

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

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Panel: International Trade in Ancient Art and Archeological Objects
ABA Section of International Law
Spring Meeting – New York City
April 15, 2010

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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 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 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 “UNESCO Convention on Cultural Property”).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, but the Convention was given life and shape by the

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² 823 UNTS 231 (1972), TIAS 7008

³ P.L. 97-446; 19 U.S.C.2601 *et seq.*

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 one hundred twenty states, including the United Kingdom, France, Switzerland and The Netherlands, have now become party.

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. We wanted to help combat pillage of archeological sites but did not wish to discourage 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 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; 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 we 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 we have 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 1970 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.

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.

This agreement, and others like it with Italy and Cyprus, implements article 9 of the Convention and is intended to help deter pillage. The China agreement 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

In 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 on-going help in recovering stolen American automobiles. At first, there was little interest in the 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 Coggin⁴ 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 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.

⁴ 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 p. 24.

I recommended that the State Department reverse course and agree to take legal measures to control illicit trade in archeological objects. The Department adopted that position and other agencies, notably the Justice Department and Treasury, were supportive. Nothing could have been accomplished, however, without cooperation of the interested domestic constituencies. Archeologists strongly favored the program, but we 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 archeologists and supportive media, the issue was receiving 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 we were able to forge a consensus 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: (1) 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; (2) a statute prohibiting imports of pre-Columbian monumental and architectural sculpture exported illegally from Latin America; and (3) 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. The UNESCO 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 the Parties: (1) to return cultural property stolen from museums, shrines and monuments, (2) to require public institutions, and to encourage private museums, not to acquire important cultural property illegally-removed from another State Party, and (3) to “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 UNESCO 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 U.S. had to propose amendments to the Secretariat draft article by article. Many

votes were extremely close. We won some and lost others in no particular pattern. As Professor Bator explains in his brilliant “Essay on the International Trade in Art,”⁵ the drafting process was chaotic, and the final text “is not a model of clarity and consistency.”

In the end, working with Mexico and others who understood that the Convention could not succeed without U.S. support, we were able to persuade the Committee to adopt a text that met essential U.S. 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.”

This language, based on a U.S. 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 might go slowly or fail, provisional measures were contemplated to prevent irremediable injury.

Implementing Legislation: 1973-1983

The 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 U.S. could not implement the Convention without significant changes in U.S. law. The plan was to introduce legislation promptly and to delay ratification pending enactment. As it

⁵ 34 Stanford Law Review 275, 373 (1982)

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 gave us 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. The Senate held hearings the next year, but declined to act until 1982. Some Senatorial concerns were substantive; others 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.⁶ 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.” State 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

⁶ 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.

detering pillage and damaging to American interests. Numerous safeguards were proposed, including a provision that each bilateral agreement be approved by Congress. 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 we believed that the Department might be in better position to protect U.S. 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 Convention Parties seeking import controls could easily have formed coalitions supporting measures beyond our 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 conditions preserving a reasonable flow of ancient art to the United States.

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.” 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) 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 a market state “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.”⁷

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. 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.

⁷ 19 U.S.C. 2602 (a).

