

WHITE PAPER: A PROPOSAL TO REFORM U.S. LAW AND POLICY RELATING TO THE INTERNATIONAL EXCHANGE OF CULTURAL PROPERTY♦

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AUTHOR'S NOTE

Sometime in 2011, one of my London-based antiquities dealer clients told me that the “United States is a mess. It’s a terrible place to do business. Collectors are worried, curators are frightened, and your government seems to have gone mad in pursuit of a vendetta against the antiquities trade.” I agreed. He asked me why. I said that the answer was long and complicated but that basically U.S. law had evolved to a point 180 degrees from where it was supposed to be back in the 1980s, which was the first (and last) time Congress focused on cultural property issues. He asked me what to do about it. I said that the first step was to form a not-for-profit corporation to serve as a platform to change the climate of opinion. That was the genesis of the Committee for Cultural Policy, which was duly formed as a not-for-profit corporation.

Sometime in 2012, the directors of the CCP were casting about for ideas about how to change the climate of opinion. I suggested that instead of simply complaining about adverse legal developments, CCP should propose a legal regime that would “rebalance” U.S. law and policy, and allow collectors, dealers, auction houses and museums to function in their traditional roles while protecting the interests of source nations in reclaiming looted antiquities. In part, that meant restoring the integrated legal framework originally contemplated by Senator Moynihan and Professor Paul Bator; in part, it meant moving beyond the “Gen-1” legal framework conceived in the 1980’s and creating a 21st century web-based system that would promote transparency, reward it with repose and offer a dispute resolution system fair to claimants and

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holders. I suggested that we needed a “White Paper;” that is, a high level, top-down, policy review of the sort generated by governments and think tanks to consider topics of national and international consequence. Cultural policy lies at the intersection of high politics, private wealth, fine art and national heritage; there is a profound sense that the existing system isn’t working. That was the genesis of this White Paper, which offers the long and complicated answer to the dealer’s original question.

The omniscient authorial voice is mine. The unattributed commentary reflects my experience as a lawyer in the art and antiquities trade, my discussions from third parties (some of whom who preferred anonymity) and a desire to strike a balance between metastasizing footnotes and readability (which may have resulted in an unsatisfactory tie). Much of the commentary reflects my experience appearing for years before CPAC trying to reconcile the plain language of the CPIA with irreconcilable import restrictions, and my experience in the art trade, helping clients navigate a confusing legal regime to prudently trade antiquities in way that would survive subsequent challenge. The White Paper reflects review and comment by a number of leading lawyers, legal scholars and art market professionals. I have tried to accurately portray the legislative history, and I thank Mark Feldman (who led the State Department’s effort to implement UNESCO into U.S. law) for his thoughtful criticism. The point of view is my own, although it is generally shared by many of those whom I have cited or who reviewed prior drafts of this paper: that national cultural heritage should be protected, archeological resources preserved, and private collecting promoted as a medium of international cultural exchange additional to the activity of museums, which is by itself insufficient. This is now a minority position and one not shared by academic archeologists in the United States and United Kingdom, the plaintiffs’ bar, their foreign sovereign clients, sympathetic cultural advocacy groups, or by a museum community that seems content to pursue its own interests without sufficiently taking into account those of the broader cultural community in which it is embedded. Many thanks to Raquel Villar, UCLA School of Law 2012, and to David Kurlander, Executive Editor and the staff at Benjamin N. Cardozo Law School’s *Arts and Entertainment Law Journal* for the otherwise thankless task of cite-checking (and tolerating my obstinance).

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INTRODUCTION

The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (“*UNESCO*” or the “*UNESCO Convention*”)¹ was the first multi-national legislation recognizing and attempting to remedy through international cooperation the problem of looting of cultural artifacts. UNESCO also acknowledged the reality of domestic and international markets for cultural property and requires the nations who join UNESCO (termed “*State Parties*”) to regulate the trade.

The U.S. Declarations and Reservations to UNESCO stipulated that UNESCO was neither self-executing nor retroactively binding on the United States. Although the U.S. Senate gave its advice and consent to the UNESCO Convention on August 11, 1972,² the United States did not become a State Party to UNESCO until December 2, 1983, following Congressional enactment of the Convention on Cultural Property Implementation Act (“*CPIA*” or the “*Implementation Act*”).³ The CPIA was the product of lengthy, contentious negotiations among the U.S. stakeholder constituencies—including art dealers, archeologists, legal scholars, museums and the State Department—and attempted to balance the competing interests of national heritage, archeological context and international cultural exchange.

This balance, achieved in the early years of CPIA, has since been overturned by policy changes effected by agencies of the Executive Branch without Congressional review or approval. First, the U.S. Department of Justice and concerned U.S. Enforcement Agencies⁴ have

¹ Convention 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.

² S. REP. NO. 97-564, at 21 (1983), *reprinted in* 1982 U.S.C.C.A.N. 4078, 4098.

³ Convention on Cultural Property Implementation Act, Pub. L. No. 97-446, tit. 3, 96 Stat. 2350 (1983) (codified as amended at 19 U.S.C. §§ 2601–2613).

⁴ For the purposes of this White Paper, the term “*U.S. Enforcement Agencies*” refers collectively to the U.S. Department of Homeland Security (“*DHS*”), a cabinet department of the U.S. federal government; U.S. Customs and Border Protection (“*CBP*”), a federal law enforcement agency under DHS; Immigration & Customs Enforcement (“*ICE*”), also a federal law enforcement agency under DHS; and Homeland Security Investigations (“*HSI*”), a directorate under ICE. The

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used U.S. criminal laws, notably the National Stolen Property Act (“NSPA” or “*Stolen Property Act*”),⁵ to enforce foreign national ownership laws. They have also aggressively used civil forfeiture proceedings based on stolen property laws to seize art without proving any of the elements required to obtain a criminal conviction. Second, the U.S. Department of State, through its interpretation of CPIA and its administration of the Cultural Property Advisory Committee (“CPAC”), has routinely disregarded the criteria established by Congress to restrict importation of archeological and ethnological materials.

In addition, the “1970 Rule,” adopted in 2004 by the Association of Art Museum Directors (“AAMD”),⁶ has turned hundreds of thousands of works of art—circulating in the trade, held in private collections or held in the inventory of AAMD member museums—into “orphans” that cannot be donated to, or exhibited or conserved by, AAMD member museums for the benefit of the public and future generations. Each of these policy changes has compounded and exacerbated the problems created by the others. None of them has been shown to decrease or deter archeological looting in source countries.

This White Paper summarizes the most glaring problems in current U.S. law and policy relating to the international antiquities trade and proposes specific solutions: the conflict between Congressional policy (embodied in the CPIA) and U.S. criminal law (embodied in the

activities of U.S. Enforcement Agencies are often coordinated. For example, DHS/ICE/HSI agents may direct the actions of U.S. Enforcement Agencies at U.S. ports of entry in terms of targeting and monitoring suspects and establishing computer watches and alerts. U.S. Enforcement Agencies may also coordinate their activities with the Cultural Antiquities Task Force (“CATF”) under the Cultural Heritage Center (“CHC”) of the U.S. Department of State’s Bureau of Educational and Cultural Affairs (“BEA”).

⁵ The National Stolen Property Act makes it a crime to deal in stolen property. 18 U.S.C. §§ 2311, 2314–2315 (2012). NSPA states, in part:

Whoever receives, possesses, conceals, stores, barter[s], sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of \$5,000 or more . . . which 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 . . . [s]hall be fined under this title or imprisoned not more than ten years, or both.

18 U.S.C. § 2315 (2012).

⁶ REPORT OF THE AAMD TASK FORCE ON THE ACQUISITION OF ARCHAEOLOGICAL MATERIALS AND ANCIENT ART (2004), *available at* <https://aamd.org/sites/default/files/document/June%2010%20Final%20Task%20Force%20Report.pdf>. For updates of the report, see INTRODUCTION TO THE REVISIONS TO THE 2008 GUIDELINES ON THE ACQUISITION OF ARCHAEOLOGICAL MATERIAL AND ANCIENT ART, *available at* https://aamd.org/sites/default/files/document/Guidelines%20on%20the%20Acquisition%20of%20Archaeological%20Material%20and%20Ancient%20Art%20revised%202013_0.pdf (last visited Nov. 23, 2013); GUIDELINES ON THE ACQUISITION OF ARCHAEOLOGICAL MATERIAL AND ANCIENT ART (2013), *available at* https://aamd.org/sites/default/files/document/Guidelines%20on%20the%20Acquisition%20of%20Archaeological%20Material%20and%20Ancient%20Art%20revised%202013_0.pdf.

*McClain*⁷ and *Schultz*⁸ line of cases) must be resolved and harmonized; unreasonable import restrictions under the CPIA must be terminated; mismanagement of the CPAC must be curbed. An electronic database should be established to promote transparency by holders, encourage claimants to come forward, create a fair dispute resolution process, and quiet title to good faith purchasers; this would help mitigate the potential for stale claims by source nations and the uncertainty created by the 1970 Rule.

The stakes are high for U.S. museums, private collectors and the art trade as a whole. The United States has thousands of museums and cultural institutions dedicated to research, conservation, and exhibition of art to the public. Almost all U.S. museums depend on donations of artwork by private individuals and institutions to enrich their collections and make their educational mission possible.⁹ This object-based philanthropy is made possible only by the existence of a private market. Overwhelmingly, the ultimate destination of U.S. private collections is public institutions, which receive these collections through charitable donations or bequests. Under the U.S. system in which private donations are the primary source of funding and accession for public institutions, museums cannot perform their obligations to research, conserve, and exhibit artworks without a vigorous art market. This public-private partnership has given the United States the finest museum system in the world; this system is at risk from the hostile U.S. legal environment governing the antiquities trade. Also at risk are the characteristically American values on which the CPIA was premised: that global access to art, art preservation and uncensored learning and study about art are in the public interest; that these are facilitated by the lawful international exchange of art and antiquities; that museums, scholars, archaeologists, private collectors, dealers, auction houses, and the general public benefit from cultural policies that facilitate the lawful transfer of art and antiquities; and that U.S. cultural life is harmed by laws and policies that do not.

⁷ *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977), *aff'd in part, rev'd in part*, 593 F.2d 658 (5th Cir. 1979), *cert. denied*, 444 U.S. 918 (1979).

⁸ *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003), *aff'g* 178 F. Supp. 2d 445 (S.D.N.Y. 2002), *cert. denied*, 540 U.S. 1106 (2004).

⁹

More than 90% of the art collections held in public trust by America's art museums were donated by private individuals. From the legendary patrons of the 19th century to today's supporters of cutting-edge contemporary art, private collectors and philanthropists, in partnership with museum professionals, have made possible the unprecedented growth of art museums as cultural, educational and civic centers throughout the nation.

ASS'N OF ART MUSEUM DIRECTORS, ART MUSEUMS, PRIVATE COLLECTORS, AND THE PUBLIC BENEFIT 1 (2007), available at <https://aamd.org/sites/default/files/document/PrivateCollectors3.pdf>.

I. THE NEED FOR REFORM

Today it is widely known that many foreign “source” nations have nationalized ownership of all archeological objects, in or out of the ground. It is little known, and perhaps conveniently forgotten, that the U.S. State Department rejected the “blank check” international regime initially proposed by the UNESCO Secretariat that would have required the automatic enforcement of source nation export controls through the establishment of corresponding import controls of unlicensed exports.¹⁰ Instead the U.S. State Department favored a balanced regime that would “help combat pillage of archeological sites . . . [without] discourag[ing] legitimate international trade in archeological objects or other cultural property.”¹¹ This was so from April 1970 when the U.S. Delegation to the Special Committee on the Draft UNESCO Convention (the “*U.S. Delegation to UNESCO*”) negotiated a moderate version of UNESCO after rejecting the Secretariat’s initial, retentionist draft,¹² through the domestic negotiations among State Department, Congress (led by Senator Daniel Patrick Moynihan) and U.S. stakeholders that led to the

¹⁰ 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.

Mark B. Feldman, *The UNESCO Convention on Cultural Property: A Drafter’s Perspective*, ART & CULTURAL HERITAGE L. NEWSL. (Am. Bar Ass’n Section of Int’l Law), Summer 2010, at 1, available at http://www.law.depaul.edu/centers_institutes/art_museum/pdf/VolumeII_IssueI.pdf. Mark B. Feldman is an Adjunct Professor at Georgetown University Law Center, former Co-Chair of the ABA Committee on Art and Cultural Heritage Law, and former Deputy and Acting Legal Adviser of the U.S. Department of State. Mr. Feldman chaired the U.S. Delegation to the UNESCO Committee that drafted the Convention, and was State Department’s lead counsel for cultural property matters until he left for private practice in 1981. Mr. Feldman is currently Of Counsel to Garvey Schubert Barer, Washington, D.C.

¹¹ *Id.*

¹² It was evident that the comprehensive import controls proposed in the Secretariat draft were administratively infeasible, and that the convention in the form presented to the Special Committee would not be acceptable to a substantial number of states whose cooperation would be necessary to the operation of the convention. . . . Accordingly, the United States Delegation proposed that the Special Committee considered revising the convention so that it would . . . allow the States Parties more flexibility in implementing its provisions; and reflect in more balanced fashion the values of legitimate commerce in art objects.

REPORT OF THE UNITED STATES DELEGATION TO THE SPECIAL COMMITTEE OF GOVERNMENT EXPERTS TO EXAMINE THE DRAFT CONVENTION ON THE MEANS OF PROHIBITING AND PREVENTING THE ILLICIT IMPORT, EXPORT AND TRANSFER OF OWNERSHIP OF CULTURAL PROPERTY 3 (1970) (submitted to the Secretary of State, Mark B. Feldman, Chairman; Prof. Paul Bator; Ronald J. Bettauer; Allan C. Mayer; Richard K. Nobbe; Dr. Frolich Rainey, July 27, 1970; Prepared by Mark B. Feldman and Ronald J. Bettauer) [hereinafter *REPORT OF THE U.S. DELEGATION TO UNESCO*]. The Report of the U.S. Delegation to UNESCO is summarized, with commentary, in the February 2, 1972 Message from the President of the United States Transmitting the Convention to the Senate of the United States for its advice and consent, and in the attached Letter of Submittal dated November 11, 1971 from the Department of State to the President [together hereinafter the *President’s Message to the Senate*].

passage of the CPIA effective on December 2, 1983. Throughout this process, the U.S. government was “mindful of the importance of encouraging international interchange of cultural property in legitimate channels.”¹³

The State Department’s position that the United States should not simply hand a “blank check” to foreign nations was supported by Professor Paul M. Bator’s¹⁴ important 1982 “Essay on the International Trade in Art.”¹⁵ In reviewing the policy considerations that informed the U.S. response to UNESCO, Bator articulated that the goal of U.S. policy should be to balance three competing interests: the retention of national heritage, the preservation of archeological context, and the interest of the general public in promoting international cultural exchange. Because the lawful international trade in antiquities was seen as an important medium of cultural exchange, U.S. law, and in particular U.S. import restrictions, should not place U.S. “market participants”—the collectors, dealers, auction houses and museums that buy, sell, hold, publish, authenticate, critique and exhibit antiquities¹⁶—at a competitive disadvantage to their foreign counterparts.

¹³ REPORT OF THE U.S. DELEGATION TO UNESCO, *supra* note 12, at 2.

¹⁴ Professor and Associate Dean of Harvard Law School, Deputy Solicitor General of the United States from 1982–1985, Reporter for the Panel on the International Trade in National Art Treasures of the American Society of International Law, and member of the U.S. Delegation to the UNESCO Special Committee.

¹⁵ Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275 (1982). In his Essay, Professor Bator observed that most nations rich in archeological sites and cultural objects, such as Italy, Greece, Turkey, Egypt and Peru, have enacted some sort of patrimony law that claims state ownership of all or part of the archeological objects or other cultural objects within the nation’s borders, whether in or out of the ground, or privately held, from the most common pot shard to the rarest, most aesthetically refined masterpiece. Professor Bator persuasively criticized such national ownership laws as being overbroad, ineffective, difficult to enforce, counter-productive, and for institutionalizing the black market in cultural property. *Id.* At this time, it seems clear that the adoption of national ownership laws does not, by itself, suffice to preserve and protect archeological sites and stratigraphic context. Bator’s Essay remains among the most thorough and balanced examinations of the different perspectives on the antiquities trade.

¹⁶ Some in the art world might feel that their inclusion among or characterization as “market participants” is inappropriate, given that their affinity for the subject matter—antiquities or tribal art—is wholly or partly motivated by concerns other than profit. In particular, museums and their curators, directors, trustees and other employees might emphasize that their institutional mission places them outside of, and somehow above, purely economic considerations. Yet academic and industry analyses of other markets (such as securities or real estate) often refer to buyers, sellers and owners collectively as “market participants,” and the reality is that the combined economic activity of collectors, dealers, auction houses and museums constitutes a market that over the last two centuries has increasingly become subject to national and more recently international regulation. The term market participants should be understood to include not just owners and traders of objects but those art historians, scholars, academics and experts who contribute to the authentication, testing, and critical and historical understanding of objects in circulation among other market participants, regardless whether they are specifically compensated for doing so. This White Paper uses the term “market participants” not merely for convenience of reference but to reflect that reality.

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But where the State Department was concerned primarily with the U.S. implementation of UNESCO, Professor Bator and Senator Moynihan went further and saw the need to construct an integrated U.S. statutory and common-law framework governing the importation of antiquities. They considered the potential interplay between the CPIA and U.S. criminal law (in particular the then-recent *McClain* case), and concluded that, not only should U.S. import restrictions on foreign archeological materials not be as broad as foreign requests, but that U.S. criminal law should not automatically be triggered by foreign national ownership laws. In particular, they saw the need to harmonize U.S. criminal law with the “no blank checks premise” of the CPIA by amending the NSPA to limit the “blank check” rule of the *McClain* case.¹⁷ Thus, they contemplated an integrated legal framework under which U.S. criminal law would remedy site-specific looting of objects from a known find-site or place of origin and U.S. import restrictions under CPIA would address general crises of looting or other cultural emergencies. The 1970 Report of the United States Delegation to the UNESCO Special Committee and Bator’s 1982 Essay served as critical reference points for the evolution of U.S. cultural policy. After a decade of careful consideration, the policy of “no blank checks” was embraced at the highest levels of Congressional leadership with the passage of the CPIA in 1983, which codified U.S. implementation of UNESCO.

Today, however, the policy of “no blank checks” has been discarded and the Executive Branch (i.e., the U.S. State Department, Justice Department, and U.S. Enforcement Agencies) and U.S. federal courts seem determined to give fullest effect to foreign laws, intentionally disregarding the best thinking of the prior generation. The broad U.S. cultural interest in promoting a lawful international trade in art as a medium of cultural exchange and the U.S. commercial interest in not placing U.S. market participants at a competitive disadvantage to foreigners have been abandoned as U.S. policy goals.

In addition, the “1970 Rule” adopted by the AAMD not only prohibits member museums from accessioning objects that lack documented provenance to 1970 (i.e., not “1970 Compliant”) but threatens to impair the marketability and value of non-compliant objects

¹⁷ This White Paper repeatedly uses the term “blank check.” The term is part of the original cultural property vocabulary. It was used by the U.S. Delegation to UNESCO, during the Congressional debates that lead to passage of the CPIA and defeat of S. 605, and by early academic commentators such as Professor Bator and James McAlee. The term has a vaguely pejorative ring. Nobody (including presumably the reader) willingly hands a blank check to an unknown third party. Yet that is precisely what the U.S. has done: U.S. criminal laws are triggered by foreign national ownership laws, regardless whether those are consistent with U.S. domestic law and policy, and U.S. import restrictions are now coextensive with (and in the case of, for example, Italy, broader than) the broadest declarations of foreign ownership, which is what the U.S. Delegation to UNESCO rejected.

at auction or in the private market.¹⁸ The 1970 Rule is a self-imposed guideline that, subject to limited exceptions, restricts AAMD member museums from acquiring ancient artworks by purchase or gift unless research substantiates that the work was outside its country of probable modern discovery before 1970 or was legally exported from its probable country of modern discovery after 1970.¹⁹ The 1970 Rule has changed the landscape for collectors who might otherwise have considered gifts or bequests to a U.S. museum. It has also had the predictable effect of creating an estimated million or more “orphaned” objects held by U.S. collectors or museums, only an indeterminate, indeterminable and probably small number of which may have looted since 1970, that cannot be donated to, or exhibited or conserved by, AAMD member museums for the benefit of the public and future generations.²⁰ Nor has

¹⁸ On the other hand, there are signs that strict compliance with the 1970 Rule is not universal among AAMD member museums and that certain museums will exercise independent judgment regarding the purchase or loan of non-1970 Compliant material. For example, The Art Institute of Chicago will consider acquiring objects that are not 1970 Compliant if the country of origin permits private ownership and a legal market in the same materials. In addition, from February through May 2012, The Walters Art Museum exhibited 129 Pre-Columbian works from Mexico to Peru from the collection of John Bourne given or promised to the Walters, including material loaned to the Walters by the Los Angeles County Museum of Art and the New Mexico History Museum. The collection included objects that were not 1970 Compliant, had no history of recorded archeological excavation and some of doubtful authenticity. The Walters’ catalogue is frank about these issues, notes the difficulty of authenticating certain pieces given the sophistication of modern forgers, and states that the Walters’ acquisitions and accessions are informed by the museum’s commitment to “Due Diligence,” “Transparency” and “Good-Faith Engagement” with claimants.

¹⁹ The genesis of the 1970 Rule lies in Article 7(a) of UNESCO, pursuant to which the State Parties undertake “to take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territory from acquiring cultural property originating in another state party which has been illegally exported after entry into force of this Convention in the states concerned.”

The reference to “national legislation” was inserted in this paragraph to accommodate the problems of governments, such as the United States Government, which do not have legislation regulating the acquisition policy of private institutions. Thus in the United States, this provision would apply primarily to institutions controlled by the Federal Government. It is expected that private institutions would develop their own code of ethics consistent with the spirit of this provision.

The President’s Message to the Senate, *supra* note 12, at VI.

²⁰ Different reactions to the 2013 revisions to the Guidelines were published in *The Art Newspaper* in April 2013. Arthur Houghton, a former Getty curator, numismatic scholar and U.S. diplomat, observed that the 1970 Rule was adopted “in a state of near panic.” Arthur Houghton, *This is Not the Way to Deal with the Antiquities Problem*, THE ART NEWSPAPER, April 2013, at 46. In emphasizing the massive orphan problem, he noted the absurdity of condemning legitimate objects for lacking documentation that they never had either because it was simply unavailable or because they were never required to have it before 2004, when the AAMD first adopted the 1970 Rule. *Id.* Richard Leventhal, a University of Pennsylvania anthropologist, wrote that the Guidelines represent “a backsliding of ethical commitments.” *Id.* at 47. Maxwell Anderson, director of the Dallas Museum of Art and chair of the AAMD’s task force on archeological materials and ancient art, rebutted Houghton by saying that the 1970 Rule provides a necessary “safe harbor” for U.S. museums that are on shaky ground collecting unprovenanced objects in light of the difficult U.S. legal framework (specifically U.S. customs law, the NSPA and CPIA). THE ART NEWSPAPER, No. 246, May 2013. Anderson failed to address the reality that the AAMD

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any art source country given any indication that it will limit its claims against U.S. museums to objects imported after 1970. In fact, recent claims by the Republic of Turkey include demands that certain U.S. museums restitute some objects collected in the 19th century.²¹

At the time of writing, there is a continued demand for ancient art among private collectors and museum curators. As a result of pre-consignment vetting, auction sales of provenanced material seem

and other U.S. museum groups have abandoned the powerful arguments they made against the prevailing U.S. legal framework as early as 1997, in their brief supporting the appeal of Michael Steinhardt from the seizure of a gold phiale in his possession. See *infra* note 97 and accompanying text. Instead of using its institutional weight to advocate for reforming a legal framework which is flawed for all the reasons that AAMD itself articulated, AAMD has since chosen to abandon the field and shelter behind the 1970 Rule, leaving hundreds of thousands of orphaned objects stranded in its wake.

A critical flaw of the 1970 Rule is that the AAMD Guidelines fail to reflect that Article 7 of UNESCO was conceived on the assumption that State Parties would comply with their obligations under Article 5 to regulate and organize their internal and export markets so as to restrict the export only of “important” items whose export would constitute an “appreciable impoverishment” of the national cultural heritage. Thus, the AAMD Guidelines prohibit AAMD member museums from accessing *any* non-compliant material that lacks either an export license or documentation of provenance to 1970 when the plain language of UNESCO bars only the accession of objects specifically designated by a State Party as “important” and subject to export restriction. Proponents of the 1970 Rule are wrong to state that compliance by AAMD Museums fulfills their obligations under UNESCO; compliance with the 1970 Rule goes far beyond their UNESCO obligations and has the effect of recognizing the universal export controls that the U.S. Delegation to UNESCO—and all other State Parties to UNESCO—rejected when they adopted the definitive text of the Convention. As a practical matter, any State Party obligations under Article 5 are arguably so self-defined, subjective and elastic as to be, in effect, illusory—which is why the U.S. Delegation to UNESCO fought so hard to oppose a “blank check” export control regime and focused instead on preserving U.S. discretion in the negotiation of bilateral agreements under Article 9. On the other hand, it is hard to accept that the plain language of Article 5—which was part of the UNESCO Secretariat’s initial draft and not the result of U.S. negotiation—was intended by the UNESCO Secretariat to be mere empty verbiage creating no obligations on or expectations of State Parties.

Another oddity of the 1970 Rule is that it looks back to 1970 instead of to 1983. UNESCO Article 7(a) is only binding on a nation after the date it becomes a State Party (i.e., for the United States, December 2, 1983, the effective date of the CPIA). It is thus arguable that the AAMD could have satisfied its perceived ethical obligations under UNESCO by adopting a 1983 Rule instead of the 1970 Rule.

The 1970 Rule fails to address the reasoned arguments in favor of collecting unprovenanced antiquities. These are made well, and perhaps most persuasively, by John Henry Merryman in *Thinking About the Sevso Treasure* (Stanford Pub. Law & Legal Theory Working Paper Series, Paper No. 1105584, 2008), available at <http://ssrn.com/abstract=1105584>. See also THE FUTURES OF OUR PASTS: ETHICAL IMPLICATIONS OF COLLECTING ANTIQUITIES IN THE TWENTY-FIRST CENTURY 51 (Michael A. Adler & Susan Benton Bruning eds., 2012); JOHN HENRY MERRYMAN, THINKING ABOUT THE ELGIN MARBLES: CRITICAL ESSAYS ON CULTURAL PROPERTY, ART AND LAW 348 (2d ed. 2009).

²¹ Dan Bilefsky, *Seeking Return of Art, Turkey Jolts Museums*, N.Y. TIMES (Sept. 30, 2012), www.nytimes.com/2012/10/01/arts/design/turkeys-efforts-to-repatriate-art-alarm-museums.html; Jason Farago, *Turkey’s Restitution Dispute with the Met Challenges the ‘Universal Museum’*, GUARDIAN (Oct. 7, 2012), www.guardian.co.uk/commentisfree/2012/oct/07/turkey-restitution-dispute-met; Tom Mashberg, *No Quick Answers in Fights Over Art*, N.Y. TIMES (July 1, 2013), www.nytimes.com/2013/07/02/arts/design/museums-property-claims-are-not-simply-about-evidence.html (“Our experience with these requests does not give us confidence in their merit,” said James Cuno, the Getty’s president.”).

strong. But there is already solid evidence from auction house sales that well-provenanced pieces sell at a premium and that unprovenanced or underprovenanced pieces of equal quality may not be accepted for consignment and may not sell if they are.²² There is also growing concern among collectors that auction houses may ultimately adopt a strict version of the 1970 Rule for the same reason as the AAMD: despite recent museum experience to the contrary, the 1970 Rule is viewed as a potentially prophylactic “safe harbor” intended to avoid the effort, expense and embarrassment of the occasional consignment withdrawn under threat from a foreign government.²³ Separate markets and price points have evolved for museum-worthy pieces with documentation to 1970 and a second tier of non-1970 Compliant objects marketable only to private collectors at a discount.

As a result, U.S. museums and other market participants are unsure of their continued ability to access, collect, trade and retain even objects acquired in good faith; private collectors are concerned that the marketability and value of their collections may be eroding. There is widespread, though unfocused, discontent among U.S. market participants with the current legal framework, and a very real sense that U.S. law and policy has swung too far in favor of national retention and restitution to the detriment of U.S. commerce and cultural life.²⁴ A large volume of criticism generated over the years by legal academics and

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While many archeologists continue to condemn the market and scandals have rocked it, the market continues to thrive, albeit in an altered state that puts a premium on provenance. In other words, “[f]ull provenance commands better market value; clients will feel secure when acquiring if they can later sell or donate the objects without fear of future reprisals or monetary loss in the future.”

Jennifer Anglim Kreder & Benjamin Bauer, *Protecting Property Rights and Unleashing Capital in Art*, 3 UTAH L. REV. 881, 888 (2011). “[C]ollectors are now paying high premiums for well-documented antiquities. ‘One artifact may sell for a multiple of the price of a nearly identical artifact of similar quality because of differing levels of documentation.’” *Id.* at 912.

²³ Sometime after the appointment of Jane Levine, a former U.S. prosecutor, as Sotheby’s Worldwide Director of Compliance in 2006, Sotheby’s adopted an in-house compliance policy of only accepting 1970 Compliant consignments. More recently, in an apparent concession to commercial reality, Sotheby’s has begun accepting non-1970 Compliant consignments on a case-by-case basis. Christie’s currently has a policy of requiring documented provenance prior to 2000 (or the earlier date of any bilateral agreement/MOU between the U.S. and the applicable State Party).

²⁴ On March 18, 2012, the Asia Society hosted a symposium co-sponsored by the American Committee for Cultural Policy, a not-for-profit corporation. See Anne Kirkup, *The Future of the Past—Collecting Ancient Art in the 21st Century: A Timely Discussion on Legal Issues Around Collecting Antiquities*, ASIA SOCIETY (Mar. 18, 2012), <http://asiasociety.org/new-york/future-past-%E2%80%93collecting-ancient-art-21st-century>. The panelists included a number of senior members of the U.S. museum community, both retired and active, as well as collectors, dealers and others. The panelists, as a whole, and in particular the museum personnel, presented a variety of viewpoints. The discussion represented a refreshingly frank public dialogue regarding concerns with the current legal and policy framework. Video of *Collecting Ancient Art in the 21st Century*, ASIA SOCIETY (Mar. 18, 2012), <http://asiasociety.org/video/arts/collecting-ancient-art-21st-century>.

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practitioners has concluded that the current U.S. enforcement regime is “extralegal” and badly in need of reform.²⁵

The premise of this White Paper is that the balanced approach originally contemplated by Congress remains persuasive and in the best interests of U.S. museums, other market participants and the public at large, and that the current “blank check” approach of the Executive Branch (i.e., the State Department, the Justice Department, and U.S. Enforcement Agencies) and the U.S. federal courts is biased in favor of restitution and universal national retention of cultural objects. Thus, comprehensive reform of U.S. law and policy governing the international antiquities trade is needed to restore the original intent of its framers and correct the current imbalance of U.S. policy against U.S. cultural life and commerce.

Archeologists, the Department of Justice, U.S. Enforcement Agencies, and cultural advocacy groups aligned with the archeological lobby or the plaintiffs’ bar may vigorously disagree and insist that the current legal framework creates a flexible, multi-layered barrier to the importation of looted objects. The prospects for legislative reform are uncertain at best. It is time, however, for U.S. museums and other concerned stakeholders to decide whether they want to accept the current “blank check” U.S. legal framework or to fight for the legal and administrative reforms necessary to institute a system that will more fairly take into account their interests and those of the U.S. public. The purpose of this White Paper is to frame the issue and pose the question, in the hope of starting a dialogue that leads to reform.

II. PROPOSALS FOR REFORM

The United States needs a definitive national policy governing the international trade in antiquities. In other words, a consistent set of principles should govern legality and trigger liability under U.S. civil, criminal and customs law (for example, it is currently possible for an importer to be in compliance with CPIA and at the same time to be in violation of U.S. criminal and customs law). To achieve this goal, this White Paper makes the following specific proposals for reform. If

²⁵ The most recent and comprehensive survey of the field is extremely critical of the current U.S. legal framework. See Stephen K. Urice & Andrew L. Adler, *Unveiling the Executive Branch’s Extralegal Cultural Property Policy* (Miami Law Research Paper Series, Paper No. 2010-20, 2010), available at <http://ssrn.com/abstract=1658519> [hereinafter Urice & Adler, *Extralegal Policy*]; Andrew L. Adler & Stephen K. Urice, *Resolving the Disjunction Between Cultural Property Policy and Law: A Call for Reform*, 64 RUTGERS L. REV. 117 (2011) [hereinafter Adler & Urice, *A Call for Reform*]; Stephen K. Urice, *Between Rocks and Hard Places: Unprovenanced Antiquities and the National Stolen Property Act*, 40 N.M. L. REV. 123 (2010) [hereinafter Urice, *Between Rocks and Hard Places*]. Adler and Urice take into account much of the prior criticism generated by commentators in academia and the antiquities trade. Urice & Adler, *Extralegal Policy*, *supra*, at 16.

adopted, these proposals would together comprise a unified, integrated, internally consistent policy governing the importation and ownership of antiquities and other cultural materials in place of the confused, confusing and contradictory hodgepodge that currently exists.

- **Amend Criminal Law.** Liability under U.S. criminal law should be limited to actual theft of site-specific objects. U.S. criminal laws should no longer be triggered by the export of unprovenanced objects in violation of foreign national ownership laws; U.S. importers should no longer be subject to the vagaries of foreign law under the “blank-check” rule of the NSPA, as interpreted by *McClain*, *Schultz* and progeny. To achieve this, S. 605, originally co-sponsored in 1985 by Senators Moynihan and Dole, should be revived and passed.²⁶ This would restore the original intent of U.S. policy makers, conform U.S. criminal law to Congressional policy and harmonize U.S. and U.K. criminal law.²⁷
- **Harmonize Customs Policy.** The current Customs Handbook²⁸ addressing the antiquities trade is obsolete. U.S. Customs policy towards antiquities has long been criticized as “wayward” and “lawless.”²⁹ The current practice of U.S. Enforcement Agencies and the U.S. Attorney’s offices is to exploit the doctrine of civil forfeiture to seize, detain and repatriate objects claimed by a

²⁶ S. 605, 99th Cong. (1985) (titled “A bill to amend sections 2314 and 2315 of title 18, United States Code, relating to stolen archeological material”).

²⁷ Dealing in Cultural Objects (Offences) Act, 2003, c. 27 (U.K.), available at http://www.legislation.gov.uk/ukpga/2003/27/pdfs/ukpga_20030027_en.pdf [hereinafter the *U.K. Act*]. The U.K. Act criminalizes knowingly “dealing in” site-specific objects that were illegally excavated or removed from a building, structure or monument (including sites and excavations) of historical, architectural or archeological interest. The site-specific limitation is consistent in principle with the intended effect of S. 605. See *infra* text accompanying notes 76 and 194. The U.K. Act was hurriedly passed by Parliament in 2003 in the immediate aftermath of the Iraqi looting crisis without addressing comments and criticism from the U.K. trade. The U.K. Act nevertheless makes better policy than the *McClain* rule, because the U.K. Act makes it a crime to deal knowingly in looted objects that are identified to a particular archeological site or monument rather than to violate a foreign patrimony law that nationalizes objects that may neither have been freshly excavated nor excavated at all.

Although a detailed analysis of the U.K. legal framework is beyond the scope of this White Paper, it should be noted that a disjunction exists between the site-specific theory of criminal liability that informs the U.K. Act and the broader “blank-check” theory of civil liability stated in the *Barakat* decision, discussed *infra* note 94. It should also be noted that harmonizing the standards for liability under criminal, civil and customs law, both intra market and inter market, would benefit both U.S. and U.K. market participants given that the U.S. and U.K. antiquities markets are integrated.

²⁸ U.S. Customs Directive, Policies and Procedures Manual, Apr. 18, 1991 No. 5230-15 (titled “Detention and Seizure of Cultural Property”).

²⁹ See Urice & Adler, *Extralegal Policy*, *supra* note 25, at 21–23; James F. Fitzpatrick, *A Wayward Course: The Lawless Customs Policy Toward Cultural Properties*, 15 N.Y.U. J. INT’L L. & POL. 857 (1983).

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foreign country without proof or analysis of any of the elements needed to prove theft under *McClain* and *Schultz*: whether the foreign law in question amounts to a clear and unambiguous declaration of national ownership; whether it is domestically enforced; whether that law was in effect on the date of export; and whether the importer knew or consciously avoided knowledge of the applicable law at the date of export. Certain recent seizures have drawn criticism as being based on legally defective complaints and thus “extralegal.”³⁰ Regardless whether U.S. criminal law is reformed as proposed, the doctrine of civil forfeiture should at least be reformed to comply with the basic requirements of the *McClain* and *Schultz* cases, and not, as currently wielded by Federal prosecutors and U.S. Enforcement Agencies, simply premised on export on some undetermined date from a country which had a patrimony law at some time in the past.

- **Adopt Interpretive Guidelines Under CPIA.** The U.S. State Department, through the Cultural Heritage Center of its Bureau of Educational and Cultural Affairs, has executed Memoranda of Understanding (“MOU”) with fourteen foreign State Parties that impose sweeping import restrictions on broad categories of “archeological materials” and “ethnological materials.”³¹ These MOUs fail to satisfy the basic legal requirements of the CPIA. They cannot be reconciled with the plain language of the CPIA, the accompanying Senate Report,³² or the statements of the panelists who guided U.S. accession to UNESCO.³³ For

³⁰ Urice & Adler, *Extralegal Policy*, *supra* note 25, at 4–12; Adler & Urice, *A Call for Reform*, *supra* note 25, at 125–35.

³¹ The countries are Bolivia, Colombia, China, Cyprus, El Salvador, Greece, Guatemala, Honduras, Iraq, Italy, Mali, Nicaragua and Peru. Restrictions on Canadian objects were allowed to expire. See Urice & Adler, *Extralegal Policy*, *supra* note 25, and Adler & Urice, *A Call for Reform*, *supra* note 25, for a summary of the discussion of the Canadian MOU in *Stealth UNIDROIT* discussed *infra* note 34. Import restrictions on Iraqi materials were established under the Emergency Protection of Iraqi Cultural Antiquities Act of 2004, 118 Stat. 2599, and then continued under the Import Restrictions Imposed on Archeological and Ethnological Material of Iraq, 73 Fed. Reg. 23334 (Apr. 30, 2008), which expired in July 2012. The State Department’s International Cultural Property Protection home page provides hyperlinks to the various MOUs as well as to certain of the statutes cited herein. Cultural Property Protection, BUREAU OF EDUC. & CULTURAL AFFAIRS, <http://eca.state.gov/cultural-heritage-center/cultural-property-protection> (last visited June 16, 2013).

³² S. REP. NO. 97-564, at 27 (1982).

³³ These included, among others, Professor Bator; Mark B. Feldman, then Deputy Legal Advisor for the U.S. Department of State; and James McAlee, a partner at the law firm of Arnold & Porter, counsel to a trade group of U.S.-based antiquities dealers. See Leonard D. DuBoff et al, *Proceedings of the Panel on the U.S. Enabling Legislation of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 4 SYRACUSE J. INT’L L. & COM. 97 (1976) [hereinafter *Panel Proceedings*].

example, the Chinese and Italian MOUs restrict U.S. market participants from owning materials that are lawfully owned, traded and exported by Chinese and Italian citizens and others participating in the robust Chinese and Italian markets. This makes no sense; it discriminates against U.S. market participants and violates several requirements of the CPIA. Binding interpretive guidelines are needed to restore the checks and balances of CPIA, and to ensure neutral interpretation of the CPIA and fair administration of the CPAC. These guidelines would synthesize criticism previously directed at the State Department and CPAC³⁴ and should be proposed as the basis for binding regulations under CPIA. The goal is to ensure that U.S. import restrictions function as selective filters on looted objects, imposed in response to archeological looting demonstrably caused by demand in the United States, and not permanent, universal barriers to the entry of anything old.

In addition, responsibility for administering CPAC and CPIA should be shifted from the State Department to either the Department of Commerce or the Department of Education. State Department has allowed CHC, whose operations appear to be autonomous and unsupervised within BECA, to overreach in its stewardship of the CPIA program. The State Department, through CHC, has proved too responsive to pressure from its foreign clientele and the U.S. archeological lobby; too contemptuous and distrustful of U.S. market participants; opposed to U.S. commercial interests; disingenuous in its interpretation of the CPIA; opportunistic and manipulative in its administration of CPAC; and has become an advocate for national retention and archeology instead of an arbiter among the four constituencies represented on CPAC (i.e., museums, archeologists, dealers, and the public). The Department of Commerce would presumably be better motivated to protect the U.S. commercial interest in maintaining a level playing field for U.S. market participants and not placing them at a competitive disadvantage to foreigners. Alternatively, the Department of Education would presumably be better motivated to

³⁴ See, e.g., Letter from Michael J. McCullough, Associate Compliance Counsel, Sotheby's Inc., to James H. Thessin, Deputy Legal Advisor to U.S. Dept. of State (Feb. 16, 2006) (on file with author) [hereinafter *Sotheby's 2006 Letter*] (critiquing the failure of the PRC's request for import restrictions to meet the requirements of the CPIA); Letter from William G. Pearlstein to Cultural Property Advisory Committee (April 22, 2010) (on file with author) (discussing Renewal of Italian MOU—Interpretive Issues Under Required Determinations). See also Urice & Adler, *Extralegal Policy*, *supra* note 25, at 24–27 and Adler & Urice, *A Call for Reform*, *supra* note 25, at 143–46, which summarize various legal and analytical defects in the Canadian and Peruvian MOUs originally stated in James F. Fitzpatrick, *Stealth UNIDROIT: Is USIA the Villain?*, 31 N.Y.U. J. INT'L L. & POL. 47 (1998) [hereinafter *Stealth UNIDROIT*]. Other critics are acknowledged in Urice & Adler, *Extralegal Policy*, *supra* note 25, at 16.

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protect the broad U.S. cultural interest in promoting the international exchange of art, both through private collecting, as a medium of cultural exchange, and through museum activity, which is by itself insufficient. The Department of State might object to the proposal to re-delegate executive authority for administering CPIA/CPAC to the Department of Commerce or the Department of Education. But the President did not delegate this authority to the State Department until 1998.³⁵ If the proposal were found to be meritorious, the President could re-delegate this authority within the Executive Branch to the Department of Commerce or Education.

- **Harmonize ARPA.** In several matters, the U.S. Justice Department has used the Archeological Resources Protection Act of 1979 (“ARPA”)³⁶ as a basis for seizure of foreign-sourced archeological objects. Nothing in ARPA or its legislative history indicates that it was meant to address anything other than materials found on land owned or administered by the U.S. government or Indian tribes. Although none of these matters was adjudicated, they are outliers and ARPA should be amended to limit its reach accordingly.³⁷
- **Harmonize OFAC Embargoes.** U.S. embargoes administered by the Treasury Department’s Office of Foreign Asset Control (“OFAC”) together with U.S. Enforcement Agencies bar imports of certain cultural materials from Cuba, Iran, Sudan, and Burma.³⁸ The rationale for these embargoes is to isolate

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In Executive Order 12555 . . . (1986), the President delegated executive authority for carrying out certain provisions of Sections 303 and 304 of the [Implementation] Act to the Director of the U.S. Information Agency. In 1998, this authority was transferred to the Secretary of State by the Foreign Affairs Reform and Restructuring Act. Now, decisions regarding entering into agreements that impose import restrictions are made by the designated decision-maker, a [State] Department official who takes into consideration the findings and recommendations of the Cultural Property Advisory Committee. The [State Department] also carries out other statutory responsibilities under the [Implementation] Act, as well as any diplomatic functions associated with implementing [UNESCO] and the [Implementation Act], including negotiating and concluding cultural property agreements.

Background, BUREAU OF EDUC. & CULTURAL AFFAIRS, <http://eca.state.gov/cultural-heritage-center/international-cultural-property-protection/process-and-purpose/background> (last visited Nov. 24, 2013).

³⁶ 16 U.S.C. §§ 470aa–mm (1979). Section 470ee(c) appears to have inadvertently omitted the phrase “from public lands or Indian lands,” which limits the reach of all other ARPA provisions.

³⁷ See Urice & Adler, *Extralegal Policy*, *supra* note 25, at 13–16; Urice, *Rocks and Hard Places*, *supra* note 25, at 135–38. The Government’s theory of liability is apparently that illegal export could trigger state criminal laws in a manner analogous to *McClain/Schultz*, although without any application or analysis of the *McClain/Schultz* criteria.

³⁸ U.S. CUSTOMS & BORDER PROT., WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT: WORKS OF ART, COLLECTOR’S PIECES, ANTIQUES, AND OTHER

these governments economically and deprive them of U.S. dollars.³⁹ These nations are all State Parties under UNESCO. These embargoes are inconsistent with the treatment of cultural materials under CPIA. With respect to the trade in cultural materials, the embargoes fail to serve their purpose of depriving these nations of U.S. dollars; there is no significant domestic export trade in archeological and ethnological materials from any of these nations. Instead the embargoes prohibit the import of objects that are already in the secondary market outside the embargoed nations. In addition, issues are generally addressed with OFAC by submitting a written request for relief, which can be time-consuming, cumbersome and expensive. Such administrative inflexibility is to the detriment of U.S. trade.⁴⁰ There are other difficulties with the embargoes, including the potential for misidentification due to geographical overlap. For example, certain Iranian objects are indistinguishable from and may be confused with other objects of “Near-Eastern” and Central Asian origin and certain Sudanese objects may be confused with Egyptian. Given the special concerns raised by the trade in cultural materials, archeological and ethnological materials originating from these nations should be removed from OFAC purview and treated consistently with materials

CULTURAL PROPERTY 20–22 (2006), available at http://www.cbp.gov/linkhandler/cgov/trade/legal/informed_compliance_pubs/icp061.ctt/icp061.pdf. For the Syria, Iran and Cuba sanctions and related licensing procedures, see U.S. DEP’T TREASURY, *Resource Center*, www.treasury.gov/resource-center/sanctions (last visited Jan. 16, 2014). “Information and informational materials” (as defined in 31 C.F.R. 560.315) are exempt from the OFAC licensing requirements. To be considered information or informational materials artworks must be classified under chapter subheading 9701, 9702, or 9703 of the Harmonized Tariff Schedule of the United States. Subject to certain qualifications and exceptions, these cover, respectively, paintings, drawings and pastels; original engravings, prints and lithographs; and original sculptures and statuary, in any material (which are limited by Customs ruling to unique, non-repetitive, non-serial carvings entirely done by hand. For example, Ushabtis are excluded because they are deemed to be stylized and repetitive).

³⁹ For example, “[t]he basic goal of the [Cuban embargo] is to isolate the Cuban Government economically and deprive it of U.S. dollars.” U.S. CUSTOMS & BORDER PROT., *supra* note 38, at 20.

⁴⁰ For example, one U.S. collector considered purchasing a low six-figure collection of antique (not ancient) Iranian textiles at auction in Germany. The collection had been owned by a single family in Germany for several generations. Because there was no assurance that OFAC would grant an exemption (especially in light of heightened tensions between the U.S. and Iran), the collector declined to bid and the collection was presumably purchased by a non-U.S. collector. Ushabtis imported by another collector were seized by U.S. Customs under the embargo because in a moment of candor he identified them as Sudanese. The problem was that they were not Sudanese, because they had been exported in the 19th century when Sudan was still part of Egypt, which was then ruled by the Ottomans or later by the English. Because export was documented to predate Sudan’s national existence, it was initially argued to U.S. Customs that Sudan couldn’t claim the pieces because no Sudanese law applied. OFAC subsequently granted an exemption after a formal submission was made.

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from other State Parties under CPIA. (If these materials became subject to CPIA, the problem of geographical overlap would theoretically be addressed by adherence to the “first discovery requirement” under CPIA.)

- **Create an Electronic Database of Objects in Order to Encourage Transparency, Restore Marketability and Provide Repose.** A universally accessible, web-based database of objects should be created on the lines proposed below. This would encourage transparency among holders of antiquities, encourage claimants to come forward, and quiet title to unprovenanced objects, thereby enabling accession by museums, and correcting the chill caused by the 1970 Rule on the marketability and value of non-1970 Compliant objects. Holders would sign a listing agreement under which they would anonymously publish objects for a fee on the electronic database, post high-quality digital images of the object from multiple angles, provide size and dimensions and known information about provenance (i.e., history of ownership and chain of title) and provenience (i.e., place of origin or find-site) all certified as true. Access to the database would be subject to a license agreement, binding on those with access and their affiliates. Information disclosed on the database would be confidential and recipients would be obligated not to disclose such information to third parties. “Seasoned Objects” (i.e., those not claimed by a country of origin within one year after initial publication) would be free and clear of any claims under U.S. federal and state law. (Thus, failure to monitor the database, as updated, would preclude claims against Seasoned Objects.)⁴¹ Claims against Seasoned Objects could be brought only if persuasive “Fresh Evidence” arises.⁴² Claims would be subject to binding arbitration by a mixed panel of experts in the field. Compensation would be paid by successful claimants to “Bona Fide Purchasers” unless a claimed object was found to have

⁴¹ This White Paper assumes that source nations will devote the personnel and resources necessary to monitor the database actively; if so, the proposed one-year window should be a sufficient amount of time to lodge a meritorious claim against published objects. This obligation should be viewed as an opportunity for sovereign claimants to police the market and reclaim their national patrimony and not as imposing an administrative hardship or unreasonable burden.

⁴² The “Fresh Evidence” exception is intended to give claimants the ability to make claims against Seasoned Objects based on demonstrably new factual evidence that only becomes available after the expiration of the original one-year publication period. The Fresh Evidence exception is not intended to undermine the integrity of the one-year publication period, and must necessarily exclude facts and circumstances that were known to or should reasonably have been known by the claimant, or that the claimant consciously avoided knowing, during the one-year publication period.

been looted from a specific site or identifiable owner. Costs and penalties could be assessed against those who make frivolous or unmeritorious claims, knowingly post false information, or breach their confidentiality obligations. Posting to and review of the database would become an industry standard and part of accepted “best practices.” The database would be privately-owned and managed. Passage into law is preferable to remove any doubt as to whether the terms and conditions of the license agreement would be binding on foreign and domestic governments and their enforcement agencies. The private dispute resolution process and confidentiality undertakings binding on claimants under the license agreement and holders under the listing agreement must not be undermined or usurped by restitution claims brought on behalf of those same (or other) claimants by U.S. Enforcement Agencies or foreign governments not party to a license agreement on grounds that they were neither party to nor bound by the terms of the license and listing agreements. The appeal of the database to potential listers would be destroyed if listing were to expose owners to discovery requests or investigations by U.S. Enforcement Agencies or foreign claimants who learn about an object independent of its listing and without having signed a license agreement. Holders will agree to transparency only if their anonymity is assured. (On the other hand, listing holders knowingly in possession of objects stolen or looted from a known institution or site should not be immune from criminal prosecution. If the concept of the database is found to have merit, the applicability of criminal laws will need to be defined and balanced so as to maintain the commercial viability of the website and its appeal to potential listers while preserving the availability of criminal remedies against malefactors.)

III. SYNOPSIS OF DISCUSSION AND ANALYSIS

In reviewing the evolution of the U.S. cultural policy framework, it is impossible to ignore that its framers (including Professor Bator, Senators Moynihan and Dole, and the State Department (with respect to CPIA but not the NSPA))⁴³ clearly rejected a “blank check” approach

⁴³ Professor Bator died in 1989. Senator Dole retired from the Senate in 1996. Senator Moynihan died in 2003. Mark B. Feldman, the State Department’s lead counsel for cultural property matters, left for private practice in 1981. The departure of these framers from the scene arguably “orphaned” cultural property matters in Washington, D.C. and left U.S. policy in the hands of CHC and U.S. Enforcement Agencies. These took advantage of a policy vacuum and the absence of supervision and oversight and adopted an increasingly activist approach. CHC has ensured the absence of oversight by simply failing to file CPAC reports with the President and Congress as required by CPIA section 306(f)(6).

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both for U.S. criminal law and import restrictions under CPIA. It is also impossible to ignore that in testifying against and blocking passage of S. 605, the Executive Branch, particularly the Justice Department and the State Department, rejected any limitations on the NSPA, thus ensuring that the U.S. criminal law and its derivative, the doctrine of civil forfeiture, would inevitably eclipse Congressional policy and the operative features of the CPIA.

The discussion under the heading “Reforming U.S. Criminal Law and Customs Policy” first contrasts the blank check approach under *McClain* with the independent U.S. decision-making process contemplated by the State Department, Senators Moynihan and Dole and Professor Bator. It concludes that current application of criminal law eclipses every important feature of the CPIA and calls into question the purpose and utility of the CPAC process as a whole. The legislative history of the CPIA and S. 605 is reviewed to note that during the Congressional hearings on S. 605, the Justice Department testified against limiting the scope of *McClain* on the grounds that *McClain*-based prosecutions would only be brought in “egregious” cases and that importers could take comfort in the high bar of protection provided by *McClain*’s *scienter* requirement. The *Schultz* case is analyzed, chiefly to show that the “conscious avoidance” standard, a lower threshold than the proof of *scienter* required by *McClain*, dangerously erodes the importer’s margin for error in light of the practical difficulties involved in learning the requirements of foreign law and obtaining basic factual information about provenance and export.

The *Steinhardt* seizure is discussed to show how U.S. Enforcement Agencies and U.S. Attorneys use civil forfeiture as the basis for seizing foreign-sourced objects that are assumed to be stolen without any analysis, application or proof of the *McClain/Schultz* factors: whether the patrimony law in effect at the time of export was a clear and unambiguous declaration of state ownership; whether it was, per *Schultz*, domestically enforced; and whether the importer knew or consciously avoided knowledge of applicable law at the date of export. Recent forfeitures involving a sarcophagus, a mummy mask and dinosaur fossils are discussed to demonstrate a disturbing pattern of aggressive seizures based on weak facts and legally defective complaints. In short, the bases for Justice Department’s opposition to S. 605—the high bar of *scienter* (also cited by the Second Circuit in *Schultz*) and rarity of prosecution—have given way to the reality of unprincipled seizure on a routine basis. This discussion concludes that the legislative framework originally contemplated by Professor Bator and Senator Moynihan can only be restored if Congress were to reform U.S. criminal laws by passing a revived S. 605 so as to base criminal liability on site-specific looting and not mere breach of a foreign

ownership law, and then harmonizing the doctrine of civil seizure to the narrowed concept of theft. Unless and until Congress does so, U.S. policy will be driven by the uncritical, reflexive enforcement of foreign patrimony laws, U.S. trade and cultural life will be diminished, and this important area of U.S. cultural policy will be regulated by the courts instead of by Congress.

The discussion under “Reforming the Implementation Act” describes the gap between theory and practice under the CPIA. The discussion focuses on two sets of flaws in the MOUs: first, the gross overbreadth of the categories of Designated Materials subject to the MOUs, due in part to failure to apply the limitations inherent in the definition of “archeological materials” and “ethnological materials” under Section 2601(2)(c), including the “first discovery requirement,” the “subject to export control requirement” and the “cultural significance requirement”; and second, analytical failures in making five determinations under Section 2602(a)(1)(A)–(D) required to impose import restrictions, discussed below under the captions the “Pillage Requirement,” the “Self-Help Requirement,” “Concerted International Response Requirement,” “Mitigation Requirement,” and “International Exchange Requirement.” Examples from the relatively recent Chinese and Italian MOUs supplement the existing academic commentary. Also discussed are a systematic pattern of secrecy and manipulation by the State Department in its administration of CPAC, its policy bias in favor of national retention and the archeological point of view, and the predominance of the archeological point of view on CPAC, as evidenced by certain appointments to CPAC in 2011.

The proposal for an electronic database is new. It responds to a growing desire among collectors, dealers and museum curators dissatisfied with the 1970 Rule who seem generally willing to trade transparency for repose, on the theory that it would be worth the risk of restituting a small number of potentially problematic pieces to quiet title and restore marketability to the great majority of their inventory.⁴⁴ The

⁴⁴ By contrast, posting of an object to the AAMD’s website creates exposure to potential claimants without any express promise of repose against stale claims after a specified period of publication. Posting may strengthen a laches defense against a claimant who satisfies the statute of limitations. At the time of writing the AAMD’s database seems conspicuously underpopulated, with only 700 or so objects posted, of which approximately 65–70% were posted by The Walters Art Museum (including planned gifts). The proposed database would also be more useful than the Art Loss Register, which only publishes the relatively small number of known objects whose theft has been reported to ALR. ALR’s utility is further diminished by its recent insistence on publishing only provenanced objects.

Jennifer Anglim Kreder and Benjamin Bauer have posited that “the United States could benefit from the creation of a single federal title registration system for documented works of art and antiquities. This system would be premised on the Torrens registered land system which allows for the title registration of real property.” Kreder & Bauer, *supra* note 22 at 884. They propose creation of “a Torrens-based Federal Bureau of Cultural Property Registration (FBCPR).” *Id.* at 885. They argue that the benefits of the proposed system of title registration

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virtue of making access to the database conditional on a license agreement, establishing a fair and balanced dispute resolution procedure and rewarding transparency with repose ought to be self-evident. The intent is to promote transparency by holders, encourage claimants to come forward, create a fair dispute resolution process, and quiet title to good faith purchasers. The database would help mitigate the potential

would include offering a

superior alternative to litigating stolen art claims, creating a means of insuring the ownership of collections, and facilitating the collateralization of arts and antiquities to create new sources of capital. . . . A better system of cultural property registration could be structured to benefit claimants by: (1) bringing works into the public light, thereby contributing to the ability of claimants to be put on notice of claims; (2) reducing or eliminating litigation costs by appointing an art or legal professional to arbitrate claims made during a thorough provenance investigation required for the registration process; and (3) providing compensation for subsequent bona fide claims through an assurance fund. Simultaneously, owners who purchase works of art in good faith and with good title would solidify their property interests in these works, rendering them more valuable, more readily marketable, and more able to be collateralized.

Id. at 886–87.

In summary, Kreder and Bauer propose that:

The registration process would begin with the filing of an application for registration, which would take the form of *in rem* civil action against the property in a federal district court in the jurisdiction in which the property is located. Applicants would provide a full description of the piece and full disclosure of known provenance. . . . Once the application and relevant information is filed, the court would appoint a cultural property examiner to research the history of the subject property. . . . For notice purposes, in addition to directly reaching out to potential claimants, the FBCPR would establish a web page that lists items pending registration, as well as descriptions and pictures of the items and all known provenance information. . . . The items would be posted immediately upon the filing of the application, and they would continue to be displayed on the site for a set statutory period—such as a year—before notice would be deemed sufficient to complete registration. . . . After the provenance research is completed, the examiner would then file a report with a federal district court recommending whether the item should or should not be registered. . . . Once the statutory notice period passes and the court has determined that the applicant has good title, then the court would issue a decree quieting all other claims of title and declaring title to be fully vested in the applicant. The court would then forward a copy of the decree to the FBCPR, which would record the ownership and article information . . . on an original certificate of title in the official registry . . . [which] would serve as conclusive legal evidence of title. . . . Subsequent transfers of registered property would require the surrender and re-issue of the certificate and the updating of the registry. . . .

Id. at 915–17.

There is much to recommend Kreder and Bauer’s proposal. However, the fundamental problem, as it relates to antiquities, is that the authors propose that only “*documented* antiquities that are legally exported from their source nations and imported into the United States should be eligible.” *Id.* at 912. The reality of the antiquities world is that many, if not, most antiquities, including all non-1970 Compliant orphans, lack the kind of documentation Kreder and Bauer would require for issuance of a certificate of title. Thus, their proposal intentionally excludes and simply does not work with respect to antiquities. By contrast, the proposal made by this White Paper puts the burden on the claimant to disprove legality after an antiquity is published rather than on the holder to prove legality as a condition to publication. This White Paper may thus propose the only solution to the “orphans issue” (short of retraction of the 1970 Rule) that offers both claimants and holders a fair process to address disputes and quiet title.

for stale claims preserved indefinitely by source nations and the uncertainty created by the 1970 Rule. Implementation of a database along the lines proposed would go a long way to enabling legitimate claims and restoring the transferability of un- or underprovenanced objects, but would not by itself be enough to restore balance and fairness to U.S. law and policy, and would not correct, for example, the misapplication of the CPIA. If found meritorious, this proposal would only be the starting point of negotiations as to particular terms and conditions. It is not further discussed below. The desirability of amending ARPA to limit its reach to its intended scope and to harmonize the OFAC embargoes with CPIA seems clear and is not further discussed below.

IV. DISCUSSION AND ANALYSIS

A. Reforming U.S. Criminal Law and Customs Policy

At the time of writing, a generation has passed since the formative Congressional debates in the 1970s and 1980s about whether to regulate the international antiquities trade or criminalize it. Until the late 1990s, the general sense among U.S. market participants was that the application of U.S. stolen property laws was and should be limited to objects that had been clearly stolen from a foreign museum, individual or archeological site. In other words, it was not generally understood to be a crime under U.S. law to acquire an object knowing that it might have been exported at some time from a nation claiming to own all antiquities without also knowing that it had been freshly looted from an archeological site or monument within that nation.⁴⁵

This view was thought to be consistent with the legal framework created when Congress passed the Implementation Act in 1983. The Implementation Act was passed in order to allow foreign nations to request U.S. import restrictions on important categories of unprovenanced cultural objects while preserving the United States' ability to limit those categories of restricted objects. The grant of U.S. restrictions is supposed to be conditioned on, among other things, a similar response by other importing nations and the adoption by the requesting nation of meaningful self-help remedies and sensible internal policies regarding site preservation, conservation and policing.

Those who thought the Implementation Act reflected an appropriate balance of interests hoped that the prospective carrot of U.S. import restrictions would also be used as a stick to negotiate agreements

⁴⁵ Much of the discussion under this heading relies on William G. Pearlstein, *Cultural Property, Congress, the Courts and Customs: The Decline and Fall of the Antiquities Market?*, in WHO OWNS THE PAST?: CULTURAL POLICY, CULTURAL PROPERTY, AND THE LAW 9 (Kate Fitz Gibbon ed., 2005).

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for *partage*, museum loans, excavation permits for U.S. archeologists, cooperation and exchange among curators and art historians, and export permits for redundant objects not deemed to be important to the national heritage. This kind of proactive cultural diplomacy would promote a range of cultural and academic activity and satisfy the CPIA's requirement that U.S. import restrictions be consistent with the promotion of the international exchange of cultural property.

Left unresolved by the passage of the Implementation Act, however, was the critical question of whether and how the importation of cultural property into the United States would continue to be subject to the NSPA, a general purpose criminal law enacted in the 1940s to deter, among other things, interstate car theft.⁴⁶ Under the rule of *United States v. McClain*, a controversial 1979 criminal case, U.S. courts have held that the knowing importation of cultural property subject to a clear declaration of ownership by a foreign nation was grounds for the criminal prosecution of the importer by the United States under the NSPA, regardless of whether the object had been looted (freshly or not) from an archeological site or cultural monument. *McClain* thus criminalizes the importation of objects that have been nationalized but are not necessarily looted (freshly or historically), and intrudes on the scope of the Implementation Act, which was meant to govern the importation of unprovenanced objects.

The Implementation Act and the *McClain* doctrine under the Stolen Property Act represent incompatible, irreconcilable approaches to the difficult issues raised by foreign patrimony claims. As further discussed below under the heading "Reforming the Implementation Act," the Implementation Act reflects an elaborate compromise designed to balance the competing interests of U.S. museums, the art market, the U.S. public, archeologists and source nations. It was designed to promote the international exchange of cultural property for the benefit of the U.S. public while allowing for the creation of import barriers only when necessary to protect important archeological sites and significant objects that merit retention and return. It embodies a definitive, thoroughly considered rejection of the arguments for the unconditioned, universal retention of cultural property made by many foreign nations and archeologists.

The *McClain* doctrine, on the other hand, is a crude, judicially crafted approach to a complex problem that was neither designed to address such matters nor intended to survive passage of the Implementation Act. Most importantly, *McClain* conflicts with or negates every operative feature of the Implementation Act. Under

⁴⁶ See Urice, *Rocks and Hard Places*, *supra* note 25, at 133–61 for a discussion of the origins and evolution of the NSPA.

McClain, a foreign nation can, by relying on the U.S. Justice Department and U.S. Enforcement Agencies, obtain the extraterritorial enforcement of sweeping national patrimony laws against U.S. citizens without regard for the checks and balances built into the Implementation Act or for the U.S. interest in promoting the international exchange of cultural property.

The open question concerning the relationship between the Implementation Act and the *McClain* doctrine was resolved in 2003, when the U.S. Court of Appeals for the Second Circuit (seated in New York City, the center of the U.S. art market) affirmed the conviction of Frederick Schultz for conspiring to receive smuggled Egyptian antiquities under the rule of *McClain*.⁴⁷ It is unclear whether the facts would have supported a conviction based on site-specific looting, and Schultz was convicted not for dealing in objects stolen from known archeological sites but for conspiring to receive objects to which Egypt claimed non-possessory title under its 1983 patrimony law.⁴⁸

Schultz has troubling implications for owners and importers of antiquities and other cultural objects, and places the *McClain* doctrine under which Schultz was convicted squarely at odds with Congressional policy regulating the importation of cultural property. By affirming *McClain*, *Schultz* arguably converted the Implementation Act from the centerpiece of U.S. cultural policy into a sideshow. It is a classic example of judicial nullification of Congressional intent.⁴⁹

1. Initial Executive Action and *McClain*

Prior to *McClain*, U.S. law and policy had historically favored the free trade of cultural property.⁵⁰ U.S. policy only began to change in 1969 in response to widespread concern over archaeological looting in Central America “with a State Department determination in 1969 that the United States should help control trade in looted archaeological objects because pillage of archaeological sites threatens the cultural heritage of mankind.”⁵¹ Mark B. Feldman writes:

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 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. . . . I

⁴⁷ *United States v. Schultz*, 333 F.2d 393 (2d Cir. 2003).

⁴⁸ *Id.*

⁴⁹ Adler & Urice, *A Call for Reform*, *supra* note 25, at 140; Bator, *supra* note 15, at 343.

⁵⁰ James R. McAlee, *From the Boston Raphael to Peruvian Pots: Limitations on the Importation of Art into the United States*, 85 DICK. L. REV. 565, 566 (1981).

⁵¹ Feldman, *supra* note 10, at 1.

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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 Department and Treasury, were supportive. Nothing could have been accomplished, however, without cooperation of the interested domestic constituencies. Archaeologists 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. . . . 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: (1) a treaty with Mexico for the recovery and return of pre-Columbian . . . objects of “outstanding importance to the national patrimony” and important historical documents; [52] (2) a statute prohibiting imports of pre-Columbian monumental and architectural sculpture exported illegally from Latin America;[53] and (3) UNESCO negotiations for a multilateral treaty seeking to diminish pillage of archeological sites.⁵⁴

The *McClain* cases were decided against this background in 1977 and 1979, prior to passage of the Implementation Act.⁵⁵ *McClain* involved the forfeiture of freshly excavated pre-Columbian artifacts and the prosecution of several individuals engaged in a scheme to plunder the objects and smuggle them into the United States for resale.⁵⁶ The first Court of Appeals decision in *McClain* held, in effect, that the

⁵² See Treaty of Cooperation for the Recovery and Return of Stolen Archaeological, Historical and Cultural Property, U.S.-Mex., July 17, 1970, 22 U.S.T. 494 [hereinafter *Mexican Treaty*]. Notably, the parties agreed “to permit legitimate international commerce in art objects.” *Id.* art. II(1)(d).

⁵³ Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals, 19 U.S.C. §§ 2151–95 (1972) [hereinafter *Pre-Columbian Monuments Act*].

⁵⁴ Feldman, *supra* note 10, at 4–5. The domestic consensus did not long survive the return of the U.S. Delegation to UNESCO from Paris. Problems became acute after Mark B. Feldman introduced the first draft of implementing legislation (certain features of which were modeled after the Pre-Columbian Monuments Act). In particular, proposals for bilateral negotiations under Article 9 of UNESCO provoked opposition from antiquities dealers, who continued to fear that the State Department would barter import restrictions for concessions on other issues. In the interest of compromise, the State Department ultimately agreed to a variety of checks and balances, which were reflected in the final text of the CPIA, but have come to be ignored. Dealer opposition to CPIA thus predates its passage in December 1983 and now appears prescient.

⁵⁵ *United States v. McClain (McClain I)*, 545 F.2d 988 (5th Cir. 1977); *United States v. McClain (McClain II)*, 593 F.2d 658 (5th Cir. 1979).

⁵⁶ *McClain I*, 545 F.2d 988; *McClain II*, 593 F.2d 658.

knowing importation of cultural property subject to a clear declaration of national ownership by a source nation was a sufficient basis for a criminal prosecution of the importer by the United States under the Stolen Property Act.⁵⁷ In doing so, however, *McClain* emphasized the need for a strict showing of *scienter* (i.e., a deliberate and knowing violation of law) and the high burden of proof this imposed on the prosecution.⁵⁸

McClain was opposed at the time by dealer groups and other U.S. cultural institutions, which filed *amicus curiae* briefs arguing that *McClain* represented a radical departure from U.S. common law and accepted interpretations of international law. *McClain* was thereafter widely criticized by Professor Bator,⁵⁹ among others. According to one commentator:

The cases leave no room for debate within the United States on whether certain classes of art should be banned from this country. Rather, the opinions delegate that decision to foreign governments. . . . The truth is that in the *McClain* cases the Court of Appeals . . . handed art-exporting nations something of a “blank check” to create crimes in the United States.⁶⁰

McClain was not used again as the basis for a criminal prosecution

⁵⁷ “[A] declaration of national ownership is necessary before illegal exportation of an article can be considered theft, and the exported article considered ‘stolen’, within the meaning of the National Stolen Property Act.” *McClain I*, 545 F.2d at 1000–01. At the same time, the court *reversed* the Stolen Property Act convictions, finding that the prosecution had failed to demonstrate that Mexico’s patrimony laws clearly vested ownership in the Mexican state, and, thus, failed to demonstrate that the objects were “stolen.” In a second ruling (after retrial), the Fifth Circuit *again reversed* the Stolen Property Act convictions for the same reason, and upheld only a conspiracy conviction based on a scheme that arose after the effective date of one Mexican law which the court concluded did pass muster as an ownership law. *McClain II*, 593 F.2d 658. In doing so, the court held that although Mexico may “ha[ve] considered itself the owner” of undiscovered cultural objects under various other patrimony laws, “it has not expressed that view with sufficient clarity to survive translation into terms understandable by and binding upon American citizens.” Brief of Amici Curiae American Association of Museums, et al. in Support of the Appeal of Claimant Michael H. Steinhardt, *United States v. An Antique Platter of Gold*, No. 97-6319, 38–39 (2d Cir. March 6, 1998) [hereinafter *Steinhardt Museum Brief*]. The Museum amici included The American Association of Museums, Association of Art Museum Directors, Association of Science Museum Directors and American Association for State and Local History.

⁵⁸ *McClain I*, 545 F.2d at 1001 n.30.

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[T]he case erodes the distinction [between “stolen” and “illegally exported” antiquities] . . . in a way that is disturbing. A blanket legislative declaration of state ownership of all antiquities, discovered and undiscovered . . . is an abstraction Yet *McClain* gives this abstraction dramatic weight: Illegal export, after the adoption of the declaration, suddenly becomes “theft.” The exporting country, without effecting any real changes at home, can thus invoke the criminal legislation of the United States to help enforce its export rules by simply waving a magic wand and promulgating this metaphysical declaration of ownership.

Bator, *supra* note 15, at 350–51.

⁶⁰ McAlee, *supra* note 50, at 595–97.

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by the United States for the forfeiture of cultural property under the Stolen Property Act for more than twenty years, until the indictment of Fred Schultz in 2001.

2. *McClain* vs. the Implementation Act: Blank Checks vs. Independent Judgment

While *McClain* was being decided, Congress was considering the U.S. response to UNESCO. UNESCO was not self-executing;⁶¹ in other words, the United States needed to enact particular implementing legislation in order for UNESCO to become effective. Congress thus passed the Implementation Act in 1983 after an eleven-year long debate about the terms on which the United States would ratify UNESCO.

According to Senator Moynihan, the Implementation Act was intended to be the “definitive national policy regarding the importation of archaeological and ethnological materials” and to balance the competing interests of archaeologists, anthropologists, art dealers, collectors, museums, academics, the State and Justice Departments and the Customs Service.⁶² The State Department viewed antiquities dealers and Senator Moynihan as the primary source of opposition to speedy implementation, due chiefly to their concern that the State Department would prove susceptible to diplomatic pressure and fail to protect American cultural interests.⁶³

⁶¹ See U.S. Declarations and Reservations to UNESCO Convention, *supra* note 1; REPORT OF THE U.S. DELEGATION TO UNESCO, *supra* note 12; *President’s Message to the Senate*, *supra* note 12. The Declarations and Reservations of the various State Parties to UNESCO, including the U.S., are available on the UNESCO website, http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html. The U.S. Declarations and Reservations, which are a critical part of the U.S. response to the UNESCO Convention, are not published on the State Department’s Cultural Heritage website. The omission is glaring.

⁶² The [Implementation Act] was enacted only after a long and arduous process of compromise which fairly balanced all competing interests. One part of the compromise which led to the unanimous passage of the act--after a decade of effort--was the clear understanding among all interests, public and private, that the [Implementation Act] would establish the definitive national policy regarding the importation of [cultural objects] and that any inconsistent provisions of law would be brought into accord. *Relating to Stolen Archeological Material: Hearing on S. 605 Before the S. Subcomm. on Crim. Law of the S. Comm. on the Judiciary*, 99th Cong. 14–15 (1985) [hereinafter *Hearings on S. 605*] (statement of Sen. Daniel Moynihan), available at <http://babel.hathitrust.org/cgi/pt?id=pst.000011950196;view=1up;seq=1>.

⁶³ The [U.S.] Senate gave advice and consent to ratification of [UNESCO] 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 turned out, that process took ten years of heated debate and difficult negotiation. [UNESCO] 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 [CPIA]. In brief, antiquity dealers and their supporters, including Senator Daniel Moynihan, had serious

The Implementation Act contains a number of important limitations on the scope of relief available to a foreign nation by imposing conditions on which the United States may impose bilateral or multi-lateral import restrictions, unilateral “emergency” restrictions, and in the provisions relating to “stolen” cultural property under section 308. The Senate Finance Committee intended these limitations

to ensure that the United States will reach an independent judgment regarding the need and scope of import controls. That is, U.S. actions need not be coextensive with the broadest declarations of ownership and historical or scientific value made by other nations. U.S. actions in these complex matters should not be bound by the characterization of other countries⁶⁴

“In general, [these limitations were] intended to ensure that the requesting nation is engaged in self-help measures and that U.S. cooperation, in the context of a concerted international effort, will significantly enhance the chances of their success in preventing the pillage.”⁶⁵

The Implementation Act uses certain terms and definitions that limit the scope of import restrictions. For example, although section 302(6) defines the term “cultural property” to be coextensive with the broad definition used in the UNESCO Convention, under sections 303 and 304, the United States may impose import restrictions only with regard to “*significant*” archeological or “*important*” ethnological materials.⁶⁶ The Senate Report states that archeological materials include only objects “of cultural significance” having “significantly rare archeological stature” (by virtue of the 250 year age threshold) and that ethnological materials include only objects of “comparative rarity” that “possess[] characteristics which distinguish them from other objects in

objections to the implementing legislation submitted to Congress by the State Department, and numerous changes had to be made to meet their concerns. . . . 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. . . . 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. . . . 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.

Feldman, *supra* note 10, at 7–9.

⁶⁴ S. REP. NO. 97-564, at 27 (1982).

⁶⁵ *Id.* at 26.

⁶⁶ Section 302(2)(i) defines the term “objects of archaeological interest” to include objects that are of “cultural significance, at least 250 years old and normally discovered as a result of excavation, digging or exploration.” Clause (ii) defines the term “objects of ethnological interest” to include objects that are “the product of a tribal or nonindustrial society and 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.”

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the same category” and are not “common or repetitive or essentially alike . . . with other objects of the same type”⁶⁷

The terms of UNESCO, the Implementation Act, its legislative history and statements by the principal U.S. draftsmen all support the conclusion that the Implementation Act was intended to afford relief to source nations only in certain narrowly defined circumstances, and to facilitate the broadest possible international exchange of cultural property consistent with the protection of important archeological sites and the retention of significant or important materials, the pillage of which would jeopardize the applicant’s “cultural patrimony.”⁶⁸

The Implementation Act was clearly intended to remedy situations like the wholesale looting of pre-Columbian objects from fresh archeological sites in Central America, which threatened to reach crisis proportions in terms of destroying the archaeological record *before* it could be developed. It was not contemplated that the Implementation Act would be stretched beyond reasonable interpretation of its plain language to restrict the import of routinely discovered, redundant objects that do not meet the required threshold of importance or rarity, nor to restrict the importation of a State Party’s entire inventory of archeological material regardless whether freshly looted or privately owned and traded in accordance with national law.

A critical difference between the Implementation Act and the Stolen Property Act is their respective treatment of “stolen” property. Under the Implementation Act, an object may be forfeited by Customs if stolen from “the inventory of a museum or religious or secular public monument or similar institution in any State Party” after the later of 1983 (the effective date of the CPIA) or the date the State Party joined UNESCO. This is a traditional, essentially site-specific, definition of theft. By contrast, under the blank check rule of *McClain*, cultural property is deemed stolen if it is subject to a national declaration of ownership regardless whether the plaintiff can document that any owner actually lost possession. *McClain* thus provides a conceptual artifice that allows a foreign nation to claim that objects of undocumented provenance are “stolen,” thereby avoiding the more difficult process under the Implementation Act of applying for import restrictions on the category of materials to which the unprovenanced objects belong.

The evaluation of foreign requests for import restrictions lies at the

⁶⁷ S. REP. NO. 97-564, at 25 (1982).

⁶⁸ Curiously, the term “cultural patrimony” is not defined in either UNESCO or the Implementation Act. According to the State Department’s then Deputy Legal Advisor, the “concept of cultural patrimony of a state being in jeopardy from the pillage of archeological or ethnological materials . . . [which] involves, at a minimum . . . the loss of a cultural patrimony through the outflow of *important* artistic objects.” *Panel Proceedings, supra* note 33, at 131 (emphasis added) (comments of Mark B. Feldman, Deputy Legal Adviser, U.S. Department of State).

heart of the Implementation Act. The CPIA allows the United States to impose import restrictions on specified categories of “archeological or ethnological materials” pursuant to a bilateral or multilateral agreement, or to unilateral emergency restrictions, after the President (or his delegee) makes the required determinations. These determinations are made after the eleven-member Advisory Committee reviews the State Party’s application and concludes that the grant of import restrictions would be consistent with such determinations. Under the Implementation Act, the Advisory Committee has a balanced composition of three archeologists, three experts in international sales of archeological and ethnological materials,⁶⁹ three representatives of the public interest, and two representatives of the museum community. The United States has, to date, granted bilateral or emergency import restrictions to fourteen nations.

Section 312(2) of the Implementation Act creates a “safe harbor” from seizure for objects held (i) for not less than three years by a U.S. museum or other cultural institution and published, catalogued or exhibited for specified periods, (ii) for not less than ten years and when a State Party has or should have received fair notice by publication (or other means prescribed by regulations to be published by the Secretary of the Treasury)⁷⁰ of its location within the United States and (iii) by a bona fide purchaser for not less than twenty years. Although these provisions of the CPIA were intended to create repose and shield U.S. collectors and institutions from liability for stale ownership claims, *Schultz* defeats their purpose. Collectors and curators may be dismayed to learn that although careful compliance with these provisions may insulate them from civil seizure under the Implementation Act, they remain exposed to *McClain*-based criminal claims (or civil forfeiture based on *McClain*-based criminal claims), including claims against any prior owner, however remote. What, they may ask, was the point of complying with the safe harbor?

“Designated Materials” that are subject to import restrictions must be “specifically and precisely” described in order to give fair notice of the restrictions to importers and others through publication in the Federal Register. Section 307 of the Act provides in substance that, after publication, Designated Materials may not be lawfully imported into the United States unless the importer is able to present either an export permit from the applicable State Party within ninety days (which can be difficult or impossible to obtain from the host country) or “satisfactory evidence” that the material was exported from the State Party either not less than ten years before the date of such entry *or* on or before the date

⁶⁹ The Senate Report states that these seats are reserved for antiquities dealers.

⁷⁰ Regulations under section 312(2)(C) have never been published.

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on which such material was designated through publication in the Federal Register. Without an export permit or such “satisfactory evidence” of prior export, the material is subject to seizure and forfeiture by Customs.⁷¹

For example, import restrictions went into effect on January 23, 2001 with respect to Designated Materials subject to the Memorandum of Understanding between the United States and the Republic of Italy dated January 19, 2001 (the “*Italian MOU*”).⁷² Under section 307, such Designated Materials may be lawfully imported on the basis of “Satisfactory Evidence” that they were exported from Italy prior to January 23, 2001. Under *McClain/Schultz* (and *Steinhardt*, discussed below), however, the importer of the same Designated Materials would be subject to criminal liability and in rem forfeiture if the importer knew (or consciously avoided knowing) that the materials left Italy after 1901.⁷³ Thus, in the case of Italy, there is a difference of 100 years between the test-date for the legality of importing materials under the Implementation Act and the test-date for the legality of importing the same materials under *McClain*. Under CPIA, the United States is required to determine the legality of importation based on the facts and circumstances in effect at the time, and to reserve judgment as to the scope of foreign ownership claims. The goal was to create selective import filters, prospective from the date of the restrictions, and not all-inclusive barriers retroactive to the date of the foreign law (e.g., for Italy, 2001 under CPIA as compared to 1901 under *McClain*).

It is reasonable to assume that every country that is granted import restrictions under the Implementation Act has enacted or will enact a national patrimony law of some sort. The same gap in time will exist with respect to every one of them. The effect of *Schultz* with respect to a country that has previously been granted import restrictions under the Implementation Act is to create two target dates for importers of objects from that country, the safe harbor date under section 307 and the date of the earlier patrimony law, but to leave the importer exposed to criminal

⁷¹ Section 307(c) essentially provides that “satisfactory evidence” must consist of a declaration under oath by the importer, stating that, to the best of his knowledge, the material was exported prior to the applicable date, and a statement by the consignor or seller of the material stating the date on which the material was exported from the State Party, or if not known, his belief that the material was timely exported and the reasons on which his statement is based.

⁷² Import Restrictions Imposed on Archaeological Material Originating in Italy and Representing the Pre-Classical, Classical, and Imperial Roman Periods, 66 Fed. Reg. 7,399 (Jan. 23, 2001). For more information on this and more recent updates, see *infra* note 152.

⁷³ Italy’s 1939 patrimony law, as amended, ratified its 1909 law, which provided for state ownership of all newly discovered archeological materials not privately owned before 1902. Law No. 1089 of June 1, 1939. Amended by Law No. 44 of Mar. 1, 1975, Law No. 88 of Mar. 30, 1998, and Law No. 100 of Mar. 30, 1998 (Protection of Items of Artistic and Historic Interest), available at [http://www.ifar.org/upload/PDFLink4909e4d7d3533WMK%20-%20Italy%20-%20Law%20No.%201089%20of%201939%20\(Eng\).pdf](http://www.ifar.org/upload/PDFLink4909e4d7d3533WMK%20-%20Italy%20-%20Law%20No.%201089%20of%201939%20(Eng).pdf). See also *infra* notes 156 and 157.

liability even after complying with the safe harbor. Again, what is the point of negotiating selective import restrictions under the Implementation Act with a nation that has an earlier, all-inclusive patrimony law? Simply put, it makes little sense for an importer to comply with import restrictions effective at a later date to gain a shield from civil liability when criminal exposure remains with respect to a foreign law passed at an earlier date.⁷⁴

The disjunction between the two statutes is nowhere more apparent than on this practical, mechanical level. *McClain* throws into confusion the validity of the import certification process established under the Implementation Act, a feature that is critical to the integrity of the CPIA. An importer of Designated Materials who takes the trouble to comply with the “satisfactory evidence” safe harbor under section 307 or the “published/old collection” safe harbor under section 312(2) should be dismayed to learn that *McClain* makes such compliance irrelevant. Members of the Advisory Committee should be equally surprised to learn that their efforts to parse through the request of a State Party applying for import restrictions and cull out qualifying “Designated Materials” are rendered irrelevant by *McClain* with regard to the same Designated Materials.

Even if one assumes that U.S. Enforcement Agencies would not apply *McClain* against Designated Materials imported in compliance with section 307, it is clear that *McClain* continues to apply to non-Designated Materials from the same State Party. This leads to the absurd result that the criminal penalties for importing non-Designated Materials are worse than the civil penalties to which Designated Materials are subject. Again, such a result undercuts the rationale for having the Advisory Committee evaluate a foreign request in the first place.

As a result of *Schultz*, the role of the Advisory Committee itself may be called into doubt. Why would any foreign nation spend the time, effort and expense of applying for import restrictions under the Implementation Act, which by definition, must always be narrower than the scope of the applicant’s patrimony law and subject to the satisfaction of strict statutory determinations, when it can simply cultivate good working relations with U.S. Enforcement Agencies and obtain the protection of U.S. criminal laws and customs policies at the

⁷⁴ This was the dilemma faced by potential U.S. bidders at Sotheby’s March 2013 auction in Paris of the Jean Paul Barbier-Mueller Collection of pre-Columbian art. Although the lots were clearly importable under the “satisfactory evidence” exemptions under the CPIA, there was no certainty that import would be lawful under U.S. criminal and customs law after Peru claimed ownership of the property based on its Supreme Decree No. 89 of April 2, 1822. Robert Kozak, *Peru’s Government Seeks to Recover Art Planned for Sotheby’s Auction*, WALL ST. J. (Feb. 28, 2013, 2:00 PM), <http://blogs.wsj.com/speakeasy/2013/02/28/perus-government-seeks-to-recover-art-planned-for-sothebys-auction/>.

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expense of U.S. taxpayers? After *Schultz*, Egypt, for example, has no incentive to apply for restrictions under the Implementation Act, which, in theory at least, can never be coextensive with Egypt's 1983 patrimony law. This is the consequence of allowing individual federal prosecutors and Customs agents to operate what is, in effect, an independent foreign policy on an *ad hoc*, discretionary basis.⁷⁵

3. Senate Bills S. 2963 and S. 605

McClain survived passage of the Implementation Act in 1983 by accident. In 1985, Professor Bator and Senator Moynihan testified before the Senate Judiciary committee in favor of S. 605, a companion bill and necessary complement to the Implementation Act that would have amended the Stolen Property Act to overturn *McClain* by statute.⁷⁶ S. 2963, the earliest version of that companion bill, was introduced in 1982.⁷⁷ Passage of S. 605 would have established a U.S. legal

⁷⁵ In his Essay, Professor Bator repeatedly expressed his concern that the continued use of *McClain* would undermine the Implementation Act. Bator, *supra* note 15, at 367 ("The enactment of [the Implementation Act] can then lead to a relaxation of the impetus to use the [Stolen Property Act] as a broad and indiscriminate tool for the control of the trade in archeological objects of mysterious provenance.").

⁷⁶ My general position is that the UNESCO legislation, which deals with the specific problem of the looting of archeological sites, and which represents a very elaborately crafted compromise, is the law that should be used to deal with this problem. General American criminal legislation should not be artificially manipulated in order to deal with the problem of the possession of artifacts of wholly uncertain and unknown origin. [Furthermore, the Stolen Property Act should be limited to] cases of real theft, where it is shown and proved that somebody took something from somebody else's ownership, and it is a real ownership and not simply one of those abstract vesting statutes saying that everything belongs to the State.

Hearings on S. 605, *supra* note 62, at 19–20 (testimony of Paul Bator, Professor, Harvard Law School). The *Schultz* District Court cited to Bator's earlier Essay, published in 1982, for the proposition that Professor Bator supported the use of the NSPA "in cases of intentional theft and knowing disposal of stolen goods, a situation in which even the primary academic proponent of the [CPIA] has stated that criminal prosecution is appropriate." *United States v. Schultz*, 178 F. Supp. 2d 445, 449 (S.D.N.Y. 2002). Bator supported the use of the NSPA in the case of the commonly understood meaning of site-specific theft. However, Bator's testimony at the Hearings on S. 605 makes it clear that he opposed the use of the NSPA to criminalize non-possessory national ownership claims under *McClain*. It may be that Professor Bator's consideration of the relationship between *McClain* and the CPIA evolved between the time he wrote his Essay, published in 1982, and the Hearings on S. 605 in 1985.

⁷⁷ S. 2963, 97th Cong. (1982). S. 2963 would have amended the Stolen Property Act by adding the following:

No archeological or ethnological material taken from a foreign government or country claiming ownership shall be considered as stolen, converted, or taken by fraud within the meaning of this section where the claim of ownership is based only upon—(1) a declaration by the foreign government of national ownership of the material; or (2) other acts by the foreign government intended to establish ownership of the material and functionally equivalent to a declaration of national ownership, and the alleged act of stealing, converting, or taking is based only upon—(A) illegal export of the material from the foreign country; (B) the defendant's knowledge of the illegal export; and (C) the claim of ownership described in clauses (1) and (2).

framework under which the Stolen Property Act would have continued to apply to objects stolen from the possession or inventory of private citizens, museums, monuments and archeological sites in a particular nation, while the legality of importing categories of culturally significant objects from that nation that could not be identified to a particular owner or site would have been governed by the Implementation Act.

Senator Moynihan testified that passage of S. 605 was part of the understanding in 1983, among all concerned parties, including the Departments of State and Justice, that led to passage of the Implementation Act.⁷⁸ However, the Senate Finance Committee, to which the Implementation Act was reported, lacked jurisdiction to consider an amendment to a criminal statute. Thus, shortly after passage of the Implementation Act, Senator Moynihan and Senator Dole, two of its sponsors, introduced S. 605.

Under S. 605, the NSPA (specifically sections 2314 and 2315 of title 18, United States Code) would have been amended to add at the end of each section the following:

This section shall not apply to any goods, wares, or merchandise which consists of archeological or ethnological materials taken from a foreign country where—(1) the claim of ownership is based only upon—(A) a declaration by the foreign country of national ownership of the material; or (B) other acts by the foreign country which are intended to establish ownership of the material and which amount only to a functional equivalent of a declaration of national ownership; (2) the alleged act of stealing, converting, or taking is based only upon an illegal export of the material from the foreign country; and (3) the defendant's knowledge that the material was allegedly stolen, converted, or taken is based only upon the defendant's knowledge of the illegal export and the defendant's knowledge of the claim of ownership described in clauses (1)(A) and (B).⁷⁹

Id.

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One part of the compromise which led to the unanimous passage of the act—after a decade of effort—was the clear understanding among all interests, public and private, that the [Implementation Act] would establish the definitive national policy regarding the importation of [cultural objects] and that any inconsistent provisions of law would be brought into accord.

....

... [A]s part of the negotiations that led to passage of the [Implementation Act], all parties interested in the legislation agreed that the *McClain* decision should be overturned by statute. I considered that commitment an essential element of the understanding that led to uncontested passage of the [Implementation Act].

Hearings on S. 605, supra note 62, at 4–5 (testimony of Sen. Daniel Moynihan).

⁷⁹ *Hearings on S. 605, supra* note 62, at 32 (statement of James I. K. Knapp, Deputy Assistant

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After S. 605 was referred to the Senate Judiciary Committee, the State and Justice Departments reneged on what Senator Moynihan believed were their earlier assurances and opposed the bill because they wanted to retain the ability to bring *McClain*-based prosecutions on an *ad hoc* basis in a limited number of egregious cases. They testified that the strict *scienter* showing imposed by *McClain* itself imposed a high burden of proof that would prevent them from abusing their discretion and destroying the regulatory structure created by the Implementation Act.⁸⁰ S.605 was never passed.

Both the District Court and the Court of Appeals in *Schultz* relied on language in the Senate Report stating that the Implementation Act does not preempt any rights or remedies under Federal or State law otherwise available to a State Party, or affect the rights and remedies of a private claimant who would not have standing to raise a claim under the Implementation Act. Taken out of historical context, this “no-preemption” language can be read to imply that Congress intended *McClain* to survive passage of the Implementation Act. The more plausible interpretation, given Senator Moynihan’s expectation, as early as 1982, that the Stolen Property Act would subsequently be amended, is simply that the “no-preemption” language meant that, after the passage of S. 605, the Stolen Property Act would continue to apply to claims by State Parties and non-State Parties for the return of cultural

Att’y Gen., Criminal Division).

⁸⁰ *Hearings on S. 605, supra* note 62, at 29, 34 (statement of James I. K. Knapp, Deputy Assistant Attorney Gen., Criminal Div., U.S. Dep’t of Justice). At the Senate Hearings on S. 605, the Justice Department took a completely opposite view from Senator Moynihan and Professor Bator:

The [CPIA], and the [UNESCO] Convention it implements, is intended to supplement existing laws relating to cultural property and not supplant them. In enacting the [CPIA], there is no credible evidence to indicate any intent by the Congress to overrule *McClain*.

The Department of Justice was involved in the long and arduous legislative process that produced the [CPIA] and we have opposed previous proposals to overrule the *McClain* decision. We have consistently noted the significant prosecutive burdens which must be overcome in a successful prosecution under 18 U.S.C. 2314 and/or 2315 [the NSPA]. . . . We have also recognized the lack of any indication of prosecutorial abuse of these statutes in their application to archeological material.

We would, however, renew an offer, first made almost a decade ago, to meet with representatives of legitimate owners of archeological material, such as dealers, private collectors and museums, to discuss the adoption of internal Department of Justice procedures which could include preindictment review of proposed prosecutions involving archeological or ethnological material to prevent inappropriate prosecutions.

In sum, however, from a law enforcement perspective, enactment of S. 605 is not desirable. S. 605 would impair our ability to prosecute the trafficker in stolen archeological and ethnological materials who flouts the laws of foreign nations concerning such property.

Hearings on S. 605, supra note 62, at 33–34 (statement of James I. K. Knapp, Deputy Assistant Attorney Gen., Criminal Div., U.S. Dep’t of Justice). It would be interesting to learn whether, after more than thirty years, the Justice Department’s invitation for dialogue with U.S. market participants is still open. It may be that some of the worst abuses of the civil forfeiture process could be curtailed by adoption of internal DOJ procedures.

property looted from a specific site or documented as stolen from inventory.⁸¹

Senator Moynihan's statements introducing S. 605 remain as true today as they were in 1985:

S. 605 would reverse the interpretation of the [Stolen Property Act] set forth in the *McClain* decision. There are three reasons why it would be proper to do so.

First, it would make the [Stolen Property Act] consistent with the comprehensive national policy regarding the importation of cultural property explicitly set forth in the . . . Implementation Act (CPIA).

Second, it would require the Executive Branch to adhere to the principles and procedures set forth in the [Implementation Act] regarding the U.S. response to legitimate problems of pillage of archeological or ethnological materials abroad. The Customs Service and the State Department have ignored the [Implementation Act] and taken actions that have resulted in a virtual unilateral embargo on the importation of all pre-Columbian objects—relying on the *McClain* decision for doing so.

Third, it would assure that American citizens are not subject to criminal prosecution on the basis of foreign declarations of law, without regard to whether the property was “stolen” in the common law sense of taking it from someone with a real possessory interest in the property.⁸²

S. 605 was a well-considered attempt to harmonize U.S. policy regarding the importation of cultural property around the Implementation Act and to prevent the continued application of the Stolen Property Act to matters that it was neither designed nor intended to address. A definitive statement of Congressional intent should not be

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It is . . . apparent that the remarks concerning preemption in the Senate Report did *not* mean that Customs officials or courts were free to disregard either the provisions of the [Implementation Act] or the important U.S. policy judgments it reflects. Congress obviously did not spend more than a decade deliberating over and legislating U.S. policy regarding . . . foreign patrimony laws (including defining the duties of Customs), only to leave it to Customs officers or courts to reach totally different policy judgments as to these same issues and thereby countermand the legislation. Stated more simply, Congress did not pass the [Implementation Act] with one hand, and invite Customs officers and courts (by virtue of two sentences in a Senate report) to abrogate or undercut it with the other. Thus, whether the [Implementation Act] is preemptive in this sense or not, the incontrovertible point—clear from both the terms of the statute itself and the legislative history—is that the [Implementation Act] reflects a critically important statement of U.S. policy and law regarding the enforcement of foreign patrimony laws that must weigh heavily in any determination regarding these matters.

Steinhardt Museum Brief, *supra* note 57, at 31.

⁸² *Hearings on S. 605*, *supra* note 62, at 13–14 (statement of Sen. Daniel Moynihan).

inferred from the failure of S. 605 and the continued survival of *McClain*. Instead they can simply be attributed to the fact that the Senate Finance Committee lacked jurisdiction to amend the Stolen Property Act when the Implementation Act was passed in 1983. Passage of S. 605 would have been desirable to avoid the confusion and disruption in the antiquities markets caused by the continued reliance on *McClain* by federal prosecutors and the Customs Service, especially in the context of civil forfeiture claims, which are made despite the assurances of the Justice Department at the Hearings on S.605 that *McClain*-based prosecution would be reserved for egregious matters and that the *scienter* requirement would set a high bar to prevent abuse.

4. *United States v. Schultz*

On July 16, 2001, Frederick Schultz was indicted for conspiring to receive antiquities smuggled from Egypt. In January 2002, the District Court denied Schultz's motion to dismiss the indictment, holding in part that the Implementation Act does not preempt the Stolen Property Act.⁸³ Schultz was subsequently convicted under the Stolen Property Act on a single count of conspiring to receive stolen property. The District Court charged the jury, among other things, that they could find that Schultz had violated the Stolen Property Act if he "was at least aware that under Egyptian law the Egyptian government owned all recently discovered antiquities *or* that a given object embraced by the conspiracy had actually been acquired from the possession of the Egyptian police."⁸⁴ The jury was further charged that they could infer Schultz's knowledge if they found that he had "consciously avoided" learning the requirements of Egyptian law.⁸⁵

The District Court conceded that

rather than banning the importation of all cultural property exported in violation of foreign law, [the Implementation Act] takes a more nuanced and complicated approach to when and under what circumstances such property can be imported into the United States; but this is because the Act is chiefly concerned with balancing

⁸³ *United States v. Schultz*, 178 F. Supp. 2d 445, 449 (S.D.N.Y. 2002).

⁸⁴ *United States v. Schultz*, 178 F. Supp. 2d 445 (S.D.N.Y. 2002) trial Vol. 11, February 12, 2002. The word "or" is italicized in the quote to emphasize that the jury charge included two alternate bases for conviction—site specific theft or a *McClain*-based knowing violation of Egypt's national ownership law. It is unclear from the record which theory Schultz was convicted on. It is also unclear from the record whether Schultz actually received any of the objects the prosecution established came from the Egyptian police; the evidence that he conspired with Jonathan Tokeley-Parry to receive them included the testimony of his co-conspirator, Tokeley-Parry, who had already been convicted in the U.K.

⁸⁵ *United States v. Schultz*, 333 F.3d 393, 413 (2d Cir. 2003).

foreign and domestic import and export laws and policies, not with deterring theft.⁸⁶

The District Court concluded that there is “[no] inconsistency between the application of the . . . Implementation Act and application of [the Stolen Property Act] to the ‘cultural property’ involved in this case.”⁸⁷

The Court of Appeals also noted the “potential overlap” between the two approaches but failed to address, much less, resolve the tension between them.

The [Implementation Act] is an import law, not a criminal law . . . It may be true that there are cases in which a person will be violating both the [Implementation Act] and the [Stolen Property Act] when he imports an object into the United States. But it is not inappropriate for the same conduct to result in a person being subject to both civil penalties and criminal prosecution, and the potential overlap between the [Implementation Act] and the [Stolen Property Act] is no reason to limit the reach of the [Stolen Property Act].⁸⁸

By declining to pursue the analysis after observing that the “potential overlap” between the two Acts might create liability under both for the same actions, the Court of Appeals missed the essential point that *McClain* criminalizes activity that Congress expressly decided to permit after weighing the merits of the issues for more than ten years. Even without passage of S. 605, the *Schultz* courts could have concluded that the Stolen Property Act was never intended to apply to cultural objects that are not stolen from the possession of a foreign claimant, or that, as a matter of statutory construction, *McClain* should not be extended to govern the importation of such objects because doing so would undercut the intended function of the Implementation Act. In other words, the *Schultz* Court was invited to affirm the conviction on a narrow (i.e., site specific) theory of state ownership, which the facts might have warranted, and declined, instead choosing to affirm on the broadest possible theory of non-possessory state ownership.

The Court of Appeals’ statement that it saw “no reason that property stolen from a foreign sovereign should be treated any differently from property stolen from a foreign museum or private home”⁸⁹ is a clear rejection of the Congressional determination to treat import restrictions on unprovenanced objects differently from thefts of cultural property stolen from inventory. The Court of Appeals’

⁸⁶ *Schultz*, 178 F. Supp. 2d at 449.

⁸⁷ *Id.*

⁸⁸ *Schultz*, 333 F.3d at 409.

⁸⁹ *Id.* at 410.

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conclusion “that the [Stolen Property Act] applies to property that is stolen from a foreign government, where that government asserts actual ownership of the property pursuant to a valid patrimony law”⁹⁰ flatly contradicts the determination in the Senate Report that “U.S. actions in these complex matters should not be bound by the characterization of other countries.”⁹¹

Both the District Court and the Court of Appeals erred fundamentally in concluding that these two antithetical approaches can concurrently govern the importation of unprovenanced objects. By affirming *McClain* (albeit with the additional requirement of requiring domestic enforcement of the applicable ownership owner), the *Schultz* courts arguably cast a cloud over title to every cultural object otherwise lawfully imported into the United States, including objects imported and subsequently owned and exhibited in compliance with the Implementation Act.

5. Conscious Avoidance and the Erosion of the Scierter Requirement

The District Court’s charge that Schultz’s knowledge could be imputed by his “conscious avoidance” of learning the requirements of Egyptian law dangerously erodes the importer’s margin of error. The effect of the conscious avoidance standard is to reduce the otherwise difficult showing of actual knowledge to a potentially minimal showing that a defendant was simply aware that a foreign nation might have had some law of unknown scope and substance relating to its cultural property.

The *Schultz* Court of Appeals likewise overrode arguments against triggering U.S. criminal liability on the vagaries of foreign law by concluding that importers could take comfort in the knowledge requirement under the National Stolen Property Act. But “conscious avoidance” is a dangerous standard for the importer. Although it seems self-evidently prudent not to turn a blind eye to suspicious facts that

⁹⁰ *Id.* at 416.

⁹¹ S. Rep. No. 97-564, at 27 (1982). The Second Circuit’s disregard for Congressional policy was foreshadowed by Judge Cabranes’ comments at oral argument in June 2003, to the effect that the Implementation Act appeared to be an example of American “unilateralism,” evidence of the Court’s failure to grasp that the Implementation Act exemplified America’s commitment to the multilateral approach mandated by the UNESCO Convention. Judge Cabranes remarked that Congress must have intended to recognize nationalizations by communist nations when it passed the Stolen Property Act in the 1940s, without asking why the Implementation Act was passed 40 years later or analyzing whether and, if so, how *McClain* could be reconciled with the Implementation Act. The legislative history of the Implementation Act indicates that, given the special values inherent in the international trade in cultural property, the question is not whether a foreign nation can nationalize cultural property but whether, and the circumstances under which, a U.S. court should enforce that nationalization, under a traditional comity analysis (considering whether enforcement of the foreign law claim by a U.S. court would be consistent with U.S. law and policy) or otherwise. *Steinhardt* Museum Brief, *supra* note 57, at 27–33.

may indicate smuggling or recent clandestine excavation, it is not self-evident that a U.S. buyer should engage foreign counsel to obtain a working knowledge of foreign laws that may or may not apply to the object in question.⁹²

Schultz effectively conditions the lawful importation of cultural property on the importer's familiarity with and accurate interpretation of the laws of any of the various foreign nations that may claim against an object. To do so is to impose a difficult burden on the importer, and one that increases the risk of acquiring or dealing in an object that survives the strictest due diligence investigation by the best informed expert. The fact that provenance is unknown, and perhaps unknowable, prior to purchase, does not ensure that the importer's investigation will survive retrospective scrutiny under the "conscious avoidance" test. Foreign patrimony laws can be difficult (e.g., Cambodia and Indonesia) or impossible (e.g., Yemen) to obtain in their native language, let alone in English translation (e.g., Mongolia).

Once the law is found, it may be difficult to obtain reliable legal advice as to its meaning and construction. Foreign national patrimony laws vary widely in substance. Some laws provide for the vesting in the State of all archeological materials discovered after a specified date (e.g., Mexico and Egypt). A small number of others do not, and provide alternate models that allow for private ownership once the needs of national heritage are deemed satisfied (e.g., Japan, England and Israel). Others, like India, permit domestic private ownership but prohibit export. Some provide for vesting on unauthorized export (e.g., New Zealand), some for hybrid treatment, such as vesting of all antiquities discovered prior to a certain date but registration and a right of first refusal with respect to other cultural property (e.g., Italy nationalized only archeological objects that were not privately owned before 1902 and permits export of privately-owned materials not deemed to be important to the national patrimony). England provides for a preemptive right of purchase for objects deemed important to the national heritage.

Furthermore, there is an important distinction between foreign ownership laws, which are enforceable under *McClain*, and foreign export controls, which are not.⁹³ But this distinction is not always clear to a U.S. importer and may only be finally determined upon testimony of expert witnesses and judicial review.⁹⁴ In addition, some foreign

⁹² Perhaps the Court of Appeals created an implied price point above which a purchaser should be seen as having consciously avoided learning the nature of foreign ownership law by failing to engage foreign counsel.

⁹³ See *Urice, Rocks and Hard Places*, *supra* note 25, at 127–30, for a discussion of the distinction between export regulations and patrimony statutes.

⁹⁴ For example, in December 2007, the U.K. Court of Appeal reversed the trial court's decision in *Islamic Republic of Iran v. Barakat Galleries Ltd.*, [2007] EWCA (Civ) 1374, [2009] Q.B. 22. The case involved the suit by Iran for the recovery of objects of Iranian origin (and perhaps

nations (e.g., Egypt, Italy, Cambodia) have adopted a series of patrimony laws over the years addressing the ownership and export of cultural property; it can be difficult or even impossible for a U.S. importer to understand which law(s) govern a particular object, especially if the date of original export is unknown and potentially unknowable. The federal courts have succeeded in creating a judicially-crafted import regime under which the rights and remedies of the source nation and the liability of importers and remote owners may never be clarified until after a lengthy trial, thereby creating a state of uncertainty and anxiety that fails to protect archeological context or objects and benefits neither importers, archeologists nor source nations. It is no surprise that construction of arguably ambiguous foreign patrimony laws has been a central issue in an increasing number of reported decisions.⁹⁵ Given the potentially unresolvable vagaries of foreign law, conscious avoidance is a dangerously diluted standard of liability.⁹⁶ It is a far cry from the strict *scienter* required by McClain and stands in stark contrast to the testimony of the Department of Justice at the hearings on S. 605.

6. *Steinhardt*, the 1991 Customs Directive and the Elimination of *Scienter*

If the “conscious avoidance” standard under Schultz dilutes the

freshly excavated). The trial court held for the defense, characterizing Iran’s law as the kind of “public,” “penal” or customs law that the courts of another nation will not enforce, citing *Attorney-General of N.Z. v. Ortiz*, [1982] 3 W.L.R. 570 (A.C.) (New Zealand lost a claim to Maori objects illegally exported to the U.K. because the objects had not been forfeited prior to export). The Court of Appeal reversed, holding that the Iranian law stated a valid ownership claim and that the general trend of international law was to recognize such claims. The reversal in *Barakat* underscores how treacherous it can be for a purchaser or importer to find, interpret and understand foreign laws and how tenuous the distinction can be between an enforceable national ownership law and an unenforceable export control law.

⁹⁵ See, e.g., *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003) (Egyptian law); *United States v. An Antique Platter of Gold (Steinhardt)*, 991 F. Supp. 222 (S.D.N.Y. 1997), *aff’d*, 184 F.3d 131 (2d Cir. 1999) (Italian law); *Peru v. Johnson*, 720 F. Supp. 810 (C.D. Cal. 1989), *aff’d sub nom. Peru v. Wendt*, 933 F.2d 1013 (9th Cir. 1991) (Peruvian law); *Jeanneret v. Vichey*, 541 F. Supp. 80 (S.D.N.Y. 1982), *rev’d*, 693 F.2d 259 (2d Cir. 1982) (Italian law); *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977) (Mexican law); *Ortiz*, *supra* note 94 (New Zealand law); *Barakat*, *supra* note 94 (Iranian law); Verified Complaint, *United States v. A 10th Century Cambodian Sandstone Sculpture*, No. 12 Civ. 2600, 2012 WL 1120480 (S.D.N.Y. Apr. 4, 2012) (Cambodian law).

⁹⁶ Determining the requirements of foreign law at the date of export is not the only minefield for an importer in performing a *McClain/Schultz* analysis. Country of origin is not always possible to determine with certainty because the geography of ancient cultures does not always match modern national borders—classical, Near Eastern and Pre-Columbian objects may often have multiple potential countries of origin. Date of export can be impossible to determine, simply because records are often nonexistent or unavailable. The difficulty of obtaining basic factual information from or about prior owners and about an object’s provenience, provenance and history of export/import reflects the reality of the antiquities market and calls into question the *Schultz* Court’s assurance that the importer can rely on the *scienter* standard for protection.

scienter requirement, reliance on McClain in the context of a civil forfeiture proceeding eliminates it altogether. Customs Directive No. 5230-15, dated April 19, 1991, titled “Detention and Seizure of Cultural Property,” alerts Customs agents that they may seize and detain cultural property at the port of entry on the grounds that foreign nations may have claims against such property on the basis of McClain. That was the basis for the Court of Appeals’ holding in *Steinhardt* that the misstatement on the “country of origin box” on a form filed with Customs when the objects were imported was material to the integrity of the customs process.⁹⁷

The Customs Directive summarizes Customs policies and procedures regarding the importation of cultural property. Among other things, the Customs Directive advises agents that they have the power to detain and seize cultural property under both the Implementation Act and the Stolen Property Act (by virtue of *McClain*). The Customs Directive alerts agents to be ready to seize cultural property that is allegedly imported in violation of a foreign patrimony law. The Customs Directive correctly observes that “it is important to note that merely because an exportation of an artifact is illegal within a particular country does not necessarily mean that the subsequent importation into the United States is illegal.” If there is doubt as to whether a foreign nation might claim an interest in a particular object or as to the nature of a foreign nation’s claim agents are directed to contact the appropriate foreign embassy or detain the object pending resolution of competing claims.

The *Steinhardt* cases involved the appeal by Michael Steinhardt from the District Court’s order of the forfeiture of a “Phiale,” a purportedly antique gold platter.⁹⁸ The District Court held that false statements on the customs entry forms regarding the value of the Phiale

⁹⁷ *Steinhardt*, 184 F.3d at 138.

⁹⁸ See *Steinhardt*, 184 F.3d 131; *Steinhardt*, 991 F. Supp. 222. *The International Herald Tribune* reported that three defendants in Italian criminal proceedings subsequently testified in affidavits that the Phiale is a modern forgery. The suspicion of forgery was reflected in the low asking price for the Phiale in Italy and Switzerland prior to its purchase by Steinhardt, and is a plausible reason why local museum officials in Sicily first declined an offer to purchase the Phiale from one of the defendants at the low price prior to its export, and then failed to “notify” the Phiale so as to formally subject it to Italy’s cultural property laws. Italian cultural authorities were thus indifferent to the Phiale while it was in Italy, and remained so until the national police were shown photographs of the Phiale in Steinhardt’s New York apartment, and learned of the relatively high price he paid. Only at this point was the Phiale transformed in Italy’s view from a potentially worthless fake into a priceless national treasure. After the U.S. Attorney received letters rogatory from The Republic of Italy for the return of the Phiale, U.S. prosecutors never thought to question whether it was appropriate to expend U.S. taxpayer dollars and departmental resources on the recovery of an object whose authenticity was in question *before* it left Italy. There is also a sense in the trade that if the Phiale is authentic, its true “country of origin” (which Customs regulations define as the country of manufacture, not the country of export) was Turkey, not Italy.

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(\$250,000 instead of Steinhardt's \$1.0 million plus purchase price) and its country of origin (Switzerland instead of Italy), and the Phiale's status as stolen property under Italian law (and thus under the Stolen Property Act by virtue of *McClain*) rendered its importation illegal.⁹⁹ Steinhardt contended, among other things, that the false statements on the customs forms were not material under the applicable customs statute.¹⁰⁰ The Court of Appeals held that the false statements on the customs forms were material.¹⁰¹

The Court of Appeals found it unnecessary to address the District Court's Stolen Property Act holding. But its holding on the materiality of the importer's misstatements on the customs forms implicate *McClain* in a way that has lasting adverse consequences for the legitimate antiquities trade. The Court of Appeals stated that the Customs Directive undermined Steinhardt's argument that listing Switzerland as the country of origin was irrelevant to the importation. The Court of Appeals noted to the contrary that the "[Customs] Directive advise[s] customs officials to determine whether property [is] subject to a claim of foreign ownership and to seize that property. An item's country of origin is clearly relevant to that inquiry."¹⁰² The Customs Directive provides a basis for seizing cultural property under the Stolen Property Act, and seizure of the Phiale would clearly be authorized under *McClain*.¹⁰³

The implication of the Court of Appeals' discussion of the Customs Directive is that the Customs Directive confers a license on Customs agents to seize any cultural property imported without an export permit from any source nation with a patrimony law, even if the country of origin is correctly stated on the customs form, because under *McClain* the country of origin may have at least a colorable (if not meritorious) claim to the property under its national patrimony laws.¹⁰⁴ Broadly construed, *Steinhardt* gives Customs a "blank check" to enforce foreign patrimony laws. *Steinhardt* has thus had the effect

⁹⁹ The District Court summarily explained its Stolen Property Act holding as follows: "Under [the Stolen Property Act], an object may considered 'stolen' if a foreign nation has assumed ownership of the object through its artistic and cultural patrimony laws." *Steinhardt*, 991 F. Supp. at 231.

¹⁰⁰ *Steinhardt*, 184 F.3d at 133.

¹⁰¹ *Id.* at 138.

¹⁰² *Id.* at 137.

¹⁰³ *Id.*

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[Steinhardt's] argument . . . misperceives the test of materiality. Regardless of whether *McClain*'s reasoning is ultimately followed as a proper interpretation of the [Stolen Property Act], a reasonable customs official would certainly consider the fact that *McClain* supports a *colorable claim* to seize the Phiale as having possibly been exported in violation of Italian patrimony laws.

Id. (emphasis added).

(albeit unintended) of chilling the importation of cultural property into the United States regardless of the circumstances of acquisition.

Leading U.S. museum associations filed an amicus brief opposing the *McClain*-based Stolen Property Act claim made in *Steinhardt*.¹⁰⁵ This important constituency argued that *McClain* is contrary to U.S. common law and to public policy as reflected in the Implementation Act, emphasized the long-standing public interest the United States has in promoting the international exchange of cultural property rather than its retention by source nations, and decried the harm resulting to the public from the chilling effect of *McClain* on the legitimate market for cultural property. The Museum *amici* also objected to *Steinhardt*'s application of a civil forfeiture law in tandem with the Stolen Property Act as a dangerous relaxation of the demanding burdens of proof required by *McClain*.

That unprecedented procedure permitted the U.S. government—acting as a surrogate for the Italian government—to use its extraordinary forfeiture powers in order to circumvent the demanding burden of proof, both as to legal and factual issues, that it would have faced in an NSPA prosecution, or that Italy would have faced in a civil repleton case to recover the Phiale in its own right.¹⁰⁶

The Museum *amici* decried the administrative license apparently conferred on Customs to conduct an independent foreign policy:

Yet another disturbing consequence of the decision in [*Steinhardt*] is that Customs officials now appear to believe that, although Congress has steadfastly refused to bar the importation of objects by virtue of foreign patrimony laws, they have a roving commission to do so and to then use U.S. forfeiture powers to enable foreign governments to appropriate objects without compensation and without proof. The decision below will permit and, indeed, encourage Customs officers to exercise their own predilections as to which foreign laws to enforce and which objects to seize at the behest of foreign governments, without regard to U.S. law and policy. As in this case, Customs' unguided actions often will conflict with the wider U.S. policy concerns that Congress so carefully considered and balanced.¹⁰⁷

The prospect of civil forfeiture raised by *Steinhardt* poses a frightening scenario for those who collect and exhibit antiquities. It is *McClain* with a vengeance, stripped of the high burdens to prosecution emphasized by the Justice Department in the Hearings on S. 605, including proof of *scienter* and the efficacy of foreign nationalization,

¹⁰⁵ *Steinhardt* Museum Brief, *supra* note 57.

¹⁰⁶ *Id.* at 5.

¹⁰⁷ *Id.* at 49.

and a far cry from the traditional concept of actual theft from inventory provided in the Implementation Act. Depending on the whim of individual customs agents or federal prosecutors, it creates a potentially impassible barrier at each port of entry against the importation of cultural property that would otherwise be lawful.

In a further twist, the absence of a *scienter* requirement was compounded by the apparent absence of *scienter* with respect to the wrongdoing on which the seizure was based: the dealer who located the Phiale for Steinhardt has written that the customs broker's computer was programmed to provide the name the country of export (i.e., Switzerland not Italy) in the country of origin box by default.¹⁰⁸ If so, *Steinhardt* has had the extraordinary effect of converting an inadvertent technical error into a judicially-sanctioned customs policy that threatens to undermine the statutory framework envisaged by Congress. In other words, *Steinhardt* affirmed a claim for civil forfeiture based, ultimately, on a criminal statute, without any showing of *scienter* either for the primary offense—the material misstatement—or the underlying offense of breach of Italy's ownership law via *McClain*.

7. The “Extralegal” Use of Civil Forfeiture: the Egyptian Sarcophagus;
the Khmer Statue; the Mongolian Dinosaur Fossils;
and the SLAM Mummy Mask

“In October 2009, federal prosecutors brought an *in rem* civil forfeiture action in the Southern District of Florida against an ancient Egyptian sarcophagus imported by a U.S. collector.”¹⁰⁹ The complaint recited a series of Egyptian patrimony laws commencing in 1835, observed that the sarcophagus was Egyptian, and simply concluded that it must have been stolen. The complaint failed to analyze any of the elements of proof required under *McClain* and *Schultz*: whether the patrimony law in effect at the time of export was a clear and unambiguous declaration of state ownership (or, for example, a mere export control law); whether it was, per *Schultz*, domestically enforced; and whether the importer knew or consciously avoided knowledge of applicable Egyptian law at the date of export. As a threshold matter, the complaint failed to allege when the sarcophagus left Egypt. As a matter of law, the complaint was “legally deficient.”

The Sarcophagus forfeiture appears to have triggered a string of increasingly aggressive civil forfeiture actions involving an Egyptian mummy mask,¹¹⁰ a Khmer statue¹¹¹ and Mongolian dinosaur fossils.¹¹²

¹⁰⁸ *The Steinhardt Phiale, a Trading History*, THE ART NEWSPAPER, Jan. 6, 1999.

¹⁰⁹ Urice & Adler, *supra* note 25 at 10. Verified Complaint for Forfeiture in Rem, United States v. One Ancient Egyptian, Yellow Background, Wooden Sarcophagus (S.D. Fla. Oct. 8, 2009) (No. 09-23030).

¹¹⁰ United States v. Mask of Ka-Nefer-Nefer, No. 4:11CV-504-HEA, 2012 WL 1094652 (E.D.

Mo. Mar. 31, 2012), *mot. for reconsid. denied*, 2012 WL 1977242 (E.D. Mo. June 1, 2012). On March 31, 2012, a U.S. federal district court granted the Saint Louis Art Museum's ("SLAM") motion to dismiss the U.S. Government's claim for civil forfeiture of ancient Egyptian sarcophagus mask known as Ka-Nefer-Nefer. The U.S. Government alleged that: Egyptian records reflected that the mask had been in the possession of the Egyptian government from the time it was excavated at Saqqara in 1952 until sometime between 1966 and 1973, when the mask was determined to be missing; SLAM purchased the mask from Phoenix Ancient Art in New York in 1999 for \$499,000; because Egyptian records never recorded the sale, de-accession or export of the mask, the mask must be considered stolen property and returned to Egypt. In a short, scathing decision, the Court held that the U.S. Government failed to allege any facts that amounted to a claim of theft under the Federal Rule of Civil Procedure 12(b)(6) and the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions, and also failed to state what law(s) were violated in order to articulate a legal standard under which to evaluate a claim of theft or illegal export. *Id.* The U.S. interest in supporting a shaky Egyptian government may have provided the impetus to pursue the matter after the District Court dismissal; the author understands that in September 2012 U.S. prosecutors remained in communication with their Egyptian counterparts as rioters were storming the U.S. Embassy in Cairo. Professor Urice has suggested to the author that the political pressures motivating certain restitution claims by U.S. Enforcement Agencies are overt and should not be underestimated. At the time of writing, settlement negotiations had apparently failed and appellate litigation appeared unavoidable. Rick St. Hilaire, *Failed Negotiations Put Ka Nefer Nefer Forfeiture Case Back on the Docket*, CULTURAL HERITAGE LAWYER RICK ST. HILAIRE (Apr. 17, 2013), <http://culturalheritagelawyer.blogspot.com/2013/04/failed-negotiations-put-ka-nefer-nefer.html>.

¹¹¹ Verified Complaint, *United States v. A 10th Century Cambodian Sandstone Sculpture*, No. 12 Civ. 2600, 2013 WL 1290515 (Mar. 28, 2013), 2013 WL 1120480 [hereinafter the *Khmer Statue Case*]. In April 2012, the U.S. filed a complaint for the civil forfeiture of a fine and rare ancient Khmer statue. The statue was one of a pair linked to a find site in Cambodia. Each statue had been broken off at the feet, and the feet and pedestals remain *in situ*. The statue (above the ankles) had been purchased by a Belgian collector from Spinks in London in the 1970s. The collector and Sotheby's signed a Consignment Agreement in late March 2010 for the September 2010 auction in New York. Sotheby's had the statue imported into the U.S. in April 2010 and then contacted the Cambodian government in an attempt to "pre-clear" the piece in advance of the March 2011 auction. Cambodia reacted by demanding that Sotheby's withdraw the lot from auction and return it to Cambodia. Sotheby's resisted, and then the U.S. filed an "*in rem*" action, in essence, on behalf of Cambodia.

The Government's complaint is founded on the premise that the statue is identified to a known find-site (i.e., the feet and pedestal remain *in situ* at the Prasat Chen temple); that the Koh Ker site in which the temple lies appears not have been looted until after 1939; and that French IndoChina and then Cambodia enacted a series of national ownership laws starting around 1900. Conspicuously absent are any hard factual allegations as to the date when, or the circumstances under which, the statue left Cambodia. As with the Egyptian Sarcophagus and the SLAM mummy mask, theft is inferred, and simply assumed to have occurred sometime during the Cambodian civil war in the 1970s. Sotheby's compliance director was quoted to say, correctly, that the statue could have been exported at any point in time before or after Cambodian patrimony laws were in effect. A dispassionate analysis under *McClain*, *Schultz* and *SLAM* suggests that, had the case been adjudicated, the Government would have lost, unless it was able to prove that the statue had been exported on a particular date after the enactment of applicable Cambodian patrimony law(s), which satisfy the *McClain* and *Schultz* tests regarding the quality, clarity and domestic enforcement of those laws.

In March 2013, the District Court denied Sotheby's Motion to Dismiss. In doing so, the Court necessarily assumed the truth of the Government's allegations, including "new factual allegations regarding the theft of the Statue from the Prasat Chen Temple in 1972 and Sotheby's knowledge that the Statue was stolen" to be pled in a "Proposed Amended Complaint," and stated that "further evidence is necessary to determine whether the law at issue unequivocally vests ownership in the Cambodian Statue." *Id.* at *1, 8. In an apparent departure from *Schultz*, the District Court stated that "while *Schultz* states that enforcement is probative of the intent behind a foreign law, the opinion fall [*sic*] short of making active enforcement a pleading requirement." *Id.*

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These matters all appear to share the same weakness regarding

at *8.

In December 2013, the U.S. Attorney for the Southern District of New York, on the one hand, and Sotheby's Inc. and Ms. Ruspoli, on the other, entered a settlement pursuant to which, among other things: (i) Sotheby's agreed to transfer the Statue to a representative of the Kingdom of Cambodia in New York, upon which the forfeiture action was dismissed with prejudice; (ii) Sotheby's and Ms. Ruspoli agreed not to make any claims against the U.S. or any of its agents including DHS and the U.S. Attorney's Office for the District of New York ("USAO-SDNY") in connection with the matter (including absence of probable cause to seize and forfeit the Statue); and (iii) the USAO-SDNY released Sotheby's (and its affiliates, lawyers, executives, officers and employees) and Ms. Ruspoli from any related civil claims. *See* Stipulation and Order of Settlement, *United States v. A 10th Century Cambodian Sandstone Sculpture*, No. 12 Civ. 2600 (Dec. 12, 2013). The preamble to the Settlement recites that Sotheby's and Ms. Ruspoli had "a good faith disagreement with the United States regarding whether the Kingdom of Cambodia owned the Statue" and that the U.S. did "not contend that Sotheby's (or any of its lawyers, executives, officers or employees) or Ms. Ruspoli knew or believed that the Statue was owned by the Kingdom of Cambodia or knowingly provided false or misleading provenance information about the Statue." *Id.* at 2.

The final scorecard in the Khmer Statue Case is troublesome. Sotheby's lost what would have presumably been a mid-six figure buyer's commission on the anticipated sale. Sotheby's also presumably bore the entire cost of the joint defense and incurred outside legal fees which presumably reached mid-to-high six figures at prevailing rates (although the absence of separate counsel to Ms. Ruspoli implies an identity or alignment of interest between consignor and auction house which is not necessarily complete). Unless Sotheby's privately agreed to make Ms. Ruspoli whole, she lost her original purchase price for the Statue and the presumably seven figure profit anticipated on its sale at auction. Sotheby's and Ms. Ruspoli managed to obtain the retraction of the Government's allegations of criminal knowledge (the threat of which may have been an important factor in their decision to settle). At the expense of the U.S. taxpayer, The Kingdom of Cambodia recovered an important piece of its cultural heritage to which it arguably lacked title and had not previously pursued. After the U.S. Attorney survived Sotheby's Motion to dismiss, it managed to force a settlement by confronting Sotheby's and Ms. Ruspoli with the expense and uncertainty of trial (and potential criminal claims or liability), without having to prove or resolve important issues of law and fact, thus underscoring the Government's advantage in civil forfeiture matters based on criminal claims. The District Court was arguably spared the embarrassment of having to rule against Cambodia under *McClain/Schultz*. And the private trade was tarred with actions it didn't commit and left shaking its head about the arguably ill-advised, well-publicized consignment of an obviously pillaged, important, site specific piece which, for better or worse, might have been safely and privately sold in European markets or elsewhere outside the U.S. for seven figures without attracting attention or controversy.

¹¹² *United States v. One Tyrannosaurus Bataar Skeleton*, No. 12 Civ. 4760 (PKC), 2012 WL 5834899, *7 (S.D.N.Y. Nov. 14, 2012). In September 2012, the U.S. Government filed a complaint for the civil forfeiture of dinosaur fossils alleged to have been exported in violation of Mongolian patrimony laws. The claimant moved to dismiss the U.S. Government's complaint on the grounds that the Mongolian patrimony laws on which the Government relied did not clearly vest title in the Mongolian government and are not available to American citizens in translation, as required by *McClain*, and are not enforced within Mongolia, as required by *Schultz*. The U.S. District Court for the Southern District of New York denied claimant's motion to dismiss. *Id.*

At the December 27, 2012 plea hearing Mr. Prokopi pled guilty to engaging in a scheme to illegally import the fossilized remains of numerous dinosaurs that had been taken out of their native countries illegally and smuggled into the United States. He also agreed to forfeit the *Tyrannosaurus bataar* skeleton and other fossils, thereby ending the companion civil forfeiture matter that kicked off this dispute. Mr. Prokopi is scheduled to be sentenced on April 25, 2013.

Steven D. Feldman, *Highlights of Selected Criminal Cases Involving Art & Culture Objects: 2012*, 14 ART & ADVOCACY 1, 3 (2013), available at <http://www.herrick.com/siteFiles/Practices/F1B9669050E3347289856700F4FB37DC.pdf>. The matter was converted to a criminal action and the defendant pled guilty before the *McClain/Schultz* factors were analyzed.

underlying facts and attenuated legal claims that characterized the Egyptian sarcophagus forfeiture.¹¹³ The current trend towards the U.S. Government's aggressive use of civil forfeiture flatly contradicts the Justice Department's testimony against S. 605 to the effect that the NSPA would only be used in "egregious cases" and that the high burden of proving *scienter* under *McClain* would protect importers. It also vitiates the Justice Department's disclaimer of prosecutorial abuse at the Hearings on S.605—while it is true that there have been a limited number of criminal prosecutions under the NSPA, there have been an increasing number of civil forfeitures based on increasingly tenuous factual and legal grounds, which amount to administrative abuse of the stolen property laws. It also implies an aggressive policy decision within the Executive Branch to pursue restitution claims by foreign governments in matters that previously would not have been pursued.

In the hands of U.S. Enforcement Agencies and the Justice Department, *McClain* has been reduced to mere punctuation for the proposition that any property imported from a country with a patrimony law may be seized at the port of entry or at any time and place thereafter from the hands of any holder in the chain of possession.¹¹⁴ Regardless whether S. 605 is revived and passed, it is necessary to conform the doctrine of civil forfeiture to the requirements of underlying criminal law.

Under Anglo-America common law, no one can take good title from a thief. If a piece is considered stolen, nobody in the chain of possession can obtain good title, and even a remote, "downstream," good faith purchaser is at risk of forfeiture.¹¹⁵ Recent amendments to the

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For the Government—whose obligation in this and every case is to see that justice is done, and not merely to attempt to win at all costs—to label this as the 'behavior of a company trying to sell artwork it knows to be stolen if it can figure out how to get away with it,' is a disappointing departure from the dispassion and care that more typically characterizes the Government's litigation positions.

Reply Memorandum of Law in Support of Claimants' Sotheby's, Inc. and Ms. Ruspoli di Poggio Suasa's Motion to Dismiss, *United States v. A 10th Century Cambodian Sandstone Sculpture*, No. 12 Civ. 2600, 2013 WL 1290515 (Mar. 28, 2013), 2012 WL 5871204 at *22 (internal citations omitted). Sotheby's attempt to "pre-clear" the statue by contacting the Cambodian cultural authorities prior to the auction (but after the piece was imported into the United States) demonstrates the risk of pre-clearing. The foreign government is under no obligation to respond. They often don't. If the government does respond, the bare response does not amount to a legally enforceable release of claims. And even an unmeritorious claim by a foreign government in response to an inquiry can render a piece unmarketable.

¹¹⁴ William G. Pearlstein, *Buying and Selling Antiquities in Today's Market*, SPENCER'S ART L. J., Spring 2012, available at <http://www.artnet.com/magazineus/news/spencer/spencers-art-law-journal-7-17-12.asp>.

¹¹⁵ *Id.*

By contrast, the law in civil code countries (such as France) often confers title on a bona fide purchaser after a certain period of repose. Switzerland amended its laws ([which had been more] favorable to bona fide purchaser[s]) under pressure from Italy

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NSPA suggest that the required guilty knowledge can be imputed to a subsequent, “downstream” owner or importer, thus making even possession by a downstream, good faith purchaser a crime.¹¹⁶

8. Other Problems with U.S. Enforcement Agencies and Civil Forfeiture

U.S. Enforcement Agencies have long been criticized for conducting what amounts to an independent foreign policy with respect to ancient art.¹¹⁷ Although the internal decision-making processes of the U.S. Enforcement Agencies are not entirely clear,¹¹⁸ for more than a decade, James McAndrew,¹¹⁹ then a DHS/ICE/HSI Special Agent, had a significant influence on Customs policy, which seems to have evolved in large part on the basis of his daily dealings with foreign cultural authorities. Mr. McAndrew developed a reputation in the trade as being generally fair, unbiased, balanced and reasonable; nevertheless, the legality of import ought to be based on well-considered policy grounds and not on the discretion of individual Customs agents. It is clear that the administrative practices at U.S. Enforcement Agencies should be harmonized with the civil and criminal branches of U.S. law.

The civil forfeiture process is heavily weighted against the importer.¹²⁰ An importer can have goods seized without explanation.

to address the concern that Switzerland was being used as a haven to launder stolen art and artifacts.

Id. The continuing tension between the U.S. and civil code rules can introduce additional uncertainty to a transaction. For example, an Israeli dealer bought what he thought was a local, Canaanite object from a licensed dealer in East Jerusalem. Assuming good faith, the Israeli took good title under Israeli law. When he consigned it to Christies in New York, a curator at the Metropolitan Museum identified the object as one that he had excavated in Egypt in the 1970s and that subsequently disappeared from an Egyptian government warehouse. The object was withdrawn from the auction and seized. In the context of a civil forfeiture, there was no opportunity raise any potential defenses, including the choice of law question as to whether the consignor’s title should be determined under Israeli law instead of U.S. law. Egypt never reported the theft to the Art Loss Registry or any other international database or government authority (note that a laches defense would not have been available in the context of a civil forfeiture). Egypt may have bigger problems than inventory management. *See infra* note 122. The comparative treatment of bona fide purchasers in Anglo-American common law jurisdictions and in civil code jurisdictions is the subject of John H. Merryman, *The Good Faith Acquisition of Stolen Art* (Stanford Pub. L. Working Paper, Paper No. 1025515, Stan. L & Econ. Olin Working Paper, Paper No. 364), available at <http://ssrn.com/abstract=1025515>. *See also* JOHN H. MERRYMAN, THINKING ABOUT THE ELGIN MARBLES: CRITICAL ESSAYS ON CULTURAL PROPERTY, ART AND LAW 520 (2d ed. 2009).

¹¹⁶ Urice, *Rocks and Hard Places*, *supra* note 25, at 134.

¹¹⁷ *See* Fitzpatrick, *supra* note 29.

¹¹⁸ The role, functions and interplay of and among the U.S. Enforcement Agencies and CATF are the subject of Christina Luke, *U.S. Policy, Cultural Heritage, and U.S. Borders*, 19 INT’L J. CULTURAL PROP. 175 (2012), the tenor of which is generally pro-restitution.

¹¹⁹ Currently in private practice as a Forensic Specialist with Grunfeld Desiderio Lebowitz Silverman & Klestadt LLP in New York, New York.

¹²⁰ It has been suggested that this imbalance could be partially redressed if the Civil Asset Forfeiture Reform Act of 2000 (“CAFRA”), were to become applicable to forfeitures of cultural property. Civil Asset Forfeiture Reform Act of 2000, Pub. L. No 106-185, 114 Stat, 201 (2000).

Some weeks later, he or she will receive a standard form “Notice of Forfeiture,” which gives the importer the choice of contesting by administrative proceeding, converting the forfeiture into a civil litigation, or not contesting and abandoning the property. The importer’s decision is heavily influenced by the value of the goods. It is rarely worthwhile for the importer to engage legal counsel to contest unless the goods have significant value, as legal fees can easily run into the tens of thousands of dollars. On the other hand, the importer and counsel have no way to know the legal theory on which the forfeiture is based (or the government’s version of the underlying facts) unless they elect to convert the proceeding into a civil litigation. Even goods that are released upon a successfully contested forfeiture can be rendered unmarketable by a history of litigation. If a civil forfeiture claim appears to be failing in court, government prosecutors have the ability to exert leverage against the defendants by converting or threatening to convert the claim into a criminal prosecution.¹²¹

However, the “Customs carve-out” of 18 U.S.C. § 983(i) creates two classes of cases – “CAFRA cases” and “customs carve-out cases.” 18 U.S.C. § 983(i) (2012). CAFRA’s procedural reforms, codified in 18 U.S.C. § 983, apply to CAFRA cases but not to customs carve-out cases, which follow procedures codified in title 19 U.S.C., the Supplemental Rules of Admiralty or pre-CAFRA case law. A potential reform would entail, among other things, limiting the “customs carve-out” so that CAFRA governed cultural property seizures. Although an evaluation of the procedural benefits to claimants under CAFRA is beyond the scope of this White Paper, it should be noted that, for example, under CAFRA the government bears the initial burden of proving illegality by a preponderance of the evidence—which might be an insuperable barrier to forfeiture in many cultural property seizures, given the difficulty establishing underlying facts and the substance of foreign laws. 18 U.S.C. § 983(c). In customs carve-out cases, outside of CAFRA, the government has the initial burden of showing probable cause for forfeiture (a significantly lower threshold of proof), then the burden shifts to the claimant to disprove forfeitability by a preponderance of the evidence. 19 U.S.C. § 1615 (2012).

Which party bears the burden under CAFRA and non-CAFRA claims in the same case was addressed in the Khmer Statue Case:

Under [CAFRA], the burden of proof is on the government to establish by a preponderance of the evidence, that the property is subject to forfeiture. CAFRA applies to 18 U.S.C. §§ 981(a)(1)(C) and 545, which the Government invokes here. However, CAFRA does not apply to 19 U.S.C. § 1595(a)(c) because it is subject to a ‘customs carve out.’ Instead, under the pre-CAFRA burden-shifting approach of 19 U.S.C. § 1615, the government must establish probable cause as to its §1595(a)(c) claim for forfeiture, and if it does so, the burden shifts to the claimant to establish a defense.

United States v. A 10th Century Cambodian Sandstone Sculpture, No. 12 Civ. 2600, 2013 WL 1290515 at *5 (S.D.N.Y. Mar. 28, 2013) (internal citations omitted).

¹²¹ See Feldman, *supra* note 112.

Mr. Prokopi’s case illustrates a conundrum periodically faced by defense attorneys in civil forfeiture cases. Because the U.S. Attorney’s Office has the ability to bring a criminal case in appropriate circumstances, it often has far more leverage in a negotiation than does the importer or purported owner of the piece at issue. While the client may wish to contest whether civil forfeiture is appropriate, if it can find a non-frivolous basis, the U.S. Attorney’s Office can threaten to bring criminal charges against the client if he or she does not consent to forfeiture. Where a piece is forfeited, the client is only out the value of the object. But if a criminal case is instituted, the client is faced with a felony record and imprisonment. With such great leverage, the

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Various sources have, on condition of anonymity, suggested that foreign claimants have learned how to navigate the U.S. system and shop for assistance, which U.S. Enforcement Agencies can be expedient or opportunistic in providing. For example, if U.S. Enforcement Agencies decline to pursue a request for investigation, the foreign claimant may submit a Request for Judicial Assistance directly to the Department of Justice, to which DOJ is obligated to respond. The U.S. Attorney's Office may then assign a Special Assistant to the matter and by-pass the grand jury process by issuing subpoenas. If FBI and DHS decline to cooperate, the U.S. Attorney may use in-house investigators. Foreign nations have also learned to use mutual legal assistance treaties ("MLATs") with the United States as a basis for making broad discovery requests against U.S. auction houses (and their consignors). MLATs require a minimal showing for discovery requests and can serve as the basis for "fishing expeditions" undertaken at U.S. taxpayer expense on potentially slender grounds.

Foreign claimants sometimes ask U.S. Enforcement Agencies to pursue restitution claims in circumstances where the responsible U.S. personnel understand that the claim would be barred under the claimant's domestic laws or in circumstances that might otherwise seem inequitable—for example, where: the statute of limitations has expired under the claimant's domestic law; local cultural patrimony laws and related administrative procedures are unenforced; the claim is against minor items that would not be subject to domestic laws that apply only to "significant" items; open, legal, domestic markets exist for the class of object being claimed; bribery commonly facilitates exports; information from the requesting country would be inadequate to support or substantiate the claim; or where the foreign claimant might otherwise appear to have unclean hands.¹²²

U.S. Attorney's Office often obtains the object it seeks to have forfeited and returned. *Id.* at 3. The threat of criminal charges, which the Government had not asserted in its original complaint for civil forfeiture, may have influenced Sotheby's decision to settle the Khmer Statue case.

¹²² For example, on April 2, 2012, it was reported that the Egyptian government had referred charges against Zawi Hawass, formerly director of Egypt's Supreme Council of Antiquities, alleging waste of public funds and theft of antiquities. *Egypt's "Indiana Jones" Faces Charges*, AHRAM ONLINE (Apr. 2, 2012), <http://english.ahram.org.eg/NewsContent/1/64/38308/Egypt/Politics-/Egypts-Indiana-Jones-faces-charges.aspx>. This report was consistent with rumors in the trade alleging that one or more Mubarak-regime insiders were selling state-owned artifacts for private gain. No inference should be drawn from the mere fact of indictment and, without more, such rumors remain merely that. Mr. Hawass received his Ph.D. from the University of Pennsylvania in 1988 and thereafter taught at the American University at Cairo and the University of California, Los Angeles. He is personally known to some of the leading U.S. curators, scholars and dealers in the field. Over the years, his office would respond, sometimes cryptically, sometimes inconclusively, to ad hoc requests by U.S. market participants for clearance with respect to particular pieces. No formal procedure or lines of communication were ever established. Mr. Hawass is an engaging and energetic promoter of Egyptian archeology. At second hand, however, one has the sense that not all of his apparently frequent demands on U.S.

In instances where substantive grounds for forfeiture may be lacking, U.S. Enforcement Agencies may seek to base seizure on a technical defect in Customs forms filed by the importer of record. The burden of proof then shifts to the importer to disprove illegality, thus raising the cost of contesting the claim. In addition, U.S. Enforcement Agencies sometimes commence civil forfeiture actions based on stolen property laws that require proof of knowledge and intent without (at least initially) any evidence of knowledge or intent.¹²³

9. The Tension Between U.S. Criminal Law and the Implementation Act Can Only Be Resolved by Passing S. 605, Pending Which a State of Confusion Will Prevail

The arguments for reforming U.S. criminal law so as to base liability on actual theft or site-specific archeological looting and not mere breach of a non-possessory foreign ownership law are more persuasive than ever before. Passage would restore the effectiveness of key features of the Implementation Act, including the “museum/old collection” and “satisfactory evidence” safe harbors, and would restore the Advisory Committee to its intended role as the centerpiece of U.S. policy-making in this area. Foreign claimants and U.S. Enforcement Agencies would retain effective civil and criminal deterrents and remedies with respect to stolen objects under the Implementation Act (seizure and forfeiture), state law (replevin and conversion) and the Stolen Property Act. What would change is that foreign nations would have to justify the scope and effect of their domestic patrimony laws and policies to the Advisory Committee before a violation thereof becomes actionable under U.S. law, instead of simply relying on federal prosecutors and the Customs Service to police their borders, at the expense of the U.S. taxpayer and without regard to defenses, such as statute of limitations and laches (that is, claimant’s unreasonable delay prejudiced the defendant), that might bar the foreign claimant from bringing a civil suit in its own name.

B. Reforming the Implementation Act

There is an unbridgeable gap between the plain meaning of the CPIA and the way in which State Department interprets its terms and applies them in granting MOUs and administering CPAC. The discussion under this heading focuses on three sets of flaws in the MOUs mentioned above: the gross overbreadth of the categories of

enforcement personnel for investigation and/or restitution of Egyptian objects in the U.S. were necessarily well-grounded in fact.

¹²³ This may have been so in the *Khmer Statue Case*, where the Government failed to allege important facts until it developed a “Proposed Amended Complaint” in response to Sotheby’s Motion to Dismiss.

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Designated Materials, analytical failures in making the five determinations required to impose import restrictions, and what can only be described as a systematic pattern of secrecy and manipulation in its administration of CPAC. To understand how far the State Department's stewardship of CPIA has strayed from its intended path, especially with respect to the scope of the MOUs, it is helpful to start with a review of UNESCO.

1. The UNESCO Convention of 1970

UNESCO is widely perceived as the first multi-national legislation recognizing and attempting to remedy the growing problem of looting of cultural artifacts. But UNESCO is often cited for what it is not. On its face, UNESCO is neither an endorsement of universal national retention nor a mandate for universal restitution. UNESCO acknowledges the reality of domestic and international markets for cultural property and attempts to regulate the trade, not eliminate it. The overall tenor of UNESCO is moderate¹²⁴ and weighted more to protection of important national heritage than to universal protection of archeological context.¹²⁵

For example, UNESCO defines "cultural property" to include only items that are "specifically designated" by a State Party as having "importance" and belonging to one of 11 specified categories.¹²⁶ International restitution of objects documented as stolen from inventory of a cultural institution must be made at the expense of the claimant with just compensation paid to bona fide purchasers.¹²⁷ Domestic and

¹²⁴ This moderate reading of the plain language of UNESCO was not shared by the U.S. Delegation to UNESCO, which feared and acted on the premise that State Party export controls would be comprehensive and would be used to shut down the export trade to the detriment of the U.S. interest in international cultural exchange. Their instincts have proved correct; since 1970, the trend has been towards comprehensive national retention of cultural property and aggressive demands for restitution.

¹²⁵ UNESCO was primarily aimed at preserving national heritage and only incidentally at archeological preservation. At the last session of UNESCO a Spanish proposal that the title read, "Convention for the Protection of the National Heritage of States Against the Illicit Movement of Cultural Property," failed by tie vote of 18-18-5. REPORT OF THE U.S. DELEGATION TO UNESCO, *supra* note 12, at 8.

¹²⁶ Article 1 defines the term "cultural property" to include only property which is "*specifically designated* by each State as being *of importance* for archeology, prehistory, history, literature, art or science" and which belongs to one of 11 specified categories. UNESCO Convention, *supra* note 1, at art. 1 (emphasis added).

¹²⁷ Under Article 7(b), State Parties undertake to: (i) prohibit the import of cultural property that is documented as being stolen from the inventory of a museum, religious or secular public monument or similar institution in another State Party after the effective date of UNESCO for both State Parties; and (ii) to "pay just compensation to an innocent purchaser or to a person who has valid title to that property" such that "all expenses incident to the return and delivery of the cultural property shall be borne by the requesting Party."

international antiquities markets are recognized and regulated,¹²⁸ and lawful exports should be facilitated and certificated.¹²⁹ Restrictions on the international trade should apply only to “important” cultural property whose export would constitute an “appreciable impoverishment” of the national cultural heritage.¹³⁰ Deference to archeological context is limited to the protection of “certain” objects in situ and “certain” sites.¹³¹ International protection should be afforded to State Parties whose “cultural patrimony”¹³² is “in jeopardy [of] pillage” but only with respect to the “specific materials concerned.”¹³³ State

¹²⁸ Under Article 5(e), State Parties are responsible, among other things, for “establishing, for the benefit of those concerned (curators, collectors, antique dealers, etc.) rules in conformity with the ethical principles set forth in this Convention; and taking steps to ensure the observance of those rules.”

¹²⁹ Under Article 10(a), State Parties undertake to:

oblige antique dealers, subject to penal or administrative sanctions, to maintain a register recording the origin of each item of cultural property, names and addresses of the supplier, description and price of each item sold and to inform the purchaser . . . of the export prohibition to which such property may be subject.

Under Article 6, State Parties undertake to introduce appropriate export certificates evidencing the authorized export of the cultural property in question.

¹³⁰ Under Article 5(a), State Parties undertake to draft laws designed, among other things, to secure the prevention of the “illicit import, export and transfer of ownership of *important* cultural property” (emphasis added). Under Article 5(b), State Parties undertake to establish and update “on the basis of a national inventory of protected property, a list of *important* public and private cultural property whose export would constitute an *appreciable impoverishment* of the national cultural heritage.” (emphasis added).

¹³¹ Under Article 5(d), State Parties undertake to supervise archeological excavations, “ensuring the preservation ‘in situ’” of *certain* cultural property and protecting *certain* areas reserved for future archeological research” (emphasis added).

¹³² UNESCO does not define the term “cultural patrimony.” The implication is that cultural patrimony consists of a subset of a State Party’s inventory of “cultural property.” Because “cultural property” is limited to that which is “important,” the subset of cultural property constituting “cultural patrimony” is presumably of special importance to the State Party’s national identity and cultural heritage.

¹³³ Under Article 9, a “State Party whose cultural patrimony is in jeopardy from pillage of archeological or ethnological materials may call upon other State Parties who are affected.” The parties undertake in these circumstances to participate in a “concerted international effort to determine and carry out the necessary *concrete measures*, including the control of exports and imports and international commerce *in the specific materials concerned*.” (emphasis added). The President’s Message to the Senate provides important insight into the scope of pillage that would trigger U.S. import restrictions as part of a concerted international response to the particular case:

At the UNESCO Sixteenth General Conference, the United States Delegate said before voting that in his view the procedure in Article 9 for determination of concrete measures to deal with pillage of archaeological or ethnological materials will permit the states affected to determine by mutual agreement the measures that can be effective in each particular case to deal with the situation and to accept responsibility for carrying out those measures on a multilateral basis. Two particular examples of such situations are (1) the case in which the remains of a particular civilization are threatened with destruction or wholesale removal as may be true of certain pre-Columbian monuments, and (2) the case in which the international market for certain items has stimulated widespread illegal excavations destructive of important archaeological resources.

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Parties have the right to classify “certain” items as not being exportable but other State Parties are obligated to recognize that right only to the extent “consistent with the laws of each State.”¹³⁴ National services responsible for cultural heritage protection should be adequately budgeted and funded.¹³⁵

2. 1983 Convention on Cultural Property Implementation Act.

The CPIA is the act by which Congress implemented UNESCO for the United States. The CPIA provides a mechanism whereby the United States can restrict the importation of “archeological materials” and “ethnological materials” designated by the U.S. President (through his designee in the Executive Branch, currently the State Department) upon review of a State Party’s application for restrictions and certain required determinations by CPAC. A number of problems have arisen in its implementation, leading to severe criticism by the trade and legal academic communities of State Department’s interpretation of CPIA and administration of CPAC.

3. Problems with the Satisfactory Evidence Exemption for Designated Material

CPIA Section 307 provides that “Designated Material” can be legally imported in the United States only if the importer can provide an export certificate from the State Party or “Satisfactory Evidence” (consisting of a Consignor’s Statement and a conforming Importer’s Declaration) to the effect that the material was either exported prior to the date the import restrictions were published in the Federal Register, or exported from the State Party not less than ten years prior to the date of entry into the United States (and the importer did not acquire an interest more than one year prior to entry).

In violation of their undertaking under Article 6 of UNESCO, many, if not most, State Parties have failed to establish a procedure for the grant of export permits. In some, the procedure can be obscure or unworkable. In the absence of an export permit, an importer must rely on the “Satisfactory Evidence” exemption, which is useful to importers who can provide the required “Satisfactory Evidence” of timely export from the State Party. Restricted materials are often imported on the

For example, the Italian MOU was triggered by the activities of the Medici smuggling ring and the Iraq Cultural Heritage Act was triggered by the massive looting in Iraq triggered by the First Gulf War.

¹³⁴ Under Article 13, State Parties undertake (but only “consistent with the laws of each State”) “(d) to recognize the inalienable . . . to classify and declare *certain* cultural property as inalienable . . . [and] which should therefore *ipso facto* not be exported . . . and to facilitate recovery of *such* property. . . .” (emphasis added).

¹³⁵ *Id.* at art. 15.

basis of this exemption.¹³⁶

Given the availability of the “Satisfactory Evidence” exemption, it is sometimes assumed that the designation under CPIA amounts to little more than an administrative inconvenience for importers. The reality, however, is that designation under CPIA can be a significant barrier to import in two ways. First, the documents constituting Satisfactory Evidence are best prepared by customs brokers or attorneys who are familiar with the statutory requirements. Their fees can exceed the purchase price of minor objects and the process of engaging professionals to process the matter can be a deterrent to importation. Second, it may be that neither the exporter nor the importer has the required knowledge of timely export. The reality of the antiquities market is that many if not most objects in circulation do not have a fully documented history and that even objects entirely lacking a documented history are not necessarily looted or illegally exported, either freshly or historically. The demand for documented provenance in the United States and the United Kingdom is a relatively recent phenomenon that has developed at an uneven pace since the early 1990s, in response to restitution claims by source nations, the AAMD’s subsequent adoption of the 1970 Rule and the adoption of more cautious consignment standards by the major auction houses. The requirement for documented provenance may be less strict in other markets or jurisdictions. In general, there are no national registries for privately-owned objects, and many private owners simply failed to keep records of their objects, such as photographs or receipts, which they treated like other household possessions. There was simply no need to. The level of pre-acquisition investigation into an object’s provenance (country or place of origin) and provenance (history of ownership) required or performed, and the level of sophistication among market participants, varies considerably by country, market, institution and individual. The cost, administrative and informational burden of satisfying the “Satisfactory Evidence” requirement should therefore be viewed as a restraint or burden on trade, especially when significant markets exist for the Designated Material outside the United States in either the country of export or other jurisdictions that do not impose a similar barrier to entry.

4. Unjustifiably Broad Import Restrictions

To date, emergency and bilateral restrictions under CPIA have been granted to fourteen nations. The trend is for unilaterally-granted,

¹³⁶ There is some question as to the quality of documentation that an importer must submit to substantiate the claims of prior export. It is also unclear how much latitude CBP has to deny the exemption if the required certificates are not supported by accompanying factual evidence of timely export. For example, photographs of the Designated Material outside the State Party prior to the publication date of the import restrictions are generally conclusive.

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theoretically narrow emergency restrictions¹³⁷ to be converted into bilateral agreements that are routinely renewed, and for bilateral restrictions to apply to *all* objects in a source nation's inventory created before a specified date (usually the point in the timeline at which "antiquity" is deemed to have ended).¹³⁸

There is substantial disagreement as to the meaning and application of the statutory criteria between, on the one hand, the collecting constituencies that feel increasingly disenfranchised by the CPAC process, and, on the other hand, the CHC bureaucrats that administer the CPIA and the archeological interest groups with which CHC is aligned; these are both opposed in principal to the acquisition of unprovenanced objects and ideologically committed to the broadest possible import restrictions.

The disagreements came to a head in the 2005 request by The People's Republic of China for blanket restrictions on all cultural objects from prehistoric times through 1911, including stone, pottery, ceramics, bamboo, painting, silk. The PRC's initial request was a "gross-overreach" that attempted to restrict all sorts of materials that fell squarely outside any accepted definition of "archeological" or "ethnographical" material.¹³⁹ Trade and museum opponents argued that the vast and booming domestic Chinese market dwarfed the external markets; given this reality and the absence of any discernible multinational response, U.S. import restrictions would accomplish little more than to shift market share to domestic Chinese auction houses and other offshore markets. There was a perception among the opposition that the State Dept. and CPAC had pushed the interpretative limits of the CPIA past any plausible bounds.¹⁴⁰

5. The CPIA: Theory vs. Practice

In theory, import restrictions ought to be limited by the plain language of the CPIA. In practice, they are not. "[A]fter request is made to the United States under Article 9 of the Convention by a State

¹³⁷ Under section 304, the United States may unilaterally impose "Emergency Restrictions on the recommendation of CPAC if an "emergency condition" exists with respect to a "newly discovered type of material," "sites recognized to be of high cultural significance," or pillage of "crisis proportions."

¹³⁸ For example, the MOU between the U.S. and the People's Republic of China restricts broad categories of materials created from the Paleolithic period (approximately 75,000 BC) through the end of the Tang Dynasty in 906 AD. The MOU between the U.S. and Italy restricts broad categories of materials from the 9th Century BC through the 4th Century AD.

¹³⁹ Peter Tompa, *Pearlstein on Cultural Property*, CULTURAL PROPERTY OBSERVER (Dec. 2, 2008, 9:54 PM) <http://culturalpropertyobserver.blogspot.com/2008/12/pearlstein-on-cultural-property.html>.

¹⁴⁰ China's application remained stalled until the last days of George W. Bush's Administration due to opposition from certain Senators.

Party,”¹⁴¹ Section 2602(a)(1)(A)–(D) of the CPIA conditions the grant of import restrictions on the President making the following specified determinations (the “*Section 2602(a)(1) Determinations*”):¹⁴²

- the cultural patrimony of the State Party is in jeopardy from the pillage of archeological or ethnological materials of the State Party (the “*Pillage Requirement*”);¹⁴³
- the State Party has taken measures consistent with UNESCO to protect its cultural patrimony (the “*Self-Help Requirement*”);¹⁴⁴
- the application of import restrictions to such materials, if applied in concert with similar restrictions implemented, or to be implemented within a reasonable period of time, by those nations individually having a significant import trade in such materials, would be of substantial benefit in deterring a serious situation of pillage (the “*Concerted International Response Requirement*”), and remedies less drastic than the application of import restrictions are not available (the “*Mitigation Requirement*”);¹⁴⁵
- the application of import restrictions is consistent with the general interest of the international community in the interchange of cultural property among nations for scientific, cultural and educational purposes (“*International Exchange Requirement*”).¹⁴⁶

Section 2602(f) provides in substance that if a State Party makes a request for import restrictions, or if the President proposes to extend a bilateral agreement, the President shall (1) publish notification of the request or proposal in the Federal Register; (2) submit to CPAC such information regarding the request or proposal as is appropriate to enable the Committee to carry out its duties under Section 2605(f); and (3) consider, in taking action on the request or proposal, the views and recommendations contained in any CPAC report required under section

¹⁴¹ 19 U.S.C. § 2602(a)(1) (2012). In its complaint against the U.S., the American Coin Collectors Guild alleged that the State Department has actively solicited certain State Parties (such as China) to apply for import restrictions and then helped draft the request, rather than wait for the State Party to initiate the process under Section 2602(a)(3) by requesting restrictions under Article 9 of UNESCO with a written statement of known facts addressing the required determinations under Section 2602(a)(1)(A)–(D). *Ancient Coin Collectors Guild v. U.S. Customs and Border Protection*, 698 F.3d 171 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 1645 (2013).

¹⁴² 19 U.S.C. § 2601(a)(1)(A)–(D) (2012).

¹⁴³ 19 U.S.C. § 2601(a)(1)(A) (2012).

¹⁴⁴ 19 U.S.C. § 2601(a)(1)(B) (2012).

¹⁴⁵ 19 U.S.C. § 2601(a)(1)(C)(i), (ii) (2012).

¹⁴⁶ 19 U.S.C. § 2602(a)(1)(D)(2012).

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2605(f)(1) or (2) and submitted within one year after the President's submission to CPAC.

Section 2602(f) provides in substance that (1) CPAC shall, with respect to each State Party request for import restrictions, undertake an investigation and review with respect to matters referred to in Section 2602(a)(1) as they relate to the State Party or the request and shall prepare a report setting forth (A) the results of such investigation and review; (B) its findings as to the nations individually having a significant import trade in the relevant material; and (C) its recommendation, together with the reasons therefor, as to whether an agreement should be entered into under Section 2602(a) with respect to the State Party. CPAC is also required to prepare a report setting forth its recommendations together with the reasons therefor, as to whether or not any agreement should be extended.

After the President considers the views and recommendations in CPAC's report and makes the Section 2602(a)(1) Determinations, Section 2602(a)(2) gives the President authority to enter into a bilateral or multilateral agreement with a State Party to apply import restrictions under Section 2606 "to the archeological and ethnological material of the State Party the pillage of which is creating the jeopardy to the cultural patrimony of the State Party found to exist under [Section 2601(a)(1)(A)]."

6. The Definitions of Archeological and Ethnological Materials Limit Import Restrictions

Before the Section 2602(a)(1) Determinations can be reached, as a threshold matter, the definition of "archeological materials" and "ethnological materials" under Section 2601 limit the scope of import restrictions to materials that fall within those definitions.¹⁴⁷ Under Section 2601(2)(c), archeological and ethnological materials must be "first discovered within" and "subject to export control by" the State Party.¹⁴⁸ Under Section 2601(2)(c)(i), archeological materials must be: (I) "of cultural significance," (II) at least 250 years old; and (III) normally discovered as a result of scientific excavation, clandestine or accidental digging, or exploration on land or underwater.¹⁴⁹ Under Section 2601(2)(c)(ii), ethnological materials must be: (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,

¹⁴⁷ 19 U.S.C. § 2601 (2012).

¹⁴⁸ 19 U.S.C. § 2601(2)(c) (2012).

¹⁴⁹ 19 U.S.C. § 2601(2)(c)(i) (2012).

development, or history of that people.”¹⁵⁰ Each of these tests provides a separate hurdle to designation.

One concern arising from State Department’s administration of CPAC is that CHC appears to limit the CPAC’s involvement to consideration (and affirmation) of the Section 2602(a)(1) Determinations without allowing CPAC to consider the equally important and interrelated issues raised by the definitions of “archeological materials” and “ethnological materials” including the “first discovery” and “subject to export control” requirements. For example, China’s original request for import restrictions in 2005 included a number of categories of materials made in China through 1911, including materials that were clearly archeological in nature, such as stone, statuary and certain pottery, and materials that were clearly non-archeological, such as silk, bamboo, paintings and certain ceramics. None of the non-archeological material was characterized as “ethnological.” Opponents from the U.S. museum community and the trade, including Sotheby’s and certain private dealers, successfully made the self-evident argument that the restrictions should be limited to archeological materials at least 250 years old. The restrictions granted in 2006 were in fact limited to archeological materials produced through the end of the Tang Dynasty in 906. The internal debate inside CPAC was apparently limited to which Dynasty should serve as the cut-off date for restrictions, with archeologists arguing for post-Tang, moderates for pre-Tang, with the compromise agreed at Tang. CPAC apparently considered no factors other than the production date of the materials concerned as measured by the Dynasty to which the materials belonged.

More recently, CHC has broadened the categories of ethnological material to include non-archeological materials that are neither tribal nor necessarily non-industrial, rare and distinctive, such as ecclesiastical materials in the case of the Cypriot and Greek MOUs, and Colonial-era weavings, textiles and tapestries in the case of the Peruvian MOU.¹⁵¹ It is unclear whether the expansion of the categories of restricted non-archeological materials to include materials not ordinarily considered to be ethnological was accomplished through unilateral administrative interpretation by CHC or with the active consideration of CPAC.

¹⁵⁰ 19 U.S.C. § 2601(2)(c)(ii) (2012).

¹⁵¹ Extension of Import Restrictions on Archaeological Objects and Ecclesiastical and Ritual Ethnological Materials from Cyprus, 77 Fed. Reg. 41266 (July 13, 2012); Import Restrictions Imposed on Certain Archaeological and Ethnological Material From Greece, 76 Fed. Reg. 74691 (Dec. 1, 2011); Archaeological and Ethnological Material From Peru, 62 Fed. Reg. 31713 (June 11, 1997). There was some concern in the trade that some or all of the non-archeological materials produced through 1911 that were originally excluded from Chinese MOU in 2006 might be recharacterized as “ethnological” and newly-designated for restriction when the Chinese MOU was renewed in 2013, but that was not the case.

7. The “First Discovery” Requirement

UNESCO and CPIA both take a country-by-country approach to the problem of looting. Thus, the CPIA bases the grant of import restrictions to a particular State Party on an informed evaluation of the facts and circumstances relevant to that State Party’s request, which underlie the requisite statutory determinations applied to the particular State Party. The CPIA contemplates that if a particular type or category of archeological material is not ordinarily “first discovered in,” for example, Italy, but is ordinarily “first discovered in,” for example, Greece, and archeological looting is prevalent in both, then Greece and Italy would apply for import restrictions applicable to the different types or categories of objects “first discovered in” Greece or Italy, respectively. Under CPIA, it is the role of the CPAC and the State Department staffers who administer CPAC to eliminate or minimize overlap between the two sets of potentially overlapping restrictions.

If import restrictions are granted to multiple State Parties with potentially overlapping categories of archeological materials, the CPIA theoretically requires that each set of restrictions be limited to materials “first discovered in” the respective State Parties and narrowly-tailored to eliminate or minimize overlap and the resulting potential for confusion among importers, U.S. Enforcement Agencies and potentially competing State Party claimants. The existence of overlapping MOUs encourages this confusion and permits overbroad import restrictions granted to one country to block the otherwise lawful import of similar objects from another country. That is neither what Congress intended nor what a plain reading of the CPIA requires.

These problems are not hypothetical. The United States and Italy signed an MOU in 2001 restricting broad categories of Roman and other archeological materials dating from the ninth century BC to the fourth century AD; this was amended in 2011 to include broad categories of Roman coins.¹⁵² In July 2011, the United States and Greece signed an MOU also restricting broad categories of classical and other

¹⁵² Import Restrictions Imposed on Archaeological Material Originating in Italy and Representing the Pre-Classical, Classical, and Imperial Roman Periods, 66 Fed. Reg. 7,399 (Jan. 23, 2001); Extension of Import Restrictions Imposed on Archaeological Material Originating in Italy and Representing the Pre-Classical, Classical, and Imperial Roman Periods, 76 Fed. Reg. 3,012 (Jan. 19, 2011). The list of Designated Materials restricted by the Italian MOU includes various categories of materials that could come from any number of modern nations or regions that either constituted part of the Roman Empire or otherwise came within the sphere of Roman influence. For example, certain restricted categories of Greek-influenced pottery could have been “first discovered” anywhere within ancient Magna Graeca, which stretched across the northern rim of the Mediterranean and its central islands. Other obvious examples of currently Designated Materials with multiple potential countries of origin include bronzes, grave stones, cut stones of Roman type, glass, and pottery of Roman and non-Roman type. There may be other problematic categories. Letter from William G. Pearlstein to Cultural Property Advisory Committee (Apr. 22, 2010) (on file with author).

archeological and ethnological materials dating from the Upper Paleolithic Period through the fifteenth century A.D. and Byzantine ecclesiastical material (characterized as “ethnological materials”) through the fifteenth century A.D., and also including broad categories of coins.¹⁵³ Given the interaction between cultures in ancient times, certain types or categories of archeological materials ordinarily “first discovered in” modern Greece might be excavated in modern Italy, and certain types or categories of archeological materials ordinarily “first discovered” in modern Italy may be excavated in modern Greece. The restrictions granted to Greece under the Greek MOU can block the importation into the United States of objects created in the Greek colonies of Magna Graecia and ordinarily “first discovered in” Southern Italy, even after the expiration of the Italian MOU resulting from a future reduction of looting in Italy or the failure or lapse of other conditions to restriction specific to Italy; similarly restrictions granted to Italy under the Italian MOU could block the importation into the United States of Roman-type objects ordinarily “first discovered in” Greece, even after the expiration of the Greek MOU based on a future reduction of looting in Greece or the failure or lapse of other conditions to restriction specific to Greece. Again, this kind of overlapping, “two-for-one” blockage is neither what Congress intended nor what a plain reading of the CPIA permits.

Taken to its extreme, the consequences of CPAC’s failure to perform a first discovery analysis are even more troubling. Greek- and Roman-type archeological materials are found from Northern Europe to North Africa and from the North Sea, to the Black Sea, the Euphrates and beyond.¹⁵⁴ The Italian MOU alone could serve to restrict import of Roman-style objects ordinarily first discovered in any modern nation within the ancient Roman sphere of influence (such as Tunisia, Spain, France, Greece, Syria, Britain, Germany, etc.) regardless of the facts and circumstances prevalent in those countries. That is not what Congress intended or the CPIA permits.

¹⁵³ Memorandum of Understanding between The Government of the United States of America and the Government of the Hellenic Republic Concerning the Imposition of Import Restrictions on Categories of Archeological and Byzantine Ecclesiastical Ethnological Material through the 15 Century A.D. of the Hellenic Republic, U.S.-Greece, July 17, 2011. *See* Import Restrictions Imposed on Certain Archaeological and Ethnological Material From Greece, 76 Fed. Reg. 74691 (Dec. 1, 2011) (providing the list of restricted material).

¹⁵⁴ At the November 2009 CPAC Hearing on the interim review of Italy’s compliance with its obligations under its MOU, a representative of the Italian Ministry of Culture suggested that U.S. import restrictions on Italian archeological materials should extend to any objects of potential Roman origin, including, for example, Roman coins found in Tunisia. That kind of expansive interpretation may appeal to the sense of scientific purity that motivates archeologists and cultural nationalists, but it is simply not permitted by the CPIA. Under the Italian MOU “Designated Materials” must be limited to those categories of objects “first discovered” in Italy—not Spain, France, Greece, Syria, Germany, Tunisia or elsewhere.

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The inclusion of coins in the Chinese, Italian and Cypriot MOUs has especially troubling implications for U.S. coin collectors and dealers. The reality of the international coin trade is that, due to their portability, the large number of similar multiples and widespread circulation from ancient through modern times, the vast majority of ancient coins currently in circulation cannot be said to have been “first discovered” in any particular modern country. Given this reality, basic information about the provenience and provenance of the vast majority of ancient coins is usually lacking; thus “satisfactory evidence” of timely prior export can rarely be generated. When it can, the cost of complying with the satisfactory evidence exemption is often prohibitive relative to the value of the coin. The inclusion of coins in MOUs should be barred by the “first discovery” requirement with the possible exception of site-specific hoards from known find spots or extremely rare categories that exist in limited multiples.¹⁵⁵

8. “Subject to Export Control”

Although Designated Materials must be “subject to export control” by the State Party, CPAC has apparently never analyzed a State Party’s patrimony laws to determine compliance with the “export control” requirement.

For example, Italy’s Law No. 1089 of June 1, 1939, provides that archeological finds and objects of antiquity belong to the Italian state, unless a party can establish private ownership of the object pursuant to a legitimate title that predates 1902, the year in which the first Italian law protecting antiquities went into effect.¹⁵⁶ Italy’s Legislative Decree no. 42 of January 22, 2004, provides export controls for objects owned by the State, but export controls apply to objects in private hands only if

¹⁵⁵ In December 2012, in reliance on the separation of powers doctrine, a Federal Court of Appeals refused to examine the merits of these arguments in rejecting the appeal of several numismatic groups which had argued that the designation of ancient coins in the Chinese and Cypriot MOUs violated various provisions of the CPIA, including the “first discovery” requirement. *Ancient Coin Collectors Guild v. U.S. Customs and Border Prot.*, 698 F.3d 171 (4th Cir 2012). After briefing and oral argument, the district court had dismissed the case without allowing any discovery, prompting an appeal. *Id.* at 171. On appeal, the ACCG asked the circuit court to rule that the district court had the authority to review the President’s action and that any import restrictions on coins must be written to comply with the plain meaning of the CPIA. The Court of Appeals declined the ACCG’s request, saying that anything but the most cursory review of the Federal Register “would draw the judicial system too heavily and intimately into negotiations between the Department of State and foreign countries.” *Id.* at 175.

¹⁵⁶ Legge 1 giugno 1939, n. 1089 (It.) (Tutela Delle Cose D’Interesse Artistico o Storico) [Protection of Items of Artistic and Historical Interest], amended by Legge 1 marzo 1975, n. 1975, and Legge 30 marzo 1998, n. 88, and Legge 30 marzo 1998, n. 100 (Law No. 1089 of June 1, 1939. Amended by Law No. 44 of Mar. 1, 1975, Law No. 88 of Mar. 30, 1998, and Law No. 100 of Mar. 30, 1998) [Protection of Items of Artistic and Historic Interest], translation available at [http://www.ifar.org/upload/PDFLink4909e4d7d3533WMK%20-%20Italy%20-%20Law%20No.%201089%20of%201939%20\(Eng\).pdf](http://www.ifar.org/upload/PDFLink4909e4d7d3533WMK%20-%20Italy%20-%20Law%20No.%201089%20of%201939%20(Eng).pdf) (subscription or payment required).

and to the extent the object has been declared to be of “particularly important . . . archeological . . . interest”¹⁵⁷ and such declaration has been formally “notified” to the owner.¹⁵⁸ In light of the “subject to export control” requirement, Designated Materials under the Italian MOU should exclude any Italian materials in private hands before 1902 unless their owners have been “notified” of their “particularly important” archeological interest. Even though Italian law differentiates between objects that are “of particularly important archeological interest” and those that are not, the Italian MOU fails to make this distinction.

9. The “Cultural Significance” Requirement

The definitional limitations in UNESCO were carried over into the CPIA, which requires that only archeological materials of “cultural significance” may be designated for restriction. However, recent MOUs apply indiscriminately to all objects in a State Party’s inventory created before a specified date (usually the point in the timeline at which “antiquity” is deemed to have ended), giving rise to one of the biggest gaps between original intent and current implementation.

CPIA defines objects of “ethnological interest” as objects that are the product of a tribal or non-industrial society and important to the cultural heritage of a people because of their distinctive characteristics, comparative rarity, or their contribution to the knowledge of the origins, development, or history of that people.¹⁵⁹ Thus the President lacks the statutory authority to impose import restrictions on a category or class of ethnological objects without first determining that each individual type of object within the category or class is either distinctive, rare or contributes to the knowledge of the people who created it. Therefore, the CPAC must undertake a qualitative analysis of individual types of ethnological objects subject to the source country’s request before recommending to the President the imposition of import restrictions.

The CPIA defines objects of “archaeological interest” as objects of “cultural significance” that are at least 250 years old, and “normally discovered as a result of scientific excavation, clandestine or accidental digging, or exploration on land or under water”¹⁶⁰ Here, too, the

¹⁵⁷ Decreto Legislativo 22 gennaio 2004, n. 42 art. 10(2)(a) (It.) (Codice dei beni culturali e del paesaggio, ai sensi dell’articolo) (*See* Article 65; Article 10(1)-(3); Article 13, Article 15, Legislative Decree No. 42 of Jan. 22, 2004) [Code of the Cultural and Landscape Heritage] translation available at [http://www.ifar.org/upload/PDFLink4909e4b5aa2e2WMK%20-%20Italy%20Code%20of%20the%20Cultural%20and%20Landscape%20Heritage%20of%202004%20\(Eng\).pdf](http://www.ifar.org/upload/PDFLink4909e4b5aa2e2WMK%20-%20Italy%20Code%20of%20the%20Cultural%20and%20Landscape%20Heritage%20of%202004%20(Eng).pdf) (subscription or payment required).

¹⁵⁸ *See id.* at arts. 10(1-3), 13, 15, 65.

¹⁵⁹ 19 U.S.C. § 2601(2)(C)(ii)(II) (2012).

¹⁶⁰ 19 U.S.C. § 2601(2)(C)(i)(III) (2012).

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CPIA authorizes the President only to restrict objects that satisfy a qualitative standard.¹⁶¹ The “cultural significance” requirement is a limiting factor in that it imposes a qualitative requirement similar to the “distinctive and rare” requirement in the definition of ethnological materials.

The legislative history makes clear that the intent of the CPIA is to apply a narrow definition of “archaeological interest,” as the intent of Congress was to control and contain the demand for objects of significant cultural value which are in jeopardy of pillage.¹⁶²

In Sotheby’s 2006 letter to the State Department’s Deputy Legal Advisor, Sotheby’s proposed that an analysis of the following factors, applied together and each being fully satisfied, would justify the conclusion that an object is of “cultural significance” for purposes of the

¹⁶¹ The CPIA does not define the “cultural significance” standard and the CPAC must exercise its discretion in applying this standard based upon the facts and circumstance of each request. Nevertheless, the legislative history provides important guidance as how CPAC should interpret and apply this limiting factor. The phrase appears to have been added to H.R. 5643 (the 1977 version of the legislation). The House Report for H.R. 5643 discusses the definition section of the bill, but there is no express guidance as to the meaning of the phrase “cultural significance.” H. REP. NO. 95-615, at 17–19 (1977). The discussion of this issue in the Senate Report is quite similar to the discussion in the earlier House Report. In both reports there is language indicating that eligible ethnological objects “must be important to a cultural heritage by possessing characteristics which distinguish them from other objects in same category providing particular insights into the origins and history of a people.” S. REP. NO. 97-564, at 27 (1982). They are not to be “trinkets” or “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, or which have relatively little value for understanding the origins or history of a particular people or society.” *Id.* This limiting language is more specific than the broader “cultural significance” test imposed on “objects of archaeological interest.” *Id.* Although the CPIA does not define “cultural significance,” it seems implicit that considerations analogous to those used to determine ethnological interest should inform the determination as to whether particular archaeological objects are of “cultural significance.” By contrast, CPAC’s current interpretative position appears to substitute “contextual significance” for “cultural significance,” thus dispensing with the need for any kind of qualitative analysis.

¹⁶² These definitional limitations are consistent with the intent of the Senate Report. The Senate Report provides that

these limitations [are intended] to ensure that the United States will reach an independent judgment regarding the need and scope of import controls. That is, U.S. actions need not be coextensive with the broadest declarations of ownership and historical or scientific value made by other nations. US actions in these complex matters should not be bound by the characterization of other nations.

S. REP. NO. 97-564, at 27 (1982). The Senate Report also states that the CPIA “reflects the approach to illicit trade in art adopted by the Congress in the Pre-Columbian Art Act of 1972 (Pub. L. 92-587) with regard to a particular category of artifacts.” S. REP. NO. 97-564, at 22 (1982). The Senate Report is in turn consistent with the concerns of Professor Bator and Mark B. Feldman, who stated that the U.S. was “not prepared to give the rest of the world a blank check in that we would not automatically enforce, through import controls, whatever export controls were established by another country.” *Panel Proceedings, supra* note 33, at 114. Professor Bator stated that:

[t]he power to place import controls on art was seen as an extreme and drastic step to be used only in cases of great necessity . . . the mere fact that a large amount of illegal export goes on should not trigger this legislation. There really has to be some specific showing that illegal export is destructive to some *important* category of art.

Id. at 132 (emphasis added).

CPIA:

- quality and state of the existing archaeological and art historical record;¹⁶³
- site specificity, portability and documentary importance;¹⁶⁴
- mass production and comparative rarity;¹⁶⁵ and
- frequent and long-term market incidence.¹⁶⁶

Sotheby's then Asian Art specialist applied these criteria to the realities of the market for ancient Chinese art and proposed a discrete list of a limited number of categories of ancient art that could plausibly be restricted, subject to and conditioned on satisfaction of the other statutory requirements.¹⁶⁷ Sotheby's 2006 analysis appears to represent the only fully-developed analysis of the "cultural significance" test.

It appears that CPAC fails to conduct this kind of detailed statutory analysis when considering requests for import restrictions. For example, the 2001 Final Rule implementing the import restrictions on Italian origin materials states:

These materials are of cultural significance because they derive from cultures that developed autonomously in the region of present day Italy that attained a high degree of political, technological,

¹⁶³ If an object is discovered within a range or type that is already well-documented in museums and in archaeological journals, and if its existence does not add any new or unique knowledge to our understanding of that type, then it is unlikely to be culturally significant. Conversely, if an object is of a type previously unrecorded and/or with only a handful extant, then the archaeological and art historical records may be incomplete or open. In that case, the type of object would more likely be of cultural significance. Sotheby's 2006 Letter, *supra* note 34, at 3.

¹⁶⁴ If an object is of a type that is site specific, or previously affixed to an archaeological structure, or bears inscriptions of unique documentary importance linking it to an historical event or location, then it is more likely to be of cultural significance. Conversely, if an object is of a type that was intended to be portable and not linked to location, that did not bear any documentary inscription linking it to an historical event or location, then it less likely to be culturally significant. *Id.*

¹⁶⁵ If an object is a unique example with individualized modeling, or of a type of which only a handful are extant, then it is likely to be of cultural significance. Conversely, if an object is mass-produced, say one of 10,000 extant from a press-mold, then that single figure is unlikely to be culturally significant. *Id.*

¹⁶⁶ If an object is of a type of which similar examples had been sold consistently in the past, over decades in the public market or to institutions, which is not rare, nor site specific, with neither documentary nor archaeological link to historical events, but has repeatedly appeared in similar type or form over a long-term period of the market, then it is unlikely to be of cultural significance. This factor is of evidentiary importance since public art market records can be referenced, with repeated incidence of sales and re-sales in a type that was long considered of limited art historical importance. Conversely, if it is an object of which no similar type or form has consistently been traded on the market over a long-period, then there is an implication that it may be of cultural significance. *Id.* at 3-7.

¹⁶⁷ *See id.*

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economic, and artistic achievement. The pillage of these materials from their context has prevented the fullest possible understanding of Italian cultural history by systematically destroying the archaeological record. Furthermore, the cultural patrimony represented by these materials is a source of identity and esteem for the modern Italian nation.¹⁶⁸

The conclusion that all objects from an ancient culture are of cultural significance because they “derive from cultures that developed autonomously” is flawed because it assumes that cultural significance is intrinsic to any and every object produced by that culture and that cultural significance inheres in all objects produced by any ancient society regardless of any other factor. This premise is not supported by facts but by a reference to the removal of the objects from their context as a direct threat to the understanding of a culture as a whole. If the test were of “archaeological significance” then each and every object found in the ground would be protected under the CPIA. But the statutory requirement is of cultural significance not of archaeological significance, as discussed in the Senate Report and the legislative history discussed above.

Archeologists argue that all objects *in situ* are “archaeologically” significant and of equal importance to their understanding of the stratigraphic record of a given culture. Neither the CPIA nor the legislative history mentions *in situ* context as a criterion for evaluating cultural significance. An amendment to the CPIA would be necessary for this factor to be the controlling factor in determining cultural significance. In contrast, the CPIA requires a qualitative analysis of extant objects in term of their significance to our current understanding of the culture in which they were produced.

For example, Etruscan *Bucchero* pottery (listed under “local vessels” in the Italian import restrictions) was mass-produced and is very well represented in Italian museums and on the market. Therefore, any piece of *Bucchero* pottery imported into the United States is most likely a multiple of an existing form and therefore not individually of sufficient cultural significance to merit restriction unless there is persuasive evidence that freshly-looted *Bucchero* pottery is currently appearing on the U.S. market in quantity.

Another assumption implicit in the 2001 Final Rule mentioned above is that all objects contribute equally to our understanding of a culture as a whole. This assumption ignores an analysis of the current

¹⁶⁸ Import Restrictions Imposed on Archaeological Material Originating in Italy and Representing the Pre-Classical, Classical, and Imperial Roman Periods, 66 Fed. Reg. 7399, 7399–400 (Jan. 23, 2001), available at <http://www.gpo.gov/fdsys/pkg/FR-2001-01-23/pdf/FR-2001-01-23.pdf>. CPAC’s report on the Italian request fails to address the issue of cultural significance entirely and the only information about this important requirement is in the public notice.

archeological and historical records; if an object is not meaningfully distinctive and therefore adds nothing to the art historical or archeological record then it should not be restricted. Again, the “cultural” as opposed to “archaeological” standard requires a qualitative analysis of the categories of objects proposed for designation.

Finally, no principle of statutory construction supports the position taken by the CPAC and its CHC staff advisors on the cultural significance requirement. The net effect is to render superfluous a critical statutory threshold and to replace it with the interpretive shortcut that anything old must be important and subject to restriction. The multi-factor test proposed above more accurately reflects the statutory language and intent than the conclusory 2001 Final Rule cited above.

The CPAC’s approach of simply picking a particular year on the timeline when antiquity is deemed to end and restricting everything potentially produced prior to that date is too simplistic. The CPIA requires the President to make the kind of qualitative judgments and critical selections that the CPAC and CHC have avoided to date.

10. The Pillage Requirement

A threshold question under CPIA is whether the volume and scope of looting in the requesting State Party is such as to place that country’s “cultural patrimony” in “jeopardy [of] pillage.”¹⁶⁹

The case of Italy is instructive. The Italian MOU first went into effect on January 23, 2001 and was renewed in 2006 and again in 2011. Facts on the ground in Italy satisfied the threshold question of whether Italy’s cultural patrimony was in “jeopardy of pillage.” A hard-core smuggling ring had been operated in Italy by Giacomo Medici from his storage facility in the Freeport of Geneva. Medici sold objects to and through, among others, Robert Hecht in Paris, Robin Symes in London, and Bruce McNall of the Summa Gallery in California, to leading U.S. museums and private collectors. When the Italian police raided Medici’s warehouse, they found photographs and records of 20,000 or more objects that had been illegally excavated and smuggled out of Italy. These documents allowed authorities to identify objects in U.S. collections as being from Medici’s warehouse and in some cases from specific find sites.¹⁷⁰ A well-publicized round of restitution claims and negotiated settlements between U.S. museums and collectors

¹⁶⁹ 19 U.S.C. § 2602(a)(1)(A) (2012).

¹⁷⁰ At the May 2010 CPAC renewal hearing a speaker for certain trade clients suggested, without result, that the renewal of the MOU be conditioned on Italy’s publication of the Medici archives so as to allow U.S. museums to police their acquisitions and the market. From the perspective of U.S. market participants, transparency should not be a one-way street.

followed.¹⁷¹ The magnitude of the looting and the fact that high-profile, international dealers were providing quantities of freshly-looted objects to American museums and collectors overwhelmed any technical objections to the initial grant of restrictions to Italy in 2001.

But ten years later, at the public portion of the May 2010 CPAC hearing on the renewal of the Italian MOU, a speaker for the Italian Government conceded in testimony that the big international smuggling rings had been broken up by the Italian police; he was reduced to pointing to the danger of pilfering of Italian archeological sites by recent Albanian immigrants as reason to extend the MOU. In the case of Italy, there is a real question as to whether the volume of artifacts historically looted by Medici and other smugglers on the U.S. market continues to justify U.S. import restrictions.¹⁷² Endemic or routine pilfering that does not threaten the subset of “culturally significant” archeological material is not enough to trigger import restrictions or justify their extension. It is also critical to bear in mind that import restrictions can only be justified by contemporary looting of fresh materials, not the mere fact of historical looting,¹⁷³ otherwise there is no illegal activity for U.S. restrictions to deter.

11. Self-Help Requirement and Mitigation Requirement

In order to impose import restrictions under the Act, the President is required to determine that the State Party has satisfied both the Self-Help Requirement (that the State Party has taken measures consistent with UNESCO to protect its cultural patrimony)

¹⁷¹ See generally PETER WATSON & CECILIA TODESCHINI, *THE MEDICI CONSPIRACY: THE ILLICIT JOURNEY OF LOOTED ANTIQUITIES* (2007); JASON FELCH AND RALPH FRAMMOLINO, *CHASING APHRODITE: THE HUNT FOR LOOTED ANTIQUITIES IN THE WORLD'S MUSEUMS* (2011).

¹⁷² In connection with the interim review of Italy's compliance with the MOU, counsel to certain trade clients noted that Italy had “won the war against looting” and that, at the same time as Italian and international enforcement efforts had shut down the supply of looted objects, heightened vigilance by U.S. market participants had shut down the demand for looted objects. He concluded:

In general, it is fair to say that the US market in Italian antiquities is currently limited to provenanced objects. No fresh, unprovenanced material is knowingly offered on the auction market or by the visible dealers. None is accepted for consignment by auction house and none is acquired by gift or purchase by US museums. There may be occasional exceptions, but the US market has generally become prudent and cautious in handling archeological materials—especially in light of the harsh penalties under criminal and customs laws for even inadvertent handling of materials that were introduced into the stream of commerce overseas and many years ago. These existing penalties are sufficient to protect the market from the introduction of looted materials.

The consensus of representatives of various cultural constituencies—including archeologists—was that “Looting in Italy is under control.” Given that consensus, it was unnecessary to extend the MOU. William G. Pearlstein, Comments to Cultural Property Advisory Committee (Nov. 13, 2009) (on file with author).

¹⁷³ Urice & Adler, *A Call for Reform*, *supra* note 25, at 143–46; Urice & Adler, *Extralegal Policy*, *supra* note 25, at 24–26 (citing *Stealth UNIDROIT*, *supra* note 34).

and the Mitigation Requirement¹⁷⁴ (that “remedies less drastic than the application [of import restrictions] are not available”).¹⁷⁵ These requirements are derived from UNESCO Articles 5, 6, 13 and 14, which require State Parties to regulate and police their internal markets and permit exports.

China and Italy failed both of these requirements; China grossly, Italy less so but only in degree. For example, the Chinese domestic market for the same materials subject to its MOU dwarfs all the offshore markets for those materials combined. This raises the question whether a State Party can meet its obligations under UNESCO and CPIA while failing to control an internal market for the same materials it asks the United States to restrict. UNESCO places specific requirements on State Parties to regulate their domestic and export trade in important cultural materials; neither China nor Italy appears to have done so.

Sotheby’s 2006 letter argued that the booming internal market within China for cultural objects, including archeological materials, was then dominated by a large and growing number of government licensed auction houses and dealers.¹⁷⁶ Approximately forty-eight Chinese auction houses and over a hundred private dealers then handled these materials. U.S. market experts believed that from 2000 to 2004 the total auction market in China and Hong Kong increased approximately 700% for the same materials that the United States was being asked to restrict, and that the size of the domestic Chinese market in both dollar volume and number of sales was greater than the U.S. market by some multiple (perhaps unknowable) and as high as \$1.4 billion in 2005. By contrast, Sotheby’s total U.S. sales in materials subject to the Chinese Request in 2004 were approximately \$13 million.¹⁷⁷ The growth of the domestic Chinese market for restricted archeological materials has continued at an exponential rate since 2005.¹⁷⁸ Although Chinese law prohibits the

¹⁷⁴ Because the Mitigation Requirement is coupled with the Concerted International Response Requirement under Section 2602(a)(1)(C), the failure of either requirement should necessarily block import restrictions even if the other were satisfied. 19 U.S.C. § 2602(a)(1)(C) (2012).

¹⁷⁵ 19 U.S.C. § 2602 (a)(1)(B) and (C)(ii) (2012). “In general, these are intended to ensure that the requesting nation is engaged in self-help measures and that U.S. cooperation, in the context of a concerted international effort, will significantly enhance the chances of their success in preventing the pillage.” S. REP. NO. 97-564, at 26 (1982).

¹⁷⁶ See Sotheby’s 2006 Letter, *supra* note 34.

¹⁷⁷ China’s share of the 2011 global auction business was almost US \$13 billion, or 42 percent of the world’s \$30.5 billion auction total. Rachel Corbett, *How Big is the Global Art Market?*, ARTNET, <http://www.artnet.com/magazineus/news/artnetnews/china-the-worlds-top-art-andanti-que-market.asp> (last visited Nov. 17, 2013).

¹⁷⁸ See James J. Lally, Comments Submitted in Connection with CPAC Hearings on Renewal of Chinese MOU (Apr. 22, 2012), *available at* <http://www.regulations.gov/contentStreamer?objectId=09000064812a1d80&disposition=attachment&contentType=pdf> [hereinafter *Lally 2013 Comments to CPAC*].

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sale of illicitly excavated cultural property within China, the Chinese government has not taken adequate steps to enforce compliance with these laws.¹⁷⁹ In addition, Chinese law permits the importation of

. . . US Customs restrictions have had absolutely no discernible effect in China because US buying accounts for only a small fraction of the sales of Chinese art in the international market today, and the Chinese art market is in fact dominated by Chinese buyers.

Throughout the last five years the market for Chinese art in mainland China has been growing faster than any other art market in the world. The internal, domestic market for Chinese art inside the People's Republic of China today is many times larger than the market for Chinese art in all the rest of the world. Chinese buyers of Chinese art are served by more than 400 auction houses in mainland China, all only selling Chinese art, and there are antiques markets with several dozen dealers in every major city in China. Sales of Chinese art in mainland auction rooms have accounted for more than 80 percent of worldwide auction sales of Chinese art in every year since 2009. In the world today, Beijing is the center of the Chinese art trade.

Chinese buyers of Chinese art also dominate the market outside China. Sales statistics for the three leading international auction houses show that over 70% of the dollar volume of Chinese art sold by Bonhams, Christie's and Sotheby's in 2012 was sold to Chinese buyers.

. . . Under the current circumstances in the international market, it is impossible for US import restrictions to have any substantial effect on the situation in China. The reason is simple and obvious: the US market for Chinese art represents only a very small fraction of the international market for Chinese art—less than 5 per cent and declining—and the restrictions imposed on the US market are not enforced anywhere else in the world.

Id. As for the overall dominance of Chinese buyers for Chinese art—and antiquities, Lally has replied:

It is true that the great majority of the published sales statistics on the internal Chinese domestic market are reporting sales of non-MOU antiquities and contemporary art. No private market statistics are available—only public auction sales statistics are published, [as noted above: more than 70% of sales made to Chinese buyers] and of course antiquities are a very small fraction of the sales volume at public auction. (The same is true in US and Europe public auction sales—antiquities of all kinds account for only a very small fraction of auction turnover). Nevertheless, the extraordinary, unprecedented growth of the art market inside China—where only Chinese art is traded, raising the turnover from zero in the mid-1980's to a multi-billion dollar total rivaling total sales for all art in New York and London today, does clearly indicate the strong demand for all Chinese art including ancient art in the internal, domestic market in China.

Letter from James Fitzpatrick to Patty Gerstenblith, Chair, CPAC (May 31, 2013), *available at* <http://culturalpropertyobserver.blogspot.com/2013/06/more-on-size-of-internal-chinese-market.html>.

¹⁷⁹ The Chinese art market is rife with problems. A six-month review by *The New York Times* confirmed not only the size and scale of China's "booming" art market but found that many sales, including

transactions reported to have produced as much as a third of the country's auction revenue in recent years—did not actually take place. Just as problematic, the market is flooded with forgeries, often mass-produced, and has become a breeding ground for corruption, as business executives curry favor with officials by bribing them with art.

David Barboza, Graham Bowley & Amanda Cox, *Forging an Art Market in China*, N.Y. TIMES (Oct. 28, 2013), <http://www.nytimes.com/projects/2013/china-art-fraud/?nytapp=true>. The article confirmed that the Chinese domestic appetite is strong for Chinese antiquities, both real and fake. *Id.* The grant of Chinese import restrictions was based in part on evidence of U.S. Customs seizures of large numbers of Chinese artifacts. These seizures presumably included a proportionate amount of fakes and forgeries. It is arguable that the prevalence of fakes among

archeological materials from offshore markets, including the United States. China's failure to regulate the export of cultural materials from Macao and Hong Kong—which still operates under a separate legal regime—also has a discriminatory effect on U.S. market participants.¹⁸⁰ By all accounts, China has taken no meaningful action to police its booming internal markets for archeological materials of Chinese origin that are restricted to Americans.

In its March 15, 2005 letter to Jay Kislak, then CPAC Chairman, the AAMD recommended that China adopt a number of specific reforms designed to improve the conservation, preservation and administration of China's inventory of cultural objects and archeological sites. In particular, AAMD recommended a program of selective de-accession and export permitting, along the lines of the generally well-regarded Japanese legislation. The Chinese MOU should have been conditioned on China's implementation of self-help measures along the lines suggested by AAMD. Absent meaningful internal reform of its cultural heritage practices, the Chinese MOU will continue to fail in the goal of protecting China's archeological heritage and simultaneously damage the legitimate U.S. market for Chinese objects. The CPIA was not intended to serve as a mechanism simply to shift demand from U.S. market participants to participants in the Chinese antiquities market.¹⁸¹

In contrast, according to pronouncements by the Italian cultural police, Italy has largely solved its looting problem through vigorous internal police action, a good example of “remedies less drastic” than

seized Chinese imports should militate against the grant of import restrictions and in favor of protecting U.S. importers against fraud by unscrupulous Chinese exporters.

¹⁸⁰ China has

not instituted any regulation nor have they introduced any restrictions on the sale or export of any kind of Chinese art in Macao and Hong Kong, which have long been among the most active ports of export of Chinese art. In both of those very active Chinese port cities the People's Republic of China has never established an office of the Cultural Relics Bureau. Anyone wishing to obtain a Chinese export license finds that no licensing authority exists in Macao or Hong Kong. American citizens seeking to comply with terms of the US import restrictions on Chinese art find that it is impossible because of China's failure to institute an export licensing arrangement in these two very busy export cities. There is no way for anyone to obtain an export license in Hong Kong from any Chinese authority. Chinese citizens, collectors of Chinese art in Taiwan and Japan, and collectors of Chinese art from everywhere else in the world enjoy the freedom to acquire ancient Chinese art in Hong Kong and export it, but US citizens alone are denied the same freedoms.

Lally 2013 Comments to CPAC, *supra* note 178.

¹⁸¹ *Panel Proceedings, supra* note 33, at 113 (“Today, the essence of the U.S. position is that we should cooperate with foreign countries to put some limitation on the illicit traffic in cultural property, and that we should seek actively to encourage these countries to liberalize their legislation where it unduly restricts the international circulation of cultural property. We place a high value on the international movement of cultural property.”) (comments of Mark B. Feldman).

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import restrictions.¹⁸² The problem is that Italy only nationalized newly-excavated antiquities not privately-owned before 1902. Thus, a large, unquantified and possibly unquantifiable number of pre-1902 antiquities are privately-owned, freely transferable and may be exported from Italy without restriction. As in the case of China, Italian dealers and auction houses legally and openly trade in materials that may be freely exported within the European Union and elsewhere but are restricted to U.S. market participants under the Italian MOU. At public hearings on the China MOU and the 2010 Italian renewal hearings, Chinese and Italian auction catalogues were circulated to CPAC members as evidence of the internal markets for restricted materials without apparent effect.¹⁸³ As with China, the fact that the Italian MOU discriminates against Americans and in favor of Italians and other collectors elsewhere cannot be reconciled either with common sense or the requirements of CPIA. Again, the CPIA was not intended to have the effect of merely shifting market share from the United States to Italy and other markets. The inference is that CPAC members and their staff advisors in the State Department are “consciously avoiding” the implications of legal domestic markets in State Parties for materials that are restricted to U.S. market participants.

¹⁸² “We’ve caught many of the biggest smugglers . . . The real problems today are elsewhere—Peru, Guatemala, Asia.” Hugh Eakin, *Looted Antiquities? Italy is Claiming that Hundreds of Objects in American Museums Were Illegally Excavated*, ARTNEWS Oct. 2002, at 129 (citing Colonel Ferdinando Musella, Operations Chief of Italy’s Comando Carabinieri Tutela Patrimonia Culturela).

¹⁸³ Pandolfini Casa d’Aste in Florence conducts an auction of archeological material every year. The catalogue for Pandolfini’s “Arte Oriental” auction held by April 8, 2009, is about 260 pages long. The archeological objects start with lot 205 on page 64. The reaction of a U.S. antiquities dealer is quoted below:

The [2009] sale is absolutely jam-packed with Etruscan, South Italian and Roman things of the type that are only found in Italy and for which the Italians say they need this MOU in order to stop looting. It is clear from this that the Italians not only overlook but even condone looting and resale as long as it is to other Italians. Proof positive that this MOU is purely political and vaguely anti-American.

Each [catalogue] is stuffed with dirt-encrusted Italian site-specific material that looks like it is fresh from the tombaroli. In particular, the amount of Greek material from South Italian areas (Puglia, Basilicata, Reggio Calabria and Sicily) is staggering. Some of it is even quite good quality. These poorer southern areas have probably been hit the hardest by illicit digging and the amount of such activity there served as a catalyst for creating a sympathetic ear in the States and elsewhere for the plight of the Italians and the woes of the archeological community. I find this particularly interesting as the Pandolfini auction house is based in the wealthier northern part of the country (Florence, to be specific). So, they are fueling the same basic human desire to possess antiquities that exists elsewhere among affluent, interested collectors, but at the expense of their fellow countrymen, and thereby encouraging the destruction of the very same archeological context that the Italians claim is so precious in the press when dealing with the trade in general and the US in cases like the Met’s Euphronios krater. Clearly, the Italians don’t think they should be held to the same standards as the US and the rest of the EU. Their own rules don’t apply to them.

William G. Pearlstein, Comments to Cultural Property Advisory Committee (Nov. 13, 2009) (on file with author).

The plain meaning of the Mitigation Requirement is that State Parties must take all steps to prevent looting short of requesting import restrictions before the United States (together with other significant market nations) takes the drastic step of impairing its domestic cultural life and economic interests by imposing import restrictions. The reality is that State Parties often request import restrictions, after prompting from and with the assistance of CHC, without making any domestic efforts to curtail looting or reform their internal practices. The exception to this rule might be Italy, which successfully shut down the Medici smuggling ring through domestic police enforcement before requesting U.S. import restriction (which again raises the question of whether and why U.S. import restrictions should survive the cessation of looting).

12. The “Concerted International Effort” Requirement

Section 2602(a)(1)(C)(i) provides that the President may not impose import restrictions unless he determines that, among other things,

the application of the import restrictions . . . [will be 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.¹⁸⁴

Thus, the United States may not grant a country’s request for import restrictions without finding that other countries with a significant import trade in the materials have implemented or will implement import restrictions that are comparable in scope and substance to those under consideration by the United States.

The Senate Report¹⁸⁵ and the legislative history¹⁸⁶ make clear that

¹⁸⁴ 19 U.S.C. § 2602(c)(2)(B) (2012). This requirement for a “multinational response” or a “concerted international effort” is a carryover from Article 9 of UNESCO. The logic behind the Concerted International Effort Requirement is that UNESCO requires a multilateral effort to combat illicit trade and the United States should never act alone in restricting imports unless the United States is the only major importer of those objects. This requirement is of critical importance to proper functioning of the CPIA because import restrictions, no matter how carefully tailored, always risk injuring the legal trade in cultural property. The drafters of CPIA were careful to emphasize the need for multilateral action to combat a multinational problem. Furthermore, as discussed below, the end result of U.S. unilateral import restrictions is simply to deflect demand to other, unregulated, markets.

¹⁸⁵ S. REP. NO. 97-564, at 26 (1982).

The concept that U.S. import controls should be part of a concerted international effort is embodied in Article 9 of the [UNESCO] Convention and carried forward in section 203. 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

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Congress considered and rejected the argument that the multi-national response requirement is satisfied, without further action, if other importing countries simply implement (or may implement in the future) either UNESCO or the UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects (“*UNIDROIT*”). Instead, the CPIA requires CPAC to examine whether the country’s legislation implementing UNESCO or UNIDROIT amounts to a similar import restriction comparable in scope and substance to the proposed U.S. import restrictions.

The CPIA contains a limited exception to the concerted international effort requirement, which allows the President to take action in situations where there is a concerted international effort that lacks the cooperation of a significant art importing country.¹⁸⁷ The President may impose import restrictions where the concerted international response among most but not all of the significant market nations could deter looting in the source country and the non-participating nation is not essential to the overall effort to deter looting. Unfortunately, this exception has come to swallow the rule.

The concerted international effort requirement has never been properly considered by the CPAC. For example, in its Report on the request by Italy in 1999, the CPAC found that “the European Union regulations, France’s implementation of the 1970 UNESCO Convention,¹⁸⁸ and the active movement of other market nations (U.K.,

that the language now adopted, which amends that contained in S. 1723 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.

Id. (emphasis added).

¹⁸⁶ Hearings on Before the S. Subcomm. on Int’l Trade, 97th Cong. 463, 475 (1982). *See* Letter from James Fitzpatrick to James Thessin, Former Deputy Legal Advisor to U.S. Dept. of State (July 8, 2005) (on file with author).

¹⁸⁷ 19 U.S.C. §2602(c)(2) (2012).

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 set forth in section 2606 of this title 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.

Id.

¹⁸⁸ In determining whether the Concerted International Response Requirement is satisfied, it is not enough for CPAC to determine that these countries have implemented or may implement either UNESCO or UNIDROIT. This determination requires the CPAC to examine whether the country’s legislation implementing UNESCO or UNIDROIT amounts to a similar import restriction comparable in scope and substance to the proposed US import restrictions. The mere adoption of UNESCO by France was not sufficient and CPAC should have analyzed whether or not France’s implementing legislation provides for a similar import restriction.

Switzerland and Japan) toward ratification of the 1970 UNESCO Convention or UNIDROIT¹⁸⁹ constituted concerted action.”¹⁹⁰ This finding was clearly erroneous and is contradicted by recent legislation adopted by those countries.¹⁹¹

Two types of laws regulate cultural property: laws that regulate behavior of people who handle cultural objects¹⁹² and laws that physically restrict cross-border movement of the cultural objects.¹⁹³ An import restriction, by definition, is an example of the latter. Laws that make criminal the intentional removal or handling of archeological objects, such as the NSPA or the U.K. Act, affect the importation of only a small fraction of the objects that are restricted by a true import restriction, such as those granted under the CPIA. For example, in more than thirty years only two convictions have been obtained under the NSPA, under *McClain* and *Schultz*, involving a small number of freshly looted objects. There has never been a prosecution, much less a conviction, under the U.K. Act. In contrast, the import restrictions on Italian objects first imposed in 2001 have affected the importation of thousands of objects regardless of their provenance, provenience, history of lawful private ownership, or whether there is any indication of theft from a museum or other institution or of fresh looting from an archeological site.

13. What Other Nations have a Significant Import Trade?

The United States may not grant import restrictions to a State Party without finding that the other countries with a significant import trade in the materials have implemented or will implement import restrictions

¹⁸⁹ The fact that the U.K., Switzerland and Japan were considering the adoption of UNESCO is equally irrelevant because the question is whether those countries were considering the implementation of similar import restriction comparable in scope and substance to the proposed U.S. import restrictions.

¹⁹⁰ U.S. DEP'T OF STATE CULTURAL PROP. ADVISORY COMM., REP. OF THE CULTURAL PROPERTY ADVISORY COMMITTEE ON THE REQUEST FROM THE GOVERNMENT OF THE REPUBLIC OF ITALY RECOMMENDING U.S. IMPORT RESTRICTIONS ON CERTAIN CATEGORIES OF ARCHAEOLOGICAL MATERIALS 23 (2000).

¹⁹¹ The legislation adopted by Great Britain, Switzerland and Japan makes it clear that they did not adopt similar import restrictions. See *infra* notes 194–196 and accompanying text.

¹⁹² For example, in the United States, the NSPA is a criminal law that makes it a crime to deal in stolen property. The NSPA is not an import restriction because it does not restrict the physical cross-border movement of an object. Rather, the NSPA criminalizes the behavior of dealing in stolen property, an activity that may include importation and exportation, but is not directed at restricting the cross-border movement of the objects. The NSPA does not empower U.S. Enforcement Agencies to restrict the importation of any class of object. Therefore, the NSPA is not an import restriction because it does not empower the Customs service to restrict physical cross-border movement of an object.

¹⁹³ The United States regime for import restriction is embodied by the CPIA. The CPIA allows for the imposition of import restrictions on categories of objects and CBP is given the enforcement authority to restrict the physical cross-border movement of an object imported contrary to the CPIA.

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that are comparable in scope and substance to those under consideration by the United States.

With respect to the Italian MOU, outside of the United States, the United Kingdom,¹⁹⁴ France, Germany and other European Union members are thought to have significant import trade in Italian works of art. Dubai has recently become a significant market nation for classical antiquities. The cooperation of major market nations would be essential to any concerted international effort in deterring a serious situation of pillage in Italy. However, none of these nations has imposed specific import restrictions on Italian cultural objects. Of all the West European nations, only Switzerland¹⁹⁵ has adopted a bilateral agreement with Italy under UNESCO. Switzerland is not, however, and has never been, considered a leading market for Italian archeological materials. Rather, during the 1980s Switzerland served as a storage center for international smuggling rings (such as Giacomo Medici) that used Switzerland (and particularly the Geneva Freeport) as an entrepôt for smuggled artifacts being sold on to buyers in other nations. As part of Italy's global strategy to combat domestic looting, it took the necessary step of negotiating import restrictions with Switzerland in order to deny

¹⁹⁴ Great Britain passed the Dealing in Cultural Objects (Offences) Act 2003 on December 30, 2003. Dealing in Cultural Objects (Offences) Act 2003, 2003, c. 27 (U.K.). The U.K. Act does not amount to an import restriction but rather is a statute that criminalizes dishonest dealing in a cultural object that is "tainted" (i.e., unlawfully removed from an archeological site, cultural institution or otherwise), knowing or believing that the object is tainted. The implementing guidelines for the law make it clear in that "the Act does not impose an import or export restriction on tainted cultural objects." DEP'T FOR CULTURE, MEDIA AND SPORT CULTURAL PROP. UNIT, DEALING IN TAINTED CULTURAL OBJECTS—GUIDANCE ON THE DEALING IN CULTURAL OBJECTS (OFFENCES) ACT 2003 9 (2004), available at <http://old.culture.gov.U.K./images/publications/Dealincultural.pdf>. The U.K. Act grants the Commissioners of Customs and Excise the power to initiate proceedings for an offence relating to the dealing in a tainted cultural object if it appears that the offence has involved the importation or exportation of such an object. This power is granted to Customs and Excise because Great Britain does not have a national police force. Under the U.K. Act the proceeding is against the person involved in dealing in the cultural object and does not amount to a restriction upon the physical cross-border movement of cultural objects. Thus, Great Britain does not have an import restriction on illicit cultural property because the U.K. Act does not empower Customs and Excise to restrict the physical cross-border movement of cultural goods. Critically, the U.K. Act is narrowly and properly focused on objects knowingly looted from archeological sites. In contrast, U.S. criminal law (the NSPA) is triggered by a violation of foreign national ownership laws and is not limited to looted objects.

¹⁹⁵ Switzerland adopted UNESCO by discharging the Federal Act on the International Transfer of Cultural Property ("CPTA") on June 20, 2003. According to the Swiss Federal Office of Culture, "nothing changes with regard to import modalities that applied to date. Special import regulations, which may be agreed upon in the future bilateral international agreements with contracting states to the 1970 UNESCO Convention, remain reserved." SWISS FEDERAL OFFICE OF CULTURE, NEW RULES FOR THE ART TRADE: A GUIDE ON THE CULTURAL PROPERTY TRANSFER ACT FOR THE ART TRADE AND AUCTIONING BUSINESS 5 (2013). The Swiss implementation is similar to that of the U.S. in that source countries must negotiate a bilateral agreement with Switzerland before import restrictions will be imposed. Switzerland and Italy signed a bilateral treaty effective April 27, 2008 and imposed import restrictions on nine broad categories of archeological materials.

Switzerland as a haven for smugglers.

With respect to the Chinese MOU, Japan,¹⁹⁶ Singapore, Taiwan, Switzerland and European Union members Great Britain, France and Germany have significant import trade in Chinese works of art. The cooperation of each of these countries would be essential to any concerted international effort in deterring a serious situation of pillage in China. However, none of these countries has imposed specific import restrictions on Chinese cultural objects, nor have there been any reported requests from China to any of these countries about imposing such restrictions. Although the Swiss law implementing UNESCO specifically provides China the opportunity to request specific import restrictions, the Chinese have not availed themselves of this potential remedy. Under any plain reading, the CPIA should have prohibited the United States from granting import restrictions to China on specified categories of designated materials unless and until each of the countries mentioned above concurrently granted similar import restrictions to China on the same categories of materials.

¹⁹⁶ In 2002, Japan ratified UNESCO by enacting the Law concerning Controls on the Illicit Export and Import of Cultural Property [hereinafter *Japanese Law*]. See *Database of National Cultural Heritage Laws: Japan—Act Concerning Controls on the Illicit Export and Import of Cultural Property* (2002), UNESCO, <http://www.cprinst.org/Home/cultural-property-laws/law-concerning-controls-on-the-illicit-export-and-import-of-cultural-property> (last visited Jan. 21, 2014). According to the Japanese Law, upon receiving notification from a foreign government to the effect that cultural property has been stolen from a museum or a religious or secular public monument or similar institution, the Minister of Foreign Affairs must notify the Minister of Education, Culture, Sports, Science and Technology (the “MEXT”) of the content thereof. *Id.* If the Minister of the MEXT recognizes that such property (i) comes under the definition of “cultural property,” and (ii) has been stolen from museums, public monument or similar institutions of foreign countries after the execution of the law (December 9, 2002), then the Minister of the MEXT must designate the property as “specified foreign cultural property.” *Id.* According to the Agency for Cultural Affairs, a branch of the MEXT, only the Republic of Turkey has notified Japan of stolen cultural property to date. It appears that there is no procedure to list categories of objects. The list of “specified foreign cultural property” is available to the public and is listed in ordinance of the MEXT. There are only two items on the list to date, an old manuscript of the Bible and a silverwork of a Crucifixion, both stolen from a church in the Republic of Turkey. In order to import “specified foreign cultural property” into Japan, an import approval issued by the Minister of the METI must be obtained in advance. Upon receiving an application for such approval, the Minister of METI contacts the Minister of the MEXT, and the Minister of the MEXT contacts the related foreign government and asks if such “special foreign cultural property” needs to be returned. An import approval will be issued only when the foreign government waives its right to retrieve the cultural property. If “specified foreign cultural property” has been imported into Japan without obtaining approval, the importer may be punished under Foreign Exchange and Foreign Trade Law and Customs Law (penal servitude up to 3 years or fine up to 3 million yen). The Japanese Law is an import restriction because it provides for authority to restrict the physical cross-border movement of an object, but it is not similar to the CPIA because it only restricts import of individual objects that are known to be stolen from museums or similar institutions. In contrast, the CPIA is much broader in that it provides for import restrictions against categories and classes of objects regardless of whether or not they were stolen from a museum or other institution or looted from an archeological site. Therefore, the Japanese Law does not amount to a similar import restriction as contemplated in the CPIA.

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Under the limited exception under Section 2602(a)(1)(C)(ii), the CPIA might have permitted the United States to grant the Chinese MOU if one or more of these missing market nations had implemented similar restrictions “within a reasonable period of time.” However, this would have required the CPAC to make a good faith determination, based upon firm documentary evidence, that: (i) China had in fact initiated discussions with the market nation in question; (ii) the applicable legislative or executive authority in that market nation had notified the State Department that the appropriate internal processes and procedures had commenced; and (iii) the internal processes were expected to result in the implementation of similar import restrictions within a reasonable period of, say, five years. Five years might be an appropriate period because any import restrictions granted by the United States would be subject to interim review by the CPAC prior to expiration of the initial term, at which point the CPAC could reassess the nation’s progress towards implementation. If the CPAC’s interim review were to disclose that the nation had not made meaningful progress towards implementation, then the CPIA would require suspension of the U.S. import restrictions.¹⁹⁷

In sum, subject to limited exceptions, the CPIA does not permit the United States to grant import restrictions on specified categories of designated materials unless and until each of the countries determined to have a significant market in a requesting State Party’s archeological materials concurrently grants similar import restrictions to that State Party on the same categories of materials. This in turn requires an accurate analysis of the market share of individual market nations in order to determine the particular nations that must effect “similar import restrictions” in order to satisfy the multinational response requirement. This has never been done. Any future guidelines or revisions to CPIA should require that satisfaction of the concerted international response requirement be conditioned on the performance of a comprehensive study of the relevant offshore markets, as well as the U.S. market, by qualified market statisticians. Without accurate data, unsupported claims that there is a vast illicit trade will continue to be used to justify import restrictions and aggressive enforcement actions.¹⁹⁸

¹⁹⁷ In this light, the CPAC’s finding of a multinational response with respect to Italy based in part on “the active movement” of certain market nations towards ratification of UNESCO fails under any reasonable interpretation of what a “reasonable period of time” might be.

¹⁹⁸ The oft-cited figure of a \$4–5 billion trade in illicit antiquities originally came from a supposed Interpol statement cited in a newspaper article by Mike Toner, which was then cited by Jeremy Haken, and made its way from there into countless publications. Mike Toner, *The Past in Peril; Buying, Selling, Stealing History*, ATLANTA J. CONST. (Sept. 19, 1999); Jeremy Haken, *Transnational Crime in the Developing World*, GLOBAL FIN. INTEGRITY 47 (Feb. 2011). Interpol has stated that there is insufficient data to support any number since at least 2004. An oft-quoted but similarly unsupported single sentence estimate of \$6–8 billion cites to the *International*

The effect of unilateral U.S. restrictions is to divert the market for restricted objects to other significant offshore markets without deterring looting or appreciably reducing overall demand, while depriving U.S. market participants of access to materials that are being traded throughout the world. For example, U.S. import restrictions on pre-Columbian materials from Central and South America¹⁹⁹ have simply driven the markets for materials from those regions to unregulated markets in Europe, the Middle East and Asia.²⁰⁰

14. International Exchange Requirement

Section 2602(a)(1)(D) further conditions the grant of import restrictions on the determination that restrictions “in the particular circumstances [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.”²⁰¹

Some observers feel that, at a minimum, this requirement implies that import restrictions must be used as a framework to facilitate museum loans to compensate for any restrictions imposed on the private trade. For example, much of the testimony by AAMD and directors of certain of its member museums at the public CPAC hearings on renewing the Italian MOU related to whether Italy had reciprocated for the MOU by facilitating loans to U.S. museums.

AAMD’s current position is that it views the Italian MOU positively, as a mechanism through which to engage the Italian cultural

Scientific and Professional Advisory Council of the United Nations Crime Prevention and Criminal Justice Programme, but no article or page number is given. Manar Idriss, Jendly Manon, Jacqui Karn, & Massimiliano Mulone, *International Report on Crime Prevention and Community Safety: Trends and Perspectives in International Centre for the Prevention of Crime*, 52 (2010); Stefano Manacorda, *Organized Crime in Art and Antiques in ISPAC*, SELECTED PAPERS FROM THE INTERNATIONAL CONFERENCE HELD AT COURTMAYEUR, ITALY 12–14TH DECEMBER 2008, (2009). The trail ends there.

¹⁹⁹ The U.S. market for pre-Columbian archeological materials from Central and South America has been significantly reduced by import restrictions under the CPIA granted to Bolivia, El Salvador, Guatemala, Honduras, Nicaragua and Peru, the Pre-Columbian Monument Act, the Mexican Treaty and treaties between the U.S. and various other Latin American nations. No nation other than the U.S. has granted any of these nations import restrictions, whether similar to those granted by the U.S. or otherwise. The market for such materials in Western Europe and elsewhere is robust, without any apparent reduction in overall demand.

²⁰⁰ For example, the chart in *Appendix A* to the 2006 Sotheby’s Letter analyzes Pre-Columbian objects offered for sale at public auction in France. In 1995, prior to the implementation of bilateral agreements with El Salvador, Guatemala and Peru, approximately 784 pre-Columbian objects were offered for sale at public auction in France. By 2004 this figure increased to approximately 1,317, which amounts to a 70% increase in the size of the market. This increase is the direct result of decreased demand in the U.S. due to import restrictions and an increased demand in France due to the lack of similar import restrictions. *Sotheby’s 2006 Letter*, *supra* note 34.

²⁰¹ 19 U.S.C. § 2602(a)(1)(D) (2012).

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authorities for the benefit of AAMD member museums.²⁰² The reality appears to be that Italy has only made loans to U.S. museums when obligated to do so as the result of a negotiated settlement over title to disputed artifacts signed (by the Museums) under the threat of litigation. Thus, although AAMD sees the Italian MOU as potentially advantageous to its members, it does not appear that the AAMD and its members have obtained any loans from Italy by virtue of their support for the MOU.

The AAMD's focus, not surprisingly, is exclusively on bargaining for museum loans. Trade commentators at public CPAC hearings have suggested, without effect, that Italy also be required to reciprocate for the MOU by facilitating the grant of export permits to U.S. market participants. There is simply no sympathy, either among the non-dealer CPAC members or CPAC's CHC staffers, for the notion that import restrictions should be used as a tool to facilitate a lawful export trade,

²⁰² Oral comments of Maxwell Anderson, then President of AAMD, to William G. Pearlstein following CPAC hearing in Washington, D.C. on renewal of Italian MOU (Apr. 22, 2010). The viability of the AAMD's strategy of working with Italy and pursuing loans by Italy to U.S. museums was called into question by the announcement in July 2013 that Sicilian cultural authorities had cancelled a major traveling exhibition of important antiquities scheduled to open at the Cleveland Museum of Art in September 2013. The cancellation was based on Sicilian complaints that the prolonged, prior loan of the same objects to the Getty Museum had already hurt Sicily's revenues from tourism. Steven Litt, *Sicily Cancels a Major Exhibition of Ancient Treasures at the Cleveland Museum of Art*, NORTHEAST OHIO (July 10, 2013), http://www.cleveland.com/arts/index.ssf/2013/07/sicily_cancels_major_exhibitio.html. In August 2013, Sicilian cultural authorities reversed the cancellation and accepted a loan of masterpieces from Cleveland Museum instead of additional loan fees. Steven Litt, *The Show is Back on: Sicily Reverses its Cancellation of Antiquities Exhibition at the Cleveland Museum of Art*, NORTHEAST OHIO (Aug. 22, 2013), http://www.cleveland.com/arts/index.ssf/2013/08/sicily_reverses_cancellation_o.html. It was subsequently reported that:

Sicily's regional government set a travel ban on 23 of the island's most important artworks, a decree that says such works, many of which were recently lent to museums in the United States and elsewhere, should not circulate abroad except under extraordinary circumstances. The do-not-travel list includes paintings by Caravaggio and Antonello da Messina, ancient Greek sculpture and a rare ensemble of Hellenistic silver that was returned to Sicily in 2010 by the Metropolitan Museum of Art as part of an earlier restitution agreement. The policy shift, enacted in June but largely unnoticed outside Italy, reflects growing concerns by Sicilian officials that their most important treasures are too often out of the country, while their own museums suffer. The decree says that loans to foreign museums "have not produced benefits" for Sicily and have not occurred under "conditions of reciprocity with the borrowing institutions, which often offer in exchange works of inferior cultural value and renown.

Hugh Eakin, *Citing Inequity, Sicily Bans Loans of 23 Artworks*, N.Y. TIMES (Nov. 26, 2013), <http://www.nytimes.com/2013/11/27/arts/design/citing-inequity-sicily-bans-loans-of-23artworks.html?emc=eta1&r=2&>. The implication is that Sicily has drawn a box around two dozen cultural objects and declared them to be non-exportable national heritage. The inference is that everything else is somehow less critical to Sicily's national heritage and should be available for international exchange either by loan or private sale. This concept of less-than-universal national retention is consistent with UNESCO and CPIA. The objects were chosen based on the tourist revenue that would be lost if they were loaned outside of Sicily. Perhaps lost tourist revenue is a new factor to be considered in determining the "cultural significance" of archeological or ethnological material proposed for restriction under CPIA.

even if that trade were no broader than the domestic market legally conducted in Italy, China or any other country with an MOU. The focus of the State Department and CPAC is on shutting down the private market, keeping objects out of the hands of U.S. market participants, and limiting international cultural exchange to carefully supervised institutional loans. This aligns with the archeological position.

15. Two Obstacles to the Fair Application and Neutral Administration of CPAC: Archeological Fundamentalism and State Department Partiality

It is clear that neither CPAC nor the State Department is playing by the rules in the interpretation and application of CPIA or in the administration of CPAC. There are at least two reasons for this.

First, CPAC appears to have a permanent super-majority favoring import restrictions among the members of its four constituencies: archeologists (3 members), museum (2 members), public (3 members) and dealers (3 members). In particular, CPAC's archeological members and sympathetic members in public and museum slots are opposed in principal to the private ownership of antiquities by private collectors, with non-1970 Compliant antiquities being especially objectionable. In their view, even private ownership of provenanced objects ought to be discouraged because it stimulates demand for unprovenanced objects by collectors.²⁰³ The archeological animus against private collecting is consistent with neither U.S. nor Italian law nor the reality of lawful private ownership in both countries. Simply put, archeologists' desire to use the CPIA as a vehicle to advance a statist model lacks any support in the terms of UNESCO, the CPIA, the Senate Report, the legislative history of CPIA, or the scholarship that underlies the CPIA. Their viewpoints are nevertheless allowed to dominate Committee deliberations because the State Department's legal advisors to the CPAC have taken permissive internal interpretive positions in order to facilitate the grant of import restrictions.

²⁰³ See Kreder & Bauer, *supra* note 22, at 888–89, 896. Malcolm Bell, an archeology professor at the University of Virginia and an advisor to the Italian Ministry of Culture, has privately stated to the author that his goal is to retain all artifacts in Italy, limit the exchange of artifacts to a limited number of carefully controlled museum loans and, to the greatest degree possible discourage demand and limit private ownership. Personal comments of Malcolm Bell to William G. Pearlstein, at the College of William and Mary, Virginia. At the November 2009 CPAC Hearing, Patty Gerstenblith, currently Chairman of CPAC, stated that artifacts legally exported under an export permit merely serve to disguise similar objects exported without permits. Richard Leventhal, an anthropologist from the University of Pennsylvania, stated that even lawfully excavated artifacts could never be deaccessioned because of his potential desire to conduct residue testing for decades into the indefinite future; in his view, every object possesses potentially unique characteristics that may be unlocked by scientific examination. A speaker for the Italian Ministry of Culture read aloud from Robin Symes' memoirs to support the extension of U.S. import restrictions on Italian materials to Tunisian coins.

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Second is what has been described as a policy of manipulation and secrecy by the State Department in its administration of CPAC. This has been summarized by one legal academic as follows:

Journalists and former members of CPAC have asserted that, not only has the State Department eliminated transparency, but it has also transformed CPAC into an institution engaged in the proactive pursuit of broad import restrictions. Indeed, one reporter has characterized CPAC's staff as having "pursued a veritable—and intensifying—fatwa against the antiquities trade . . . [,] successfully hijack[ing] American foreign policy on cultural patrimony" by employing a number of aggressive tactics, such as: selectively controlling the information provided to members of CPAC; employing staff members with an archaeological background, who control CPAC's mission and even prepare its reports; manipulating the CPAC nomination process; silencing the views of stakeholders (especially dealers); and unevenly applying conflict-of-interest rules. While the State Department is legally permitted to advise the President to reject CPAC's recommendations, it has no legal authority to prevent CPAC from carrying out its mission in the manner prescribed by Congress.

The State Department's imposition of secrecy and partiality is troubling for several reasons. First, preventing public scrutiny of CPAC's operations undermines the democratic values of transparency and accountability. Jay Kislak, a former recent Chairman of CPAC, has been particularly outspoken on this point, referring to this systemic secrecy as "absolutely, completely, un-American." Second, the State Department's infusion of partiality into CPAC's review process undermines Congress' careful establishment of an advisory committee "fair[ly] represent[ing] the various interests" involved. In our view, the State Department has effectively eviscerated this critical, structural component of the statute. Third, although systemic secrecy has prevented us from analyzing the legality of recent import restrictions in the same way that Fitzpatrick did in *Stealth UNIDROIT*, our inability to do so is perhaps more troubling than any instances of extralegal behavior we might have found. Indeed, the State Department's infusion of partiality into the review process, coupled with the substantive revelations of *Stealth UNIDROIT*, lead us to conclude that the executive branch is using secrecy as a means to conceal the routine manipulation and disregard of the CCPIA.²⁰⁴

²⁰⁴ Urice & Adler, *Extralegal Policy*, *supra* note 25, at 28–30 (alteration in original) (footnotes omitted). Jay I. Kislak, a former Chairman of CPAC, has confirmed the secrecy and manipulation of CPAC by CHC staff:

[The] committee did not end up having staff report to it, which gathered material and

16. Imbalance in CPAC Appointments and the Iraq Cultural Heritage Protection Act

Responsibility for the administration of CPAC was transferred from the United States Information Agency to the Department of State in 2000. Since then, serious concerns have arisen regarding the failure to fill empty “expert-in-the-trade” or “dealer” slots, and the propensity to fill museum slots with representatives from museums that do not actively collect antiquities and “public” slots with advocates for national retention or aligned with the archaeological lobby.²⁰⁵

Archeological dominance of CPAC was confirmed with the appointment of Patty Gerstenblith as CPAC Chairman in 2011. Her nomination provoked the concern that she was “so thoroughly identified with the archaeological viewpoint that it is hard to believe that she can administer the CPAC with an open mind or a sense of balance.”²⁰⁶ This concern was highlighted in part by her role in connection with the passage of The Iraq Cultural Heritage Protection Act (H.R. 2009). In a letter to President Barack H. Obama, the American Committee for Cultural Policy (“ACCP”)²⁰⁷ opposed Gerstenblith’s nomination as Chairman and as a “public” rather than an “archeological” member of CPAC. The ACCP letter is quoted at length below because it echoes the criticisms catalogued above by Professor Urice and details the depth of archeological distrust of the CPAC mechanism itself²⁰⁸:

conducted the meetings. This staff ran the committee, fed the committee whatever it wanted to feed it, and used the committee to rubber stamp and to sign on these four determinations, and then on a fifth, which made as little sense as the other four because the fifth, which was the determining determination—whatever that means—said that in view of everything else, we determine that this MOU should be done.

Seminar Transcript—The Cultural Property Implementation Act: Is it Working?, CULTURAL POLICY RESEARCH INSTITUTE (Mar. 21, 2011), available at <http://www.cprinst.org/Home/issues/transcript---cultural-property-implementation-act-is-it-working>, at 84–85. See also Steven Vincent, *Stealth Fighter: The Secret War of Maria Kouroupas*, ART & AUCTION (Mar. 2002) (providing an investigative journalist’s expose of CHC’s manipulation of CPAC/CPIA).

²⁰⁵ Former CPAC member Robert Korver stated that the appointment of a prior staff member of The International Council of Museums (“ICOM”), a pro-retention, pro-restitution international museum group, as a Public member of CPAC “takes ...staff activism to a new level.” *Seminar Transcript*, *supra* note 204, at 50.

²⁰⁶ Letter from American Committee for Cultural Policy to Barack H. Obama, c/o Presidential Personnel, The White House (July 27, 2011) (on file with author) [hereinafter *ACCP Letter*].

²⁰⁷ A not-for-profit corporation.

²⁰⁸ ACCP Letter, *supra* note 207. The ACCP letter also summarized defects in the process by which the White House appoints candidates for CPAC and the confusion that reigns over the classification of the CPAC members. Some of this confusion may be attributable to administrative sloppiness at the Office of White House Personnel rather than overt manipulation of the nomination process by State Department in favor of pro-archeological candidates:

Over the years, the pattern of appointment, vacancy and holdovers to CPAC has become unclear, with the result that the original scheme of staggered classes and rotating membership has been lost. In 2003, the classification of CPAC members became further confused when a number of CPAC members resigned *en masse*. Joan Connelly, James Matory and Nancy Wilkie were appointed in 2003 to fill vacant

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In November 2002, non-archaeological constituencies first warned the public that the US would bear a heavy burden in protecting Iraq's archaeological heritage against the looting that would follow any invasion.^[209] Arthur Houghton^[210] then arranged for meetings on January 24, 2003 between US cultural constituencies, including archaeologists, and the Departments of State and Defense, in order to minimize damage to Iraqi archaeological sites.

The archaeological lobby thereafter refused to engage in cooperative efforts with non-archaeological constituencies. Instead, Gerstenblith was the prime advocate and draftsman of The Iraq Cultural Heritage Protection Act (H.R. 2009), sponsored by Congressmen Leach and English. H.R. 2009 was publicly presented as necessary to impose "emergency import restrictions" so that Iraqi antiquities looted after the invasion in 2003 would be excluded from the US market. This laudable goal had the broad and unqualified support of US cultural constituencies.

But when the proposed legislation was published in the Congressional Record, non-archaeological constituencies were surprised to see that the fine print would have amended the CCPIA to permanently remove from CPAC review the consideration of *any* "emergency restrictions" requested by *any* nation at *any* time.

This would have violated the basic architecture of the CCPIA and removed CPAC's ability to evaluate requests for emergency restrictions and determine whether the CCPIA's requirements were satisfied based on an informed review of facts and circumstances. The unstated goal of these features was to disenfranchise the non-archaeological members of CPAC from participating in the process

archaeological slots. The President recently re-appointed Wilkie to serve her third consecutive three-year term, and appointed Prof. Rosemary Joyce, presumably to replace either Connelly or Matory. Whichever of Connelly or Matory survives will, unless replaced by Gerstenblith, also be holding over for a third consecutive three-year term. If Gerstenblith is appointed as a "public" member, the archaeologists would effectively have at least four seats on CPAC. Two of these would be third term hold-overs, evidencing the breakdown of the system of staggered class appointments required by CCPIA, and altering the balance and allocation mandated by Congress. It would thus be consistent with Congressional intent to appoint Gerstenblith as an "archaeological" (rather than a "public") member to replace Connelly or Matory (whichever was not replaced by Joyce).

²⁰⁹ See Ashton Hawkins & Maxwell L. Anderson, *Preserving Iraq's Past*, WASH. POST, Nov. 29, 2002, at A43, available at <http://www.maxwellanderson.com/sites/PreservingIraqsPast.htm>.

²¹⁰ Formerly a curator of antiquities at The Getty Museum, a former member of CPAC, and a diplomat with more than 20 years of experience at high levels in the State Department and on the White House Staff. Houghton resigned from The Getty Museum in April 1986, because of increasing differences of opinion between him and John Walsh over the management of the Museum and Houghton's department, and in particular because Walsh decided to ignore the consequences of a full investigation of the (fraudulent) background to the purchase of a Kouros of doubtful provenance. Email from Arthur Houghton to William Pearlstein (Feb. 17, 2013) (on file with author).

of deciding whether emergency restrictions are ever justified, and to avoid the delay and potential narrowing of any restrictions resulting from CPAC review. Objections were made to Congressmen Leach and English, who noted the absence of consensus and revised H.R. 2009 to delete the objectionable features.^[211] Thus, despite Gerstenblith's efforts, CPAC, with its balanced composition, today retains the authority to review foreign requests for emergency import restrictions.²¹²

The Iraq Cultural Heritage Protection Act was ultimately passed and resulted in the imposition of emergency restrictions on Iraqi archeological and ethnological materials without eliminating CPAC's responsibility for evaluating any proposed emergency import restrictions under CPIA. It is noteworthy how close that Act's pro-archeological proponents came to cutting CPAC's authority in half and effecting a major statutory amendment virtually without public comment or Congressional debate, and disturbing that that the chief advocate for truncating the CPAC's purview is now its Chairperson.²¹³

²¹¹ The staffers for Congressmen Leach and English were surprised to learn that other constituencies objected to these extraneous proposals, and the staff attorney for the Senate Finance Committee (having jurisdiction over CPIA) decided that the proposed restructuring of CPAC's authority was unrelated to the stated goal of barring looted Iraqi materials.

²¹² ACCP Letter, *supra* note 207. The ACCP letter continued in a manner that echoed the broader criticisms of CHC and CPAC quoted above:

ACCP believes that Congressional intent in preserving the balance of interests has been eroded over the years, and that the CPAC has evolved into a vehicle to grant overbroad import restrictions on foreign source cultural materials that are often neither consistent with statutory requirements nor justified by facts on the ground in "source" nations.

Among the constituencies that participate in the antiquities market—museums, collectors, dealers and auction houses—CPAC is widely viewed as a rubber stamp for the broadest possible import restrictions. These non-archaeological constituencies have lost confidence that CPAC's recommendations reflect the balance and interpretative nuance that Congress intended. They see CPAC as overly-responsive to the archaeological viewpoint—which is shared by CPAC's State Dept. Staff—and manipulated by the State Department, which desires to generate deliverable treaties for its foreign counterparts on "soft" subject matter. This loss of confidence has made it difficult to find qualified candidates willing to serve as a "dealer" member on CPAC."

²¹³ The Iraqi import restrictions appear to be having their intended effect. Despite looting of Iraqi archeological sites on a massive scale, looted materials do not seem to be appearing on Western markets in any quantity or with any frequency (although seizures are occasionally announced of varying magnitude). (Near Eastern objects did appear on Western markets in quantity after the first Gulf War in the 1990s.) Although seizures in the U.S. appear to be isolated, thousands of objects have been seized in and repatriated from Jordan and Syria, where, deprived of Western buyers, they were apparently awaiting transshipment to unregulated markets in the Gulf or the Far East. According to Donny George, former (now late) head of the Iraqi antiquities department, Turkey appears to have made little effort to interdict looted Iraqi materials and Iran only began to do so in late 2008. There is no evidence that Iraq ever repatriated cultural materials looted by Iraq from Kuwait during the first Gulf War. Public opinion in the U.S. continues to be shaped by anti-market statements. For example, at a public panel at the New York County Bar Association in Spring 2008, Col. Matthew Bogdanos, United States Marine Corps Reserve, who assisted in the recovery of material looted from the Baghdad Museum, insisted that antiquities fund terrorism. One of his slides showed solid lines purporting to demonstrate that Iraq is connected with New

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Two U.S. archeologists working in Iraq in the decade following the U.S.-led invasion in 2003 under the auspices of the CHC's Iraq Cultural Heritage Initiative state that the collaboration between the Department of State and U.S. archeologists has evolved to the point where "archaeology and archaeologists are key elements in the U.S. diplomatic toolkit . . . and are deployed in the service of U.S. diplomacy abroad . . ." ²¹⁴ They describe their activities as a form of soft diplomacy.

In their view, the CHC has been transformed from "an office that had been working quietly and diligently behind the scenes with little recognition or support to an entity that has become, by cultural heritage standards, a major funding source, intellectual resource, and a prominent player in establishing U.S. approaches to cultural policy and programs on the international level." They note that "[f]unding archaeological field research . . . is not cheap and it is often U.S. taxpayer dollars through programs from the U.S. Department of State, the Fulbright program, the National Science Foundation, the National Endowment for the Humanities, and the Council for Overseas American Research Centers, that enable field projects to go ahead." They note that "[o]ver the years the Iraq Cultural Heritage Initiative has received some US \$12.9 million for various cultural heritage projects in Iraq." At a time of severe federal budgetary cutbacks in the United States, they argue that archeologists should enter the political fray and lobby for continued federal funding of their efforts. The non-archeologist must ask whether the Iraq Cultural Heritage Initiative has in fact purchased \$12.9 million of goodwill for the United States, and whether the U.S. taxpayer should continue to fund the narrow interests of a small academic elite at a time when mandatory federal budgetary sequestration threatens funding for thousands of federal programs from

York and other western capitals by a global antiquities smuggling network. Yet when asked how much looted Iraqi material is entering New York, he answered: "None, yet." On the other hand, in July 2013, an initial agreement was reported between Iraq and the U.S. for the return of more than 10,000 artifacts stolen from Iraq after the 2003 U.S.-led invasion. These objects were in addition to more than 1,500 artifacts had previously been returned to Iraq from the U.S. Details about how the artifacts were imported into the U.S. were not disclosed. Absent such disclosure, it is impossible to gauge the frequency with which looted Iraq materials are being imported into the U.S. or the quality of or intended market for those objects. The high-end of the market for Iraqi materials appears to have been chilled by the well-publicized import restrictions. The large number of seized objects may imply that they were generally smaller and portable, perhaps composed largely of pot shards and cylinder seals, rather than intact, high value objects. Agence France-Presse, *Iraq, US Reach Deal on Stolen Artefacts [sic]: Official*, FOX NEWS (July 26, 2013), <http://www.foxnews.com/world/2013/07/26/iraq-us-reach-deal-on-stolen-artefacts-official/>.

²¹⁴ Morag M. Kersel & Christina Luke, *Ten Years After Iraq: Archaeology, Archaeologists, & U.S. Foreign Relations*, ASOR BLOG (May 15, 2012), <http://asorblog.org/?p=4505>. See also CHRISTINA LUKE & MORAG M. KERSEL, *US CULTURAL DIPLOMACY & ARCHEOLOGY: SOFT POWER, HARD HERITAGE* (2012).

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major weapons systems to school lunches. CHC's function as an advocate for the U.S. archeological lobby and a platform for overseas archeological projects casts further doubt on CHC's ability to serve as a neutral administrator and interpreter of CPAC and CPIA.

CONCLUSION

It is clear that the original intent of Congressional policy was to balance the interests of national retention, archeological context and international cultural exchange. It is also clear that the current bias of the Executive Branch (i.e., the Departments of State and Justice and U.S. Enforcement Agencies) in favor of restitution and national retention cannot be reconciled with Congressional intent or the bargain among U.S. cultural constituencies that led to the passage of the Implementation Act. It is fair to say that the current enforcement regime is "lawless" and conducted with disregard for Congressional policy. U.S. cultural policy governing the international antiquities trade should be informed by higher goals than to celebrate "a lovely repatriation ceremony."²¹⁵ Unless and until reforms along the lines proposed by this White Paper are implemented, U.S. policy will be driven by the uncritical, reflexive enforcement of foreign patrimony laws by U.S. courts and U.S. Enforcement Agencies, U.S. museums will continue to withdraw behind the 1970 Rule with their institutional mission arguably impaired, and U.S. trade and cultural life will be diminished.

²¹⁵ Sharon Levin, Chief of Asset Forfeiture, U.S. Attorney's Office for the S.D.N.Y., Statement regarding the repatriation of the Steinhardt Phiale to Italy to Art Litigation and Dispute Resolution Inst., NY County Lawyers' Ass'n (Nov. 2012).