International Cultural Property Trusts: One Response to Burden of Proof Challenges in Stolen Antiquities Litigation

Marion P. Forsyth Esq.
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I. INTRODUCTION

The United Nations Educational, Social, and Cultural Organization ("UNESCO") has estimated that the international trade in cultural property is worth $5 billion annually, second in value only to narcotics trafficking. As the demand for archaeological and ethnographic materials increases, looters respond with a reliable supply of antiquities by attacking archaeological sites. Because looted antiquities are unique, undocumented, and irreplaceable, traditional bilateral treaties and international trade law have proven insufficient to protect them. This Article discusses the issues that arise in an ownership dispute when the boundaries of the ancient culture that created objects overlap modern state borders and suggests that negotiating international cultural property trusts ("ICPTs") is an appropriate response to protect archaeological sites and to provide proper stewardship for cultural treasures.

The futility of trying to prove ownership by only one country when antiquities were created by a culture whose boundaries span multiple modern

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1 Roger F. Noriega, Helping the Hemisphere Recover and Preserve Its Cultural Patrimony, State Department Press Release ¶ 2 (July 1, 2004), available online at <http://www.state.gov/p/wha/rls/rls/35418.htm> (visited Apr 21, 2007) ("INTERPOL estimates the value of the illicit trade in art and artifacts worldwide each year at $5 billion—only the illegal markets in drugs and arms are larger").

states was exhibited in *Peru v Johnson,* in which the court found that Peru could not succeed in claiming artifacts that could have come from Ecuador or Bolivia. The outcome in this case strongly suggests that modern countries sharing such ancient cultural boundaries would benefit by executing multilateral agreements to create ICPTs that delegate their international litigation claims to a single agent. The creation of multilateral ICPTs that encompass ancient cultural footprints would yield more fair and just repatriation results and increased success of repatriation claims brought in the courts of market countries, particularly the United States. Rather than source countries losing in court because of competing ownership claims, the ICPT would need only prove by a preponderance of the evidence that the object is owned by one of the ICPT's member countries or by the ICPT itself.

This Article discusses (i) the shortcomings of the current framework; (ii) the need for a unified claim in American courts by modern states that share ancient cultural boundaries; and (iii) how ICPTs would lead to more just outcomes for the stewardship of antiquities. Indeed, an ICPT established by modern states that share ancient cultural boundaries would serve as a deterrent for looting of sites and yield increased scholarship, stronger and more effective stewardship, and enhanced educational opportunities for all citizens of the world.

II. The Current Framework: The Looting of Sipán and *Peru v Johnson*

The current legal framework for repatriation of antiquities, or the return of antiquities to their country of origin, is based on national ownership laws enacted by countries with significant troves of property from ancient cultures that supply the international art market ("source countries"). These national ownership laws vest all of the rights of ownership in the state, rather than in private parties. With ownership comes the right to control international trade, and source countries enact permit and export regulations to help enforce their rights. Many national ownership laws declare the state's ownership over all antiquities both above and under the ground—that is, over antiquities that have already been discovered as well as those yet to be excavated. Because of these laws, antiquities that are looted from archaeological sites may be deemed stolen property, and looters who remove the objects and deprive the state of its rights in such objects deemed thieves.

National ownership laws, particularly as they apply in modern states with political boundaries that overlap ancient cultural boundaries, were put to the test

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most directly in *Peru v Johnson*. This case focused on antiquities from the Moche culture. The Moche—who existed nearly 1,200 years before the rise of the Inca civilization in modern-day Peru—farmed river valleys along a 220-mile stretch of Peru’s northern coast known as the Lambayeque region. Moche settlements were characterized by great pyramids and adobe brick platforms. Many of these ancient structures have survived the centuries, and modern Peruvians in the Lambayeque region know them as part of the natural landscape as well as a trove of treasures from the past. Objects similar to those found in Moche sites in Peru have also been found in parts of Bolivia and Ecuador.

The story of the Moche people, who did not have their own writing system, is told through illustrated pottery and the artifacts they left behind in *huacas* (the Peruvian word for mounds that dot the Lambayeque valley). Because these *huacas* have attracted the attention of looters over four centuries, many artifacts that could tell the story of the Moche have been lost over time. When archaeological sites are looted, rather than scientifically excavated, the context of the items is lost. Because of the rampant looting of Moche sites and the resulting loss of contextual information, comprehensive scientific excavation of sites had not occurred, and salvage archaeology of the looted tombs revealed little information. As a result, there were many unanswered questions about the Moche culture in the late 1980s when magnificent archaeological discoveries were made at Sipán. Looting of archaeological sites has long been a problem throughout Peru, but perhaps it has never caused the loss of as much information as occurred at Sipán, the site of a royal *huaca* with a stunning cache of gold artifacts.

Looters from the Bernal family broke into the grand *huaca* at Sipán in February, 1987, and stole objects of unfathomable importance in understanding the Moche culture, including ritual objects and decorative gold ornaments. Objects that were not made from gold or silver—and which therefore held less market value—were simply destroyed in the pillaging, and with them incalculable lessons that could have been derived from the Moche. The objects seized by

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5 Id.
6 Id at 512.
7 Following the discovery of the Royal Tombs at Sipán, salvage archaeology and larger scale excavations were conducted at Sipán that increased knowledge about the Moche. See, for example, Walter Alva, *The Moche of Ancient Peru: New Tomb of Royal Splendor*, 177 Nat Geographic 2 (June 1990); Peter Gwin, *Peruvian Temple of Doom*, 206 Nat Geographic 102 (July 2004).
Bernal and his band of looters, including gold peanuts and other precious jewelry,\(^9\) quickly found their way to the international art market in violation of Peru's national ownership law and stringent export restrictions. These laws establish explicitly that any antiquities found and held in private collections in Peru must be registered with the state and none may leave the country without a proper export permit. Today a significant part of the material stolen by the Bernal family is in a private collection in Switzerland, while other objects are scattered in private and public hands throughout the world.\(^10\)

Some of the loot from Sipán made its way illegally to the United States and into the hands of antiquities dealers in California. When a conspirator blew the whistle, the US government located the objects and brought criminal charges against one of the dealers, David Swetnam. Swetnam eventually pleaded guilty to three counts of smuggling and lying on Customs forms and became the first person ever jailed in America for smuggling Peruvian antiquities.\(^11\)

During the course of the investigation, it became clear that Swetnam had sold many of the objects to Benjamin Johnson, an antiquities collector. In an effort to recover the Sipán objects from both Swetnam and Johnson, the government of Peru brought a civil action in federal court alleging conversion and seeking return of the stolen artifacts, arguing that Peru was the legal owner of the objects seized by the US Customs Service.

To meet its burden of proof in a civil case for conversion, Peru had to show that: (i) the objects came from Peru; (ii) its ownership law was in place before the objects left Peru; and (iii) the objects left Peru in violation of that national ownership law.\(^12\) After a bench trial, the court found Peru had not met its burden.\(^13\) An expert witness at trial acknowledged that there are similar sites in Bolivia and Ecuador, as Pre-Columbian culture, including Moche, spanned not only modern-day Peru but also areas now within the modern political borders of Bolivia and Ecuador. Absent documented excavation of the objects, there was no proof of their findspot.\(^14\) The court held that Peru did not establish

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\(^9\) Alva, 174 Nat Geographic at 543 (cited in note 4).
\(^10\) Watson, The Lessons of Sipán at 16 (cited in note 8).
\(^11\) Id.
\(^12\) Johnson, 720 FSupp at 812–14.
\(^13\) Id at 812.
\(^14\) Id at 812–14. The court also engaged in extensive fact-finding regarding Peru's national ownership laws. Unfortunately, Peru's laws seemed "far from precise and [had] changed several times over the years." Id at 812. Examining these laws, the court found that Peru had many declarations concerned with protection, but not ownership. Within Peru's borders, possession of artifacts is allowed to remain in private hands, and objects can be transferred by gift or bequest or intestate succession. Peru had not previously sought to exercise its ownership rights in property as...
that the artifacts were excavated in modern day Peru, and that Peru did not
establish its ownership at the time of exportation because similar sites in Bolivia
and Ecuador could have been the source of the objects.

Peru did not prevail in part because the court could not determine factually
in which country the objects were found and from which country the objects
were first exported. Despite this conclusion, the court was sympathetic:

Irrespective of the decision in this matter, the court has considerable
sympathy for Peru with respect to the problems that it confronts as
manifested by this litigation. It is evident that many priceless and beautiful
Pre-Columbian artifacts excavated from historical monuments in that
country have been and are being smuggled abroad and sold to museums and
other collectors of art. Such conduct is destructive of a major segment of
the cultural heritage of Peru, and the plaintiff is entitled to the support of
the courts of the United States in its determination to prevent further
looting of its patrimony.15

While national ownership laws have become more accepted in American
courts as a basis for proving ownership in the years since the Johnson
decision,16 Peru’s loss has served as a deterrent against asserting repatriation claims in US
courts to other countries where ancient cultural boundaries overlap modern state
borders.

III. ONE RESPONSE: ICPTs TO PROMOTE SCHOLARSHIP,
RESEARCH, PUBLIC EDUCATION, INTERNATIONAL EXCHANGE,
AND RESPONSIBLE STEWARDSHIP

As the Johnson decision exemplifies, proving national ownership of objects
created by an ancient culture spanning modern borders is an obstacle to proper
stewardship of antiquities both because of the mechanics of national ownership
laws and the difficulty in allocating the burden of proof to individual countries.
Multilateral treaties among modern states sharing ancient cultural boundaries
could address both the ownership questions of objects whose findspot is
unknown and the proper determination of stewardship of the relevant
antiquities, thus benefiting cultural descendants and broader humankind.

The traditional premise for enacting national ownership laws is that some
objects are of such great importance to the cultural history of a nation that they
are integral to that nation’s identity. Their significance is so great that private
ownership is wholly inappropriate, and the resources of the nation should be

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15 Id at 811–12.
16 See, for example, United States v Schulte, 333 F3d 393 (2d Cir 2003) (recognizing Egypt’s national
ownership laws).
used to ensure that the objects are properly studied, conserved, and made accessible to the public. National ownership laws enable a nation to hold antiquities in trust for the public.

An artificial distinction enters this arrangement when ancient cultural boundaries overlap those of modern states. In such cases, one nation may not have a stronger claim to ancient cultural patrimony than any other country that spans the ancient cultural border. For example, it would be difficult for Mexico to make an argument that it has a stronger claim to steward ancient Mayan culture than do the other states that share ancient Mayan territory: Guatemala, Honduras, El Salvador, and Belize. As Mayan history is important to the national identity of each country, it would be inappropriate for any one country to deny access, study, or conservation of these objects at the expense of the other impacted nations.

Rather than competing against one another in repatriation claims in US courts, these countries should come together and establish an ICPT that allows for shared responsibility and shared benefit of their shared cultural heritage. Some nations have already created their own national cultural property trusts and enjoy much success. For example, in 1989 Japan established within the World Heritage Centre of UNESCO the Japanese Trust Fund for the Preservation of the World Cultural Heritage ("Trust"), which provides assistance to the stewardship of monuments throughout Asia that are of significance to the Japanese people. Additionally, the Japanese government works cooperatively with other nations through the Trust to ensure proper conservation of Japanese antiquities held abroad. Japan has also established the UNESCO Japanese Funds-in-Trust for the Preservation and Promotion of the Intangible Cultural Heritage, which has been responsible for the preservation of traditional dance and music and the making of lacquerware and ceramics in Asian countries.

Japan has employed its Trusts as a focus of international diplomacy. Recognizing that "the modern reality of Japan does not always seem to be reflected accurately in the images spread overseas," Japan seeks bilateral exchanges and the opportunity to display Japanese cultural property. For example, Japan has initiated a cultural exchange with Iraq. Recognizing that

18 For more information on Japan’s initiatives, see Ministry of Foreign Affairs of Japan, Diplomatic Bluebook chapter IV(A) (1997), available online at <http://www.mofa.go.jp/policy/other/bluebook/1997/IV.html> (visited Apr 21, 2007).
19 Id ch IV(A)(2)(b).
20 Id ch IV(A)(1).
Iraq's post-war situation has some similarities to the challenges that Japan faced in the post-World War II period. Japan has taken the opportunity to improve its profile in Iraq by distributing copies of Japanese television programs (ninety-six episodes of Oshin were provided to Iraqi television with Arabic subtitles); donating judo uniforms and equipment, as well as travel expenses, to the Iraqi Judo team to participate in a Japanese sports exchange; and making monetary contributions to educational and museum efforts to preserve Iraq's cultural heritage.\(^{21}\) As further evidence of Japan's recognition that cultural exchanges are an important diplomatic tool, the Japanese government established the Japan Foundation through special legislation in 1972, and since then has developed a network of nineteen offices in eighteen countries throughout the world.\(^{22}\) The Japan Foundation regularly sponsors cultural exchange and public education campaigns to enhance understanding of Japanese culture.

Other nations have cultural property trusts that exist as entities separate from the national government. The British National Trust, a registered charity, was established in 1895 "to act as a guardian for the nation in the acquisition and protection of threatened coastlines, countryside, and buildings."\(^{23}\) The British National Trust now stewards 612,000 acres of countryside in England, Wales, and Northern Ireland as well as 700 miles of coastline and more than 200 buildings of national significance. Most of these properties are held in perpetuity. Likewise, the United States National Trust for Historic Preservation exists as an independent 501(c)(3) entity,\(^{24}\) but was chartered by Congress in 1949 to further the policy of the Historic Sites Act and "to facilitate public participation in the preservation of sites, buildings, and objects of national significance or interest."\(^{25}\) Today, the National Trust for Historic Preservation provides leadership, education, advocacy, and resources to save America's diverse historic places and to revitalize communities. With 270,000 members in fifty states, the National Trust has stewardship over twenty-eight historic properties and provides funding to protect threatened resources, including


\(^{22}\) Japan Foundation of New York, *About the Japan Foundation*, available online at <http://www.jfny.org> (visited Apr 21, 2007).

\(^{23}\) For more information about the British National Trust, see *History of the Trust*, available online at <http://www.nationaltrust.org.uk/main/w-trust/w-thecharity/w-history_trust.htm> (visited Apr 21, 2007).

\(^{24}\) Public charities are referred to as 501(c)(3) organizations because their status is established in the Internal Revenue Code, 26 USC § 501(c)(3) (2000).

significant documents, works of art, and historic structures that document and illustrate the history of the United States. The trust concept that has been so successful in Japan, Britain, and the United States should be extended beyond the individual nation model to multilateral agreements among modern states that share ancient cultural boundaries.

The establishment of ICPTs would encourage scholarship and research, public education, and international exchange while deterring the looting of archaeological sites. ICPTs could facilitate the cataloging and archiving of cultural materials, enabling broader study of objects and more effective curation. ICPTs would also facilitate international exchange through traveling public exhibitions, interdisciplinary research among scientists from various countries and fields of expertise, and public education through conferences, seminars, exhibits, and publications. An example of the breadth of possibilities for the work of an international trust is offered by the Aga Khan Trust for Culture, a private foundation established in Switzerland to promote community revitalization in the Muslim world with an emphasis on cultural heritage. Its five programs include the Aga Khan Award for Architecture, the Historic Cities Support Programme, the Music Initiative in Central Asia, the Humanities Project, the on-line archival resource ArchNet, and the Aga Khan Program for Islamic Architecture at Harvard University and the Massachusetts Institute of Technology. While the Aga Khan Trust is a privately supported nonprofit organization, similar activities could be undertaken by ICPTs with government support.

While there are programmatic models from which ICPTs may draw, there is an important distinction between existing cultural trusts and the international agreements proposed herein. To deter looting of archaeological sites and the international trade in stolen antiquities, ICPTs must declare ownership of all ancient cultural objects within the borders of their member states. As national ownership laws serve as the basis for repatriation claims in US courts, and to some extent UK courts, ownership of antiquities must be transferred from the individual countries to the ICPT to allow it to claim stolen objects in the courts of market countries.

A unified ownership law among an ICPT’s member countries would serve to eliminate loopholes and minimize confusion among sellers and purchasers. Today, sellers and purchasers who are apprehended dealing in illegal antiquities may claim ignorance or confusion as to the laws of the source country, as was

26 About the National Trust, available online at <http://www.nationaltrust.org/about/> (visited Apr 21, 2007).

27 For more information, see Aga Khan Trust for Culture, available online at <http://www.akdn.org/agency/aktc.html> (visited Apr 21, 2007).
attempted in the *Autocephalous Greek-Orthodox Church of Cyprus v Goldberg & Feldman Fine Arts, Inc*\(^{28}\) and *United States v Schulte*\(^{29}\) cases. In both cases, the courts acknowledged that the laws can be confusing but decided that as sophisticated businesspersons, the sellers and purchasers were assumed to know the law, and rewarding conscious avoidance of the law is against public policy.\(^{30}\)

Foreign national ownership laws as a basis for proving stolen property in US courts was initially introduced in the Fifth Circuit in the 1977 landmark case *United States v McClain*.\(^{31}\) In that case, dealers in pre-Columbian antiquities were charged with violations of the National Stolen Property Act\(^{32}\) for trafficking in antiquities owned by the Mexican government. While the US government ultimately did not prevail in its prosecution, the use of foreign national ownership laws to establish ownership in US courts was established.\(^{33}\)

Since *Johnson*, the Second Circuit has also adopted the tenet that foreign national ownership laws may be used to establish ownership of antiquities. In *Schulte*, an American antiquities dealer was charged with violating the National Stolen Property Act for trafficking in antiquities from Egypt.\(^{34}\) In its opinion, the Second Circuit laid out the elements of proving ownership: the foreign government must show that (i) it was the owner of such artifacts at the time the defendant took possession of them or removed them from that country; (ii) the artifacts in question came from that country; (iii) the country’s patrimony laws are clear and unambiguous; and (iv) the country enforces its own laws.\(^{35}\) The fourth prong, that the country enforces its own laws, was not an issue considered in the *Peru v Johnson* litigation, but is now given weight by courts deciding these claims.\(^{36}\) Courts continue to discern whether a patrimony law is truly an ownership law or just an export regulation.

The creation of an ICPT addresses each of these burdens of proof. The ICPT may prove ownership by asserting an ironclad patrimony law that encompasses each country in which cultural objects are found; artifacts, if they are affiliated with that culture, necessarily must have originated in one of the countries party to the trust; the patrimony law will be clear and unambiguous.

\(^{28}\) 917 F2d 278, 283 (7th Cir 1990).
\(^{29}\) 333 F3d at 410.
\(^{30}\) 917 F2d at 294; 333 F3d at 393.
\(^{31}\) 545 F2d 988 (5th Cir 1977).
\(^{32}\) National Stolen Property Act, 18 USC §§ 2314–2315 (2000).
\(^{33}\) See, for example, *Schulte*, 333 F3d at 393.
\(^{34}\) Id at 395.
\(^{35}\) This is the Author’s interpretation of the criteria used by the judge in this case. The full text of the opinion is available at 720 F Supp 810.
\(^{36}\) See, for example, *Schulte*, 333 F3d at 393.
The ICPT will provide for consistency of the law, as each nation will enact the exact same controls as the others in its domestic law. Strengthening the ability of these countries to litigate for repatriation in American courts would serve as an effective deterrent for the illegal international antiquities trade.

Another benefit of the multilateral ICPT approach over individual country claims is that an ICPT could obviate the need for bilateral agreements with the United States, as established under the Convention on Cultural Property Implementation Act.\(^3\) Currently, the United States requires countries who desire the US to adopt their export regulations as import laws to submit a request to the President to enter into a bilateral agreement. The requesting country must then present evidence that its sites are subject to pillage; that import restrictions, if applied in concert with similar regulations in other market countries, would be of substantial benefit in deterring pillage; that less drastic measures are not available; that the requesting country is enforcing its own strong laws concerning cultural property; and that import restrictions are in the best interest of the international community.\(^4\) The process is rigorous, and only twelve such agreements have been enacted in the past twenty-four years.\(^5\)

The establishment of ICPTs would simplify this process by gaining protection for an entire region in one bilateral agreement with the United States and by making the four elements of proof noted above less daunting. Concerted international action, for example, would be demonstrated prima facie by the presence of an ICPT. By negotiating with the United States as a bloc of countries, rather than individually, these countries may enjoy enhanced bargaining power that could affect other aspects of the process as well.

IV. A DRAFT MULTILATERAL AGREEMENT ESTABLISHING AN INTERNATIONAL CULTURAL PROPERTY TRUST

A multilateral agreement establishing an ICPT could take a variety of forms, and a number of considerations must be negotiated prior to drafting. The first concern is that all modern states that overlap the ancient cultural boundaries must be included in the agreement for it to be effective. Without the participation of all impacted countries, the agreement will not simplify international trade agreements with the US and other market countries, and will

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38 Id § 303.
39 Agreements have been entered into with the following countries: Bolivia, Cambodia, Canada, Colombia, Cyprus, El Salvador, Guatemala, Honduras, Italy, Mali, Nicaragua, and Peru. For a listing of these agreements, see Department of State, Chart of Current and Expired Import Restrictions under the Convention on Cultural Property Implementation Act, available online at <http://exchanges.state.gov/culprop/chart.html> (visited Apr 21, 2007).
not aid in repatriation litigation because opponents could argue that objects without an identified findspot may have come from a country not party to the agreement.

The definition of the cultural property to which the agreement will apply, including the dates of creation of the objects and the era of the culture from which they are derived, will be particularly important for countries that have several sources of cultural heritage. Likewise, countries should determine whether they wish an ICPT to apply to all cultural heritage from that culture, including both objects not yet found and those already in possession of the countries. The agreement must, at minimum, establish ownership over objects not yet found and documented, but for policy reasons could also transfer ownership of objects already claimed by the member countries to an ICPT. The agreement should also address instances where new archaeological finds alter the countries' understanding of the culture (for example, when a culture may be found to date from earlier than previously known) and its extent (for example, when objects are found outside established, anticipated boundaries). Such significant changes in understanding are rare, but mechanisms for amendment of the agreement must be in place to address them should they arise.

An ICPT should be governed by a board comprised of representatives of all member states. The relative representation of the member states, and the terms of governing board members, will be points of negotiation. Additionally, the initial monetary investment of the countries and their ongoing financial obligations to the trust must be addressed. Countries could either choose to make an initial investment to endow an ICPT, or make yearly contributions, or both. The ICPT need not be solely funded by countries, but might solicit private contributions as well.

The mission of the ICPT must be laid out in the agreement, with a clear articulation of the trust's education and conservation mission and the extent to which ICPT decisions trump those of countries themselves. Finally, the agreement must contain a delegation of litigation authority to the ICPT as a single claimant for purposes of international repatriation.

V. A DRAFT AGREEMENT ESTABLISHING AN INTERNATIONAL CULTURAL PROPERTY TRUST FOR THE BENEFIT OF THE PEOPLE OF THE REPUBLICS OF BOLIVIA, ECUADOR, AND PERU

This section presents a draft agreement that contemplates these necessary considerations and may serve as a model for actual agreements. For purposes of this example, the author contemplates a multilateral agreement between the Governments of Bolivia, Ecuador, and Peru to protect pre-Columbian antiquities. Each section of this model agreement is followed by a discussion of its importance and relevance.
Preamble

Whereas the Republic of Peru, the Republic of Ecuador, and the Republic of Bolivia, Acting pursuant to their shared interests in the preservation of pre-Columbian culture; and

Desiring to increase scholarship, research, and understanding of pre-Columbian cultural heritage and to strengthen stewardship of that heritage; and

Desiring to reduce the incentive for pillage of irreplaceable archaeological objects and materials representing the pre-Columbian cultural heritage of their countries,

Agree as follows:

Introductory statements should explain the motivations of the member states and the facts that inform their decisions to enter into the agreement.

ARTICLE I

A. The Republics of Bolivia, Ecuador, and Peru hereby establish an international cultural property trust for the express purpose of assuming ownership of all pre-Columbian antiquities from the period of X year to Y year within their national borders, both above and in the ground.

This ICPT will own all of the antiquities that date from a certain time period. This agreement contemplates ownership of antiquities both above and below ground, meaning that objects that have yet to be excavated or found are nevertheless owned by the ICPT. Because of this provision, items that are looted from archaeological sites are owned by the ICPT even though the objects have not previously been documented.

B. Such international cultural property trust shall exercise ownership over all pre-Columbian antiquities from the period of X year to Y year within their national borders, both above and in the ground, as of January 1, 2008.

Establishing a date on which ownership transfers is critical. Only those objects that are removed after the date of this agreement will be deemed stolen and be subject to a claim for repatriation by the ICPT.

C. The Republics of Bolivia, Ecuador, and Peru shall conduct systematic inventories of cultural resources in museums, ecclesiastical
buildings, state collections, and archaeological sites that were found prior to January 1, 2008. The ownership of these objects shall be transferred to the cultural property trust by national legislation enacted by each Republic party to the trust prior to January 1, 2008.

Creating a central inventory of the holdings of the ICPT is critical to minimizing disputes concerning which objects are covered by the agreement.

ARTICLE II

A. The governing board of the international cultural property trust shall comprise fifteen representatives, five from each of the countries party to the trust. The board members will elect a chair from among their members. Representatives shall serve for a term of five years and may be reappointed by their respective governments.

This agreement contemplates equal representation by each nation on the board of the ICPT. Other agreements could assign representation based on relative geography, resources donated, or population. Countries should consider whether term limits would be appropriate and whether terms of board members should be staggered.

B. Each country shall contribute an endowment sum of X percent of its GDP in the first year of the establishment of the international cultural property trust. The trust shall be authorized to raise money from private sources in addition to government contributions.

This agreement contemplates that financial burdens will be shared on an equal percentage basis of GDP. Countries could consider allocating financial burden based on percentage of boundaries spanned by ancient culture, relative amount of cultural property donated, population, or other theories.

C. The international cultural property trust will use its best efforts to develop a prioritized management plan for the effective protection of its pre-Columbian cultural resources, giving increased attention to sustainable archaeological tourism as an economic resource.

The ICPTs will always have limited resources and must prioritize their stewardship activities. Sustainable archaeological tourism is important because it could enhance economic development in these countries, thereby increasing the resources available to the ICPT.

40 This agreement assumes only ownership will be transferred, and not possession of the objects. Countries could negotiate, however, for possession to be transferred to an ICPT as well.
D. The international cultural property trust will use its best efforts to allocate sufficient resources for site conservation, museum development, and the adequate conduct of salvage archaeology where there is proposed land development, and to ensure that such development, which can give rise to pillage, is fully monitored.

These activities will promote responsible stewardship of cultural property and minimize damage to resources yet uncovered.

E. The international cultural property trust will facilitate the exchange of its archaeological objects among the Republics of Bolivia, Ecuador, and Peru and also with other countries under circumstances in which such exchange does not jeopardize its cultural heritage, such as for temporary loans for exhibitions and other cultural, educational, and scientific purposes.

Such opportunities for exchange could be memorialized in this agreement; for example, a country could require that a certain number of objects be on display within its borders at any given time.

F. The international cultural property trust will use its best efforts to encourage collaborative law enforcement programs among the Republics of Bolivia, Ecuador, and Peru to ensure the protection of archaeological sites and cultural resources, subject to international smuggling laws.

A collaborative law enforcement program will help satisfy the other burdens of proof required in the courts of market countries, including that the countries themselves enforce their own laws. Likewise, the ICPT on its face will demonstrate a concerted international action, and enhance the ICPT’s request for a bilateral treaty with the US to adopt import restrictions on objects owned by the ICPT.

G. The Governments of Bolivia, Ecuador, and Peru hereby delegate their claims for international repatriation of stolen cultural objects to the international cultural property trust.

By creating a framework through which all three countries may delegate their claims to a single agent, the burden of proof issues in Johnson are overcome. The countries no longer compete against each other in US courts but cooperate in their claim.

ARTICLE III

This agreement may be amended by mutual consent of all parties in writing.
IN WITNESS WHEREOF, the undersigned, being duly authorized by their respective Governments, have signed the present Agreement.

Dissolution of the agreement may only be effected by an amendment that has the support of all parties. Countries may wish to contemplate the consequences of a party’s noncompliance and the right of a party to withdraw within the agreement’s text.

VI. CONCLUSION

The looting of antiquities is a global problem because it results in the loss of understanding about ancient cultures and the history of mankind. Antiquities markets, particularly in the US and Europe, demand a constant stream of new finds, and thieves in source countries loot archaeological sites as if they were growing cash crops. To deter this behavior that has such far-reaching consequences for cultural history and understanding, many source nations assert ownership claims in US courts requesting that items be returned to them. These legal actions deter purchasers from buying undocumented, illicitly excavated antiquities.

However, these claims cannot serve as a deterrent when they do not succeed. Repatriation claims are often unsuccessful when ancient cultural borders overlap modern state boundaries. In these cases, proving ownership is challenging because similar objects are found in neighboring countries. It is also less clear in these situations which country should justly have control over the artifacts, when several countries serve as stewards of a shared ancient history.

To create an effective deterrent but also to improve stewardship and cultural exchange, ICPTs may be negotiated among modern states that share ancient cultural boundaries. ICPTs will hold ancient artifacts and cultural property in trust for citizens of all countries who have a shared history, and they will facilitate international exchange and increased scholarship. ICPTs will also serve as effective plaintiffs in US courts to recover stolen cultural property and deter future looting. Source countries that share ancient cultural borders should establish ICPTs to safeguard their cultural heritage for the benefit of future generations.