
NO. 11-2012

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ANCIENT COIN COLLECTORS GUILD
Plaintiff-Appellant,

v.

U.S. CUSTOMS AND BORDER PROTECTION, DEPARTMENT OF
HOMELAND SECURITY;
COMMISSIONER, U.S. CUSTOMS AND BORDER PROTECTION;
U.S. DEPARTMENT OF STATE; AND
ASSISTANT SECRETARY OF STATE, EDUCATIONAL
AND CULTURAL AFFAIRS,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Maryland
(Civil Action No. 1:10-cv-00322-CCB)

BRIEF OF *AMICI CURIAE*
AMERICAN COMMITTEE FOR CULTURAL POLICY AND
INTERNATIONAL ASSOCIATION OF DEALERS IN ANCIENT ART
IN SUPPORT OF APPELLANTS
(SUPPORTING REVERSAL)

Richard B. Rogers
Richard B. Rogers plc
6606 Thurlton Drive
Alexandria, VA 22315-2649
571-969-1727

Counsel for Amici Curiae

November 7, 2011

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Local Rule 26.1, *amicus curiae* American Committee for Cultural Policy states as follows:

1. The American Committee for Cultural Policy is a newly-formed Delaware not-for-profit corporation and is tax-exempt under Section 501(c)(3) of the Internal Revenue Code of 1986, as amended.

2. The American Committee for Cultural Policy has no parent corporation, and no publicly-held corporation owns 10 percent or more of the Committee's stock.

3. The American Committee for Cultural Policy is not aware of any publicly-held corporation that has a direct financial interest in the outcome of this litigation and has been advised by Appellant that no publicly-held corporation has such an interest.

4. The American Committee for Cultural Policy is not a trade association and knows of no publicly-held member whose stock or equity value could be affected substantially by the outcome of this proceeding.

Also pursuant to Fed. R. App. P. 26.1 and Local Rule 26.1, *amicus curiae* International Association of Dealers in Ancient Art states as follows:

5. The International Association of Dealers in Ancient Art is not a corporation and does not issue shares of stock to the public.

6. The International Association of Dealers in Ancient Art has no parent corporation, and no publicly-held corporation owns 10 percent or more of the Association's stock.

7. The International Association of Dealers in Ancient Art is not aware of any publicly-held corporation that has a direct financial interest in the outcome of this litigation and has been advised by Appellant that no publicly-held corporation has such an interest.

8. The International Association of Dealers in Ancient Art is a trade association of dealers in works of ancient art. The Association knows of no publicly-held member whose stock or equity value could be affected substantially by the outcome of this proceeding.

/s/ Richard B. Rogers
Richard B. Rogers
Richard B. Rogers plc
6606 Thurlton Drive
Alexandria, VA 22315-2649
571-969-1727

Counsel for Amici Curiae

TABLE OF CONTENTS

RULE 26.1 DISCLOSURE STATEMENT	i
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	iv
IDENTITY OF <i>AMICI CURIAE</i>	1
STATEMENT OF <i>AMICI CURIAE</i> 'S INTEREST IN CASE	3
STATEMENT OF <i>AMICI CURIAE</i> 'S AUTHORITY TO FILE BRIEF	4
RULE 29(C)(5) STATEMENT	4
SUMMARY OF ARGUMENT	5
ARGUMENT	8
I. THE UNESCO CONVENTION AND CPIA PROVIDE THE MECHANISM FOR ENACTMENT OF IMPORT RESTRICTIONS.	8
II. THE DISTRICT COURT'S HOLDING THAT THE IMPORTER MUST PROVE THAT OBJECTS ARE IMPORTABLE IS INCOMPATIBLE WITH THE CPIA AND UNWORKABLE IN PRACTICE.	12
A. The Government Has the Initial Burden of Narrow Designation and CPAC is Responsible for "First Discovery" Analysis and Compliance.....	15
B. The CPIA's Purposes Are Frustrated by Overbroad Designation in Favor of One State Party and Advanced by Narrow, Compliant Designation in Favor of Multiple State Parties.	17
C. Overbroad, Non-Compliant Designation Causes Multiple Problems.....	19
CONCLUSION.....	22
CERTIFICATE OF COMPLIANCE	24
CERTIFICATE OF SERVICE	25

TABLE OF AUTHORITIES

Statutes

19 U.S.C. § 2601.....	5, 11
19 U.S.C. § 2602.....	10, 11
19 U.S.C. § 2603	11
19 U.S.C. § 2604	5, 12
<i>Convention on Cultural Property Implementation Act,</i> Pub. L. 97-446, Title III, 96 Stat. 2350 (1983) (codified at 19 U.S.C. §§ 2601 <i>et seq.</i>)	3, 5

Other Authorities

Andrew L. Adler and Stephen K. Urice, <i>Unveiling the Executive Branch’s Extralegal Cultural Property Policy</i> (Aug. 12, 2010)	10
Paul M. Bator, <i>Essay on the International Trade in Art,</i> 34 Stan. L. Rev. 275 (1982)	9
Italian Law No. 1089 of June 1, 1939, amended by Law No. 44 of Mar. 1, 1975, Law No. 88 of Mar. 30, 1998, and Law No. 100 of Mar. 30, 1998 (Protection of Items of Artistic and Historic Interest)	17
Italian Legislative Decree No. 42 of Jan. 22, 2004 (Code of the Cultural and Landscape Heritage)	17
Written Comments of William Pearlstein to CPAC (Apr. 22, 2010).....	22
<i>Proceedings of the Panel on the U.S. Enabling Legislation of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property</i> , 4 Syracuse J. Int’l L. & Com. 97 (Summer 1976)	9

Regulations

Extension of Import Restrictions Imposed on Archaeological Material Originating in Italy and Representing the Pre-Classical, Classical, and Imperial Roman Periods, 76 Fed. Reg. 3,012 (Jan. 19, 2011)	20
Extension of Import Restrictions Imposed on Pre-Classical and Classical Archaeological Material Originating in Cyprus, 72 Fed. Reg. 38,470 (July 13, 2007)	12
Import Restrictions Imposed on Archaeological Material Originating in Italy and Representing the Pre-Classical, Classical, and Imperial Roman Periods, 66 Fed. Reg. 7,399 (Jan. 23, 2001)	20
Import Restrictions Imposed on Certain Archaeological Material from China, 74 Fed. Reg. 2,838 (Jan.16, 2009)	12
Import Restrictions Imposed on Pre-Classical and Classical Archaeological Material Originating in Cyprus, 67 Fed. Reg. 47,447 (July 19, 2002)	12

Treaties

<i>Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property</i> , 823 U.N.T.S. 231 (Nov. 14, 1970)	5, 9
--	------

IDENTITY OF *AMICI CURIAE*

The American Committee for Cultural Policy (“ACCP”) is a newly-formed Delaware not-for-profit corporation, tax exempt under Section 501(c)(3) of the Internal Revenue Code of 1986, as amended. The ACCP was founded on the premise that the international art market in general, and the antiquities market in particular, serves as a medium of cultural exchange and education. The ACCP’s purpose is to educate the public about the benefits resulting from a healthy, legal, international market in ancient art, and to advocate public policies and private practices that promote the trade and collection of ancient art and cultural materials. The ACCP hopes to serve as an umbrella group for those who wish to preserve and promote the trade and collection of ancient art and cultural materials. The ACCP anticipates that it will focus its fund-raising efforts on collectors, connoisseurs, dealers, curators, professionals and other members of the general public with an interest in ancient art and related policy issues. Filing this brief is among the ACCP’s first post-incorporation activities.

The International Association of Dealers in Ancient Art (“IADAA”) was formed in London in 1993. The IADAA is the international association of leading dealers in works of ancient art with high ethical standards. Members adhere to a stringent code of conduct designed to serve not only the interests of their clients but also the integrity of the objects themselves. At the

present time, 29 members from nine countries belong to the IADAA. The IADAA's objectives are:

1. To encourage the study and interest throughout the world of ancient art and to address issues exclusively concerning works of ancient art from the Mediterranean civilizations and other civilizations directly in contact with them.

2. To encourage contacts between museums, archaeologists, collectors and the trade and to foster its relations with governmental and non-governmental international organizations.

3. To actively encourage the protection and preservation of ancient sites. The IADAA subscribes to the view put forward in the Preamble to the Hague Convention of the 14th May 1954 (249 U.N.T.S. 240) that "Damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world." The IADAA believes that a more liberal and rational approach to regulations on the import and export of works of art will help to protect world cultural heritage.

4. To organize mutual assistance between dealers in works of ancient art and official Institutions, by communicating to members of the IADAA all information needed to apply strictly to the code of ethics and practice.

5. To foster friendly relations between the members of the Association.

STATEMENT OF *AMICI CURIAE*'S INTEREST IN CASE

This case presents an important question of first-impression under the Cultural Property Implementation Act (“CPIA”)¹: whether the State Department has the initial burden of limiting import restrictions granted to a particular foreign nation under the CPIA to categories of “archaeological materials” “first discovered” in that nation or whether the CPIA permits the State Department to avoid making a “first discovery” analysis and shift to the importer of an unprovenanced object the burden of determining whether and when that object was exported from that nation in order to avoid seizure and forfeiture of the object under the CPIA.

Under the District Court’s holding, the government would be empowered to promulgate significantly overlapping import restrictions for multiple foreign nations and require importers, Customs agents, and competing foreign claimants to sort it out. For example, the “Memorandum of Understanding” between the United States and Italy could restrict import of Roman-style objects ordinarily first-discovered in Tunisia, Britain, Greece, Germany, or elsewhere, regardless of the facts and circumstances prevalent

¹ *Convention on Cultural Property Implementation Act*, Pub. L. 97-446, Title III, 96 Stat. 2350 (1983) (codified at 19 U.S.C. §§ 2601 *et seq.*).

in those other countries. For the reasons stated below, *amici* believe that this result would violate the requirements of the CPIA and frustrate its purposes.

The ACCP and the IADAA believe that the outcome of this appeal has broad implications for all importers of archeological and ethnological materials, including collectors, dealers, auction houses, museums, scholars, connoisseurs, and the general public, regardless whether their field of interest is in Graeco-Roman, Egyptian, Near Eastern, Asian, African, Tribal, or other materials.

STATEMENT OF *AMICI CURIAE*'S AUTHORITY TO FILE BRIEF

Counsel for *amici* contacted counsel for Appellant and Appellees to inquire whether they would consent to the filing of this brief. Counsel for Appellant granted such consent, but counsel for Appellees declined. Accordingly, *amici* have submitted a motion for leave to file this brief.

RULE 29(C)(5) STATEMENT

Pursuant to Fed. R. App. P. 29(c)(5), *amici curiae* states that this brief was written by the ACCP's president and inside counsel. *Amici curiae*'s outside counsel provided non-financial support in the form of editorial work, formatting, preparation of the motion for leave to file, electronic filing, and submission of the required paper copies to the Court. Neither a party to this case nor a party's counsel contributed money that was intended to fund

preparation or submission of this brief, and no other person aside from *amicus curiae* ACCP and its members contributed money for said purpose.

SUMMARY OF ARGUMENT

The Cultural Property Implementation Act (“CPIA”)² provides a mechanism whereby “State Parties” signatory to the 1970 UNESCO Convention (“Convention”)³ may, on a country-by-country basis, request that the United States impose import restrictions on specified categories of “archeological or ethnological material of a State Party.”⁴ The CPIA requires that the United States narrowly tailor any such import restrictions so that restricted materials are limited to archeological or ethnological materials “first discovered within” a particular State Party.⁵

The Ancient Coin Collectors Guild (“ACCG”) has sued the U.S. government⁶ and has requested that Chinese-type and Cypriot-type coins be excluded from import restrictions granted under the CPIA to the People’s Re-

² *Id.*

³ *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property*, 823 U.N.T.S. 231 (Nov. 14, 1970).

⁴ 19 U.S.C. § 2601(2).

⁵ 19 U.S.C. §§ 2601(2), 2604.

⁶ Specifically, those agencies of the Executive Branch responsible for administering the CPIA, including the Department of State, U.S. Customs and Border Protection, and the Department of Homeland Security. *Ancient Coin Collectors Guild v. U.S. Customs and Border Protection, Department of Homeland Security, et al.*, Civ. No. CCB-10-322 (D. Md.).

public of China and Cyprus. The ACCG, Plaintiff-Appellant in this case, essentially argues that the government failed to satisfy the “first discovery” requirement under the CPIA, and that the inclusion of broadly described categories of coins in the Chinese and Cyprus MOU’s places an impossible compliance burden on prospective importers, who often have no way to know when or whether a particular coin was exported from a particular State Party (e.g., China or Cyprus).

The District Court held that the ACCG “missed the mark” because (i) the CPIA is silent as to how the government is to satisfy the “first discovered” requirement and thus requires the importer to establish the date and country of export, and (ii) strict application of the “first discovery” requirement to objects without a known find spot would frustrate the purpose of the CPIA, which is to deter archeological looting.⁷

Amici curiae submit that the District Court missed the mark on all counts.

- First, the CPIA clearly places the initial burden on the government to satisfy the “first discovery requirement” by crafting narrowly-drawn import restrictions that relate only to types or categories of archeological materials “first discovered” in a particular State Party.

⁷ Dist. Ct. Op. at 35–36, JA 461–62.

- Second, the CPIA clearly places the burden of determining whether the “first-discovery” requirement is satisfied on the 11-member Cultural Property Advisory Committee (“CPAC”). CPAC is charged with making certain determinations required by the CPIA and with policing State Party requests to ensure that non-complying materials are not included in final import restrictions. In evaluating a State Party’s request for import restrictions, CPAC must, as a threshold matter, evaluate whether the materials subject to the request are “archeological or ethnological materials” within the meaning of CPIA § 2601(2). This necessarily includes a “first discovery” analysis. Given the combined expertise of the CPAC members—who include archaeologists, antiquities dealers, and museum and public representatives—and of the State Department staffers who advise CPAC (who include trained archeologists), the government is well-equipped to satisfy the “first discovered” requirement, based on an informed analysis of archaeological, art historical, technical, and other applicable factors.
- Third, the Convention and the CPIA require that looting be addressed by import restrictions granted on a country-by-country basis. If import restrictions are granted to multiple State Parties with potentially overlapping categories of archaeological materials, the CPIA requires that each set of restrictions be limited to materials “first discovered in” the

respective State Parties and narrowly-tailored to eliminate or minimize overlap and the resulting potential for confusion among importers, U.S. Customs, and potentially competing State Party claimants. The District Court's holding would encourage this confusion and permit over-broad import restrictions granted to one country to block the otherwise lawful import of similar objects from another country. That is neither what Congress intended nor what the CPIA requires.

ARGUMENT

I. THE UNESCO CONVENTION AND CPIA PROVIDE THE MECHANISM FOR ENACTMENT OF IMPORT RESTRICTIONS.

Congress passed the CPIA in 1983 in order to implement the Convention.⁸ The CPIA was intended by its sponsors to be the definitive statement of U.S. policy regarding the importation of archaeological and ethnological materials. The CPIA was intended to balance the national interest in promoting the international exchange of such materials with the competing interest of foreign nations in protecting their national patrimony, and the archaeolog-

⁸ As a non-self-executing treaty, the Convention required implementing legislation before it became enforceable U.S. law. Congress enacted such legislation through the CPIA. The CPIA enjoyed bi-partisan sponsorship from Senators Moynihan, Dole, and Matsunonga. The 13-year long implementation process was marked by lengthy Congressional hearings.

ical interest in protecting stratigraphic context from illegal or unscientific excavation.⁹

The CPIA provides a mechanism whereby “State Parties” signatory to the Convention may, on a country-by-country basis, request that the United States impose import restrictions on specified categories of “archaeological or ethnological material of a State Party.”¹⁰

Under the CPIA, requests for import restrictions are evaluated by the 11-member Cultural Property Advisory Committee (“CPAC”), composed of

⁹ The CPIA was informed by the thinking of the U.S. delegation to UNESCO and by the views of Prof. Paul M. Bator, whose *Essay on the International Trade in Art*, 34 Stan. L. Rev. 275 (1982), remains the most thorough and balanced examination of the different perspectives on the antiquities trade. See *Proceedings of the Panel on the U.S. Enabling Legislation of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 4 Syracuse J. Int’l L. & Com. 97 (Summer 1976).

¹⁰ The CPIA’s country-by-country approach is consistent with Article 9 of the Convention, which provides that:

Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archeological 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 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 materials concerned....

Convention, *supra* note 3.

three archeologists, three antiquities dealers, three “public” members, and two museum members. CPAC is required to evaluate the State Party’s request and to make certain specific determinations required by the CPIA based on an evaluation of the facts and circumstances then in effect.¹¹

After taking into account CPAC’s recommendations, the President, through his delegee, the Assistant Secretary of State for Educational and Cultural Affairs, may then impose import restrictions on certain categories of “Designated Materials.” Import restrictions may take the form of a bilateral or multilateral agreement between the United States and one or more requesting State Parties or, in the event of certain “emergency conditions,”

¹¹ These determinations reflect the balancing of interests that underlies the CPIA: the requirement for a concerted international response, i.e., that other nations with a significant market in similar materials must impose similar import restrictions under Article 9 of the Convention; that the State Party must have taken “self-help” measures consistent with the Convention; that remedies less drastic than import restrictions are not available; and that import restrictions 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.” 19 U.S.C. § 2602(a)(1)(A)–(D).

There is severe disagreement as to the meaning and application of the CPIA’s definitions and determinations between certain collecting constituencies (of which the ACCP is representative) that feel increasingly disenfranchised from and disheartened by the CPAC process; the State Department bureaucracy that administers the CPIA; and the archaeological lobby, which is generally opposed in principle to even the lawful acquisition of unprovenanced objects and private ownership of antiquities and in favor of the broadest possible import restrictions under the CPIA. See Andrew L. Adler and Stephen K. Urice, *Unveiling the Executive Branch’s Extralegal Cultural Property Policy*, pp. 16 *et seq.* (Aug. 12, 2010), electronic copy available at <http://ssrn.com/absattract=1658519>.

may instead take the form of unilateral import restrictions.¹² In either case, lists of Designated Materials are published in the Federal Register. Section 2606 of the CPIA provides that, after publication, Designated Materials may only be imported if accompanied by an export certificate from the State Party or “satisfactory evidence” that the object had been exported from the State Party at least 10 years prior to the date of entry or that the object had been exported from the State Party prior to publication. If the importer cannot satisfy this requirement, the object is subject to seizure and forfeiture by Customs.

Section 2601(2) of the CPIA defines “archaeological or ethnological material of a State Party” to mean any object of archaeological interest that is among things “first discovered within, and is subject to export control by, the State Party.”¹³

Section 2604 of the CPIA requires that the United States narrowly tailor any import restrictions to apply only to archaeological or ethnological materials specific to (and “first discovered within”) a particular State Party. In

¹² 19 U.S.C. §§ 2602, 2603.

¹³ 19 U.S.C. § 2601(2). In addition, “archaeological materials” must be “culturally significant,” at least 250 years old, and ordinarily discovered by digging. “Ethnological materials” must be tribal, distinctive, comparatively rare, and “non-redundant.”

particular, after the United States signs an agreement with one or more State Parties, or unilaterally grants restrictions pursuant to “emergency” action,

[t]he Secretary [of the Treasury] shall by regulation promulgate (and when appropriate shall revise) a list of the archaeological or ethnological material of the State Party covered by the agreement by or such action. The Secretary may list such material by type or other appropriate classification, but *each listing made under this section shall be sufficiently specific and precise to insure that (1) the import restrictions under section 2602 of this title are applied only to the archaeological and ethnological material covered by the agreement or emergency action....*¹⁴

II. THE DISTRICT COURT’S HOLDING THAT THE IMPORTER MUST PROVE THAT OBJECTS ARE IMPORTABLE IS INCOMPATIBLE WITH THE CPIA AND UNWORKABLE IN PRACTICE.

In 2002, the United States signed a “Memorandum of Understanding” with Cyprus (the “Cyprus MOU”) restricting import of Cypriot archeological materials, which was amended in 2007 to include Cypriot-type coins.¹⁵ In 2009, the United States signed a “Memorandum of Understanding” with the People’s Republic of China (the “Chinese MOU”) restricting import of Chinese archeological materials, including Chinese-type coins.¹⁶

¹⁴ 19 U.S.C. § 2604 (emphasis added).

¹⁵ Import Restrictions Imposed on Pre-Classical and Classical Archaeological Material Originating in Cyprus, 67 Fed. Reg. 47,447 (July 19, 2002); Extension of Import Restrictions Imposed on Pre-Classical and Classical Archaeological Material Originating in Cyprus, 72 Fed. Reg. 38,470 (July 13, 2007).

¹⁶ Import Restrictions Imposed on Certain Archaeological Material from China, 74 Fed. Reg. 2,838 (Jan.16, 2009).

(footnote continues on following page)

The ACCG, Plaintiff-Appellant in this case, sued the government and requested that Chinese-type and Cypriot-type coins be excluded from the lists of Designated Materials subject to the Chinese and Cyprus MOUs. The ACCG stated that, by their nature, ancient coins were widely minted in ancient times, are inherently portable, and are today generally widely dispersed outside the modern country in which the coin was either minted or “first discovered.”

The ACCG essentially argued that the government failed to satisfy its initial burden of narrow designation under Section 2604 of the CPIA and that the inclusion of broadly described categories of coins in the Chinese and Cyprus MOUs placed an impossible compliance burden on prospective importers, who often have no way to know when or whether a particular coin was exported from a particular State Party (e.g., China or Cyprus).

(footnote continued from previous page)

The disagreements among the opposed cultural constituencies described *supra* in note 11 came to a head with the 2005 request by the People’s Republic of China for blanket restrictions on all cultural objects from prehistoric times through 1911, including stone, pottery, ceramics, bamboo, painting, silk, etc. Opponents argued that the vast and growing domestic Chinese market dwarfed the external markets and would render any U.S. import restrictions pointless, especially in the absence of a multi-national response, the presence of a vibrant Hong Kong market, and failure plausibly to satisfy the other determinations under CPIA § 2602(a)(1)(A)–(D). There remains a perception among those opposed to the Chinese MOU that the State Department and CPAC had pushed the interpretative limits of the CPIA past any plausible bounds. Due to senatorial opposition, the Chinese MOU was not signed until the last day of the Bush Administration.

The District Court held against the ACCG, stating that the ACCG's argument "misses the mark" for essentially two reasons:

First, the subsection imposing the "first discovered" requirement, 19 U.S.C. § 2601(2), is silent on how the government must establish, in the absence of a documented find spot, whether a particular object "was first discovered within, and is subject to export control by, the State Party." Moreover, the CPIA anticipates that there may be some archaeological objects without precisely documented provenance and export records and prohibits the importation of those objects.... Thus for objects without documentation of where and when they were discovered, the CPIA expressly places the burden on importers to provide that they are importable

....

Third, interpreting the "first discovered in" requirement to preclude the State Department from barring the importation of archaeological objects with unknown find spots would undermine the core purpose of the CPIA, namely to deter looting of cultural property.... Looted objects are, presumably, extremely unlikely to carry documentation, or at least accurate documentation, of when and where they were discovered and when they were exported from the country in which they were discovered. Congress is therefore unlikely to have intended to limit import restrictions to objects with a documented find spot.¹⁷

Amici curiae believe that the District Court, not the ACCG, "missed the mark" for the following reasons.

¹⁷ Dist. Ct. Op. at 35-36, JA 461-62.

A. The Government Has the Initial Burden of Narrow Designation and CPAC is Responsible for “First Discovery” Analysis and Compliance.

The District Court was wrong to conclude that, because 19 U.S.C. § 2601(2) is silent on how the government must establish, in the absence of a documented find spot, whether a particular object “was first discovered within, and is subject to export control by, the State Party,” the CPIA expressly places the burden on importers to prove that objects without documentation of where and when they were discovered are importable.

First, Section 2604 of the CPIA clearly places the initial burden of narrow designation on the government. The government is required to narrowly tailor any import restrictions to apply only to archeological or ethnological materials “first discovered within” a particular State Party. Lists of Designated Materials may describe restricted objects by type or category, but Section 2604 clearly provides that each listing must be sufficiently specific and precise to insure that import restrictions are applied only to the archaeological and ethnological material covered by the particular agreement or emergency action.

Second, the District Court simply overlooked the fact that the CPIA places the burden on CPAC of determining whether the “first-discovery” requirement is satisfied. In evaluating a State Party’s request for import restrictions CPAC must, as a threshold matter, evaluate whether the materials subject to the request are “archaeological or ethnological materials” within

the meaning of CPIA § 2601(2). Part of CPAC's function is to police the materials subject to a State Party's request and ensure compliance with the definitional requirements Section 2601(2). This necessarily includes a "first discovery" analysis.

The government is uniquely well-equipped to determine which types or categories of objects are ordinarily "first discovered in" the applicable State Party. The expertise of the CPAC members (who include archaeologists, antiquities dealers, and museum members) combined with the additional expertise of the State Department's CPAC staffers (who include trained archaeologists) gives the government the technical expertise in the fields of archaeology and art history to make the kinds of informed judgments required by the CPIA in order to limit Designated Materials to those that are "first discovered in" the applicable State Party.

CPAC knows how to exercise its judgment and police the definitional requirements under Section 2601. For example, the People's Republic of China's initial 2005 request for import restrictions included certain materials, such as paintings, silk, and bamboo, that were less than 250 years old and otherwise fell outside the definition of "archaeological and ethnographical materials" under CPIA § 2601.¹⁸ These non-compliant materials were ulti-

¹⁸ See *supra* note 16. On the other hand, CPAC refused to trim the comprehensive list of Designated Materials subject to the Italian MOU (*see infra* note 21), despite the fact that Italian archaeological materials privately owned (*footnote continues on following page*)

mately excluded from the list of Designated Materials subject to the Chinese MOU.

B. The CPIA's Purposes Are Frustrated by Overbroad Designation in Favor of One State Party and Advanced by Narrow, Compliant Designation in Favor of Multiple State Parties.

The District Court was correct to say that Congress did not intend to limit import restrictions to objects with a documented find spot, but it drew the wrong conclusion from that observation.

The Convention and the CPIA both take a country-by-country approach to the problem of looting. Thus, the CPIA bases the grant of import restrictions to a particular State Party on an informed evaluation of the facts and circumstances relevant to that State Party's request, which underlie the

(footnote continued from previous page)

before 1902 and not "notified" as being of special interest are not "subject to export control by" Italy, as required by Section 2601(2). Italian Law No. 1089 of June 1, 1939, amended by Law No. 44 of Mar. 1, 1975, Law No. 88 of Mar. 30, 1998, and Law No. 100 of Mar. 30, 1998 (Protection of Items of Artistic and Historic Interest), available at [http://www.ifar.org/upload/PDFLink4909e4d7d3533WMK%20-%20Italy%20-%20Law%20No.%201089%20of%201939%20\(Eng\).pdf](http://www.ifar.org/upload/PDFLink4909e4d7d3533WMK%20-%20Italy%20-%20Law%20No.%201089%20of%201939%20(Eng).pdf); Article 65, Article 10(1)-(3), Article 13, and Article 15, Italian Legislative Decree No. 42 of Jan. 22, 2004 (Code of the Cultural and Landscape Heritage), available at [http://www.ifar.org/upload/PDFLink4909e4b5aa2e2WMK%20-%20Italy%20-%20Code%20of%20the%20Cultural%20and%20Landscape%20Heritage%20of%202004%20\(Eng\).pdf](http://www.ifar.org/upload/PDFLink4909e4b5aa2e2WMK%20-%20Italy%20-%20Code%20of%20the%20Cultural%20and%20Landscape%20Heritage%20of%202004%20(Eng).pdf). (Italy's Legislative Decree No. 42 of January 22, 2004, provides export controls for objects owned by the State, but export controls apply to objects in private hands only if and to the extent the object has been declared to be of "particularly important ... archaeological ... interest" and such declaration has been formally "notified" to the owner.)

requisite statutory determinations applied to the particular State Party. The CPIA contemplates that, if a particular type or category of archaeological material is not ordinarily “first discovered in,” for example, Italy, but is ordinarily “first discovered in,” for example, Greece, and archaeological looting is prevalent in both, then both Greece and Italy would apply for import restrictions applicable to types or categories of objects “first discovered in” Greece or Italy, but not both. It is the role of CPAC and the State Department staffers who administer CPAC to eliminate or minimize overlap between the two sets of potentially overlapping restrictions.

The District Court ignored the fact that the CPIA places the initial burden of “narrow designation” on the government, and ignored the possibility that multiple State Parties might be granted complementary but not overlapping import restrictions. The District Court was thus wrong to conclude that interpreting the “first discovered in” requirement to preclude the State Department from barring the importation of archaeological objects with unknown find spots would undermine the purpose of the CPIA. The CPIA is designed so that if multiple State Parties have a looting problem, narrowly-crafted, compliant restrictions will be considered and granted on a country-by-country basis.

C. Overbroad, Non-Compliant Designation Causes Multiple Problems.

Overbroad categories of Designated Materials that are not limited to materials “first discovered in” a particular State Party impermissibly shift the compliance burden from State to the importer and create an often impossible burden for the importer. The problem would be compounded if two lists of Designated Materials overlap. The problem is not limited to importers. If Customs were to seize and forfeit material that is arguably restricted under more than one set of import restrictions, which country would Customs return the material to? Would Customs be required to implead all potential State Parties and let them litigate their respective entitlement to the material? Under the District Court’s holding, the government would be empowered to promulgate significantly overlapping restrictions for multiple State Parties, and require importers, Customs agents, and competing State Party claimants to sort it out. That is not what Congress intended.

These problems are imminent and not hypothetical. The U.S. and Italy signed an MOU in 2001 restricting broad categories of Roman and other archaeological materials dating from the ninth century BC to the fourth century AD; this was amended in 2011 to include broad categories of “Italian-type coins,” including issues from Magna Graecia, the Roman Republic, and

certain city coins struck during the early Imperial period.¹⁹ In July 2011, the U.S. and Greece signed an MOU,²⁰ although as of the date of this brief, the related list of Designated Materials has not yet been published. Given the interaction between cultures in ancient times, certain types or categories of archaeological materials ordinarily “first discovered in” modern Greece might be excavated in modern Italy, and certain types or categories of archaeological materials ordinarily “first discovered” in modern Italy may be excavated in modern Greece. The implication of the District Court’s holding is that the restrictions granted to Greece under the Greek MOU would block the importation into the U.S. of objects created in the Greek colonies of Magna Graecia and ordinarily “first discovered in” Southern Italy, even after the expiration of the Italian MOU based on a future amelioration of looting in Italy. Similarly, restrictions granted to Italy under the Italian MOU could block the impor-

¹⁹ Import Restrictions Imposed on Archaeological Material Originating in Italy and Representing the Pre-Classical, Classical, and Imperial Roman Periods, 66 Fed. Reg. 7,399 (Jan. 23, 2001); Extension of Import Restrictions Imposed on Archaeological Material Originating in Italy and Representing the Pre-Classical, Classical, and Imperial Roman Periods, 76 Fed. Reg. 3,012 (Jan. 19, 2011).

²⁰ A Press Release/Fact Sheet dated July 17, 2011, and published on the State Department’s website, <http://www.state.gov>, states that the U.S. and Greece have signed a Memorandum of Understanding Concerning the Imposition of Import Restrictions on Categories of Archaeological and Byzantine Ecclesiastical Ethnological Material through the 15 Century A.D. of the Hellenic Republic, and that a list of restricted material will be published in the Federal Register.

tation into the U.S. of Roman-type objects ordinarily “first discovered in” Greece. This kind of extra-territorial restriction could occur *after* the expiration of the Greek MOU or the Italian MOU based on a future amelioration of looting in Greece or Italy. That is not what Congress intended.

Taken to its extreme, the District Court’s holding is even more troubling. Greek- and Roman-type archaeological materials are found from Northern Europe to North Africa and from the North Sea to the Black Sea, the Euphrates, and beyond. Under the District Court’s holding, the Italian MOU alone could serve to restrict import of Roman-style objects ordinarily first discovered in Tunisia, Britain, or Germany, regardless of the facts and circumstances prevalent in those countries.²¹ Surely, that is not what Congress intended.

²¹ The list of Designated Materials restricted by the Italian MOU includes various categories of materials that could come from any number of modern nations or regions that either constituted part of the Roman Empire or otherwise came within the sphere of Roman influence. For example, certain categories of Greek-influenced pottery “first discovered” in Italy could have been first discovered anywhere within ancient Magna Graecia, which stretched across the northern rim of the Mediterranean and its central islands. Other examples of Designated Materials with multiple potential countries of “first discovery” include bronzes, grave stones, cut stones of Roman type, glass, and pottery of Roman and non-Roman type. There may be other problematic categories of Designated Materials. At the public hearing before CPAC on November 13, 2009, a representative of the Italian Ministry of Culture suggested that U.S. import restrictions on Italian archaeological materials should extend to any objects of potential Roman origin, including, for example, Roman coins found in Tunisia. That kind of expansive interpretation may appeal to archaeologists and the Italian Ministry of Culture, but it is simply not permitted by the CPIA. “Designated Materials” subject to the *(footnote continues on following page)*

CONCLUSION

The CPIA requires the government to craft narrowly-defined import restrictions informed by a review of applicable facts and circumstances rather than to promulgate overbroad categories of Designated Materials that block the otherwise lawful importation of similar materials from other State Parties.

The State Department is well-equipped to comply with its initial statutory burden of narrow designation. Contrary to the District Court's holding, requiring the State Department to tailor import restrictions to comply with the "first discovery" requirement would be consistent with and advance, and would not frustrate, the CPIA's purposes and Congressional intent.

The District Court's decision should be reversed, and coins should be excluded from the Chinese and Cyprus MOUs to the extent the government fails to establish persuasively that they belong to types or categories "first discovered in" China or Cyprus.

(footnote continued from previous page)

Italian MOU should be limited to those categories of objects "first discovered" in Italy—not Spain, France, Greece, Syria, Germany, Tunisia, or elsewhere. *See* Written Comments of William Pearlstein to CPAC (Apr. 22, 2010).

DATED: November 7, 2011

Respectfully submitted,

/s/ Richard B. Rogers

Richard B. Rogers

Richard B. Rogers plc

6606 Thurlton Drive

Alexandria, VA 22315-2649

571-969-1727

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of FRAP 32(a)(7)(B), as applied to an *amicus curiae* by FRAP 29(d), because Microsoft Word's word count reports that the brief contains 5,095 words, including footnotes and excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii), and

2. This brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) because this brief has been prepared using Microsoft Word 2010 in a 14-point proportionally-spaced typeface with serifs, MB Type's Equity Text B.

/s/ Richard B. Rogers
Richard B. Rogers
Richard B. Rogers plc
6606 Thurlton Drive
Alexandria, VA 22315-2649
571-969-1727

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of November, 2011, I electronically filed the foregoing *amicus curiae* brief. The Court's CM/ECF system will send notice of such filing to the following registered CM/ECF users:

Jason H. Ehrenberg
Peter K. Tompa
Bailey & Ehrenberg PLLC
1015 18th Street N.W.
Suite 204
Washington, DC 20036

Larry D. Adams
Office of the U.S. Attorney
36 South Charles Street
Baltimore, MD 21201

/s/ Richard B. Rogers
Richard B. Rogers
Richard B. Rogers plc
6606 Thurlton Drive
Alexandria, VA 22315-2649
571-969-1727

Counsel for Amici Curiae