

UNDERSTANDING GUATEMALA'S CULTURAL HERITAGE: EXTENDING PROTECTION TO COLONIAL ART IN THE MEMORANDUM OF UNDERSTANDING BETWEEN THE UNITED STATES AND GUATEMALA

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INTRODUCTION

The issue of stolen Colonial art, specifically religious statues (icons), has become a growing problem in Guatemala in recent years. In the last ten years there have been over 500 thefts of religious artifacts.¹ Most of the artifacts that have been stolen have been shipped abroad to private collectors and museums.² To see how this phenomenon has been an increasing problem, it is enough to look at the list of stolen and recovered objects kept at the Guatemalan Ministry of Culture and Sport.³ The list shows that Catholic churches around the country, especially in smaller communities, have been targeted by thieves.⁴ For example, in 2005 the

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1. E-mail from Oscar Eduardo Mora, Coordinator of the Unit for the Prevention of Illicit Traffic of Cultural Property, Ministry of Culture and Sport of Guatemala, to the author (Oct. 23, 2008, 5:32 pm) (on file with author). Mr. Mora provided statistics of stolen cultural artifacts in Guatemala from 1997 to 2007. He can be reached at traficoilicito@mcd.gob.gt.

2. *Id.*

3. See Eduardo Torres, Presentación y Entrega del Documento "Lista Bienes Culturales Guatemaltecos en Peligro;" (Dec. 2, 2009), <http://www.mcd.gob.gt/2009/12/02/presentacion-y-entrega-del-documento-%E2%80%9CLista-de-bienes-culturales-guatemaltecos-en-peligro%E2%80%9D/>.

4. *Id.*

Catholic church of Aldea San Jacinto in Chimaltenango⁵ had nine pieces stolen: a figure of the Virgin Mary, a figure of St. Joseph, a figure of baby Jesus, two angels, a wood-carved bible, a figure of St. Jacinto and two crowns.⁶ As Juan Antonio Valdés said: “In the last few decades, there has . . . been a constant theft of valuable images, gold ornaments, and gold and silver religious objects from Catholic churches.”⁷

Thefts of Colonial art have become as common as those of Pre-Columbian artifacts, and the number grows every day. Although the main body of law regarding cultural property in Guatemala, the *Ley para la Protección del Patrimonio Cultural de la Nación* [Law for the Protection of the Cultural Heritage of the Nation],⁸ refers to Colonial art as essential to the cultural patrimony of Guatemala, international agreements do not seem to be as concerned with protecting Guatemala’s Colonial art as they are with Pre-Columbian artifacts. Among such international agreements is the bilateral agreement between the United States and Guatemala entitled “Memorandum of Understanding between the Government of the United States of America and the Government of the Republic of Guatemala Concerning the Imposition of Import Restrictions on Archaeological Objects and Materials from the Pre-Columbian Cultures of Guatemala” (“MOU”),⁹ which focuses only on the protection of archaeological objects representing the pre-Hispanic cultures of Guatemala.

A possible explanation for this pre-Hispanic emphasis rests on the idea that Guatemala’s true cultural heritage is pre-eminently Mayan, and, thus Colonial art, which is *per se* European, is not equally representative of Guatemalan culture. This misconception is in stark contrast with the way in which Guatemalan law approaches its own cultural heritage, where pre-Hispanic and European patrimony are both considered fundamental for the culture of the country.

5. Chimaltenango is one of the 22 departments into which Guatemala is divided. TOM BARRY, *INSIDE GUATEMALA* 12 (1992).

6. Email from Oscar Eduardo Mora, *supra* note 1.

7. Juan Antonio Valdés, *Management and Conservation of Guatemala’s Cultural Heritage: A Challenge to Keep History Alive*, in *ART AND CULTURAL HERITAGE: LAW, POLICY & PRACTICE* 94, 95 (Barbara T. Hoffman ed., 2006).

8. Decreto No. 26-97 as modified by Decreto No. 81-98, *Ley para la Protección del Patrimonio Cultural de la Nación* [Law for the Protection of the Cultural Patrimony of the Nation] (Guat.), available at <http://www.mcd.gob.gt/wp-content/uploads/2009/05/leyparala0proteccion20del20patrimonio20cultural20y20natural.pdf>.

9. Memorandum of Understanding Between the Government of the United States of America and the Government of the Republic of Guatemala Concerning the Imposition of Import Restrictions on Archaeological Objects and Materials from the Pre-Columbian Cultures of Guatemala, U.S.-Guat., Sep. 29, 1997, <http://exchanges.state.gov/heritage/culprop/gtfact/pdfs/gt1997mou.pdf> (last visited Feb. 21, 2011) [hereinafter MOU].

The inconsistent protection afforded Guatemala's cultural heritage has left Colonial artifacts on the sidelines and has afforded them very limited international protection. Clemency Coggins¹⁰ addressed the issue in her comments on the most recent extension of the MOU in 2007:

Guatemala is the only country from the original governing lands of the Colonial Spanish vice-royalties (the others were Mexico, Perú, and Colombia) that has not included the Colonial heritage in an MOU with the US. Everywhere in Latin America the theft of this historic heritage is growing to equal the scale of the archaeological depredations.¹¹

As will be discussed further below, Guatemala needs to make a case to include Colonial artifacts in the MOU. To do so, Guatemalan authorities must demonstrate that Colonial artifacts are essential to Guatemala's cultural heritage and that they constitute "ethnological material" under the definition of the agreement and that Guatemala is trying to protect them.

This Article presents a discussion of Guatemalan cultural identity and proposes that, in order to better protect Guatemala's cultural property, Guatemala's cultural heritage must be understood to include both Pre-Columbian and Colonial material. As a result, the MOU should be amended to include Colonial art within the definition of "ethnological material" and, therefore, within the scope of its protection. Without the inclusion of Colonial material in this agreement, the protection of Guatemala's cultural heritage is incomplete, and it is harder for the Government of Guatemala to repatriate any Colonial item located in the United States. If the international community focuses only on Pre-Columbian artifacts, eventually Guatemala could be plundered of almost all of the Colonial art intrinsic to its heritage and the legacy of the Guatemalan people.

10. Clemency Coggins is Professor of Archaeology and Art History at Boston University, an associate at the Peabody Museum of Archaeology and Ethnology, and a member of the editorial boards of the *International Journal of Cultural Property*. Faculty Profile of Clemency C. Coggins, *Archaeology Department*, BOSTON UNIVERSITY <http://www.bu.edu/archaeology/people/coggins> (last visited Feb. 3, 2011).

11. Clemency Coggins, *Comments by Clemency Coggins on the Guatemalan Request for an Extension of the 1997 Memorandum of Understanding with the United States* (2007), www.savingantiquities.org/CogginsGuatemala.doc.

I. THE IMPORTANCE OF COLONIAL ART TO GUATEMALA'S CULTURAL HERITAGE

A. The Problem of Stolen Colonial Art

Colonial art includes the paintings, sculptures, and artifacts, both Catholic and secular, produced in Guatemala during the Colonial period (1524-1821).¹² To understand how Guatemalan Colonial art came to exist, it is first necessary to introduce some aspects of the history of the country.

Guatemala is a country very rich in history and culture.¹³ Before the discovery of America and the arrival of the Spanish conquistadores, Guatemala was the epicenter of the Mayan civilization that flourished 2,000 years ago.¹⁴ All over Guatemala there are vestiges of the Mayan civilization:¹⁵ in the highlands stand the ruins of ceremonial and fortress cities,¹⁶ and, in the northern region of Petén, the city of Tikal stands out as one of the most important Mayan cities of the Classic period.¹⁷ In 1524, Guatemala was conquered by the Spanish soon after the conquest of México by Hernán Cortéz in 1519¹⁸ and became part of a growing empire that would soon include the rest of Latin America. Guatemala was part of the Spanish Empire for about three hundred years (1524-1821).¹⁹ During this Colonial period, Spanish immigrants, who imposed a new culture, religion, and language on the local inhabitants, changed Guatemala's

12. *See generally* OAKAH L. JONES, GUATEMALA IN THE SPANISH COLONIAL PERIOD (1994).

13. *See generally* W. GEORGE LOVELL, A BEAUTY THAT HURTS - LIFE AND DEATH IN GUATEMALA (2000).

14. The Maya civilization flourished in Mesoamerica, a region that includes the current territories of Southern Mexico, Guatemala, Belize, El Salvador, and western Honduras. It is divided in three periods: Pre-Classic (2,000 B.C.), Classic (250-900 A.D.), and Post-Classic (900-1500 A.D.). Of these periods, the Classic is the most well-known and the one where the Maya reached the apotheosis. It witnessed the peak of large-scale construction and urbanism, the recording of monumental inscriptions, and a period of significant intellectual and artistic development. *See* MICHAEL D. COE, THE MAYA (6th ed.1999).

15. *See generally* J. ERIC S. THOMPSON, THE RISE AND FALL OF MAYA CIVILIZATION (1954) (providing a detailed account of the Maya civilization, its periods and most important cities); ROBERT SHARER & LOA TRAXLER, THE ANCIENT MAYA (6th ed. 2006).

16. *See generally id.*

17. *See generally id.*

18. Bernal Díaz del Castillo in his book HISTORIA VERDADERA DE LA CONQUISTA DE LA NUEVA ESPAÑA gives the most important account of the conquest of Mexico and Guatemala. The book was finished in 1575 and originally published in Madrid in 1632. *See generally* BERNAL DIAZ DEL CASTILLO, HISTORIA VERDADERA DE LA CONQUISTA DE LA NUEVA ESPAÑA (Alberto Rivas Yanes ed., Editorial Castalia, 1999).

19. *See* JONES, *supra* Note 12; W. GEORGE LOVELL, CONQUEST AND SURVIVAL IN COLONIAL GUATEMALA: A HISTORICAL GEOGRAPHY OF THE CUCHUMATAN HIGHLANDS, 1500-1821, at 7 (3d ed. 2005).

culture.²⁰ The process of conquest, and, later, the process of *mestizaje*,²¹ transformed Guatemala, as the rest of Latin America, into a Catholic, Spanish-speaking, western territory.²² The flourishing of Catholicism within Guatemala can be attributed in significant part to the church's ceremonial focus on carved representations of Jesus and the saints meshing well with the pluralistic Mayan religion, which accepted multiple deities.²³ What resulted was "a syncretic set of beliefs that combine[d] elements of Mayan and Roman Catholic ritual and mixe[d] the aboriginal pantheon with Catholic saints."²⁴ For example, the "church . . . allowed the assimilation of some of the older Indian gods into the ranks of Christian saints, identifying them with saints who shared similar attributes or whose feast days coincided with the celebration of the traditional god[s]."²⁵ Even "[t]oday, when an indigenous person prays in native dialect[,] he or she prays to ancient Mayan gods."²⁶ In contrast, "[w]hen that [same] person prays in Spanish or English[,] the names of those addressed suddenly become those of Catholic saints."²⁷

As might be expected, the Spanish culture impacted all aspects of society, including the arts. Many painters, sculptors, and artists flourished during this time, producing works of art that reflected not only Spanish aesthetic influences but also the vernacular American world.²⁸ During the sixteenth and seventeenth centuries, artists such as Baltazar Echave Orío, Luis Juárez, Alonso López de Herrera and Echave Ibia were among the early painters from the New World.²⁹ And, in the eighteenth century, important Guatemalan artists included Miguel Cabrera, José Ignacio de la

20. *See generally* CHRISTOPHER H. LUTZ, *SANTIAGO DE GUATEMALA, 1541-1773: CITY, CAST, AND THE COLONIAL EXPERIENCE* (1994) (providing a detailed history of the process of colonization after the conquest in Guatemala).

21. 'Mestizaje' is a Spanish word that refers to the racial and cultural mixture of Spanish and Indigenous people. COLONIAL LATIN AMERICA, A DOCUMENTARY HISTORY 364, 410 (Kenneth Mills et al. eds. 2002).

22. *See* LUTZ, *supra* note 20, at 3-7.

23. JIM PIEPER, *GUATEMALA'S FOLK SAINTS MAXIMON/SAN SIMON, REY PASCUAL, JUDAS, LUCIFER, AND OTHERS* 33 (2002).

24. *GUATEMALA: A COUNTRY STUDY* 68 (Richard F. Nyrop, ed., 2d ed. 1983).

25. *Id.* at 12.

26. PIEPER, *supra* note 23, at 33.

27. *Id.* at 33-34.

28. *See, e.g.*, ATLAS OF WORLD ART 151 (2004).

29. *Red List of Endangered Cultural Objects of Central America and Mexico*, INTERNATIONAL COUNCIL OF MUSEUMS, <http://icom.museum/what-we-do/resources/red-lists-database/red-list/central-america-and-mexico.html>. (last visited Feb. 21, 2011) (providing a list of stolen colonial objects from Mexico and Guatemala).

Cerda, Nicolas Enriquez, Miguel de Herrera, and Jose de Ibarra, to mention just a few.³⁰

In Guatemala, many of these types of paintings are still found in Catholic churches, and recently they have been targeted by thieves because churches are open to the public and therefore are vulnerable and because it is relatively easy to smuggle paintings abroad. Usually thieves cut them out of the frames and roll them up, so that they pass as rolled textiles.³¹

In addition, Guatemalan churches, convents and monasteries are full of religious sculptures influenced by the Colonial Spanish style.³² This art constitutes a treasure for Guatemala's cultural heritage, not only because of its historical and artistic value, but also because certain icons are fervently venerated and are part of the national religious sentiment.³³ A good example is the *Virgen del Carmen* [Virgin of Carmen], which has been adored for centuries.

In 2001, the *Virgin of Carmen* was stolen, showing that the business of stealing and exporting icons has no barriers, not even for an icon that represents so much to the Guatemalan people. In a *Los Angeles Times* article,³⁴ T. Christian Miller described the theft:

The thieves scaled the white church walls with a ladder. They pried off the rusty iron bars on a window, then dropped to the nave, just below the choir loft.

Working quickly, they slipped through the dark to the altar. They lifted a gilded glass bell jar, laid it carefully aside, then grasped their prize: a statue of the Virgin of Carmen, 15 inches tall and covered with gold and silver.

Within minutes, they had shimmied up a rope and out of the church. They sped away in a red pickup . . . They left a gaping hole, not only in the church but also in Guatemala.³⁵

At the same time, the article explains what the *Virgin of Carmen* represents to Guatemala:

30. *Id.*

31. *Id.*

32. *Id.*

33. E-mail from Oscar Eduardo Mora, Coordinator of the Unit for the Prevention of Illicit Traffic of Cultural Property, Ministry of Culture and Sport of Guatemala, to the author (Oct. 24, 2008, 10:58 am) (on file with author). Mr. Mora argues that the robberies of catholic icons destroy the intangible cultural property of the nation because of the connection of these icons with religious fervor.

34. T. Christian Miller, *Stealing a Nation's Very Soul*, L.A. TIMES, Aug. 8, 2001, <http://articles.latimes.com/2001/aug/08/news/mn-31733>.

35. *Id.*

The Virgin of Carmen is no ordinary icon. A gift from St. Teresa of Avila to Guatemala about 400 years ago, it is both a symbol and protector of the nation. Millions of Guatemalans wear a small necklace with a picture of the virgin over their hearts.³⁶

The case of the *Virgin of Carmen* is exceptional because it involves not only a theft of a piece with historical value, but also a religious object that carries spiritual value for a great percentage of the population.³⁷ This would be comparable to stealing the *Virgin of Guadalupe* Canvas in Mexico or the Liberty Bell in Philadelphia. The magnitude of the robbery of the *Virgen del Carmen* caused the authorities to mobilize quickly. Two years later, after intense investigation and searches, the *Virgin of Carmen* was recovered.³⁸ Unfortunately, other sacred art has not been so fortunate:

Someone is stealing Guatemala's soul, bit by bit. Roman Catholic churches all over the country have been pillaged in recent years. Hundreds of colonial-era religious statutes and paintings have vanished The rate [in 2001 was] a church reporting a burglary every other day

Worse . . . is the record of resolving such cases. Most of the icons are believed to have been shipped abroad to private collectors, never to be seen again. Of the 255 artifacts stolen in the last 2½ years, authorities have recovered only 29.³⁹

Cesar Lara, director of the Center for Folklore Studies at the University of San Carlos in Guatemala City at that time, explained: "When they rob our icons, they are robbing the most important thing we have, they are robbing our identity."⁴⁰ This statement is very important because it makes clear what Colonial art means to the Guatemalan people. Colonial art is not the art of the Spanish oppressor, the art of the old European continent or the art of a past that has nothing to do with the Guatemalan people. Rather, it is at the very crux of Guatemalan culture. As will be explained, this sentiment comes from the "*mestizo* culture,"⁴¹ a mixed

36. *Id.*

37. Guatemala's population is estimated to be between fifty and sixty percent Catholic according to the U.S. Department of State. See U.S. DEPARTMENT OF STATE, *Guatemala: International Religious Freedom Report 2006*, <http://www.state.gov/g/drl/rls/irf/2006/71462.htm>.

38. *Hoy es Dia de la Virgen del Carmen*, PRENSA LIBRE (Guatemala), July 16, 2009, http://prensalibre.com/vida/Hoy-Dia-Virgen-Carmen_0_80391964.html.

39. Miller, *supra* note 34.

40. T. Christian Miller, *Thieves Preying on Guatemala's Religious Treasures*, CHIC. TRIB. Aug. 22, 2001, http://articles.chicagotribune.com/2001-08-22/news/0108220256_1_guatemala-city-thefts-catholic-church.

41. *Mestizo* means "mixed." COLONIAL LATIN AMERICA, *supra* note 21, at 364, 410. In Guatemala, the term "ladino" meant "Spanish-speaking Indians" during the Colonial period; by the time

culture that evolved from Mayan and Spanish roots and that claims both cultures as its own.

B. National Identity and the *Mestizo* Culture

An understanding of cultural identity and cultural heritage is crucial when dealing with cultural property claims. Cultural heritage refers to a collective and public notion, belonging to the realm of public interest and held for the public good.⁴² On the other hand, “[c]ultural property is that specific form of property that enhances identity, understanding, and appreciation for the culture that produced the particular property.”⁴³ What is it that makes countries have a claim of ownership over cultural objects, then? For example, why would Perú and not Costa Rica have a claim over Incan artifacts? Is it all based on territorial grounds? Territory alone is not enough, and it is here where cultural identity plays a role.

A good example is Greece’s claim over the Elgin Marbles. The Elgin Marbles were taken from the Parthenon in Athens by Lord Elgin and were brought to Great Britain in 1816.⁴⁴ Since then, Great Britain has refused to return them and seems to have a continued interest, if not an ownership claim, over them.⁴⁵ When Melina Mercouri, Greek Minister of Culture, requested the repatriation of the Marbles in 1983, she said, “This is our history, this is our soul,”⁴⁶ suggesting that the cultural heritage of a country expresses the cultural identity of its people.

In Guatemala, a country with Mayan cities like Tikal and Spanish cities like Antigua, the *mestizo* culture could claim ownership of both Indian and European artifacts, because both traditions are essential to the *mestizo* culture.⁴⁷ In other words, Guatemalans could claim that Mayan stelae and, at the same time, Spanish Colonial sculptures, are “their history, and their soul.” The *mestizo* culture is something unique to Latin America,

of independence, it was used to describe people of mixed biological descent. See Carol A. Smith, *Origins of the National Question in Guatemala: a Hypothesis*, in *GUATEMALAN INDIANS AND THE STATE: 1540 TO 1988*, at 72, 86 (Carol A. Smith ed., 1990).

42. Randall Mason, *Conference Reports: Economics and Heritage Conservation: Concepts, Values, and Agendas for Research*, Getty Conservation Institute, Los Angeles (December 8-11, 1998), 8 INT’L J. CULTURAL PROP. 550, 561 (1999).

43. Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 569 (1995).

44. JOHN HENRY MERRYMAN, THINKING ABOUT THE ELGIN MARBLES: CRITICAL ESSAYS ON CULTURAL PROPERTY, ART AND LAW 24 (2000).

45. *Id.* at 24-30.

46. *Id.* at 24.

47. See generally CHARLES R. HALE, MAS QUE UN INDIO: RACIAL AMBIVALENCE AND NEOLIBERAL MULTICULTURALISM IN GUATEMALA (2006) (detailing the way two Guatemalan women defined their racial identity over time).

which explains both its richness and its conflicts.⁴⁸ The great Mexican writer Octavio Paz,⁴⁹ who in many of his writings tries to define the identity of the Mexican people, reaches the same conclusion, stating that the cultural identity of Mexico (and here, we would add the identity of Guatemala and most of Latin America) can only be expressed by the *Mestizo* culture: “[I]f for the Spaniards, the conquest was a deed, for the Indians it was a rite, a human representation of a cosmic catastrophe. The sensibilities and imagination of the Mexican people have always oscillated between those two extremes, the deed and the rite.”⁵⁰

At the same time, Octavio Paz explains *mestizaje* as a product not only of the conquest but also of the Catholic approach to evangelization, which is different from the Protestant approach:

Conquest and evangelization: these two words, deeply Spanish and Catholic Conquest means not only the occupation of foreign territories and the subjugation of their inhabitants but also the conversion of the conquered. The conversion legitimized the conquest. This politico-religious philosophy was diametrically opposed to that of English colonizing; the idea of evangelization occupied a secondary place in England's colonial expansion If the different attitudes of Hispanic Catholicism and English Protestantism could be summed up in two words, I would say that Spanish attitude is inclusive and the English exclusive. In the former, the notions of conquest and domination are bound up with ideas of conversion and assimilation; in the latter, conquest and domination imply not the conversion of the conquered, but their segregation.⁵¹

Octavio Paz captures the historical aspect that gave birth to *mestizo* culture and, at the same time, facilitates understanding of the cultural identity of Mexico, Guatemala and most of Latin America as a product of two historical memories superimposed: the Indian and the European. These two legacies are merged in the current *mestizo* culture, and it is the Spanish legacy inherent in the *mestizo* culture that allows it to claim ownership of the Colonial cultural heritage. With the *mestizo* culture in mind, it is possible to understand the mindset of Guatemalan lawmakers and why

48. See generally SERGE GRUZINSKI, *THE MESTIZO MIND: INTELLECTUAL DYNAMICS OF COLONIZATION AND GLOBALIZATION* (Deke Dusinberre trans., 2002).

49. Octavio Paz (1914-1998) is winner of the 1990 Nobel Prize for Literature and maybe the most important Mexican writer. See MARSHALL C. EAKIN, *THE HISTORY OF LATIN AMERICA: COLLISION OF CULTURES* 283, 403, 404 (2007) (noting the influential literature of Paz in Latin American culture).

50. OCTAVIO PAZ, *THE LABYRINTH OF SOLITUDE AND OTHER WRITINGS* 291 (Lysander Kemp et al. trans., 1985) (1972).

51. *Id.* at 361-363.

Guatemalan law includes both as equally important in the cultural patrimony of the nation.

C. The Approach of Guatemalan Law to Cultural Property

To define cultural property, it is first necessary to discuss how we came to value the objects of the past. When we hear that a Greek vase was broken and defaced to get it out of the ground, or when we hear about the looting of the Iraqi Museum, there is something that shocks our consciousness—the idea that something very valuable has been lost. We take the loss as our own; otherwise we would not experience this feeling. Andrzej Tomaszewski says that valuing cultural objects seems to be rooted deeply in the western tradition.⁵² He says that the idea of idealizing tangible cultural property comes from neither Judaism nor the Greco-Roman culture; instead, it comes from the Christian tradition.⁵³

The origin of western ‘materialistic’ approach to the values of a historical monument lies in the Christian tradition. This belief lay behind the traditions of the cult of holy relics, being one of the bases for the doctrine of the Roman Church. This cult was and still is connected with the authenticity of their material substance. The cult of relics, at first limited to the bodies of the holy martyrs, gradually widened its scope to include objects connected with holy people and with places imbued with their presence. In this manner architectural elements also attained the status of relics, and their authenticity depended entirely on their material substance. An important expansion, and at the same time secularization of architectural relics, took place during the Italian Renaissance. It was in this manner that humanists regarded the ruins of ancient pagan Rome. Such approaches evolved into modern attitudes, expressed, for example, in the fragments of the Berlin Wall sold today to tourists like relics.⁵⁴

If this is true, it would explain why the main international conventions on cultural property have come from western countries. At the same time, it would explain why most of the market nations⁵⁵ are rich western countries that have inherited this “materialistic” drive to collect cultural objects, and

52. Andrzej Tomaszewski, *Tangible and Intangible Values of Cultural Property in Western Tradition and Science* 1 (2003), <http://www.international.icomos.org/victoriafalls2003/papers/A1-1%20-%20Tomaszewski.pdf>.

53. *Id.*

54. *Id.*

55. MERRYMAN, *supra* note 44, at 67. ‘Market Nations’ refer to those countries that buy or collect cultural objects. *Id.*

why source nations⁵⁶ seem to be countries with predominantly non-western cultures.⁵⁷ It would also explain why international conventions have traditionally focused on tangible cultural property without regard to the intangible counterpart.⁵⁸

The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (“Hague Convention”) defines cultural property as follows:

Movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest, works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property.⁵⁹

The UNESCO Convention on the means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (“UNESCO Convention”) defines cultural property as

property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art, or science and which belongs to the following [eleven] categories [enumerated, among these, elements of archaeological sites, antiquities over one hundred years old, and objects of ethnological interest].⁶⁰

56. *Id.* ‘Source Nations’ refer to those countries where those cultural objects come from. These countries are usually third-world or non-western countries.

57. Similar terminology used in Lyndel v. Prott & Patrick J. O’Keefe, *National Legal Control of Illicit Traffic in Cultural Property*, U.N. DOC. CLT-83/WS/16, at 2 (1983), <http://unesdoc.unesco.org/images/0005/000548/054854eo.pdf> (describing nations as “exporting” versus “importing” or “collecting,” even while recognizing such categorization as overly simplistic).

58. *But see* UNESCO, Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Oct. 3–Oct. 21, 2005, U.N. DOC. CLT-2005/CONVENTION DIVERSITE-CULT REV. (Oct. 20, 2005), 2440 U.N.T.S., available at <http://unesdoc.unesco.org/images/0014/001429/142919e.pdf> (recognizing that “cultural diversity” deserving of protection extends to all manners of expression, tangible and intangible); UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, Sept. 29–Oct. 17, 2003, U.N. DOC. MISC/2003/CLT/CH/14 (Oct. 17, 2003), 2368 U.N.T.S. 3 available at <http://unesdoc.unesco.org/images/0013/001325/132540e.pdf>.

59. The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240, available at <http://unesdoc.unesco.org/images/0018/001875/187580e.pdf>.

60. UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, art. I, Nov. 14, 1970, 823 U.N.T.S. 231, available at <http://unesdoc.unesco.org/images/0013/001333/133378mo.pdf> [hereinafter UNESCO Convention].

The UNIDROIT Convention does not attempt to define cultural property but instead focuses on ‘cultural objects,’ similar to those listed in the UNESCO Convention.⁶¹ Thus, a general definition of cultural property, based on the definitions of these conventions, could be summarized as “objects that have artistic, ethnographic, archaeological, or historical value.”⁶² This definition refers basically to “tangible cultural property.” In contrast, intangible cultural property encompasses non-material values of cultures that, over the years, have become part of a collective tradition such as music, dance, religious practices, and aspects of culture that are idiosyncratic to a particular culture.⁶³

In Guatemala, however, legal cultural protection is not limited solely to material objects; the law protects both tangible and intangible cultural property.⁶⁴ In this sense, the scope of cultural property is an umbrella that encompasses a wide variety of things, including chattels, real property, and intangible cultural traditions, both from Pre-Columbian and Colonial origin. The authority of Guatemalan Law to protect the country’s cultural patrimony derives from the Guatemalan Constitution itself:

Forman el patrimonio cultural de la Nación los bienes y valores paleontológicos, arqueológicos, históricos y artísticos del país y están bajo la protección del Estado. Se prohíbe su enajenación, exportación o alteración, salvo los casos que determine la ley.⁶⁵

[The cultural heritage of the nation is comprised of the paleontological, archaeological, historical and artistic goods and values of the country, and they are under the protection of the State. Their alienation, exportation or alteration is prohibited, except in cases determined by law.]

61. UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects, art. 2, June 24, 1995, 34 I.L.M. 1322, available at <http://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-e.htm>.

62. MERRYMAN, *supra*, note 44, at 27.

63. To illustrate the concept of intangible cultural property, recently, UNESCO declared the celebration of Holy Week in Guatemala a part of the world’s intangible cultural heritage. See Cerigua, *Declararán la “Semana Santa en Guatemala” como Patrimonio Cultural de la Nación*, CENTRO DE REPORTES INFORMATIVOS SOBRE GUATEMALA, Sept. 4, 2008, http://cerigua.info/portal/index2.php?option=com_content&do_pdf=1&id=3420.

64. See Ley para la Protección del Patrimonio Cultural de la Nación, *supra* note 8. See also Estuardo Torres, *26 de Febrero, Día del Patrimonio Cultural de Guatemala*, MINISTERIO DE CULTURA Y DEPORTES, Feb. 25, 2010, <http://www.mcd.gob.gt/2010/02/25/26-de-febrero-dia-del-patrimonio-cultural-de-guatemala/comment-page-1/#comment-2310> (discussing tangible and intangible cultural property).

65. Constitución Política de la República de Guatemala, Nov. 17, 1993, art. 60, available at http://www.oas.org/juridico/mla/sp/gtm/sp_gtm-int-text-const.pdf (translation by authors).

The Guatemalan Constitution, Article II of the Law for the Protection of the Cultural Heritage of the Nation, provides as follows:

“Forman el patrimonio cultural de la nación los bienes e instituciones que por ministerio de ley o por declaratoria de autoridad lo integren y constituyan bienes muebles e inmuebles, públicos y privados, relativos a la paleontología, arte, ciencia y tecnología, y la cultura en general, incluido el patrimonio intangible, que coadyuven al fortalecimiento de la identidad nacional.”⁶⁶

[The cultural heritage of the nation is comprised of the property and institutions designated as such by law or authority and includes chattels and real property, public and private, relating to paleontology, art, science and technology, and the culture in general, including the intangible heritage, that strengthens the national identity.]

Further, Article III subdivides tangible property into movable and immovable categories.⁶⁷ Among the immovable tangible property protected by the law are 1) architecture and its elements, including the applied ornamentation; 2) groups of architectural elements and complexes, and complexes of vernacular architecture; 3) historical centers and complexes, including the surrounding areas and landscapes; 4) the urban design of cities and towns, 5) paleontological and archaeological sites; 6) historical sites; 7) areas or singular places created by humans, or a combination of these with the surrounding landscape, recognized by its character or sight as a place of exceptional value; 8) prehistoric and pre-Hispanic inscriptions and representations.⁶⁸

Among the movable tangible property are 1) collections and objects of scientific importance to the country, be it of value for zoology, botany, mineralogy, anatomy or paleontology; 2) the product of excavations and explorations whether authorized or not, or any paleontological or archaeological discoveries; 3) elements coming from the dismemberment of artistic and historic monuments, or archaeological sites; 4) artistic and cultural goods related to the history of the country including: paintings, drawings and sculptures; photographs, engravings, sacred art, manuscripts and antique books; historical newspapers and magazines; archives, musical instruments and antique furniture.⁶⁹

As can be seen from Article III, Guatemalan law clearly protects both Pre-Columbian and Colonial objects. For example, the phrase

66. Ley para la Protección del Patrimonio Cultural de la Nación, *supra* note 8, at art. II (translation by authors)

67. *Id.* at art. III.

68. *Id.*

69. *Id.*

“archaeological sites and the elements coming from them” refers to pre-Hispanic monuments of the Mayan culture.⁷⁰ On the other hand, the phrase “artistic objects such as sculptures, sacred art and paintings” refers to Colonial objects.⁷¹ The law uses an integrative approach with the goal of protecting Guatemala’s Colonial heritage in its totality. Curiously, the law does not make a distinction between Pre-Columbian and Colonial cultural property by listing them in separate categories. Thus, the approach taken by the Guatemalan law is an integrative approach in which Pre-Columbian and Colonial artifacts are both viewed as being equally important for the history of Guatemala.

II. THE MEMORANDUM OF UNDERSTANDING BETWEEN THE UNITED STATES AND GUATEMALA

A. The Approach of the Memorandum of Understanding

The bilateral agreement between the United States and Guatemala, the MOU,⁷² was signed in 1997 and protects Guatemalan Pre-Columbian archaeological objects. This agreement is based on an emergency agreement that the two nations entered into on April 15, 1991.⁷³ As it states in its preamble, the MOU was made pursuant to the 1970 UNESCO Convention,⁷⁴ and its purpose is to “reduce the incentive for pillage of irreplaceable archaeological objects and materials representing the pre-Hispanic cultures of Guatemala.”⁷⁵

The UNESCO Convention follows a nationalist approach.⁷⁶ It gives nations a special ownership interest in cultural objects independent of each object’s location.⁷⁷ The Convention defines cultural property as “property which, on religious or secular grounds, is specifically *designated by each State* as being of importance for archaeology, prehistory, history, literature,

70. Araujo, Max, *Breviario de Legislación Cultural*, (2006) (2009), Page 10, <http://www.mcd.gob.gt/wp-content/uploads/2009/10/breviarioactualizacion2009.pdf>.

71. *Id.*

72. *See* MOU, *supra* note 9.

73. *See* U.S. Dep’t of State, Guatemala, <http://exchanges.state.gov/heritage/culprop/gtfact.html> (last visited Feb 21, 2011) (noting the extension of import restrictions on Maya archaeological artifacts from the Petén region of Guatemala that was first promulgated in an emergency action in 1991).

74. UNESCO Convention, *supra* note 60.

75. MOU, *supra* note 9, at pmb1.

76. *See* MERRYMAN, *supra* note 44, at 79–82 (arguing that UNESCO 1970 is characterized by “cultural nationalism”—supporting retention of property by source nations—as distinct from the “cultural internationalism,” designed to preserve cultural property from damage or destruction, that characterized earlier agreements like the 1954 Hague Convention).

77. *Id.*

art or science.”⁷⁸ The nationalistic approach is reinforced by granting each State the discretion to define what constitutes its own cultural property.

Pursuant to the UNESCO Convention, nations have the discretion to define their own cultural property. Guatemala, by means of article III of the Law for the Protection of the Cultural Heritage of the Nation, has designated what constitutes its cultural property, covering Pre-Columbian and Colonial sites and objects.⁷⁹ Since Guatemala included Colonial art as part of its cultural heritage, why did the MOU, which was created pursuant to the UNESCO Convention, ignore Colonial art?

The UNESCO Convention is implemented in the United States under the Convention on Cultural Property Implementation Act (“CPIA”).⁸⁰ Under the CPIA the President has authority to enter into agreements with other nations to apply import restrictions on archaeological or ethnological material from nations that request such cooperation from the United States.⁸¹ The MOU with Guatemala is one of these agreements. The CPIA provides that the President may impose import restrictions:⁸²

[i]f the President determines, after request is made to the United States under article 9 of the Convention by any State Party (A) that the cultural patrimony of the State Party is in jeopardy from the pillage of archaeological or ethnological materials of the State Party; (B) that the State Party has taken measures consistent with the Convention to protect its cultural patrimony; (C) that (i) the application of the import restrictions set forth in section [2606 of this title] with respect to archaeological or ethnological material of the State Party, if applied in concert with similar restrictions implemented, or to be implemented within a reasonable period of time, by those nations (whether or not State Parties) individually having a significant import trade in such material, would be of substantial benefit in deterring a serious situation of pillage, and (ii) remedies less drastic than the application of the restrictions set forth in such section are not available; and (D) that the application of the import restrictions set forth in [section 2606 of this title] in the particular circumstances is consistent with the general interest of the international community in the interchange of cultural

78. UNESCO Convention, *supra* note 60, at art. I (emphasis added).

79. *See Ley para la Protección del Patrimonio Cultural de la Nación, supra* note 8, at art. III (recognizing cultural and artistic property relating to the history of the country as part of its cultural heritage).

80. 19 U.S.C. § 2601–13 (2006).

81. *Id.* The President has delegated this authority to the Department of State. *See* U.S. Dep’t of State: Cultural Heritage Center, <http://culturalheritage.state.gov/overview.html> (last visited Feb. 21, 2011) (explaining that the U.S. State Department’s Cultural Heritage Center administers U.S. responsibilities related to the *1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*).

82. 19 U.S.C. §2602(a)(1) (A)–(D) (2006).

property among nations for scientific, cultural, and educational purposes; the President may, subject to the provisions of this [chapter], take the actions described in paragraph (2).⁸³

The President chose to exercise power under the CPIA as to Guatemala only in regard to archaeological material from the pre-Hispanic cultures. One possibility is that, when it was signed, the MOU was intended primarily as a response to the looting of Mayan sites, which was occurring at a great pace. Perhaps in order to respond to that emergency the agreement was limited only to Pre-Columbian objects.⁸⁴ Juan Antonio Valdés, a prominent Guatemalan archaeologist, was the Director of the Office of Cultural Heritage at the time of the agreement negotiations.⁸⁵ In his article *Management and Conservation of Guatemala's Cultural Heritage: A Challenge to Keep History Alive*,⁸⁶ Valdés gives an account of the negotiations:

What is new in the case of the Memorandum is Guatemala's contention that the area that is to be protected by the agreement should be extended to include objects not only from the Petén region but from the whole country, including artifacts produced by the Pre-Columbian cultures of the highlands and the southern coast of Guatemala.⁸⁷

This extension recognized that other regions of the country that were not necessarily Mayan were equally important archaeologically and needed to be protected as well.⁸⁸ This was a big change from the 1991 emergency agreement, which was limited to Mayan artifacts.⁸⁹ The preamble to the MOU notes the “[desire] to reduce the incentive for pillage of irreplaceable archaeological objects and materials representing the pre-Hispanic cultures of Guatemala: The Maya of the Petén Lowlands and the cultures of the Highlands and the Southern Coast.”⁹⁰

83. *Id.*

84. Before implementing the UNESCO Convention, the United States had enacted the “Regulation of Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals,” which prohibited the importation of any piece of Mayan murals or architectural pieces into the United States unless properly documented. This statute was implemented due to an emergency of stolen Pre-Columbian monuments. *See* 19 U.S.C. § 2091-95; Pub. L. No. 92-587 (1972).

85. Valdés, *supra* note 7, at 96.

86. *Id.* at 94–99.

87. *Id.* at 96.

88. *Id.*

89. *See id.* (affirming that the new memorandum expanded the area to be protected beyond the [Mayan] Petén region).

90. MOU, *supra* note 9, at pmb1.

Regarding Colonial material, Guatemala indeed argued for its inclusion in the agreement, but the United States rejected this proposal:

[T]he authorities in the United States rejected Guatemala's contention that protection should be extended to objects produced in Guatemala during the Colonial Period (1524-1821) and during the centuries following independence. It was pointed out that they were not of particular ethnological interest because the painting and sculptures of the famous Antigua School were executed by various artists, in some cases by Spaniards born in Guatemala rather than by Creoles. Although the matter was discussed, there was no way of persuading the U.S. authorities that these works should be included on the list of protected works.⁹¹

It seems that Colonial art failed the CPIA test that requires, in its first prong, "that the cultural patrimony of that nation be in jeopardy from the pillage of archaeological or ethnological materials."⁹² Apparently the U.S. authorities did not consider Guatemalan Colonial art to be of "particular ethnological interest."⁹³

The definition of ethnological material is found in Section 302(2) (ii) of the CPIA:

No object may be considered to be an object of ethnological interest unless such object is: 1) the product of a tribal or non-industrial society, and 2) important to the cultural heritage of a people because of its distinctive characteristics, comparative rarity, or its contribution to the knowledge of the origins, development, or history of that people.⁹⁴

Colonial art should be considered ethnological material because: 1) it was done by a non-industrial society (the Guatemalan colonial society) and 2) it is important to the cultural heritage of Guatemala because of its distinctive characteristics, comparative rarity, and, in particular, its contribution to the knowledge of the "origins, development, [and] history" of the Guatemalan people.

However, the United States has a stricter interpretation of this definition. A U.S. Senate Report describes how U.S. law interprets the term *ethnological material*:

The definition is intended by the committee to reflect the understanding of U.S. negotiators that the application of import

91. Valdés, *supra* note 7, at 96.

92. 19 U.S.C. § 2602(a)(1)(A) (2006).

93. Valdés, *supra* note 7, at 96.

94. Cultural Property Implementation Act § 302, 19 U.S.C. § 2601(2)(c)(ii) (2006).

restrictions under agreements entered into under section 203 or emergency actions taken under section 204 is limited to a narrow range of objects possessing certain characteristics “Ethnological Material” includes any object that is the product of a tribal or similar society, and is important to the cultural heritage of a people because of its distinctive characteristics, its comparative rarity, or its contribution to the knowledge of their origins, development or history. While these materials do not lend themselves to arbitrary age thresholds, *the committee intends this definition, to encompass only what is sometimes termed “primitive” or “tribal” art*, such as masks, idols, or totem poles, produced by tribal societies in Africa and South America. Such objects must be important to a cultural heritage by possessing characteristics which distinguish them from other objects in the same category providing particular insights into the origins and history of a people.⁹⁵

Under this interpretation, Colonial material is not of ethnological interest because it was not made by the indigenous “primitive” or “tribal” people of Guatemala. The phrase “the committee intends this definition to encompass *only* what is termed “primitive” or “tribal” indicates that the MOU’s protection extends only to those materials that are ethnologically related to the indigenous pre-Hispanic culture. This idea is reaffirmed by what Valdés says was the answer of the United States during the negotiations, “[that] the paintings and sculptures of the famous Antigua School were executed by . . . Spaniards born in Guatemala and not by [indigenous people].”⁹⁶ Does this mean that Spaniards born in Guatemala’s territory were not Guatemalans? Does Colonial art in Guatemala belong to Spain? The United States’ position does not seem to make sense, at least not to the Guatemalans who venerate their Catholic icons and seem proud of their Spanish legacy.⁹⁷

Here is where Guatemala’s *mestizo* culture becomes crucial to how the cultural property of the nation is defined as well as to the legal interpretation of what represents ethnological material. Although the great Mayan civilization and the Spanish Colonial era are part of Guatemala’s past, the present *mestizo* culture claims both legacies as its own and therefore can claim both cultural patrimonies. Thus, Colonial art is of foundational ethnological interest to the culture of Guatemala because it

95. S. REP. NO. 97-564, at 4–5 (1982), available at <http://exchanges.state.gov/heritage/culprop/laws/pdfs/97-564.pdf> (emphasis added).

96. Valdés, *supra* note 7, at 96.

97. See Miller, *supra* note 40 (quoting one Guatemalan academic, saying “when they rob our icons, they are robbing the most important thing we have . . . They are robbing our identity.”).

“contributes to the knowledge of the origin, development, and history” of the current *mestizo* culture:

After the Spanish conquest, it was logical that the union of the two dominant cultures would produce the mestizo population, which over the centuries has become as strong and as solid as it is today. The conquistadors could not wipe out the rich indigenous culture. It survived by intelligently and subtly integrating itself into the new way of life That is why all Guatemalans have the same duty to protect, care for, and administer Guatemala's cultural and natural heritage, whether it be 300, 2,000, or more than 4,000 years old.⁹⁸

Valdés reaches the conclusion that all Guatemalans have the same duty to protect Guatemala's cultural heritage, be it prehistoric, Pre-Columbian, or Colonial. This duty should also apply to the international agreements that try to protect Guatemala's cultural property, such as the MOU.

In her article *Latin America, Native America, and the Politics of Culture*,⁹⁹ Clemency Coggins recognizes the problem of defining cultural property in Latin America and poses the following question: “How and when are cultural property and cultural identity—stones and bones—the same?”¹⁰⁰ Linking Guatemala's cultural property to the cultural identity of the country poses some challenges because they do not seem to correspond to one another. In the eyes of an outsider, it is hard to define the *mestizo* culture because it seems to deny the purity of the indigenous culture. In order to vindicate the indigenous populations oppressed by colonization, many advocate that those of indigenous descent are the true heirs of the glorious past of the Pre-Columbian civilizations.¹⁰¹ This quest for a “true indigenous culture” seems to permeate not only some scholarship,¹⁰² but also some aspects of American legislation. As described below, this approach is followed in the Native American Graves Protection and

98. Valdés, *supra* note 7, at 97.

99. Clemency Coggins, *Latin America, Native America, and the Politics of Culture*, in CLAIMING THE STONES, NAMING THE BONES: CULTURAL PROPERTY AND THE NEGOTIATION OF NATIONAL AND ETHNIC IDENTITY 97-115 (Elazar Barkan et al. eds., 2002).

100. *Id.* at 97.

101. There are still numerous indigenous communities in Guatemala that have preserved their culture and their languages. Although there has been a movement to preserve their identities and restitute Mayan ownership to ‘true’ descendants of the Maya, it has been impossible to erase almost 500 years of Spanish influence. Aspects of *mestizo* culture can be appreciated even in those communities where their religious characters share characteristics with Catholic saints. *Id.* at 106–08.

102. E.g., Angela R. Riley, “*Straight Stealing*”: *Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69 (2005).

Repatriation Act (“NAGPRA”) and also seems to have influenced the bilateral agreement between Guatemala and the United States.

B. The Approach to Indigenous Cultural Property in the United States

The NAGPRA¹⁰³ provides that Native American objects and human remains belong to the lineal descendants of the corresponding Native American tribe or to the Native Hawaiian organization on whose tribal land such objects or remains are discovered.¹⁰⁴ Cultural items protected under NAGPRA include Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony.¹⁰⁵ The Act tries to safeguard the rights of Native Americans on the premise that the artifacts or human remains are central to the Native American cultural heritage and should belong to them and not to the other American groups, namely Americans of European descent.¹⁰⁶ NAGPRA has two distinct schemes governing the return of Native American cultural items to tribes: first, where the item is held by a federal agency or museum; and second, where it is discovered on federal lands.¹⁰⁷ Because federally recognized Indian tribes in the U.S. are sovereign, the objects can be “repatriated” back to the original tribe.¹⁰⁸

NAGPRA’s approach is consistent with the historical development of the United States, in which *mestizaje* did not shape the national identity of the country. In other words, the indigenous culture is considered separate from European culture even to this day. Octavio Paz offers an interesting insight:

In the United States, the Indian element does not appear. This, in my opinion, is the major difference between our two countries. The Indians who were not exterminated were corralled in “reservations.” The Christian horror of “fallen nature” extended to the natives of America: The United States was founded on a land without a past. The historical memory of Americans is European, not American. For this reason, one of the most powerful and persistent themes in American literature, from Whitman to Williams and from Melville to Faulkner, has been the search for (or invention of) American roots. We owe

103. 25 U.S.C. § 3001 (2006).

104. 43 C.F.R. § 10.1 (2010).

105. 25 U.S.C. § 3001 (3) (2006).

106. *See id.*

107. *Pueblo of San Ildefonso v. Ridlon*, 103 F.3d 936, 938 (10th Cir. 1996).

108. *Id.*

some of the major works of the modern era to this desire for incarnation, this obsessive need to be rooted in American soil.¹⁰⁹

While the mestizo culture of Guatemala considers Mayan and Spanish patrimonies to be part of its heritage, the majority of Americans do not seem to claim the Native American legacy as part of their past. In Guatemala, NAGPRA's approach would fail because of the *mestizo* culture:

The idea that the Mayas should manage their sites, the Garifuna should manage theirs, and the mestizos should manage sites dating from after the conquest, is not constructive, because it would lead to a tremendous conceptual division and the creation of little fiefdoms. If this were to happen, who would take care of the palaeontological remains that stand as silent witnesses in the middle of this ethnic discord? Perhaps prehistoric man, who lived 10,000 years ago, will also return to claim what is rightly his!¹¹⁰

Were the U.S. authorities who negotiated the MOU segregating European from indigenous elements when the MOU was negotiated? It seems that the main problem was that Colonial material could not be interpreted as ethnological material primarily because it was not produced by a "tribal" society. But how could the authorities obviate something so important for the Guatemalan heritage as the artifacts produced in the Colonial era?

As the MOU shows, the protection of Guatemalan cultural property is incomplete; the problem of stolen Colonial artifacts is growing and it seems imperative that both Guatemalan and American authorities revise the scope of protection of the MOU. The next section will discuss the scope of the MOU and will compare the original and amended text of its Article II.

C. The Scope of the Memorandum of Understanding and the Subsequent Amendment of its Article II

In order for the United States to impose import restrictions on archaeological objects, the MOU requires that the objects be included on the "Designated List."¹¹¹ Article I of the MOU provides that the United States shall restrict the importation of objects listed on the Designated List

109. PAZ, *supra* note 50, at 362.

110. Valdés, *supra* note 7, at 97.

111. See Import Restrictions Imposed on Archaeological Artifacts From Guatemala, 62 Fed. Reg. 51771 (Oct. 3, 1997) (to be codified at 19 C.F.R. pt. 12), available at <http://exchanges.state.gov/heritage/culprop/gtfact/pdfs/gt1997dlfn.pdf> (last visited Feb. 21, 2011).

unless Guatemala issues a certification.¹¹² At the same time, the only relief offered is the possibility of return of such objects.¹¹³ Under Article I (B), “[t]he Government of the United States of America shall offer for return to the Government of the Republic of Guatemala any object or material on the Designated List forfeited to the Government of the United States of America.”¹¹⁴ Although the list is very comprehensive and embraces all kinds of Pre-Columbian artifacts, if an artifact is not included on the List, the United States does not have any responsibility to return it.

Other aspects of the MOU reflect the Colonial divide. The language of Article II in its original version, signed in 2002, arguably was ambiguous as to whether or not Colonial artifacts could be protected. Although the goal of the MOU was primarily to protect Pre-Columbian artifacts, the vague use of the words “cultural patrimony” gave some room for interpretation. This was, of course, advantageous to Guatemala because it allowed an interpretation of a generalized protection of Guatemala’s cultural patrimony. Curiously, when the MOU was extended in 2007 for a period of five more years, Article II was amended.¹¹⁵ The amendment made it clear that Guatemalan Colonial artifacts are excluded and limited protection to only archaeological material.

The relevant language in the original Article II (B) is as follows: “[t]he Government of the United States of America will use its best efforts to facilitate technical assistance to Guatemala in *cultural resource management* and security, as appropriate under existing programs in the public and/or private sectors.”¹¹⁶ The phrase “cultural resource management” was used broadly and could yield different interpretations. It could be interpreted to mean that the assistance would go only to places that keep archaeological artifacts, but it could also be interpreted to mean that the U.S. would provide assistance in cultural resource management to churches, museums, and other ‘public/private sectors’ where Colonial artifacts are kept. The term “cultural” could be interpreted either way.

The revised version of Article II(B) is more specific: “[t]he Government of the United States of America shall use its best efforts to provide technical support to the Republic of Guatemala in *archaeological heritage management*, border security, and other preventive activities, as appropriate through available programs in the public and/or private

112. See MOU, *supra* note 9, at art. I.

113. *Id.*

114. *Id.*

115. Article II Revised 2007, <http://exchanges.state.gov/heritage/culprop/gtfact/pdfs/gt2007mouext.pdf> (last visited Feb. 21, 2011).

116. See MOU, *supra* note 9, at art. II (B) (emphasis added).

sectors.”¹¹⁷ The amended version has eliminated the term “cultural resource management” and has replaced it with “archaeological heritage management,” a term that specifically deals with Pre-Columbian artifacts and eliminates the possibility of interpreting it as protection of Colonial artifacts.

Likewise, the original language of Article II (E) appears to be ambiguous: “[t]he Government of the Republic of Guatemala will seek to develop professional training programs for archaeologists, ethnologists, and museum staff and public institution administrators responsible for *cultural patrimony*, and to promote the establishment of local museums.”¹¹⁸ The amended version is more specific: “[t]he Government of the Republic of Guatemala shall continue collaborating with communities to reduce the incentive for looting of *archaeological sites* through monitoring and enforcement of existing laws.”¹¹⁹ The amendment switched the focus from developing professional training programs for the preservation of cultural patrimony to collaborating with communities to reduce the looting of archaeological sites. Here again, the concept of cultural patrimony has been narrowed down to “archaeological sites.”

Article II (G), in its original version, was another section that created some ambiguity: “[t]he Government of the Republic of Guatemala will use its best efforts to develop a prioritized management plan for the effective protection of its *cultural resources*; and to continue to carry out its plans for the strengthening of the Registry of Archaeological, Historical, and Artistic Properties.”¹²⁰ This section gave Guatemala discretion in developing a plan for protection “its cultural resources.” The concept of “cultural resources” was ambiguous because it did not specify whether it meant only Pre-Columbian objects or any other cultural resources. At the same time, this section referred to a “Registry of Archaeological, Historical and Artistic Properties.”¹²¹ This Registry was created in Guatemala under the name *Registro de Bienes Culturales* [Registry of Cultural Goods] and is kept at the Ministry of Culture and Sport.¹²² The Ministry defines the Registry as the “first step for the protection and conservation of the

117. See Article II Revised 2007, *supra* note 115, at (B) (emphasis added).

118. See MOU, *supra* note 9, at art. II (E) (emphasis added).

119. See Article II Revised 2007, *supra* note 115, at (E) (emphasis added).

120. See MOU, *supra* note 9, at art. II (G) (emphasis added).

121. *Id.*

122. The Registry can be found at Presentación y Entrega del Documento “Lista De Bienes Culturales Guatemaltecos en Peligro,” MINISTERIO DE CULTURA Y DEPORTES, <http://www.mcd.gob.gt/2009/12/02/presentacion-y-entrega-del-documento-“lista-de-bienes-culturales-guatemaltecos-en-peligro> (last visited Feb. 21, 2011).

Cultural Property, be it movable or immovable, public or private.”¹²³ The Registry is divided into three sections: Pre-Hispanic, Hispanic and Republican, and Folklore.¹²⁴ The Registry requires every entity, public or private, to register any cultural object in its possession.¹²⁵

It was not clear from the original version of Article II (G) whether the Registry should deal only with Pre-Columbian objects. Two facts seemed to indicate otherwise: First, the MOU referred to a Registry of “Archaeological, Historical and Artistic Properties.” “Archaeological”¹²⁶ could be interpreted as referring specifically to Pre-Columbian objects, but “historical” and “artistic” seem to allow for an interpretation that includes other types of properties. Second, the fact that the Registry in Guatemala includes a section of Hispanic-Republican (Colonial and post-Colonial) items shows that Guatemala did not intend to limit its scope only to Pre-Columbian artifacts.

In the amended version, the section dealing with the Registry appears as Article II (F): “[t]he Government of the Republic of Guatemala shall continue its progress on the registration of all known *archaeological materials* in the country, and vigorously promote compliance by private collectors with the national law requiring registration.”¹²⁷ The official Registry is no longer mentioned. Instead, the text of the amended version refers only to the “registration of all known archaeological materials.” Again, this limits the scope of the MOU to solely Pre-Columbian artifacts.

Finally, the original language of Article II(H) was removed in the amended version: “[t]he Government of the Republic of Guatemala will apply its best efforts to fully implement the Law for the Protection of National Cultural Patrimony, Decree 26-97 of the Congress of the Republic of Guatemala.”¹²⁸ This law is the same as the previously discussed “Law for the Protection of the Cultural Patrimony of the Nation.”¹²⁹ In that body of law, Guatemala takes an integrative approach where both pre-Columbian and Colonial artifacts are considered part of the national identity of the

123. *Id.*

124. *Id.*

125. *Id.*

126. U.S. Senate Report 97-564 defines the term “archaeological” as: “any object which is of cultural significance, which is at least 250 years old, and which normally has been discovered through scientific excavation, clandestine, or accidental digging, or exploration on land or under water. Archaeological objects are usually found underground or under water, or are discovered through excavation, digging, or exploration.” *See supra* note 96.

127. *See* Article II Revised 2007, *supra* note 115, at (F) (emphasis added).

128. *See* MOU, *supra* note 9, at art. II (H).

129. *See generally* discussion *supra* Part I.C.

country.¹³⁰ If, as the MOU required, Guatemala applied its best efforts to “fully implement” this law, then the MOU acknowledged that Guatemala had full responsibility to protect its Colonial material as well. In the amended version, this section was completely taken out of Article II.¹³¹ In that sense, the MOU’s new version seems is concerned only with pre-Columbian artifacts.

As has been presented, the objective of the MOU is exclusively to protect Pre-Columbian artifacts, and even though the original version gave some room of protection for other types of cultural property, the amended version has changed that. Thus, although the MOU requires Guatemala to make efforts to protect its cultural patrimony, be it archaeological, historical or artistic, the import restrictions into the United States deal exclusively with Pre-Columbian artifacts displayed on the Designated List. Accordingly, the final Part of this Article explores the possibility of requesting an amendment to include Colonial artifacts in the MOU.

III. EXTENDING PROTECTION TO COLONIAL ART

A. The Current Protection in Multilateral Conventions

Guatemala has ratified the UNESCO and the UNIDROIT Conventions and is a signatory party to the Convention on the Protection of the Archaeological, Historical and Artistic Heritage of the American Nations (“San Salvador Convention”).¹³² These conventions provide protection to Guatemala’s cultural heritage without distinguishing the Pre-Columbian from the Colonial artifacts.

Of these conventions, UNIDROIT probably provides the most advantages to Guatemala. First, it provides direct access to the courts of another State where objects have been exported; second, the convention applies to all stolen cultural objects.¹³³ It contrasts with Article 7 of the UNESCO Convention, which has been interpreted as restricting the obligation of return only to objects inventoried in institutions.¹³⁴ Because the United States is not a party to the UNIDROIT Convention, Guatemala

130. *Id.*

131. *See supra* note 122.

132. Convention on the Protection of the Archaeological, Historical, and Artistic Heritage of the American Nations, San Salvador, June 16, 1976, O.A.S.T.S. No. 47, *available at* <http://www.oas.org/juridico/english/treaties/c-16.html> (last visited Feb 21, 2011) [Hereinafter San Salvador Convention].

133. *See* UNIDROIT Convention, *supra* note 61.

134. *See* UNESCO Convention, *supra* note 60.

could not bring any claims under UNIDROIT to repatriate any cultural property in American territory.¹³⁵

However, both the United States and Guatemala are parties to the UNESCO Convention.¹³⁶ This is the only international agreement between the two countries that could conceivably cover Colonial artifacts. Under the UNESCO Convention, Parties agree to do the following:

- 1) prevent the transfer of ownership and illicit movement of cultural property;
- 2) insure the earliest possible restitution of property to rightful owners;
- 3) admit actions for recovery of cultural property brought by or on behalf of aggrieved parties; and
- 4) recognize the indefeasible right of each state to declare certain cultural property inalienable and not susceptible to exportation.¹³⁷

At the same time, Article 7(b)(ii) of the UNESCO Convention “allows a Party seeking recovery and return of illegally exported cultural property to make a demand through diplomatic channels by providing documentation to establish its claim.”¹³⁸

Thus, Guatemala’s Colonial art is still protected under the UNESCO Convention. However, under this Convention, the process to recover an item would be longer, more difficult and more formal. For example, assume Guatemala requests an object purchased by a private collector who does not want to return it without just compensation and who files a declaratory judgment action to quiet title. Guatemala would have to go through a costly and delayed process, which would not only include making a demand through the diplomatic channels but also costly litigation to recover the object, if a good claim could be established. Extending protection to Colonial artifacts in the MOU would avoid the potential for protracted and costly litigation.

Also of particular interest is the San Salvador Convention,¹³⁹ which has been ratified by nine Latin American countries¹⁴⁰ and is specifically dedicated to preserving the cultural heritage of Latin America. In the Preamble, this Convention states its purpose:

135. See UNIDROIT Convention, *supra* note 61.

136. See UNESCO Convention, *supra* note 60.

137. John Alan Cohan, *An Examination of Archaeological Ethics and the Repatriation Movement Respecting Cultural Property (Part Two)*, 28 ENVTL L. & POL’Y J. 1, 44 (2004).

138. *Id.*

139. San Salvador Convention, *supra* note 132.

140. The countries that have ratified the San Salvador Convention are Argentina, Bolivia, Chile, Costa Rica, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Paraguay and Perú. See <http://www.oas.org/juridico/english/sigs/c-16.html> (last visited Feb. 21, 2011).

Having seen the continuous looting and plundering of the native cultural heritage suffered by the countries of the hemisphere, particularly the Latin American countries; and considering that such acts of pillage have damaged and reduced the archaeological, historical, and artistic wealth, through which the national character of their peoples is expressed¹⁴¹

The Convention takes an integrative approach that protects not only the archaeological cultural patrimony, but also the historical and artistic patrimony. More importantly, it recognizes the national cultural identity of the Latin American countries. The phrase in the Preamble “through which the *national character* of their peoples is expressed,”¹⁴² conveys the unity of cultural identities in Latin America, identities that claim both indigenous and Spanish legacies as their own. Article II justly states what constitutes the cultural property of Latin America:

The cultural property referred to in the preceding article is that included in the following categories:

- a) Monuments, objects, fragments of ruined buildings, and archeological materials belonging to *American cultures existing prior to contact with European culture*, as well as remains of human beings, fauna, and flora related to such cultures;
- b) Monuments, buildings, objects of an artistic, utilitarian, and ethnological nature, whole or in fragments, from the *colonial era and the Nineteenth Century*;
- c) Libraries and archives; incunabula and manuscripts; books and other publications, iconographies, maps and documents published before 1850;
- d) All objects originating after 1850 that the States Parties have recorded as cultural property, provided that they have given notice of such registration to the other parties to the treaty;
- e) All cultural property that any of the States Parties specifically declares to be included within the scope of this convention.¹⁴³

This definition addresses the cultural property of Latin America as a whole. It includes not only the Pre-Columbian and Colonial patrimonies, but also post-Colonial patrimony dating after 1850, and, furthermore, it gives the States Parties the discretion to declare new patrimony of importance for the country. The way Latin American countries see their cultural property is the same followed in Guatemala's Law for the Protection of the Cultural Patrimony of the Nation.¹⁴⁴ The United States,

141. See San Salvador Convention, *supra* note 132, at pmb1.

142. *Id.* (emphasis added).

143. See San Salvador Convention, *supra*, note 132, at art. II (emphasis added).

144. See Ley para la Protección del Patrimonio Cultural de la Nación, *supra* note 8.

which is a member of the Organization of American States, has not ratified the San Salvador Convention.¹⁴⁵

Thus, Guatemala's Colonial material is not completely unprotected. The UNIDROIT Convention allows Guatemala to bring claims for the protection of its Colonial material, mainly in European countries, and the San Salvador Convention allows for collaboration with other Latin American countries. The UNESCO Convention is the only link between Guatemala and the U.S. regarding Colonial art. As described below, although these Conventions provide protection for Guatemala's cultural property in general, a revised MOU would be ideal because it would help reduce the exportation of Colonial art and deal with the current looting problem.

B. Comparison of Guatemala's Memorandum of Understanding with Other Bilateral Agreements between the United States and Other Latin American Countries

Is the exclusion of Colonial art in the MOU particular to Guatemala or does the United States follow the same approach in other agreements with neighboring nations? The analysis of bilateral agreements between the United States and other Latin American countries reveals that the current trend is to implement agreements that protect mostly, but not exclusively, Pre-Columbian archaeological objects.¹⁴⁶ The United States has signed bilateral agreements with Bolivia, Colombia, El Salvador, Guatemala, Honduras, Nicaragua, and Perú. Of these, only Mexico, Perú and Colombia have been able to negotiate protection of their Colonial art. And, in the case of Perú, and Colombia, this protection has been restricted only to "certain Colonial material."

The case of Mexico is different, and its agreement should be considered separately from the rest of the Memoranda. The agreement, called "Treaty of Cooperation between the United States of America and the United Mexican States Providing for the Recovery and Return of Archaeological, Historical and Cultural Properties,"¹⁴⁷ was signed in 1970, long before the United States ratified the UNESCO Convention in 1983.¹⁴⁸

145. *See supra* note 140.

146. *See* Import Restrictions List and Chart, U.S. DEPARTMENT OF STATE, <http://exchanges.state.gov/heritage/culprop/listactions.html> (last visited Feb. 21, 2011).

147. Treaty of Cooperation Providing for the Recovery and Return of Archaeological, Historical, and Cultural Properties, U.S.-Mex., July 17, 1970, 791 U.N.T.S. 313, *available at* <http://exchanges.state.gov/heritage/culprop/laws/pdfs/treaty01.pdf> (last visited Feb. 21, 2011).

148. The United States ratified the UNESCO Convention on Sept. 2, 1983. *See United States of America: Ratified Conventions*, UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL

This was the first bilateral agreement signed by the United States that provided for the return of stolen artifacts.¹⁴⁹ The Treaty with Mexico is a bilateral agreement under which both countries, on an equal footing, agree to protect each other's cultural patrimony. Article I of the Treaty defines cultural patrimony:

- a) Art objects and artifacts of the Pre-Columbian cultures of the United States of America and the United Mexican States of outstanding importance to the national patrimony, including stelae, and architectural features such as relief and wall art;
- b) art objects and religious artifacts of the colonial periods of the United States of America and the United Mexican States of outstanding importance to the national patrimony;
- c) documents from official archives for the period up to 1920 that are of outstanding historical importance; and
- d) that are property of federal, state, or municipal governments or their instrumentalities, including portions or fragments of such objects, artifacts and archives.¹⁵⁰

This agreement is the only one in which the United States has agreed to a very broad protection of the cultural patrimony of a Latin American nation.

In contrast to the agreement with Mexico, the other agreements follow the same format as that of Guatemala's MOU, in which the United States imposes import restrictions on Pre-Columbian artifacts and offers to return the artifacts displayed on the Designated List. Only Perú and Colombia have been able to negotiate any minimal protection for their Colonial art.

In the case of Perú, the "Memorandum of Understanding between the Government of the United States of America and the Government of Perú Concerning the Imposition of Import Restrictions on Archaeological Material from the Pre-Hispanic Cultures and Certain Ethnological Material from the Colonial Period of Perú" ("Peruvian MOU")¹⁵¹ protects some categories of Colonial art:

[C]ertain categories of ethnological material of the Colonial period, ranging in date from A.D. 1532 to 1821, proposed by the Government

ORGANIZATION, http://portal.unesco.org/la/conventions_by_country.asp?contr=US&language=E&typeconv=1 (last visited Feb. 21, 2011).

149. JEANETTE GREENFIELD, *THE RETURN OF CULTURAL TREASURES* 159 (2d ed. 1996).

150. See Treaty of Cooperation, *supra* note 147, at art. I.

151. Memorandum of Understanding Concerning the Impositions of Import Restrictions on Archaeological Material from the Pre-Hispanic Cultures and Certain Ethnological Material from the Colonial Period of Perú, U.S.-Perú, June 9, 1997, <http://exchanges.state.gov/heritage/culprop/pefact/pdfs/pe1997mou.pdf>.

of Perú for U.S. import restrictions but limited to (1) objects directly related to the pre-Columbian past, whose pre-Columbian design and function are maintained with some Colonial characteristics and may include textiles, metal objects, and ceremonial wood, ceramic and stone vessels; and (2) objects used for religious evangelism among indigenous peoples and including Colonial paintings and sculpture with distinct indigenous iconography.¹⁵²

The protection of Colonial patrimony in the Peruvian MOU is limited to objects that are directly related to the indigenous cultures.¹⁵³ The phrase “Pre-Columbian design and function are maintained with some Colonial characteristics”¹⁵⁴ means that the protection is concerned primarily with indigenous objects that have some Colonial influence. The second part limits protection to “objects used for religious evangelism among indigenous peoples.”¹⁵⁵ Thus, Colonial art in the Peruvian MOU has to have some relationship with the indigenous culture in order to be protected. This approach does not give full protection to the Colonial legacy of Perú, which was the capital of the Spanish Viceroyalty of Perú. At the same time, Lima was one of the most important Spanish cities in the New World.¹⁵⁶ Most Peruvian Colonial artifacts probably do not have a direct relationship with the indigenous culture, and yet they are very important to the history of the country.

Similarly, the bilateral agreement with Colombia covers some Colonial artifacts but is limited to certain ecclesiastical material only. The “Memorandum of Understanding between the Government of the United States of America and the Government of the Republic of Colombia Concerning the Imposition of Import Restrictions on Archaeological Materials from the Pre-Columbian Cultures and Certain Ecclesiastical Material from the Colonial Period of Colombia” (“Colombian MOU”)¹⁵⁷

152. Archaeological and Ethnological Material from Perú, 62 Fed. Reg. 31,713, 31713-14 (June 11, 1997) (to be codified at 19 C.F.R. pt. 12), available at <http://culturalheritage.state.gov/pe97fr01.html>.

153. *Id.*

154. *Id.*

155. *Id.*

156. During the Colonial period, Latin America was subdivided into viceroyalties. These were politico-administrative entities in charge of the government of different territories. There were four viceroyalties: The Viceroyalty of New Spain (Mexico, Central America, some southern states of the United States); The Viceroyalty of New Granada (Some territories of Colombia, Venezuela, Panama); The Viceroyalty of Perú (Colombia, Ecuador, Bolivia and Perú); and the Viceroyalty of Rio de la Plata (Argentina, Uruguay, Paraguay and some Chilean territory). See Viceroyalty of Perú, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/453253/Viceroyalty-of-Peru> (last visited June 15, 2010).

157. Memorandum of Understanding Concerning the Imposition Restrictions on Archaeological Material from the Pre-Columbian Cultures and Certain Ecclesiastical Material from the Colonial Period

was not signed until March 15, 2006. The agreement was formed as a response to requests that the Government of Colombia made under Article 9 of the UNESCO Convention.¹⁵⁸

The restricted ethnological materials range from A.D. 1530 to 1830 and include: 1) original documents and incunabula; and 2) objects used for rituals and religious ceremonies including Colonial religious art, such as paintings and sculptures, reliquaries, altars, altar objects and liturgical vestments.¹⁵⁹ The protection of Colonial art in the Colombian MOU is broader than in the Peruvian MOU. Although the protection is limited to ecclesiastical material, it does not include the limitation of requiring a direct relationship with the indigenous culture.¹⁶⁰ The ecclesiastical ethnological material listed in the Designated List¹⁶¹ seems to deal with traditional Catholic artifacts and does not require a Pre-Columbian link.

As has been shown above, protection of Colonial art in a memorandum of understanding is not entirely uncommon. Perú and Colombia, although with some limitations, have been able to include Colonial artifacts in their respective agreements. Taking into consideration these two examples, Guatemala could have its Colonial material included in the present MOU if the Guatemalan authorities are able to make a better case that Colonial material is of significant "ethnological interest" for the culture of Guatemala.

To achieve more inclusive protection of Guatemalan heritage, the MOU should be amended to include Colonial artifacts. Article IV(B) of the MOU provides for amendment via diplomatic means: "[t]his Memorandum of Understanding may be amended through an exchange of diplomatic notes."¹⁶² Likewise, Article IV(C) provides for periodic review: "[t]he effectiveness of this Memorandum of Understanding will be subject to review in order to determine, before the expiration of the five-year period, whether it should be extended."¹⁶³ Thus, the MOU can be amended and its effectiveness can be reviewed each term. The current MOU was renewed in

in Colombia, U.S.-Colom., March 15, 2006, <http://exchanges.state.gov/heritage/culprop/cofact/pdfs/co2006mou.pdf>.

158. See Colombia, U.S. DEPARTMENT OF STATE, <http://exchanges.state.gov/heritage/culprop/cofact.html> (last visited Feb. 21, 2011).

159. See Colombia MOU, *supra* note 157.

160. *Id.*

161. Import Restrictions Imposed on Certain Archeological and Ethnological Materials from Colombia, 71 Fed. Reg. 13757 (Mar. 17, 2006) (to be codified at 19 C.F.R. pt. 12), *available at* <http://exchanges.state.gov/heritage/culprop/cofact/pdfs/co2006dlfrn.pdf>, (last visited June 15, 2010).

162. See MOU, *supra*, note 9, at art. IV (B).

163. *Id.* at art. IV (C).

2007 and extended for a further five years.¹⁶⁴ Based on the current problem of stolen Colonial artifacts, particularly religious icons, the effectiveness of the current MOU should be reviewed and an amendment should be proposed to extend protection to Colonial material.

CONCLUSION

The current problem of stolen Colonial art in Guatemala poses new challenges to the Guatemalan authorities and to the international community. An effective way to help reduce this problem is to have an agreement with the United States that provides import restrictions on Colonial artifacts. Unfortunately, the current MOU covers only Pre-Columbian artifacts, owing to a narrow interpretation of what constitutes 'ethnological material' from Guatemala. This interpretation does not take into consideration the cultural identity of the *mestizo* culture, which claims both Pre-Columbian and Colonial legacies as its own.

The approach followed by the Guatemalan legislation is an integrative approach whereby both traditions are indispensable to the cultural heritage of the nation. This approach is the same as that followed in the San Salvador Convention and presents the best approach to protecting the cultural property of Latin America. Since other countries, such as Perú and Colombia, have been able to include Colonial artifacts in their Memoranda, Guatemala should, too. A proposal to amend the current MOU should be based on a conscientious review of its current effectiveness, taking into consideration the growing problem of stolen religious artifacts and following the examples of Perú and Colombia. The inclusion of Colonial artifacts in the MOU will not only better protect Guatemala's cultural heritage as a whole, but will also create a better understanding of Guatemalan culture.

164. See Article II Revised 2007, *supra* note 115.