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The Third World and The Protection of National Patrimony: Oil, Art and Orchids

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INTRODUCTION

Between 1970 and 1974, three multilateral pronouncements were adopted which have been the subject of extensive critical analysis from diverse sources. These pronouncements were the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, which was approved by our Congress but subject to implementing legislation that has not been forthcoming; the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora, to which the United States became the first rati-
fying nation; and the 1974 United Nations General Assembly Charter of Economic Rights and Duties of States, to which the United States strenuously objected and cast a minority, negative vote. Each of these pronouncements (the use of any term which would suggest they have standing as binding international agreements is intentionally avoided) places or permits what may be extreme restrictions on the international trade flow of natural resources, cultural heritage, and fauna and flora from the Third World to developed nations. While much has been said about the above three pronouncements, and numerous objections to the restrictions voiced by persons in the developed world, none of the comments has focused on the fact that these three pronouncements are quite interrelated, or that they are part of a broad Third World response to the impact of foreign persons on Third World nations. The impact of both foreign individuals and foreign corporations has frequently been documented to be extensive. The Third World is particularly concerned about the presence and activities of foreign persons, principally the multinational corporations, in their respective nations. The Charter of Economic Rights and Duties of States was clearly a response to the activities of the extractive,


8. The term "Third World" is used as an alternative to "less developed countries," "developing countries" or "underdeveloped countries." It essentially encompasses most of the nations of Latin America, Africa and Asia. This should not suggest that development problems of other areas, e.g., Spain, Portugal or Southern Italy, are not similar to the issues of development in the Third World, nor to problems in some Eastern European nations. The Eastern European nations are often considered part of the "Second World," those nations with dominant socialist systems, the "First World" being the industrialized nations with market economies. Some prefer to classify many of the Third World nations in a separate "Fourth World" status, essentially those with extreme poverty. Professor Rostow identifies five stages of economic growth as a method of division: "traditional society," "preconditions for take-off," "take-off," "drive to maturity," and "age of high mass-consumption." W. Rostow, THE STAGES OF ECONOMIC GROWTH 4 (2d ed. 1971). This writer has suggested that the Third World nations might appropriately be referred to as either developing or dependent nations determined by the level of known and producing natural resources in each nation. See Gordon, Developed, Developing and Dependent Nations: Central American Development in a New Economic Realignment, 11 J. OF INT'L L. & ECON. 1 (1976).

oriented multinational corporations in Third World nations. While conventions dealing with international trade in cultural property and fauna and flora did not evolve from a long term presence of foreign persons in the Third World nations, they were prompted by the ever increasing volume of flow of these items to the developed world. Thus, each of the three pronouncements can be viewed as part of a broad Third World response to the impact of foreign persons on Third World nations. In becoming familiar with the three multilateral pronouncements and related bilateral and unilateral enactments discussed herein, persons in the developed world may gain an understanding of the motivations and basic fears of the Third World regarding the overall, perceived damage to their national patrimony resulting from the presence or demands of foreign persons. Such an understanding should assist in formulating intelligent responses to any one protective proposal, whether the proposal should pertain to oil, art, orchids, or some new object of national patrimony which Third World nations might in the future seek to protect.

The Third World nations are not the only nations endowed with natural resources, a cultural heritage and endangered species of fauna and flora. The attempts of the past decade to protect national patrimony nevertheless have been forthcoming principally from the Third World nations. That should not be surprising. The recent decade has been an era of developing pride and nationalism for the Third World, where increasingly large middle classes have sought to halt various political, economic and cultural influences from abroad, and to affirm ties with the past. Many of these Third World nations would like to display their own national patrimony, but discover that much of their national patrimony is owned by foreigners. Even when the patrimony is owned by Third World nationals, it is difficult for Third World governments to purchase the patrimony; the successful bidders for such privately owned patrimony tend to represent the richer nations of the developed world. Third World governments attempting to protect their nations’ patrimony are faced with the power of multinational corporations seeking their resources, international art collectors and foreign museums seeking their cultural properties, and foreign zoological facilities, botanical gardens, and private collectors seeking their fauna and flora.
National Patrimony—Three General Subject Areas of Concern

There is frequent reference to “patrimony” in the constitutions of Third World nations. The Costa Rican Constitution, for example, stipulates that among the cultural aims of the republic are protection of its natural beauty, and preservation and development of the historic and artistic patrimony of the nation. Patrimony, or heritage, would appear to encompass tangible property, traditions, rights and traits of character—essentially items which are passed on from one generation to another, usually without regard to concepts of ownership. The limits of national patrimony are difficult to define. Few would dispute that a nation’s patrimony includes its natural resources, its cultural heritage, and its fauna and flora. Under the Convention on Cultural Property, the term cultural property includes items of importance to archaeology, pre-history, history, literature, art or science, all further enumerated in some eleven subcategories, including even postage stamps and furniture. The Charter of Economic Rights and Duties of States refers broadly to “natural resources,” which appears to be a generally accepted term found in the domestic laws of many Third World nations, and encompassing petroleum, gas, minerals, water and forestry resources. While “natural resources” might technically also include fauna and flora, these latter classes of national patrimony have been treated separately because they have different characteristics. Generally speaking, fauna and flora are easily severed from their habitat and transported thus calling for special controls against clandestine pil- lage—controls which are not necessary for petroleum and minerals.

Also referred to as part of the national patrimony, but not possessing the heritage concepts of natural resources, cultural patrimony, and fauna and flora (the three general subject areas of concern) is the operation of small businesses or the practice of the professions. These areas of “occupational” patrimony do not suffer from potential removal from the nation. That potential is a primary reason for the Third World’s concern regarding the acquisition by foreign persons of natural resources, cultural heritage and fauna and flora.

The scope of controlled national patrimony has been a topic of

10. CONSTITUCION art. 89 (1949) (Costa Rica).
12. Id., art. 1(i) and (k).
criticism in each of the three subject area, particularly in the cultural heritage and fauna and flora areas. The entire Orchidaceae family, for example, was included in the restricted lists in the Convention on Endangered Species, when only certain species are truly threatened and others are multiplying without serious threat by man. Progressive expansion of the scope of protectionist restrictions is illustrated by the experience of Mexico. A United States treaty with Mexico, consummated in 1970 at the urging of the Mexican government, applies to three classes of cultural patrimony: pre-Columbian objects of outstanding importance to either country; art and religious objects dating from the colonial periods of the two nations, also of outstanding importance; and documents from official archives dated prior to 1920, of great historical value. While the United States was aware that such broad classification could be troublesome, it was thought that the terms of the treaty would nevertheless permit significant exchanges of cultural property. However, subsequent to signing the treaty, the Mexican government adopted legislation extending national ownership to private collections and absolutely prohibiting the export of any pre-Columbian artifacts. The feared over-breadth of the protectionist restrictions was thus confirmed by the enactment of these domestic laws.

The Attributes of Oil, Art and Orchids

In attempting to illustrate the commonality of purpose of the protective legislation, various attributes of the three categories should be considered. While there are significant distinguishing characteristics between the three, some interesting similarities are also evident.

Natural resources, the cultural heritage and fauna and flora are all resources capable of exhaustion. Natural resources are not repor-
ductive within foreseeable time periods, although total resource reserves are unknown. The ocean mineral resources are immensely extensive, and resource reserve levels on land masses are constantly being increased, illustrated by the 1978 Mexican announcement of an increase in proven petroleum reserves to 16.8 billion barrels. In many cases, technology can provide substitutes when particular resources are exhausted, but this frequently means a shift in supply from the nations with the diminishing supply to the nations possessing the resource base for production of the substitute. The possibility of substitutes does not temper the concern of the resource possessing nations. Instead it makes them all the more covetous of their known reserves. The increasing gap between the quality of life in developed and Third World nations leads to attempts by Third World nations to make even more dear their resources through the formation of cartels and other artificial economic devices.

The cultural heritage of a nation is also exhaustible. While the passage of time adds to a nation’s cultural heritage, each item is nevertheless irreplaceable; additions to a nation’s heritage through time are thus little solace to earlier losses. Moreover, the number of Third World nationals engaged in the artistic creation of this century is not significant. With few exceptions (such important Mexican artists of this century as Orozco, Rivera, Siqueiros and Tamayo come to mind), the Third World has not been a source of contemporary art of significant international demand. The interest in Third World culture of the Western Hemisphere is principally in pre-Columbian artifacts, with some lesser demand for Colonial art and certain more recent crafts of indigenous Indian tribes. It is important to note that the removal of cultural items from their place in the cultural heritage can in itself be seriously destructive. The removal of pre-Columbian artifacts, for example, before they have played a role in unraveling the secrets of past civilizations, is premature and destructive to the furtherance of knowledge. Furthermore, untimely removal greatly diminishes the value of the arti-

18. Riding, Mexico Grapples With Its Oil Bonanza, N.Y. Times, May 7, 1978, § 3, at 3. Mexico has also announced that estimated probable reserves are an additional 31 billion barrels and total potential reserves 120 billion barrels. Id.

facts. This is an attribute quite in contrast to natural resources, the maximum value of which is realized only by the process of extraction and conversion into other commodities.

Fauna and flora are also exhaustible. The extinction of a species carries with it the sadness of the loss to mankind of a living species. Few would bemoan the extinction of copper, its exhaustion would be of concern only if adequate substitutes were not available. The exhaustion of petroleum is feared not for any intrinsic aesthetic value, but because of the economic consequences of the loss of a resource without currently known substitutes for many of its uses. The extinction of a living species is quite different. Much like the loss of a great painting, a Maya stela, or any other treasured object of the cultural heritage, the extinction of a living species detracts from the intellectual quality of life for all mankind.

The element of aesthetic loss relates to the inconvertability of the cultural heritage and of fauna and flora. With the exception of the conversion of gold from ancient civilizations during the period of conquest, cultural items and fauna and flora have been traded for intrinsic value. Identity is one measure of the value of an item of cultural heritage, and the value of a specimen of fauna or flora. Identifiability is an important characteristic for another reason; it relates to the visibility of the commodity which is sought to be protected.

Unlike the cultural heritage and fauna and flora, natural resources are converted and thereby lose their identities. The value of natural resources lies not in the visibility of the resource after extraction and exportation, but in its transformation or consumption. Once extracted, a natural resource is quickly transformed into a new form of fungible good which is usually co-mingled with other resources for the production of any one of numerous commodities. Thus, copper is transformed into candlesticks; iron ore into steel and then to automobiles; petroleum into plastics and then to utensils, etc. In some cases, the resource is intentionally exhausted, such as in the case of fuel. Despite transformation or consumption, natural resources in their converted forms do return to the Third World in the form of manufactured goods, to remind the nations of origin of the economic significance of resource exploitation. The price at which the Third World nations must purchase products manufactured from resources taken from their nations is a constant irritant, particularly when the international price of the resource (perceived as a valuable component of the final product) remains relatively constant, while the price of the manufactured good increases, often dramatically.
Unlike natural resources, cultural items and fauna and flora removed from a nation rarely find their way back. A painting, pre-Columbian artifact, or rare orchid acquired for its intrinsic value, remains highly visible and often carefully guarded in its new setting. Its monetary value, frequently difficult to measure in the original acquisition stage, may soar in its new location, sometimes due to its removal as much as to its scarcity and beauty. Photographed, written about and now included in the cultural heritage of its new nation, the object may become the subject of an international property dispute. Due to the fact that items acquired for their intrinsic value can be identified and traced, questions of ownership may arise long after acquisition by a developed world owner, whether the owner be a private collector or public museum. Factors bearing on whether a question of ownership will arise are whether the item is (or was) included in the defined national patrimony of the nation of origin, and whether the item was lawfully transferred out of the country of origin. Resolution of an ownership question may require the accommodation of internationally conflicting concepts of property rights.

Although the issue of ownership does not generally arise with regard to natural resources once transferred abroad, on occasion it may create significant conflict. In at least one instance, a nation claimed that extracted and exported petroleum belonged to the nation of origin. Subsequent to the Peruvian expropriation of properties of the International Petroleum Company (part of the Humble Oil organization), the Peruvian government claimed a $690,524,283 offset to the requested compensation. The offset represented the value of all mineral products extracted by the company for several decades during which title to the properties had been under question.20 The argument of the Peruvian government as to the foreign corporation’s lack of title can be traced, in part, to the civil law concept of the inalienability of subsoil rights21 (subject to the government’s authority to grant concessions for the extraction of natural resources)—a concept which would appear to be quite consistent with the view that a nation’s cultural heritage is inalienable. The latter view has potentially profound implications if in the future Third World nations should gain the economic leverage to demand

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21. Furnish, supra note 20, at 73-74. Italy has also asserted State rights to anything found under the soil. See Gaskill, supra note 19, at 27.
the return of all items of their cultural heritage.

The view that a nation's cultural patrimony is national property raises not only a question of the possible return of items previously transferred, but also a question as to the rights of individual artists. Under the national property view, would an artist lose his absolute right to deal with his creations as he chooses during his lifetime? If Mexico, for example, considers the works of its renowned artists (Orozco, Rivera, Siqueiros and Tamayo) to be part of the nation's cultural patrimony, and therefore national property, is Tamayo (the only one of the four still living) to be denied the right to sell his work to anyone other than the Mexican government? Or, should any proposed sale be subject to a right of first refusal on the part of the nation? The foregoing issues of ownership must be resolved if the evolving notion of a nation's cultural patrimony is to encompass the works of contemporary artists, and works which were previously transferred under traditional concepts of property ownership.

Issues of ownership have considerably less applicability to certain other items of cultural heritage, notably the pre-Columbian artifacts (which were the principal reason for Mexico's promotion of protective measures). Those items, identified not with particular artists, but with entire cultures, raise a discrete but even more perplexing ownership issue. Do they belong to any one nation, or, are they the heritage of the world and therefore the property of mankind? Mankind's interest in the cultural heritage of the world mandates a more liberal policy on the international exchange of items than appears to be contemplated by such restrictive legislation as that of Mexico. Restrictive national legislation, or even a restrictive administrative attitude following more liberal legislation, might well facilitate the use of political or economic leverage. Perhaps an exchange would only be available to those developed nations supporting a commodity price support plan, or most favored nation treatment. Might not one nation refuse to participate in any international exchange with a certain other nation until that nation returned an item considered to be of signal importance to the demanding nation? How extensive the demands might become can only be imagined, but the potential for leverage in some degree is clear. Yet if cultural objects identified with vast cultures, as opposed to individual artists, were to constitute the property of mankind, who would be responsible for protecting the property and who would have authority to exchange it?

Little consideration has been given to the ownership issue in the
area of fauna and flora, except with respect to migratory fish in coastal waters. Traffic in fauna and flora has for the most part been legitimate, with some illegal trade in alligator skins, crocodile skins and bird feathers. Where fauna and flora have been transported by legal but artificial means, that is, where the fauna has not freely migrated, there has been no challenge to title. Even if one were to argue that the fauna and flora have always been a part of a nation's patrimony, and therefore inalienable, or transferable only with government permission, would the alleged inalienability relate not only to specimens improperly transferred, but also to their offspring? Unlike the Elgin marbles, which have remained unchanged during the decades they have rested in the British Museum, lions brought from Africa thirty years ago have long since passed away. If the lions had left progeny, would the asserted title of the African nation to the present animals pass through to successive generations? What of the cubs of a male from Kenya and a Tanzanian female? Or an awarded and highly prized orchid, the parentage of which is Mexican and Brazilian? However academic a question this may appear, might it not arise in the future if a species becomes extinct in its natural habitat and the sole living members of that species are in the zoological or botanical parks of the developed world? In many instances, the zoological and botanical specimens can be assisted in reproduction. Thus, in the event of threatened extinction, the advanced zoological and botanical facilities in the developed world may be in a position to help prevent extinction of species native to other parts of the world. In that case, a flow to and return from the developed nations will have served the interests of both nation groups.

Reasons for Protection

The need to control trade in each of the three categories has been the subject of some argument. In each category the proponents of the free trade arguments have represented recipient developed nations, while the restrictive arguments have been forthcoming from Third World nations. However those in the developed world may view the need to control issue, an understanding of the basis for the restrictive arguments is important because the control issue will ultimately be resolved by the nations in possession of the subject items, not by the nations with a demand for those items.

The protection of natural resources is based on the view that national economic development is gained only by a careful trade-
off of a nation’s national resources. Third World nations seek to limit the outward flow of their natural resources so that the income received from the exploitation of these exhaustible commodities may be carefully allocated to create an economy which will no longer be reliant upon the exhaustible resources. Illustrative of this view are the economic plans of the oil rich nations to convert their petroleum resources before they are exhausted in order to develop a status of national non-dependency. The developed world importers of a given resource would obviously prefer that larger quantities of the resource be available, with the resultant lower price. They argue, sometimes with good reason, that the restrictions imposed on resource outflow by Third World nations have a detrimental effect on exploration in the Third World for both new supplies of these same resources and supplies of new substitute resources. Inasmuch as new discoveries of either supply would spur economic development in the Third World, this detriment is significant.

The protection of cultural heritage evolves principally from an awareness of the benefits of such protection to scholarship, intellectual stimulation, national pride and identity. There is the additional potential of increased tourism, a benefit of an economic nature, similar to the benefits reaped from the preservation of natural resources, but with quite different implications in terms of foreign presence. The protection of natural resources and their careful allocation as a quid pro quo for development does not necessarily require the presence of foreign persons in significant numbers. If the cultural heritage of a nation is to be preserved to increase the economic benefit of tourism, a new problem arises—the problem of the impact of tourism itself on the nation’s culture.22

Fauna and flora are not significant potential sources of economic wealth for Third World nations. The ability of recipient nations to locally reproduce most species of fauna and flora which have been imported minimizes the demand for these species. Few species of fauna and flora (notably tropical fish, tropical birds, and the two plant families, Orchidaceae and Cactaceae) are in such great demand by private persons as to lead to commercial collecting. Thus, the limitations on the trade flow of fauna and flora stem not from the development goals of Third World countries, but ostensibly

22. In certain instances the impact may be severe. The extension of the Inter-American Highway through the Darien Gap in Panama, for example, has made the indigenous Choco and Cuna Indian tribes more accessible to travelers. If foreigners are permitted to view the tribes without restriction, however, their presence will unquestionably alter the tribal environment.
from a desire to limit the exploitation of these species and preclude their further endangerment. Those in the developed world may well question the sincerity of the Third World’s alleged desire to protect endangered species. Thus far, the multilateral protectionist measures adopted by the Third World nations have been limited to the curtailment of international trade. The measures fail to address more serious domestic problems, such as slash and burn agriculture, strip mining, charcoal “farming,” and other modes of “development” in the Third World which permit the destruction of vast natural areas. While measures taken to protect endangered species (however limited in scope) should not be objected to on the ground that other measures are also needed, the lack of parallel domestic measures suggests that more than the protection of endangered species was considered.

How to Control Trade in National Patrimony

Once a nation determines that the international trade in its patrimony should be controlled, it must next consider how to control. The patrimony of a nation can be acquired by the government through expropriation, in which case it is no longer necessary to control legitimate trade, but only to prevent illegitimate trade. As an alternative to expropriation, export controls can be imposed on private transfers of patrimonial property. Specific methods of control may have greater effectiveness in one category of patrimony than in another. Similarly, the regulatory needs of a particular nation may be better served by one method than by another.

Domestic Legislation

A. Expropriation

The exploitation of natural resources has been effectively controlled by domestic legislation limiting the rights of exploitation to the Third World nation. In some cases this occurred in a two stage process, first to declare all natural resources the patrimony of the nation, and then to bring the means of extraction under national ownership. There is a substantial and documented history of this process, beginning in this hemisphere with the Mexican nationalization of petroleum in 1938.23 The extractive industries in Latin Amer-
ica are now substantially under government ownership, or at least subject to extensive government control. More recently, foreign ownership of corporations engaged in extractive operations has been converted to local ownership by a progressive phasing out of the foreign interests, principally through the use of the joint venture device. The foreign enterprise divests itself of majority ownership and control of the Third World subsidiary, after which the percentage of remaining foreign participation is decreased gradually to the point where the former foreign parent no longer has any share of ownership. The former foreign parent may continue to have some relationship to the subsidiary, usually in the form of an agreement to transfer technology. The phasing out process is often called Mexicanization, or Chileanization, or Peruvianization, substituting a nationalistic term for more onerous terms, such as expropriation or confiscation.

Control of the outward flow of a nation's natural resources has not in itself been difficult. Ancillary issues, such as the overall impact on foreign investment, have proven more difficult. The principal concern in phasing out foreign participation in a nation's extractive industries is to avoid discouraging foreign investment in other fields. The nationalizing nations do not wish to create fears of similar treatment in non-extractive sectors which would stimulate a general reduction in foreign investment. A related concern is the possible loss of technology in the event the former parent will not agree to transfer technology without a share of ownership.

The concept of expropriation has also been applied to cultural patrimony. Mexico recently declared in domestic legislation that all pre-Columbian artifacts are part of the cultural heritage and are thus owned by the nation. Unlike privately owned natural resources, the location of privately held collections of pre-Columbian artifacts is not easily discovered. The declaration of the Mexican government has had the unfortunate effect of prompting private collectors to illegally transport their collections out of the country, usually in small quantities at a time. Even substantial collections have been offered for sale, with foreign delivery guaranteed. Because


25. See note 17, supra.
many museums in developed nations are currently refusing to purchase collections which cannot be identified as being in the lawful possession of the sellers, sales of pre-Columbian artifacts are often made to foreign private collectors, to the loss of the general public of all nations. Thus, Mexico’s “expropriation” of the pre-Columbian artifacts has not been fully successful in preserving national patrimony. It is regrettably a good example of “overkill,” similar to the inclusion of all orchids in the restricted list of the Convention on Endangered Species.

B Pre-emptive Legislation

Pre-emptive legislation, providing that a proposed sale to a party abroad may be consummated unless the government objects and is willing to purchase the item, is not considered practical by many Third World governments which lack the funds to purchase even the most important items of their cultural heritage. Even if a Third World government has sufficient funds, a pre-emptive plan cannot succeed in protecting cultural patrimony if the plan is not accepted by private collectors. Fearing government delays, or devices to keep the property within the nation, or failure of the government to ultimately pay for its purchases, private owners will continue to illegally transport artifacts abroad. Nevertheless, a pre-emptive plan appears to have better prospects for success (in terms of compliance) than a general expropriation plan, particularly if the government acts sincerely and pays fairly and promptly. Governmental attempts to place substantial restrictions on the exportation of small and easily smuggled artifacts will probably not be successful as long as higher prices can be obtained from foreign purchasers.

C. Problems of Enforcement

A difficulty facing governments that are attempting to regulate the flow of cultural items is that many items can be copied so effectively that the real artifacts may pass through the borders as replicas. There is a substantial market for replicas of pre-Columbian artifacts, which often so closely resemble the originals that professional assistance is required for identification purposes. Current customs procedures seem to place little burden on the im-

26. In an article written in 1973, just after the change in Mexico’s law, Rogers anticipated that the Mexican system, with its “potential for ‘regulatory overkill,’” would contribute to a “flourishing black market.” Rogers, supra note 1, at 945-56.
porter to prove that an item is authorized for export, particularly if the importer can show a receipt from a store for the purchase of a replica, even though the replica may have been discarded and replaced with an original, and the receipt retained for proof at the border. While the problem of genuine artifacts passing as replicas is limited to specific portions of a nation's cultural patrimony, and does not apply to natural resources or in most cases, to fauna or flora, it does involve items of great value and archaeological importance.

A similar difficulty may arise with respect to orchids since the endangered species legislation was not designed to encompass orchid hybrids or propagated botanicals (species). Will customs officials of the developed world accept a statement from an importer that the orchids he is carrying are hybrids or propagated botanicals? Or, will some proof be required at the customs station, from the nation of origin, certifying that even hybrids and propagated botanicals are authorized for export? The foregoing discussion of customs procedures should demonstrate that in certain areas of cultural heritage and fauna and flora, the burden of protecting a Third World nation's patrimony may be shifted by necessity to the customs officials of the developed world—a rather ironic result when increasing traffic to the developed world was the motivation for the protection in the first place. Without cooperation from the developed world, it is not possible for Third World nations to enforce selective legislation tailored to protect only the truly important items of a nation's cultural heritage, or the truly endangered species of fauna and flora. If the developed world customs officials are not cooperative, the developed nations can expect continued legislative overkill by the Third World nations.

27. The treaty would appear to apply to natural hybrids. The lack of clarity in defining the scope is not fully the fault of the treaty drafters; botanists are continually revising Orchidaceae classifications. What currently may be considered a species may later be determined to be a natural hybrid.

28. Replicas of cultural artifacts require no export permit and the same confusion in identification may occur. Should any item which might be an original artifact, or a natural species of the Orchidaceae be presented at customs, one may expect to be required to prove the item is exempt from the laws.

29. It is not surprising that some bitterness is expressed by Third World nations when, in seeking to protect their national patrimony, they discover that protection can only be successfully accomplished with the assistance of the very nations they wish to cut off from the flow of their patrimony (see text at notes 48-50, infra). That help must come at a time when the increasing disparity of relative affluence of developed and Third World nations causes developed world art collectors to seek new sources of supply and causes orchid, tropical fish, and bird collectors to demand increasing quantities of their desired species.
Due primarily to problems of enforcement, domestic legislation (as compared with bilateral and multi-lateral legislation) has not been especially effective in protecting national patrimony, except in the area of natural resources. Trade in natural resources can hardly be clandestine. To profit from exploiting natural resources, trade in the resource must be in such amounts as to make both the extraction and shipment highly visible, and therefore easily controlled. In contrast, trade in the cultural heritage is often illegal and is extremely difficult for individual nations to police. While the long United States-Mexican border creates a dilemma for the United States in terms of ease of entry for illegal immigrants, it poses a similar dilemma for Mexico in terms of illegal exportation of pre-Columbian artifacts. The facility with which one may remove small but extremely valuable artifacts, such as jade, gold and small ceramic pieces, all of great value compared to small amounts of copper, iron ore or bauxite, explains why the Third World nations have sought to implement international controls on the trade in cultural artifacts and to share the burden of enforcing these controls with the developed nations.

Trade in fauna and flora is closer conceptually to natural resources than to the cultural heritage. The value of fauna and flora, with few exceptions, lies in quantity, making the supply of fauna and flora highly visible. Moreover, the need to sustain life, unique to trade in this category, requires giving careful consideration to the available means of transportation and limits the opportunities for illegal transport. There is some clandestine trade in fauna and flora, but not to the extent of the illegal trade in cultural items.

Bilateral Measures

Bilateral attempts to protect national patrimony have the advantage of two nations committing themselves to the enforcement of protective measures. An example of bilateral protection is the 1970 treaty between Mexico and the United States for the return of stolen archaeological, historical and cultural properties. The treaty

30. Even in that sphere, the Third World has sought multi-lateral support—through the Charter of Economic Rights and Duties of States—for its position on the extraction and trade of natural resources.

31. United States-Mexico Treaty, supra note 14. This treaty was adopted by the United States at the urging of Mexico, partially in repayment for Mexico's cooperation in 1936 when that nation agreed to sign a treaty proposed by the United States for the return of stolen vehicles. Convention for the Recovery and Return of Stolen or Embezzled Motor Vehicles, Trailers, Airplanes, or Component Parts of Any of Them, Oct. 6, 1936, United States-Mexico, 50 Stat. 1333, T.S. No. 914.
assures Mexico of assistance from the United States in the discovery and study of archaeological sites and in the deterrence of illicit excavations and theft. Each party agreed to facilitate the circulation and exhibit of archaeological, historical and cultural objects in both countries for the purpose of enhancing public appreciation of the two countries’ cultures. Additionally, the treaty contains an assurance that legitimate international trade in art objects will be permitted as long as such trade is consistent with national and international laws that seek to conserve cultural patrimony. Yet, despite the foregoing assurance, other domestic legislation of Mexico—vesting in the nation ownership of all immovable monuments and all artifacts found at sites; extending national ownership to private collections; and prohibiting exportation of any pre-Columbian artifacts—raises serious doubt as to whether significant trade will occur.

Multilateral Measures

Multilateral protective measures have the advantage of obviating the need for a nation to negotiate treaties with every other nation considered to be a potential importer of the protecting nation's heritage. The multilateral approach to protecting national patrimony is illustrated by the three pronouncements first mentioned above: the Convention on Cultural Property, the Convention on Endangered Species, and the Charter of Economic Rights and Duties of States. Each evolved from different circumstances, each has been reacted to differently by the developed nations, but each has sufficient common characteristics and motivation to be consid-

32. United States-Mexico Treaty, supra note 14, art. II(1) (c). The Metropolitan Museum of Art in New York has an exchange agreement with Mexico's National Museum of Anthropology and History. Under the agreement, signed in 1968, pre-Columbian articles from the Mexican Museum were loaned in exchange for items of early Egyptian and Cypriot civilizations (not items of early American cultures which tend to have lesser standing than the pre-Columbian artifacts) from the Metropolitan Museum. Zelle, Acquisitions: Saving Whose Heritage?, Museum News, April 1971, at 19, 25.

33. United States-Mexico Treaty, supra note 14, art. II (1) (d).

34. Ley Federal del Patrimonio Cultural de la Nación, supra note 17, art. 52.

35. Ley Federal Sobre Monumentos y Zones Arqueológicos, Artísticos, & Históricos, supra note 17, art. 27.


37. Supra note 2.

38. Supra note 4.

39. Supra note 6.
ered part of the Third World’s aggregate reaction to the presence and affect of foreign persons on national patrimony.

A. The Charter of Economic Rights and Duties of States

The Charter of Economic Rights and Duties of States was first promoted by Mexico. It was clearly a Third World document and the substantial majority vote in its favor at the United Nations General Assembly is indicative of the Third World-developed world split over the Charter. The United States, Japan, Canada and all of the member nations of the European Economic Community either voted against its adoption or abstained. The objections of the developed nations to the Charter were not premised upon a claim of right to the natural resources of the Third World. It was not the declaration that “each State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities,” which troubled the developed world. Rather, it was the rejection of international law and international fora for the resolution of investment disputes which they found so disturbing. The developed nations viewed the Charter as regrettably substituting developing nation domestic tribunals for the preferred use of international courts. The Charter recognizes the right of a State to expropriate and then stipulates that compensation for expropriated property is to be determined according to the domestic law of the expropriating nation, unless otherwise agreed upon. Where there has been multi-nation participation in the extraction and trade of a natural resource, the developed nations favor a multi-nation resolution of disputes. In other words, they prefer to resolve conflicts over compensation for foreign assistance in the extraction of Third World resources under principles of international law.

Had the nationalistic views espoused by the Third World in the Charter been espoused in the international conventions dealing with the cultural heritage and fauna and flora, similar negative responses from the developed nations would have been forthcoming. Yet the Third World nations declined to include such views in the latter conventions. One explanation for this difference is that the natural

41. Id.
42. Charter of Economic Rights and Duties of States, supra note 6, art. 2(1).
44. Charter of Economic Rights and Duties of States, supra note 6, art. 2(2) (c).
resources which the Third World seeks to protect by the terms of
the Charter are those remaining in Third World nations, not those
extracted in the past. Thus, with respect to natural resources, the
Third World nations have the leverage of possession, which is not
entirely true in the case of cultural patrimony, both because so
much of the Third World's cultural patrimony has already been
exported and because of the severe illegal smuggling problem. In
negotiating agreements for the protection of cultural patrimony, the
Third World lacks the bargaining leverage to obtain general accept-
ance of a multilateral protection document containing the restric-
tive concepts of the Charter. Had the Third World nations adopted
a charter for the protection of cultural patrimony without the par-
ticipation of the developed nations, the necessary element of de-
veloped world cooperation (particularly on the part of customs offi-
cials) would have been missing.

B. The Convention on Cultural Property

Even without the restrictive concepts of the Charter, the
UNESCO Convention on Cultural Property has not yet been ac-
cepted by the United States. Ratification of the present Convention
is increasingly unlikely; a new convention placing greater emphasis
on exchanges may be necessary before congressional implementa-
tion will occur. The United States did not participate in the drafting
of the present Convention; it was promoted by Mexico (as was the
Charter of Economic Rights and Duties of States). In response to
the initial draft of the present Convention, the Third World and
communist nations voiced their desire for stricter controls. The art-
importing nations questioned the need for such severe restrictions
(such as imposing criminal sanctions on persons in charge of public
or private institutions adding stolen art to their collections) to sup-
port what in their view were legitimate goals. A revised draft, mod-
erating the severity of some sanctions, was adopted, the United
States agreeing with certain reservations. The initial ratifications
were all by Third World or communist nations. The United States
did not immediately ratify the Convention. Congress approved the
Convention, but did so subject to the submission by the Department
of State of proposed implementing legislation. Implementing legis-
lation was introduced in 1973, but was never passed. The passage
may well await Senate approval of a new UNESCO Convention,
designed to offset the restrictive nature of the 1970 Convention
through an international agreement for exchanges of cultural prop-
erty. Ratification of an agreement for exchange would demonstrate
at least a partial acceptance of the view that a nation's cultural heritage is the property of mankind. The Third World may find that it must accept a freer exchange of its cultural heritage if it is to gain the cooperation of the developed world in curtailing the illicit international trade of cultural property.

C. The Convention on Endangered Species

The United States was the first to ratify the Convention on Endangered Species. This Convention has been subject to much less objection from the developed world than have the Charter and the Convention on Cultural Property. Importers of fauna and flora have not been as vocal or organized as those objecting to the Charter and the Convention on Cultural Property. The trade in cultural artifacts is more profitable than that in fauna and flora. Importers of the former are thus more vehement in their opposition. Neither importers of cultural property nor importers of fauna or flora wield the power of the multinational corporations importing natural resources, enterprises which have been the source of much opposition to the Charter.

Substantial objection to the Convention was voiced however, by the American Orchid Society, a highly respected organization. The American Orchid Society objected in particular to the inclusion of all orchids in Appendix II, the restrictive classification mandating export permits, despite the fact that not all species of the Orchidaceae are threatened. In as much as the Convention was ratified over its objection, the American Orchid Society would appear to lack the political persuasiveness of the museums and art dealers who successfully objected to certain provisions of the Convention on Cultural Property. This illustrates that the market power generated by the item in question, whether it be oil, art or orchids, is an important factor in predicting the success of developed world opposition to terms of a convention restricting trade in the item.

45. The United States ratified the Convention on September 13, 1973, 12 INT'L LEGAL MATERIALS 1085 (1973). Canada has also ratified it, although most of the early ratifiers were Third World nations.


47. A.O.S. Response to Endangered Species Proposals, 45 AM. ORCH SOC'Y BULL. 814 (1976); Peterson, When in Doubt, Legislate, 45 AM. ORCH SOC'Y BULL. 767 (1976). The reasons for such broad inclusion have to do with a nation's ability to enforce a selective listing of species (discussed further in the text at notes 48-60, infra, and note 27, supra) and with the general approach taken by many Third World nations in all areas of protection of national patrimony. That approach is to protect entire categories without regard to the real need to protect any single item or resource.
D. Problems of Enforcement

Effective multinational control of the international trade flow in both cultural items and fauna and flora has not yet been fully tested. The legitimate flow of cultural artifacts and fauna and flora has certainly diminished as a result of the protective legislation although it is to be assumed that unlawful exportation has increased. A major obstacle to controlling the export of cultural artifacts and fauna and flora is the lack of an inspection of departing travelers from nearly all nations. Since it is consequently quite easy to remove small artifacts and plants, the only effective means of implementing the protections of the Conventions is to shift the burden of enforcement to the customs officials of the importing nations. Criminal prosecution for the transportation of stolen property has proven effective in the United States and has resulted in the return of a Guatemalan stela. In the case of unlawfully exported cultural artifacts, items confiscated by customs officials can be returned to the nation of origin, but it is unlikely that confiscated plants will be returned. Even if they were returned, most would be discarded upon arrival, as botanical facilities are lacking in all but a few Third World nations. That the restrictions imposed by the Convention apply to the entire Orchidaceae (as opposed to specific species whose existence is threatened) make it feasible for officials in developed nations to enforce the restrictions. Customs officials are not sufficiently expert to verify the accuracy of the classification of plant specimens presented at a border, just as they are unable to determine whether a small clay pot is pre-Columbian or an accurate replica. They should be able, however, to determine whether a plant is an orchid. The customs inspectors of importing nations may have the additional burden of verifying whether plants have been propagated or are natural species, as the former would appear to be exempt from the controls. The participation of the United States in limiting the entry of orchids began in May 1978. It is interesting that the standard customs form long in use in the United


49. See Inspection of Plants Killing Interest in Conservation, Miami Herald, Sept. 24, 1978, at 25-H., Col. 1. Employees of the USDA Inspection Station at the Miami International Airport estimated they were holding 10,000 orchids, in inadequate facilities, because the persons importing the orchids did not possess export permits from the countries of origin.

50. See text at note 27, supra.
States for returning citizens will assist in implementing the Convention protecting flora. One question specifically asked in the form is whether the traveler is carrying any plants. The question was not included out of a concern for endangered species, but from a desire to control the entry of diseased plants into the United States. No questions appear on the standard customs form regarding the importation of fauna or cultural properties.

An Historical Perspective

That the three multinational pronouncements were adopted during the first half of the 1970’s should not suggest to the reader that the concept of protecting national patrimony has contemporary origins. The current protection of the patrimony of the Third World nations is the result of an evolutionary process. The exploratory voyages that led to the discovery of the nations of the Western Hemisphere were commissioned principally for the purpose of seeking sources of wealth to be transported to the European nations. Historically, economic development occurred more slowly in those areas which were discovered by explorers seeking resources for the mother country, than where the purpose of exploration was colonization. From the time of discovery by the European explorers, the terms of trade were economically unfavorable to the conquered areas of the West—the receipt of Christianity in return for the labor needed to exploit the local wealth. In the early years of the Colonial period, the exploitation of the cultural wealth of the West (gold and jade artifacts) resulted in a partial conversion to economic wealth through the melting of gold to create currency to support continental wars. It was not until later in the Colonial period that the cultural wealth of the West was plundered for its intrinsic value. Artifacts then began to gain entry into the private collections of European royalty rather than into the melting pot for conversion to media of exchange.

Throughout the Colonial era, the European powers gave little thought to the preservation of the patrimony of Western territories in the sense of offering a fair exchange for their natural resources or leaving their cultural heritage undisturbed. And, because the acquired Western territories lacked a truly separate political identity, there was little thought on their part that patrimonial rights might even exist.

The exploitation of what would later become the national patrimony was nevertheless one of the motivating factors leading to de-
mands for independence. As generations with diminishing ties to the European parent nations were born, the continued exploitation of territorial wealth (principally the natural resources, but partially the cultural heritage) by the European nations was an irritant to those whose allegiance was increasingly to the territory in which they lived and worked. One natural consequence of independence would have been thought to be that the exploitation of the patrimony of the former territories would come to a halt. It nevertheless continued. In order for the newly independent nations to survive, it was necessary that these nations trade their national resources for what proved to be painfully slow development. The natural resources continued to flow to Europe, and later to the United States, although with admittedly less of an exploitive nature than during the Colonial period. Also, the cultural heritage continued to find its way into foreign private collections even though many of the leaders of the newly independent States began to accumulate collections of items with cultural significance. As wealth accumulated disproportionately in the developed nations, significant items more often found their way into the international market than into local collections. Ironically, favorable terms of trade for the natural resources of the newly independent Third World nations often created the wealth with which the developed nations could begin acquiring the cultural resources of those same nations.

Only after decades of independence, political instability, and in some instances, revolution (with the concomitant termination of longstanding international trade relationships), did the Third World nations reach the point where they could begin to effectively protect their national patrimony. Few nations reached that point before the middle of this century. This new era of concerted protection of Third World national patrimony will expectantly include elements of excessive restraint. One must view restrictive actions with a degree of patience. The apparent immediacy of the problem to the Third World is not unjustified. The title of the Convention on International Trade in Endangered Species of Wild fauna and Flora itself illustrates a problem which may be applicable to the natural resources and cultural heritage of Third World nations as well. They, too, are endangered. The developed nations’ affluence encourages increasing levels of exploitation of natural resources and further acquisition of cultural properties. Unquestionably, the Third World nations are at present in a better bargaining position than in past decades. That position enables them to obtain higher prices for their patrimony from among the purchasing competitors.
of the United States, Canada, Europe and Japan. The recent protective legislation was enacted to enable the Third World nations to pre-determine both what they will allow to be exported from their decreasing stock of national patrimony, and the rate at which they will trade it for perceived development acquisitions. It is the unilaterally determined rate of permitted trade which most disturbs the developed nations. In reacting negatively to these protective measures, however, developed nation traders often overlook the history of foreign exploitation and the frustrations experienced by the Third World in attempting to alter the terms of trade with the developed world.

Future Developments

It is difficult to imagine how the scope of national patrimony might in the future be expanded beyond natural resources, the cultural heritage and fauna and flora. One can conceive of the inclusion of increasing classes of items under the broad cultural heritage framework, but the fauna and flora and natural resources categories do not seem capable of extension. Certainly, the listings of fauna and flora to be protected can be expanded to a degree similar to the inclusion of all Orchidaceae and Cactaceae species in the current Convention. One can also conceive of technology being classified as national patrimony, but technology is not a part of the patrimony of the Third World, it is indeed antithetical to the term Third World. One might expect the developed world to place restrictions on the flow of technology to the Third World as a response to Third World practices such as cartel participation. Many persons in the developed world argue for limitations on the transfer of technology to the Third World, but usually not for reasons of protecting national patrimony, unless the protection of jobs for workers in the nations owning the technology is to be considered the protection of national patrimony.

Attempts to further protect national patrimony may be directed either to curtailing the outflow of specific elements of the patrimony, or to limiting foreign access to those portions of a nation’s patrimony remaining in the country. If human access to a nation’s patrimony causes damage, are limitations not reasonable? It may be that only limited numbers of persons will be permitted to climb pyramids or enter ancient tombs because of the physical damage caused by large numbers of visitors. Photography may well be prohibited because of the damage caused by photographing light
sensitive art work with artificial light. If access is to be restricted, should the limitations favor a country's nationals? Or, should they favor academicians, of any nationality, over tourists? These are difficult questions yet to be resolved.

The most controversial issue which is certain to arise in the near future is that of the retrieval of patrimony previously transferred abroad. While inapplicable to natural resources, and applicable only in an academic sense to fauna and flora, the retrieval issue is a definite concern in the area of cultural patrimony. The possibility of retrieval is clearly being considered by the officials of some Third World nations. The Organization of American States Convention on the Protection of the Archaeological, Historical, and Artistic Heritage of the American Nations, for example, states in the prefatory declaration that "it is essential to take steps, at both the national and international levels, for the most effective protection and retrieval of cultural treasures. . . ." This can be read to mean retrieval of items transported unlawfully under the Convention, or to mean retrieval of items long past removed. The term "retrieval" does not appear in the Convention text, although four articles are addressed to the recovery and return of "unlawfully imported or removed" items. Retrieval of other than stolen items is not likely to be effective until the Third World nations gain much greater economic power than they now possess. Any retrieval which occurs in the near future in the absence of a convention will be on an ad hoc level, substituting comity and moral commitments for economic coercion as the motivation for the return. Historically, these have not been terribly effective as motivating factors.

Conclusion

One can only speculate as to where the process of protecting the patrimony of Third World nations will ultimately lead. We have witnessed a past era of protecting national patrimony through inef-

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51. This has already occurred to a degree with Third World governments either refusing assistance from foreign archaeologists to excavate sites, reserving the work for local personnel, or insisting upon the participation of Third World nationals in excavation work supervised by developed world scholars.

52. Adopted unanimously by the OAS General Assembly on June 16, 1976 (but not yet ratified), 15 INT'L LEGAL MATERIALS 1350 (1976).

53. Id. (emphasis added).

54. Id. art. 11.

55. Id. arts. 5, 6.

56. Id. arts. 10-13.

57. Id. art. 11.
witnessed a past era of protecting national patrimony through ineffective concepts of morality. We have now entered an era of protection through legislation, the success of which will certainly have an impact on what means of protection future eras will bring. For the present, the interrelation of the three multinational pronouncements restricting the trade flow of national patrimony suggests that in drafting new measures (or refining existing measures) for the protection of any one of the three general categories of patrimony, there is much to be gained both from surveying the history of attempted protection in the other two categories, and from viewing protectionist measures as part of a sincere attempt by Third World nations to impede the perceived damaging effects of some foreign presence.