

January 3, 2007

Cultural Property Advisory Committee
U.S. Department of State
301 4th Street, S.W.
Washington, D.C. 20547

Dear Committee Members,

I am submitting this letter on behalf of myself and the Lawyers' Committee for Cultural Heritage Preservation¹ in support of the proposed extension of the United States-Cyprus Memorandum of Understanding. I will focus my comments on the third determination and seek to inform the Committee concerning the current status of the various international conventions as these may be relevant to the Committee's findings under this determination with respect to Cyprus.

The Senate Report that accompanied enactment of the CPIA noted that determining which countries have a significant import trade may be a function of "type and historic trading patterns" as well as of monetary value (Senate Report No. 97-564, 27). The use of the word "similar" (rather than the word "same") in the statutory language to describe the actions of other nations to be considered indicates that the CPIA only requires that other nations need to take similar actions that serve the underlying purpose of restricting the trade in looted artifacts. The CPIA's explicit inclusion of the actions of nations that are not party to the 1970 UNESCO Convention further indicates that the precise form of restriction used by other countries is not relevant. The Senate Report urged 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) where the purposes of the legislation nevertheless would be served by doing so" (Senate Report No. 97-564, 28). The Senate intended this requirement to be interpreted with a significant degree of flexibility on a case-by-case basis. Thus, if a nation restricts the import of such artifacts without the use of bilateral agreements or even if the nation restricts the trade in such artifacts through a means not including import restrictions, these actions should still be considered as part of the third determination analysis.

Recent developments indicate that the evidence for an international response to the problem of the looting of archaeological sites in Cyprus has increased considerably over the past five years. The most significant development with respect to Cyprus is its entry into the European Union in 2004 which now has a membership of twenty-seven. The nations that are members of the European Union are part of the regulatory regime established by the European Directive on the return of cultural objects unlawfully removed from the territory of a Member State and the European Regulation on the export of cultural goods (93/7/EEC of 15 March 1993 and 3911/92 of 9 December 1992, respectively). The Regulation requires the

¹ The Lawyers' Committee for Cultural Heritage Preservation is an association of lawyers who have joined together to promote the preservation and protection of cultural heritage resources in the United States and internationally through education and advocacy.

presentation of an export license for cultural goods to be exported outside of the area of the European Union, while the Directive provides for the return of cultural objects that have been illegally removed from a Member State. These EU provisions cover several traditional market nations, including the United Kingdom, Germany, France and Belgium, thereby bringing these nations into a regional treaty regime.

There are now 110 States Parties to the UNESCO Convention, twenty of whom joined the Convention since the time of Cyprus's initial request for a bilateral agreement, including the United Kingdom, Switzerland, Japan, Denmark and Sweden. Several other market nations are seriously considering ratifying the Convention (such as Germany and Belgium) with Germany already preparing draft implementing legislation. Unlike the situation in the United States, ratification of the Convention is self-executing in many countries. In those countries, there is no need to enact implementing legislation. In addition, other nations, such as Australia and Canada, have enacted domestic implementing legislation that automatically prevents the import of illegally exported cultural materials from other States Parties. These nations have therefore *already* implemented restrictions that are *similar* to, albeit much broader than, any import restrictions that would be imposed by the United States pursuant to the CPIA.² Switzerland has just entered into its first two bilateral agreements (with Italy and Peru) under its implementation of the UNESCO Convention.³

The United Kingdom has implemented its ratification of the UNESCO Convention through creation of a new criminal offense. This legislation criminalizes the knowing dealing in "tainted cultural objects," which are defined as an object whose "removal or excavation constitutes an offence."⁴ However, application of the criminal offence statute goes an additional step toward restraining the trade in looted archaeological artifacts. The offence of dealing in tainted cultural objects includes the import or export of such objects, in which case Her Majesty's Customs and Excise (HMCE) investigates the potential offence and is empowered to seize such objects as part of the investigation.⁵ If HMCE determines that there

² These restrictions are much broader because they apply to *all* illegally exported cultural materials and are not restricted to archaeological materials that are older than 250 years or to specifically designated categories of archaeological and ethnological materials. See, e.g., Canada Cultural Property Export and Import Act, R.S.C. 1985, c. C-51, § 37; Australia Protection of Movable Cultural Heritage Act 1986.

³ See http://www.kultur-schweiz.admin.ch/arkgt/kgf/e/e_kgt.htm. The Swiss bilateral agreements differ from those of the United States because they continue indefinitely without need for renewal. Federal Act on the International Transfer of Cultural Property, Article 7. The Swiss statute, unlike the CPIA, provides criminal penalties for illicitly importing cultural property. Article 24(c).

⁴ Dealing in Cultural Objects (Offences) Act 2003, 2003 Ch. 27, Sections 1 and 2(2), *available at* <http://www.uklegislation.hmso.gov.uk/acts/acts2003/20030027.htm>. The statute refers to objects removed from "a building or structure of historical, architectural or archaeological interest" or from an excavation either in the United Kingdom or in a foreign country. Section 2(4).

⁵ The explanatory notes and guidance issued in conjunction with the Act state that section 4 of the Act gives HMCE the "necessary powers of enforcement where an offence involves the importation or exportation of a tainted cultural object." It further adds: "These [powers] include search and seizure powers under the Police and Criminal Evidence Act 1984." A government report issued in February 2004 in response to queries from the Select Committee stated:

The new Dealing in Cultural Objects (Offences) Act 2003 has given HM Customs and Excise new powers of seizure under the Police and Criminal Evidence Act (PACE) for cultural objects they suspect to be tainted at the time of import. HM Customs and Excise can also rely on their seizure powers under the Customs and Excise Management Act 1979 where the import of any cultural objects also involves the commission of a Customs offence.

is not sufficient evidence to prosecute a crime, the antiquities whose ownership is vested in the nation will be returned to the country of origin. As an HMCE agent wrote, "Customs' main objective in relation to tainted objects/antiquities is to seize and return the objects to the country of origin where claims for return are made by those countries."⁶ Thus, although the United Kingdom has chosen a different method of implementing the UNESCO Convention, by criminalizing the dealing in "tainted" artifacts, this legislation and the CPIA serve the same function and purpose of deterring trade in illegally excavated artifacts.

Also in 2004, Cyprus joined the 1995 Unidroit Convention to which there are now twenty-eight States Parties. Unlike the UNESCO Convention, the Unidroit Convention focuses on requiring nations to create private rights of action for recovery of stolen and illegally exported cultural objects. Of greatest significance is Article 3(2), which recognizes all illegally excavated archaeological objects as stolen property, when this is consistent with local law where the illegal excavation took place. This offers a potentially powerful disincentive to trading in archaeological materials in other States Parties.

The changes in international law concerning the trade in cultural objects have been remarkable during this relatively short period of time, and it is likely that still more nations will continue to ratify or accede to the UNESCO and Unidroit Conventions in the next few years. All of this indicates that the evidence of an international response to the problem of the looting of archaeological sites has strengthened and will continue to do so. At this point, this criterion under the CPIA for bilateral agreements seems easily satisfied with respect to Cyprus.

I hope that the Committee will find these comments useful and I thank you for the opportunity to offer them.

Sincerely,

Patty Gerstenblith
Professor of Law and Director,
Program on Cultural Heritage Law
President, Lawyers' Committee for
Cultural Heritage Preservation

⁶ Anne Marie Dryden, "Enforcing the laws - UK Customs" in *Not for Sale, A Swiss-British Conference on the traffic in artifacts from Iraq, Afghanistan and beyond* (February 2004).