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Art & Cultural Heritage Law Newsletter

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The UNESCO Convention on Cultural Property: A Drafter's Perspective

MARK B. FELDMAN[1]

For years, trade in looted antiquities flourished in the United States. Today, the American market for ancient art and archeological material has been transformed. In the future, reputable museums are not likely to acquire works of dubious provenance, and importers of archeological material exported from countries of origin without license risk seizure by U.S. Customs or even criminal prosecution for dealing in "stolen" property.

This change in U.S. cultural property law began with a State Department determination in 1969 that the United States should help control trade in looted archeological objects because pillage of archeological sites threatens the cultural heritage of mankind. Forty years ago this week, a UNESCO Special Committee meeting in Paris negotiated the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (the "Convention").[2] I was privileged to chair the U.S. delegation that framed the terms of the Convention and to lead the effort to obtain implementing legislation in Congress. The President ratified the Convention in 1983 when Congress passed the Convention on Cultural Property Implementation Act (the "CCPIA").[3]

The Convention aims to discourage pillage of archeological sites and ethnological resources by controlling international trade in looted antiquities through import controls and other measures. This program was not an American initiative, although the Convention was given life and shape by the United States government. The United States was the first and, for some years, the only major antiquities market to support the Convention. A number of key market states did not participate in the negotiations. Forty years later, the norms propounded in the Convention are gaining broad acceptance in the international community. Close to 120 states, including the United Kingdom, France, Switzerland and The Netherlands, have now become States Party to the Convention.

This success, I would argue, can be attributed to the moderate and highly focused Convention negotiated in Paris forty years ago. The UNESCO draft tabled in 1970 would have required all States Party to impose export controls on cultural property and to bar imports of any item not licensed for export by the state concerned. The United States opposed this "blank check" system in principle and on the practical ground that no market state could accept the proposed regime. The U.S. delegation wanted to help combat pillage of archeological sites but did not wish to discourage legitimate international trade in archeological objects or other cultural property.

In the end, the U.S. delegation was able to persuade a majority of the participating governments to agree to forgo

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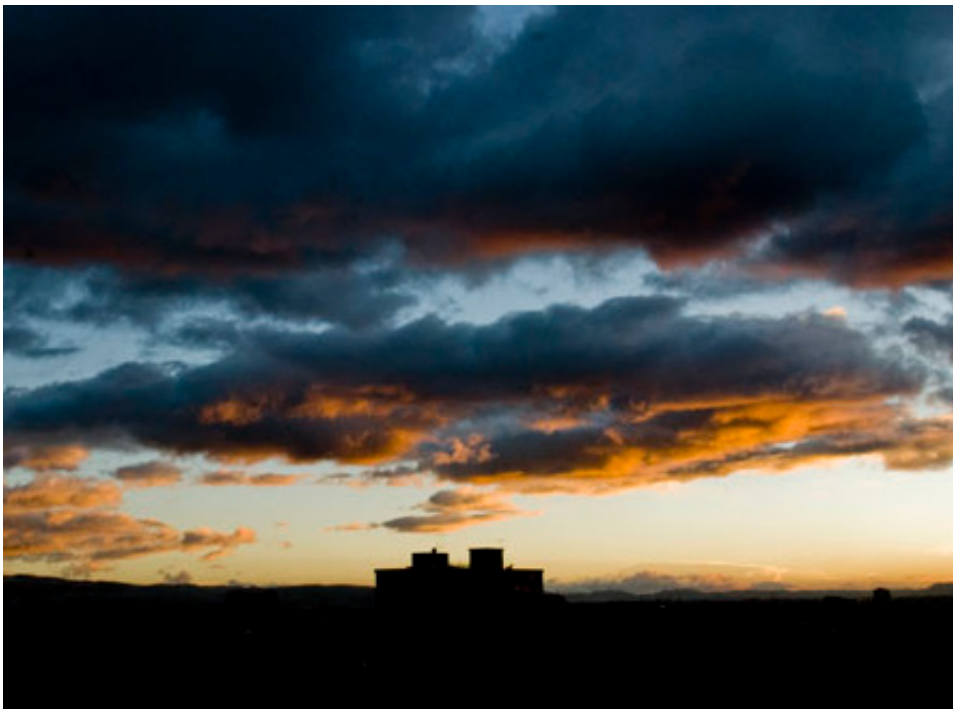

On behalf of the Art & Cultural Heritage Law Committee, welcome to the sixth issue of our newsletter and our first summer issue. In this issue, we are pleased to provide to you the five papers presented by our colleagues at the panel entitled "International Trade in Ancient Art and Archeological Objects" held at the Spring International Law Section Meeting in New York this April. This year marks the 40th anniversary of the adoption of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. In the papers presented here, these distinguished panelists address the current state and future challenges of this monumental Convention and its implementation in the U.S. through the Convention on Cultural Property Implementation Act, from the diverse perspectives of antiquities dealers, archeologists, the museum community, legal scholars and those involved in the complex negotiations that took place 40 years ago.

We hope you enjoy this exciting discussion.
David Bright, Sharon Erwin and Jacqueline Farinella, Newsletter Editors

ABOUT US

The Art & Cultural Heritage Law Committee is a committee of the American Bar Association Section of International Law. Its current leadership is as follows:

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comprehensive export/import controls in favor of a more targeted regime applying import controls in two situations: first, to recover and return objects stolen from museums, shrines and public monuments; and second, as part of a concerted international effort to meet threats to cultural patrimony from pillage of specific archeological or ethnological material. In the latter circumstance, the Convention contemplated *ad hoc* negotiations of concrete measures on a case-by-case basis with the further proviso that pending agreement "each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State."

These measures were broadly supported by American stakeholders at the time, because they adopted a moderate approach towards trade in ancient art, balancing the need to deter despoliation of archeological sites and the U.S. interest in acquiring ancient art for cultural and educational purposes. The consensus eroded, however, and U.S. ratification was delayed until 1983 when Congress enacted legislation incorporating substantive criteria and procedural safeguards that dealers and collecting institutions believed protected their interests. U.S. efforts to limit the Convention's obligations were criticized at the time – and by some today – as niggardly, but I believe experience proves the negotiating parties were right. It took more than ten years to persuade Congress to pass the measures proposed by the State Department, and I doubt that a more ambitious program would have been adopted by Congress or by any other market state.

Furthermore, the United States is doing more than any other market state to control international trade in antiquities. It is unclear that any market state that has joined the Convention actually matches the kind of measures the U.S. has adopted to implement the Convention and U.S. law in this field has moved well beyond the Convention as such. In recent years, the State Department has agreed to foreign requests for broad import controls, foreign pressures and public opinion have moved museums to change acquisition standards, and law enforcement officials have applied U.S. stolen property legislation to enforce foreign laws claiming State title to cultural property, including all archeological material in the nation's territory.

Two recent actions demonstrate the dramatic impact the Convention is having in the United States:
In June 2008, the American Association of Art Museum Directors issued new guidelines to its member institutions expressly recognizing that the Convention has created expectations for museums, sellers and donors and recommending that museums "normally should not acquire a work unless provenance research substantiates" that the work was removed from "the probable country of modern discovery" before 1970 or was legally exported from that country after 1970.[4]

This policy was laid down in article 7 of the Convention, but implementation was delayed because the Convention did not require government regulation of private institutions.

On January 14, 2009, the United States concluded an agreement with the People's Republic of China barring import of unlicensed archeological materials dating from the Paleolithic Period (75,000 B.C.) through the Tang Period (A.D. 907) and monumental wall art and sculpture at least 250 years old.[5]

This agreement, and others like it with Italy and Cyprus, implements article 9 of the Convention and is intended to help deter pillage. The agreement with China has been criticized, however, on grounds that the statutory regime does not contemplate comprehensive import controls applicable to all archeological material and that China tolerates an illicit market within its own borders.

There is no doubt that the United States is taking effective action to control illicit trade in antiquities, but serious questions have been raised whether these measures strike the balance made in the Convention, whether they comply with the intent of Congress, and whether they actually help deter pillage of archeological sites. As we approach the 40th anniversary of the Convention, it is timely to recall its aims and to assess its impact.

State Department Initiative: 1969

Between 1969-70, the American public was awakening to the fact that the cultural heritage of mankind was jeopardized by widespread looting of archeological sites in Latin America and around the world. Mexico appealed to the United States for legal action to recover and return looted antiquities, and UNESCO had initiated work on a new multi-lateral convention to require such international cooperation. The issue was brought to my attention in 1969 when Mexico presented a diplomatic note linking its demands to Mexico's ongoing help in recovering stolen American automobiles. At first, there was little interest on the part of the United States government. In fact, the United States opposed the UNESCO initiative on grounds that our legal tradition did not contemplate enforcement of foreign penal laws.

The evidence was compelling, however, that pillage of archeological sites threatened irreplaceable cultural resources, and I became convinced that, given the importance of the American art market, the United States needed to respond. The most immediate concern was the extraordinary threat to the remains of Mayan civilization documented by Dr. Clemency Coggins[6] and by Ian Graham, a photographer, whose before-and-after pictures showed brutal destruction of many important Mayan sites. At the same time, public opinion was disturbed by scandals involving prominent American museums. In one widely publicized case, a dealer offered the Metropolitan Museum of Art a beautiful, multi-colored façade from a previously unknown Mayan site. To its credit, the Museum declined the offer and the piece was returned to Mexico.

I recommended that the State Department reverse course and agree to take legal measures to control illicit trade in archeological objects. The State Department adopted this position and other agencies, notably the Justice

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Department and Treasury, were supportive. Nothing could have been accomplished, however, without cooperation of the interested domestic constituencies. Archeologists strongly favored the program, but the process could not proceed without support in the museum community and art world. Not surprisingly, many worried that curtailing trade in ancient art would damage the mission of museums and the public interest. Antiquities dealers were concerned that the State Department might agree to limit art imports as a bargaining chip to obtain concessions from other governments on matters unrelated to cultural property issues.

Fortunately, conditions were ripe for action. Thanks to the archeologist community and supportive media, the issue received considerable public attention, and other stakeholders were prepared to negotiate. To facilitate these discussions, the State Department asked the American Society of International Law to host a panel of archeologists, museum representatives, dealers and academics chaired by the distinguished attorney, William D. Rogers. Professor Paul Bator served as reporter and contributed much to the deliberations.

Compromises had to be made, but a consensus was forged that enabled the State Department to initiate a three part program to control imports of ancient works of art looted from archeological sites and illegally exported from countries of origin. The first part was a treaty with Mexico for the recovery and return of pre-Columbian and colonial objects of "outstanding importance to the national patrimony" and important historical documents. The second was a statute prohibiting imports of pre-Columbian monumental and architectural sculpture exported illegally from Latin America. The third consisted of UNESCO negotiations for a multilateral treaty seeking to diminish pillage of archeological sites.

The first two items were surprisingly non-controversial at the time and relatively easy to implement. I negotiated the Mexican Treaty in 1970, and Congress passed the pre-Columbian legislation that I drafted with Congressional staff in 1972.[7] The Convention was a different story, however.

The draft prepared by the UNESCO Secretariat, based on comments from the interested governments, proposed a comprehensive ban on international trade in virtually all cultural property unless the object was accompanied by an export license from the country claiming patrimony. Given the reluctance of many countries to approve export of even routine and plentiful cultural artifacts, such a "blank check" regime would have severely restricted international trade in nearly all cultural objects of artistic, historical and educational interest. Panelists were also concerned that other art-importing states would not cooperate, and that unilateral U.S. import controls would merely divert art objects to other markets.

Ultimately, most stakeholders agreed that carefully focused import controls were necessary to dampen market incentives for pillage of archeological sites and endorsed an international convention for that purpose provided it had no retroactive effect on existing American collections. The panel rejected the "blank-check" approach that would have implemented foreign export controls designed to keep art at home in favor of limited import controls intended to discourage looting that threatened to destroy the record of human civilization while preserving imports of ancient art to promote study of ancient civilizations.

Based on this consensus, the State Department prepared an alternative Convention text committing its parties to: (1) return cultural property stolen from museums, shrines and monuments; (2) require public institutions, and to encourage private museums, not to acquire important cultural property illegally-removed from another State Party; and (3) "take appropriate measures," including agreed import controls, to remedy situations where a state's cultural heritage is jeopardized by the removal of important cultural property. These points, with some modification, make up the core of the Convention as adopted.

UNESCO Negotiations: 1970

The Convention was drafted by a Special Committee of Governmental Experts meeting in Paris in April, 1970. Some forty-six states participated, but important market states, including the United Kingdom and Switzerland, did not. While the negotiations were friendly, there was considerable resistance to the U.S. approach from a number of art-rich nations, political problems with the Soviet bloc, technical differences regarding property rights, and procedural obstacles. The United States prepared an alternative treaty text, but we were not permitted to table it as such. Instead, the United States had to propose amendments to the Secretariat draft article by article. Many votes were extremely close. The U.S. won some and lost others in no particular pattern. As Professor Bator explains in his brilliant "Essay on the International Trade in Art," the drafting process was chaotic, and the final text "is not a model of clarity and consistency."[8]

In the end, working with Mexico and other states that understood that the Convention could not succeed without U.S. support, the U.S. was able to persuade the Committee to adopt a text that met essential United States negotiating objectives. (A detailed negotiating history and analysis are set out in the U.S. Delegation Report submitted to the Secretary of State, July 27, 1970.)

Article 9, the most far-reaching commitment, provides:

Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archeological or ethnological materials may call upon other States Parties who are affected. The States Parties ... undertake ... to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State.[9]

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Critics argued that this provision for bilateral agreements did not require a "concerted international effort" as contemplated by Article 9 and opened the door for unilateral import controls that would be ineffective in deterring pillage and damaging to American interests.

This language, based on a United States proposal, substituted a regime of *ad hoc* future agreements for the comprehensive export/import controls contemplated by the UNESCO draft. A concerted international effort was expected but was not defined. As negotiations of bi-lateral agreements might go slowly or fail, provisional measures were contemplated to prevent irremediable injury.

Implementing Legislation: 1973-1983

The U.S. Senate gave advice and consent to ratification of the Convention on August 11, 1972 on the understanding that its provisions were neither "self-executing nor retroactive." This understanding was suggested by the Executive recognizing that the United States could not implement the Convention without significant changes in United States law. The plan was to introduce legislation promptly and to delay ratification pending enactment. As it turned out, that process took ten years of heated debate and difficult negotiation. The Convention finally entered into force for the United States on December 2, 1983.

There is not space here to detail the negotiations that ultimately lead to the CCPIA. In brief, antiquity dealers and their supporters, including Senator Daniel Moynihan, had serious objections to the implementing legislation submitted to Congress by the State Department, and numerous changes had to be made to meet their concerns. The House of Representatives passed a bill in 1977.[10] The Senate held hearings the next year, but declined to act until 1982. Some Senatorial concerns were substantive; others were related to growing frustration with the United Nations.

The State Department bill was supported by archeologists, major museums and by the principal museum associations, but it was strongly opposed by dealers and by some museums and academics. Speaking for the Department, I testified that the United States has an important national interest and a moral obligation to help avert destruction of the cultural heritage of mankind.[11] Opponents held a deep concern that the State Department, under diplomatic pressure, would agree to impose excessive import controls without protecting American cultural interests, as contemplated in the negotiated Convention.

One of the most controversial parts of the draft legislation submitted by the State Department authorized the Executive to conclude either bilateral or multilateral agreements with States Party to the UNESCO Convention calling for targeted import controls when the President determines that (1) import controls "with respect to designated objects or classes of objects would be of substantial benefit in deterring...pillage," and (2) the controls would be consistent with "the general interest of the international community in the interchange of cultural property among nations for scientific, cultural and educational purposes." The State Department proposed that a panel of experts representing the interested communities be appointed to advise the Executive.

Critics argued that this provision for bilateral agreements did not require a "concerted international effort" as contemplated by Article 9 and opened the door for unilateral import controls that would be ineffective in deterring pillage and damaging to American interests. The critics had a point. Article 9 does not provide for bilateral agreements as such, but it proved difficult to define a "concerted international effort," and some believed that the State Department might be in better position to protect United States cultural interests in bilateral negotiations than in a multi-national process organized by UNESCO. In the 1970s, there was no reason to expect other art-importing countries to participate in the near future, and parties to the Convention seeking import controls could easily have formed coalitions supporting measures beyond U.S. interests. I proposed the bilateral option because I was concerned that Article 9 would remain a dead letter unless Congress authorized bilateral cooperation, and I expected the State Department to limit import controls to material attracting serious threats to archeological resources and to insist on

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Numerous safeguards were proposed, including a provision that each bilateral agreement be approved by Congress.

conditions preserving a reasonable flow of ancient art to the United States.

Numerous safeguards were proposed, including a provision that each bilateral agreement be approved by Congress. Ultimately, a grand bargain was achieved in Congress that imposed significant procedural and substantive constraints on Executive authority to enter bilateral agreements and authorized the Executive to establish temporary import controls unilaterally in three critical situations: where an "emergency condition" threatened either newly discovered archeological or ethnological material or particular sites of high cultural significance, or to counter a threat of "crisis proportions" to the record of a "particular culture or civilization."[12] To my mind, this authority was the most important part of the bill.

The main safeguards established by Congress to protect the public interest from excessive interference with the movement of cultural property into the United States were (1) the formation of a formal Cultural Property Advisory Committee ("CPAC") expected to represent the conflicting interests of the American stakeholders directly affected, and (2) statutory prohibition of import controls, other than emergency controls, unless "applied in concert" with those nations individually having a significant import trade in the material concerned. Exceptionally, the President is authorized to enter an agreement for import controls, if he determines that (a) "similar restrictions" by other market states "are not essential," and (b) application of U.S. import controls in concert with other nations having a significant import trade in such material "would be of substantial benefit in deterring a serious situation of pillage."[13]

This language affords the Executive some latitude in determining what kind of foreign measures are necessary to enable U.S. action to be of substantial benefit, but the statute clearly requires a good faith determination that other nations involved in the trade are taking measures to curb imports of the restricted materials. The U.S. government is not authorized to act unilaterally unless an emergency condition exists as defined by law.[14] It is not clear how the State Department makes the findings required by law as it has never explained its interpretation of the statute, disclosed the bases for those findings or published the CPAC reports to Congress required by the Act. ◆

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[2] 823 U.N.T.S. 231 (1972), TIAS 7008.

[3] P.L. 97-446; 19 U.SC. § 2601, *et seq*.

[4] REPORT OF THE AAMD TASK FORCE ON THE ACQUISITION OF ARCHEOLOGICAL MATERIAL AND ANCIENT ART, June 4, 2008.

[5] *Memorandum Between the Government of the United States of America and the Government of the People's Republic of China Concerning the Imposition of Import Restrictions on Categories of Archeological Material from the Paleolithic Period through the Tang Dynasty and Monumental Sculpture and Wall Art at least 250 Years Old*, January 14, 2009, TIAS…, implemented by import restrictions, January 16, 2009, 74 Fed. Reg. 2838-2844.

[6] *See Efrat, Protecting against Plunder: The United States and the International Efforts against Looting of Antiquities*, Cornell Law School Working Paper Series No. 47, at 24 (2009).

[7] P.L. 92-587 (1972), 19 U.S.C. 2091-2095.

[8] Bator, *Essay on the International Trade in Art*, 34 Stanford Law Review 275, 373 (1982).

[9] 823 UNTSU.N.T.S. 231 (1972), TIAS 7008.

[10] H.R. 5643, H.Rep. 95-615 (95th Cong. 1st Sess. 1977), approved unanimously October 17, 1977.

[11] Testimony of Deputy Legal Adviser, Mark B. Feldman, Hearing on H.R. 5643 and S. 2261, Subcommittee International Trade, Senate Finance Committee, 95th Cong., 2d sess., February 8, 1978.

[12] 19 U.S.C. 2603.

[13] *See* 19 U.S.C. 2602 and 2603, *supra*.

[14] *Id*.

Archaeologists and the 1970 UNESCO Convention

NANCY C. WILKIE

Background to the 1970 UNESCO Convention

As early as 1964, the General Conference of the United Nations Educational, Scientific and Cultural Organization ("UNESCO") adopted a Recommendation that Member States take whatever action was necessary to protect cultural property within their borders.[1] One of the main principles of that recommendation was that Member States should "take appropriate steps to exert effective control over the export of cultural property" and "to prevent the illicit transfer of ownership of cultural property." Nothing in the recommendation noted, however, that the source of much of the cultural property involved in the illicit trade was the product of clandestine excavations.

Five years later, when a group of about eighty graduate students and professors from Harvard University attempted to convince the College Art Association (the "CAA") to adopt a statement at its 1969 annual meeting decrying the destruction caused by the looting of archaeological sites in order to feed the international art market, their pleas fell on deaf ears. In fact, at that meeting many art historians argued that the problem was not "serious enough" to warrant interference in an art market that had operated without regulation or oversight for more than a century.[2]

Yet there was growing evidence of a dramatic increase in the looting of monuments in Mexico and Guatemala from about 1960 on, as the 39th International Congress of Americanists recognized in their resolution condemning the illicit trade in Pre-Columbian antiquities in August 1968. What had been lacking in the debate was documentation of the looting and subsequent sale of Mayan objects in the U.S. and elsewhere. In 1969, Clemency Coggins provided this evidence in her seminal article "Illicit Traffic of Pre-Columbian Antiquities".[3] In it, she published a list of stone sculptures and reliefs that had been stolen recently from sites in Guatemala and Mexico, some of which she could trace to dealers and museums in the United States.[4] At many sites, looters had used chain saws to cut up stone monuments and large sculptured stelae so that they could transport them more easily to foreign markets, "saving" them from disintegration in the jungle as some would argue. But, in fact, every major looted piece arrived at its destination damaged, requiring repair before it could be sold or displayed. Moreover, those pieces that had not been documented were now without context and could no longer be connected with the sites from which they were stolen. Their historical significance had been lost and their aesthetic value diminished due to the damage caused by the looters.

Preah Kahn, Cambodia.
Late 12th century.
Beheaded sculpture.

One such piece is a fresco fragment from Teotihuacan, Mexico acquired by the Art Institute of Chicago in 1962.[5] According to Coggins, by 1969 at least eleven museums in the U.S. had acquired pieces of wall paintings from the site, and numerous others were in the hands of dealers and private collectors.[6]

As Coggins noted, this list of looted Mayan antiquities "provided a *verifiable* body of horror stories for which American dealers, museums and collectors shared much of the responsibility."[7] With this evidence in hand, the United States, in 1972, enacted the Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals Act,[8] which prohibits the importation of these materials from Mexico, South America, Central America and the Caribbean if they lack an export permit from their country of origin. The law has not been very effective, however, since the procedures for recovering objects are very expensive and time-consuming. Moreover, the law has no criminal provisions—only the civil penalty of forfeiture of the imported property.

Adoption of the 1970 UNESCO Convention

In response to the growing pressure to combat the looting of archaeological sites, UNESCO adopted the Convention

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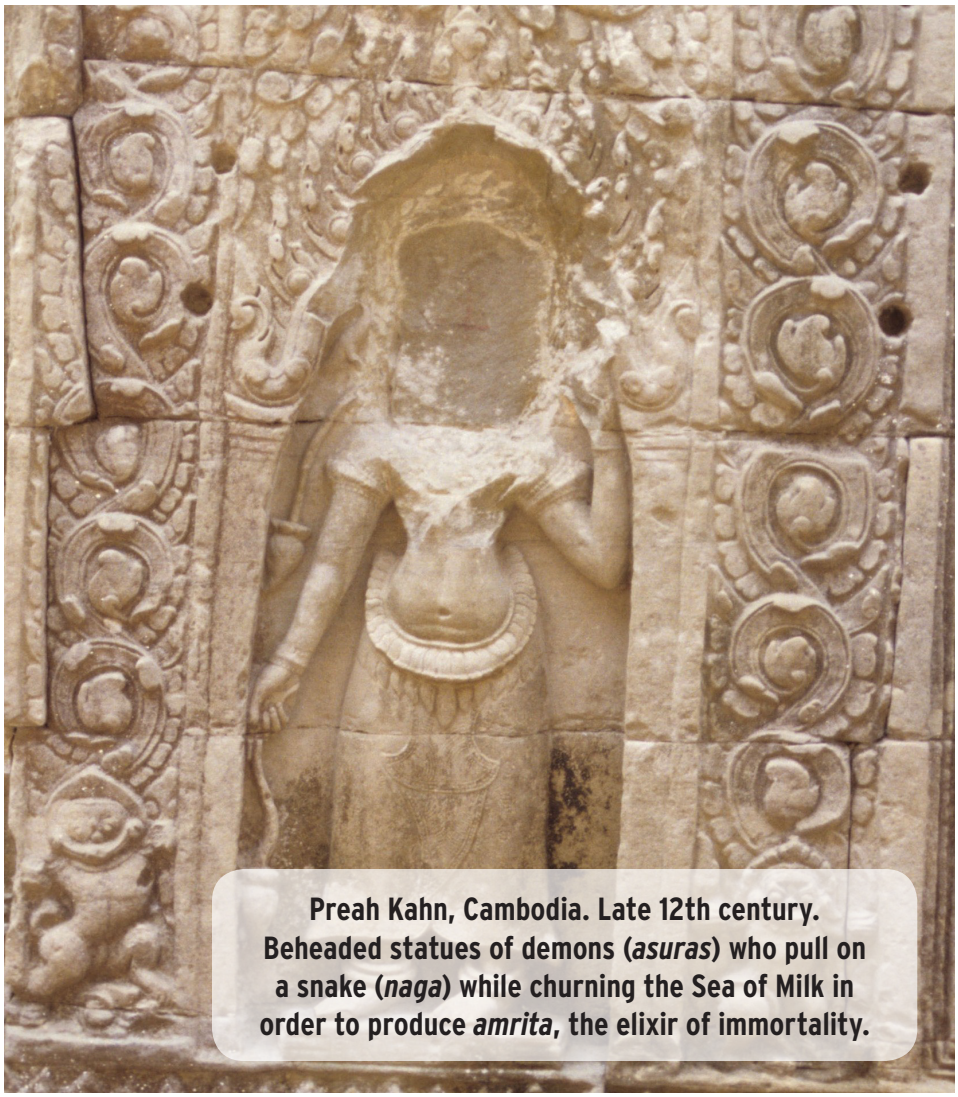

Preah Kahn, Cambodia. Late 12th century. Beheaded statues of demons (*asuras*) who pull on a snake (*naga*) while churning the Sea of Milk in order to produce *amrita*, the elixir of immortality.

on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property in November 1970 (the "Convention"). Two months later the CAA adopted a resolution urging the U.S. Senate to ratify the draft Convention,[9] at the same time calling on its members, museums and collectors "to refrain from purchasing or accepting "works of art" exported in contravention of the Convention.

A month earlier the Archaeological Institute of America (the "AIA") passed a similar resolution,[10] but in this case the objects in question were called "antiquities" and "archaeological materials" rather than "works of art," giving greater recognition to the fact that these objects generally are acquired through the illicit excavation of archaeological sites or destruction of archaeological monuments. It also specifically applauded efforts of authorities both in the United States and abroad to prevent the despoliation of archaeological sites.

It was not until 11 August 1972, however, that the United States Senate unanimously gave its advice and consent to ratification of the Convention, but with the understanding that it was not self-executing. A few months later the Metropolitan Museum of Art unveiled the Euphronios krater, a sixth century B.C. red-figured vase for which it had paid $1 million, and questions soon arose about its provenance. Many believed that it had been illegally excavated from an Etruscan tomb near Rome and questioned the legitimacy of the purchase, especially since the Met was among those institutions that had endorsed ratification of the Convention.

The CPIA

Despite the obvious need for measures to control the illicit trade in antiquities, it took ten years for the necessary domestic implementing legislation, the Convention on Cultural Property Implementation Act (the "CPIA"),[11] to become law in the U.S. Only in February 1983 did the United States deposit the instrument of acceptance with UNESCO.

The Senate Report on the CPIA stipulates that the President of the United States may "enter into bilateral or multilateral agreements intended to provide U.S. cooperation towards protecting from the danger of pillage the archaeological or technological materials comprising the cultural patrimony of another State Party."[12] One of the reasons cited for the legislation in the Senate Report on the CPIA was the increasing demand for archaeological and ethnological materials and antiquities. It also noted that because increased supply can only come "from the sales of known artifacts and those newly recovered from archaeological sites," the trade issues involved are unlike those connected with "the normal concerns of the reciprocal trade agreements program or U.S. trade law."

This statement is in direct contradiction to opinions of scholars, such as John Merryman, who claim that market transactions should be the means of exchange of cultural property, noting that both the World Trade Organization and European Treaties prohibit export controls on "goods".[13] Yet these treaties provide an exception for "the protection of national cultural treasures,"[14] and so Merryman asks, "would an ancient vase of no particular distinction, one of many that for most purposes are unremarkable and fungible, be considered a treasure?" He poses the same question regarding "the allegedly huge numbers of duplicate antiquities in storehouses in major source nations."[15]

In the eyes of archaeologists, howev-

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Members are appointed by the President for three-year terms, and they may be reappointed for additional terms or serve until a successor is named.

er, no properly excavated object is "fungible" or a "duplicate," even when numerous examples of the same type, however ordinary, are recovered from a single site. New scientific techniques for the analysis of archaeological materials continue to be devised, for example those that can identify organic residues on ancient pots in order to reveal what they once contained. This knowledge can in turn lead to links between a pot's form and its function, as well as to information about ancient diet and nutrition.

For example, forty-two years after the tomb of King Midas, the legendary ruler of the Phrygian kingdom in central Turkey, was discovered, Patrick McGovern of the University of Pennsylvania was able to determine the menu of the funerary banquet held there in ca. 700 B.C.[16] More than 150 bronze vessels were laid out in the tomb along with three large cauldrons that presumably once held the beverage consumed at the funeral meal.[17] Although analyses of chemical residues in the drinking vessels were done shortly after the tomb was excavated, they were largely negative. Forty years later, however, new techniques and more sensitive analytical instruments produced evidence for a mixed fermented beverage of grape wine, barley beer, and honey mead. In addition, eighteen pottery jars were found to have held a spicy lentil and barbecued sheep or goat stew.

More recently, McGovern has been collaborating with researchers at the University of Pennsylvania's Abramson Cancer Center to determine whether or not any of the chemical compounds he has identified in wine residues from ancient Egyptian vessels have medicinal benefits that might be useful today.[18] Had the vessels he analyzed been sold on the antiquities market, we surely would be deprived of knowledge from the past that has the potential to benefit us in the future.

Bilateral Agreements and the CPAC

According to the CPIA, the President may enter into bilateral agreements with other states party to the CPIA for the imposition of import restrictions on designated categories of archaeological and ethnological materials after seeking "substantial input from knowledgeable representatives of the private sector."[19] To this end, the CPIA established an eleven-member Cultural Property Advisory Committee (the "Committee"). Representation on the Committee is as follows:

1. Two members who represent the interests of museums;
2. Three who are expert in archaeology, anthropology, ethnology or related fields;
3. Three who are expert in the international sale of cultural property; and
4. Three who represent the interests of the general public.

Members are appointed by the President for three-year terms, and they may be reappointed for additional terms or serve until a successor is named. The appointments do not require Senate confirmation.

Once appointed, members of the Committee must recuse themselves from any matters under consideration that would have a "direct and predictable effect" on their financial interests. However, if such a conflict of interest should arise, a member may seek a waiver from legal counsel to the Committee in order to participate in the deliberations. Since members are appointed to the Committee because of their expertise in matters that come before it, conflicts of interest are inevitable. To deprive the Committee of a member's expertise in a matter under review would be a disservice to the Committee. As a result, at least within my experience, waivers usually have been granted.

Requests from foreign governments for Memoranda of Understanding ("MOUs") are transmitted to the Committee by the State Department along with additional information not contained in the request. This includes written comments from the public, which become part of the record of the meeting and are transmitted to the appropriate State Department officials. As

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part of its review of a request, the Committee also *may* hold a public hearing at which oral presentations are limited in order to allow time for interchange with Committee members.

Once the Committee has reviewed a request, it recommends a course of action to the United States State Department, where the President's decision-making responsibilities under the CPIA reside. At this point the Committee's work is complete. The State Department leads the negotiations with the requesting country if the decision calls for a five-year bilateral agreement, while the Untied States Department of Homeland Security takes immediate action if the final decision calls for emergency import restrictions.

Recent Developments

At the time that the United States became a State Party to the Convention, 49 other countries also had ratified or accepted the Convention, most "source" countries. Today 119 countries are party to the Convention,[20] including most of the major "market" countries. Among the most recent State Parties are Belgium and the Netherlands (2009), Germany (2007), Switzerland, Denmark and Sweden (2003), the United Kingdom (2002), and France (1997). Of these major market countries, only Switzerland implements the Convention with bilateral agreements, but unlike the United States, Switzerland's agreements are in perpetuity. To date the United States has entered into bilateral agreements with thirteen countries, of which twelve are currently in force.

One country with which the United States has entered into bilateral agreements is Cambodia, where looting of archaeological sites has been particularly rampant (Figs. 1-2). In 1999, the United States imposed emergency import restrictions on Khmer stone sculpture and other architectural elements from Cambodia.[21] This action was followed with a bilateral agreement in 2003, which was renewed for an additional five years in 2008.[22] Subsequent to the agreement, the Cambodian government established the Special Police Corps for the Protection of Cultural Heritage, headquartered in the Angkor Park of Siem Reap; and in 2007, the United States repatriated a sandstone carving of an Apsara to Cambodia that had been smuggled out of Cambodia and seized by the United States Immigration and Customs Enforcement.[23]

As in the case of Cambodia, one outcome of these bilateral agreements has been increased efforts on the part of source countries to protect their cultural property from pillage, which is of primary concern when the Committee undertakes interim reviews and requests for renewals of MOUs. Moreover, most countries now have at least partial inventories of cultural property in their museums, churches and other institutions. In addition, archaeological sites are being protected, often by members of local communities that have come to see them as valuable resources to be protected rather than plundered for a one-time gain. Preservation of the world's cultural heritage is no longer simply in the hands of archaeologists, museums, collectors and dealers, but it has become a concern of all humanity. ◆

1 Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property (19 Nov. 1964), available at http://portal.unesco.org/en/ev.php-URL_ID=13083&URL_DO=DO_TOPIC&URL_SECTION=201.html.

2 Coggins, *Illegal International Traffic in Art: Interim Report*, 30 ART JOURNAL 384 (1971).

3 Coggins, *Illicit Traffic of Pre-Columbian Antiquities*, 29 ART JOURNAL 94 (1969).

4 *Id.*

5 *Mural Fragment Representing a Ritual of World Renewal*, A.D. 600/750, available at www.artic.edu/aic/collections/artwork/14968.

6 Coggins, *supra* note 2.

7 *Id.*

8 19 U.S.C. §§ 2091-95.

9 *The College Art Association Annual Meeting*, 30 ART JOURNAL 296 (1971).

10 *Resolutions on the Importation of Antiquities*, available at www.archaeological.org/webinfo.php?page=10192.

11 19 U.S.C. §§ 2601-13.

12 U.S. Senate Report 97-564.

13 *See, e.g.*, John Henry Merryman, *A Licit International Trade in Cultural Objects*, ART MARKET MATTERS 27 (Helvoirt, Netherlands: European Fine Art Foundation 2004).

14 *Id.*

15 *Id.*

16 McGovern, *The Funerary Banquet of 'King Midas'*, 42 EXPEDITION 21-29 (2000)

17 *Id.*

18 Patrick E. McGovern, Armen Mirzolan and Gretchen R. Hall, *Ancient Egyptian Herbal Wines*, available at www.pnas.org_cgi_doi_10.1073_pnas.0811578106.

19 *Supra*, note 10.

20 http://portal.unesco.org/la/convention.asp?KO=13039&language=E

21 64 FR 67479.

22 *See* http://exchanges.state.gov/heritage/culprop/cbfact.html for the texts of these agreements.

23 http://cambodia.usembassy.gov/repatriation_ceremony.html

United States Implementation of the 1970 UNESCO Convention

PATTY GERSTENBLITH*

Introduction

Growth in the trade of illicitly-obtained cultural objects following World War II prompted UNESCO in the 1960s to begin the drafting of a new international convention. The UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (the "Convention") was finalized in November 1970.[1] The goal of this Convention is to regulate the international trade in cultural property,[2] to encourage nations to regulate their domestic trade in art objects, and to provide an international mechanism for recognition of different countries' import and export controls with respect to cultural objects.

In 1972, the United States Senate gave its unanimous consent to the ratification[3] of the Convention. However, it stated one reservation and six "understandings" to its ratification. One of these understandings provided that the United States viewed the Convention as executory in nature. This meant that for the Convention to have domestic legal effect, Congress would have to enact legislation by which the Convention would be implemented into domestic law. Such legislation was proposed and passed in the House of Representatives during the late 1970s, but it was largely held hostage in the Senate through the efforts of the late Senator Daniel Patrick Moynihan of New York, the heart of the United States art and antiquities market. Although it was one of the first significant market nations to vote to ratify the Convention, due to this stalemate, the United States' implementation of the Convention was delayed for ten years. In late 1982, the United States finally enacted implementing legislation, the Convention on Cultural Property Implementation Act ("CCPIA"),[4] adopting only two provisions of the Convention, Article 7(b) and Article 9.

In interpreting the CCPIA, one must keep in mind the purpose of the Convention itself, which the CCPIA implements, and the goals for the CCPIA as set out by Congress in the statute's legislative history. The Senate Report states:

> The purpose of this bill is to...promot[e] U.S. leadership in achieving greater international cooperation towards preserving cultural treasures that not only are of importance to the nations whence they originate, but also to a greater international understanding of our common heritage...
>
> *Background* — The increasing demand in recent years for archaeological and ethnological materials and antiquities has spurred, in most experts' opinions, a great increase in the international exchange of such materials. But unlike other commodities, increased or new production of these articles cannot rise to meet the demand. Instead, the increased supply results from the sales of known artifacts and those newly recovered from archaeological sites. The unique origin and character of these articles raises serious trade issues distinct from the normal concerns of the reciprocal trade agreements program or U.S. trade law.
>
> [T]he demand for cultural artifacts has resulted in the irremediable destruction of archaeological sites and articles, depriving the situs countries of their cultural patrimony and the world of important knowledge of its past. Further, because the United States is a principal market for articles of archaeological or ethnological interest and of art objects, the discovery here of stolen or illegally exported artifacts in some cases severely strains our relations with the countries of origin, which often include close allies.

As stated by the Department of State in commenting on S. 1723:

> The legislation is important to our foreign relations, including our international cultural relations. The expanding worldwide trade in objects of archaeological and ethnological interest has led to wholesale depredations in some countries, resulting in the mutilation of ceremonial centers and archaeological complexes of ancient civilizations and the removal of stone sculptures and reliefs. In addition, art objects have been stolen in increasing quantities from museums, churches, and collections. The governments which have been victimized have been disturbed at the outflow of these objects to foreign lands, and the appearance in the United States of objects has often given rise to outcries and urgent requests for return by other countries. The United States considers that on grounds of principle, good foreign relations, and concern for the preservation of the cultural heritage of mankind, it should render assistance in these situations.[5]

Article 7(b)(i) of the Convention calls on States Parties to prohibit the import of stolen cultural property that had been documented as part of the inventory of a museum or similar public institution.[6] This provision is codified in the CCPIA.[7] The Department of Homeland Security, working through Immigration and Customs Enforcement ("ICE") and Customs and Border Protection ("CBP"), may seize and forfeit cultural objects that can be shown to have been documented in the collection of a museum or other secular or religious institution and that was stolen after the later date of 1983 or when the other nation ratified the Convention, without need to establish knowledge or intent on the part of the importer. This simplifies significantly the elements that the government must establish and the procedures for seizure of objects stolen from a public institution in another State Party.

United States Implementation of Article 9

Article 9 of the Convention provides a

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A State Party must first submit a request to the United States through diplomatic channels to enter into a bilateral agreement.

mechanism by which States Parties assist each other in cases of pillage of archaeological and ethnological materials.[9] While the Convention does not define the terms "archaeological" and "ethnological" materials, the CCPIA does and, particularly because archaeological materials must be at least 250 years old, this definition is restrictive[10] and curtails the potential applicability of the CCPIA.[11]

The United States' implementation of Article 9 is complex and is split into two sections of the statute. The first is found in Section 303 of the Act,[12] which provides a mechanism by which the United States can enter into bilateral or multilateral agreements with other States Parties for the imposition of import restrictions on designated categories of archaeological or ethnological materials. These bilateral agreements are negotiated between the United States and a requesting State Party without the necessity of Senate ratification of a new treaty. Over the twenty-seven years that the CCPIA has been in effect, the United States has entered into bilateral agreements with only thirteen nations: El Salvador, Guatemala, Nicaragua, Honduras, Peru, Bolivia, Mali, Italy, Canada, Cambodia, Colombia, Cyprus and China.[13]

A State Party must first submit a request to the United States through diplomatic channels to enter into a bilateral agreement. The request is referred to the Cultural Property Advisory Committee,[14] which makes a recommendation concerning the four determinations that the CCPIA outlines[15] to the State Department official, to whom the President's authority under the CCPIA has been delegated. The decision maker determines whether the four statutory criteria are satisfied, and, if they are, the United States enters into negotiations to finalize a bilateral agreement.[16] Once import restrictions are in place, objects that fall into the designated categories may be imported into the United States if they are accompanied by documentation of legal export, such as an export certificate, from the country of origin or if the importer can present satisfactory evidence that the objects left the country of origin before the effective date of the import restriction or more than ten years before the date of entry into the United States.[17] It is worthwhile looking at the four determinations in greater detail.

First Determination: The cultural patrimony of the State Party is in jeopardy from the pillage of archaeological or ethnological materials.[18] This provision of the CCPIA tracks most closely the text of Article 9, but which raises interpretation questions of its own, in particular because most of the operative terms are left undefined.[19] It seems that the terms "jeopardy" and "pillage" are to be given their normal definitions, without implying that a crisis or emergency situation must exist.[20]

Second Determination: This determination looks at whether the requesting State Party has taken steps consistent with the Convention to protect its cultural patrimony.[21] In analyzing this determination, one would look to whether the requesting nation has made efforts, within the range of its ability, to protect archaeological sites; educate local people, as well as those entering and leaving the country, about the need to protect archaeological sites and to prevent trade in looted artifacts; and train site guards and customs officials. As the goal is to protect the in situ preservation, particularly of archaeological artifacts, this determination evaluates whether the requesting nation is making efforts to further this goal.

Third Determination: This determination[22] examines whether other nations with a significant import trade in the cultural materials for which the requesting nation has asked the United States to impose import restrictions are or will be undertaking actions to ensure that the United States import restrictions will further the goal of deterring pillage. The nature and extent of this action is not, however, spelled out in the statute, al-

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though it clearly includes actions that are expected to be implemented within a reasonable time.

The first step in the analysis is to determine what other nations have a significant import trade in the artifacts that would be subject to United States import restriction. The Senate Report comments:

The determination of which countries have a significant import trade in the material that is in jeopardy of being pillaged, and whether the effort will help to ameliorate the problem, is within the discretion of the President. These decisions inherently preclude precise determination, given the goals of the Convention and the uncertain factual basis for them. For example, whether a country has a "significant import trade" may be a function of not only value of imports, but type and historic trading patterns. Therefore, a measure of Presidential judgment is required.[23]

Furthermore, the CCPIA says that the restrictions imposed by other countries must be "similar" to those of the United States but does not require that they be identical. Thus, actions that are taken by other nations with a significant import trade must serve the same basic purpose as the United States-imposed restrictions (that is, to reduce market demand) but do not need to look the same or operate in the same manner. The Senate Report makes clear that Congress intended to vest considerable amount of discretion in the President in making this determination, in particular.

This determination also requires that less drastic remedies not be available.[24] While any detailed discussion of this point falls outside the scope of this paper, it has been suggested that court decisions recognizing national ownership of antiquities[25] make import restrictions imposed under the CCPIA unnecessary. While, as the Second Circuit held in *United States v. Schultz*, the CCPIA and prosecutions under the National Stolen Property Act[26] work in very different ways, the most significant difference is that a forfeiture action brought under the CCPIA does not require proof of any knowledge or intent to violate the CCPIA on the part of anyone involved in the importation process. This makes forfeiture under the CCPIA a more straightforward process than under other laws and is arguably a unique remedy.[27] In addition, import restrictions under the CCPIA are the least drastic remedy because the CCPIA provides for no criminal penalties or any civil penalty other than forfeiture of the materials subject to import restriction.

There is also an important exception to the third determination[28] When the third determination is read with the exception, the United States can enter into a bilateral agreement (1) when the United States is the only nation with a significant import trade in the material under consideration, or (2) if a nation with a significant import trade fails to impose import restrictions, but that country's participation is not essential to deter the pillage. In the second circumstance, it is sufficient if the United States' import restrictions, in conjunction with actions of other nations with a significant import trade in the relevant cultural materials, will be of substantial benefit to deterring the pillage.

Fourth Determination: This determination looks to whether import restrictions are consistent with the interest in encouraging the interchange of cultural property "for scientific, cultural, and educational purposes."[29] While a variety of actions may satisfy this determination, typical examples include making those objects that are subject to import restriction available to American museums on loan (either short-term or long-term) so the American public will still have opportunities to see these types of objects; facilitating opportunities for American scholars to engage in research and excavation in that country, and ensuring publication of the cultural materials at issue so they are accessible in a variety of formats.

The bilateral agreements, which take the form of Memoranda of Understanding ("MOU"), include reasons for the agreement, the list of designated materials whose import is to be restricted, and other provisions, found primarily in Article II of the MOU. The Article II provisions demonstrate that, while many people focus exclusively on the import restrictions, the agreements establish a mutually beneficial relationship between the United States and the other country. These provisions create a path for mutual cooperation between the United States and the other country in the realm of cultural heritage protection, the provision of technical assistance, and certain provisions that are specific to the particular country involved.

For example, the MOU with El Salvador included the expectation that the national museum of El Salvador would be rebuilt, and this was done.[30] The MOU with Italy includes the expectation that Italy will make its best efforts to provide materials that belong to the designated categories on long-term loan to museums in the United States, consistent with current Italian legislation that makes loans available for educational, research and conservation purposes.[31] In response, Italy extended the period for which Italian art works can be on loan, currently up to a maximum of four years. Another example of mutual cooperation is the publication of the numerous International Council of Museums (ICOM) Red Lists that illustrate categories of archaeological and ethnographic objects that are in danger from pillage; these often track the list of designated materials in the bilateral agreements.

While these additional provisions of the MOUs provide expressions of the directions in which the relations between the two countries may develop concerning cultural heritage, these undertakings are not prerequisites to the renewal of a MOU, as they are not requirements under the statute, except to the extent that they relate to the statutory determinations. The criterion for renewal is that the same conditions that originally justified the agreement still exist.[32]

The second provision of the CCPIA allows the United States to impose unilateral import restrictions, without the negotiation of a bilateral agreement, in

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case of an "emergency."[33] The CCPIA describes three circumstances that constitute an "emergency condition".[34] However, this emergency provision is available only if the other State Party has already submitted a request for a bilateral agreement. This emergency provision seems to be the implementation of the last part of Article 9, which calls on States Parties to take "provisional measures" to prevent irremediable injury while an agreement on more permanent measures are pending.

Import restrictions applied under this provision have been tailored to narrow categories of materials, for example materials from the Cara Sucia region of El Salvador; ceremonial textiles and other ethnological materials from Coroma, Bolivia; archaeological objects from the Sipan Region of Peru, and Maya artifacts from the Péten region of Guatemala. Emergency restrictions can last for a maximum of five years and be renewed one time for a maximum of three additional years.[35]

Import restrictions imposed pursuant to either of the CCPIA provisions become effective after a notice is published in the Federal Register. The designated categories of archaeological or ethnological materials are listed in this notice. A web site maintained by the Cultural Heritage Center of the State Department provides information about the import restrictions, including a chart of all import restrictions by country with their effective dates and a database of available images that are illustrative of the designated categories of materials whose import is restricted.[37]

Implementation of the Convention by Other Market Nations

Because the question of what other market nations are doing to prevent the trade in looted archaeological and ethnographic objects is part of the third determination analysis under the CCPIA, it is worthwhile looking at some of the different methods of implementation chosen by several of the market nations. In engaging in this analysis, it is important to keep in mind that different countries have different legal systems and traditions and that it is not reasonable to expect, nor does the CCPIA require, that other methods of implementation look like the method chosen by the United States (consonant with our particular legal system and traditions). So long as these other methods of implementation are *similar* in their purpose and effect, then they are legitimately part of this analysis.

Currently 119 states are party to the Convention. In 1998, France joined the Convention and in 2002, two of the largest market nations (after the United States), the United Kingdom and Japan, became parties. These countries were soon joined by Sweden and Denmark; Switzerland in 2003; Germany in 2007, and the Netherlands and Belgium in 2009.[38] The momentum is clearly toward ratification of the Convention by market nations and implementation through a variety of legal mechanisms that serve the same underlying purpose of deterring the looting and pillage of archaeological and ethnographic objects.

Many States Parties have enacted specific implementing legislation that grants reciprocal recognition to the export restrictions of other nations when those export restrictions are promulgated as part of their implementation of the Convention. For example, Canada enacted broad import and export regulations, pursuant to Articles 3 and 6(b) of the Convention.[39] Australia extended import controls to all illegally-exported cultural objects, regardless of whether the nation of origin is a party to the Convention.[40] In addition, the date the object was illegally exported from its country of origin does not matter, so long as the import into Australia occurred after the effective date of the legislation (July 1, 1986).[41] O'Keefe has commented,

> Some contend that States such as Canada and Australia which implement Article 3 ... are not implementing Article 9 and are therefore not taking action comparable to that of the United States of America. This is completely incorrect. Canada and Australia can both act under Article 9 if so requested. Their legislation doesn't require additional agreements — the power is already there to act if so requested. The situation in both States is comparable to that in the United States but also goes much further.[42]

New Zealand, which joined the 1995 Unidroit Convention on Stolen or Illegally Exported Cultural Objects[43] (the "1995 Unidroit Convention") in late 2006 and the Convention in 2007, enacted comprehensive legislation that incorporates implementation of both conventions into its domestic law.[44] In addition to regulating the export of protected cultural objects from New Zealand, the legislation prohibits the import into New Zealand of unlawfully exported foreign protected objects. The definition of "foreign protected object" tracks the definition of cultural property used in the UNESCO and Unidroit Conventions.[45] This legislation also allows reciprocating states to bring actions to recover stolen or illegally exported protected objects.[46]

The United Kingdom originally took the position that it did not need to enact implementing legislation for the Convention.[47] However, in 2003, it enacted new criminal legislation, the Dealing in Cultural Objects (Offences) Act 2003, which created a new offense for dealing in "tainted cultural objects."[48] One commits this offense if he or she "dishonestly deals in a cultural object that is tainted, knowing or believing that the object is tainted."[49] The statute defines a "tainted object" under the following circumstances: "(2) A cultural object is tainted if, after the commencement of this Act (a) a person removes the object in a case falling within subsection (4) or he excavates the object, and (b) the removal or excavation constitutes an offence."[50] Subsection 4 refers to an object removed from "a building or structure of historical, architectural or archaeological interest"[51] from " a monument of such interest." For purposes of the statute, it does not matter whether the excavation or removal took place in the United Kingdom or in another country or whether the law violated is a domestic or foreign law.[52]

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The Swiss implementing legislation, the Federal Act on the International Transfer of Cultural Property, took effect in June 2005.[53] Switzerland implements the UNESCO Convention in a manner that is closer to the United States' model of implementation, through a series of bilateral agreements that impose import restrictions. The Swiss legislation permits the Swiss Federal Council to enter into agreements with other nations that are party to the UNESCO Convention to protect "cultural and foreign affairs interests and to secure cultural heritage".[54]

Unlike the U.S. bilateral agreements, the Swiss agreements are of potentially unlimited duration and do not need to be renewed. Requests for an agreement are not subject to review by a committee of private citizens but rather are directly negotiated by officials of the Swiss Ministry of Culture. The Swiss Federal Council can also take additional measures when a "state's cultural heritage [is] jeopardized by exceptional events".[55] Switzerland has concluded agreements with Italy (2006), Peru (2006), Greece (2007), Colombia (2010)[56] and Egypt (2010). According to the Swiss Culture Office, the 2005 law has been very successful in intercepting illegal objects while also allowing Switzerland to continue as one of the centers of the international art market.[57]

Germany enacted implementing legislation for the Convention in 2007. Under this legislation, Germany will not allow the import of any illegally exported cultural objects that have been individually classified in an accessible inventory by the country of origin one year prior to removal. In addition, the country of origin may place archaeological objects in the inventory within one year of the time when the country of origin gains knowledge of the excavation.[58]

The most recent European[59] nation to ratify the Convention, the Netherlands, took yet another approach in its implementing legislation.[60] The Netherlands seems to have implemented a combination of the Convention and the 1995 Unidroit Convention.[61] The implementing legislation focuses on implementing Article 3 of the Convention, rather than Article 9.[62] The legislation therefore prohibits the import of cultural property that "(a) has been removed from the territory of a State Party in breach of the provisions adopted by that State Party in accordance with the objectives of the Convention in respect of the export of cultural property from that State Party or the transfer of ownership of cultural property; or (b) has been unlawfully appropriated in a State Party."[63] The primary enforcement mechanism is through a private right of action for a foreign nation that wishes to recover its illegally exported or unlawfully appropriated cultural property, but Dutch officials are also authorized to take such materials into custody when there is suspicion that this provision has been violated, pending the filing of a claim by the foreign nation.[64] Although this section of the implementing legislation is based on article 7(b)(i) of the Convention, the explanatory memorandum clarifies that unlawful appropriation includes unlawful excavation at archaeological sites.[65] The Dutch legislation thus takes a very broad view of what is required to implement the Convention, a much broader view than is taken by the United States, and thus should provide effective protection for cultural heritage.

Import restrictions implemented pursuant to other international or regional agreements must also be considered in evaluating the third determination. Probably the most important such convention is the 1995 Unidroit Convention.[66] Unlike the Convention, the Unidroit Convention is more specific in what States Parties must do when ratifying it and requires States Parties to amend their domestic law to comply with the Convention. The Unidroit Convention focuses on the creation of private rights of action whereby either an original owner or a nation may recover its stolen or illegally-exported cultural objects. This is in contrast to the Convention, which focuses primarily on government-to-government remedies. Thirty countries have ratified the Unidroit Convention including Italy, Greece, Cyprus, China, Cambodia, El Salvador, and Peru.

From the perspective of the European art market nations, the most important regional agreements are the European Union Regulation[67] and Directive.[68] These must be considered when the nation requesting a bilateral agreement with the United States is a member of the EU (such as Italy and Cyprus) and another EU member state has a significant import trade in the particular cultural materials at issue. The Directive requires one member state to return to the country of origin cultural materials that were exported in violation of export restrictions, while the Regulation obligates member states to prevent the export of such materials out of the European Union. These trade restrictions are clearly similar to those of the CCPIA in purpose, although, again, no separate bilateral agreements will be apparent.

Conclusion

The current significance of the third determination must be evaluated within the context of the many changes that have occurred in ratifications and implementation of the Convention over the years since the United States was the first market nation to ratify the Convention in 1972 and the first to enact specific implementing legislation in 1983. At that time, it was perhaps thought that few, if any, other market nations would ratify the Convention and so the third determination was a potentially significant barrier to the formation of bilateral agreements. The third determination serves a critical function in the decision whether to impose restrictions by ensuring that the market for the designated materials would not simply shift to other end-consumer market nations and therefore not accomplish the underlying purpose, while unilaterally burdening the market in the United States.

However, the situation has changed dramatically in the past decade. Many market nations, particularly in Western Europe, have considered the Convention and chosen to ratify it. These nations have adopted various modes of imple-

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mentation, consonant with their different legal systems and traditions and with their views of how best to contribute to the global effort to control the trade in illegally obtained archaeological and ethnological materials. The desire to use the Convention as a means of combating the illegal trade in cultural objects is clearly increasing and the efficacy of the Convention, as it nears its fortieth anniversary, seems ever more apparent. ◆

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[1] Nov. 17, 1970, 823 U.N.T.S. 231, 10 I.L.M. 289 (1971). The most extensive and authoritative discussion of the 1970 UNESCO Convention is that of PATRICK J. O'KEEFE, COMMENTARY ON THE UNESCO 1970 CONVENTION ON ILLICIT TRAFFIC (2d ed. 2007).

[2] Article 1 of the 1970 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" one of eleven numerated categories. These categories include "products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;" "elements of artistic or historical monuments or archaeological sites which have been dismembered;" "objects of ethnological interest;" "property of artistic interest" and "rare manuscripts and incunabula".

[3] O'KEEFE, *supra* note 1, at 107.

[4] 19 U.S.C. §§ 2601-2613.

[5] U.S. Senate Report No. 97-564, at 21-23.

[6] Article 7 states: "The States Parties to this Convention undertake . . . (b)(i) to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another Sate Party to this Convention after the entry into force of this Convention for the States concerned, provided that such property is documented as appertaining to the inventory of that institution."

[7] The CCPIA states: "No article of cultural property documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution in any State Party which is stolen from such institution after the effective date of this title, or after the date of entry into force of the Convention for the State Party, whichever date is later, may be imported into the United States." 19 U.S.C. § 2607.

[8] Objects recovered under this provision include a tenth century Chinese tomb relief stolen from the tomb of Wang Chuzi, see Jane A. Levine, *Returning Stolen Cultural Property: Tomb of Wang Chuzi Marble Wall Relief*, 2 CRM 17 (2002), and a Spanish colonial altar stolen from Challapampa, Peru, see U.S. Immigration and Customs Enforcement, "Cultural Heritage Investigations and Repatriations," available at: http://www.ice.gov/pi/news/factsheets/cultural-artifacts-repatriation.htm.

[9] Article 9 states:
Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States Parties who are affected. The States Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State.

[10] The CCPIA definitions are:
The term "archaeological or ethnological material of the State Party" means--

(A) any object of archaeological interest;

(B) any object of ethnological interest; or

(C) any fragment or part of any object referred to in subparagraph (A) or (B); which was first discovered within, and is subject to export control by, the State Party. For purposes of this paragraph--

(i) no object may be considered to be an object of archaeological interest unless such object--

(I) is of cultural significance;

(II) is at least two hundred and fifty years old; and

(III) was normally discovered as a result of scientific excavation, clandestine or accidental digging, or exploration on land or under water; and

(ii) no object may be considered to be an object of ethnological interest unless such object is--

(I) the product of a tribal or nonindustrial society, and

(II) 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.

19 U.S.C. § 2601(2).

[11] O'KEEFE, COMMENTARY, supra note 1, at 111. For example, objects from sites of much of the historic or Colonial periods in North America and from historic shipwrecks do not qualify as archaeological materials because they do not reach the 250-year threshold requirement.

[12] 19 U.S.C. § 2602.

[13] The agreement with Canada was not renewed in 2002. This number represents approximately 10% of the nations that have ratified the 1970 UNESCO Convention, demonstrating the burdensome nature of the process involved in requesting a bilateral agreement and the renewal process. As Neil Brodie noted, "U.S. policy is responsive—there needs to be a clear request from a recognized central authority before any action can proceed, and the authority

requesting action must have an effective jurisdiction and be able to implement measures designed to protect cultural heritage. In wartime, these requirements may be compromised." Neil Brodie, *Spoils of War*, 56:4 ARCHAEOLOGY 16, 19 (July/Aug. 2003). In addition to the burdens imposed by the CCPIA process, from the time a request is submitted to imposition of import controls, it can take anywhere from several months to several years.

[14] The Cultural Property Advisory Committee consists of 11 members, appointed by the President. Three represent the interests of the archaeological/anthropological community, three are experts in the international sale of art and antiquities, two represent museums, and three represent the public.

[15] The statutory determinations are:
(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...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 . . . in the particular circumstances is consistent with the general interest of the international community in the interchange of cultural property among nations for scientific, cultural, and educational purposes.
19 U.S.C. § 2602 (a)(1).

[16] Such a bilateral agreement may not last more than five years but it may be renewed an indefinite number of times. 19 U.S.C. § 2602 (e).

[17] 19 U.S.C. § 2606 (a) and (b).

[18] 19 U.S.C. § 2602 (a)(1)(A).

[19] *See* O'KEEFE, *supra* note 1, at 69-73.

[20] Id. at 70-71 (*quoting* Mark Feldman and Paul Bator). As Feldman commented, "I don't think we're talking about crisis situations in any technical sense. What is meant is situations that are serious in the sense that there is jeopardy from the pillage of archaeological or ethnological material." Mark B. Feldman, *Proceedings of the Panel on the U.S. Enabling Legislation of Import, Export and Transfer of Ownership of Cultural Property*, 4 SYR. J. INT'L L. & COMM. 97, 125 (1976).

[21] 19 U.S.C. § 2602 (a)(1)(B).

[22] 19 U.S.C. § 2602 (a)(1)(C).

[23] Senate Report 97-564, at 27.

[24] 19 U.S.C. § 2602 (a)(1)(C)(ii).

[25] Many nations that are rich in archaeological resources have vested ownership of those antiquities that are still in the ground in the nation. Courts in both the United States and the United Kingdom have held that artifacts that are removed without permission of the nation are stolen property. *See, e.g., U.S. v. Schultz*, 333 F.3d 393 (2d Cir. 2003)(holding that antiquities removed from Egypt in violation of its 1983 national ownership law are stolen property and affirming the conviction of the dealer, Fredrick Schultz, for conspiring to deal in such antiquities); *Gov't of the Islamic Republic of Iran v. Barakat Galleries Ltd.*, Court of Appeal (Civil Division), EWCA Civ 1374 (2007) (holding that Iran can maintain a suit to recover antiquities allegedly looted from Iran). See also Gerstenblith, Schultz *and* Barakat: *Universal Recognition of National Ownership of Antiquities*, 14:1 ART ANTIQUITY AND LAW 29-57 (2009).

[26] 18 U.S.C. §§ 2314-15.

[27] Forfeiture of illegally imported goods may be obtained for violation of several provisions of the Customs statute. *See, e.g., U.S. v. An Antique Platter of Gold, known as a Gold Phiale Mesomphalos* c. 400 B.C., 184 F.3d 131 (2d Cir. 1999) (affirming forfeiture of antiquity under 18 U.S.C. § 545 that was imported by means of false Customs declarations as to value and country of origin).

[28] The statute provides:
the President may enter into an agreement if he determines that a nation individually having a significant import trade in such material is not implementing, or is not likely to implement, similar restrictions, but--
(A) such restrictions are not essential to deter a serious situation of pillage, and
(B) the application of the import restrictions . . . in concert with similar restrictions implemented, or to be implemented, by other 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.
19 U.S.C. § 2602 (c)(2). Contrary to what James Fitzpatrick has asserted, this is a plain reading of the statute and not an elimination of the third determination's requirements. See James F. Fitzpatrick, "Falling Short—Profound Failures in the Administration of the 1983 Cultural Property Law," Panel: International Trade in Ancient Art and Archeological Objects," at p.8, note 15. Further, I am not suggesting that the United States can act alone except in particular, narrow circumstances.

[29] 19 U.S.C. § 2602 (a)(1)(D).

[30] Bonnie Magness-Gardiner, International Conventions and Cultural Heritage Protection, in MARKETING HERITAGE: ARCHAEOLOGY AND THE CONSUMPTION OF THE PAST 27, 36 (Yorke Rowan & Uzi Baram eds. (2004).

[31] Italian Code of the Cultural and Landscape Heritage, Legislative Decree No. 42 of 22 Jan. 2004, Article 67 (1) (c) and (d).

[32] 19 U.S.C. § 2602(e).

[33] 19 U.S.C. § 2603.

[34] The CCPIA provides:
the term "emergency condition" means, with respect to any archaeological or ethnological material of any State Party, that such material is—
(1) a newly discovered type of material which is of importance for the understanding of the history of mankind and is in jeopardy from pillage, dismantling, dispersal, or fragmentation;
(2) identifiable as coming from any site recognized to be of high cultural significance if such site is in jeopardy from pillage, dismantling, dispersal, or fragmentation which is, or threatens to be, of crisis proportions; or
(3) a part of the remains of a particular culture or civilization, the record of which is in jeopardy from pillage, dismantling, dispersal, or fragmentation which

is, or threatens to be, of crisis proportions; and application of the import restrictions...on a temporary basis would, in whole or in part, reduce the incentive for such pillage, dismantling, dispersal or fragmentation.
19 U.S.C. § 2603(a). The other requirements for a bilateral agreement, such as the concerted action requirement, do not apply to emergency actions.

[35] 19 U.S.C. § 2603 (c)(3).

[36] [19 U.S.C. § 2604.

[37] See http://exchanges.state.gov/heritage/culprop.html

[38] A full list of States Parties is maintained on the UNESCO web site: http://portal.unesco.org/la/convention.asp?KO=13039&language=E&order=alpha.

[39] Export-Import Act, R.S.C. 1985, c. C-51 et seq.

[40] Protection of Movable Cultural Heritage Act 1986, section 14. For more detailed discussion of the Australian legislation, see O'KEEFE, supra note 1, at 100-06.

[41] O'KEEFE, *supra* note 1, at 11.

[42] Id. at 73.

[43] The text of this Convention is available at: http://www.unidroit.org/English/conventions/1995culturalproperty/1995culturalproperty-e.htm.

[44] Protected Objects Act 1975, as revised 2007.

[45] *Id*. Part 1, section 2(1).

[46] *Id*. Part 1, section 10.

[47] Trade in cultural objects within the European Union is regulated primarily through European Council Directive 93/7/EEC of 15 March 1993 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State,

[48] Dealing in Cultural Objects (Offences) Act 2003, Ch. 27.

[49] *Id*. Section 1, Subsec. 1.

[50] *Id*. Section 2, Subsec. 2.

[51] O'KEEFE, supra note 1, at 11.

[52] *Id*. Section 2, Subsec. 3.

[53] Loi fédéral du 20 juin 2003 sur le transfert international des biens culturels (LTBC).

[54] *Id*. Article 7.

[55] *Id*. Article 8.

[56] *See* http://www.bak.admin.ch/themen/kulturguetertransfer/01985/index.html?lang=en.

[57] A recently completed study by the Federal Justice Office of the Swiss law's effectiveness showed that 400 investigations led to eleven cases reported by the customs authorities. *Switzerland Restores Image over Art Trafficking* (June 4, 2010), available at: http://www.swissinfo.ch/eng/culture/Switzerland_restores_image_over_art_trafficking.html?cid=9005486.

[58] Implementation Act of 18 April 2007, section 6(2), sentences 1-3. BGBl.I. Nr. 21 (23 May 2007).

[59] The most recent nation to ratify the Convention, as of this writing, was Haiti, which ironically deposited its instrument of ratification just a month after the earthquake of January 2010.

[60] 1970 UNESCO Convention on the Illicit Import, Export and Transfer of Ownership of Cultural Property (Implementation) Act (12 June 2009), available at: http://www.wetten.nl [hereinafter "Implementation Act"].

[61] *See supra* note 38.

[62] The explanatory memorandum for the implementing legislation specifically rejects the view of the United States that only Articles 7 and 9 need to be implemented, stating that "[t]he Bill is based on a more balanced interpretation" of the Convention and "sets out to give as much meaning as possible to the provisions of the Convention, in accordance with article 31 of the Vienna Convention on the Law of Treaties.". 1970 UNESCO Convention on the Illicit Import, Export and Transfer of Ownership of Cultural Property (Implementation) Act Explanatory Memorandum, at 12 [hereinafter "Explanatory Memorandum"].

[63] Implementation Act, *supra* note 54, Section 3.

[64] *Id*. Section 10.

[65] Explanatory Memorandum, *supra* note 56, at 16. The explanatory notes refer to the 1995 Unidroit Convention's equation of unlawful excavation at an archaeological site with theft. See Unidroit Convention, *supra* note 38, Article 3 (2) (stating that "a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place.").

[66] See *supra* note 38.

[67] Council Regulation No 3911/92 of 9 December 1992 on the export of cultural goods; re-codified as Council Regulation (EC) No 116/2009 of 18 December 2008 on the export of cultural goods, OJ L 39/1, 10.2.2009.

[68] Council Directive 93/7/EEC of 15 March 1993 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State.

American Bar Association International Section Spring Meeting

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I. Introduction

The United States was one of the early signatories to the United Nations Educational, Scientific, and Cultural Organization's 1970 Convention on Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (the "UNESCO Convention" or the "Convention").[1] The Convention was the result of growing international concern about the unscientific and often illicit excavation of archeological material and the destruction of ancient monuments and other ancient artifacts. While the discovery and removal of archeological material and ancient artifacts by or through market countries was not new in 1970, he scale and pace of the illegal removal of objects either from their archeological context or from monuments or other structures became a problem of perceived ever-increasing magnitude during the middle and latter portions of the 20th century. The Convention crystallized in many ways the differences between those countries rich in archeological material and ancient artifacts (the "Source Countries") and those countries that maintain significant art markets (the "Market Countries"),[2] and sought to bring their interests into alignment. That the Convention was a controversial attempt to establish an international norm is demonstrated by the pace of adoption of the Convention by countries around the world. Many Source Countries quickly embraced the Convention, at least by signing it, while Market Countries, other than the United States (and even the United States as discussed below) were reluctant to sign, much less implement, the Convention.[3]

II. Elements of the Convention

The Convention sought to provide international protection for a vast array of material running the gamut from archeological objects to flora and fauna and including, amongst other things, stamps, musical instruments and paintings. The Convention did not accord automatic protection to all such objects, but rather contemplated a system whereby objects stolen from museums and monuments would be accorded special protection by signatory countries, but other objects would be the subject of bilateral or multilateral discussions between Source Counties and Market Countries. The Convention called for the creation of a system of export certification or permits (Article 6 of the Convention) whereby objects could be legally exported in a fashion that would allow other countries of the world, principally Market Countries, to establish that an object had been legally exported from its Source Country.[4] Ideally, through bilateral or multilateral agreements and a system of export permits, Market Countries would agree under the Convention to close their borders to specific types or categories of objects exported from Source Countries without a certificate or permit. This export permit system was an attempt to overcome the widely-held legal proposition that the export laws of one country will not be enforced by another country. Viewed from the perspective of United States public policy, the underlying principal is based upon a reluctance to have United States courts acting as agents of a foreign country's police through the enforcement powers of the court.[5]

The passage of the Convention accelerated a debate which continues to this day between those labeled as "protectionist" or "nationalists" arguing for the right of Source Countries to deal with cultural property found within their borders in any manner that they deem appropriate versus the "internationalists" or "universalists" who argue that the creative work of mankind belongs to everyone and should be freely traded, collected and displayed for the benefit of all. Both positions have their extremists, and the debate has become increasingly polarized over the last forty years.

III. Early Court Cases/ 1973 Pre-Columbian Art

A. COURT CASES

Even though the United States signed the Convention in 1972, implementing legislation was to wait for more than ten years. Faced with an important art market on the one hand and the desire not to encourage looting through an unregulated market on the other, Congress took many years to develop an acceptable methodology for implementing the Convention. In the meantime, the issue of cultural property and its protection by the United States moved in two different directions, one to the courts and the other to targeted legislation by Congress. In the case of the courts, in 1974 the Ninth Circuit Court of Appeals upheld a district court decision in a criminal case finding that a dealer had conspired to violate and did violate the National Stolen Property Act (the "NSPA") by transporting in interstate commerce a stele illegally removed from Guatemala.[6] The NSPA provides that whoever receives, possesses, conceals, stores, barters, sells or disposes of any goods, wares or merchandise, securities or money of the value of $5,000 or more, that have crossed a state or United States boundary after being stolen, unlawfully converted or taken, knowing the same to have been stolen, unlawfully converted or taken is guilty of a crime.[7] In a short opinion which assumed, without much analysis, that a violation of Guatemalan law could form the predicate for a NSPA violation, the Ninth Circuit upheld the conviction.

The predicate for a conviction under the NSPA is that the object in question must be "stolen." In *Hollinshead*, the court based its determination of theft on the illegal taking from Guatemala. The

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Congress implemented the Convention in 1983, more than ten years after the United States signed the Convention and almost ten years after passing the Pre-Columbian Act.

case received little attention but was soon followed by a series of decisions in *United States v. McClain*.[8]

This case, which went up and down between the district court and the Court of Appeals for the Fifth Circuit, involved an alleged conspiracy by a group of individuals to bring into the United States and sell Pre-Columbian objects from Mexico. The court, analyzing Mexican law, determined that a 1972 legislative enactment in Mexico declared ownership over the objects involved and the illegal export of those objects after the passage of that law made them "stolen" for purposes of the NSPA. The defendants' importation and transportation of the objects into the United States, knowing that they were stolen, constituted a conspiracy to violate the NSPA. Thus, the Mexican national law formed the basis for a United States conspiracy conviction. As a result of *Hollinshead* and *McClain*, the United States courts recognized the cultural patrimony laws[9] of a foreign nation outside of the UNESCO Convention context for the first time.[10]

B. TARGETED LEGISLATION

While the courts were addressing cultural property issues in a country-by-country approach, Congress took a more focused approach on specific types of objects. In 1972, Congress enacted the Pre-Columbian Monumental or Architectural Sculpture or Murals Act, 19 U.S.C. § 2091 *et seq.* (2000) (the "Pre-Columbian Act"). This Act focuses on a specific type of objects – specifically stone carvings, wall art, architectural structures and architectural decorations – that are a product of any Pre-Columbian culture in Belize, Bolivia, Columbia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Peru, or Venezuela and prohibits the importation of any such objects into the United States unless the object was exported from its country of origin before June 1, 1973 or the importer presents a certificate issued by the government of the country of origin certifying that the exportation was not in violation of the laws of that country.[11]

IV. CPIA

Congress implemented the Convention in 1983, more than ten years after the United States signed the Convention and almost ten years after passing the Pre-Columbian Act. With the 1983 adoption of the Convention on Cultural Property Implementation Act, 19 U.S.C. § 2601 et seq. (the "CPIA"), Congress both directly implemented portions of the UNESCO Convention and also created a procedure, delegated to the Executive Branch, for country-by-country implementation of import restrictions.

A. DIRECT IMPLEMENTATION - CULTURAL PROPERTY

The direct implementation of the UNESCO Convention is found at 19 U.S.C. § 2607 (2000), implementing Article 7(b)(i) of the Convention. The CPIA prohibits the importation into the United States of "cultural property,"[12] which is (a) documented as appertaining to the inventory of a museum, religious or secular public monument or similar institution in any state a signatory to the Convention, and (b) stolen from such institution after 1983 or after the date that the Convention had entered into force for the subject country, whichever date is later.

At the same time that the CPIA was introduced in Congress, legislation was also prepared to negate the decisions in *Hollinshead* and *McClain* so that the CPIA would then be the only (in addition to the Pre-Columbian Act) United States approach to restrictions on the importation and ownership of cultural property.[13] The legislation to negate the court decisions was, however, never passed and, as later discussed, the result has been, at best, a confusion of the legal implications of collecting and, at worst, a frustration of many of the intended consequences of the CPIA.

B. EMERGENCY RESTRICTIONS AND BILATERAL AGREEMENTS

In addition to the direct prohibition contained in the CPIA and discussed above, the CPIA presented a comprehensive and complicated approach to restricting

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the importation into the United States of two types of property, archaeological and ethnological material. This portion of the CPIA was intended to implement Article 9 of the Convention. Archaeological material is defined as objects at least 250 years old that are of cultural significance and are normally discovered as a result of excavation or exploration. Ethnological objects are those that are the product of a tribal or non-industrial society and are important to the cultural heritage of the people because of their distinctive characteristics, or rarity or contribution to the knowledge of the origins or history of the people.[14]

The CPIA, as drafted, creates a process that seeks to weigh the legitimate interests of archaeologists, museums, collectors, dealers, the public and the foreign country's efforts to protect its cultural patrimony. All of these potentially disparate considerations were to be brought together, at least for consideration, if not for harmonization, in the Cultural Property Advisory Committee (the "CPAC"), a committee created under the CPIA to investigate and review requests by State Parties to the Convention and prepare reports, including recommendations, to the President and Congress.

For archaeological and ethnological material, the CPIA creates two mechanisms for the imposition of import restrictions. The first are emergency actions which are based upon a request for import restrictions by a Convention State Party because newly discovered material is in jeopardy of pillage. The CPAC is required to make a report, including recommendations, on such a request and, if the statutory considerations are met, import restrictions can be imposed by the President for up to five years, and may be extended for up to three years.[15] The second method for the imposition of import restrictions, and the more formal methodology, is through the execution of a memorandum of understanding – really a bilateral agreement – between the State Party requesting import restrictions and the United States. Again, a number of criteria set forth in the CPIA must be met before this method may be implemented, many of which are designed to weigh the differing considerations of various groups both within and without the United States.

For example, before the President can enter into a memorandum of understanding, the CPAC must find that the import restrictions, in conjunction with efforts of other market countries, will be of substantial benefit in deterring pillage. Also, the requesting country has to be undertaking efforts on its own to protect its cultural patrimony.[16]

C. IMPORT RESTRICTIONS INITIALLY LIMITED

The first emergency actions and memoranda of understanding entered into under the CPIA were targeted and limited, both as to the types of objects involved and the geographical location of those objects. For example, early emergency restrictions were imposed on objects of the Moche culture coming from the Sipan region in Peru.[17] Since those early import restrictions, however, the breadth and depth of import restrictions have blossomed to the point where the most recent memorandum of understanding, entered into with China, covers a vast array of objects found in China and created over a period of more than 75,000 years.[18]

As the implementation of import restrictions has evolved, there has been considerable controversy with respect to the expansion of import restrictions as well as the methodology by which CPAC makes its recommendations and the public availability of and access to their decision making process.[19]

V. Additional Court Decisions Post-CPIA

While the CPIA has been in place, neither the courts nor the federal government have been silent on the use of purely domestic legislation to stop at the border, or seize after importation, cultural objects illegally removed from a source country. For example, the federal government seized a gold phiale allegedly illegally exported from Italy, brought into the United States by a dealer and sold to a Manhattan collector. The country of origin and value of the object were misstated on the customs entry form. The government began a forfeiture action in the district court.[20] In 1997, the district court found that not only was the phiale subject to seizure because of these misdeclarations but also because Italy's cultural patrimony law declared such objects to belong to the state and, therefore, the phiale's importation into the United States after its illegal export from Italy was contrary to law because the phiale was stolen.[21] On appeal, the Second Circuit only upheld the forfeiture action on the grounds of the misdeclaration, but the district court decision again brought into public awareness the possibility that foreign cultural patrimony laws could form the predicate for both criminal sanctions and forfeiture proceedings involving cultural objects illegally exported from a source country and found in the United States.

Subsequent to the *Steinhardt* decision, the federal government brought a criminal proceeding against a New York dealer, Frederick Schultz,[22] based upon an alleged conspiracy to violate the NSPA. Mr. Schultz had allegedly brought into the United States objects illegally exported from Egypt which, under Egyptian law, were declared to be the property of the state. In upholding his conviction, the Court of Appeals for the Second Circuit also addressed Mr. Schultz's argument that the CPIA was the exclusive statutory pronouncement on the subject of cultural property illegally exported from a foreign country and imported into the United States. The court made short shrift of this argument finding that the criminal laws were separate, apart and distinct from the CPIA.

A number of forfeiture proceedings have been brought using the predicate of foreign cultural patrimony laws since the *Schultz* decision. While they have rarely resulted in reported court decisions, they appear to have been effective in forcing the turnover of the objects involved through either abandonment by the importer or settlement with the government.[23]

Government efforts to convict those guilty of moving cultural objects across

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state lines that have been illegally exported from a country with a cultural patrimony law or to seize such objects in the hands of holders (even those who are unaware of the "theft") have not been confined to the NSPA or the customs laws. In an innovative approach that began with a conviction in 1993,[24] the federal government has utilized provisions of the Archaeological Resources Protection Act[25] ("ARPA") to seize objects allegedly illegally removed from a Source Country and transported into, or in the United States. ARPA has a number of advantages over the NSPA in that the *scienter* requirement is less restrictive and the monetary limits lower than that of the NSPA. A number of cultural patrimony laws have been used as the predicate for seizures under ARPA including Thailand, Peru and Italy.[26]

Interestingly enough, while numerous cases utilize the NSPA or the customs laws or ARPA to indict and convict those involved in trafficking or to seize objects that have been illegally introduced into the United States or transported across state lines, very few reported cases have come under the CPIA.[27] A number of possible explanations exist for the more frequent use by the government of other statutes.

For example, the CPIA forfeiture provisions do have various defenses, in particular innocent owner and museum specific defenses, and the CPIA is, except for the direct imposition discussed above, only applicable if emergency action or a bilateral agreement is in place. Furthermore, when using the NSPA, ARPA or the customs laws, in order to seize an object at the U.S. border, the only requirement to use the foreign patrimony law as a predicate is that there be a clear enunciation by the foreign country of its declaration of ownership and that it has undertaken measures to enforce its laws in its own country. In contrast, to obtain the necessary import restrictions under the CPIA, a web of statutory requirements must be met before the import restrictions can be put in place and, even when they are in place such restrictions are only prospectively applied.

One can ask whether the intent of the drafters of the CPIA has been accomplished since its passage. While the CPIA, regardless of arguments about its implementation, especially in recent years, set out a complex and, in many ways, thoughtful process for the implementation of import restrictions, the use of other laws, such as the NSPA, the customs laws or ARPA, have no such considerations.

There is arguably an issue for legitimate debate as to the relevance of the CPIA in the United States today. For those countries that do not have a cultural patrimony law, but wish to curtail the importation into the United States of objects illegally exported from their country, the CPIA does create a vehicle for the imposition of import restrictions by the United States. Domestic legislation, such as the NSPA or ARPA, does not, at this time, address such purely foreign export restrictions. Other than those countries that do not have cultural patrimony laws declaring ownership, or those that wish to broaden the scope of potential U.S. import restrictions beyond their cultural patrimony laws, one wonders what is the legal significance of import restrictions imposed under the CPIA. Perhaps the best way to answer that question is to look at the actions of the federal government. Very few actions have been brought under the CPIA, while the government has extended the use of statutes like ARPA.

For importers, transportation companies, dealers, collectors and museums, the result of judicial decisions and government enforcement has been to create a hodgepodge of laws and regulations applicable to the acquisition of cultural property. While the original intent of the CPIA was to provide a single source for knowledge of what could and could not be imported into the United States, the current situation presents a mosaic of foreign laws that must be studied and evaluated before an acquisition can occur. This imposes a significant burden on the holders, sellers and purchasers of cultural objects, especially those who have neither the resources nor the economic incentive, because of modest value, to undertake the often difficult and sometimes inconclusive task of determining what is and is not legal in a foreign country. The research is additionally hampered by imprecision in foreign law, its availability and its translation. Perhaps the biggest concern is that the CPIA was designed to effectuate policy decisions made by Congress and to allow the executive branch to continue to make policy decisions after its passage, but with clearly enunciated standards. The use of the NSPA, ARPA, customs laws, etc. in effect delegates policy decisions to law enforcement officials, the courts and foreign countries. This could hardly have been the intent of the drafters of the CPIA.

Rather than the piecemeal approach currently in effect, perhaps now is the time for a considered focus on a new framework for the protection of cultural property and appropriate market regulation. This framework would hopefully lead to a comprehensive and cohesive determination of what is and is not legal in the trade in cultural objects rather than the current situation that effectively allows foreign countries through their governmental actions to determine what is or is not permitted under United States law. Acknowledging that the current system does not work is the first step. Developing a comprehensive approach that balances the responsibility not to promote looting with the market's legitimate need for clarity and removing the government from the costly and time-consuming role of policing other countries' domestic legislative agendas is the next step. Any new policy approach should:

- Clarify that a new CPIA is the only law applicable to alleged illegal importation, sale, purchase, transportation or possession of cultural property from a foreign source country;
- Provide a rational and graduated series of sanctions and forfeiture for violations of the new CPIA that include reasonable exceptions and limitations, some of which are already in the CPIA;
- Limit the import restrictions to objects of important cultural significance;
- Allow for emergency actions even for countries that have not signed the UNESCO Convention or have not formally requested such actions in circumstances of demonstrated

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immediate danger to areas subject to active illegal excavations;
- Require countries seeking emergency actions or bilateral agreements to implement meaningful cooperation on long term loans of at least ten years, and preferably longer;
- Require countries seeking emergency action or bilateral agreements to work towards the creation of a legal market for objects that are not true national treasures; and
- Require an open and collaborative process in a revised CPAC.

Would not legislation addressing these issues be better than the confusion that reigns today with multiple laws and court cases controlling the market without cohesion, uniformity or precision? ◆

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1 The United States signed the Convention in 1972, but did not accede to the Convention until February 12, 1983, when implementing legislation was passed.

2 The terms "Source Countries" and "Market Countries" while frequently used can be misleading as countries with significant and important archaeological material may also have active art markets and vice versa, but the terms are so well known that they are used herein.

3 For example, by 1975, 23 countries had accepted or ratified the Convention, but France only ratified the Convention in 1997, the United Kingdom in 2002 and Switzerland in 2003.

4 There is some confusion in the use of the term "country of origin." Country of origin is often used to denote what is really the country of modern discovery of an object. In the customs context, country of origin means the country where an object was created. So a vase created by a potter in Greece and transported in ancient times to Greek colonies in southern Italy, but excavated in the 20th century, would have Greece as its country of origin and Italy as its country of modern discovery.

5 For an interesting analysis of the policy issues (and a contrary position in dicta), see *Gov't of Islamic Republic of Iran v. The Barakat Galleries Ltd.*, [2007] EW HC705 (Q.B.D. 2007), *rev'd*, [2007] EWCA Civ. 1374 (A.C. 2007).

6 *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974).

7 18 U.S.C. §§ 2314 and 2315 (2000).

8 *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977), *reh'g denied*, 551 F.2d 52 (5th Cir. 1977), *aff'd in part, rev'd in part*, 593 F.2d 658 (5th Cir. 1979).

9 The term cultural patrimony law is used to denote an ownership law.

10 Subsequently, the Second Circuit adopted the same approach to the NSPA, this time based on Egyptian law, in *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003), *cert. denied*, 540 U.S. 1106, 124 S. Ct. 1051, 157 L. Ed. 2d 891 (2004).

11 Unlike general customs law, for purposes of the Pre-Columbian Act, country of origin means the country where the sculpture or mural was first discovered. For a more recent example of targeted legislation, see *The Emergency Protection for Iraqi Cultural Antiquities Act of 2004* (title III of Pub. L. 108-429).

12 Cultural property is broadly defined to include any article described in then Article I (a) through (k) of the Convention, in other words, a broad category of objects that include flora, fauna and musical instruments, collections, products of archaeological excavations, antiquities (more than 100 years old), etc.

13 S. 2963, 97th Cong. (1982).

14 16 U.S.C. § 2601 (2000).

15 16 U.S.C. § 2603 (2000).

16 16 U.S.C. § 2602 (2000).

17 55 Fed. Reg. 19,029 (1990).

18 Memorandum of Understanding, http://exchanges.state.gov/heritage/culprop/chfacts/pdfs/ch2009mou.pdf.

19 For example, *see, Ancient Coin Collectors Guild v. U.S. Customs and Border Protection, et al.*, Case No. 1:10-cv-0322 (D.Md). Also, see, Jeremy Kahn, Is the U.S. Protecting Foreign Artifacts? Don't Ask, N.Y. TIMES (April 8, 2007) (available at http:www.nytimes.com/2007/04/08/artsdesign/08kahn.html?_ r=1&scp=2&sq=Jeremy%20Kahn%20Don't%20ask&st=cse) (last checked 8/10/10).

20 *United States v. An Antique Platter of Gold*, 991 F. Supp. 222 (S.D.N.Y. 1997), *aff'd on other grounds*, 184 F.3d 131 (2d Cir. 1999). This opinion is also frequently referred to as the "Steinhardt decision."

21 *Id*. at 231.

22 *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003), *cert. denied*, 540 U.S. 1106, 124 S. Ct. 1051, 157 L. Ed. 2d 891 (2004).

23 For a recent example, see *United States v. One Ancient Egyptian Yellow Background Wooden Sarcophagus*, (S.D. Fl. Filed October 8, 2009). An earlier forfeiture action, and one that was initially resisted by the holder, is *United States v. One Red-Figure Calyx Krater*, (C.D. Cal. Filed April 28, 2004)

24 *United States v. Gerber*, 999 F.2d 1112 (7th Cir. 1993) (upholding a conviction based on a taking from private land in violation of state (Indiana) law).

25 16 U.S.C. § 470aa *et seq.* (2000).

26 *See Search Warrant in United States v. Charles W. Bowers Museum Corp.*, No. 08-0093M (C.D. Cal. issued Jan. 19, 2008); *United States v. Barchitta*, Crim. No. 03-550-M (E.D. Va. filed May 30, 2003); *United States v. An Archaic Etruscan Pottery Ceremonial Vase*, No. 96 Civ. 9437 (JES) (S.D.N.Y. filed March 31, 1997). In Barchitta, the government also alleged violation of the CPIA.

27 *United States v. Eighteenth Century Peruvian Oil on Canvas Painting of the "Doble Trinidad,"* 2009 WL 349280 (E.D. Va.).

Falling Short — Profound Failures in the Administration of the 1983 Cultural Property Law

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Mark Feldman's opening remarks on 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (the "Convention") perfectly lay the basis to examine how Congress legislatively responded and, more significantly, how the Executive Branch has carried out, or in my view grossly distorted, Congress' standards in the 1983 Cultural Property Law.[3] As Mark said, it took Congress 10 years — until 1983 — to formally implement the UNESCO Convention.

During that period, I represented dealers in antiquities and was therefore in the middle of the legislative push and pull. As a result, I believe I had a first-hand view of what Congress, and the parties, expected.

Of course, innumerable skirmishes existed, including customs procedures, proof of presumptive ownership where there was no clear provenance, conditions to be met to justify an embargo and membership on the Cultural Property Advisory Committee. However, only one central controversy delayed final passage.

In my view, the central blocking point was the competing views whether, in efforts to eliminate or minimize looting, the United States should act as a moral leader for the world (a view endorsed by Representative Abner Mikva and the House in a 1977-passed version of the bill),[4] or whether the United States should act only in concert with other art importing nations so as to deal collectively with specific problems of looting in a given source country. The dealer and museum communities favored the latter approach while archaeologists favored the former. Notably, Section 9 of the Convention expressly provided for a concerted international response to any significant instances of looting of culturally significant objects.[5]

The impasse was broken in 1982 with general agreement in the Senate to include a requirement that any United States action would be conditioned on a concerted international response to a particular, serious instance of looting. Thus, the Senate Report stated:

"The concept that U.S. import controls should be part of a concerted international effort is embodied in article 9 of the Convention and carried forward in section [2602 of the CCIPA]. **In previous years' consideration of various proposals for implementing legislation, a particularly nettlesome issue was how to formulate standards establishing that U.S. controls would not be administered unilaterally.** The Committee believes that the language now adopted...and which is agreeable to all private sector parties that have contributed actively to the Committee's consideration of the bill, satisfies the twin interests of obtaining international cooperation while achieving the goal of substantially contributing to the protection of cultural property from further destruction."[6]

This agreement involving all parties was incorporated in a series of provisions in the CCIPA. First, **Section 2602(a)(1)(c)(i)** requires a Presidential (or designee) finding that any U.S. import restriction will be "applied in concert with similar restrictions...by those nations...individually having a significant import trade in such material." Second, **Section 2602(2)(c)** explicitly denies the President the authority to enter into an import limitation unless there is a concerted international response to the particular problem of pillage identified by a requestor nation.

Third, and perhaps most significantly, under **Section 2602(d)**, the President shall, in a particular case, suspend our MOU if other art importing countries have not implemented "import restrictions" that are similar to our import restrictions.[7]

With this seminal issue settled, the bill promptly passed the Senate and the House acceded to the Senate version with no further hearings, mark-ups, or debate on that side.

More than twenty-five years have passed since the passage of the CCIPA. This is an appropriate time to consider how faithful has been the administration of the CCIPA to its original text and intent. Having been involved in passage of the CCIPA as well as acting as an advocate in many of the subsequent administrative proceedings, I have concluded that the implementation of the CCIPA has departed dramatically from its text and its intent. Specifically, I would like to discuss the State Department's decisions:

- To essentially read the "concerted international agreement" requirement out of the CCPIA;
- To promulgate across-the-board embargos extending to a source nation's entire cultural history, or thousands of years of it;
- To permit a requesting nation openly to sell in its domestic markets the very antiquities it wants to deny to the U.S. market, thereby disregarding the obligation for a requesting nation to take appropriate self-help measures and, at the same time, meaning that a United States embargo could not be fully effective in deterring looting.
- To conduct all its proceeding in the tightest grip of secrecy, denying the public the opportunity to evaluate its activities;
- To permit the MOU process to become a diplomatic bargaining chip instead of making decisions based on the cultural criteria contained in the CCIPA.

1. There is no "Concerted International Response"

The State Department has, through a series of contrivances, essentially made

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the "concerted international response" requirement a nullity. This means that unilateral action on the part of the U.S. simply will result in diverting the United States market to internal markets in the source country or to other international markets.

The brutal truth is that no other major market country has imposed import controls over the particular cultural objects that a source nation has asked us to forbid entry of to the United States market. But Congress' purpose in crafting a requirement that the United States must be part of a concerted international response from other art importing nations in the material said to be looted, could not have been clearer. Congress contemplated that a requesting country would go to other market countries to seek import controls there, or that the United States would engage in multilateral discussion with such countries to agree on a common procedure to deal with the requesting countries' assertions of looting. The point was, as the Senate Report stated, "to formulate standards establishing that U.S. controls would not be administered unilaterally."[8] But that is exactly what has happened; our detailed import restrictions to meet a specific situation of looting have not been part of a common effort with other market countries — in any United States promulgation of a MOU —; "U.S. controls" are in fact "administered unilaterally."[9]

With one possible exception, the reality is that no other market country has been asked by a source nation to join in a common effort with the U.S. to impose import controls to stem looting of particular objects that endanger a nation's cultural patrimony. The U.S. is acting alone, unilaterally.[10] The result is that United States museums, collectors and the public are denied the opportunity to study, appreciate and collect antiquities, while the rest of the world goes its merry way. How can the State Department so cavalierly flout the clearly expressed will of Congress that the President cannot act unilaterally?

The answer is a series of contrivances fostered by the State Department and designed to read the clear multinational response requirement out of the CCIPA. None of them bears analysis.

Some have pointed to the number of nations that have simply ratified the Convention, without doing anything more.[11] That might be satisfactory from the point of view of a **foreign** nation, but mere ratification does not satisfy **the U.S.** statutory requirement that nations providing a market in particular antiquities join with us in a common enterprise to impose import controls to respond to a particular instance of looting. Nothing in the terms of the statute or its legislative history supports the proposition that merely ratifying the Convention constitutes joint action under **U.S.** statute to deter looting through import controls of particular artifacts. Indeed, Article 9 of the Convention expressly contemplates market countries acting in concert to respond to crisis situations with import controls "in the specific materials involved." On its face, this text clearly requires some joint action beyond mere ratification of the Convention.[12]

Others have pointed to the United Kingdom's refusal to impose import controls under the Convention, however it has criminalized certain objects without export permits in the country.[13] But such criminal laws are not a comprehensive customs bar to importing cultural objects into the country as ours is. Indeed, the British have said that they will not impose any customs and import restrictions on antiquities.[14] One knowledgeable party has confirmed, in the context of the Italian MOU proceeding, "there exist no restrictions to imports of antiquities from Italy into the United Kingdom."[15]

The law is a scatter-shot criminal provision, depending on proof of criminal intent. Significantly, United Kingdom officials have stated there have been **no prosecutions brought in the seven year history of the 2003 Act**.[16] That unenforced provision, simply on the shelf, cannot qualify as meaningful, particularized cooperation and "concerted action" with the U.S. in dealing with the looting problems of countries such as Cambodia, Cyprus, Peru or China. The result is that the United Kingdom, one of the world's major markets in cultural objects, has no effective process to ban imports of cultural objects allegedly looted from a source country. Markets in the United Kingdom are thus unaffected while U.S. markets are closed.

There is also reference to a set of rules promulgated by the EU, but analyses and reports on the administration of these rules confirm that they fall far short of any comprehensive, enforced import ban as we impose.[17]

Finally, there is the argument that Congress really didn't mean it when it required a multinational response.[18] This argument expands a narrow, clearly defined exception so as to read the requirement entirely out of the CCIPA. Congress did not want "the formula measuring the presence of a concerted effort" to be "so mechanical" as to preclude United States participation in a concerted effort if a given market country did not agree to import controls.[19] But that exception applied **only** if the United States action, in concert with **other** market countries, will contribute to stopping looting.

To meet this special situation, Congress adopted "a limited exception to the general requirement of a multinational response."[20]

The procedure is for the President (or his designee) to "identif[y] the significant importing nations the participation of which ordinarily would be expected to comprise a concerted international effort."[21] Once that list has been established, a MOU can be entered "without the participation of **all** such nations."[22] But the President must first determine that:

- Participation by the recalcitrant "particular such nations" is "not essential to deter pillage"; and
- United States import controls in concert with actions of other nations "having a significant import trade" would be a substantial benefit to deterring a serious situation of pillage.[23]

Thus, the process contemplates that, for example, if the President finds five nations other than the United States that

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have significant trade in the particular antiquities at issue and one of the five won't enter into a concerted response, he or she can proceed with a MOU — if that recalcitrant nation's participation is "not essential" and that action by the United States and the remaining market countries, in a concerted response, will be of benefit to deter pillage. It has been suggested by Ms. Gerstenblith that this exception provides a blank check for the United States to act unilaterally.[24] Under that view, there is no need for **any** concerted response in **any** circumstance. That view simply cannot be squared with the text of the statute; it would read out entirely the central Congressional goal of ensuring that the United States **not** act unilaterally. The exception would swallow the rule.

But, unilateral action has become the sad reality in the administration of the CCIPA. The clear Congressional intent that we would join with other nations significantly engaged in trade in particular goods has never been realized, or even pressed by our government. The State Department, and its lawyers, have effectively eliminated this element of the CCIPA, and refuse to discuss its legal rationale.[25]

2. Recent MOU's Have Unjustifiably Been Extended to "A Nation's Entire Cultural History"

The State Department has approved in recent years across-the-board embargoes of all cultural objects whether they are important cultural objects subject to pillage or insignificant baubles. I believe that the statutory requirement that embargoed objects be of "cultural significance" has largely been replaced with the concept of "archaeological significance." To the contrary, as Mark Feldman has stated, "The idea is to have the legislation reflect our general support for the international movement of art."[26]

Jack Josephson, former CPAC Chairman, has said in this regard: *"There can be little doubt about the sympathies of the framers of this law, who did not wish for unfair or blanket embargoes. Unfortunately, rarely has the Committee membership been in conformity with the CCIPA."*[27]

In addition, another former CPAC member, Kate Fitz Gibbon, has said: *"Import restrictions in crisis ["emergency"] situations will have broad support, not only on the Committee but domestically and globally, from every faction of the world. Placing dubious construction on the law and imposing blanket restrictions will not. Too many times when Congress intended the Committee to use a scalpel, it has used a club." IFAR Journal, p. 35.*

That the CCIPA did not contemplate across-the-board embargoes is confirmed by the text of the CCIPA itself; its evolution from a broad authorization for Presidential authority to narrow, circumscribed power; and the relevant legislative history of the CCIPA.

A. The CCIPA's Express Language Limits The President's Agreement Authority To Specific, Well-Defined Objects Or Classes Of Objects That Are Shown To Be Pillaged

First, a look at the text of the statute. Section 2602(a)(2)(A) of the CCIPA grants the President limited authority to restrict the import of "the archaeological or ethnological material...*the pillage of which* is creating the jeopardy to the cultural patrimony of the State Party..."[28] The language "the pillage of which" modifies the phrase "the archaeological or ethnological material." This limiting phrase means that any items within an import ban must be pillaged and that that pillage be jeopardizing the cultural patrimony of the State Party in question. This restrictive language reinforces the conclusion that Congress intended to limit the President's agreement authority through the express language of the CCIPA. Factual proof must be in the record that embargoed items were themselves subject to pillage and such pillage jeopardizes cultural patrimony.

Absent the language in § 2602(a)(2)(A), the President arguably would have authority under the CCIPA to restrict the import of any and all archaeological or ethnological material from a State Party. Had Congress intended to give the President such broad authority, it could have and would have done so. Instead, Congress chose to limit the President's authority by precisely defining the scope of any import bar; therefore, that express limitation cannot be read out of the statute, giving the President broader authority than was intended, as those administering this Act have improperly done. Because Congress chose to limit expressly the President's agreement authority with respect to import restrictions, the President may not agree to import restrictions that are broader than the express language of the statute; *i.e.*, he or she may not agree to any import restriction on any *objects* not demonstrated to be involved in ongoing pillage.[29]

CPAC proceedings have not considered evidence of pillage of items within a nation's entire cultural history, or that each of those items is a critical element in a nation's cultural patrimony. For example, the China MOU embargoed **all** archeological objects from prehistoric times to the end of the Tang Dynasty.[30] It is impossible to believe that China presented evidence of pillage of all such objects. Proof of selective instances of pillage cannot under the terms of the CCIPA be extrapolated to a wall-to-wall bar of everything.

B. The Evolution Of The CCIPA Shows Congress Intended To Limit The President's Agreement Authority To Specific, Well-Defined Objects Or Classes Of Objects That Are Being Pillaged

A look back at history: The State Department in 1976 proposed H.R. 14171,[31] the first significant version of the legislation ultimately enacted in 1983 as the Cultural Property Implementation Act. The proposal gave the President broad, unrestricted authority to limit imports.[32] To wit, the relevant proposed language read: "[T]he President may enter into an agreement...to restrict the importation of such designated protected objects, or classes of objects, of archeo-

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logical [sic] or ethnological interest…"[33] On its face, that the bill arguably gave the President wide latitude to restrict imports, because the limiting language that was ultimately enacted, *i.e.*, "the pillage of which [objects] is creating the jeopardy," was absent.[34] Thus, under the express language of H.R. 14171, the President might have restricted the import of a broad range of cultural property even though that particular property was not the subject of pillage that was jeopardizing the cultural patrimony of the State Party.[35]

The legislation was next introduced in 1977 as H.R. 5643, 95th Cong. (1977) and was referred to the Ways and Means Committee. Although the initial language of H.R. 5643 tracked the earlier expansive language in H.R. 14171, when the bill emerged from committee, the provision granting the President agreement authority was materially altered to limit severely the President's power. The legislation contained the restrictive language found in the current Act. Speaking on the floor of the House, Congressman Steiger noted the important limitations on the President's agreement authority: "The bill gives the President authority to enter into bilateral or multilateral agreements…to restrict the importation of *particular endangered* archeological [sic] or ethnological objects."[36]

Explicitly, the Committee indicated its intention to limit the President's agreement authority by stating: "The [§ 2602(a)] findings require a 'serious situation of pillage' and the authority is not intended as a means to deal with the general problem of illegal exportation of large amounts of cultural objects from many countries."[37]

Thus, the Committee recognized the potential for overreaching by the President through the use of overly broad import restrictions and sought to address such potential abuse through its amendments to the bill. The Committee further contemplated that the President would consider carefully and negotiate these import restrictions and only after such consideration and negotiation would place restrictions on "*specific* materials…within the parameters of the definition of 'archaeological or ethnological material.'"[38] Congress recognized the potential for Executive Branch abuse through the use of overly broad import restrictions in the bill as originally proposed by the State Department.[39] Congressman Steiger, expressing this concern, noted in floor debate,

[the § 2602(a)] requirements should prevent *carte blanche coverage of numerous artifacts*…that could be said to have a relation to a country's national heritage but which are not under threat…. [T]hese limitations should discourage some countries from trying to get the United States indirectly to enforce vague or nonexistent internal laws.[40]

Therefore, the Committee amended the bill to provide the President would only be able to restrict the import of specific, well-defined objects or groups of objects that are undergoing pillage.

Although Congress did not pass the CCIPA until 1983, the language that emerged from the House Ways and Means Committee in 1977 remained intact throughout the remaining consideration and debate of the bill, including Senate consideration of the CCIPA. A narrow interpretation of the President's agreement authority based on the express language of the CCIPA therefore remained firmly in place and was clearly the intention of Congress throughout consideration of the CCIPA. Thus, on their face, wall-to-wall embargoes fly in the face of Congress' intent.

Congress spoke of archeological objects as limited to "a narrow range of objects…"[41] Import controls would be applied to "objects of significantly rare archeological stature…"[42] As for ethnological objects, the Senate Committee said it did not intend import controls to extend to trinkets or to other objects that are common or repetitive or essentially alike in material, design, color or other outstanding characteristics with other objects of the same type…"[43]

Not only was the scope of the CCIPA meant to be narrow, it was never contemplated that the President's authority would extend to restricting the import of the entire cultural patrimony of a country.[44] Even more explicit is the statement of Mark B. Feldman in 1978 hearings stating, as the policy underlying H.R. 5643 and S. 2261, that the U.S. would apply import restrictions "to carefully defined classes of cultural property…*we would not agree to a comprehensive system of import controls applicable to all cultural property.*"[45]

Mr. Feldman described the position of the State Department further when he added:
[§ 2602(a)(2)] requires negotiation on a case-by-case basis of the specific materials to which import controls are to be applied…. [I]mport controls would only be applied to specific categories of archeological [sic] or ethnological objects from particular countries and only after agreements had been negotiated with those countries and detailed regulations issued by the Treasury.[46]

Mr. Feldman added:
[O]ne misconception that is commonly stated is that this legislation could result, or would result, in a total blockage of the import of art to this country. That is, I think, just a fundamental misunderstanding of the legislation on several counts.

First, the scope of the legislation, the import bar, is very limited: it applies only to archeological [sic] and ethnological material.

Second, import bars would apply only to particular categories of objects. They would be negotiated over time, and it would take a long time, and they would be discrete — that is to say, they would be circumscribed by the terms of the agreement."[47]

In response to written questions on H.R. 5643, the State Department again indicated its opinion that only narrowly defined objects or classes of objects would be restricted:
Question 7. How are the import restraints contained in the bill going to be administered?

Answer 7. [W]e would expect such volumes to be very limited as the agreements to be negotiated would apply only to care-

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fully defined categories of archaeological and ethnological material.[48]

I believe this view is confirmed in the Congressional testimony, which contemplates the protection of certain, specific objects or classes of objects. My recollection is that each time the question was raised regarding the circumstances under which it would be appropriate for the President to act, the government official testifying before Congress responded by mentioning the pillage of specific sites and the protection of specific objects or classes of objects. Never was it asserted that it might be appropriate for the President to agree to restrict the import of all objects within the cultural patrimony of a particular country, whether or not they were subject to pillage and whether or not they satisfied the other demanding criteria of the CCIPA.

Therefore, the text and the legislative history of the CCIPA clearly and consistently confirm Congressional intent to limit the President's agreement authority to well-defined, specific objects or classes of objects that are subject to pillage. Nothing indicates that Congress intended for the President to have unbounded authority to restrict the import of the entire cultural patrimony of any country.

3. The State Department Does Not Require a Requesting Country to Eliminate Open, Domestic Trade in the Very Items Requested for a Uniredstates Embargo

Notwithstanding the requirements of the CCIPA, no real requirement exists that a United States MOU will be efficacious in deterring looting.[49] The theory of the statute is simple economics: if demand from market countries for antiquities is reduced, then the supply of looted antiquities from source countries will diminish. As pointed out above, without a concerted international effort involving market countries across the world, undiminished imports by those market countries will fuel demand, and therefore, looting, under this theory. And there simply is no international response to bar imports from source countries.

Moreover, the CPAC and the State Department may overlook the case that often source countries seeking a United States embargo permit the open, legitimate sales in **their** markets of the **very** items they wish to deny the American public.

In the CPAC proceedings leading to the MOU with China, representatives of antiquities dealers presented page after page of Chinese antiquities that were coming up for contemporary auctions in an open, legitimate public sale in China.[50] These **very same objects** were the subject of the Chinese embargo request and were included in the China-United States MOU. If it is said that the sale of a Chinese antiquity in Boston fuels demand, why doesn't the sale of the very same antiquity in Beijing fuel the same demand?

China itself is now the largest market in the world for Chinese antiquities.[51] Its market has exploded and the public market in China is likely larger than all the rest of the world combined. If the goal of the statute is to stop looting by cutting demand, the place to start is in the domestic Chinese market. Without such action — and comparable import restrictions for other market countries for Chinese antiquities — demand simply will not be abated. Beyond that, permitting a source country to sell publicly the same objects it asks to be denied to United States museums is directly contrary to the statutory requirement that a requesting nation undertake effective self-help measures to stem a problem of looting.[52]

4. The State Department Has Unjustifiably Made All Their Proceedings Under the CCIPA Secret

The State Department's imposition of a tight lid of secrecy on all CCIPA proceedings is directly contrary to law, as well as to President Obama's commitment to open up his Administration to the sunshine of public scrutiny.[53] Moreover, the Attorney General has said, "An agency should not withhold information simply because it may do so legally. I strongly encourage agencies to make discretionary disclosures of information. An agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption."[54]

Former CPAC member Kate Fitz Gibbon has described the CPAC procedures: *"Source nation requests are secret; they are summarized and made public. CPAC staff work is secret. Meetings are conducted in secret. They are tape recorded, lest one say the wrong thing, and 'big brother' hears. Staff is not forthcoming with information."*[55]

The mania for secrecy was initially rationalized that releasing information supporting a source nation's case would provide a "road-map" for looters. Kate Fitz Gibbon replied: *"The argument that looters will use the Committee briefing materials to seek out sites is ridiculous. In one briefing report that we received, eighty percent of the items were things from eBay — showing there was a market."*[56]

Or if there was sensitive material, the State Department "could mark out the police information" and not make that public.[57]

On this point, Chairman Kislak said: *"The sites were indicated in their requests and the looters had already been there. I think that's a rather weak argument."*[58]

A further rationale is that transparency would endanger our diplomatic relations. Chairman Kislak's response: *"[Maybe others] heard state secrets discussed. I never did. I never heard anything that was diplomatic material."*[59]

And former CPAC Chairman Jack Josephson rejected the bizarre assertion that release of materials would make it difficult to negotiate a MOU, when he stated: *"[T]he countries are coming to us asking for a favor. How on earth would transparency affect that?"*[60]

Indeed, a source nation's request for secrecy may be nothing more than a re-

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sponse to prompting by the Committee staff that has an interest in keeping their work sheltered from any public scrutiny.[61]

This pattern of secrecy has been sharply criticized by the recent Chairman of CPAC. Thus, Jay Kislak, CPAC Chairman from 2003 to 2008, stated: *During my tenure as Chairman of CPAC, I became concerned about the secretive operations of the Cultural Heritage Center [which supervises CPAC operations] and its lack of transparency in processing requests for import restrictions made on behalf of foreign states. I believe this lack of transparency has hampered the ability of museums, private parties and others to make useful presentations to CPAC. I also believe that this lack of transparency has also hampered the ability of CPAC to provide recommendations to the executive branch about the best way to balance efforts to control looting at archeological sites against the legitimate international exchange of cultural artifacts.*

I believe that the release of details of foreign requests for import restrictions could promote transparency and allow CPAC to be better able to make recommendations. I also believe that the release of CPAC's reports in full could also promote the same goals. I do not believe that release of this material after a decision has been made will discourage CPAC members from discussing the merits of each case. To the contrary, release of CPAC reports will allow interested parties to frame their arguments more effectively when import restrictions come up for renewal every five (5) years. In addition, release of this documentation will also promote the accountability of Cultural Heritage Center Staff to both CPAC and the public at large.[62]

This secrecy has largely protected State and CPAC from any meaningful public scrutiny. In earlier days, USIA (predecessor to State) released, under Freedom of Information procedures,[63] the CPAC report on the Canadian MOU and the higher official response to that recommendation. That release permitted a detailed examination of the record that demonstrated that, in fact, there was no serious crisis of pillage and looting in Canada, but that the U.S. was simply asked to aid Canada in its administration of **Canadian** export control laws; clearly **not** a justified rationale for a United States embargo under the CCIPA.[64] The ability to evaluate the unjustified initial CPAC decision and USIA promulgation of the Canadian MOU was instrumental in the ultimate denial of the Canadian request for an extension of its MOU.[65]

The State Department under the current administration is refusing to release the recent CPAC report on the China MOU.[66] Thus, one cannot know how the CPAC dealt with two key issues:

- How can a concerted international response to asserted problems of looting in China exist where other major markets such as Japan, Singapore, Taiwan and the United Kingdom have no import restrictions?
- How an efficacious United States MOU exist if China itself is the major market for Chinese antiquities and its **domestic** auction houses are selling the very items that are denied to United States markets under the China MOU?[67]

The State Department has been erratic in its position toward releasing CPAC reports. In the mid-1990s, USIA released the full record of the CPAC report and subsequent USIA action in the Canadian and Peruvian MOUs in response to a Freedom of Information request.[68] Likewise, the Italian CPAC Report was released (only after appeal), providing much greater insight into the CPAC rationale for its decision.

Now, as noted, it refuses to release the China CPAC report and the Cypriot report.[69] However, Chairman Kislak has sharply criticized that decision: *"I believe that the release of CPAC's reports would promote [transparency] goals. I don't believe that the release of this material after a decision has been made will discourage CPAC members from discussing the merits of each case." Even more significantly, release of these materials will "promote the accountability of [State Department] Cultural Heritage Center Staff] to both CPAC and the public at large."*[70]

These concerns have, for over a decade, been pressed before CPAC, but to no avail. Thus, in a letter of June 17, 1999 arguing for greater transparency of CPAC procedures, of special note is the opinion of CPAC legal counsel that the practice of total secrecy of CPAC proceedings is one of **policy**, not a **legal requirement**.[71] He is correct that there is no **legal** requirement for the shroud of secrecy.

One other aspect of the CCPIA that supports enhanced transparency has been ignored. For an extended period, there have been reports that counsel to CPAC has warned members that any conversations with outsiders on issues before CPAC could constitute serious — indeed criminal — liability.[72]

Such a warning seems directly contrary to Section 2605(i)(2) which provides that any rules of confidentiality should be drafted in a fashion to permit "to the maximum extent feasible" meaningful consultations by Committee members with persons in the public affected by proposed agreements under the CCIPA.[73] This clearly contemplates some measure of communication between CPAC members and private parties or museums who will be impacted by embargo decisions.

The initial rationale for not releasing any information contained in a source country's request was that this material could provide a "road map" for potential looters to go to particular locations. But that does not hold up in the current context with nations asking for a comprehensive ban on its entire cultural history.[74]

As counsel of CPAC stated, these severe restrictions on transparency are a matter of policy, not law. For the reasons set forth by Chairman Kislak, the current policy of shutting out the public simply results in a lack of transparency, to the detriment of the CPAC process itself, and shelters State Department officials from any legitimate examination and critique of their actions.

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5. THE MOU PROCESS IS BECOMING A DIPLOMATIC "BARGAINING CHIP"

The MOU process has become a "bargaining chip" for the State Department in its diplomatic dealings.[75] Congress initially placed the administration of the MOU process in the USIA to try to insure that MOU decisions were made on the basis of cultural issues rather than diplomatic considerations.

There are two indications that this Chinese wall has broken down:

- The Canadian MOU went into a black hole from 1989 to 1995, when Canadian officials came to Washington to protest the Helms-Burton Act. The dormant MOU was resuscitated and released as a 'deliverable" to assuage Canadian outrage at Helms-Burton.
- The State Department recently expanded the scope of the Cypriot MOU to extend it to apply to coins, which the CPAC had voted against. Then they said there was no disagreement between officials at State and the CPAC. What I believe most likely happened was representations from Cypriot diplomatic officials to the State Department, which led to the expansion of the MOU to include coins. State Department officials later joined Cypriot officials to acknowledge this embargo and to express our appreciation of Cypriot cooperation with our "War on Terror."[76]

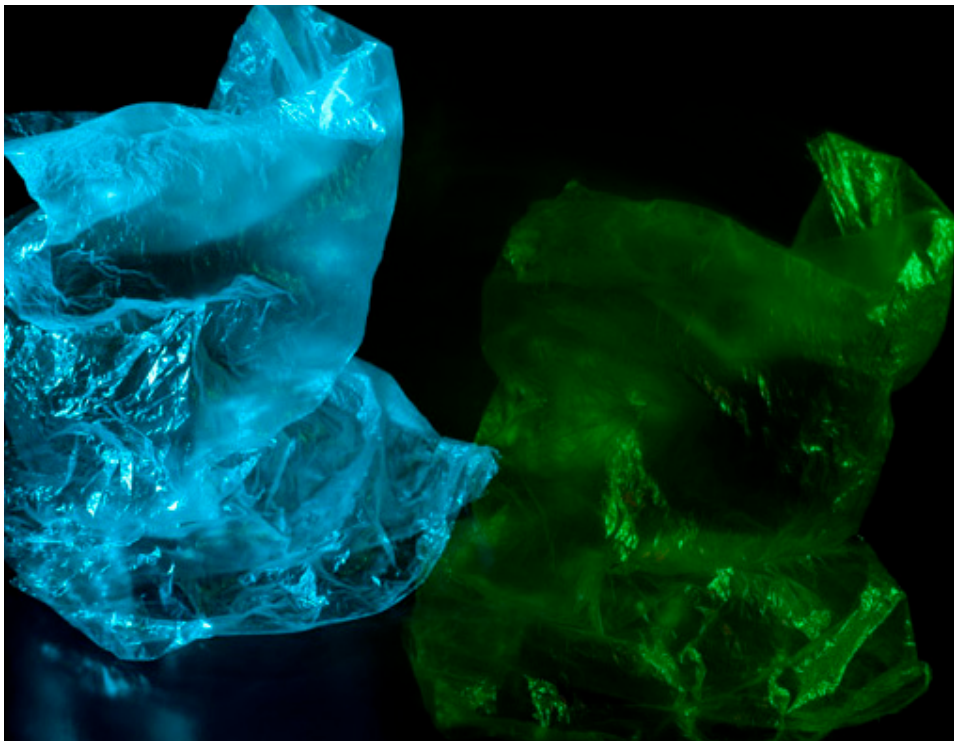
What should be done to assess fairly whether the State Department has gone seriously off course, as I believe it has?

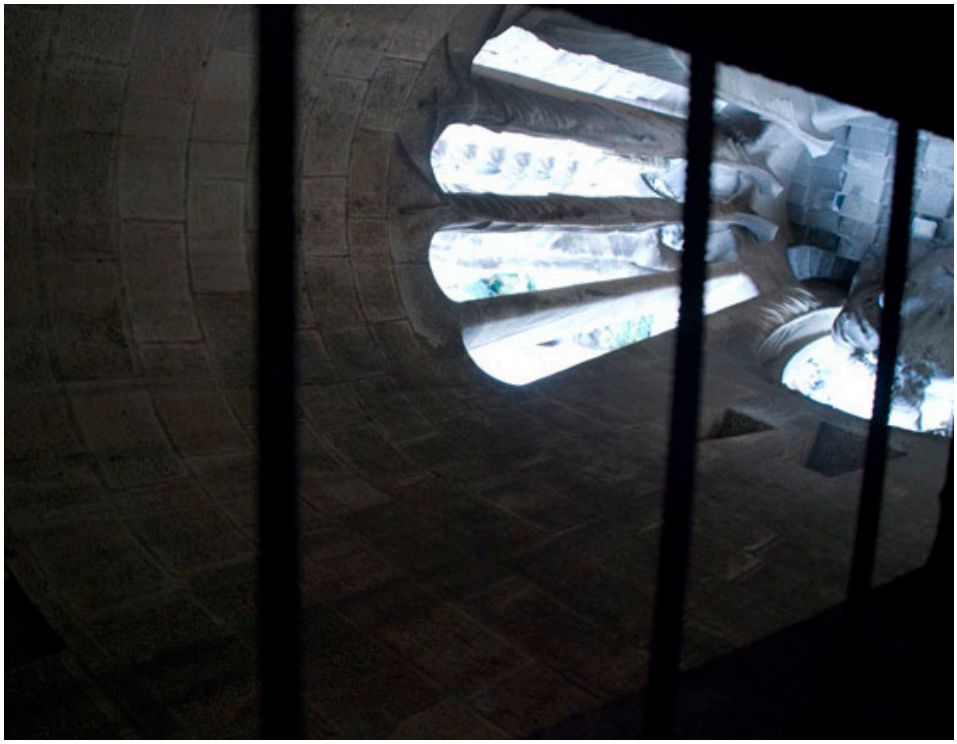
Recourse to the courts is not a favored alternative. That approach is costly, time consuming and would face stiff government opposition to any judicial evaluation of the stewardship of the CCIPA. It would also be difficult to frame a judicial challenge to look comprehensively whether State has faithfully administered the CCPIA.

Likewise, interesting Congress in revisiting this issue at this time -- with the myriad major policy issues facing it on other fronts — would be difficult. Congress did make one attempt to reform CPAC procedures in the late 1990s, but that occurred mainly because a Senate sponsor of the bill, Daniel Patrick Moynihan of New York, felt that the initial policies and terms of the CCIPA, of which he was a major draftsman, had been so significantly subverted.

The better approach might be for the American Bar Association, and its International Law Section, to commission a series of studies to examine how faithfully to the statute the MOU program has been administered. That kind of forum would provide the State

Continued on page 31





Department the opportunity to publicly describe its interpretation of the law (which it has refused to do to date) and hold that up to the text and intent of Congress in the law's promulgation. This would serve as a foundation for further changes in the law, or preferably, for the State Department itself to reform its procedures to comply with Congress' intent. ◆

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[1] Mr. Fitzpatrick is a Senior Partner of Arnold & Porter, a Washington, D.C. law firm. He teaches a course on cultural property law at the Georgetown Law School. For many years, he represented antiquities dealers in legislative, administrative and judicial proceedings involving the international movement of antiquities.

[2] This panel discussion is referred to herein as "ABA Panel."

[3] *Convention on Cultural Property Implementation Act*, 19 U.S.C. §2601 (herein the "CCPIA").

[4] *See* H. REP. REPORT, 95-615, at 8 (1977): The concern that United States action alone will be ineffective in meeting the objectives of the Convention and only continue the flow of objects to non-participants is a legitimate one. However, the committee believes the United States should take a moral stand and exercise its leadership as the major art-importing country by implementing the Convention, thereby helping to remove an incentive to serious pillage by prohibiting entry into the United States art market of objects illegally exported of importance to the cultural patrimony of States Parties irrespective of whether other countries continue to tolerate such illicit trade (emphasis added.)

[5] *Conventions on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, Nov. 14, 1970, 823 U.N.T.S. 231 (1972) (herein, "UNESCO 1970", or the "Convention").

[6] S. REP., 97-564, at 27 (1982) (emphasis added) (herein "Senate Report").

[7] Note the statutory provisions relating to an "emergency" situation – with very demanding standards – do not require concerted action. See 19 U.S.C. § 2603.

[8] Senate Report, at 27.

[9] Jack Josephson, Chair of the Cultural Property Advisory Committee ("CPAC") from 1990-1995, has said: "The law is very specific on the requirement that public diplomacy by the State Department must be invoked in order to prevent the dispersal of embargoed cultural property to markets in other countries, thereby simply transferring sales overseas. I never saw that happen..." 10 IFAR Journal (Nos. 3 & 4), at 33 (2008/2009) (herein, the "IFAR Journal"). Further, he said, "the CCIPA calls for the State Department to enlist and encourage other art importing countries to embargo importation of the same material excluded from the United States. This has never been done..." Letter from Jack Josephson, Chair of CPAC to Senator Daniel Patrick Moynihan, dated January 21, 1999 (in possession of the author).

[10] Switzerland has now adopted a procedure similar to ours. Loi federal du 20 juin surle transfert international de biens culturels (LTBC). It is unclear how effectively is the enforcement of any import ban.

[11] This position has been advocated by Professor Patty Gerstenblith, whose views consistently support foreign source countries and archaeologists and consistently present positions adverse to U.S. interests. See Gerstenblith, *United States Implementation of the 1970 UNESCO Convention*, at 8, ABA Panel.

[12] As the Senate Report noted, at page 24, the Convention requires: "where a state party's cultural patrimony is in jeopardy from pillage of identified types of [cultural objects], the parties agree to apply import controls or other appropriate corrective measures." This clearly confirms that, under our view, there is action required under the Convention beyond simply ratifying it.

[13] Gerstenblith, at 10, ABA Panel.

[14] *But cf.*, "...the Convention does not impose any new onerous burdens on the U.K. or individuals," noting that it "largely reflects" the EU policy re return of cultural objects without export permits. See U.K. Department of Culture, Media and Sport, *The 1970 UNESCO Convention – Guidance for Dealers and Collectors of Cultural Property*", [PAGE] (YEAR) (copy in possession of the author]. Further, "Although the [UNESCO] Convention has been ratified by the United Kingdom, no legislation has been introduced to implement it, apparently because the government is of the view that existing legislation is sufficient to enable the United Kingdom to comply with its obligation under the Convention." *Iran v. Barakat Galleries, Ltd.*, 2009 QB 22 [2008], Westlaw p 1, 31.

[15] Letter from Pierre F. Valentin, Director, Public Affairs, Sotheby's to Martin Sullivan, the Director of Public Affairs of Sothebys, to Martin Sullivan, Chair of CPAC, dated of November 19, 1999 (in possession of the author).

[16] An official of the U.K. Department for Culture, Media and Sport has confirmed, "To date no prosecutions have been made under the Dealing in Cultural Objects (offenses) Act 2003." Letter Letter of 4/7/2010 to Mark Dodgson, Secretary General, The British Antique Dealers' Association, dated April 7, 2010 (in possession of author).

[17] *See* Rena Moulopoulos Neville, *The European Experiment in Enforcing the Export Control Laws of Fellow Member States*," 5/2001 Art and Cultural Property Newsletter of the International Bar Association Section of Legal Practice. *See also* Report on Application of Counsel Directive 93/7 EEC at http://www.law_archaeology.gr/index.asp?c-3.

[18] Gerstenblith, at 5, ABA Presentation.

[19] Senate Report, at 28.

[20] *Id.*

[21] *Id.*

[22] *Id.* (emphasis added).

[23] *Id.*

[24] Gerstenblith, at 5, ABA Panel.

[25] Complaint, *Ancient Coin Collectors Guild v. U.S. Dept. of State*, Civ. Act 07-72074 (RSL) U.S. Dist. Court for the District of Columbia (April 20, 2009).

[26] Symposium, *Proceedings of the Panel on the U.S. Enabling Legislation of the UNESCO Convention*, 4 Syracuse J. Intl. L. and Com. 97 (1976).

[27] IFAR Journal, at 33 (emphasis added).

[28] 19 U.S.C. § 2602(a)(2)(A) (1994) (emphasis added).

[29] H.R. 14171, 94th Cong. § 1 (1976).

[30] *Memorandum Between the Government of the United States of America and the Government of the People's Republic of China Concerning the Imposition of Import Restrictions on Categories of Archeological Material from the Paleolithic Period through the Tang Dynasty and Monumental Sculpture and Wall Art at least 250 Years Old*, January 14, 2009, TIAS..., implemented by import restrictions, January 16, 2009, 74 Fed. Reg. 2838-2844 (hereinafter "China-U.S. MOU").

[31] 94th Cong. (1976). The bill was referred to the Ways and Means Committee and in fact was a revision of an earlier proposal, S. 2677, 93d Cong. (1973), which was not considered in the House. *See* H.R. REP. NO. 95-615 at 3 (1977) (discussing history of the various versions of the bill leading to the amended H.R. 5643).

[32] SUBCOMMITTEE ON TRADE OF THE COMMITTEE ON WAYS AND MEANS, 94TH CONG., 2D SESS., WRITTEN COMMENTS ON H.R. 14171, at 15 (Comm. Print 1976).

[33] H.R. 14171, 94th Cong. § 1 (1976). The bill contained similar provisions to those found in § 2602 (a)(1) of the current Act; *i.e.*, it required the President to make similar findings before he could enter into any restrictive agreements. *See* H.R. 14171, 94th Cong. § 1(1)-(4).

[34] The Ways and Means Committee Report makes clear, however, that even in this early draft, proposed as it was by the State Department, the intent was still to limit the scope of the President's agreement authority. *See* SUBCOMMITTEE ON TRADE OF THE COMMITTEE ON WAYS AND MEANS, *supra* note 32, at 15. ("It is anticipated that the authority provided...would be used only in serious situations and *the President would not use this authority to conclude general agreements prohibiting the entry of all objects of archeological [sic] or ethnological interest . . . or for prohibiting the entry of such objects when they are not in danger.*") (emphasis added).

[35] *See* H.R. 14171, supra note 33, at § 1.

[36] Senate Report, at 25 (emphasis added).

[37] H.R. REP. NO. 95-615 at 6.

[38] *Id.*, at 7 (emphasis added).

[39] *See*, *e.g.*, 123 CONG. REC. 33,932 (1977) (statement of Cong. Steiger).

[40] *Id.* (statement of Cong. Steiger) (emphasis added).

[41] Senate Report, at 25.

[42] *Id.*

[43] *Id.*

[44] *See* House Ways and Means Report, at 6, stating, "... the [§ 2602(a)(2)] authority is not intended as a means to deal with the general problem of illegal exportation of large amounts of cultural objects from many countries".

[45] *Convention on Cultural Property Implementation Act: Hearing Before the Subcommittee on International Trade of the Senate Committee on Finance*, 95th Cong. 17, at 18 (1978) (emphasis added).

[46] *Id.*, at 18.

[47] *Id.*

[48] *Id.*, at 31 (written responses of State Department to questions submitted by Sen. Ribicoff).

[49] *See*, *generally* 19 U.S.C. § 2602 (1994).

[50] *See* China-U.S. MOU, supra note 30.

[51] *See* e.g., UNESCO Convention on Cultural Property; Hearings on HR 5643 before the House Subcommittee on Trade, 95th Cong. 20 (1977) (statement of State Department official using an example of 150 Syrian tablets from 2400BC. See also 128 Cong. Rec. 18,282 (1979) (statement of Senator Matsunaga citing as rationale for implementation the removal of specific antiquities from Herculaneum and Pompeii, bronze and gold tablets from King Midas' tomb, etc.)

[52] CCPIA, at § 303(a)(1)(B).

[53] *See* Barack Obama, "Memorandum for the Heads of Executive Departments and Agencies," 74 FR 4685 (Jan. 21, 2009).

[54] Eric Holder, *Memorandum for Heads of Executive Departments and Agencies regarding FOIA* (Mar. 19, 2009), available at http://www.justice.gov/ag/foia-memo-march2009.pdf (retrieved Mar. 11, 2010).

[55] IFAR Journal, at 41.

[56] *Id.*

[57] *Id.*, at 43.

[58] *Id.*, at 41.

[59] *Id.*

[60] *Id.*, at 43.

[61] As six former CPAC members have said: "The State Department staffers who advise CPAC actively solicit foreign requests and help complete applications." Letter from Eugene Thaw, former CPAC member, to Honorable Charlotte L. Beers, Undersecretary for Public Diplomacy, DOS, dated April 29, 2002 (letter in author's possession). Further, Professor Stephen Urice wrote: "The sole journalist to have taken a forceful opposing position [to State] was the late Steven Vincent. For example, in *The Secret War of Maria Kouroupas*, 24 Art & Auction 62 (2002), Vincent argues that Maria Kouroupas, the staff director of CPAC, discharges her duties in a biased manner (anti-collecting) thereby frustrating the compromise achieved by Congress after 11 years of debate when it enacted

the CCPIA in 1983."

Stephen K. Urice, *Antiquities as Cultural Property: Dealing With the Past, Looking to the Future – An Introduction*, ALI-ABA Course on Legal Issues in Museum Administration, March 14-16, 2007 (copy in possession of the author).

[62] Declaration of Jay I. Kislak, *Ancient Coin Collectors Guilt v. U.S. Department of State*, Civ. Act 07-72074 (RSL) U.S. District Court for the District of Columbia (April 20, 2009) (herein, the "Kislak Declaration").

[63] Documents in author's possession (herein referred to as "Freedom of Information procedures").

[64] *See* Fitzpatrick, *Stealth Unidroit: Is USIA the Villain?*, 31 NYUJ of Intl. Law and Politics, No. 1, at 47 (1995).

[65] The State Department has claimed that the Canadian renewal request was denied in 2002 because "there was evidence that Canada had the problem of pillage well under control." See U.S. Dept. of State, Bureau of Educational Affairs, http://exchanges.state.gov/heritage/culprop/cafact.html. But, I believe, there was never pillage in the first place to support the initial MOU.

[66] Complaint, *Ancient Coin Collectors Guild v. U.S. Dept. of State*, Civ. Act 07-72074 (RSL) U.S. Dist. Court for the District of Columbia (April 20, 2009).

[67] The archaeologists' professional association has acknowledged the impact of the domestic antiquities market on looting. In AIA News of 3/20/09, an AIA trustee said: "There is no way to know the true scope of the internal trade in antiquities in China. As the Chinese economy has soared over the past decade or so, more and more Chinese collectors are buying Chinese antiquities, most of which in the past would have ended up in the international market. The site destruction caused by looters in search of sellable objects is equally reprehensible, whether it is caused by domestic demand or by international demand." http://www.archaeological.org/news/advocacy/91

[68] Documents in possession of author.

[69] Complaint, *Ancient Coin Collectors Guild v. U.S. Dept. of State*, Civ. Act 07-72074 (RSL) U.S. Dist. Court for the District of Columbia (April 20, 2009).

[70] Kislak Declaration, at 2.

[71] In this letter, as representative of antiquities dealers, I stated: "The past practice of total secrecy is one of policy, not of legal requirement. It is of great significance that Richard Werksman, USIA Counsel to the Committee, confirmed yesterday that the decision to keep all this information and data confidential is a matter of policy. There is no legal requirement for this veil of secrecy. On that point, he is perfectly correct. Current policy should be reexamined and revised." Letter from James Fitzpatrick, as representative of antiquities dealers to Martin Sullivan, Chair of CPAC, dated June 17, 1999 (letter in possession of the author).

[72] In this regard, one former CPAC member said: "…when I asked CPAC's [legal] counsel whether I could share a dissenting opinion with someone outside the committee, I was told 'you can, but it is probably the last thing you will do on this committee.'" Letter of Gerald Stiebel, former CPAC member, to Sen. Moynihan, dated October 14, 1999 (letter in possession of author).

[73] This penchant for secrecy has given one side – the archaeologists – preferred access to the Committee. One former CPAC member has said: "When matters of fact and description of conditions of looting were discussed, it was often after a presentation by and with the participation of an outside archaeologist (sometimes a former member of the Committee). Never was outside expertise called or allowed from the collecting community – museums, private collectors or dealers." Letter of Eugene Thaw, former CPAC member, to Sen. Daniel Patrick Moynihan, dated January 21, 1999 (letter in possession of the author).

[74] The situation might be different in those emergency requests early in the history of CPAC where newly-discovered materials were being looted and coming onto the market. See IMPORT RESTRICTIONS ON ARCHAEOLOGICAL MATERIAL FROM EL SALVADOR, 52 Fed. Reg. 34614-02 (1987); IMPORT RESTRICTIONS ON CULTURAL TEXTILE ARTIFACTS FROM BOLIVIA, 54 Fed. Reg. 10618-02 (1989); IMPORT RESTRICTIONS IMPOSED ON SIGNIFICANT ARCHAEOLOGICAL ARTIFACTS FROM PERU, 55 Fed. Reg. 19029-01 (1990); IMPORT RESTRICTIONS IMPOSED ON ARCHAEOLOGICAL ARTIFACTS FROM GUATEMALA, 56 Fed. Reg. 15181-01 (1991); IMPORT RESTRICTIONS IMPOSED ON SIGNIFICANT ARCHAEOLOGICAL ARTIFACTS FROM MALI, 58 Fed. Reg. 49428-01 (1993).

[75] One former CPAC member stated, "… the thrust of the Committee's work is still to automatically ratify the archaeological position and at the same time, never cross the requirements of the State Department in their desire to accommodate all source nations." Letter of Eugene Thaw, former CPAC member, to Senator Moynihan, dated January 21, 2002 (letter in possession of the author).

[76] *See* Kislak Declaration, at 3. *See* also http://www.cyprusembassy.net/home/index.php?module=article&id=4077.