Claims of Indigenous Peoples to Cultural Property in Canada, Australia, and New Zealand*, 18 HASTINGS INT'L & COMP. L. REV. 195, 202–04 (1994); Kristin Ann Mattiske, Note and Comment, *Recognition of Indigenous Heritage in the Modern World: U.S. Legal Protection in Light of International Custom*, 27 BROOK. J. INT'L L. 1105, 1121–26

legislation of these countries do not vest ownership of cultural property with the government.<sup>215</sup> Instead they are simple export restrictions, which, as demonstrated above, are not recognized in most foreign courts.<sup>216</sup> Thus, the most effective solution for the United States is to grant the Native American Graves Protection and Repatriation Review Committee the power to advise the U.S. Attorney General to pursue civil litigation on behalf of Native American tribes in cultural property repatriation claims.

To assist the U.S. Attorney General in this, Native American tribes should ensure that their constitutions and laws vest ownership of sacred objects and cultural property with the tribe. Many tribes have not codified their cultural property laws.<sup>217</sup> Though tribal law is recognized only infrequently, this should not deter tribes from codifying tribal law protecting their sacred objects and cultural property. One scholar, Angela R. Riley, predicts that courts will begin to recognize tribal law more frequently.<sup>218</sup> She encourages tribes to codify tribal laws protecting cultural property so that tribes will have a legal structure in place as the international community begins to recognize tribal law more and more.<sup>219</sup> She argues that as the tribes continue to conduct themselves as sovereigns by codifying their laws, countries in the international community will be more willing to acknowledge the tribes as sovereigns.<sup>220</sup> By codifying ownership over tribal cultural property, tribes will be assisting the U.S. Attorney General when it pursues a repatriation claim in a foreign court.

These two modifications to the STOP Act would address both legal categories of Native American objects: those obtained prior to 1990 (and thus in compliance with NAGPRA); and those obtained after 1990 (and thus in violation of NAGPRA). Due to the doctrine of territoriality, neither the export license provision, nor the Department of Justice

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(2002).

<sup>215</sup> See sources cited *supra* note 214.

<sup>216</sup> See *supra* Section II.A.

<sup>217</sup> See Angela R. Riley, "Straight Stealing": Towards an Indigenous System of Cultural Property Protection, 80 WASH. L. REV. 69, 115 (2005) ("Despite comprehensive cultural property codes among several tribes, this research reveals that the majority of tribes surveyed have not undertaken codification as a means of protecting their cultural property.").

<sup>218</sup> *Id.* at 123 ("Expecting the world to recognize and abide by tribal law may seem idealistic. . . . However, tribal law may, in fact, influence rule makers and judges outside of the tribal court system.").

<sup>219</sup> *Id.* ("As international (and perhaps domestic) law advances toward the recognition and protection of indigenous peoples' rights regarding cultural property, tribes that have tried and tested their laws will be able to speak to the ideal regime in terms of substance, scope, and content.").

<sup>220</sup> *Id.* at 119 ("Despite very real limits on enforcement of tribal law, indigenous nations must nevertheless pursue the path of a 'living sovereign.' That is, Native American sovereign status should be reinforced not only through words, but also through the actions of a sovereign nation.").

provision would always guarantee recovery of an object in a foreign court.<sup>221</sup> However, it can be anticipated that this proposed legislation would be more successful in a foreign court than a pure export restriction, like the STOP Act as currently drafted.

### C. *Diplomatic and International Solutions*

The proposed amendments to NAGPRA would be the quickest and least expensive method for the United States to protect and recover Native American artifacts.<sup>222</sup> However, as demonstrated above, these cultural patrimony laws are not always successful in foreign courts.<sup>223</sup> Therefore, in addition to seeking this revised domestic legislation, the United States should also pursue a long-term resolution through a stronger international treaty and individual bilateral treaties.

By passing the UNDRIP,<sup>224</sup> the global community has already started working towards a treaty banning the sale of sacred indigenous objects. As explained above, the UNDRIP is not binding international law, but is instead a declaration of goals and ideals by the signing States.<sup>225</sup> However, the Declaration reflects the global community's awareness that the rights of indigenous people need to be recognized, including their right to the repatriation of their cultural property. UNDRIP is a positive step towards a binding international treaty protecting the rights of indigenous people.<sup>226</sup> The United States should actively promote and invest in the development of such a treaty so that Native Americans have an international legal mechanism to recover their cultural property.

Another solution would be for the United States to require countries seeking bilateral agreements with the United States under the CPIA to prohibit the importation of Native American artifacts.<sup>227</sup> As explained above, the CPIA as currently constituted does not require these States to prohibit the import of Native American artifacts.<sup>228</sup> The United States is effectively restricting its own import abilities while not requiring other States to do the same. By amending the CPIA, the United States would increase the number of Native American artifacts

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<sup>221</sup> See *supra* Section II.A.

<sup>222</sup> See *supra* Section III.A.

<sup>223</sup> See *supra* Section II.B.

<sup>224</sup> See *Declaration on the Rights of Indigenous People*, *supra* note 65; see also UNDRIP, *supra* note 32.

<sup>225</sup> See sources cited *supra* note 71.

<sup>226</sup> See ECHO-HAWK, *supra* note 213, at 6 (“[T]he *Declaration* can provide guidance and persuasive authority to spark social, cultural, and political transformations, which often run deeper into the fabric of a nation than superficial legal change.”).

<sup>227</sup> Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2601–2613 (2012).

<sup>228</sup> See Anderson, *supra* note 52, at 337.

repatriated to the United States.

#### CONCLUSION

Senator Heinrich presented the STOP Act as a means of preventing the sale of Native American artifacts in France.<sup>229</sup> Rather than passing this bill, Congress should amend NAGPRA to authorize the creation of an export license system, and to explicitly permit the Native American Graves Protection and Repatriation Review Committee to advise the U.S. Attorney General to pursue civil litigation on behalf of Native Americans.<sup>230</sup> These modifications will not guarantee success in foreign courts in every instance, but they will increase the likelihood of success. Cultural property law is complex and frequently involves the interaction of the laws of foreign jurisdictions. It is in the best interests of the Native Americans and the United States to strengthen NAGPRA with as many protections as possible so that more Native American cultural property can return home.

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<sup>229</sup> See Press Release, Martin Heinrich, *supra* note 12.

<sup>230</sup> See *supra* Part III.