Searching for a Solution: An Analysis of the Legislative Response to the Iraqi Antiquities Crisis of 2003

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LEGISLATIVE UPDATE

SEARCHING FOR A SOLUTION:
AN ANALYSIS OF THE LEGISLATIVE RESPONSE TO THE IRAQI ANTIQUITIES CRISIS OF 2003

INTRODUCTION

The fall of Saddam Hussein’s regime in April 2003 marked the end of an era of population oppression, a victory for the Coalition Forces, and the beginning of Iraqi anarchy. Without the fear of adverse consequences, Iraqis looted their own country. They raided schools, government buildings, cultural institutions, and thousands of archaeological sites, taking anything that could be of value. The most publicized looting occurred at the National Museum in Baghdad. The story of 170,000 antiquities being stolen from the museum by “Ali Babas” as Coalition Forces stood by and watched the looting take place spread throughout the international press. Though initial reports contained inflated figures, the publicity irreparably harmed the reputation of the United States. In reaction to their outrage, the international cultural property community called upon the United States to take immediate steps to secure Iraq’s remaining cultural treasures. Recognizing the need for serious remedial measures, Congress proposed two bills: the Iraq Cultural Heritage Protection Act¹ [hereinafter H.R. 2009] and the Emergency Protection for Iraqi Cultural Antiquities Act of 2003² [hereinafter S. 1291]. After receiving feedback from the cultural property community, a third bill³ was introduced in the House of Representatives that

effectively replaces H.R. 2009.

In this legislative update, I will discuss the history of Iraq’s antiquities, their regulation, and previous occurrences of antiquity looting (I). Part I contains an explanation of the economics of the international antiquities market. I will then explain the actual looting and damage that took place at the National Museum in Baghdad and that continues to take place at many archaeological sites throughout Iraq (II). I will also address the public and foreign policy concerns created by the looting in Iraq (II-D). I will explain the current legal protections that the United States has in place, noting their inadequacies (III & IV). Section III, regarding current legal protections, explains the economic sanctions and the Convention on Cultural Property Implementation Act. I will discuss the contents of each bill and its possible effects, as well as the interests of those parties that support and oppose each bill (V). In my analysis of the proposed legislation, I will argue that neither H.R. 2009 nor S. 1291 should be passed as currently proposed (VI-A & B). Finally, I will discuss the reasons for my reserved support of the most recent bill proposed in the House of Representatives (VI-C &D).

I. HISTORY OF IRAQ’S ANTIQUITIES; LOOTING AND THE INTERNATIONAL MARKET FOR ILLICIT CULTURAL PROPERTY

A. Mesopotamia and Iraq’s Antiquities Laws

Within the borders of present day Iraq lies a plain nestled between the Tigris and Euphrates rivers known as Mesopotamia: the land between two rivers. Mesopotamia marks a beginning in the history of human civilization and claims many firsts such as the first cities, temples, codified religion, organized warfare, and writing. 4 The country of Iraq is home to many of the great

archaeological sites of the world such as: Ashur, Babylon, Hatra, Khorsabad, Nimrud, Nineveh, Samarra, Ur, and Uruk. These famous sites are only a few among the more than 10,000 registered archaeological sites throughout Iraq.

Iraq’s cultural property remained relatively well-protected under strict national antiquities laws from post-World War I until the Persian Gulf War in 1991. Under the Republic of Iraq’s 1936 Antiquities Law No. 59, as amended in 1974 and 1975, Iraq considered all antiquities not yet discovered to be property of the State, regardless of the property ownership of the land. The law

“Iraq is not just a desert. It’s the place where civilization began, it has the longest surviving continuous tradition of civilization in the world, it’s earlier than Egypt, it’s earlier than any place else, and we trace our own cultural roots back to Mesopotamia.” Id.

5. See John Malcolm Russell, Iraq in the Crosshairs, An Uncertain Future for the Past, ICON WORLD MONUMENTS, Spring 2003, enumerating twenty-seven of Iraq’s most important sites. Ashur was the political and religious center of Assyria and was the first well documented mercantile center. Id. Babylon is the site of the Tower of Babel and the Ishtar Gate. Id. Hatra was a very important ancient religious center. Id. Khorsabad was the Assyrian royal capital. Id. At Nimrud, a discovery of gold-filled tombs is considered to be one of the greatest archaeology discoveries of all time. Id. Nineveh was the imperial capital to the Biblical King Sennacherib. Id. Samarra, an Islamic capital is home to the Great Mosque. Id. Ur is said to be the birthplace of Abraham. Id. One of the best-preserved ziggurats is located at Ur. Id. Uruk was the first large city of Mesopotamia and was the site of some of the earliest-known writing. Id. See also Andrew Lawler, Saving Iraq’s Treasures, SMITHSONIAN, June 2003, Vol. 34, No. 3 at 42-55 for a more in depth history of Uruk, Ashur, Babylon, Hatra, and Samarra.


7. See McGuire Gibson, The Theft of Ancient Cities, NEWSDAY, Sept. 21, 2003 at A34, stating that, “The huge market in illegal antiquities did not exist at all before the 1991 Gulf War, because Iraq had a strong antiquities law.” See also Norman Hammond, In the Fray: Time to Secure Iraq’s Treasures... WALL ST. J. EUR., April 17, 2003 at A7, stating that, “the new antiquities laws put in place by Gertrude Bell after World War I ensured that the new Kingdom of Iraq retained much of its heritage.”

prohibited private individuals from acquiring movable antiquities,\(^9\)
discovers of movable antiquities required government notification within seven days,\(^10\) and the law prohibited the taking of antiquities outside of Iraq.\(^11\) Furthermore, only the government or groups authorized by the government were allowed to excavate for antiquities, thus, even a private land owner could not excavate his own land without an official permit.\(^12\) All antiquities discovered by excavators were considered property of the State.\(^13\) The law made it strictly “forbidden to break, mutilate, destroy or damage antiquities whether movable or immovable.”\(^14\) Finally, the antiquities laws provided strict criminal punishment of fines, seizure and confiscation, and imprisonment for violators.\(^15\)

In efforts to provide greater protection for its cultural property, Iraq joined international treaties and non-governmental

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9. Id. at ch. III, art. 16 (1). It should be noted that Art 16(2) provided for two exceptions: antiquities existing in palaces and ancient manuscripts. Id. at art. 16(2). However the private possession of manuscripts was conditional upon registration, conservation, and government approval for the transfer of ownership. Id. at art. 16(3). The Directorate of Antiquities also had the right to purchase any registered manuscript and to control or confiscate any that are lost or mutilated due to negligence or intentional destruction. Id. at art. 16(6).

10. Id. at art. 17.
11. Id. at art. 26.
12. Id. at ch. V, art. 40.
13. Id. at art. 49.
14. Id. at ch. I, art. 5.
15. See generally id. at ch. VI on Penalties. Iraq amended the laws in 2002 creating stricter penalties and protections for antiquities. See Antiquities and Heritage Law, No. 55 (2002) (Iraq). Protection for cultural heritage materials (movable and fixed property or assets less than two-hundred years old that are of historic, patriotic, national, religious, or artistic value) and for historic sites were included to provide a much broader range of protection. The previous law guaranteed protection for antiquities (objects two-hundred years or older), but gave discretion to the Directorate to decide if an object of less than two-hundred years would be considered an antiquity. The 2002 version of Iraq’s antiquities laws also significantly increased the available prison sentences and fines for violators. Certain cases involving stolen antiquities impose life imprisonment or the death penalty. See Antiquities and Heritage Law, No. 55 § 6 art. 40 (2002) (Iraq).

B. Concerns of Looting, Illicit Trade and the Persian Gulf Experience

Due to the great quantity and quality of Iraq’s cultural resources, it is known as one of the great source countries on the international antiquities market.\(^{17}\) As a source country, Iraq is inherently at risk of looting and pillage of its vast cultural property resources so long as market countries such as the United States, the United Kingdom, and Japan continue to demand those antiquities.\(^{18}\)

On the antiquities market, objects move in trade from their country of origin, through several transit countries, until they reach the art markets of western countries.\(^{19}\) With each transfer of


\(^{17}\) See generally Predita C. Rostomia, Looted Art in the U.S. Market, 55 RUTGERS L. REV. 271, 272 (2002), explaining that “peacetime looting of antiquities occurs in countries that are rich in...antiquities and archaeological sites, but poor in resources to stop the looting of...their cultural property.”

\(^{18}\) See id. at 279, stating that “[m]arket nations are wealthier nations that have a market for cultural objects of artistic value, while source nations are less affluent nations that contain a plethora of such objects.” See also id. at n. 9, quoting John Henry Merryman, Two Ways of Thinking about Cultural Property, 80 AM. J. INT’L. L. 831, 832 (1986). In footnote 9, Rostomia explains how the antiquities market is created by a division of the world “into ‘source nations and market nations’” where the source nations are those that have a “supply of desirable cultural property [that] exceeds the internal demand[.]” Id. The market nations, conversely have a demand for antiquities that exceeds their own supply. Id. Such a “condition ‘encourages export from source nations[.]’” Id.

\(^{19}\) See Patty Gerstenblith, The Public Interest in the Restitution of Cultural
ownership, the antiquity garners a higher purchase price until the competitive market price is reached. Such price is attained when the person willing and able to pay the highest price purchases the article. Due to the high-demand and low-supply condition of western country antiquity markets, western countries serve as the end consumer in antiquity trade. Western countries are rich in financial resources; therefore, they are able to pay the highest price for antiquities. Additionally, western countries are generally poor in their own antiquities and cultural resources, thus, they are also willing to pay the highest price. Because of the low-supply, high-demand condition, market country consumer demand heavily influences the supply of antiquities on the international market.

The incentive to loot antiquities in source countries can also be attributed to the fact that an increased supply does not decrease the market price for antiquities. Market prices remain high for two key reasons. The supply of antiquities is arguably finite and each antiquity is itself unique. The supply of antiquities is considered finite because it is not a renewable resource. Antiquities are objects and object remnants produced by ancient cultures and civilizations; therefore, the supply is limited to the amount of objects produced by each civilization at some point in history.

Objects, Ownership and Protection of Heritage: Cultural Property Rights for the 21st Century, 16 CONN. J. INT’L L. 197, 201 (2001), explaining that looted objects of cultural heritage “move through the market from the looter to the smuggler, eventually to auction houses and dealers, and finally to private collectors and museums in major cities of Western Europe, North America, and Asia.” See generally Neil Brodie, Spoils of War: The plundering of Iraq’s cultural institutions demonstrates yet again how warfare fuels the global trade in looted antiquities, ARCHAEOLOGY, July/Aug. at 18 (2003).

20. See Rostomia, supra note 17, at 272.

21. In a perfect market, if supply is increased and demand remains constant, the market price will fall.

22. See Neil Brodie, et al., Stealing History: The Illicit Trade in Cultural Material 1, 13-14 (The McDonald Institute for Archaeological Research Cambridge 2000) [hereinafter Stealing History]. Brodie argues that “asset-stripping the finite resource of cultural heritage is, by definition, unsustainable in economic terms,” and that cultural heritage is a non-renewable resource. Id.

23. Objects are classified as antiquities under the Convention when they are
Antiquities enter the market upon discovery rather than through the traditional process of manufacture in response to consumer demand. Therefore, the current market supply can be increased by increasing discovery, but the supply will, theoretically, diminish at the point when all antiquities have been found. However, the definition of an antiquity is dependant on the object’s age; thus, it is also arguable that every year a new supply of antiquities exists, because each year more objects would qualify, by definition, as an antiquity. Because antiquities collectors know that there is a limited supply they are willing to pay premium prices.

Another factor that explains the international demand for antiquities is the uniqueness inherent in each antiquity. Such uniqueness increases its value to collectors because there are no equal substitutes. Thus, unique objects for which there is a finite supply are viewed as investment opportunities by collectors. This fact, coupled with the willingness of collectors to pay premium prices on the inflated world art market has caused the illicit trade in antiquities to increase dramatically since the 1970s. When there is a constant demand for antiquities and those demanding the objects are willing to pay a premium price, looters in source countries have an incentive to loot in order to meet the demand.

of significant cultural importance to a country for archaeology, prehistory, history, literature, art or science purposes and are more than one hundred years old. See Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, UNESCO art. 1(e) (1970) [hereinafter UNESCO Convention].

24. See supra note 24. See also 19 U.S.C.A. § 2601(2)(i) (2003) stating that “no object may be considered to be an object of archaeological interest unless such object is of cultural significance; is at least two hundred and fifty years old...” And see H.R. 2009, 108th Cong. § 2(1), defining “archaeological material of Iraq” as “any object or fragment or part of an object...that was first found within the borders of Iraq...and that is at least 100 years old.” Similarly, Iraq’s own antiquities law defines antiquities as “[m]ovable and fixed property or assets, not less than two hundred years old, that were built, manufactured, sculpted, produced, written, sketched, or photographed by man.” Antiquities and Heritage Law, No. 55 §1, art. 4(7) (2002) (Iraq).


26. See id. at 211, explaining that “[b]ecause demand for antiquities is
As a result of the structure of the antiquities market, looting and the illicit trade of looted material occurs at epidemic levels.\textsuperscript{27} It has also been suggested that the illicit trade in cultural material has a relationship with the illegal drug market and the funding of terrorism activities.\textsuperscript{28}

The incentive to loot archaeological sites and engage in illicit trade of antiquities is further exaggerated when a source country is in a state of economic turmoil and political unrest.\textsuperscript{29} Source countries are generally economically poor, thus, as long as the demand for antiquities on the global market remains constant, looters in source countries have a financial incentive to find and sell antiquities. Assuming that demand for antiquities exists, the only deterrent to pillagers in economically-strapped source countries is finite, sites are looted so as to increase supply and thereby satisfy the demand. The only way to decrease the looting of sites is...to decrease the demand of undocumented antiquities at the end-point of the market.”

\textsuperscript{27} See Jodi Patt, \textit{The Need to Revamp Current Domestic Protection for Cultural Property}, 96 Nw. U. L. Rev. 1207, 1208 (2002), stating that “[i]llicit art trade is second only to narcotics trafficking as the largest and most profitable type of illegal trade worldwide. The number of archaeological artifacts secretly excavated and illegally exported every year continues to grow at an astounding rate.”

\textsuperscript{28} See Brodie, Stealing History, \textit{supra} note 22, at 16, explaining that recent reports have appeared to show that gangs dealing in drug smuggling and money laundering are also dealing in antiquities. Brodie lists specific instances of drug smuggling rings tied to trade in stolen antiquities. \textit{Id.}

\textsuperscript{29} See Neil Brodie, \textit{Spoils of War: The plundering of Iraq’s cultural institutions demonstrates yet again how warfare fuels the global trade in looted antiquities}, \textit{Archaeology}, July/Aug. at 16 (2003) [hereinafter \textit{Spoils of War}]. Brodie, the coordinator of the Illicit Antiquities Research Center of the McDonald Institute for Archaeological Research at the University of Cambridge, discusses in this article how historically armed conflict in culture rich source countries has resulted in the plundering of sites and museums. \textit{Id.} He specifically notes the Iraq situation after the Gulf War, the looting of Afghanistan’s National Museum and archaeological sites during the fighting that erupted when the Soviets withdrew from Kabul, a renewed upsurge of site looting in Afghanistan the fall of the Taliban, the looting of national museums in Somalia during civil unrest in 1991, and the looting and partial destruction of Angkor Wat, a famous site in Cambodia. \textit{Id.} at 16-17.
SEARCHING FOR A SOLUTION

Both economic strife and lawlessness as a result of conflict were present following the Persian Gulf War in 1991 and again at the fall of the Saddam Hussein Regime during the War on Iraq in 2003. Following the Gulf war, illicit Iraqi antiquities emerged in substantial amounts on the international market. In the three years following the war, ten of Iraq’s regional museums were attacked, resulting in a loss of about three thousand objects. Looting also occurred at Iraq’s archaeology sites and evidence of such existed on the European market. From the end of the Gulf War until the fall of the Saddam Regime in 2003, Iraqis established illicit trade networks, identified transport routes, and successfully learned how to smuggle. Iraq is said to have porous borders because its “long land frontiers are difficult to police and allow easy passage into Turkey, Iran, Jordan, Saudi Arabia, and Syria.” Thus, looted Iraqi antiquities flow easily out of their country of origin and onto the world-wide market with an end destination in Europe, the United States, or Japan.

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30. See Gerstenblith, supra note 19, at 202, stating that the movement of cultural objects “often works in tandem with war and other misfortunes, as attested by the considerable influx of Iraqi objects on the market that coincided with the economic boycott following the Gulf War.”
31. See Brodie, Spoils of War, supra note 29, at 16.
32. Id.
33. Id., explaining that, in “Europe dealers were circulating photographs of relief fragments from palaces at Nineveh and Nimrud. Cuneiform tablets, cylinder seals, and other small antiquities—more difficult to trace—were sold openly.”
34. See Brodie, Spoils of War, supra note 29, at 18.
35. Id.
36. See id., explaining the channels of trade from source countries to market countries on the illicit antiquities market. “From Turkey material can move directly to Europe, and from Saudi Arabia it can pass through the Gulf States to Europe...From Jordan material can be sent directly to Europe, or pass into Israel, where there is a legal antiquities market.” Id. “[M]aterial from Iraq will
Although looted material is traded on the illicit market upon its entry, many times these objects end up on the legitimate art market due to the good faith purchaser laws of several European countries, namely Switzerland.\textsuperscript{37} It is suspected that civil laws such as Switzerland's that favor innocent purchasers have created a legal loophole allowing "large quantities of stolen material to be 'laundered' by means of a good faith purchase. . . Switzerland, in particular, has a thriving market in cultural material and objects bought there can be sold legitimately in the UK or US."\textsuperscript{38} Once looters smuggle the illicit antiquities out of their country of origin and into a jurisdiction with good faith purchaser laws, the antiquity loses its bad title when it is purchased by a bona fide, good faith buyer.\textsuperscript{39} The object can then be transferred to other buyers at increased values without the subsequent buyers risking loss, due to claims brought by the rightful owner.\textsuperscript{40} Each transfer creates a receipt or bill of sale, "which are virtually all that the major auction houses require to show good title."\textsuperscript{41}

The issue of good faith purchasers arose in Autocephalous... and presumably then on to the markets in Europe, Japan, and the United States."\textsuperscript{Id.} "Large numbers of antiquities from Iraq, likely looted, have been on open sale in Europe and America for the past ten years..."\textsuperscript{Id.}

37. See Thomas and Charles Danziger, Hot Stuff There's a lot of Stolen Art Out There. As a buyer, how do you minimize your risk?, ART AND AUCTION, July 2003, at 82, explaining that, under U.S. law, stolen works may indefinitely be exposed to a claim by the original owner. However, in countries such as Germany, France, and Switzerland which have good faith purchaser laws, "a good faith purchaser may indeed acquire title from a thief, even against the rightful owner. . . in Switzerland a bona fide purchaser obtains good title to a stolen object if five years have elapsed since the theft."\textsuperscript{Id.}

38. Brodie, Stealing History, supra note 22, at 33. Brodie further notes that "[t]he attribution 'property of a Swiss gentleman' is regarded by some as a euphemism for 'illicit material.'"\textsuperscript{Id.}


40. Id.

41. Id.
Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc. 42 The case illustrates the limitations of good faith purchaser laws in purging the tainted title of stolen property.

Under Swiss law, a purchaser of stolen property acquires title superior to that of the original owner only if he purchases the property in good faith. Tr. 19 (von Mehren). A bad faith purchaser of stolen property never acquires title. As Professor von Mehren explained at trial, to conclude that a purchaser did not act in good faith, a court must either find that the purchaser actually knew that the seller lacked title, or find that “an honest and careful purchaser in the particular circumstances would have [had] doubts with respect to the capacity of the seller to transfer property rights.”

Swiss law presumes that a purchaser acts in good faith. However, a plaintiff seeking to reclaim stolen property may overcome this presumption. To do so he must show that suspicious circumstances surrounded the transaction which should have caused an honest and reasonably prudent purchaser to doubt the seller’s capacity to convey property rights. If the plaintiff shows that the circumstances surrounding the transaction should have created such doubt, then the defendant purchaser has the burden of establishing his good faith. A purchaser establishes his good faith by showing that he took steps to inquire into the seller’s capacity to convey property rights and that such steps reasonably resolved such doubt.43

42. Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc., 717 F. Supp. 1374 (S.D. Ind. 1989) [hereinafter Church of Cyprus], aff’d 917 F.2d 278 (7th Cir. 1990).
43. Church of Cyprus, 717 F. Supp. 1374, 1400 (citations omitted). The Court found that the circumstances under which Goldberg purchased the mosaics raised significant suspicions such that “an honest and reasonably prudent purchaser in Goldberg’s position [should have doubted the seller’s] capacity to convey property rights to the mosaics.” Id. at 1402. Ultimately, Goldberg had a duty to take reasonable steps to resolve the doubt created by suspicious circumstances and her cursory inquiry into the seller’s capacity to
As the *Church of Cyprus* case illustrates, good faith purchaser laws do have limits. Transacting the sale of antiquities in Swiss free ports does not necessarily purge an illicit object’s bad title. Courts assess the good faith of a purchaser based on an objective standard. The inquiry is not whether the purchaser believed that the title was good, but whether the honest and reasonably prudent purchaser would have reason to doubt the title’s validity. If the circumstances give rise to such objective doubt, then the purchaser has an affirmative duty to take reasonable steps to resolve that doubt. Most importantly, where the purchaser suspects that the object may have been stolen or illegally exported, the potential purchaser should contact authorities in the article’s country of origin.

There are also several other sources that purchasers can contact for information regarding a suspicious object. The International Foundation for Art Research collects and maintains an updated international registry of missing and stolen art objects. Interpol, the international police organization, has information regarding reported stolen objects. These resources are helpful only to the extent that an object is known to exist and is known to be missing or to have been stolen. Objects looted from archaeological sites complicate the inquiry. Such objects are not easily identified by their country of origin because the objects’ discovery was not recorded and the objects have not been formally inventoried by a museum or other institution. It may be difficult to determine the proper country of origin where the object is not particularly identifiable to a specific area or civilization. In the case of such objects, receipts or bills of sale may be the only evidence available making it difficult to determine whether good title ever existed.

Beyond the difficulties in tracing the source of illegally excavated antiquities, removal from archaeological sites creates convey property rights did not satisfy that duty. *Id.* at 1404. Thus, Goldberg did not purchase the mosaics in good faith so the title remained tainted. *See id.*

several other problems for the country of origin seeking to retain and protect its cultural property. The first great concern of scholars is the loss of context that occurs when archaeological sites are looted. Looting by clandestine diggers removes objects from the setting in which the object was found. The breadth of contextual information available at the time of discovery is permanently lost once the object is removed from its original setting.

The second problem created by archaeological site looting and the illicit trade of such objects is the emergence of fakes and forgeries on the international market. Skillful forgers attempt to take advantage of the high market prices that exist when the available supply is low and the demand remains great by creating a supply of fakes. Because objects that are looted directly from sites have no record of their findspot, it is up to the buyer to be able to discern genuine antiquities from fakes. This is not such a simple task. Looters do not record the discovery of those looted objects; therefore, the determination of genuineness must be made by an expert.

Fakes are designed to fool the expert and clever forgers have many techniques at their disposal — from simulating the accretions of grime and soot that may build up on an object stored for decades in the rafters of a smoky village hut, to smearing pots with mud from genuine archaeological sites. One Mexican forger was so successful that he was arrested and accused of looting Pre-Columbian sites. Authorities

45. See Patt, supra note 27, at 1209, explaining that only scientific excavation results in the appreciation of an object for its scientific, historic and cultural values. The loss of context that results from careless, illegal excavation prevents "archaeologists from reconstructing 'the functions of such objects, to learn more about diet, technology, trade, settlement patterns, religion, literature – in short, to learn about every aspect of a past society.'" Id. quoting Patty Gerstenblith, Ownership and Protection of Heritage: Cultural Property Rights for the 21st Century: The Public Interest in the Restitution of Cultural Objects, 16 CONN. J. INT'L L. 197, 199 (2001).

46. See Brodie, Stealing History, supra note 22, at 17.
released him only after a demonstration of his craft. 47

As long as the demand, and thus the price, for antiquities remains high, whether on the legitimate or the black market, there will be an incentive for forgers to create fakes.

The third problem is one of economics. The original finder of an antiquity that is traded on the illicit market receives less than 2% of the price paid by the final purchaser. 48 The structure of the illicit market necessitates the use of several middlemen. Looters in source countries do not have the means of negotiating a sale with the final purchasers in large market countries. Furthermore, those purchasers would never purchase directly from a source highly suspect of looting because of the inherent risk of the title being invalid. End purchasers buy antiquities only after they have developed a provenance legitimized through several previous transactions. Traders move the antiquities quickly out of the source country and into several intermediate countries before offering it for sale to purchasers in market countries. The price paid by each middleman increases at each stage of the trading process. Thus, the middlemen make a substantially higher profit from the sale of the antiquity than its original finder.

Limited economic beneficiaries are another related problem stemming from the disparate profit margins of the illicit antiquities

47. Id. Brodie also explains another case where the J Paul Getty Museum bought a marble statue supposedly dating to the 6th century BC. Id. at 18. The statue carried no provenance, and its accompanying documentation turned out to be false. Id. The Museum sought expert opinions from nineteen art historians and scientists. Id. The group concluded that they could not determine the authenticity of the statue. Id.

48. See Brodie, Stealing History, supra note 22, at 13-14. “It is clear that in all cases over 98% of the final price was destined to end up in the pockets of the middlemen; the original finder received very little and the final buyer can hardly claim to have obtained a bargain.” Id. at 13. See also Gerstenblith, supra note 19, at 226. “To the extent that the sale of looted artifacts benefits the local population, this economic benefit is dwarfed by the gains made by the middlemen in the later sequences of an object’s movement from point of discovery ultimately to private collector or museum in the United States or Western Europe.” Id.
market. In the source country, only the actual looter stands to receive economic benefit from his sale of antiquities. This benefit is relatively minimal yet must necessarily be sufficient to him as an individual to incite him to continue to loot and illicitly sell the antiquities. In the context of countries under severe economic depression it is easy to see how individual gains, though minimal, would be sufficient incentive especially when the looter receives enough money from such activity to provide food and shelter for himself and for his family.

On the other hand, the middlemen traders reap large economic benefits. Intermediate countries are not typically stricken with poverty. Thus, the middlemen trade purely for personal profit. Furthermore, the economic benefits, though they are initially only incurred by a few individuals, spread to the general economy of the middleman’s country when the traders spend their profits. With 98% of the profits for every sale of illicit antiquities going to the middlemen, the countries in which these traders live receive a great windfall of international funds that they would not receive but for the illegal trading. These countries do not have much incentive to prevent the illegal movement of antiquities through their borders because they incidentally receive economic benefits from the trade and they do not have any emotive ties to the cultural property of another country’s culture.

Where illicit trafficking in antiquities creates only a few individual economic beneficiaries in the source country with the majority of profits going to benefit middlemen and incidentally the middlemen’s countries, the opposite effect would exist if the antiquities remained within the borders of the country of origin. Antiquities that remain in the source country can be a great revenue generating source over an extensive length of time as they increase tourism, science and education, all of which are benefits to the nation as a whole and not just to one individual.  

49. See Gertenblith, supra note 19, at 226, explaining that “local museums and cultural tourism provide a sustainable form of economic benefit to local populations.”
C. Iraq’s Antiquities in the United States

Within just a few weeks of the initial museum looting, art collectors and dealers in the United States began receiving queries about Iraqi artifacts. The FBI expected that the “the thieves [would] attempt to sell most of the stolen pieces in wealthy countries such as the United States, Britain, Germany, Japan, France and Switzerland. Collectors in the United States buy about 60% of the world’s art, both legal and illegal.”

The international market for art, artifacts and antiquities surpasses the billion dollar level. It has been estimated that the illicit trade in antiquities world-wide is between $150 million and $2 billion per year. Sotheby’s, one of the world’s leading art auction houses, sells approximately 100,000 objects every year; of those, only a fraction of 1% are from the area comprising current day Iraq. The most commonly sold Iraqi antiquity in the United States is the cylinder seal, which garners a low price relative to the entire art market. The record price for a cylinder seal originating from this area and sold at Sotheby’s New York auction house was $143,000. However, the average U.S. market price

51. Id. quoting Lynne Chaffinch, manager of the FBI Art Theft Program.
53. Brodie, Stealing History, supra note 22, at 23. Due to the secretive and clandestine nature of illicit trade, reliable data is difficult to obtain. Id.
56. See Letter from Mathew Weigman, Director, Sotheby’s New York Press Office, to Karin E. Borke, Staff Writer, DePaul University College of Law Journal of Art and Entertainment Law (July 25, 2003), stating that, “[t]he highest prices for Sumerian (southern Iraq) in New York are probably for the
for a Sumerian cylinder seal is approximately $400. Revenue from legitimate sales of Iraqi antiquities on the U.S. art market is relatively insignificant. It is difficult to estimate the total market existing in the United States for trade in Iraqi antiquities. Data of transactions made and revenue generated from illegitimate sales is unknown because of the secretive nature of the black market. Furthermore, there exists an overlap of markets where, "[t]hieves usually attempt to sell stolen art and artifacts on the legal market."

II. ACTUAL LOOTING OF IRAQ'S NATIONAL TREASURES RESULTING FROM THE 2003 WAR ON IRAQ

A. Cultural Property Experts Issue a Pre-War Warning to the U.S. Military

Recognizing the danger of the past repeating itself, several

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57. A search of Sotheby’s online archives using the keywords “Sumerian” and “antiquities” produced 65 lots sold at the New York auction house over the last five years. Of those 65 lots, 41 (63%) were comprised of cylinder seals. One hundred fourteen seals were sold for a total of $46,971, resulting in an average closing bid of $412.03 per cylinder seal. In the five-year period from 1998-2003, the highest closing bid for one seal was $5,462 on June 4, 1998, for a Sumerian Lapis Lazuli Cylinder Seal with Contest Scene, Early Dynastic II/III, circa 2700-2400 B.C. The lowest price paid per seal in that five-year period was $65.71 when the closing bid was $460 for Seven Sumerian Limestone and Alabaster Cylinder Seals, Jemdet Nasr Period, circa 3100-2900 B.C. also on June 4, 1998.

58. FBI, supra note 50. The FBI usually gets information regarding stolen objects on the market when dealers or experts report suspect artifacts. Id.
members of the art, archaeological and cultural property community advised the U.S. Department of Defense regarding the protection of Iraqi's priceless antiquities. As early as December 2002, the United States enlisted a team of experts under the direction of McGuire Gibson, an archaeologist from the University of Chicago, to catalogue information about the location of historical and archaeological sites throughout Iraq. The concern is not just for the protection of patrimony of interest to the people of Iraq, but that the antiquities are of interest to the history of civilization and thus of interest to much of the modern world. With over 10,000 archaeological sites throughout the country, almost the entire country is an archaeological site. With the very real danger of cultural property destruction in mind, rival groups of academics, curators, and collectors all scrambled to influence the State Department and Pentagon officials regarding the minimization of destruction and looting of cultural property in the event of war. Gibson and his group of experts gave the Pentagon a detailed list of 4,000 Iraqi sites that needed to be protected and later added another 1,000 to that list.

Beyond the fear of site destruction from military combat, the experts also emphasized that the “museum was the single most

59. Bowen, infra note 62, at P12. “[R]ecalling the belated and flawed communication between the US government and experts during the 1991 Gulf War, the experts ‘want to point out what happened in the past and try to suggest ways in which we can avoid that, if at all possible, or at least to mitigate the consequences.’” Id. quoting Jane Waldbaum, AIA president.

60. See Patrick Anidjar, Conundrum for US Forces: how to conquer Iraq, but leave its treasures intact. AGENCE FRANCE-PRESSE, December 24, 2002.

61. Id.

62. See Ted Bowen, Caught in the line of fire – Archaeology Iraq – War may well see the destruction of thousands... FINANCIAL TIMES, Feb. 5, 2003, at P12.

63. Id.

64. Id. See also, Gibson supra note 4, at 20, explaining that “they put those [sites] into their computers, into their mapping systems. And I know the military made an effort not to destroy sites. They had a special list of 150 sites on the “do not target” list that included all the famous ones you can think of and a lot of others.”
important archaeological location in the country." The Archaeological Institute of America (AIA) additionally urged the government to "observe international treaties on cultural property, to work to minimize damage to archaeological sites and artefacts, [sic] to prevent looting, and to facilitate the preservation of Iraqi cultural heritage in the wake of any conflict."

B. Actual Looting at The National Museum in Baghdad

The looting of Iraq's National Museum in Baghdad occurred between April 9 and April 12, 2003, as U.S. forces entered Baghdad in the final days of the war. Prior to the war, museum staff moved many of the most important pieces out of the National Museum in Baghdad and into safe bank vaults and other secure hidden locations. The objects left in the galleries were either too large or too fragile to move or they were permanently attached to their gallery displays. Among the most important items taken by looters from the museum were the Warka Vase and the marble face of a woman, both from Uruk. Each of these items has subsequently been returned. The looters removed the Akkadian copper statute from Bassetki, that weighs several hundred pounds, by dragging it down several stairs damaging both the statue and the museum. Looters also damaged and destroyed many other

65. Gibson, supra note 4, at 20.
69. Id.
70. Id. See also John M. Russell, A Personal Account of the First UNESCO Cultural Heritage Mission to Baghdad, May 16-20, 2003, Archaeological Institute of America, Aug. 2003, at 4, explaining that the foot of the Warka vase remained attached to its pedestal, evidence that the looters broke the vase free.
71. See Gugliotta, infra note 82, at A10, stating that Warka Vase had been returned. As of July 28, 2003, of the 40 objects stolen from the galleries, 10 had been recovered. Russell, supra note 70, at 5.
72. See Russell, supra note 70, at 4. As of November 11, 2003 the Bassetki statue along with about 800 other smaller objects had been returned through the
objects and then left them behind.\textsuperscript{73} The administrative offices were also completely emptied of furniture and equipment.\textsuperscript{74} Many paintings in the administrative offices were badly damaged.\textsuperscript{75} The looters also took many small objects including cylinder seals and jewelry from one of the basement rooms, including an entire collection of cylinder seals totaling 4,795.\textsuperscript{76}

Aside from priceless gallery items, the looters also raided three of the museum’s five store rooms.\textsuperscript{77} The store rooms held the museum’s study collection.\textsuperscript{78}

The Iraq museum is a national archeological museum, which means everything excavated in Iraq goes there...\textsuperscript{[T]he vast majority [of these objects] went into the museum’s study collection...[and] were of equal importance to those on display. That’s because groups of objects tell the story of the people who left them there in a way that an individual object...exhibited on its own simply cannot.\textsuperscript{79}

Furthermore, many of the objects in the study collection may not yet have been inventoried by the museum. It is estimated that between 2,100 and 12,000 objects are missing from the store rooms.\textsuperscript{80}

The Coalition responded to the museum looting by creating an amnesty program to induce the return of looted objects.\textsuperscript{81} Under

\begin{footnotesize}
\begin{itemize}
\item 73. Russell, \textit{supra} note 70, at 5.
\item 74. \textit{Id.} at 6.
\item 75. \textit{Id.}
\item 76. \textit{Id.} at 9.
\item 77. Russell, \textit{supra} note 68, at B05.
\item 78. \textit{Id.}
\item 79. \textit{Id.}
\item 80. Russell, \textit{supra} note 68, at B05.
\item 81. See Guy Gugliotta, \textit{Iraq Museum is Slowly Recovering Artifacts}, THE
\end{itemize}
\end{footnotesize}
the program people could return objects with no risk of criminal or civil prosecution. On July 11, 2003, Colonel Matthew Bogdanos reported that,

about 2,260 objects stolen from the museum had been recovered within Iraq thanks to an amnesty program and police work. Most of these are from the old magazine, and many are replicas and forgeries. None of the 10,337 objects stolen from the basement storerooms – all of them genuine and many of them extremely valuable and easily marketable – had been recovered in Iraq.

The fact that the valuable, genuine objects taken from the basement rooms have not been returned supports Colonel Bogdanos’ conclusion that the theft in those rooms was committed by professionals. By September 15, 2003, Colonel Bogdanos stated that 3,411 items had been recovered under the amnesty program, but that more than 10,000 were still missing.

C. Actual Looting at Iraqi Archaeological Sites

It has been said that “the greatest cultural disaster of the war happened in southern Iraq, where looters plundered major archaeological sites.” Ambassador Pietro Cordone toured the sites in May and reported that dozens, sometimes hundreds, of clandestine diggers were at the sites taking only objects that would sell well on the export market and discarding the rest. In April, Iraqi officials requested that the American military assist in the protection of many archaeological sites. Military officials did

\begin{verbatim}
82. Id.
83. Russell, supra note 70, at 14.
84. Id.
85. Gugliotta, supra note 81, at A10.
86. Russell, supra note 68, at B05.
87. Id.
88. Edmund L. Andrews, Iraqi Officials Say Looting of Ancient Sites
\end{verbatim}
protect a few of the most famous sites such as Babylon, however, the vast majority remain unprotected.89

Marine officials stated that “protecting archaeological treasures was merely one of many priorities, and not necessarily on the top” in the aftermath of the fall of Saddam’s regime.90 Lt. Col. Richard S. Long stated that, “[y]ou have to put the securing of those archaeological sites within the mosaic of ensuring food, water, electricity, sewage and other types of basic needs.”91 There is simply not enough military man power to set up guards at all of the sites. It was suggested that the military could arm the Iraqi guards, however, “[e]xperts and local Iraqis say many guards had themselves become collaborators and even organizers of the looters.”92 The situation reflects the larger problem of anarchy that existed in Iraq following the fall of Saddam’s regime. It is the absence of law and law enforcement that gave rise to the looting.93

Without fear of legal consequences, local looters were free to take advantage of the great potential for immediate wealth. One reporter met with a local dealer who was able to produce a small bronze statue potentially worth thousands if it proved to be authentic, as well as several other ancient artifacts including cuneiform tablets and cylinder seals.94 The dealer offered everything for sale at prices of $1,500 and up.95 The dealer also stated that he had “more than a thousand tablets. I have big statues made of stone. Just tell me what you want, and I can show it to you.”96 All of the items had been stolen from archaeological sites in southern Iraq.97 The local dealers’ prices illustrate the profit

89. See id.
90. Id.
91. Id.
93. Id.
95. Id.
96. Id.
97. Id. Other large scale objects such as “[f]ull-sized urns, some packed with
incentive to loot as well as the profit margin problem when viewed in context of the world-wide art market. “[A] single sale of $2,000 is more than what many people earn in a year. But experts say the prices demanded... are a fraction of what those objects can fetch in Saudi Arabia, Kuwait, Europe and the United States.”

The archaeological concern is that looters destroy the ability of scientists to gain information from the context in which the objects are found. Furthermore, the rudimentary and reckless digging is destructive to the artifacts, often damaging them in the process of removal. Archaeologist Susanne Osthoff stated that, at Isin, “[i]n two weeks, they have ruined all the work that was done over 15 years.”

D. Public and Foreign Policy Concerns Surrounding the U.S. Failure to Protect Iraq’s Antiquities.

Though the military failed to immediately secure the Museum, Library, and many archaeological sites, it did respond quickly to the public outcry and subsequently secured the Museum. However, the looting that occurred while the museum was unprotected irreparably hurt the U.S. reputation. “The looting was a public relations disaster for the United States, which was sharply criticized for ignoring the pillagers as they charged through the museum.” Much of the international outrage stemmed from the fact that the United States failed to prevent a predictable disaster. Due to warnings from the cultural property community prior to the cuneiform tablets, are being dug up daily at sites like Isin and Chokha, a site to the south of Afak that [the dealer] said was his primary source of merchandise.”

98. Id.
99. See Andrews, Looters Tearing Up Sites, supra note 6. Dr. Donny George, of the Iraqi State Board of Antiquities stated that, “[i]f you find an artifact but you don’t have the context, you lose 80 to 90 percent of the information.”
100. See id. (explaining that swarms of looters were digging around the clock at Isin with shovels, knives, and semiautomatic weapons).
conflict, the United States had sufficient knowledge of the great international interest in and the importance of protecting Iraq’s many cultural treasures. At a Pentagon briefing in mid-April, U.S. Secretary of Defense, Donald Rumsfeld addressed the Defense Department’s failure to adequately protect Iraq’s antiquities. 102

Looting is an unfortunate thing. Human beings are not perfect. And we’ve seen looting in this country. We’ve seen riots at soccer games and various countries around the world. We’ve seen destruction after athletic events in our own country. No one likes it. No one allows it. It happens. And it’s unfortunate. And to the extent it can be stopped, it should be stopped.

To the extent it happens in warzone, it’s difficult to stop. The United States is concerned about the museum in Baghdad, and the president and the secretary of state and I have all talked about it, and we are in the process of offering rewards for people who will bring things back, or to assist us in finding where those things might be. 103

In the wake of the media coverage of the Museum’s looting, the United States faced a serious international relations crisis. One commentator noted that,

as the White House has learned in the aftermath of war in Iraq, art is a mighty weapon in the battle for hearts and minds. Lose or abuse the treasures of ancient civilizations, or fail to prevent others from doing damage, and incur a blast of international disapproval. Preserve artifacts and share the heritage of humankind, and perhaps, over time, even a foreign invader may gain respect. 104

103. Id.
It is clear that the United States needs to take affirmative steps to remedy the Iraqi antiquity situation in order to regain international respect. The implementation of legislation to prevent the importation of Iraq’s antiquities into the United States is one such measure that Congress is actively pursuing.

III. CURRENT U.S. LEGAL PROTECTIONS FOR IRAQ’S CULTURAL PROPERTY

In this section I will discuss two of the sources of protection for Iraq’s antiquities under current U.S. law. I will explain in detail the history, purpose, and legal application of the Convention on Cultural Property Implementation Act [hereinafter CPIA] because it is the most significant protective device for international cultural property under U.S. law. Furthermore, the House of Representative’s bill, H.R. 2009, proposes three amendments to the CPIA. Thus, it is necessary to be familiar with the legislative history of the CPIA in order to understand the significance of possibly amending this historical piece of legislation. I will then explain the inadequacies of the two legal structures currently available.

A. Treasury Department’s Office of Foreign Assets Control

Economic Sanctions

The United States imposed economic sanctions on Iraq pursuant to Executive Orders 12722 and 12744 when Iraq invaded Kuwait

105. A third source of protection for stolen property in the United States is the National Stolen Property Act. 18 U.S.C.A. § 2315 (2003) [hereinafter NSPA]. In U.S. v. Schultz, the 2nd Circuit recently upheld the McClain doctrine holding that the NSPA applies to property “stolen” from a foreign country, where the object’s “stolen” status is based on the patrimony laws of the foreign country. U.S. v. Schultz, 333 F.3d 393 (2nd Cir. 2003), see also U.S. v. McClain, 545 F.2d 988 (5th Cir. 1977). However, I will not address this avenue of protecting Iraq’s cultural property because it falls outside the scope of this legislative update.
in August of 1990.\textsuperscript{106} The economic sanctions included a "complete trade embargo which automatically prohibited trade in Iraqi antiquities."\textsuperscript{107} The United Nations Security Council also called on UN members to impose economic sanctions on Iraq pursuant to Resolution 661.\textsuperscript{108} Congress authorized the President to comply with the UN sanction recommendations pursuant to the International Emergency Economic Powers Act [hereinafter IEEPA].\textsuperscript{109} Section 586 of IEEPA is the Iraq Sanctions Act of 1990 that grants the President specific authority to comply with UN sanction recommendations and to impose trade embargos against Iraq.\textsuperscript{110} The Iraqi Sanctions Regulations are administered by the Treasury Department’s Office of Foreign Assets Control [hereinafter OFAC].\textsuperscript{111}

On May 22, 2003, the UN Security Council lifted most economic sanctions on Iraq by adopting Resolution 1483.\textsuperscript{112} The Resolution “also provided that Member States should establish a prohibition on trade in archaeological, cultural, historical, religious, and rare scientific items of Iraq, that may have been illegally removed from the country since the adoption of Resolution 661 back in 1990.”\textsuperscript{113} OFAC implemented the UN

\begin{itemize}
\item [106.] S. 1291 pmbl., 108th Cong. (2003).
\item [107.] Id.
\item [108.] Id.
\item [111.] Id.
\item [112.] Id. See also UN Security Council Lifts Iraq Sanctions at http://www.cnn.com/2003/WORLD/meast/05/22/sprj.irq.main (May 22, 2003), explaining the unanimous vote to lift the sanctions.
\item John Negroponte, the U.S. ambassador to the United Nations, said that ‘it is time for the Iraqi people to benefit from their natural resources’ after being frozen out of the world’s economy under Saddam Hussein’s rule. The resolution requires a one-year review, a step sought by Germany and France so that the U.S.-led power of authority would not be open-ended. Id.
SEARCHING FOR A SOLUTION

Security Council’s new Resolution the following day by issuing a general license to lift most of the U.S. trade sanctions on Iraq, while continuing to ban trade in looted Iraqi antiquities. The current OFAC sanction on Iraq’s antiquities is not indefinite. If the conditions that provided the legal basis for the sanctions no longer exist, then the sanction must be lifted. “[T]he legal authority for OFAC’s continuing restrictions on trade in Iraqi antiquities derives from the Executive Orders issued in 1990, which are... premised upon the existence of emergency conditions [in] Iraq.” Thus, the OFAC sanctions may be lifted at any time subject to a Presidential determination that emergency conditions no longer exist.

B. Convention on Cultural Property Implementation Act

The United States has historically resisted international pressure to broaden restrictions on the importation of art from foreign countries. The United States “resisted vehemently” the original council also called upon nations to respond to humanitarian appeals, to deny safe haven to the members of Saddam Hussein’s regime who are alleged to be responsible for crimes and atrocities, and to take steps to facilitate the return of Iraqi cultural property.” Id. See also U.N. SCOR, 4761st mtg. at 3, ¶7, U.N. Doc. S/RES/1483 (2003).

Decides that all Member States shall take appropriate steps to facilitate the safe return to Iraqi institutions of Iraqi cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from the Iraq National Museum, the National Library, and other locations in Iraq since the adoption of resolution 661 (1990) of 6 August 1990, including by establishing a prohibition on trade in or transfer of such items and items with respect to which reasonable suspicion exists that they have been illegally removed, and calls upon the United Nations Educational, Scientific, and Cultural Organization, Interpol, and other international organizations, as appropriate, to assist in the implementation of this paragraph.[.] Id.

115. Id.
116. Id.
117. See U.S. v. McClain, 545 F.2d. 988, 997, n.14 (5th Cir. 1977). In footnote 14, Circuit Judge Wisdom discusses the legislative history of certain art
1969 draft of the UNESCO Convention, because it would require signatory States to commit "themselves to make it illegal under their own law to import all art works exported without an export certificate from the territory of another party to the Convention."\(^{118}\)

The United States was successful in changing the mandatory import provision to a provision calling for "concerted international action, including import controls, only when needed in 'crisis' situations."\(^{119}\)

The Senate approved the revised UNESCO Convention subject to certain reservations.\(^{120}\) The United States ratified the UNESCO Convention in 1972 and formally implemented it through legislation in 1983, becoming the first market nation to do so.\(^{121}\)

U.S. participation in the UNESCO Convention plays an important role in U.S. foreign policy. The U.S. Department of State provided the following statement regarding its participation in the Convention:

The legislation is important to our foreign relations, including our international cultural relations. The expanding worldwide trade in objects of archaeological and

\(^{118}\) Id. at 997 n.14.

\(^{119}\) Id.

\(^{120}\) Id.

ethnological interest has led to wholesale depredation...resulting in the mutilation of...archaeological complexes of ancient civilizations... In addition, art objects have been stolen in increasing quantities from museums, churches, and collections. ...the appearance in the United States of [illicitly exported or stolen] objects has often given rise to outcries and urgent requests for return by other countries. The United States considers that on grounds of principle, good relations, and concern for the preservation of the cultural heritage of mankind, it should render assistance in these situations.\textsuperscript{122}

To date, one hundred countries are party to the UNESCO Convention.\textsuperscript{123} However, market nations have been slow to accede to the UNESCO Convention out of reluctance to restrict their art markets.\textsuperscript{124} Only recently did France, the United Kingdom, and Japan become State Parties.\textsuperscript{125} The UNESCO Convention "prohibits the importation of cultural property illegally exported or stolen from a foreign nation."\textsuperscript{126} But the UNESCO Convention also imposes an obligation on its member states to protect their own cultural property internally.\textsuperscript{127} This is a significant aspect of the UNESCO Convention, because it "encourages national...

\footnotesize{122. See Frequently Asked Questions at http://exchanges.state.gov/culprop/faqs.html.}
\footnotesize{124. Lehman, supra note 39, at 540. See also Patt, supra note 27, at 1222, quoting Jennifer Sultan, Comment, Combating the Illicit Art Trade in the European Union: Europol’s Role in Recovering Stolen Artwork, 18 NW. J. INT’L L. & BUS. 759, 776-77 (1998). Western European nations with large art markets are reluctant to join “because it ‘conflicts with common market regulations; that it would force them to return items housed in their museums; and that they are capable of preventing looting of their own archaeological sites without the Convention’s assistance.’” Id.}
\footnotesize{125. See supra note 121.}
\footnotesize{126. Lehman, supra note 39, at 539.}
\footnotesize{127. See id. at 540.}
protection measures, rather than international enforcement.”

The UNESCO Convention seeks to stop pillaging, looting, and the theft of cultural property by regulating the trade of international cultural property. Its focus is on private conduct, primarily during peacetime. After ten years of debate, Congress passed the Convention on Cultural Property Implementation Act as a somewhat restrictive ratification of the UNESCO Convention in December 1982, and the bill was signed by President Regan on January 12, 1983. The CPIA codified Articles 7(b) and 9 of the 1970 UNESCO Convention into U.S. law. The CPIA is civil customs and import law codified in the “Customs Duties” title of the U.S. Code.

The purpose of the CPIA was to “achieve greater international cooperation towards preserving cultural treasures that not only are of importance to the nations whence they originate, but also to

128. See Patt, supra note 27, at 1220, further explaining that the Convention, instead of creating standard, international export controls, requires signatories to introduce domestic export controls to prevent the illicit export of their own cultural property.

129. See Lehman, supra note 39, at 539, remarking that “it must be understood that the 1970 Convention did not emerge suddenly within the context of UNESCO. It was the end product of a long line of efforts to stop the pillaging and looting of archaeological sites, and theft of cultural property of extreme importance.” Id., quoting Lyndel V. Prott, International Control of Illicit Movement of the Cultural Heritage: The 1970 UNESCO Convention and Some Possible Alternatives, 10 SYRACUSE J. INT’L L. & COM. 333, 338 (1983).

130. See Original Manuscript, supra note 121 at *3. This is in contrast to the Hague Convention that focuses on protecting cultural property during times of armed conflict.


132. See Original Manuscript, supra note 121 at *3, stating that “[t]his Act, 19 U.S.C.A. §§ 2601-2613, focuses primarily on implementation of Articles 7(b) and 9 of the UNESCO Convention, which call for concerted action among nations to prevent trade in specific items of cultural property in emergency situations.”

greater international understanding of our common heritage."\(^{134}\) One commentator states that the enactment of the CPIA represented the United States' recognition of "the fact that free trade in cultural property has resulted in pillage of archaeological and ethnological materials and had deprived many nations of their cultural heritage."\(^{135}\) This implies that the purpose of the CPIA is to restrict trade in cultural property in order to curtail pillage and to preserve cultural heritage in its country of origin. However, in his concurring opinion in *Autocephalous Greek-Orthodox Church of Cyprus*, Circuit Judge Cudahy reasoned that,

\[\text{[t]he delay in the enactment of the [CPIA] apparently was caused, in part, by pressure from art dealers and traders, who argued that if the United States undertook unilateral import controls, illegal cultural property would simply be sold to those art market countries lacking similar import controls. In fact, the [CPIA] was perhaps finally enacted only because it was perceived as a restraint of sorts on certain Customs officers...The [CPIA], therefore, emphasized the need for concerted action and, in particular, seemed to prefer action resulting from bilateral treaties between the United States and the affected source countries.}\(^{136}\)

At the time the CPIA was enacted, certain customs officers, relying on the National Stolen Property Act, were seizing archaeological material from foreign nations that had vesting laws


\(^{135}\) Eck, *supra* note 131, at 609.

\(^{136}\) *Autocephalous Greek-Orthodox Church of Cyprus* v. Goldberg and Feldman Fine Arts, 917 F.2d 278, 297 (7th Cir. 1990). In *Autocephalous Greek-Orthodox Church of Cyprus*, the Church brought suit to recover stolen mosaics under Indiana's replevin laws. The court discussed certain U.S. international agreements regarding cultural property to illustrate U.S. policy. Though the CPIA was not directly applicable in this case, the court stated that "the policy that the Act embodies is clear: at the very least, we should not sanction illegal traffic in stolen cultural property that is clearly documented as belonging to a public or religious institution." *Id.*
by claiming that it was "stolen." After the McClain decision, U.S. Customs issued a directive that allowed the seizure of archaeological material coming from those countries that had national vesting laws. The dealer community thought the CPIA would help eliminate such practices by providing import restrictions on cultural property only to those States that entered bilateral trade agreements with the United States and on objects documented as belonging to and stolen from religious or public institutions of States party to the UNESCO Convention. As a result, the CPIA created bright line categories of archaeological material subject to seizure. However, the enactment of § 2607 eliminated the need to prove the mens rea of "knowledge" under the NSPA by allowing Customs to seize all cultural objects stolen from public institutions. Thus the CPIA did not really change the actions of U.S. Customs officers.

Pursuant to Article 9 of the UNESCO Convention, the CPIA allows the United States to participate in international protection of cultural property by proving a means for source countries to enter bilateral or multilateral trade agreements with the United States, whereby United States Customs officers enforce import restrictions on the cultural property of the foreign nation. And in certain emergency situations, the CPIA authorizes the President to impose unilateral import restrictions on the cultural property of the requesting State. Pursuant to Article 7(b) of the Convention, the CPIA also provides for blanket protection of stolen cultural property "documented as appertaining to the inventory of a museum or religious or secular public monument or similar

137. Id.
138. See U.S. v. McClain, 545 F.2d 988 (5th Cir. 1977), holding that Mexico's laws vested the country of Mexico with ownership of the pre-Columbian artifacts and that the illegal exportation of the artifacts from Mexico rendered them "stolen" within the meaning of the NSPA.
institution in any State Party.\textsuperscript{143} However, the CPIA limits the extent to which the market can be restricted through several conditions. These limitations strike a balance between the U.S. economic policy of a free market and Congress's recognition that the market for cultural property is unique and certain trade restrictions may be necessary to achieve the objectives of the Convention. The legislative history of the CPIA illustrates this point.

But unlike other commodities, increased or new production of these [archaeological and ethnological materials and antiquities] cannot rise to meet the demand. Instead, the increased supply results from the sales of known artifacts and those newly recovered from archaeological sites. The unique origin and character of these articles raises serious trade issues distinct from the normal concerns of the reciprocal trade agreements program or U.S. trade law.\textsuperscript{144}

The Senate further recognized that the United States is a "principle market for articles of archaeological and ethnological interest and of art objects[.\textsuperscript{145}] Finally, the Senate explained in full detail the several conditions that must be met before the President may authorize restrictions on the import of another nation's cultural property.

1. Definition of Material Subject to Import Restrictions

The first of such restrictions is embodied in the definition of the materials that qualify for import restrictions. In recognizing that the Convention does not define "archaeological" or "ethnological" material, the Senate committee reported the following: "[t]he definition is intended . . . to reflect the understanding of the U.S. negotiators that the application of import restrictions under

\begin{footnotesize}
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\item[144.] S. REP. NO. 97-564, 22-23 (1982).
\item[145.] Id. at 23.
\end{itemize}
\end{footnotesize}
agreements entered into...or emergency actions taken...is limited to a narrow range of objects possessing certain characteristics."  

By limiting the scope of material that qualifies for protection, the United States reinforced its economic policy of maintaining a free and open market. Thus, Congress intended to allow only a very specific category of material to be removed from that free market through the imposition of import restrictions.

Archaeological material is defined as "any object which is of cultural significance, which is at least 250 years old, and which normally has been discovered through scientific exploration on land or under water." The Senate committee stated that "the 250-year threshold age requirement ensures that the controls authorized by this Act will be applied to objects of significantly rare archaeological stature, while encompassing a range of important artifacts that are of a more recent vintage." The committee also noted that archaeological sites that are important to "understanding the settlement of North America contain objects not greatly exceeding 250 years of age." This finding indicates that Congress set the 250-years old minimum at what it considered the lowest threshold necessary for classifying archaeological material. Thus, the age requirement was not arbitrarily set, but rather was set with recognition given to the purpose of the legislation to protect cultural treasures that are important to their country of origin. In contrast, the Archaeological Resources Protection Act [hereinafter ARPA] sets the minimum age requirement at 100 years for the protection of U.S. archaeological material. However, ARPA is codified in Chapter 16 of the U.S. Code dealing with "conservation" as opposed to international trade and its purpose is domestic protection of U.S. archaeological

146. Id. at 25.
147. Id. See also 19 U.S.C.A. § 2601(2) (2003).
149. Id.
150. Id. at 21.
151. See 16 U.S.C.A. § 470bb(1) (2003) (stating that "[n]o item shall be treated as an archaeological resource under regulations under this paragraph unless such item is at least 100 years of age").
Ethnological material is defined more broadly than archaeological material. Ethnological material is "any object that is the product of a tribal or similar society, and is important to the cultural heritage of a people because of its distinctive characteristics, its comparative rarity, or its contribution to the knowledge of their origins, development or history." Though ethnological material is not limited by age requirements, Congress did intend for its scope to be limited. "The committee intends this definition, to encompass only what is sometimes termed 'primitive' or 'tribal' art, such as masks, idols, or totem poles, produced by tribal societies in Africa and South America." The Senate further explained that,

[t]he committee does not intend the definition of ethnological material... to apply to trinkets and 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. An agreement or emergency action would also not apply to ethnological material produced by more technologically advanced societies.

However, the definition allows the CPAC to have discretion in its interpretation of the statute and has been construed broadly in the past. Bilateral agreements such as those with Italy and Canada

152. See 16 U.S.C.A. § 470aa(b) (2003) (stating that the purpose of ARPA is to "secure, for the present benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands, and to foster increased cooperation and exchange of information between governmental authorities, the professional archaeological community, and private individuals having collections of archaeological resources and data").
155. Id.
are illustrations of such broad interpretation. 156

The requirements inherent in the definitions of archaeological and ethnological material create guidelines for the President and the Cultural Property Advisory Committee [hereinafter CPAC] to follow in its assessment of whether material qualifies for CPIA protection. It is, thus, clear that Congress interpreted and defined the key terms of the Convention so as to manifest its intention of limiting the scope of material for which other State Parties could request import restrictions.

2. UNESCO Convention State Party Requirement

Currently, the United States may impose import bans on the cultural property of other State Parties to the Convention. 158 This


157. The Cultural Property Advisory Committee is composed of eleven Presidential-appointed members. Two represent the museum community, three are experts in either archaeology, anthropology, or ethnology, three are experts in the international sale of cultural property representing the interest of collectors and dealers, and the remaining three are representatives from the general public. 19 U.S.C.A. § 2605 (2003). The Senate reported that the "exercise by the President of the authorities provided in [the CPIA] will require substantial input from knowledgeable representatives of the private sector. Section 206 [U.S.C.A. § 2605] establishes a Cultural Property Advisory Committee for this purpose." S. REP. NO. 97-564 at 30.

158. See 19 U.S.C.A. § 2601(5) (2003), defining "Convention" as "the Convention on the means of prohibiting and preventing the illicit import, export, and transfer of ownership of cultural property adopted by the General Conference of the United Nations Educational, Scientific, and Cultural Organization at its sixteenth session." And defining "State Party" as "any nation which has ratified, accepted or acceded to the Convention." Id. at 2601(9). See also, 19 U.S.C.A. §§ 2602(a)(2) and 2603(b) (2003), outlining the President's authority to enter agreements and to take emergency action.
requirement applies to bilateral agreements, to emergency actions, and to § 2607 blanket import bans on stolen cultural property. Additionally, the CPIA requires the foreign State to include, in its formal request for import restrictions, evidence of its domestic efforts to protect its own cultural property. These requirements are consistent with the UNESCO Convention’s emphasis on requiring a State to first protect its own cultural property at the domestic level before requesting assistance from the international community. By joining the UNESCO Convention, States assume a duty to take affirmative steps at the national level to protect their own cultural property. States that have failed to join the UNESCO Convention are under no such obligation. By only allowing the United States to enter trade agreements with other State Parties and by requiring a showing that the “State Party has taken measures consistent with the Convention to protect its cultural patrimony,” Congress has remained consistent with the UNESCO Convention’s policy supporting international concerted action as a supplement to domestic protection measures.

3. Duration Limitations

Specific statutory time limits create another limitation on the CPIA’s ability to restrict the free trade of cultural property. Bilateral and multilateral agreements impose initial import restrictions for 5 years. The agreement is then renewable for


160. See 823 U.N.T.S. 231, pmbl., regarding the policy considerations of the Convention. “... it is incumbent upon every State to protect the cultural property existing within its territory against the dangers of theft, clandestine excavation, and illicit export, ... to avert these dangers, it is essential for every State to become increasingly alive to the moral obligations to respect its own cultural heritage and that of all nations, [and] ... the protection of cultural heritage can be effective only if organized both nationally and internationally among States working in close co-operation[.]” Id. (emphasis added).


additional 5-year periods upon a finding that the necessary conditions still exist to warrant the renewal. Emergency import restrictions are limited to a possible 8-year maximum. The time limits for import restrictions are definite and put the requesting country on notice at the outset of the import ban’s expiration date. These provisions create clear time guidelines during which the State must strengthen its own internal protections. By eliminating the requesting State’s ability to rely on the U.S. import restrictions indefinitely, the requesting State has a greater incentive to take affirmative steps domestically to remedy risk of pillage. The time limit creates an incentive for the requesting State to take immediate remedial action while providing sufficient time for the creation of a domestic protective infrastructure. The limitations are consistent with the CPIA’s objective of encouraging self-help.

4. **Continuous CPAC Review**

All agreements and emergency import restrictions are subject to a CPAC review process. Where cause exists, the CPAC may recommend a suspension of an agreement. Additionally, if the CPAC determines that any agreement or emergency action is not achieving its objectives, the CPAC may make a recommendation for “improving the effectiveness of any such agreement or emergency action...” This procedural safeguard acts as a check on the necessity and effectiveness of import restrictions after the President authorizes their imposition.

5. **Conditional Requirements to Entering Bilateral Agreements**

Several other limitations are embodied in the specific conditions that the President, with the advice of the CPAC, must determine are met prior to entering a bilateral agreement. The Senate stated that such determinations “are intended to ensure that the requesting

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164. *Id.*
165. *Id.* § 2605(g)(2).
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.”

The first condition requires a showing by the requesting State that its cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials. This requirement is consistent with the general purpose of the Convention “to combat the increasing illegal international trade in national art treasures, which in some countries has led to wholesale pillaging.” The United States will, therefore, only restrict its art market through the imposition of import restrictions if the requesting State can prove that its material is in “jeopardy of pillage.” By imposing such a requirement the United States is further limiting the situations in which it deems trade restrictions necessary in order to preserve free trade.

The second condition requires that the State Party show proof of its own domestic protections for cultural property. The President may enter agreements only after determining “that the State Party has taken measures consistent with the Convention to protect its cultural patrimony.” This requirement reflects the UNESCO Convention’s objective of providing international import restrictions as a supplement to a State Party’s domestic protections.

Third, the CPIA requires that the requesting nation show that the U.S. import restrictions, if applied, would be an effective means of achieving the CPIA’s objective of “deterring a serious situation of pillage.” In addition, it must be determined that there are no less

170. See 19 U.S.C.A. § 2602(a)(1)(C)(i) (2003), requiring a finding that “the application of the import restrictions set forth in section 2606 of this title with respect to archaeological or ethnological material of the State Party, if applied in concert with similar restrictions implemented, or to be implemented within a reasonable period of time, by those nations (whether or not State Parties) individually having a significant import trade in such material, would be of
restrictive means of achieving the objective.\textsuperscript{171} Congress specifically intended that determinations for the necessity to impose import restrictions be made on an objective basis and from the U.S. perspective. Congress also intended to further the Convention policy of concerted international protection efforts when it enacted these provisions. The Senate noted such intentions when it reported that,

these limitations . . . 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 countries. . . . the concept that U.S. import controls should be part of a concerted international effort is embodied in Article 9 of the Convention and carried forward in section [2602].\textsuperscript{172}

When considering the likelihood of deterrence, it could be inferred that the CPIA requires an international market analysis regarding the trade of the material at issue. In enacting these requirements, Congress gave consideration to the nature of the antiquities and cultural property market as well as to its interest in preventing the impositions of unreasonable restrictions on trade.\textsuperscript{173}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{171} See 19 U.S.C.A. § 2602(a)(1)(C)(ii) (2003), requiring a determination that “remedies less drastic than the application of the restrictions set forth in such section are not available[.]”
\item \textsuperscript{173} See S. REP. NO. 97-564, 27 (1982), explaining that “[t]he determination of which countries have a significant import trade in the material that is in jeopardy of being pillaged, and whether the effort will help to ameliorate the problem, is within the discretion of the President. These decisions inherently preclude precise determination, given the goals of the Convention and the uncertain factual basis for them. Whether a country has a ‘significant import trade’ may be a function of not only value imports, but type and historic trading patterns. Therefore, a measure of Presidential judgment is required.
\end{itemize}
\end{footnotesize}
Due to the lack of specific data regarding the international market in the trade of antiquities, especially illicit antiquities, Congress recognized that it would be impracticable to require a specific market analysis.\textsuperscript{174} First it must be determined whether one or more nations have a significant import market for the material.\textsuperscript{175} If so, it must then be determined whether those countries have or plan to impose, in a reasonable time, restrictions on that trade.\textsuperscript{176} If a nation that does have a significant import market for the material is found to have import restrictions, (or plans to implement similar restrictions), then it must be determined whether those restrictions, in concert with the U.S. restrictions, would be a substantial benefit in deterring pillage.\textsuperscript{177} To make such a determination, the combined demand for the material in both the United States and the other nation(s) should be viewed in context of the global demand for such material. This could require an economic analysis to determine a minimum percent that the global demand for such material would have to be reduced to deter pillage. However, absent reliable, factual information regarding the market for such material, a general estimation may be made considering the known market facts and historical patterns of trade. Once a baseline percent is adduced, the question is simply, whether the combined total percent of demand in the United States and other market nation(s) is equal to or greater than the baseline percent. If it is, then this condition is satisfied. On the other hand, when it cannot be shown that the other market nation(s) currently has, or plans to impose in the near future, any market restrictions on the

\textsuperscript{174.} See id., stating that, "[i]t is the committee's further intent that the formula measuring the presence and worth of a 'concerted international effort' not be so mechanical as to preclude the conclusion of agreements under section 203(a) [codified at 19 U.S.C.A. § 2602(a)] where the purposes of the legislation nevertheless would be served by doing so."


\textsuperscript{176.} Id.

\textsuperscript{177.} Id.
material, then the condition is not met. In those cases, the United States will not impose restrictions on the import of such material because a constant demand for the material on the global market would remain. Thus, U.S. restrictions, if imposed, would not be an adequate means of reaching the objective of deterring pillaging.

However, Section 2602(c) of the CPIA provides an exception to subpart (i) of the third condition. The exception applies when "a nation individually having a significant import trade in such material is not implementing, or is not likely to implement, similar restrictions." 78 Under the exception, the President may impose U.S. import restrictions on the material if trade restrictions in the other market country "are not essential to deter a serious situation of pillage." 79 U.S. import restrictions, when considered in combination with similar restrictions implemented by nations that also have a significant import trade in such material, "would be of substantial benefit in deterring a serious situation of pillage." 80 Thus, if it can be shown that there is only one nation with a significant import trade in the material at issue that is not implementing similar import restrictions, then the exception may apply.

The next step would be to consider whether pillage deterrence can only be achieved if that nation imposes trade restrictions on the material. In order to make such a determination, the President should consider that country’s market share in the world-wide market for the import trade of such material. If that country’s individual market share is dominant, or so large that global demand will not be reduced absent that country’s participation in concerted trade restrictions, then the circumstances will not satisfy the “essential” prong of the exception. If however, the country’s individual market share is not dominant, then import restrictions in that country may not be “essential to deter a serious situation of pillage.” 81

When the first prong is satisfied, the third step is for the President to consider whether U.S. imposed restrictions, when considered in combination with current import restrictions or those soon to be implemented in other countries that also have a significant import trade, would substantially benefit the deterrence of pillage. It appears that this prong is satisfied when the sum of market shares for the United States and all significant market countries that have or plan to have import restrictions equals a dominant percent of the total market. Where both prongs of the exception are satisfied, then U.S. import restrictions may be imposed regardless of one market nation not participating through the implementation of import restrictions.

The second subpart of the third condition requires a determination that there are no less restrictive means of achieving the same objective. Under § 2602(a)(1)(C)(ii) of the CPIA, the President must make a finding that “remedies less drastic than the application of the restrictions set forth in such section are not available.” Thus, if the President determines that measures less drastic than a restriction on the importation of certain archaeological or ethnological material are available to prevent pillage of the material at issue, then the President shall not enter a bilateral agreement. This condition creates a requirement that the import restrictions be a narrowly tailored solution to achieve the government’s objective. Requests for import restrictions that sweep too broadly, that restrict more trade than necessary to reduce the incentive to pillage, will be denied.

The fourth condition requires the President to determine that the import restrictions under the circumstances of each case 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.”

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6. Restrictions on Emergency Actions

Additional limitations exist under the CPIA’s grant of authority to impose import restrictions on cultural property dealing with emergency situations. Before the President may impose unilateral import restrictions on a State’s cultural property, the State must have made a formal request to enter a bilateral agreement with the United States, the President must determine that an “emergency condition” exists, and the President must consider the recommendations of the CPAC. The imposition of emergency import restrictions is further limited by duration of applicability. Section 2603(c)(3) of the CPIA states that, “No import restrictions . . . may be applied under this section . . . for more than five years after the date on which the request of a State Party . . . is made to the United States.” The emergency import restrictions may be extended for three additional years if the “emergency condition” continues to exist. Before the President may authorize

184. Section 2603 of the CPIA covers the emergency implementation of import restrictions. 19 U.S.C.A. § 2603 (2003). This section outlines three situations that qualify as an “emergency condition.” Id. An emergency condition exists when the state’s cultural material is:

(1) a newly discovered type of material which is of importance for the understanding of the history of mankind and is in jeopardy from pillage, dismantling, dispersal, or fragmentation;

(2) identifiable as coming from any site recognized to be of high cultural significance is such site is in jeopardy from pillage, dismantling, dispersal, or fragmentation which is, or threatens to be, of crisis proportions; or

(3) a part of the remains of a particular culture or civilization, the record of which is in jeopardy from pillage, dismantling, dispersal, or fragmentation which is, or threatens to be, of crisis proportions. Id. § 2603(a).

185. See 19 U.S.C.A. § 2603 (2003). See also S. REP. NO. 97-564 at 28-9 (explaining the limitations of the President’s authority to implement emergency restrictions.) “First, it prohibits the President from implementing section 204 [U.S.C.A. § 2603] unless the State Party made a request to the United States. . Second, before making his decision on emergency action, the President must consider the views and recommendations of the Advisory Committee.” Id.

such an extension, the President is required to request and consider
the recommendations of the CPAC. 187

This Section of the CPIA does not require that the President
determine that import restrictions are the least restrictive means
before implementing emergency import restrictions. However,
Congress ensured that the emergency implementation of import
restrictions would not unreasonably restrain trade by specifically
limiting the duration of the import ban. Under the current CPIA,
emergency import restrictions may only be in place for a
maximum of eight years, as opposed to the possible indefinite
renewal process available for bilateral agreements.

7. The Limited Scope of Blanket Import Bans on Stolen Cultural
Property

Another limitation of the CPIA’s authority to restrict the free
trade of cultural property involves the provision covering stolen
cultural property. Section 2607 of the CPIA implements Article
7(B)(1) of the UNESCO Convention by creating a blanket
protection for “cultural property stolen from the inventory of a
museum or religious or secular monument or similar institution.”188
This Section creates a general ban on the importation of stolen
cultural property. However, the Section only applies if the object
was stolen from a “museum or religious or secular public
monument or similar institution in any State Party.”189 The
Section also requires that the object be “documented as
appertaining to the inventory” of such institutions.190 The
documentation requirement ensures that only objects stolen from
the institutions of other State Parties to the UNESCO Convention
will receive U.S. protection. An object’s proof of documentation
as belonging to another institution also serves as proof that the
object is “stolen.” Furthermore, objects stolen from private
IV. INADEQUACIES OF CURRENT PROTECTIONS

Congress recognized that neither the CPIA nor the OFAC sanctions could provide sufficient protection for Iraq’s antiquities. The following is an explanation of the legal loopholes that the proposed bills seek to close. Iraq is a State Party to the UNESCO Convention, however, because it lacks a formal government it would not be able to meet the first requirement under the CPIA, that the government of the State Party must make a formal request for the imposition of import restrictions. It is also debatable whether Iraq, absent a formal government, legally remains a State Party to the Convention. Furthermore, Iraq will not be able to satisfy the CPIA requirement that it “has taken measures consistent with the Convention to protect its cultural patrimony.” Though Iraq had very protective antiquities laws prior to the fall of the Saddam Regime and effective enforcement at least until 1991, it is not certain that, under the new government, those laws will be reenacted and enforced. If the new Iraqi government chooses to write new antiquities laws, they would have to provide sufficient safeguards for the national protection of Iraq’s own cultural property. Once enacted, such laws would have to be strictly enforced. However, Iraq does not yet have the resources to provide the infrastructure necessary for effective and strict enforcement of its antiquities laws.

If Iraq is still considered a State Party to the Convention, then it will qualify for the blanket protections provided under § 2607 of the CPIA covering documented and inventoried stolen cultural property belonging to a religious or public institution. Those objects of cultural property looted from the museums, libraries, schools, and other public institutions cannot be legally imported.

191. See 19 U.S.C.A. § 2607 (2003). “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. . .may be imported into the United States.” Id.
into the United States if the object is documented as belonging to the inventory of such an institution. Therefore, a significant amount of the items stolen from the National Museum in Baghdad would be subject to this import restriction. However, those objects in the study collection of the Museum that remain undocumented or are not inventoried do not qualify for protection. Similarly, all objects looted from archaeological sites are, by their very nature of not having been previously discovered, undocumented and do not qualify for protection under this Section of the CPIA.

The indefiniteness of the OFAC sanctions render them insufficient. The economic sanctions currently barring the import of Iraqi cultural property are subject to an executive order. If the President determines that the situation is such that the sanctions are no longer warranted, then the sanctions may be lifted at any time.

V. PROPOSED LEGISLATION

Representatives Phil English and Jim Leach responded immediately to the looting and pillage in Iraq by proposing H.R. 2009. In response to the broad protections endorsed in the House bill, Senators Charles Grassley and Max Baucus introduced S. 1291 as a more narrowly tailored means of protecting Iraq’s cultural property. Several members from the U.S. cultural property community responded to the proposed legislation with mixed support and concern. In November 2003, after taking into consideration the criticisms and concerns regarding H.R. 2009, Representatives English and Leach introduced a new bill in the House of Representatives that effectively replaces H.R. 2009.

A. HR 2009: Iraq Cultural Heritage Protection Act (I)

On May 7, 2003, Representative Phil English from Pennsylvania and Representative Jim Leach from Iowa introduced the Iraq Cultural Heritage Protection Act in the House of
Representatives. The purpose of the bill is "[t]o provide for the recovery, restitution, and protection of the cultural heritage of Iraq." As a means of achieving this purpose, the bill proposes a blanket import restriction on all "archaeological" and "cultural" material of Iraq that was removed from Iraq after August 2, 1990. The import restrictions are to run indefinitely, subject only to a future legislative act. The import prohibition shall be enforced at the point of entry by customs officials through seizure and forfeiture. The Act provides for repatriation of material forfeited in violation of the Act.

The definitions of the material subject to protection differ from those under the CPIA. The Act defines "archaeological material of Iraq" as:

any object or fragment or part of an object...that was first found within the borders of Iraq...and that was built, manufactured, sculpted, produced, or written by humans; is at least 100 years old; and was discovered as a result of scientific excavation, illegal or clandestine digging, accidental discovery, or exploration on land or under...
This definition differs from the definition of objects of archaeological interest under the CPIA, in that it reduces the minimum age requirement from 250 years to 100 years. It also requires that the material be produced by humans, whereas the CPIA merely states that the object must be of cultural significance. The bill defines “cultural material of Iraq” as:

any object, regardless of age, including manuscripts, and materials used for traditional or religious ceremonial purposes, or a fragment or part of an object, that was, on or after August 2, 1990, in the care of Iraq’s cultural or religious institutions and is of historic, artistic, religious, scientific, or cultural interest.

Under the CPIA, the second category of protected objects are those of “ethnological interest” which are the product of a non-industrial society and important to the cultural heritage of the people. The definition of “cultural material of Iraq” under H.R. 2009 covers a broader scope of material than what would qualify as ethnological material under the CPIA because it does not require that the objects be the product of a non-industrial society.

Section five of H.R. 2009 specifically defines the “country of origin.” This change eliminates the problem of determining how to define an object’s “country of origin” when applying customs laws. Under H.R. 2009, the country of origin is “the country within whose borders, as they exist at the time the object or fragment is imported...into the United States, the object or

198. Id. § 2(1). The bill also includes human and animal skeletal remains and plant remains under the definition of archaeological material if it is found in association with other archaeological material. Id.


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fragment was first discovered or excavated.\textsuperscript{203} Thus, any archaeological material's country of origin is the country in which it was first discovered or removed from the ground regardless of whether the material has been held in a private collection in another country for any length of time.

H.R. 2009 also proposes six significant amendments to the CPIA that are unrelated to the import restrictions to be imposed on archaeological and cultural material of Iraq under §§ 2-5 of the bill.\textsuperscript{204} First, the bill would change the definition of objects of archaeological interest under the CPIA to cover objects that meet a minimum 100 year age requirement as opposed to the current 250 year minimum.\textsuperscript{205}

The second amendment to the CPIA eliminates the requirement that the country receiving benefit of emergency import restrictions be a State Party to the UNESCO Convention.\textsuperscript{206} This amendment only applies to import restrictions imposed pursuant to section 2603 of the CPIA.\textsuperscript{207} It does not apply to bilateral agreements or to blanket import restrictions on objects stolen from institutions. Thus, UNESCO Convention State Party status is still required for cultural property protection pursuant to Sections 2602 and 2607 of the CPIA.\textsuperscript{208}

The third amendment eliminates the need for a country to make a formal request in order to receive emergency import restrictions.\textsuperscript{209} Under this bill, the President may on his own initiative impose emergency import restrictions when he determines that another country's situation warrants such protection.

Fourth, CPIA § 2603(c)(3) is replaced with a paragraph that omits the requirement that the President request and consider recommendations of the CPAC before extending emergency

\textsuperscript{203} Id.


\textsuperscript{205} See id. § 6(a).

\textsuperscript{206} See id. § 6(b), (c).


import restrictions. This change is intended to expedite the process of imposing emergency import restrictions in true emergency situations. It allows the President, acting alone, to react timely to emergency situations without having to wait for a formal recommendation from the CPAC.

Fifth, H.R. 2009 extends the duration of import restrictions imposed pursuant to unilateral emergency actions. The bill increases the initial duration of emergency restrictions from five years to ten. The amendment also changes the date on which the period begins to run from the current “date on which the request of a State Party...is made to the United States,” to “the date on which the notice in the Federal Register imposing such restrictions is published.” Because this bill eliminates the formal request requirement for emergency actions, the date for running also needed to be changed. This change extends, defacto, the length of protection.

The bill also states that “[s]uch 10-year period may be extended by the President if the President determines that the emergency condition continues to apply.” This sentence is significant because, though somewhat ambiguous, it appears to allow the emergency restrictions to be extended for a second ten-year term. Emergency import restrictions could potentially be in place for a total of 20 years as opposed to the current limit of 8 years. One could also interpret the sentence as failing to specify the length of time for restriction extensions. Interpreted as such, it can be inferred that the President is granted unlimited discretion in determining the length of the extension.

The sixth amendment proposed in H.R. 2009 increases the extension of bilateral agreements from an additional five years to an additional ten. However, H.R. 2009 does not change the initial five-year duration of import restrictions when they are imposed.

212. Id. § 6(b).
215. Id.

In response to H.R. 2009’s broad protection of Iraq’s antiquities and the attached CPIA amendments, the U.S. Senate proposed a bill specifically limited to remedying the Iraq situation. Senators Charles Grassley, a Republican from Iowa, and Max Baucus, a Democrat from Montana, proposed Senate bill 1291 on June 19, 2003, “[t]o authorize the President to impose restrictions on archaeological or ethnological materials of Iraq until normalization of relations between the United States and the Government of Iraq has been established.” 216 Sen. Grassley explained that the bill was meant to close the potential legal loophole in the protection of Iraq antiquities. “If the Administration were to normalize relations between the United States and the next Government of Iraq, thereby terminating the OFAC import restrictions, it is possible that looted Iraqi antiquities could begin entering the United States while we sit and wait for a possible bilateral agreement to be finalized.” 217

This bill simply authorizes the President to impose emergency import restrictions pursuant to his authority under § 2603 of the CPIA on all archaeological and ethnological material of Iraq without Iraq making a formal request and without a recommendation by the CPAC. 218 The bill allows the restrictions to run until September 30, 2004, or 12 months after the President certifies to Congress the normalization of relations between the US and Iraq. 219 Termination occurs at which time either deadline is met. 220 The bill also provides a specific definition of archaeological and ethnological material that would be subject to the emergency restrictions.

219. Id. § 3.
220. Id.
[T]he term “archaeological or ethnological material of Iraq” means cultural property of Iraq and other items of archaeological, historical, cultural, rare scientific, or religious importance illegally removed from the Iraq National Museum, the National Library of Iraq, and other locations in Iraq, since the adoption of United Nations Security Council Resolution 661 of 1990.221

Senators Grassley and Baucus intended that this legislation would provide a “narrowly tailored amendment to the Implementation Act.”222 It does not “seek to supplant the established process for protecting cultural antiquities under the Implementation Act; instead, it permits an extra guarantee of protection for Iraq’s cultural antiquities in the short term while Iraq completes its transition back into the community of nations.”223 This bill also addresses the balance of interests that Congress considered in its enactment of the CPIA. Grassley noted that “[a]s we work to reestablish the free flow of trade with a liberated Iraq, I believe it is very important that we in Congress remain mindful of the need to take steps to protect Iraq’s cultural heritage.”224

C. Public Support and Criticism of H.R. 2009 and S. 1291

Several organizations throughout the cultural property community expressed both approval of and concerns with the provisions of H.R. 2009 and S. 1291. The cultural property community is divided into three groups that traditionally have competing interests: the dealers and collectors, the museums, and the archaeologists. The dealers and collectors support H.R. 2009 to the extent that it deals with the Iraqi situation. However, they

221. Id. § 2(b). See also U.N. SCOR 1483, ¶7.
223. Id.
224. Id.
oppose those portions of H.R. 2009 that significantly amend the CPIA. The CPIA was enacted after thirteen years of careful Congressional consideration and debate and the dealer community believes it is inappropriate to hastily make significant changes to it. "We think there is no need to hustle these provisions through the Congress without open discussion and debate at hearings."225

The museum community generally supports the passage of S. 1291 and opposes H.R. 2009, with the exception of certain individual museums. The Association of Art Museum Directors [hereinafter AAMD] expressed its support for S. 1291 in June because the Senate bill would remedy the Iraqi situation without changing the current process of protecting cultural property under the CPIA.226 The Senate bill would "most quickly solve[] this pressing problem without unnecessary complications."227 The AAMD also stated that "[i]n a clear and concise bill, unburdened by extraneous elements, S. 1291 reinforces the federal government’s determination not to allow looted artifacts to enter the US."228

The American Association of Museums [hereinafter AAM] expressed its approval of the Senate’s "recognition that there might be a gap in legal authority to continue the current [OFAC


227. Letter from Peter Morrin, President, Association of Art Museum Directors, to Phil English and Jim Leach, Congressmen, U.S. House of Representatives (June 24, 2003) (encouraging the congressmen to modify H.R. 2009 so that it is more in line with the bill proposed by Senator Grassley).

228. Letter from Peter Morrin, President, Association of Art Museum Directors, to Charles Grassley, Senator, U.S. Senate (June 25, 2003) (expressing approval of the Senate bill’s approach because it does not eliminate the CPAC’s involvement in the determination of “emergency conditions” and it does not extend the CPIA’s protection to non-UNESCO countries).
sanctions] once an interim government in Iraq is in place."\textsuperscript{229} The AAM further stated that "[a]llowing the President to impose emergency import restrictions in an expedited and targeted manner in this particular case, as S. 1291 proposes, is thus very appropriate for the situation."\textsuperscript{230} The AAM has concerns similar to the dealers and collectors regarding the public policy of significantly changing the CPIA "without substantial public hearings and testimony, since it took 13 years of negotiation to arrive at the CPIA itself."\textsuperscript{231}

Other individual museums, such as The Field Museum, have gone on record in support of H.R. 2009 because it provides longer term protection than S. 1291.\textsuperscript{232} The Field Museum explained that "[r]especting another country's export restrictions, as proposed in H.R. 2009, is an important component of [the principles formalized in the UNESCO Convention]."\textsuperscript{233} The Field Museum also supports the CPIA amendments proposed in H.R. 2009.\textsuperscript{234} The Field Museum reasoned that "[g]iving the President the ability to enact emergency import restrictions without waiting for a [CPAC] opinion is of critical importance if this country truly wants to act quickly and in a meaningful manner in response to future incidents

\textsuperscript{229} Letter from Edward H. Able, Jr., President and CEO, American Association of Museums, to Charles E. Grassley, Chairman, Senate Finance Committee (July 7, 2003).
\textsuperscript{230} Id.
\textsuperscript{231} Id. See also Letter from Edward H. Able, Jr., President and CEO, American Association of Museums, to Jim Leach and Phil English, Congressmen, U.S. House of Representatives (July 29, 2003) (expressing that "significant revisions of the Act should not be undertaken without hearings and in the current pressing circumstances that require a quick solution").
\textsuperscript{232} See Letter from John W. McCarter, Jr., President and CEO, and Robert D. Martin, Vice President, Academic Affairs and Provost, The Field Museum, to Danny K. Davis, Congressman, U.S. House of Representatives (July 24, 2003).
\textsuperscript{233} Id. The Field Museum also noted that it has "continued its groundbreaking research and collecting activities" while refusing to "acquire... any object that cannot be shown to have been exported legally from its country of origin." Id. Such research and collecting is "proof that this type of legislation does not hinder scientific inquiry, nor will it lead to the end of collecting." Id.
\textsuperscript{234} Id.
around the world. . . .”235

Individuals and organizations from the scientific and academic community fully support H.R. 2009 because it offers greater protection for antiquities by enlarging the scope of objects that qualify for protection and by extending the duration of import restrictions. The Archaeological Institute of America [hereinafter AIA] endorses H.R. 2009 and not S. 1291 because the House bill provides indefinite as opposed to limited protection for Iraq’s antiquities.236 The AIA believes that the Senate bill “offers no disincentive to looting” because of its limited duration of applicability.237 John M. Russell, a professor of art history and archaeology at the Massachusetts College of Art, encouraged the archaeological community to support H.R. 2009, as opposed to S. 1291 because it would permanently prohibit the import of Iraqi antiquities and “close a loophole in the current US law.”238

D. H.R. 3497: Iraq Cultural Heritage Protection Act (II)

Congressmen English and Leach introduced H.R. 3497 into the House of Representatives on November 17, 2003. H.R. 3497 replaces H.R. 2009 and addresses several inconsistencies in H.R. 2009. H.R. 3497 proposes essentially the same ban on the import of Iraqi archaeological and cultural material as was proposed in H.R. 2009.239 The bill prohibits the importation of archaeological material and cultural material of Iraq into the U.S. if removed from Iraq after executive order 12722 of August 2, 1990 was issued.240

235. Id.
237. See id.
238. Russell, supra note 70, at 14.
239. See generally H.R. 3497, 108th Cong. §§ 3 and 4 (2003). However, the definition of “archaeological material of Iraq” now excludes coin and coin-like objects less than 250 years old and provides a specific definition for coins and coin-like objects. See H.R. 3497, 108th Cong. § 3(1) and (2) (2003).
Archaeological material must be at least 100 years old. Cultural material includes all objects, regardless of age, in the care of Iraq’s cultural or religious institutions that are of historic, artistic, religious, scientific, or cultural interest.

Rather than running indefinitely, the import restrictions on Iraqi archaeological and cultural material will cease “at the end of the 6-month period beginning on the date on which paragraph 7 of United Nations Security Council Resolution 1483... ceases to be effective or is suspended pursuant to a decision of the United Nations Security Council.”

H.R. 3497 contains CPIA amendments similar to those proposed in H.R. 2009. First, the amendments change the minimum age requirement within the definition of archaeological material from 250 to 100 years. Second, the amendments eliminate the UNESCO Convention State Party requirement for countries seeking import restrictions under § 2603 of the CPIA for emergency conditions. Third, H.R. 3497 authorizes the President to impose and renew emergency import restrictions without a formal request from the country and without requesting a review and recommendation from the CPAC. Fourth, H.R. 3497

242. Id.
244. H.R. 3497, 108th Cong. § 7(a) (2003). This amendment also excludes coin and coin-like objects less than 250 years old from the definition of “archaeological material.” Id.
245. Id. § 7(b) (striking “State Party” and replacing it with “country”). See also id. § 7(d) (conforming amendments).
246. Id. § 7(b)(2) & (c)(3). This new bill also changes the composition of the CPAC to add an additional position for a member from the museum community and a position for “an expert in the field of conservation of archaeological or ethnological artifacts, sites, or related areas.” Id. at § 7(c)(1) & (2). It should also be noted that although the requirement to consult the CPAC before entering or renewing an emergency import restriction has been eliminated, that requirement would still exist for entering bilateral agreements under § 2602 of the CPIA. See 19 U.S.C.A. §§ 2602(f) & 2605(f). The CPIA provision allowing the CPAC to do a continuous review of the effectiveness of all import restrictions, whether entered for emergency conditions or under bilateral agreements, will also still be available. See 19 U.S.C.A. § 2605(g) (2003).
extends the duration of import restrictions under both emergency conditions and bilateral agreements from five years to ten, with each being renewable for unlimited, subsequent ten year periods.\(^\text{247}\)

Congress intends, by amending the CPIA, to expedite the CPIA process of imposing emergency import restrictions and to provide a more targeted response for countries in emergency situations. Eliminating the mandatory CPAC consultation and the formal request requirement allows the President to evaluate the situation and, when warranted, authorize emergency import restrictions more quickly. This new bill also has the effect of extending the duration and scope of protection for international cultural property under U.S. law. The definitional change of archaeological material from a minimum 250 years to 100 years means that more artifacts will fall within the scope of material that qualifies for protection. The provision making emergency import restrictions available for non-UNESCO State Parties has the effect of further broadening the scope of material that qualifies for protection. Finally, by extending the duration of import bans, the bill significantly expands the length of time for which protection is available.

VI. ANALYSIS

The “least restrictive means” is the appropriate approach for protecting Iraq’s antiquities and amending the CPIA. Using the “least restrictive means” analysis, I will explain why neither S. 1291, nor H.R. 2009 should be passed in its current proposed form. I will then argue that H.R. 3497’s protection of Iraq’s antiquities is

\(^{247}\) H.R. 3497, 108th Cong. § 7(b)(2)(B) (2003) (“No import restrictions...may be applied under this section...for more than 10 years after the date on which the notice in the Federal Register imposing such restrictions is published. Such 10-year period maybe extended by the President if the President determines that the emergency condition continues to apply...”). And see id. § 7(e) (changing agreement durations from five years to ten, renewable for 10-year periods and allowing existing agreements to run for “ten years beginning on the date on which the agreement entered into force with respect to the United States”).
SEARCHING FOR A SOLUTION

 Properly tailored to meet its objectives, but that the CPIA should not be amended unless such amendments can be proven necessary.

A. Reason for Applying Strict Scrutiny

In maintaining consistency with the aims of the CPIA and the UNESCO Convention, any legislation seeking to restrict the free trade of cultural property through the imposition of U.S. import restrictions should be narrowly tailored to achieve its objectives. By requiring that import restrictions be necessary to achieve the protection of international cultural property and be the least restrictive means of aiding international cultural property protection, free trade will not be unreasonably restrained.

The United States aided in drafting the UNESCO Convention so that it requires each State Party to actively protect its own cultural property through strictly enforced domestic measures before seeking international support. This requirement was a concession on the part of the United States to accept certain import restrictions after rejecting the previously proposed total import ban on all objects illegally exported from a State Party. Furthermore, Congress enacted the CPIA specifically to implement into U.S. law only Articles 7(b) and 9 of the UNESCO Convention. The enactment of the CPIA represented Congress’s restricted adoption of the policies outlined in the UNESCO Convention. By accepting, as a market country, the burden of participating in the protection of cultural property under the UNESCO Convention, Congress intentionally constructed the CPIA to include several conditions and procedural safeguards as a means of limiting the executive authority to impose import restrictions thereby restraining trade. Congress achieved the appropriate balance between encouraging free trade and participating in the cooperative protection of international cultural property through its enactment of the CPIA.

Where the interest in protecting another country’s cultural property is substantial enough to warrant a restriction on free trade, the restriction must be narrowly tailored so that only those objects that are intended to be protected receive the benefit of the import
restriction. A restriction that sweeps too broadly, by protecting more objects than necessary or that lasts for unreasonable lengths of time cannot be justified under U.S. economic policy. The trade agreement prerequisites and procedural safeguards that are currently a part of the CPIA ensure that restraints on trade imposed pursuant to the CPIA are reasonable and narrowly tailored to serve the intended purpose of the CPIA and the UNESCO Convention. Thus, any changes to the current system must be proven necessary and the least restrictive means of achieving the objectives of the UNESCO Convention.

B. Applying Strict Scrutiny to the Proposed Legislation

In part 1, I will explain how the Senate bill fails the strict scrutiny standard because it is too narrowly tailored. S. 1291 provides inadequate protections and will not achieve its desired objective. In part 2, I will explain how H.R. 2009, conversely, sweeps too broadly and would have the effect of unreasonably restraining trade. In part 3, I will argue that H.R. 3497 provides the appropriate protection for Iraq’s cultural property given the emergency situation that exists in Iraq. In part 4, I will explain why it would be inappropriate to significantly amend the CPIA without proper Congressional hearings to assess whether such amendments are necessary to achieve the UNESCO objectives.

1. Analysis of S.1291

Several factors exist to justify the enactment of protective legislation. Iraq has already suffered a great loss caused by looters and pillage. The pillage of archaeological sites will continue to occur so long as Iraq lacks an effective infrastructure of laws and law enforcers to provide protection. The United States faces international criticism for its failure to adequately protect Iraq’s antiquities. The protective legislation responds to the international community’s call for effective protection of Iraq’s remaining cultural property. S. 1291 purports to be a narrowly tailored solution to the Iraqi situation by closing an alleged legal loophole.
However, I find that S. 1291 is insufficient to achieve the desired objectives.

The one-year limit of protection provided under S. 1291 is not an adequate assessment of the amount of time necessary for Iraq to enter a bilateral trade agreement under the current CPIA. First, it is not clear that within one year’s time Iraq will have a formal constitutional government in place to make the formal request. Until such government exists, Iraq cannot begin the application process provided for under the CPIA. Second, even if a formal government is in place within one year in Iraq, there is no guarantee that the Iraq Antiquities Authority will have the resources necessary to complete a formal application in a timely manner.

Third, it is also not clear that Iraq would be able to meet the CPIA requirements for emergency protection. The CPIA requires that the requesting country take effective measures to protect its own property. It is not clear whether the former Republic of Iraq antiquities law will be reenacted or whether a new law will be written. Furthermore, even if the former law is reenacted, the law standing alone would not necessarily meet the CPIA requirement absent a showing of its implementation through active enforcement. Such adequate national enforcement does not appear to be a high priority of the Iraqi people, nor even necessarily possible. Currently the protection and safety of the Iraqi people, and of other national resources, such as oil, is of graver concern. It is unrealistic to think that the amount of officers necessary to patrol the porous borders of Iraq and the thousands of archaeological sites will be trained and in place within one-year’s time.

Finally, even if the Iraqi government made a formal request to enter a trade agreement with the United States, there is no guarantee that such an agreement would be entered. The CPAC may not find that the conditions are satisfied for either a memorandum of understanding or for a unilateral emergency action. The final decision maker for all CPIA trade agreements is the President, or an officer appointed by him. Even if the CPAC gave an affirmative recommendation, the President has the
authority to refuse to enter the trade agreement. Considering the timetable for entering trade agreements as outlined by the current CPIA S. 1291 is an unrealistic approach to providing effective protection for Iraq’s antiquities.

2. Analysis of H.R. 2009’s Protection of Iraqi Antiquities

H.R. 2009 fails to reach the balance of interests intended by Congress in its enactment of the CPIA. H.R. 2009 affords more protection for Iraq’s antiquities than the Senate bill, but its protection sweeps too broadly and, therefore, constitutes an unreasonable restraint on trade. Because I do not agree with the protections for Iraq’s antiquities as proposed under this bill, I will not address the CPIA amendments until my discussion of H.R. 3497.

Though H.R. 2009 and the CPIA seek to regulate and restrict the international illicit trade of antiquities by eliminating a sector of demand on the world art market, H.R. 2009 and the agreements entered pursuant to the CPIA impose restrictions on the import of goods into the United States, thus, the effects on the U.S. market cannot be ignored. It is, therefore, important to balance two competing themes of public policy: U.S. economic policy and U.S. foreign policy. Legislation involving both realms of public policy should strike a balance between encouraging free trade and protecting international cultural property.

To remain consistent with traditional U.S. trade principles and policies, any trade regulation should have the effect of encouraging free trade. Under U.S. law, reasonable restraints on trade are generally permissible. In considering the affect of time limitations on reasonableness, the question is whether the length of the restraint is fair under all the circumstances. In this case, H.R. 2009 imposes an unlimited restraint on the trade of all archaeological and cultural material of Iraq. Import restrictions that could potentially run indefinitely are not reasonable in these circumstances. The import restrictions should have a limited duration to encourage the people of Iraq to take domestic measures to protect the country’s own cultural property. Without a time
limit on the U.S. import restrictions Iraq does not have an incentive to promptly implement and enforce domestic protective measures. Import restrictions with a definite time limit would restrict trade less than indefinite restrictions and would still achieve the aim of protecting Iraq’s cultural property in this emergency situation. Therefore, H.R. 2009 does not propose the least restrictive means of achieving its objective.

3. Analysis of Protection of the Iraq’s Antiquities under H.R. 3497

Under H.R. 3497, archaeological and cultural material of Iraq removed from Iraq after August 2, 1990, which lacks proper export documentation, shall not be imported into the United States. The import restrictions imposed on Iraqi material will be lifted “at the end of the 6-month period beginning on the date on which paragraph 7 of the United Nations Security Council Resolution 1483... ceases to be effective or is suspended.” Considering the extensive looting of several archaeological sites throughout Iraq resulting from the United States’ war on Iraq, it is clear that an emergency situation exists in Iraq and that the United States has an obligation to take remedial measures in this situation. To the extent that import restrictions may deter some trade of Iraqi antiquities and may aid in the recovery of those items stolen from the National Museum, the import restrictions are a necessary means of achieving the objective of the Iraqi Cultural Heritage Protection Act. As a matter of U.S. foreign policy it is important for the U.S. to actively participate in the protection and recovery of looted Iraqi antiquities. By specifically limiting the duration of the import restrictions imposed on Iraq’s antiquities, this bill strikes a fair balance between restricting free trade and the important foreign policy interest in actively protecting Iraqi cultural property.

4. Analysis of the CPIA Amendments Proposed in H.R. 3497

At issue is whether the CPIA amendments proposed in H.R. 3497 are necessary to achieve the objectives of the CPIA or whether they have the effect of allowing unreasonable restraints on free trade. It should be noted that the CPIA amendments are independent of the protection of Iraq’s antiquities under this bill. The amendments must be viewed in the context of their possible effects on future emergency actions and bilateral agreements and not in the context of the Iraqi situation.

a. Removal of State Party Requirement for Imposing Emergency Import Restrictions

Congress specifically stipulated that only UNESCO State parties would be eligible for U.S. import restrictions under the CPIA recognizing the policy of concerted international protection as a supplement to domestic protection for cultural property. The aim of the UNESCO Convention itself is to provide international cultural property protection as a supplement to domestic protections. In order to achieve this goal, the UNESCO Convention imposes an affirmative duty on each State Party to protect its own cultural property at the domestic level before requesting assistance from other State Parties. An amendment to the CPIA allowing any country, not just UNESCO State Parties, to receive emergency import restrictions for its cultural property ignores this key objective of the UNESCO Convention.

International agreements and emergency import restrictions are meant to encourage, and on some levels, facilitate national protection in order to prevent pillage. By eliminating the State Party requirement this amendment eliminates the guarantee that the country receiving the benefit of the import restrictions is also taking domestic actions to protect its own cultural property. If the country experiencing an emergency situation of pillage has no affirmative duty to try to remedy the situation domestically, then it is not likely that U.S. import restrictions will help reduce the pillage.
The theory behind the CPIA is that U.S. import restrictions will aid in reducing the demand for the looted antiquities by eliminating a market country’s demand. The import restrictions realistically only lessen demand on the legitimate U.S. market. The theory fails to consider the existence of a black market for antiquities as well as the continued demand in other market countries. With the existence of demand in other market countries as well as on the black market, the objective of reducing pillage cannot be met without a requirement that the country of origin take affirmative domestic measures to protect its own cultural property. Where the country of origin fails to take affirmative steps to prevent the pillage and traffic of such objects, the objects can leave the country easily and enter the world-wide market where demand continues to exist. Reliance on unilateral U.S. import restrictions alone is not an effective means of preventing pillage. Only those countries that are party to the UNESCO Convention should receive the reciprocal benefit of U.S.-imposed import restrictions because those countries have accepted the affirmative obligation of domestically protecting their own cultural property. Adhering to this requirement addresses two key policy issues: that international import restrictions are intended to supplement domestic protection and that import restrictions should only be imposed where they are a necessary means of reducing the incentive to pillage.

b. Elimination of Formal Request Requirement and CPAC Recommendation for Emergency Actions

Emergency situations require a timely response, however, the CPIA requirement for formal requests and a CPAC recommendation are administerial inefficiencies that hinder the CPIA’s effectiveness. The Iraq situation, which would clearly satisfy the emergency condition criteria, is an example of how these particular CPIA procedural safeguards inhibit the CPIA from reaching its objective of deterring pillage. Iraq is a State Party to the UNESCO Convention. It would clearly qualify for U.S. import restrictions under the emergency action section of the CPIA. However, without a formal government, Iraq is unable to make a
formal request for import restrictions so the CPIA approval process cannot be initiated.

Even if Iraq were able to make a formal request, the provision requiring a CPAC recommendation further hinders the timeliness of a U.S. response to true emergencies. Currently Section 2603 gives the CPAC 90 days to make a recommendation to the President. When one considers the damage and looting at the National Museum in Baghdad that occurred over the course of two days, allowing three months for administerial decision-making is not an effective means of providing emergency protection. By eliminating the CPAC recommendation requirement, the President would be able to respond to situations, like that of Iraq, in a timely manner. This change is necessary to achieve the objective of deterring serious situations of pillage. Furthermore, the CPIA provision allowing continuous CPAC review will continue to act as a check on all emergency actions authorized by the President.

c. Extension of Import Restriction Term Length to Ten Years Renewable for Additional Ten-Year Periods

The CPIA is based on the theory that import restrictions imposed by the United States, a market country, will cause a significant decrease in the demand of the antiquities subject to the restriction, thereby reducing the market price and, hence, the incentive to loot. Where the market price and demand drop, the profitability and the incentive to loot diminishes. At issue is whether, by extending the duration of import restrictions, such restrictions will affect the market price and decrease demand for antiquities on the global market or whether other less restrictive means exist to achieve such goals.

When applying a supply and demand theory to the antiquities market, one must consider the peculiar nature of the market. A reduction in the demand on the legitimate art market in the United States does not necessarily affect the total world-wide demand for antiquities. It is necessary to consider the black market for antiquities, the existing demand in other market countries, and the inelasticity of unique, non-renewable resources.
Strict import restrictions in market countries may reduce some demand of art collectors and dealers who desire to trade in only legitimate objects. However, the legitimate market for antiquities is small in comparison to the entire art market. The demand for antiquities cannot be viewed in a vacuum of legitimate and known collectors. It is not disputed that a significant black market for antiquities exists. The existence of any demand, whether on the legitimate or illegal market, helps antiquities retain a constant inflated value. Furthermore, antiquities retain great value regardless of minor increases and decreases in the demand on the legitimate art market. Therefore, antiquities continue to be traded at exorbitant prices on the black market. The existence of black market demand inhibits any measures intended to decrease the incentive to loot.

If open trade in antiquities is restricted through the imposition of import bans, then the trade of antiquities will be driven underground to the illegal black market. Import restrictions will merely force a change in the method of distribution from open market trade to black market trade. Increased sales on the illicit market inflate the market price because it is more risky to trade on the black market. The discrete nature of the market also causes price inflation because of a lack of open price competition. The secrecy of the black market affects information loss in two other respects. The scientific community loses contextual information because the object’s origin is often lost through the trade process. And the general public loses information because they are not exposed to the vast array of cultural material that is available. Where the effect of import restrictions is an increase of sales on the black market, import restrictions are not serving the purpose of protecting cultural property.

Import restrictions also reduce the transparency of trade, thereby inflating the price due to lack of price competition. Black market trade lacks the price competition necessary for consumers to trade at a fair market price. The existence of consumers willing to pay inflated prices provides an incentive rather than a disincentive to loot. On the other hand, open market trade increases visibility. A free and open market would reduce the impact of black market
trade on the inflated price of antiquities. If the price were controlled by competition and consumer access to price information on the open market, then prices would likely drop. Lower prices, and, therefore, lower profits for traders would have a more likely result of reducing the incentive to trade in stolen antiquities.

Open trade provides other benefits to the source country. It increases global knowledge and awareness of antiquities. Such increased awareness may stimulate tourism in the source country. Tourism driven by cultural property provides the source country with an incentive to protect and preserve its resource, the cultural property, in order to sustain a long-term source of revenue.

Open trade increases international knowledge of antiquities and encourages the sharing of cultural information. The availability of information acts as a stimulus necessary to increase tourism. Countries rich in cultural property resources have a potential economic stimulant that can be used to develop a strong tourism industry. Cultural tourism can be a great source of national income for developing countries. Wealthy tourists transfer their wealth from the market country to the source country by visiting cultural destinations. By deriving profits from the tourism industry, the transfer of wealth is from the market country to the country of origin, rather than to the middle-men countries. Thus, the source country receives the direct economic benefit from cultural property tourism. In order for this tourism model to be effective, it requires the source country to domestically protect and preserve its cultural property, as well as to stimulate tourism interest by controlling the dissemination of antiquities onto the open market. The source country could maximize its profits from its cultural property resources by allowing open trade of some of its antiquities on the international market thereby stimulating cultural tourism interest, and by enacting and strictly enforcing protective cultural property laws at the domestic level. However, the achievement of a thriving tourism industry based on cultural property resources takes years to develop. It may be necessary for the international community to aid the source country in protecting is cultural property by imposing short term import bans that run
only long enough for the source country to implement a protective domestic infrastructure.

With the goal of source country tourism in mind, a less trade restrictive means of reducing pillage would be for the source country to create a protective infrastructure that effectively guards and preserves its own cultural property. This requires the enactment of protective laws that are strictly and effectively enforced. Furthermore, publicity can play a large role in decreasing the incentive to loot. The general public views looting and pillage negatively. A country plagued with rampant pillage and looting can create negative publicity by exposing the looting epidemic through the media. This puts the world on alert that certain objects from that country may appear on the market as a result of pillage. Widespread knowledge that certain types of cultural property from certain countries are likely available due to looting and illegal acquisition makes collectors reluctant to purchase such objects. Publicity of well-known pieces renders them unmarketable. . . . "Some art objects are so well known there is no market." In this way, media exposure can help drive down the demand for such antiquities on the international art market. Such a reduction in demand reduces the incentive to loot. It can also create domestic public awareness of the pillage situation in the source country. This may further aid in the reduction of incentive to loot where looting becomes socially unacceptable.

To summarize, it is not clear that by extending the duration of import restrictions, the incentive to loot and pillage will be reduced. U.S. import restrictions do not necessarily decrease demand to the level required to reduce the incentive to loot and pillage. Rather, import restrictions should be viewed as a means of providing the country of origin an incentive to strengthen its own domestic protections. A reduction in pillage can be achieved through the combination of strong domestic protections and an open, transparent international market.

Following from this analysis, I propose that market restrictions

should only be imposed for the amount of time necessary for the country of origin to implement domestic cultural property laws and an effective law enforcement infrastructure. If Congress can prove that five years is an insufficient length of time for a country to achieve effective domestic protection and that ten-year import restrictions are necessary then I would support a time extension amendment to the CPIA. Ten years of import restrictions will not unreasonably restrain trade, where that time is necessary for the creation of permanent protections at the domestic level in the country of origin. The procedural safeguards provided by the CPIA ensure that the restrictions cannot be imposed or renewed except when necessary. Namely, the CPIA provides for ongoing committee review. Furthermore, the renewal of restrictions is conditional upon a finding that the situation continues to meet the criteria necessary to enter the original bilateral agreement or emergency action. Where actual proof can be offered to show that ten-year agreements are necessary, then the procedural safeguards of the CPIA will ensure that the extended period is the least restrictive means of achieving international cultural property protection. Absent such proof, I cannot support the duration extension of import restrictions imposed pursuant to the CPIA.

d. Minimum Age Requirement for Archaeological Material

Archaeological material is relevant only to bilateral agreements and emergency condition actions under the CPIA. U.S. import restrictions imposed on archaeological material of other countries are authorized by the CPIA's implementation of Article 9 of the UNESCO Convention.251 The UNESCO Convention provides


Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States Parties who are affected. The States Parties to this Convention undertake, in these circumstances, to participate in a
several different categories of material considered "cultural property." Only "antiquities" are given a specific minimum age requirement: they must be more than one hundred years old. Under the UNESCO Convention, Article 9 explicitly addresses archaeological and ethnological materials. Where the Convention defines these categories of cultural property without stating a minimum age requirement, the State Party's legislature is given discretion to set such standards. The U.S. Congress set the minimum age requirement for archaeological material at 250 years under the CPIA. However, under ARPA, protection for domestic archaeological material has a 100-year minimum. ARPA protects archaeological sites and materials domestically. It does not include a provision for ethnological material.

Arguably, that ethnological material does not have a minimum age requirement Congress indicated that more recent material could be subject to import restrictions. Given that more recent vintage material can be covered under the ethnological category of the CPIA, it may not be necessary to reconcile the age discrepancy for archaeological material in these two pieces of legislation. By extending the scope of material eligible for U.S. import restrictions to objects that are merely 100 years old, the possible protections under the CPIA reach beyond those intended by Congress when it implemented the UNESCO Convention. A change in the minimum age requirement from 250 years to 100 years for archaeological material has the potential to sweep too broadly by widening the scope of recent vintage material eligible for protection. A broad definition of archaeological material would allow the U.S. to enter bilateral agreements that are nearly totally inclusive of all material found and removed from the ground. If, 

concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific material concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State. Id. (emphasis added).

252. Id. art. 1(e).
253. See supra note 247.
however, Congress can provide specific findings that show how
the archaeological material age change is necessary to achieve the
objective of deterring serious situations of pillage then I would
support this amendment to the CPIA.

VII. CONCLUSION

Due to the ongoing looting of several archaeological sites
throughout Iraq and the severe damage and looting of the National
Museum, the Iraqi situation is one that warrants U.S. aid. The
current U.S. protections provided by the OFAC sanctions and the
CPIA are an inadequate remedy for the epidemic cultural property
loss in Iraq. In search of a legal solution to the problem at hand,
Each is distinctly different in its approach to protecting Iraq’s
antiquities from illegal importation into the United States. After
carefully analyzing the actual impact that each bill could have on
current U.S. legal structures, as well as on the trade of Iraqi
Antiquities, it is clear that H.R. 3497 is the best solution. However,
each amendment to the CPIA, as proposed in H.R. 3497, should be
strictly scrutinized and supported by actual proof of its necessity
before drastically changing the scope of trade restrictions available
pursuant to the CPIA.

Karin E. Borke254

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