

United States of America and Canada

Expert Report  
by

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for participants in the

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Canada and the United States were among the first Western market nations to join the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (“1970 UNESCO Convention” or “1970 Convention”).<sup>1</sup> The United States Senate gave its unanimous consent to ratification in 1972, but the United States did not deposit its instrument of ratification until 1983, after enacting the Convention on Cultural Property Implementation Act (“CPIA”).<sup>2</sup> Canada accepted the Convention in 1978 when it enacted provisions in its Cultural Property Export and Import Act (“CPEIA”) implementing the 1970 Convention.<sup>3</sup> While these two nations share much background in their legal systems, they chose very different methods by which to implement the 1970 Convention.

## I. Ratification and Implementation of the 1970 Convention

### A. The United States

The United States directly implemented only two provisions of the UNESCO Convention, Article 7(b) and Article 9, that were not self-executing. Other provisions are incorporated in or are relevant to the interpretation of the CPIA.<sup>4</sup> Section 308 of the CPIA codifies Article 7(b) of the 1970 Convention, prohibiting the import of stolen cultural property that had been documented in the inventory of a museum or other public secular or religious institution.<sup>5</sup>

Article 9 of the 1970 UNESCO Convention calls on States Parties to assist each other in cases of pillage of archaeological and ethnological materials. The United States’ implementation of Article 9 provides a mechanism by which the United States can impose import restrictions on certain categories of archaeological or ethnological materials<sup>6</sup> pursuant to bilateral agreements or memoranda of understanding (MOU) with

<sup>1</sup> 823 U.N.T.S. 231 (Nov. 14, 1970).

<sup>2</sup> 19 U.S.C. §§ 2601-2613.

<sup>3</sup> Cultural Property Export and Import Act, R.S.C. 1985, c. C-51, § 37: Foreign Cultural Property.

<sup>4</sup> For example, Article 1 of the 1970 UNESCO Convention defines “cultural property” as “property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to” one of eleven enumerated categories, including archaeological materials, antiquities more than one hundred years old, objects of ethnological interest, rare manuscripts and incunabula, and property of artistic interest. The CPIA specifically adopts this definition of cultural property “whether or not any such article is specifically designated as such by any State Party ...”. 19 U.S.C. § 2601(6).

<sup>5</sup> The CPIA states: “No article of cultural property documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution in any State Party which is stolen from such institution after the effective date of this title, or after the date of entry into force of the Convention for the State Party, whichever date is later, may be imported into the United States.” 19 U.S.C. § 2607. For the United States, this date is 1983. *See United States v. An Original Manuscript*, 1999 U.S. Dist. LEXIS 1859 (S.D.N.Y. 1999).

<sup>6</sup> The 1970 UNESCO Convention does not define “archaeological or ethnological materials. The CPIA defines these terms as:

The term “archaeological or ethnological material of the State Party” means--

- (A) any object of archaeological interest;
- (B) any object of ethnological interest; or
- (C) any fragment or part of any object referred to in subparagraph (A) or (B);

other States Parties or emergency actions.<sup>7</sup> The United States has entered into bilateral agreements with fourteen nations: El Salvador, Guatemala, Nicaragua, Honduras, Peru, Bolivia, Mali, Italy, Canada, Cambodia, Colombia, Cyprus, China and the Hellenic Republic (Greece).<sup>8</sup> Emergency import restrictions, which were put in place pursuant to special legislation, are in effect for Iraq and are discussed later in this paper.

A State Party initiates the process by submitting a request to the United States through diplomatic channels.<sup>9</sup> The request is referred to the Cultural Property Advisory Committee (CPAC).<sup>10</sup> Under the CPIA, the role of CPAC is limited to reviewing the request with regard to whether the four statutorily required criteria are satisfied.<sup>11</sup> Based

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which was first discovered within, and is subject to export control by, the State Party.

For purposes of this paragraph--

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

(I) is of cultural significance;

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

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

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

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

(II) important to the cultural heritage of a people because of its distinctive characteristics, comparative rarity, or its contribution to the knowledge of the origins, development, or history of that people.

19 U.S.C. § 2601(2).

<sup>7</sup> 19 U.S.C. §§ 2602-03. The CPIA allows the President to impose import restrictions through these agreements without need for Senate ratification of a new treaty. The President's powers under the CPIA have been delegated to the Department of State and the Department of Homeland Security.

<sup>8</sup> The agreement with Canada was in effect from 1997 to 2002. As of June 2012, requests for agreements from Bulgaria and Belize are pending. The number of current agreements represents a little more than 10% of the nations that have ratified the 1970 UNESCO Convention.

<sup>9</sup> The information to be provided is described as:

To the extent information is known to the requesting country, such a request should offer background regarding the national cultural patrimony and how it is in jeopardy from pillage; it should provide information about what internal protective measures have been put in place; it should indicate the significance of the U.S. market for the material in question; and it should say why U.S. import restrictions would be in the best interest of the international community for education, cultural, and scientific purposes.

Maria P. Kouroupas, *Illicit Trade in Cultural Objects*, 13 *Conservation*, the GCI Newsletter 5, 6 (1998), quoted in PATRICK J. O'KEEFE, *COMMENTARY ON THE 1970 UNESCO CONVENTION* 112 (2d ed. 2007).

<sup>10</sup> The Cultural Property Advisory Committee consists of 11 members, appointed by the President. By law, three represent the interests of the archaeological/anthropological community, three are experts in the international sale of archaeological, ethnological and other cultural property, two represent museums, and three represent the public. 19 U.S.C. § 2605.

<sup>11</sup> The statutory determinations are:

(A) that the cultural patrimony of the State Party is in jeopardy from the pillage of archaeological or ethnological materials of the State Party;

(B) that the State Party has taken measures consistent with the Convention to protect its cultural patrimony;

(C) that--

(i) the application of the import restrictions . . . with respect to archaeological or ethnological material of the State Party, if applied in concert with similar restrictions implemented, or to be implemented within a reasonable period of time, by those nations

on this review, CPAC makes recommendations to the delegated decision maker as to whether to enter into or extend an agreement. The delegated decision maker makes the determinations as to whether the statutory criteria are satisfied, and, if they are, the United States enters into negotiations to finalize a bilateral agreement. Such an agreement has a five year term and may be renewed an indefinite number of times.<sup>12</sup> The criterion for extension is that the same conditions that originally justified entering into the agreement still exist.<sup>13</sup>

The CPIA also allows the United States to impose import restrictions, without the negotiation of a bilateral agreement, in case of an “emergency” *but only if* the State Party has already submitted a request for a bilateral agreement.<sup>14</sup> This emergency provision is the implementation of the last part of Article 9, which calls on States Parties to take “provisional measures” to prevent irremediable injury while an agreement on more permanent measures is pending. Emergency import restrictions can last for a maximum of five years and may be extended one time for a maximum of three additional years.

The United States imposed import restrictions on cultural materials illegally removed from Iraq after 1990 pursuant to special legislation that Congress enacted, the Emergency Protection for Iraqi Cultural Antiquities Act.<sup>15</sup> These import restrictions fulfill the United States’ responsibilities under United Nations Security Council Resolution 1483.<sup>16</sup> Tracking the Security Council Resolution, these import restrictions apply to a broad definition of cultural objects<sup>17</sup> and will last for an indefinite period of time.

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(whether or not State Parties) individually having a significant import trade in such material, would be of substantial benefit in deterring a serious situation of pillage, and

(ii) remedies less drastic than the application of the restrictions set forth in such section are not available; and

(D) that the application of the import restrictions . . . in the particular circumstances is consistent with the general interest of the international community in the interchange of cultural property among nations for scientific, cultural, and educational purposes.

19 U.S.C. § 2602 (a)(1). There is an exception to the third determination. The statute provides: the President may enter into an agreement if he determines that a nation individually having a significant import trade in such material is not implementing, or is not likely to implement, similar restrictions, but--

(A) such restrictions are not essential to deter a serious situation of pillage, and

(B) the application of the import restrictions . . . in concert with similar restrictions implemented, or to be implemented, by other nations (whether or not State Parties) individually having a significant import trade in such material would be of substantial benefit in deterring a serious situation of pillage.

19 U.S.C. § 2602 (c)(2).

<sup>12</sup> 19 U.S.C. § 2602(e).

<sup>13</sup> *Id.*

<sup>14</sup> 19 U.S.C. § 2603.

<sup>15</sup> Sections 3001–03, P.L. 108-429.

<sup>16</sup> S/RES/1483, Para. 8 (2003), available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N03/368/53/PDF/N0336853.pdf?OpenElement>.

<sup>17</sup> This legislation authorized the President to exercise his authority under the CPIA to prohibit import of designated archaeological and ethnological materials from Iraq. It is notable for defining the archaeological and ethnological materials of Iraq in accord with UNSCR 1483 in place of the normal CPIA definitions of these types of materials. *See supra* note 6.

Once import restrictions are in place, an object that falls into one of the representative categories may be imported into the United States only if it is accompanied by certain documentation outlined in the CPIA.<sup>18</sup> Import restrictions become effective upon publication of a notice in the Federal Register. The categories of archaeological or ethnological materials that are subject to import restriction are listed in this notice. The only remedy available under the CPIA is civil forfeiture.<sup>19</sup> A web site maintained by the Cultural Heritage Center of the State Department's Bureau of Educational and Cultural Affairs provides information about the import restrictions, including a chart of all import restrictions by country with their effective dates and a database of available images that are illustrative of the designated categories of materials whose import is restricted.<sup>20</sup>

The bilateral agreements entered into under the CPIA provide several mechanisms for fostering the protection of the world's cultural heritage. The statutorily mandated criteria for entry into a bilateral agreement look to whether the requesting nation has taken measures toward protecting its own archaeological and ethnological heritage, consistent with the 1970 Convention,<sup>21</sup> as well as efforts to seek assistance from other States Parties in appropriate circumstances. Finally, the bilateral agreements establish a path toward mutual cooperation between the United States and the other State Party in the realm of cultural heritage preservation,<sup>22</sup> including the provision of technical assistance, and certain provisions that are specific to the particular country involved.<sup>23</sup>

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<sup>18</sup> An archaeological or ethnological object, which is subject to import restriction, may be imported into the United States if it is accompanied by an export license, 19 U.S.C. § 2606(a), or if satisfactory evidence can be presented showing that the object left the country of origin more than ten years before the date of entry or on or before the date the import restriction went into effect, 19 U.S.C. § 2606(b).

<sup>19</sup> 19 U.S.C. § 2609. The only reported decision discussing import restrictions imposed under a CPIA bilateral agreement concerned the importation of two Colonial period paintings from Peru. *United States v. Eighteenth Century Peruvian Oil on Canvas Painting of the "Doble Trinidad" or "Sagrada Familia con Espiritu Santo y Dios Padre"*, and *Seventeenth Century Peruvian Oil on Canvas Painting of "San Antonio de Padua" and Santa Rosa de Lima*, 597 F. Supp. 2d 618 (E.D. Va. 2009). The U.S.-Peru agreement includes a number of "[s]pecific types of objects used for religious evangelism during the Colonial period," including "[p]aintings." There was some question as to whether the paintings originated from Bolivia or from Peru, but as the same categories were covered by the bilateral agreements with both countries, the court did not find it necessary to determine which country was the country of origin.

<sup>20</sup> See <http://exchanges.state.gov/heritage/culprop.html>.

<sup>21</sup> The UNESCO Convention includes among its provisions that a State Party undertakes to: establish a government agency or service that will assist in the preparation of laws for the regulation of cultural objects, establish a national inventory of protected property, promote scientific and technical institutions, and supervise archaeological excavations (Article 5); establish a licensing system for the export of cultural objects (Article 6), and require dealers to maintain registers with information on the origin, supplier, description and price of items sold (Article 10).

<sup>22</sup> Another form of U.S. cultural assistance, not related to the CPIA, is provided through the Ambassadors Fund for Cultural Preservation. The Ambassadors Fund has provided nearly \$26 million over ten years to cultural preservation projects in over one hundred countries. See <http://exchanges.state.gov/heritage/afcp.html>.

<sup>23</sup> For discussion of the article II provisions of bilateral agreements, see Maria P. Kouroupas, *Preservation of Cultural Heritage: A Tool of International Public Diplomacy*, in *CULTURAL HERITAGE ISSUES: THE LEGACY OF CONQUEST, COLONIZATION, AND COMMERCE* 325, 331-33 (James A.R. Nafziger and Ann M. Nicgorski eds. 2010).

For example, the MOU with El Salvador included the expectation that the national museum would be rebuilt and this was later done. The MOU with Italy includes the expectation that Italy will make its best efforts to provide materials that belong to the designated categories on long-term loan to museums in the United States, consistent with current Italian legislation that makes loans available for educational, research and conservation purposes. In response, Italy extended the period for which art works can be on loan, up to a maximum of four years. With passage of another amendment earlier this year, Italy has the possibility of extending loans up to an additional four years.

## B. Canada

Canada implemented the 1970 Convention through its Cultural Property Export and Import Act (“CPEIA”).<sup>24</sup> In its implementation of the 1970 Convention, Canada seems to have focused on implementing Article 3.<sup>25</sup> The CPEIA establishes a system of controls on the export of cultural materials from Canada and serves an important function in preserving Canada’s cultural heritage.<sup>26</sup> With respect to import controls, the CPEIA applies to “foreign cultural property”, defined as “any object that is specifically designated by [a reciprocating State] as being of importance for archaeology, prehistory, history, literature, art or science.”<sup>27</sup>

The operative provisions of the Act are relatively straightforward, stating, “it is illegal to import into Canada any foreign cultural property that has been illegally exported from that reciprocating State.”<sup>28</sup> However, in order for a foreign nation to recover its illegally exported cultural property, the government of the reciprocating State must submit a request in writing to the Canadian Minister, after which the Attorney

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<sup>24</sup> Cultural Property Export and Import Act, R.S.C. 1985, c. C-51

<sup>25</sup> See CRAIG FORREST, *INTERNATIONAL LAW AND THE PROTECTION OF CULTURAL HERITAGE* 191 (2010). According to O’Keefe, this broader approach to the 1970 Convention means that Canada did not need to implement separately Article 9. O’KEEFE, *supra* note 9, at 72.

<sup>26</sup> JAMES A.R. NAFZIGER, ROBERT KIRKWOOD PATERSON & ALISON DUNDES RENTELN, *CULTURAL LAW: INTERNATIONAL, COMPARATIVE, AND INDIGENOUS* 302-05 (2010). This legislation allows the establishment of a list of cultural materials whose export is subject to control and for which an export permit is required. The bilateral agreement between the United States and Canada under the CPIA, which was in effect from 1997 to 2002, meant that the United States would not allow the import into the United States of cultural objects that left Canada without such an export permit. While export controls are considered important to the cultural heritage of Canada, Canada’s export system is not the focus of this Report.

<sup>27</sup> Cultural Property Export and Import Act, R.S.C. 1985, c. C-51, § 37(1). The definition is thus similar to the 1970 Convention’s definition of cultural property. A “reciprocating State” is a “foreign State that is a party to a cultural property agreement.” *Id.* The Act envisages the possibility that Canada will enter into bilateral and multilateral agreements, “relating to the prevention of illicit international traffic in cultural property.” While the Act does not specifically refer to the 1970 UNESCO Convention as one such agreement, it is clear that the Convention fits this definition and that the Act’s provisions therefore apply to any nation that is a State Party.

<sup>28</sup> Cultural Property Export and Import Act, R.S.C. 1985, c. C-51, § 37(2). The import restrictions apply only to foreign cultural property illegally exported after the date on which a cultural property agreement comes into force in both Canada and the reciprocating State (that is, the State from which the foreign cultural property was illegally exported). The relevant date for Canada with respect to the 1970 Convention is 1978.

General of Canada may institute an action for recovery.<sup>29</sup> The court may then order recovery of the property if it is convinced that the cultural materials have been imported into Canada in violation of Canada's import controls.<sup>30</sup> The Act also requires the payment of compensation by the reciprocating State to a person, institution or public authority that qualifies as a bona fide purchaser for value of the property or has valid title to the property and acquired it without knowledge that the property had been illegally exported from the reciprocating State. The court has the discretion to determine the amount of compensation it "considers just in the circumstances."<sup>31</sup>

It is worth noting that Canada has ratified the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict and both the First and Second Protocols. Canada's implementation of the Second Protocol prohibits illegal removal of cultural objects from occupied territory and establishes a mechanism for recovery of such objects that is similar to the mechanism used under the provisions implementing the 1970 Convention.<sup>32</sup> While this is not part of Canada's implementation of the 1970 Convention,<sup>33</sup> it provides an additional mechanism for prohibiting the import of illegally exported cultural objects under certain circumstances.

Two examples of attempted recoveries of cultural materials under the Canadian Act occurred relatively early in the history of the Act and, in both attempts, it could not be established that the cultural materials had left their country of origin after the date on which the Canadian Act went into effect. One example involved a shipment of antiquities from Egypt that was seized at Mirabel Airport near Montreal in 1989.<sup>34</sup> The Egyptian authorities presented evidence that the artifacts had been illegally excavated and smuggled out of Egypt but, in the end, were not able to present proof that they had been taken out of Egypt after 1978. A similar episode occurred in the prosecution of a dealer for importing artifacts smuggled out of Nigeria.<sup>35</sup>

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<sup>29</sup> Id. § 37(3). The Attorney General must then give notice of the action to appropriate persons and anyone with an interest in the action must be given a reasonable opportunity to be heard. Id. §§ 37(4) and (5). Apparently no foreign representative has standing to institute recovery proceedings and it is possible that the Attorney General would refuse to institute such a proceeding, but this has not yet been tested. See NAFZIGER et al., *supra* note 27, at 313.

<sup>30</sup> R.S.C. 1985, c. C-51, § 37(5).

<sup>31</sup> Id. § 37(6).

<sup>32</sup> The Act prohibits the "knowing[] export or otherwise remov[al of] cultural property ... from an occupied territory of a State Party to the Second Protocol, unless the export or removal conforms with the applicable laws of that territory or is necessary for the property's protection or preservation." R.S.C. 1985, c. C-51, § 36.1(2). The mechanisms for recovery are in subsections (4)-(7).

<sup>33</sup> However, one might note the similarity between these provisions of the Canadian law implementing the Second Protocol and those of Article 11 of the 1970 Convention.

<sup>34</sup> See David Walden, *Canada's Cultural Property Export and Import Act: The Experience of Protecting Cultural Property* 203, 208-10 U.B.C.L. REV. (Special Issue) (1995).

<sup>35</sup> *R. v. Heller* (1984), 30 A.L.R. (2d) 130 (Q.B.). This case involved the attempted prosecution of a New York dealer who imported a Nok terracotta sculpture into Canada that had been illegally exported from Nigeria. See Folarin Shyllon, *The Recovery of Cultural Objects by African States through the UNESCO and Unidroit Conventions and the Role of Arbitration* 221 (2000), available at <http://www.unidroit.org/English/publications/review/articles/2000-2-shyllon-e.pdf>.

However, the actions that Canada has taken to implement the 1970 Convention are clearly increasing in number. In 2006, the Movable Cultural Property Directorate reported that fifteen actions had been taken by Canada over illegal imports, but that the Directorate had opened thirty-four cases during 2006-2007, many of which originated from online auction sites.<sup>36</sup> In 2010, the Directorate reported that it had opened thirteen new cases of possible illegal imports into Canada; since 1978, there were thirteen returns of cultural property to eight different States.<sup>37</sup> According to Canada's report to UNESCO on its implementation of the 1970 Convention, over the past decade, Canada has successfully returned cultural property to a number of countries, including Bolivia, Colombia, Egypt, Mexico, Peru, and the Syrian Arab Republic.<sup>38</sup> However, the largest seizure and return of cultural artifacts by Canada occurred in 2011 and involved the restitution to Bulgaria of 21,000 cultural objects, including 18,000 ancient coins and other objects such as jewelry, Byzantine crosses, amulets, belt buckles and bronze eagles.<sup>39</sup>

In addition to providing a mechanism for the restitution of illegally imported cultural property, the CPEIA makes it a criminal offense to import or attempt to import cultural property in violation of the CPEIA.<sup>40</sup> The maximum penalty is a fine in the amount of \$25,000 and imprisonment of up to five years.<sup>41</sup> There seems to have been only one conviction under this provision in a case involving a dealer who imported textiles from Bolivia.<sup>42</sup>

## II. Changes in the Legal Regime Subsequent to Ratification and Implementation

For both Canada and the United States, implementation of the 1970 UNESCO Convention brought about significant change in their existing laws by establishing a mechanism by which the attempted import of cultural objects whose export violated another nation's export controls constitutes a violation of the importing nation's domestic

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<sup>36</sup> Canadian Heritage, Movable Cultural Property Directorate, available at: <http://www.pch.gc.ca/pgm/bcm-mcp/publctn/rpt/103-eng.cfm>.

<sup>37</sup> Cultural Property Export and Import Act Annual Report 2009-2010, at 12, available at: [http://publications.gc.ca/collections/collection\\_2011/pc-ch/CH1-28-2010-eng.pdf](http://publications.gc.ca/collections/collection_2011/pc-ch/CH1-28-2010-eng.pdf).

<sup>38</sup> Report by Canada [to UNESCO] on Implementation of the 1970 *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*. O'Keefe cites that between 1978 and 2000, there were eleven requests for returns, seven of which were successful. Between 2000 and 2007, there were five returns, one each to Peru, Bolivia and Egypt, and two to Colombia. O'KEEFE, *supra* note 9, at 149.

<sup>39</sup> Alison Crawford, Canada returns Bulgarian stolen artifacts, CBC News, Jun. 10, 2011, available at: <http://www.cbc.ca/news/canada/story/2011/06/10/bulgaria-artifacts.html>; see also Government of Canada Returns Its Largest Ever Seizure of Cultural Property to the Republic of Bulgaria, available at: <http://www.newswire.ca/en/story/815789/government-of-canada-returns-its-largest-ever-seizure-of-cultural-property-to-the-republic-of-bulgaria>.

<sup>40</sup> R.S.C. 1985, c. C-51, §§ 43 and 45. This is in contrast to the U.S. legislation, which provides only the remedy of forfeiture of the cultural objects.

<sup>41</sup> R.S.C. 1985, c. C-51 § 45.

<sup>42</sup> *R. v. Yorke*, 166 N.S.R. (2d) 130 (1998). For a description of this case, see O'KEEFE, *supra* note 9, at 152-53. In addition to the *Yorke* prosecution, the prosecution in *R. v. Heller*, discussed *supra* at note 35, was not successful.

law.<sup>43</sup> Canada takes a broad approach to this recognition, with the CPEIA granting across-the-board recognition of the export controls on cultural objects of another State Party to the Convention. For the United States, this change is more modest because recognition of the foreign nation's export controls is limited to those nations with which the United States has entered into a bilateral agreement.<sup>44</sup> On the other hand, the attention that is given to these agreements has produced several positive results.

The import restrictions imposed pursuant to the bilateral agreements have led to numerous seizures and restitutions of cultural objects to their country of origin.<sup>45</sup> The presence of import restrictions with particular countries under the CPIA may lead an importer to misdeclare the country of origin of a cultural object, in order to evade scrutiny by Customs agents. This, however, is also an import violation that can lead to forfeiture of the object and criminal prosecution under the right circumstances.<sup>46</sup> In addition, the agreements bring considerable attention to the problem of looting of archaeological and ethnological materials, raise consciousness of this issue among the

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<sup>43</sup> Although there is some debate in the legal literature, the generally accepted legal rule is that export controls of one nation are not enforced by another nation except pursuant to an international or bilateral agreement. The 1970 Convention and its implementing legislation in Canada and the United States provide the bases for recognition of other nations' export controls. See Catherine Bell and Robert K. Paterson, International Movement of First Nations Cultural Heritage in Canadian Law, in PROTECTION OF FIRST NATIONS CULTURAL HERITAGE: LAWS, POLICY, AND REFORM 90 (Catherine Edith Bell & Robert K. Paterson, eds. 2009).

<sup>44</sup> Implementation of Article 7(b) of the 1970 Convention by the United States produced a less significant change in United States law. However, by changing the elements that the government must prove in a forfeiture proceeding, this provision of the CPIA facilitates pursuit of such property by the U.S. government.

<sup>45</sup> The exact legal basis for a seizure and forfeiture is not always given when such an action is announced. The website for Immigration and Customs Enforcement (ICE), Department of Homeland Security, the agency tasked with investigating and pursuing cases of illegal importation, reports the following seizures and restitutions of cultural objects from nations with which the United States has a bilateral agreement since 2003, when ICE was created: In 2003, 279 Pre-Columbian artifacts were returned to Honduras; in 2004, several Pre-Columbian artifacts were returned to Peru; in 2005, the Challapampa Altar was returned to Peru under 19 U.S.C. § 2607. In 2007, 412 pre-Columbian artifacts were returned to Peru; pre-Columbian Maya artifacts were returned to Guatemala. In 2008, 60 pre-Columbian artifacts were returned to Colombia; more than 1000 artifacts were returned to Iraq. In 2009, 337 Pre-Columbian artifacts were returned to Peru; a fresco wall panel stolen from the Roman site of Pompeii in Italy, and a Corinthian column krater also looted from Italy were seized by ICE from the New York auction house Christie's. In 2011, fourteen artifacts were returned to China and other artifacts to Peru. Dept of Homeland Security, ICE-HSI, "Priceless Chinese Antiquities Unlawfully Imported to U.S. Returned to Chinese Government," Mar. 13, 2011, available at: <http://newsroom-magazine.com/2011/executive-branch/homeland-security-department/ice-hsi/priceless-chinese-antiquities-unlawfully-imported-to-u-s-returned-to-chinese-government/>; "ICE and CBP Officials Return Cultural Artifacts to Peru," May 12, 2011, available at: <http://www.ice.gov/news/releases/1105/110512washingtondc.htm>. In April 2012, the United States returned to Italy two ancient ceramic vessels and a Roman sculpture, which had been sold at Christie's in New York in 2009, <http://www.ice.gov/news/releases/1204/120426washingtondc.htm>. Press releases concerning many of these restitutions can be found at: <http://www.ice.gov/news/releases/index.htm?top25=no&year=all&month=all&state=all&topic=04>. This list is not exhaustive.

<sup>46</sup> 18 U.S.C. §§ 542 and 545. Bell and Paterson point out that cultural property is frequently misdeclared upon import into Canada and the violation of the Customs Act provides a separate basis for forfeiture of the property, which is then generally returned to the country of origin. Bell and Paterson *supra* note 43, at 90.

public and governments of the United States and the other State Party, and are an effective training tool for U.S. law enforcement.

While the United States does not impose across-the-board import restrictions on the full range of cultural property, it can impose import restrictions on the types of cultural property, that is, archaeological and ethnographic materials, that are the most vulnerable to looting. These are also the least likely types of materials to be documented and are therefore the most difficult to recover through ordinary legal mechanisms. One must keep in mind that when an archaeological site is looted, not only is the object lost, but the original context in which the object was found, along with associated cultural features, such as architecture, faunal and floral remains, and other artifacts, is also destroyed. This diminishes our ability to reconstruct and understand the past, thus having a detrimental effect far beyond the looting itself. By focusing attention on these two important categories (archaeological and ethnological materials), as set out in Article 9, the United States can bring greater awareness and law enforcement resources to bear on the trade in these types of materials.

The bilateral agreement mechanism provides an opportunity for the United States to engage directly with other States Parties concerning these types of looting and to assist them in preventing the looting in the first instance by both reducing market demand and providing technical assistance. The bilateral agreements create a path to cooperation between the United States and the other State Party, which encourages opportunities for the interchange of cultural materials and of technical assistance and training to help in the protection of sites, museums, and cultural monuments. The mutual cooperation fostered through the 1970 UNESCO Convention and the CPIA thus provides a significant mechanism for the preservation of the world's cultural heritage.

The greatest obstacle to full use of the United States' Article 9 mechanism is the lack of awareness by States Parties that they need to bring an Article 9 request to the United States. Here, UNESCO could play a significant role in bringing this to the attention of States Parties, educating them in the process, and assisting them in the preparation of such a request. In addition, those States Parties that have not made an Article 9 request to the United States should familiarize themselves with the process and the determinations that are made under the CPIA. UNESCO could assist States Parties in taking measures consistent with the 1970 Convention to protect their cultural patrimony.<sup>47</sup> These measures are contained in Articles 5, 6 and 10, including drafting of laws and regulations to protect cultural heritage;<sup>48</sup> establishing and maintaining

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<sup>47</sup> See also *supra* note 21.

<sup>48</sup> Many nations with a rich archaeological heritage have enacted laws that vest ownership of undiscovered archaeological artifacts in the nation. When such objects are removed without permission, they are stolen property and retain that characterization when brought to the United States and other nations, such as the United Kingdom. Well-drafted vesting laws that are internally enforced within the nation provide an additional mechanism for discouraging the looting of sites by denying title to the finder and subsequent purchaser and for recovering such artifacts in other countries. See, e.g., *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003), and *Government of the Islamic Republic of Iran v. The Barakat Galleries Ltd.*, [2007] E.W.C.A. Civ. 1374; [2008] 1 All E.R. 1177. For more discussion of national ownership laws, see Patty

inventories of protected property; promoting scientific and technical institutions; organizing the supervision of archaeological excavations, and taking educational measures to develop respect for the cultural heritage of all States. These measures are aimed at protecting archaeological sites and collections of cultural objects so that such objects are less likely to be looted or illegally exported.<sup>49</sup>

UNESCO could also assist States Parties in approaching other nations, such as Canada, to seek greater assistance in barring the import of illegally exported cultural property. The Canadian law contemplates involvement by States Parties in the internal process by requiring the reciprocating State to submit a request to Canadian authorities for the return of illegally exported cultural objects. UNESCO could facilitate the interactions between States Parties and Canada in initiating such requests and in monitoring the appearance in Canada of cultural objects which are suspected of having been illegally exported.

## II. Advantages and Disadvantages of Revising the 1970 Convention

There are two respects in which the 1970 Convention may be perceived as unsatisfactory by the nations that are rich in cultural, particularly archaeological, heritage. One is the issue that the Convention does not require States Parties to apply its provisions retroactively. While this may seem unsatisfactory to some nations, this is an unavoidable aspect of most international treaty law.<sup>50</sup> Prott points out that the 1970 Convention does not prohibit a nation from making the Convention's provisions retroactive,<sup>51</sup> although it does not require retroactive effect. Canada and the United States have made their implementation non-retroactive—in the case of the United States through the wording of the CPIA<sup>52</sup> and in the case of Canada through judicial interpretation.<sup>53</sup> It is not likely that

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Gerstenblith, *Schultz and Barakat: Universal Recognition of National Ownership of Antiquities*, XIV ART ANTIQUITY AND LAW 1 (2009).

<sup>49</sup> Other areas of access, education and outreach in the cultural heritage realm include publication of the ICOM Red Lists, which illustrate the types of objects that may be subject to pillage and illegal trade and serve to raise awareness among law enforcement personnel, and the UNESCO Database of national laws, which helps to inform all those concerned with cultural heritage of relevant laws. It is particularly important that all States Parties deposit their national laws with UNESCO for placement in this Database.

<sup>50</sup> While a treaty can be made expressly retroactive, this is relatively unusual. *See, e.g.*, the Vienna Convention on the Law of Treaties, Article 28, stating: “Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.”

<sup>51</sup> Lyndel V. Prott, *Strengths and Weaknesses of the 1970 Convention: An Evaluation 40 years after its adoption* 4-5, CLT/2011/CONF 207/7, Paris, March 2011, available at: <http://unesdoc.unesco.org/images/0019/001918/191880e.pdf>; O’KEEFE, *supra* note 9, at 9-11. The only explicit mention of this issue in the Convention is Article 7, referring to the acquisition of cultural property by museums and cultural property stolen from a museum or other institution “after the entry into force of this Convention for the States concerned”. Neither Article 3 nor Article 9 refers to the question of retroactivity. O’Keefe, *supra* note 9, at 10.

<sup>52</sup> The CPIA allows the import into the United States of archaeological or ethnological materials if the importer can provide “satisfactory evidence that such material was exported from the State Party ... on or before the date on which such material” became subject to import regulation under a bilateral agreement or emergency action. 19 U.S.C. § 2606(b)(2)(B).

a protocol or other modification to the 1970 Convention would change this situation nor, even if a retroactive provision were written, would such an amendment receive any significant degree of ratification or acceptance, particularly among art-importing nations.<sup>54</sup>

The second difficulty applies specifically to archaeological objects, which, typically, are looted directly from sites, and, as they are undocumented, first become known when they appear at the border of a market nation or on the international market. Here, the impediment to the efficacy of the 1970 Convention has been perceived to be the 1970 Convention's definition, in Article 1, of "cultural property" which states: "property which, on religious or secular grounds, is *specifically designated* by each State as being of importance for archaeology, prehistory, history, literature, art or science ..." (emphasis added). However, it is worth noting that Article 9, which refers only to archaeological and ethnological materials, does not include a requirement of "specific designation."

The forms in which both Canada and the United States have implemented the 1970 Convention eliminate this as an issue. The United States' definition of "cultural property" explicitly removes the requirement of specific designation.<sup>55</sup> Canada's definition of "foreign cultural property" refers to the "specifically designated" requirement. However, it seems clear that Canada views the categorization of cultural objects for the purpose of export control by a State Party as constituting designation in compliance with the 1970 Convention's requirement.

One comes to this conclusion, first, in terms of Canada's own export controls, which list the categories of cultural objects that it subjects to export control and which

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<sup>53</sup> The CPEIA states: "From and after the coming into force of a cultural property agreement in Canada and a reciprocating State, it is illegal to import into Canada any foreign cultural property that has been illegally exported from that reciprocating State." R.S.C. 1985, c. C-51, § 37(2). O'Keefe points out that this could have been interpreted as applying to cultural objects exported from the reciprocating State before enactment of the CPEIA but which were imported into Canada after the date of enactment. However, in *R. v. Heller*, (1983), 27 Alta. L.R. (2d) 346 (Prov. Ct.), rev'd (1984) 30 A.L.R. (2d) 130 (Q.B.), the court held that the CPEIA applied only to cultural objects exported after the date of the CPEIA's enactment. *See also* Bell and Paterson, *supra* note 43, at 90 (stating that the 1970 UNESCO Convention is not retroactive and does not apply to First Nations' cultural objects that were removed before the date the Convention entered into force for Canada, 1978, and citing to *R. v. Heller*). Both Prott and O'Keefe point out that Australia's implementing legislation, the Protection of Movable Cultural Heritage Act 1986, applies only to objects imported after the date of the legislation's enactment but retroactively to cultural objects illegally exported at any time. Prott, *supra* note 51, at 4; O'Keefe, *supra* note 9, at 11.

<sup>54</sup> Prott well summarizes the problems of creating amendments or supplements to existing international treaties. The most significant difficulty is that different nations would be subject to different legal rules, which would create an unworkable patchwork without clarity as to when a particular rule would apply. This is exacerbated by the problem that because ancient cultures often span more than one modern nation, it is often difficult to determine the precise country of origin of a particular archaeological object. To the extent that the neighboring countries are subject to the same international treaty regime, this difficulty is reduced. Prott, *supra* note 51, at 8. Particular at a time when many importing countries have recently ratified the 1970 UNESCO Convention, it is unreasonable to expect them to ratify and implement modifications of the Convention.

<sup>55</sup> The CPIA defines cultural property as "articles described in article 1(a) through (k) of the Convention *whether or not any such article is specifically designated* as such by any State Party ...". 19 U.S.C. § 2601(6) (emphasis added).

Canada views as sufficient to satisfy the Convention's requirement.<sup>56</sup> Second, with respect to Canada's import controls, the court in *R. v. Yorke* held that the Bolivian Decree, which subjected the textiles at issue to export control, was in compliance with the 1970 Convention and therefore the textiles had been designated and fit the CPEIA's definition of "foreign cultural property." The court understood the difficulty posed by a "specific designation" requirement, particularly as applied to the types of archaeological and ethnographic objects that were undocumented before their illegal removal, stating:

[T]he appellant's submission that, to "specifically designate" cultural property something more was required to Bolivia than what was specified in the Decree, is not tenable. It would not be possible for a nation to create an itemized list of every piece of property to be protected. The categories have been made clear in the Decree as described by Dr. Valdez-Andretta, and they apply to the items seized from the appellant. Likewise, the suggestion that the term "weavings" is somehow overly broad and fails to distinguish those "weavings" which are of cultural significance from those which are not, is not persuasive. The term "weavings" is one of common usage and the Decree distinguishes them from property of other types of manufacture. Ms. Bubba-Zamora testified about the weaving tradition in Bolivia. Textiles that are cultural property reveal valuable information regarding ethnic groups and their religious practices.<sup>57</sup>

However, it would seem advantageous for the archaeologically rich nations to work with the art-importing nations to encourage more flexible interpretations of the "specific designation" section of the Article 1 definition of cultural property or for them to interpret Article 9 as not requiring "specific designation" for the categories of archaeological and ethnological materials. For example, both the United States and Switzerland use a system of bilateral agreements by which categories of archaeological and ethnological materials that are subject to pillage, rather than specific objects, are placed on a designated list. This method permits archaeological and ethnological materials that are not documented to be subject to import restriction. Perhaps other market nations could be persuaded to adopt a similar approach. In the alternative, perhaps other market nations might be convinced to adopt Canada's approach whereby the listing of object or artifact types by category for purposes of export control complies with the "specific designation" portion of the Article 1 definition of cultural property. Thus, it should be possible through interpretations of the 1970 Convention's provisions in a way that responds to these particular issues, to solve the problem of deterring the trade in undocumented archaeological objects without the promulgation of a new legal instrument.

Another alternative to promulgation of a new international legal instrument is ratification of the 1995 Unidroit Convention on Stolen or Illegally Exported Cultural Objects. The element of greatest usefulness for this discussion is the Article 3(2) definition of stolen property, which states, "a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when

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<sup>56</sup> See NAFZIGER et al., *supra* note 26, at 313.

<sup>57</sup> *R. v. Yorke* (1998), 166 N.S.R. (2d) at 150. This may be the only judicial interpretation of the "specific designation" requirement means and how it can be satisfied.

consistent with the law of the State where the excavation took place.”<sup>58</sup> So far, neither the United States nor Canada seems to have expressed interest in ratifying the Unidroit Convention, but given their forms of implementation of the 1970 Convention and the recognition of foreign vesting laws of archaeological objects by U.S. courts,<sup>59</sup> ratification by the United States or Canada seems less important.

However, it would be particularly important for other market nations, which do not yet recognize foreign vesting laws or whose implementation of the 1970 Convention is not as clear, to ratify the Unidroit Convention. Movement towards ratification of the Unidroit Convention among other market states, particularly France, would provide significant protection for undocumented archaeological objects. Other nations that have ratified the UNESCO Convention but whose implementation does not seem well crafted to deal with the problem of archaeological objects that are looted directly from the ground and are therefore undocumented, such as Germany, should be encouraged to adopt a more realistic and effective approach. Efforts should be focused on strengthening implementation of the 1970 Convention and encouraging ratification of the Unidroit Convention, rather than expending resources and efforts on creating yet another legal instrument or modifying the existing ones.

### **III. Conclusion: Expanding Influence of the 1970 Convention**

In evaluating the implementation and effectiveness of the 1970 Convention, it is necessary to keep in mind its influence on the development of voluntary codes of ethics and practice. In the United States and Canada, major professional organizations have adopted voluntary codes that restrict their publications and annual meetings to the presentation of archaeological objects with a documented provenance predating 1970 (in recognition of the 1970 Convention) or an export license from the country of origin.<sup>60</sup> Perhaps of greater significance was the adoption of codes by North American museums that restrict their acquisitions to archaeological objects that were documented before 1970 or that have an export license from the country of origin. Some museums, such as the Field Museum of Natural History in Chicago and the University of Pennsylvania Museum of Archaeology and Ethnography, adopted such policies in the early 1970s.

More recently, however, there has been a major shift by the two major North American museum associations—the Association of Art Museum Directors and the American Association of Museums. In 2008, both associations adopted guidelines for

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<sup>58</sup> There are many other provisions of the Unidroit Convention, but these fall outside the scope of this Report.

<sup>59</sup> See *supra* note 48 for discussion of national vesting laws.

<sup>60</sup> Two major North American archaeological organizations adopted provisions for their codes of ethics. The first to do so was the Archaeological Institute of America, which adopted its first policy in 1972. Naomi Norman, Editorial Policy on the Publication of Recently Acquired Antiquities, *AMERICAN JOURNAL OF ARCHAEOLOGY* 109: 135-36 (2005). The AIA policy states that AIA publications and meetings will not be the place of first publication or presentation of archaeological objects that do not meet the “1970 rule.” The American Schools of Oriental Research adopted its policy in 1995, Joe D. Seger, ASOR Policy on Preservation and Protection of Archaeological Resources. Electronic document, <http://www.bu.edu/asor/excavations/policy.html>.

their member museums restricting the acquisition of archaeological objects to those with a pre-1970 provenance or export license from their country of origin.<sup>61</sup> These guidelines contain exceptions that permit the acquisition of inadequately provenanced archaeological objects, but they establish the standard with which museums are expected to comply. Also of great interest is the AAMD requirement that any object that an AAMD member museum acquires whose provenance does not satisfy the requirements of the 1970 rule should be posted, with available provenance information, on the AAMD's Registry of Archaeological Objects.<sup>62</sup>

While the private market, including collectors, auction houses and dealers, in North America has not adopted an equivalent policy, the acquisitions policies of the major museum organizations can have a significant, even if indirect, effect on the private market. At least in the United States, many collectors purchase antiquities with the intent of possibly donating such objects to a museum. If a collector knows that a museum will not accept such a donation because the object does not meet the institution's acquisitions policy, then collectors are less likely to acquire such objects. It is not possible, however, to measure, at least at this stage, whether these museum guidelines are having this positive effect on the private market.

The conclusion that one might reach is that the 1970 UNESCO Convention has had a significant impact in both the United States and Canada. This impact includes significant changes in the law regarding the importation of cultural objects, the fostering of relationships and collaboration among States Parties, and potential reforms in acquisition practices by private institutions and perhaps ultimately the market. At this point, what is needed is further vigilance and attention to implementation of the existing Convention in order to continue its influence in promoting preservation of the world's cultural heritage.

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<sup>61</sup> The AAM's Standards Regarding Archaeological Material and Ancient Art are available at: <http://aam-us.org/museumresources/ethics/ethics-archaeology.cfm>. The AAMD's Report on Acquisition of Archaeological Materials and Ancient Art Issued by Association of Art Museum Directors is available at: <http://aamd.org/newsroom/documents/2008ReportAndRelease.pdf>.

<sup>62</sup> The AAMD's Registry of New Acquisitions of Archaeological Material and Works of Ancient Art is available at: <http://aamdobjectregistry.org/Antiquities>. As of June 2012, four years after its creation, approximately 560 objects have been placed on the registry by thirteen museums. If AAMD member museums are in compliance with this requirement, the registry is a potential resource for information concerning current museum acquisition practices and the provenance histories of the archaeological objects that they acquire.