

MARK K. NEVILLE, JR.

CUSTOMS AND BORDER PROTECTION AS CULTURAL GUARDIANS

That U.S. trade laws provide for the protection of certain private property rights is clear from several prior discussions in this column on border sanctions available to prevent trademark counterfeiting and patent violations.¹ But the United States is equally concerned with protecting public property rights. As a result, it has statutory programs to protect against the free and unfettered importation into the United States of cultural property that may represent the stolen patrimony of a foreign country.

These two sets of available import restrictions are meant to prevent the looting of pre-Columbian sites in the Western Hemisphere and impose a more general ban on cultural property without geographic

limitation and any subsequent free-for-all acquisition frenzy by United States art collectors, whether private individuals or museums or other public institutions. As discussed below, restricted imports are denied entry into the United States and in fact are subject to seizure and forfeiture at the border.

Protection for Pre-Columbian Art

Arising from the reaction to the indiscriminate looting of archaeological sites in Central and South America, the trade law and implementing customs regulations have prohibited the importation of pre-Columbian monumental or architectural sculpture or mural artwork from the pre-

Columbian Indian cultures of Mexico, Central and South America, and the Caribbean Islands after the effective date of the regulations, January 1, 1973.² The protected art is defined as any stone carving or wall art, or a fragment thereof, that is from the pre-Columbian Indian cultures in the geographical areas, was an immobile monument or architectural structure, or was attached or affixed to any such monument or structure and is subject to export controls in the country of origin.³ Only limited exceptions to this importation ban are permitted. The importer may be able to show that it has a certificate issued by the country of origin of the sculpture or material or, alternatively, that the sculpture or mural had been exported from the country of origin before January 1, 1973. If any of the covered articles are imported into the United

States, they are subject to seizure and forfeiture.⁴ They are to be offered first to the country of origin, which must pay the costs associated with the storage and return, or be subject to disposal in the normal manner prescribed for all forfeited articles.

Limitations

The limitations of this focus are important. These customs regulations were first promulgated to put into partial effect measures that stem from a 1970 UNESCO Convention to protect against the looting of art and architecture.⁵ The regulations are limited to the pre-Columbian era and are further limited to Mexico, the Central American countries, the Andean countries of South America (Bolivia, Peru, Ecuador, Colombia), and Venezuela. The effective date is a further limitation. The

MARK K. NEVILLE, JR., LL.M. (International Legal Studies), NYU, is Principal of International Trade Counsellors and may be reached at mkneville@itctradelaw.com. He has served as an adjunct professor at the University of California, Berkeley's Haas School of Business and NYU's Stern School. Mr. Neville is the Journal's Customs & Trade correspondent and a member of the Board of Advisors.

regulations specify an effective date of January 1, 1973. Thus, if the importer can show export prior to that date, the prohibition on importation will not apply.⁶

General Protection for Cultural Property

Apart from the separate pre-Columbian regime, there is a more generally applicable ban on the importation of certain archaeological or ethnological material. This is a feature of the Convention on Cultural Property Implementation Act (CPIA).⁷ The import restrictions that are available follow requests from the other signatory countries, or "state parties," to the UNESCO Convention.

There is a bit of overlap with the pre-Columbian regulations, as specific import restrictions have been imposed on certain archaeological material from such countries as Nicaragua, Peru, and Colombia.⁸ Because the few rulings that Customs and Border Protection (CBP) has issued in this area do not specify which statutory program is relevant to the inquiry, where the relevant country involved falls under both programs, it must be inferred from the referenced dates whether the cultural property or the specific pre-Columbian regime is being applied. In ruling no. E84818 (July 20, 1999), CBP applied the 1991 date of a bilateral agreement with Guatemala and also applied the 1971 date of a treaty with Mexico. Thus, each of these dates served as the respective effective date for application of the restrictions. In ruling no. 877224 (August 20, 1992), the entry into force of the UNESCO Convention in

Panama in November 1973 was seemingly taken as the jurisdictionally significant date. The Brooklyn Museum sought to lend objects for an exhibition in Brussels and requested advice on the right to re-import the objects. CBP concluded: "Since these artifacts have been in the possession of the Brooklyn Museum prior to that date [November 13, 1973], they will not be subject to import bans or treaties governing cultural property."

The purpose of the CPIA is to promote U.S. leadership in achieving greater cooperation in preserving cultural treasures, of importance to the countries where they originate as well as for greater international understanding of common or shared heritage.⁹ Congress was concerned with the irremediable destruction of archaeological sites and articles.

The customs regulations closely track the statute. As with the pre-Columbian art restrictions, there are limitations to the CPIA coverage. First, the import restrictions apply only to archaeological or

ethnological material, which are defined as articles of archaeological or ethnological interest or fragments thereof. To be of archaeological interest, the article must be of cultural significance and be at least 250 years old and normally discovered as a result of excavation, digging, or exploration. To be of ethnological interest, the object must be the product of a tribal or nonindustrial society and important to the cultural heritage of a people.¹⁰

Presidential Action

The CPIA empowers the President to take certain action, after a request by another state party, if he determines that (1) the cultural patrimony of the state party is in jeopardy; (2) the state party has taken measures to protect its cultural patrimony; (3) application of import restrictions would be of substantial benefit and there are no less drastic remedies available; and (4) application of the import restrictions is consistent with the general interest of the international

community in the interchange of cultural property.

In the ordinary course, the President may impose restrictions under a bilateral or multilateral agreement.¹¹ In emergency situations, the President is empowered to quickly implement import restrictions, to run for not more than five years.¹² An "emergency condition" includes instances where a material is newly discovered, is identifiable as having come from a site of high cultural significance, or is part of the remains of a particular culture or civilization, the record of which is in jeopardy of crisis proportions from pillage, dismantling, dispersal, or fragmentation. Even here, a state party must have requested U.S. action and the recommendations of the Cultural Property Advisory Committee (CPAC)¹³ must be taken into consideration.

The reference to the CPAC speaks to the balancing at the heart of the CPIA. The CPAC is to comprise 11 representatives from various sectors—museums, scientific community

¹ 19 U.S.C. sections 1526 and 1337, respectively. See, e.g., Neville, "Lever Rule: Gray-Market Showstopper," 21 JOIT 19 (October 2010).

² Act of October 27, 1972, PL. 92-587, codified at 19 U.S.C. section 2091 *et seq.* and 19 C.F.R. sections 12.105-109.

³ 19 U.S.C. section 2905(3).

⁴ 19 U.S.C. section 2903.

⁵ United Nations Educational, Scientific and Cultural Organization Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, November 14, 1970, Art. 1, 823 U.N.T.S. 231 (UNESCO Convention). At the present time, over 100 countries are signatories.

⁶ See CBP ruling no. I89448 (December 19, 2002).

⁷ Act of January 12, 1983, PL. 97-446, codified at 19 U.S.C. section 2601 *et seq.*, with the corresponding customs regulations promul-

gated at 19 C.F.R. sections 12.104 *et seq.*

⁸ Canada is a state party in the Western Hemisphere that has requested assistance under the CPIA. Other state parties outside the Western Hemisphere that have requested imposition of import restrictions include Italy, Cambodia, and Cyprus.

⁹ S. Rep't No. 97-564 (1983).

¹⁰ 19 U.S.C. section 2601(2).

¹¹ 19 U.S.C. sections 2602, 2604.

¹² 19 U.S.C. section 2603.

¹³ Organized under the authority of 19 U.S.C. section 2605.

¹⁴ Pursuant to 19 U.S.C. section 2604.

¹⁵ 19 C.F.R. section 12.104g(a).

¹⁶ For an example of a recent renewal of import restrictions, see CBP Dec. 10-32, extension of import restrictions on certain categories of archaeological material from the pre-Hispanic cultures of the Republic of Nicaragua. 75 Fed. Reg. 64,654 (October 20, 2010) reprinted

in 44 Cust. Bull. No. 45, November 3, 2010, page 1.

¹⁷ 19 U.S.C. section 2606(a), 19 C.F.R. section 104c.

¹⁸ 19 U.S.C. section 2611, 19 C.F.R. section 12.104h.

¹⁹ This would have applied to the materials being returned to the Brooklyn Museum in ruling no. 877224, although that ruling had not specifically cited to the CPIA.

²⁰ Schultz, 333 F.3d 393 (CA-2, 2003), makes it clear that a person whose property has been seized and forfeited under the CPIA can also be prosecuted under the National Stolen Property Act, 18 U.S.C. section 2315. For good discussion and application of the CPIA in a recent case, see Eighteenth Century Peruvian Oil on Canvas Painting of the "Doble Trinidad," 597 F. Supp. 2d 618 (DC VA, 2009).

²¹ 19 U.S.C. section 2609, 19 C.F.R. section 104e.

²² 19 C.F.R. section 104d.

(archaeology, anthropology, ethnology), dealers/sellers, general public. Members are to serve for three-year terms. The CPAC is organized under the auspices of the U.S. Information Agency, an agency of the State Department. The CPAC is expected to review all state-party requests for import restrictions.

Once the President's determination to impose restrictions is taken, the materials designated for restrictions¹⁴ are announced in the Federal Register and published in a listing in the customs regulations.¹⁵ The five-year limits on restrictions are subject to renewal if the state party so requests a continuation and the President determines that renewal is justified.¹⁶

There is one way around the import restrictions once they have been announced. First, an importer may be able to produce a certification or other documentation from the state party showing that the exportation was not in violation of the laws of the state party.¹⁷ Second, the importer may be able to look to the timing of the removal of the material from the foreign country. The importer has the option of showing that the material was exported from the state (1) not less than ten years before the date of such entry and that neither the person for whose account the material is imported nor any related person contracted for or acquired an interest in the material more than one year before the date of entry; or (2) on or before the date that the material was designated under the CPIA. The importer's "satisfactory evidence" of the exportation date consists of declarations under oath and statements of the

dates of the exportation, with reasons therefor.

Exemptions

Certain exemptions also come into play. For instance, the cultural property regulations will not apply if the material is being imported temporarily for an exhibition or display and the material is immune under a 1965 statute.¹⁸ Also exempt are any designated archaeological or ethnological material that the terms of the exemption make clear are being returned to the United States.¹⁹ Such returned material will be exempt if it has been held for not less than three consecutive years by a recognized museum or similar institution but only if the material had been purchased in good faith and if the acquisition been reported, the material has been exhibited for at least one year during that three-year period or has been catalogued and the catalogue material has been available for at least two years. Other exemptions apply if the material had been in the United States for not less than ten years or 20 years and other conditions apply. All of these exemptions create something of a safe harbor for material already in the United States.

Stolen Property

The CPIA also contains a blanket prohibition against importing stolen cultural property. This definition of "stolen" is circumscribed in that (1) the theft must be from the inventory of a museum or religious or secular public monument or similar institution in any state party; and (2) the theft must have occurred after the later of the effective

date of the statute (January 12, 1983) or the entry into force of the UNESCO Convention for the state party.²⁰ The consequences of the designation of materials for import restrictions or that the imported materials were stolen makes them subject to seizure and forfeiture.²¹

Seizure and Forfeiture

As noted many times in this column, CBP is the enforcement arm of the government at the border. With cultural property, no less than with other prohibited or inadmissible goods, importers will learn that CBP is vigorous in this role. If the importer cannot produce certification or other documentation to establish that importation of the cultural property is permitted, CBP will first detain the goods and send them to a bonded warehouse. The importer has 90 days, or such longer time as may be granted, to produce the needed information.²² If the importer advises that he cannot or will not produce the requisite documentary proof, or if he simply fails to produce it, the goods will be seized and summarily forfeited to the United States. Any such designated archaeological or ethnological material that is seized will first be offered to the state party or to a claimant who can establish that he has valid title and is a bona fide purchaser in good faith for value. In either event, the government must be repaid for the expenses involved in the return and delivery of the material. If neither the state party nor the claimant wants to regain the seized material, it will be disposed of in the usual manner prescribed by law. Seized property that is

stolen will first be offered to the state party, which pays the necessary expenses, or will otherwise be disposed of in the manner prescribed by law.

Conclusion

As enacted, the CPIA reflects a balancing of competing interests. On one hand, restricted importations will be caught at the border and seized and forfeited. On the other hand, certain safe harbor carve-outs protect the interest of US stakeholders.

Some would favor the forcible return to its country of origin of all cultural property, under all circumstances and with no exceptions. Others would argue that cultural property should remain in the United States for several reasons, including that such property might be better safeguarded than in its country of origin. As with most endeavors that might be styled a compromise, criticism of the CPIA may be expected from both camps.

To the extent that there can be competing interests on these issues, the constituency of the CPAC is interesting. Of the total of 11 members, fully five represent the combined interests of museums (two) and dealers (three), both of whom might be assumed to have an alignment of interest in gaining access to cultural property. For their part, the scientific community (three) might be expected to want full protection of the cultural property *in situ*. The three representatives of the public must be seen as something of a swing vote. Given further that no less drastic remedies must be available, the President's actions under the CPIA can be expected to be measured. ●