

# Implementation of the 1970 UNESCO Convention by the United States and Other Market Nations

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## Introduction

The major threats to cultural heritage come in the twin forms of destruction during military conflict and looting of sites and collections. Both in antiquity and in contemporary times, we see these destructive activities often going hand-in-hand (Miles 2008, 33-104). While the Roman authors Cicero and Polybius provide antecedents for the protection of cultural heritage, these ideas appeared first in modern history in the writings of the international legal theorist, Emmerich de Vattel, in the mid-eighteenth century (Miles 2008, 300-302). The Hague Conventions and Regulations of 1899 and 1907, which were influenced by the Lieber Code, drafted for the Union Army in 1863 during the American Civil War, engrained concepts of protection into international law.

It was only with the end of the Second World War and the ruin wreaked upon Europe from both a humanitarian and cultural perspective by the Nazi forces that the international community approached international humanitarian law from a comprehensive perspective. The late 1940s saw the large-scale development of international humanitarian law principles, embodied primarily in the Geneva Conventions. The subject of cultural property protection was separated into its own distinct convention, the 1954 Hague Convention on the Protection of Cultural Property during Armed Conflict. While the First Protocol to the 1954 Hague Convention addresses the subject of movable cultural property, it does so only under very narrow circumstances of illegal removal of cultural objects from occupied territory and the deposit of cultural objects by one State in another State for the purpose of safekeeping.

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· Distinguished Research Professor, DePaul University College of Law. © All rights reserved (2017). This paper is a chapter in a forthcoming publication: Jane Anderson and Haidy Giesmar, eds. 2017. *The Routledge Companion to Cultural Property*. London and New York: Routledge Press.

<sup>1</sup> There are several stages by which a State becomes party to an international treaty or convention. The first stage is signature. A convention is generally open to signature for only a limited amount of time. Whether or not a State signs a convention, the State can still ratify or accede to it, following whatever process is required for that particular country. The United States Constitution, for example, requires approval by two-thirds of the Senate for ratification. A treaty or convention is not binding on a State until it completes the formal ratification process, but, by signing a convention, the

However, in the post-Second World War period, the appetite of the international art market for works of art, including archaeological objects, grew commensurately with the increase in wealth of the European and North American countries. Unlike contemporary works of art, the corpus of archaeological objects available on the market can increase only by the addition of fakes and forgeries or by the looting of archaeological sites. At the same time, the increasing application of scientific methodologies, including stratigraphic retrieval and scientific analyses, meant that greater quantities of information could be recovered from the proper excavation of sites. Therefore, the looting of sites caused an increasing loss to our knowledge and understanding of the past. Finally, with the end of colonialism in much of the world, particularly Africa and Asia, the new countries sought legal means to conserve at home what remained of their heritage, after so much had been lost to the colonial powers.

Sparked in particular by the work of Professor Clemency Coggins (1969), who brought world attention to the destruction of Maya architectural and monumental sculptural remains in Central America, and of Karl E. Meyer (1977), the world community under the leadership of UNESCO sought to draft a new international convention to confront the illegal trade in art works, antiquities, and ethnographic objects. These efforts culminated in the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (“the 1970 UNESCO Convention” or “the Convention”). The Convention currently has 131 States Parties. Depending on how a country views a particular convention, it may need to enact implementing legislation to give the convention domestic legal effect. The extent to which a convention is legally binding within a nation then depends on the parameters of this domestic legislation. This essay will consider the nature of the implementing legislation for the 1970 UNESCO Convention enacted by several of the most significant market nations for archaeological objects. The method by which the United States implements the 1970 UNESCO Convention is examined first and then several paradigms of implementation used by other States are considered in briefer detail.

## Implementation by the United States

The United States was one of the first market countries to take steps toward ratification of the 1970

UNESCO Convention when the Senate gave its unanimous consent to ratification in 1972. 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.<sup>1</sup> 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, who represented the heart of the United States art and antiquities market and was himself involved in the antiquities collecting world.

The implementing legislation, known as the Convention on Cultural Property Implementation Act (CPIA), 19 U.S.C. §§2601-13, was finally enacted in December 1982 and signed into law by President Reagan in January 1983. Among the reasons given by Congress for enactment of the CPIA and ratification of the 1970 UNESCO Convention were:

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.

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The Senate Report also recognized that archaeological and historical sites in the United States were equally subject to pillage and looting. “The destruction of such sites and the disappearance of the historic records evidenced by the articles found in them has given rise to a profound national interest in joining other countries to control the trafficking of such articles in international commerce” (U.S. Senate Report 1982).

The CPIA substantively implements only two sections of the 1970 UNESCO Convention — Article 7(b), which addresses return of stolen cultural property that had been inventoried in the collection of a public secular or religious institution, and Article 9, which provides a mechanism by which States Parties may call upon each other for assistance in cases of jeopardy to cultural heritage through the looting of archaeological and ethnological materials. The CPIA incorporates other sections, including the definition of cultural property in Article 1 of the Convention and measures that a State Party should take to protect its cultural heritage outlined in Article 5. The United States explicitly failed to view Article 3, which other countries consider to be the Convention’s core obligation, as substantive in nature and therefore refused to include it within the U.S. implementing legislation (O’Keefe 2007, 41, 108). The view of the United States was likely the result of Article 3’s across-the-board adherence to the Convention’s provisions, in particular the recognition of all other States Parties’ export controls on cultural objects.

#### “Stolen Cultural Property”: Article 7(b)

Of the two substantive provisions of the CPIA, the more straightforward concerns cultural property stolen from public or religious institutions, reflecting Article 7(b) of the Convention. This section of the CPIA 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 is later, may be imported into the United States.

19 U.S.C. §2607. The term "cultural property" is defined in reference to the Convention as "includ[ing] articles described in article 1 (a) through (k) of the Convention whether or not any such

article is specifically designated as such by any State Party for the purposes of such article." 19 U.S.C. §2601(6). The Convention definition is very broad and includes virtually every sort of cultural object that might be housed in a museum or other type of public secular or religious institution.

The primary change in United States domestic law that this section of the CPIA produced was essentially one of remedy. It had always been possible for private litigants, including foreign governments recognized by the United States, to enter United States courts to reclaim their stolen property in a civil replevin action. The United States interpreted the Convention's admonition to prohibit the import of cultural property stolen from an institution to mean that such import should be prohibited at the border. The CPIA thus gives to the Department of Homeland Security (formerly Customs) the authority to seize and forfeit such property at the border, although such property can also be seized and forfeited after it has entered the country.

The only elements that the government must prove in order to to seize and forfeit such cultural property are that the cultural property came from a documented public collection and that it was stolen from the institution after the date on which both the United States and the country of origin became parties to the Convention (whichever date is later). There is no need for the government to establish that the importer had any knowledge of or intent to commit any wrongdoing. This provision can also prove useful in the case of recovery of documented cultural property that is stolen from a State Party which cannot maintain a suit in U.S. courts. This provision of the CPIA thus grants significant "enhanced" protection.

#### **Import Restrictions for Undocumented Archaeological and Ethnological Materials: Article 9**

The United States' implementation of Article 9 is complex and splits this provision into two sections of the CPIA. The first of these statutory provision, 19 U.S.C. §2602, provides a mechanism by which the United States can enter into bilateral agreements or memoranda of understanding (MOU) with other States Parties for the imposition of import restrictions on designated categories of archaeological or ethnological materials. The CPIA allows the United States to enter such an agreement with a requesting State Party without the necessity of Senate ratification of a new treaty. These agreements pertain only to archaeological and ethnological materials, rather than to the broader category of cultural property defined in Article 7(b) of the Convention.

Unlike the Convention, the CPIA offers a definition of the archaeological and ethnological materials to which the Article 9 provisions may apply.

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). As O'Keefe has noted, these definitions significantly curtail the potential applicability of the CPIA (O'Keefe 2007, 111). For example, objects from sites of the historic or Colonial periods in North America and from historic shipwrecks will not qualify as archaeological materials if they do not reach the 250-year threshold requirement.

A State Party initiates the process by submitting a request for a bilateral agreement to the United States through diplomatic channels. The request is referred to the Cultural Property Advisory Committee, which consists of eleven members appointed by the President — three are experts in

archaeology or anthropology; three are experts in the international sale of archaeological, ethnological and other cultural property; two represent the museum community, and three represent the general public. 19 U.S.C. §2605(b). This Committee evaluates requests from States Parties for bilateral agreements and makes recommendations to the President (who has delegated this function to the Assistant Secretary of State for Educational and Cultural Affairs) as to whether the statutory criteria are satisfied. The delegated decision maker makes the actual determinations required by the CPIA and, if the criteria are satisfied, initiates negotiation of a bilateral agreement to impose import restrictions under Section 303 or may take emergency action under Section 304.

The statutory determinations required for a bilateral agreement 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).

While some elements of these determinations track the language of Article 9, other elements clearly impose additional obligations on a requesting State Party. Other provisions appear inconsistent. For

example, in (A) the phrase "jeopardy from the pillage" is used, whereas in (C)(i), the phrase "serious situation of pillage" is used. The third determination, (C)(i), anticipates that the United States' actions will be taken within a concerted or multilateral context. The nature and extent of this concerted action is not, however, spelled out in the statute, although it clearly includes actions that are expected to be implemented within a reasonable time.

There is also an important exception to this concerted action requirement. The statute provides:

[T]he 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).

Reading both the basic provision concerning the concerted action requirement and the exception together, it would seem that the United States can enter into a bilateral agreement even in the absence of concerted action when (1) the United States is the only country to have a significant import trade in the material being considered or (2) it is not essential to deterrence of the pillage for another nation with a significant import trade to impose import restrictions. In the second circumstance, it is sufficient if the United States' own action regarding import restrictions will be of substantial benefit.

A bilateral agreement may not last more than five years, but it may be renewed an indefinite number of times. The agreement with El Salvador has been renewed four times. The criterion for renewal is that the same conditions that originally justified the agreement still exist. 19 U.S.C. § 2602(e).

The CPIA allows the United States to impose import restrictions, without the negotiation of a bilateral agreement, in certain circumstances. This emergency provision is 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 is pending. This provision under the CPIA is available only if the other State Party has already submitted a request for a bilateral agreement with supporting documentation for the criteria necessary for both a bilateral agreement and emergency action. The CPIA describes three circumstances that constitute an "emergency condition:"

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). Many of the prerequisites for a bilateral agreement are not found here, including the concerted action requirement. Those circumstances that constitute an emergency condition are defined fairly narrowly and precisely. Such import restrictions may last initially only five years; they may be renewed only one time for a maximum of three additional years, in contrast with a bilateral agreement, which can have an unlimited number of renewals.

The United States has bilateral agreements with only sixteen nations: Belize, Bolivia, Bulgaria, Cambodia, China, Colombia, Cyprus, Egypt, El Salvador, Guatemala, Hellenic Republic, Honduras, Italy, Mali, Nicaragua, and Peru. An agreement with Canada was in effect from 1997 to 2002. In several cases, import restrictions under the emergency provisions had been imposed for particular materials before the respective bilateral agreement was negotiated and finalized. These include, for example, Maya artifacts from the Cara Sucia region of El Salvador; culturally significant archaeological objects from the Sipan Region of Peru, and Maya artifacts from the Péten region of

Guatemala.

The United States maintains permanent restrictions on the importation of cultural materials illegally removed from Iraq after August 1990 under the Emergency Protection for Iraqi Cultural Antiquities Act, enacted in late 2004. Sections 3001–03, P.L. 108-429. This legislation authorized the president to exercise his authority under the CPIA to prohibit import of designated archaeological and ethnological materials from Iraq. This legislation is notable for defining the archaeological and ethnological materials of Iraq in accord with United Nations Security Council Resolution 1483 of 2003 in place of the normal CPIA definitions of these types of materials. In addition, although these import restrictions were authorized under the emergency provisions of the CPIA, 19 U.S.C. §2603, the EPIC Antiquities Act provided that Iraq did not need to first bring a request for a bilateral agreement and the import restrictions would last for an indefinite period of time. These import restrictions went into effect in April 2008. Under legislation modeled on the special Iraq legislation, comparable import restrictions were imposed on cultural materials illegally removed from Syria after March 2011, thus implementing U.S. obligations under U.N. Security Council Resolution 2199 of 2015.

O'Keefe has pointed out that the process for requesting a bilateral agreement imposes burdens on a State Party that were not anticipated by the Convention itself, particularly as a nation must prepare a request for a bilateral agreement in order to seek import restrictions in an emergency situation (O'Keefe 2007, 112). Despite this burden, some of the world's poorest nations, including Mali, Bolivia, El Salvador, and Guatemala, have been successful in obtaining bilateral agreements with the United States. In light of the fact that many States Parties to the UNESCO Convention automatically grant reciprocal recognition of other States Parties' export restrictions on cultural property, bilateral agreements with sixteen States Parties, which represents less than fifteen percent of the States with which the United States could have agreements, is not evidence of an overwhelming compliance with Article 9. However, it was a significant step taken by probably the world's largest art market nation before most of the art market nations were ready to join the Convention at all.

Import restrictions imposed pursuant to either of the CPIA provisions become effective upon publication of a notice in the Federal Register. The agreement includes a list of designated categories

of archaeological or ethnological materials that represent types of objects, rather than specific objects, that are subject to import restriction. The Cultural Heritage Center of the State Department's Bureau of Educational and Cultural Affairs maintains a website, <http://eca.state.gov/cultural-heritage-center/cultural-property-protection>, that 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.

An archaeological or ethnological object that falls into one of the designated categories may be imported into the United States if it is accompanied by an export license, 19 U.S.C. §2606(a), or if satisfactory evidence can be presented showing that the object left the country of origin more than ten years before the date of entry or on or before the date the import restriction went into effect, 19 U.S.C. § 2606(b). The Department of Homeland Security enforces compliance with the import restrictions. The only remedy available under the CPIA is civil forfeiture of the object. 19 U.S.C. §2609. Once an object is forfeited, title to it transfers to the U.S. government, which then returns the object to the other State Party.

In addition to the reasons for the agreement and the list of designated materials, the agreement typically contains other provisions, primarily in Article II. These concern mutual cooperation between the United States and the other country in the realm of cultural heritage preservation, the provision of technical assistance, and certain provisions that are specific to the particular country involved. For example, the original MOU with El Salvador included the expectation that the national museum would be rebuilt and this was done within the first term of the bilateral agreement. 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 long-term loans available for educational, research and conservation purposes. In response, Italy has now extended the period for which art works can be on loan to four years, renewable for an additional four years. While these Article II provisions express directions in which the relations between the two countries may develop concerning cultural heritage, these undertakings are not prerequisites to the extension of an MOU, as they are not requirements under the statutory determinations, although, in some cases, they may relate to the statutory determinations (Kouroupas 2010, 331-33).

An international legal regime that relies on individual nations raises certain difficulties. The boundaries of modern nations and ancient cultures, even indigenous communities, do not necessarily coincide. The Inca culture in South America, the Maya culture of Central America and the Roman culture of the Mediterranean and Europe are but a few examples of ancient cultures that span more than one modern nation's borders. While import restrictions that operated on a cultural, rather than modern nation-state, basis might be more effective, international conventions are State-to-State agreements and function on that basis.

The first reported decision discussing import restrictions imposed under a CPIA bilateral agreement concerned the importation of two Colonial period paintings from Peru. *United States v. Eighteenth Century Peruvian Oil on Canvas Painting of the "Doble Trinidad" or "Sagrada Familia con Espiritu Santo y Dios Padre"*, and *Seventeenth Century Peruvian Oil on Canvas Painting of "San Antonio de Padua" and "Santa Rosa de Lima"*, 597 F. Supp. 2d 618 (E.D. Va. 2009). The U.S-Peru agreement includes "[o]bjects that were used for religious evangelism among indigenous peoples" including paintings of the Colonial period. *Archaeological and Ethnological Material From Peru*, 62 Fed. Reg. 31,713 at 31,720 (Dep't of Treasury, June 11, 1997). There was some question as to whether the paintings originated from Bolivia or from Peru, but as the same categories of ethnological objects were covered by the bilateral agreements with both countries, the court did not find it necessary to determine which country was the country of origin. This approach is limited, however, to the circumstance in which all of the likely modern countries of origin have a bilateral agreement with the United States covering the same categories of objects.

The only other reported decisions concerning the CPIA bilateral agreements involved a test case instigated by the Ancient Coin Collectors Guild (ACCG) to challenge the validity of import restrictions on ancient coins from Cyprus and from China. The ACCG arranged for the import in April 2009 through Baltimore, Maryland, of unprovenanced coins that fit the Cypriot and Chinese designated coin types. The District Court for the District of Maryland dismissed the ACCG's complaint, on the ground, among others, that neither the Department of State nor Customs and Border Patrol, a bureau of the Department of Homeland Security, had exceeded its authority under the CPIA. *Ancient Coin Collectors Guild v. U.S. Customs and Border Protection*, Dep't of

Homeland Security, et al., 801 F. Supp. 2d 383 (D. Md. 2011). The U.S. Court of Appeals for the Fourth Circuit affirmed this decision, relying in part on the sensitive nature of the conduct of foreign affairs and Congress' delegation to the Executive of significant discretion in carrying out the CPIA. *Ancient Coin Collectors Guild v. Customs and Border Protection, Dep't of Homeland Security, et al.*, 698 F.3d 171 (4<sup>th</sup> Cir. 2012). The Fourth Circuit also held that once the United States meets its burden of establishing that the object is of a type appearing on a designated list, the importer bears the burden of establishing that the object is eligible to be imported into the United States. The court concluded that "the importer need not document every movement of its articles since ancient times. It need demonstrate only that the articles left the country that has requested import restrictions before those restrictions went into effect or more than ten years before the date of import." *Id.* at 183. This decision provides substantive guidance that no particular category of ancient artifacts, including ancient coins, is, by their nature, ineligible to be placed on a particular designated list. Litigation is ongoing to determine whether these particular coins are subject to forfeiture.

It is difficult to assess the number of restitutions of cultural objects seized and forfeited by the U.S. government and returned to their country of origin as a result of bilateral agreements under the CPIA. The U.S. government does not maintain comprehensive statistics and, while the Department of Homeland Security occasionally publishes press releases announcing restitutions, these often do not state the legal basis for the forfeiture. However, objects have been returned to several countries under the bilateral agreements including to Italy, Peru, Guatemala and China.

### Implementation by Other Market Countries

While it took close to thirty years before other major market countries demonstrated interest in the 1970 UNESCO Convention, that situation began to change significantly in the late 1990s and early 2000s. 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 were soon joined by Sweden and Denmark; Switzerland joined in 2003 and Germany in 2007. The most recent European countries to join the Convention are Luxembourg and Austria. Several of these countries decided to ratify the Convention in response to the looting of archaeological sites and museums that occurred during and after the U.S.-led invasion of Iraq in 2003. Switzerland was motivated, at least in part, by the discovery of large quantities

of looted antiquities that had been stored in the freeport zone of the Geneva airport by the Italian dealer Giacomo Medici. Finally, some countries joined in response to their analysis of the 1995 UNIDROIT Convention on Stolen and Illegally Exported Cultural Property. While examining this later convention, which was drafted to appeal to the European continental countries, these countries realized that its more onerous requirements were not acceptable, whereas the less precise requirements of the 1970 UNESCO Convention made it more attractive. A sufficient number of market nations have now ratified and implemented the Convention that it seems possible to create a typology of methods of implementation.

### **“Across-the-Board” Import Restrictions: Implementation of Article 3**

Most States Parties grant reciprocal recognition to the export restrictions of other nations when those export restrictions are promulgated as part of their implementation of the 1970 UNESCO Convention. This broad approach to the recognition of other States Parties’ export controls implements Article 3 of the Convention, which states: “The import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention by the States Parties thereto, shall be illicit”. Article 6(b), which states that States Parties “undertake ... to prohibit the exportation of cultural property from their territory unless accompanied by the ... export certificate” described in Article 6(a), is also an integral part of a trade regulatory scheme. The implementation schemes of three nations, Australia, Canada and Germany, are examined as examples of across-the-board import restrictions.

*Australia:* Australia enacted its implementing legislation, The Protection of Movable Cultural Heritage Act, in 1986 before becoming a State Party in 1989 and amended it in 2011. It is perhaps unique among nations that have ratified the 1970 Convention in that its import controls apply to all illegally exported cultural objects, regardless of whether the country of origin is a party to the 1970 Convention. The export control that was violated only needs to be a “law of that country relating to cultural property” (Section 14(1)). In addition, it does not matter when the object was illegally exported from its country of origin, so long as the import into Australia occurred after the effective date of the legislation. Such an object is subject to forfeiture. A person who knowingly violates the import prohibition commits an

offence punishable by a fine not exceeding \$100,000 or imprisonment not exceeding five years or both (Section 14(2)). Australia is reported to be considering strengthening its legislation in the wake of the scandals involving Australian museums that acquired sculptural pieces stolen from Hindu temples from the dealer Subhash Kapoor (Pearlman 2013).

*Canada:* In 1978, Canada enacted broad import and export regulations, pursuant to Articles 3 and 6(b) of the Convention, when it adopted the Cultural Property Export and Import Act (“CPEIA”), R.S.C. 1985, c. C-51 ff. The CPEIA establishes a system of controls on the export of cultural materials from Canada and serves an important function in preserving Canada’s cultural heritage (Nafziger et al. 2010, 302-05). This legislation allows the establishment of a list of cultural materials whose export is subject to control through an export permit requirement.

With respect to import controls, the CPEIA applies to “foreign cultural property”, defined as “any object that is specifically designated by [a reciprocating State] as being of importance for archaeology, prehistory, history, literature, art or science.” R.S.C. 1985, c. C-51, § 37(1). The definition is thus similar to the 1970 Convention’s definition of cultural property. One recurring theme in the implementing legislation of several market nations is the question of how the UNESCO Convention’s definition of cultural property as property that is “specifically designated” is viewed. One court in Canada answered this question with respect to Canada’s import controls, in *R. v Yorke*, by holding that the Bolivian Decree, which subjected the textiles at issue to export control, was in compliance with the designation requirement and therefore fit the CPEIA’s definition of “foreign cultural property.” The court understood the difficulty posed by a specific designation requirement, particularly as applied to the types of archaeological and ethnographic objects that were frequently undocumented before their illegal removal, stating:

[T]he appellant's submission that, to "specifically designate" cultural property something more was required of Bolivia than what was specified in the Decree, is not tenable. It would not be possible for a nation to create an itemized list of every piece of property to be protected. The categories have been made clear in the Decree ..., and they apply to the items seized from the

appellant. Likewise, the suggestion that the term "weavings" is somehow overly broad and fails to distinguish those "weavings" which are of cultural significance from those which are not, is not persuasive. The term "weavings" is one of common usage and the Decree distinguishes them from property of other types of manufacture. Ms. Bubba-Zamora testified about the weaving tradition in Bolivia. Textiles that are cultural property reveal valuable information regarding ethnic groups and their religious practices.

R. v Yorke (1998), 166 N.S.R. (2d) at 150. This may be the only judicial interpretation of the specific designation requirement and how it can be satisfied.

A "reciprocating State" is a "foreign State that is a party to a cultural property agreement." The Act envisages the possibility that Canada will enter into bilateral and multilateral agreements, "relating to the prevention of illicit international traffic in cultural property." While the Act does not specifically refer to the 1970 UNESCO Convention as one such agreement, it is clear that the Convention fits this definition and that the Act's provisions therefore apply to any nation that is a State Party.

The operative provisions of the Act are relatively straightforward, stating, "it is illegal to import into Canada any foreign cultural property that has been illegally exported from that reciprocating State." R.S.C. 1985, c. C-51, § 37(2). The import restrictions apply only to foreign cultural property illegally exported after the date on which a cultural property agreement comes into force in both Canada and the reciprocating State. The relevant date for Canada with respect to the 1970 Convention is 1978.

Two examples of attempted recoveries of cultural materials under the Canadian Act occurred relatively early in its history and, in both attempts, it could not be established that the cultural materials had left their country of origin after the date on which the CPEIA went into effect. One involved a shipment of antiquities from Egypt that was seized at Mirabel Airport near Montreal in 1989 (Walden 1995, 208-10). The Egyptian authorities presented evidence that the artefacts had been illegally excavated and smuggled out of Egypt but ultimately were not able to present proof that they had been taken out of Egypt after 1978. A similar episode

occurred in the prosecution of a dealer for importing artefacts smuggled out of Nigeria. *R. v Heller* (1984), 30 A.L.R. (2d) 130 (Q.B.). This case involved the attempted prosecution of a New York dealer who imported a Nok terracotta sculpture into Canada that had been illegally exported from Nigeria (Shyllon 2000, 221).

The actions that Canada has taken to implement the 1970 Convention are clearly increasing in number. O’Keefe stated that between 1978 and 2000, there were eleven requests for returns, seven of which were successful. Between 2000 and 2007, there were five returns, one each to Peru, Bolivia and Egypt, and two to Colombia (O’Keefe 2007, 149). According to Canada’s 2010 report to UNESCO on its implementation of the 1970 Convention, between 2007 and 2010, Canada returned 350 cultural objects to Bulgaria, China, Egypt, Mali and Nigeria (Canada 2010, 3). However, the largest seizure and return of cultural artefacts by Canada occurred in 2011 and involved the restitution to Bulgaria of 21,000 cultural objects, including 18,000 ancient coins and other objects such as jewellery, Byzantine crosses, amulets, belt buckles and bronze eagles (Crawford 2011; n.a. 2011).

It is a criminal offense to import or attempt to import cultural property in violation of the CPEIA. R.S.C. 1985, c. C-51, §§ 43 and 45. The maximum penalty is a fine in the amount of \$25,000 and imprisonment for up to five years. R.S.C. 1985, c. C-51 § 45. There seems to have been only one conviction under this provision in a case involving a dealer who imported textiles from Bolivia. *R. v Yorke*, 166 N.S.R. (2d) 130 (1998) (O’Keefe 2007, 152-53).

*Germany*: Germany enacted implementing legislation for the 1970 UNESCO Convention in 2007. Under this legislation, Germany did not allow the import of any illegally exported cultural objects that had been individually classified in an accessible inventory by the country of origin at least one year prior to removal (termed the “list principle”). In an attempt to take account of the difficulties of inventorying freshly looted archaeological objects, the country of origin was given one year from the time when the country of origin gains knowledge of the excavation to place archaeological objects in the inventory (Germany 2007).

It is widely recognized that this approach is not effective for confronting the problems of the looting of archaeological sites which, by definition, produces undocumented artifacts whose existence is generally unknown until they appear in a market country. In recognition of this limitation, in 2016 Germany amended its legislation to deal more effectively with this problem (Germany 2016). This legislation is, at least in part, a response to the widespread looting that is occurring in Middle Eastern countries, particularly in Iraq and Syria, and fulfils Germany's obligations under United Nations Security Council Resolution 2199 (2015).

The new legislation unifies German law with respect to export controls. Of greater relevance to this discussion are the new provisions for import of archaeological objects into Germany. Under this legislation, an importer must present documentation that the cultural property was legally exported if it left another State Party to the 1970 UNESCO Convention after 2007, the date of Germany's ratification of the Convention. This shifts the burden to the importer to present such documentation; in the absence of such documentation, the cultural property is considered to have been unlawfully removed (Federal Government Commissioner for Culture and the Media 2016, 7). The burden is further shifted onto the importer because the legislation creates a presumption that, in the absence of documentation that establishes otherwise, cultural objects were unlawfully exported from the relevant State Party after 2007. This requirement recognizes that most States require licenses for the export of cultural property and that this provision, moving from a list principle to a category principle, particularly helps to protect archaeological objects.

## Bilateral Agreements

Switzerland is the only State Party, in addition to the United States, that requires other States Parties to enter into supplementary agreements in order to implement the 1970 UNESCO Convention. Despite this superficial resemblance, the Swiss legislation differs from that of the United States in several important respects. The Swiss legislation imposes import restrictions on categories of cultural objects but implements Article 3 rather than, as in the case of the United States, Article 9. For this reason, it is not limited to the categories of archaeological and ethnological materials but, rather, may apply to all types of cultural property.

The Swiss implementing legislation, the Cultural Property Transfer Act (“CPTA”), took effect in June 2005. Loi fédéral du 20 juin 2003 sur le transfert international des biens culturels. The Swiss legislation permits the Swiss Federal Council to enter into agreements with other nations that are party to the 1970 Convention to protect “cultural and foreign affairs interests and to secure cultural heritage”. CPTA, Article 7. The Swiss legislation defines “cultural property” as “significant property from a religious or universal standpoint for archaeology, prehistory, history, literature, arts or sciences belonging to the categories under Article 1 of the UNESCO Convention of 1970.” CPTA, Article 2(1). Without explicitly stating this, the Swiss definition omits the mention of “specific designation” found in Article 1 of the Convention.

The agreements include a list of designated artefact types of cultural property that are listed by category. This allows the import of objects to be restricted even if they have not been documented before their illegal removal and, in this respect, the Swiss agreements are similar to those used by the United States. While the Swiss agreements are not restricted to archaeological and ethnological materials, they primarily relate to categories of archaeological objects recognized as being of significant importance for the cultural heritage of a State.

Unlike the U.S. bilateral agreements, the Swiss agreements are of potentially unlimited duration and do not need to be renewed. This potential for indefinite duration arguably

presents a greater deterrent effect than the U.S. system in which an agreement must be reconsidered every five years and there is always the possibility, as in the case of Canada, that an agreement will not be extended and objects whose import is currently restricted may, in the near future, become available for unrestricted import. Most of the Swiss agreements are truly mutual in nature in that they call for recognition of Swiss regulations on the export of cultural property and each agreement has two designated lists of protected cultural properties—one list of Swiss cultural property and the second list for the cultural property of the State with which Switzerland has the agreement.

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 Federal Council can also take additional measures when a "State's cultural heritage [is] jeopardized by exceptional events". CPTA, Article 8. Unlike the bilateral agreements under the CPTA that implement Article 3, emergency actions taken under Article 8 are viewed as implementing Article 9 of the Convention and must be for a limited amount of time. While specifying that such actions may be taken under Article 9 of the Convention, Article 8 of the CPTA is not clear as to whether such actions are limited to archaeological and ethnological materials.

Finally, the CPTA adds criminal provisions for the intentional or negligent illicit import of cultural property or incorrect declaration of cultural property during import or transit. The maximum penalty under the CPTA for intentional violation is a fine of 100,000 Swiss francs or imprisonment of up to one year; for negligent violation, the maximum fine is 20,000 Swiss Francs. If the offender acts on a professional basis, the sanction is a fine of up to 200,000 Swiss Francs or jail for up to two years. CPTA, Article 24. If the offender is subject to a greater penalty under a different provision, then the greater penalty can be imposed. The CPTA adopts higher duties of diligence for "persons active in the art trade and auctioning business". CPTA, Article 16.

Switzerland has agreements in force with Italy (2008), Greece (2011), Colombia (2011), Egypt (2011), China (2014), Cyprus (2014), and Peru (2016). While there have not been any

prosecutions under the CPTA, several artefacts have been returned to their country of origin, including Greece, Italy, Egypt, Turkey, Peru and Lebanon, although some of these actions do not seem to have been taken pursuant to a bilateral agreement (Switzerland n.d.). A group of 32 artifacts were returned to Egypt in June 2015 pursuant to the bilateral agreement and in conjunction with a celebration to mark the 10<sup>th</sup> anniversary of the Swiss legislation (Al-Youm 2015).

The Swiss legislation, like the United States legislation, has the drawback of not automatically applying to illegally exported cultural materials, in the absence of a bilateral agreement. In contrast, however, because the Swiss legislation allows the Federal Council to respond to crisis situations without need for a request from the affected State, import restrictions can be imposed on an emergency basis under the Swiss implementation of Article 9 of the 1970 UNESCO Convention. In the case of Syria, this is the route that was adopted when the Swiss Federal Council acted in late 2014 to restrict the import of cultural materials illegally exported from Syria after the beginning of the rebellion in March of 2011 through its Order 946.231.172.7 (Switzerland 2014; Neuhaus 2015).

The Swiss legislation that implemented the 1970 UNESCO Convention also made other changes in Swiss law regulating the art market. Perhaps prime among these were changes in the good faith purchaser doctrine, which permitted a seller to transfer title to stolen property to a good faith purchaser and made Switzerland, in the past, a place where title to stolen and looted antiquities could be laundered. These changes have altered the applicability of the doctrine to acquisitions of art and cultural objects making Switzerland less desirable as an intermediate market country. While other countries now serve the function of transit point, Switzerland still seems to host a robust art trade.

#### [Influence of the 1995 UNIDROIT Convention: Hybrid Approaches](#)

At this point in time, several market nations have ratified both the 1970 UNESCO Convention and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Prott 1997). These nations typically adopt implementing measures pursuant to both

Conventions.<sup>2</sup> These measures seem to emphasize compliance with the UNIDROIT Convention, which is mandatory in its requirements for implementation. One distinguishing difference (among several) between the two Conventions is that the UNIDROIT Convention pertains to private international law and implementing legislation creates private rights of action for recovery of stolen and illegally exported cultural objects, whereas the 1970 Convention operates on a State-to-State basis.

An example of a nation ratifying both Conventions is New Zealand, which joined the 1995 UNIDROIT Convention in late 2006 and the 1970 UNESCO Convention in early 2007. Its comprehensive legislation, the Protected Objects Act, incorporates elements of both Conventions into its domestic law (New Zealand 2007). In addition to regulating the export of protected cultural objects from New Zealand, the legislation reflects Articles 3 and 7 of the 1970 Convention in prohibiting the import into New Zealand of unlawfully exported protected foreign objects. Section 10A. The definition of “protected foreign object” tracks the definition of cultural property used in the 1970 UNESCO and UNIDROIT Conventions (Section 2(1)). This legislation also allows reciprocating States to bring actions to recover stolen or illegally exported protected objects. Section 10B. However, some nations have ratified only the 1970 UNESCO Convention and yet have incorporated some particular principle or measure that is found in the UNIDROIT Convention. The Netherlands and the United Kingdom will be considered as examples of a hybrid approach.

*The Netherlands:* The Netherlands took what may be viewed as an explicit hybrid approach in its implementing legislation (Netherlands 2009a). The legislation focuses on implementing Article 3 of the 1970 UNESCO Convention, rather than Article 9, and, in its accompanying Explanatory Memorandum, the Netherlands explicitly rejected the view of the United States

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<sup>2</sup> Those States Parties that are also members of the European Union must enact legislation implementing the European Union provisions regulating the movement of cultural objects: the Council Directive on the return of cultural objects unlawfully removed from the territory of a Member State Council Directive No. 93/7 of March 15, 1993, OJ L 74 of 27 March 1993, and Regulation on the export of cultural goods, Council Regulation (EEC) No. 3911/92 of December 9, 1992, codified with several amendments in Council Regulation (EC) 116/2009 of 18 December 2008 (OJ L 39 of 10 February 2009) on the export of cultural goods. Italy’s Code of the Cultural and Landscape Heritage (Legislative Decree no. 42 of 01.22.04, in particular Articles 73-87) is an example of legislation implementing these European Union provisions.

that Article 3 did not need to be implemented (Netherlands 2009b, 12). The legislation 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.” Section 3. 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. Section 10.

The explanatory memorandum clarifies that unlawful appropriation includes unlawful excavation at archaeological sites (Netherlands 2009b, 16). The explanatory notes refer to the UNIDROIT Convention’s Article 3(2), which equates unlawful excavation at an archaeological site with theft and states 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.” The Dutch legislation thus takes a very broad view of what is required to implement the 1970 UNESCO Convention. While the Dutch legislation is similar to that of Canada and other nations following the broad model of implementation of the 1970 UNESCO Convention’s Article 3, the explanatory notes specifically refer to the UNIDROIT Convention in the definition of stolen property as applied to illegally excavated archaeological material and thus should be considered to represent a hybrid model.

*United Kingdom:* One can suggest that the United Kingdom has taken something of a hybrid approach as well, incorporating the misappropriation definition from the UNIDROIT Convention. When the United Kingdom ratified the 1970 UNESCO Convention, it originally took the position that it did not need to enact implementing legislation. However, in 2003, it enacted new criminal legislation, the Dealing in Cultural Objects (Offences) Act 2003, although this was not characterized as a direct means of implementing the 1970 UNESCO Convention. This Act created a new offence for dealing in “tainted cultural objects.” Ch. 27.

One commits this offence if he or she “dishonestly deals in a cultural object that is tainted, knowing or believing that the object is tainted.” Section 1, Subsec. 1.

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.” Section 2, Subsec. 2. Subsection 4 refers to objects removed from “a building or structure of historical, architectural or archaeological interest” or from an excavation. 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. Section 2, Subsec. 3. These provisions are clearly based on Article 3(2) of the 1995 UNIDROIT Convention and, to that extent, the UK legislation bears a similarity to the Dutch legislation implementing the 1970 UNESCO Convention.

Although it was not enacted as a means of restricting the importation of cultural objects, the UK legislation has been used as a means of seizing “tainted objects” upon entry. The offence of dealing in tainted cultural objects includes the import or export of such objects, in which case Her Majesty’s Customs and Excise is empowered by Section 4 to investigate the potential offence and to seize such objects as part of the investigation (United Kingdom, Department of Culture, Media and Sport, 9). Section 49(1)(b) of the Customs and Excise Management Act 1979 allows for the forfeiture of goods that are imported contrary to a statute, in this case the Dealing in Cultural Objects (Offences) Act. If forfeited, the goods would be returned to their country of origin. Since 2005, archaeological objects from Afghanistan, Iran, Greece, India and possibly other countries have been seized (Vigneron 2008, 262, 292-293, 295; Steel 2012). In a recent case, a statue from Libya, which was misdeclared upon import as to both value and country of origin, was ordered forfeited under the Customs and Excise Management Act. *HM Revenue & Customs v. Riad Issa Mohamad Al Qassas*, Westminster Magistrates Court (1 Sept. 2015) (Mercer 2015).

### “Specific Designation”: Japan

Some nations have adopted far narrower views of the 1970 UNESCO Convention in that they require that objects whose recovery is sought to have been recorded or inventoried before they are stolen or illegally exported. This requirement is particularly problematic for regulating the trade in previously undocumented objects, specifically, archaeological artifacts and ethnological materials. The prime example of this approach is Japan. It is likely that Japan adopted this approach because Japan itself maintains inventories of cultural objects and otherwise allows for free trade in objects that are not inventoried.

Japan has likely taken the most minimal approach to implementation of the 1970 UNESCO Convention among State Parties. Japan became a party to the Convention in 2002 and enacted the Law concerning Controls on the Illicit Export and Import of Cultural Property (O’Keefe 2007, 202). Despite its name, it implements exclusively Article 7(b) of the Convention by prohibiting import of “specified foreign cultural property”. Article 2 defines as cultural property what each State Party designates in accordance with Article 1 of the 1970 UNESCO Convention and thus seems to give the Convention a broad interpretation. (O’Keefe 2007, 124-25). This is negated, however, in that Articles 3 and 4 apply only to “specified foreign cultural property” defined as “cultural property that has been stolen from an institution stipulated in Article 7(b)(i) of the Convention.” Japan’s implementation therefore seems entirely inadequate to deal with the problem of looted and therefore undocumented archaeological and ethnographic objects, as well as with the realities of difficulties in providing lists of objects stolen from museums and other public collections. (O’Keefe 2007, 124-28; Lee 2004, 12-13).

When the specific designation requirement of Article 1 is interpreted as requiring inventorying of specific objects, it places a significant burden on a nation attempting to recover illegally removed archaeological objects, which when looted from the ground are, by definition, previously undocumented and ethnographic objects, which, by their nature as part of an indigenous community, may not be inventoried. Cultural objects that are part of a more traditional collection, such as a museum, church or private collection, may also not be inventoried. While inventorying is a desirable goal as it reduces the incentive for theft and

increases the likelihood of recovery, it is often not feasible to fully inventory all cultural objects, particularly in developing nations where computerized databases and other technology may not be easily accessible.

## Conclusion

The 1970 UNESCO Convention has steadily received ratification by market nations over the past almost twenty years, in sharp contrast to the first twenty years of its existence. This phenomenon seems to be in response to two events. One is the particularly egregious example of looting of archaeological sites and museum collections that occurred in Iraq following the 2003 Gulf War and the current crises throughout the Middle East. The second, perhaps ironically, occurred in response to decisions not to ratify the 1995 UNIDROIT Convention, which, although drafted to respond to the concerns of the European continent civil law nations, was largely rejected by them because of its more exacting requirements.

In contrast, many of the countries of origin, which tend to be the victims of the desire to obtain particularly archaeological objects for sale on the international market, have expressed increasing dissatisfaction with the 1970 UNESCO Convention in its current form. One reason for this dissatisfaction is the non-retroactive nature of the Convention. While international conventions are almost universally non-retroactive, this feature of the 1970 Convention seems particularly problematic to the countries of origin because the Convention does not assist these nations in recovering cultural objects that were removed during the 19<sup>th</sup> and first half of the 20<sup>th</sup> centuries, often as the result of colonialism. While there may be ethical, moral and cultural reasons for returning such objects (or some of them), international conventions by their nature are not retroactive and this situation would not be alleviated through a new convention.

A more significant concern is the “specific designation” requirement of Article 1 of the 1970 UNESCO Convention and the role that it plays as an impediment, depending on the form of implementation taken by some market nations, to the recovery of looted archaeological objects and therefore reduction in demand for such objects. A new convention is not, however, needed to resolve this problem. What is needed is for market nations to follow the lead of the example set by Canada in defining the designation requirement in a way that

requires only designation of categories and not of individual objects or the example set by the Netherlands and the United Kingdom in incorporating the UNIDROIT Convention's definition of stolen object that includes illegally excavated objects into their own legislation. With the increasing awareness of the large-scale looting of archaeological sites in the Middle East and the mobilization of the international community around the destruction that is being wrought today, perhaps this is the time for the countries of origin to bring political and other forms of pressure to bear to achieve this goal, which would be of significant assistance in protecting the world's archaeological heritage.

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