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Chapter 14
Educational and Cultural Issues

A. CULTURAL PROPERTY: IMPORT RESTRICTIONS

In 2012, the United States took steps to protect the cultural property of Peru, Cyprus, Mali, and Guatemala by extending import restrictions on certain archaeological and ethnological material from those countries. These actions were based on determinations by the Department of State’s Bureau of Educational and Cultural Affairs that the statutory threshold factors permitting initial entry into each agreement still pertained and that there was no cause for suspension of such agreement. 19 U.S.C. § 2602 (a)(1)(A). The United States extended these agreements pursuant to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (“Convention”), to which the United States became a State Party in 1983 and pursuant to the Convention on Cultural Property Implementation Act, which implements parts of the Convention. See Pub. L. No. 97-446, 96 Stat. 2350, 19 U.S.C. §§ 2601–2613 (“the Act”). If the requirements of 19 U.S.C. § 2602 are satisfied, the President has the authority to enter into or extend agreements to apply import restrictions for up to five years on archaeological or ethnological material of a nation which has requested such protections and which has ratified, accepted, or acceded to the Convention. The President may also impose import restrictions on cultural property in an emergency situation pursuant to 19 U.S.C. §§ 2603 and 2604.

Also in 2012, the United States Department of State continued to participate in litigation relating to the imposition of import restrictions under the Act. And in May 2012, the State Department renewed the charter of the Cultural Property Advisory Committee, which reviews requests from States Parties to the Convention seeking the imposition of U.S. import restrictions on archaeological or ethnological material, and makes recommendations thereon to the Department’s Bureau of Educational and Cultural Affairs.

1. Peru


Also on June 9, the Department of Homeland Security, U.S. Customs and Border Protection (“CBP”), and the Department of the Treasury extended the import restrictions imposed previously with respect to certain archaeological and ethnological materials from Peru. 77 Fed. Reg. 33,624 (June 7, 2012).

2. Cyprus


Also on July 13, 2012, the Department of Homeland Security, CBP, and the Department of the Treasury issued a notice in the Federal Register extending the import restrictions imposed previously with respect to Pre-Classical and Classical archaeological objects and Byzantine ecclesiastical and ritual ethnological materials and amending the restrictions to include materials from the Post-Byzantine period. 77 Fed. Reg. 41,266 (July 13, 2012).

3. Mali


4. Guatemala


On September 28, 2012 the Department of Homeland Security, CBP, and the Department of the Treasury published a notice in the Federal Register extending the import restrictions imposed previously with respect to certain categories of archaeological and ethnological materials from Guatemala and adding the additional materials included in the amendment. 77 Fed. Reg. 59,541 (Sept. 28, 2012).

5. Ancient Coin Collectors Guild v. U.S. Department of State

In 2012, the United States filed its brief as appellees in a case involving an attempted importation into the U.S. of ancient Cypriot and Chinese coins of types restricted under agreements with those countries pursuant to the Convention and the Act. Ancient Coin Collectors Guild v. United States, No. 11-2012 (4th Cir. 2012). Appellant, the Ancient Coin Collectors Guild, had purchased the coins in London and attempted to bring them into the United States. Because the coins were of types subject to import restrictions, they were seized. Rather than seeking to demonstrate any legal basis for importing the coins and going through the administrative procedures to determine whether they could be imported, the Guild challenged the restrictions in U.S. district court. The district court granted the government’s motion to dismiss and the Guild appealed to the U.S. Court of Appeals for the Fourth Circuit. The section of the U.S. brief summarizing the U.S. argument in the case appears below. The brief is available in full at www.state.gov/s/l/c8183.htm.
The Convention on Cultural Property Implementation Act ("CPIA") authorizes the President to agree to enter into agreements with other nations to protect their cultural patrimony and curb the ongoing pillaging of archaeological sites. Pursuant to the CPIA and the international convention that it implements, the United States has entered into memoranda of understanding with Cyprus and China. In consequence, the United States has precluded several types of archaeological items including certain types of ancient Cypriot and Chinese coins.

Plaintiff sought to import 22 ancient Cypriot and Chinese coins which are concededly of the types designated in Customs regulations, and Customs agents duly seized the coins in accordance with the statute. In this action, plaintiff contests that seizure, claiming that the import restrictions on these coins are unlawful.

This Court should decline plaintiff’s invitation to review its claims. The CPIA and its implementing regulations provide for judicial forfeiture proceedings. Plaintiff has invoked those procedures, but they have not occurred as this litigation has been ongoing. Plaintiff does not explain why its arguments should not be considered in the forum designated by Congress.

Even apart from that threshold question, plaintiff’s request for extra-statutory *ultra vires* review and review under the Administrative Procedures Act misconceives the appropriate scope of judicial review. The CPIA purports to authorize the negotiation of agreements with foreign nations and consequent import restrictions. The structure and text of the statute, which contemplate discretionary determinations by the President or his delegee, do not suggest that Congress intended review under the APA of these decisions, which are imbued with foreign policy concerns. For similar reasons, it would be anomalous to create extra-statutory review procedures here.

If the Court concludes that some form of judicial review is nevertheless appropriate in these proceedings, it should affirm the district court’s conclusion that plaintiff has not stated a viable claim. Plaintiff’s primary contention is that its 22 ancient Cypriot and Chinese coins were unlawfully seized based on their “type.” Plaintiff urges that, although the coins appear on the Designated Lists of restricted materials published by Customs, the coins must be allowed entry to the United States unless the government can prove, on a coin by coin basis, that each was first unearthed in Cyprus or China. Pl. Br. 22; see Am. Compl. 44 (JA 178). The district court correctly concluded that plaintiff’s proposed scheme lacks any basis in the statute.

Contrary to plaintiff’s assertions, the CPIA expressly anticipates that the “archaeological . . . material of the State Party” will be subject to restrictions based on “type or other appropriate classification.” 19 U.S.C. § 2604; see also id. § 2605(f)(4). In turn, the CPIA defines “archaeological material of the State Party” as being, inter alia, “first discovered” in the State Party. 19 U.S.C. § 2602(1). The question of “first discovery” is thus addressed by the State Department when determining what “archaeological material” is to be covered by a given MOU and thus included on the Designated List of restricted materials. Id. § 2602(a)(2). The Assistant Secretary exercised her judgment and discretion under the CPIA in determining that certain types of ancient Cypriot and Chinese coins qualify as the “archaeological material of the State Party” and applying import restrictions to them. As the district court concluded, plaintiff’s approach cannot be reconciled with the plain terms of the
Act, is unworkable, and “would undermine the core purpose of the CPIA.” D. Ct. Op. 35 (JA 461).

Finally, the district court correctly rejected plaintiff’s request for discovery with regard to the precise contents of China’s diplomatic note requesting that the United States impose import restrictions under Article 9 of the Convention on Cultural Property. The United States has met all of its statutory obligations, and is not required to make such information public.

* * * *


The Guild asks this court to engage in a searching review of the State Department’s conclusions that (1) import restrictions on coins were requested by China and Cyprus, (2) the restricted articles were part of each state’s respective cultural patrimony, and (3) the restrictions were necessary to protect each state’s respective cultural patrimony. …Congress set out an elaborate statutory scheme for promulgating import restrictions on culturally sensitive items and gave the Executive Branch broad discretion in negotiating Article 9 agreements with foreign states. See 19 U.S.C. § 2602(a). Congress itself retained oversight of the CPIA process, id. § 2602(g), and placed significant responsibility in the hands of CPAC [the Cultural Property Advisory Committee], a body composed of experts in the fields of archaeology and ethnology, id. § 2605. Congress also provided forfeiture procedures through which importers could challenge any seizures made pursuant to the CPIA. Id. § 2609.

The conclusions to be drawn from the entirety of this statutory scheme are clear. The federal judiciary has not been generally empowered to second-guess the Executive Branch in its negotiations with other nations over matters of great importance to their cultural heritage, to overrule CPAC in its conclusion that import restrictions on coins were necessary to protect the cultural patrimonies of Cyprus and China, or to challenge Congress in its decision to channel CPIA disputes through forfeiture proceedings. Mindful of the deference owed the political branches under the statute, we consider the Guild’s arguments.

A.

The Guild contends that the State Department acted ultra vires when it imposed import restrictions on certain Cypriot and Chinese coins. Our review under the ultra vires standard is necessarily narrow. We may not dictate how government goes about its business but only whether a public entity “has acted within the bounds of its authority or overstepped them.” Catholic Health Initiatives v. Sebelius, 617 F.3d 490, 497 (D.C.Cir.2010) (Brown, J., concurring in the judgment). Government action is ultra vires if the agency or other government entity “is not doing the business which the sovereign has empowered him to do or he is doing it in a way

* Editor’s note: The Guild filed a petition for certiorari in the Supreme Court of the United States. On March 25, 2013, the Supreme Court denied the petition. 133 S.Ct. 1645, 81 USLW 3475 (U.S. Mar 25, 2013) (NO. 12-996).
which the sovereign has forbidden.” *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949); see also *U.S. Dep’t of Interior v. 16.03 Acres of Land*, 26 F.3d 349, 355 (2d Cir.1994).

The statute, as noted, involves a sensitive area of foreign affairs where Congress itself has delegated the Executive Branch significant discretion. Given that approach, a searching substantive review of the State Department’s diplomatic negotiations or CPAC’s application of its archaeological expertise would be singularly inappropriate in this forum. And the record itself leaves no room for an ultra vires challenge on any other basis.

As the district court noted, there is no question that the State Department complied with CPIA procedures when it placed import restrictions on Chinese coins…

* * * *

…[T]he Guild argues that the State Department and CBP ran off the rails by enacting import restrictions on Chinese coins without following the procedures required by the CPIA. The Guild alleges two distinct violations of the statute. First, the Guild argues that the State Department imposed restrictions on Chinese coins even though China did not mention coins in its May 2004 request. In making this argument, however, the Guild seeks to add a provision to the statute that is simply not there, namely a requirement that a request under Article 9 include “a detailed accounting of every item eventually covered by an Article 9 agreement.” *ACCG*, 801 F.Supp.2d at 410.

The CPIA requires that a State Party (here China) formally request assistance from the United States in protecting its cultural patrimony, 19 U.S.C. § 2602(a)(1), (a)(3), but the request need not include a comprehensive list of all the items that might later be found appropriate for inclusion in a negotiated Article 9 agreement. Were the federal judiciary to require a State Party to include such a list, we would be placing burdens that Congress nowhere mentioned upon China, Cyprus, and every other foreign country that sought this country’s assistance in protecting its own cultural heritage. We would be drawn into preliminary negotiations between the State Department and foreign countries in a far more detailed manner than the CPIA contemplated. This is the very intervention into sensitive diplomatic matters that we have earlier emphasized is not permissible, and we decline to require from China more than the statute itself does.

Second, the Guild contends that the State Department’s notice in the Federal Register was defective because it did not mention that China requested restrictions on coins. Once again, the Guild effectively seeks to have us impose a requirement that does not appear in the CPIA, this time that the State Department “publish verbatim the list of items requested to be restricted.” *ACCG*, 801 F.Supp.2d at 410.

The statute merely requires that the State Department publish “notification of the request” in the Federal Register, 19 U.S.C. § 2602(f)(1), not an exhaustive description of its terms. To scrutinize the adequacy of the State Department’s publication and require a verbatim publication of a foreign request would involve the judiciary in the very early stages of the CPIA process and place upon the State Department a burden that Congress did not intend. Requiring the Department of State to reveal every detail of a request made by a foreign government through confidential diplomatic channels runs afoul of the admonition that such revelations may “compromise the Government’s negotiating objectives or bargaining positions on the negotiations of any agreement authorized by [the CPIA].” 19 U.S.C. § 2605(h). Because Congress required that the Department of State simply publish “notification of the request” by a
State Party, we decline to accept the Guild’s suggestion that we require more from State Department’s notice in the Federal Register.

In sum, each of the Guild’s arguments with respect to State’s procedural compliance would have us add encumbrances to the CPIA, ultimately placing additional burdens on foreign governments and State Department officials negotiating Article 9 agreements with those governments. It is true that at the conclusion of negotiations and upon the reaching of an Article 9 agreement with the foreign government in question, CBP must publish a list of import restrictions by type in the Federal Register. *Id.* § 2604. CBP complied with that requirement here. 74 Fed. Reg. 2,839–2,842. But the detail required by the statute at the conclusion of the process is altogether different from the level of detail required before negotiations between our country and another nation have even so much as begun.

Congress sought to strike a balance here between the need for notice and transparency on the one hand, and the need for confidentiality in sensitive matters of diplomacy on the other. Likewise in balance is the aim of having the CPIA process move forward with some modicum of efficiency while still providing both proper notice of the restrictions and procedural recourse for those who are subject to them. It is clear that deviation from the provisions of the statute runs every risk of throwing this balance out of kilter in an area where traditional competencies and constitutional allocations of authority have counseled reluctance on the part of the judiciary to intervene. The Guild asks us to do just that, and we decline its invitation.

C.

Section 2601 narrows the universe of articles that may be subjected to import restrictions under the CPIA. Only an object of archaeological or ethnological interest “which was first discovered within, and is subject to export control by” the requesting state may be restricted. 19 U.S.C. § 2601(2). The Guild alleges that State and CBP acted *ultra vires* by placing import restrictions on all coins of certain types without demonstrating that all coins of those types were “first discovered within” China or Cyprus. Guild Br. at 21–22. According to the Guild, the government and the district court effectively read the “first discovered” requirement out of the statute. *Id.* at 24.

We are not persuaded. As an initial matter, the CPIA is clear that defendants may designate items by “type or other appropriate classification” when establishing import restrictions. 19 U.S.C. § 2604. State and CBP are under no obligation to list restricted items with more specificity than the statute commands, and they are certainly not required to impose restrictions on a coin-by-coin basis. Such a requirement would make the statutory scheme utterly unworkable in practice.

Here, CBP published detailed lists of restricted types from both China and Cyprus. The requests categorize the restricted articles by material (e.g., “Bronze,” “Iron”), then by category (e.g., “Coins,” “Sculpture”), then by time period, and finally by specific “type.” *E.g.*, 74 Fed. Reg. 2,842; 72 Fed. Reg. 38,473. One Cypriot coin type, for example, was described as follows: “III. Metal, D. Coins of Cypriot Types, 3. Provincial and local issues of the Roman period from c. 30 B.C. to 235 A.D. Often these have a bust or head on one side and the image of a temple (the temple of Aphrodite at Palaipaphos) or statue (statue of Zeus Salaminios) on the other.” 72 Fed. Reg. 38,472–73.

CPAC and the Assistant Secretary did consider where the restricted types may generally be found as part of the review of the Chinese and Cypriot requests. CBP listed the articles in question in the Federal Register by “type”—but only after State and CPAC had determined that each type was part of the respective cultural patrimonies of China and Cyprus. 74 Fed. Reg.
2,839–42 (Chinese coins); 72 Fed. Reg. 38,470–73 (Cypriot coins). Among the members of CPAC are three “experts in the fields of archaeology, anthropology, ethnology, or related areas” and three “experts in the international sale of archaeological, ethnological, and other cultural property.” 19 U.S.C. § 2605(b)(1). Plaintiffs have given us no reason to question CPAC’s conclusion, as adopted by State, as to where the types of cultural property at issue were discovered. To the contrary, it was hardly illogical for CPAC to conclude that, absent evidence suggesting otherwise, Chinese and Cypriot coins were first dis-covered in those two countries and form part of each nation’s cultural heritage.

As the district court noted, “the CPIA anticipates that there may be some archaeological objects without precisely documented provenance and export records.” ACCG, 801 F.Supp.2d at 408. In those cases, the statute expressly provides that CBP may seize the articles at the border: “If the [importer] of any designated archaeological or ethnological material is unable to present to the customs officer the required documentation, the “officer concerned shall refuse to release the material from customs custody ... until such documentation or evidence is filed with such officer.” 19 U.S.C. § 2606(b). In short, CBP need not demonstrate that the articles are restricted; rather, the statute “expressly places the burden on importers to prove that they are importable.” ACCG, 801 F.Supp.2d at 408.

This conclusion is borne out by § 2606, which states that once archaeological or ethnological material has been designated by “type” and included in the list of restricted articles, it may not be imported into the United States without specific documentation showing that it is eligible for import. 19 U.S.C. § 2606. Such documentation must show that the article in question was either (1) lawfully exported from its respective state while CPIA restrictions were in effect; (2) exported from its respective state more than ten years before it arrived in the United States; or (3) exported from its respective state before CPIA restrictions went into effect. Id. In other words, the importer need not document every movement of its articles since ancient times. It need demonstrate only that the articles left the country that has requested import restrictions before those restrictions went into effect or more than ten years before the date of import.

Here, CBP has listed the Chinese and Cypriot coins by type, in accordance with 19 U.S.C. § 2604, and CBP has detained them, in accordance with 19 U.S.C. § 2606. The detention was lawful as an initial matter, and the Guild had an opportunity at the time of detention to present evidence that the coins were subject to one of the CPIA exemptions. See id. As explained above, the Guild need not have documented every movement of its coins since ancient times. To comply with § 2606, the Guild need demonstrate only that the Cypriot coins left Cyprus prior to 2007 and that the Chinese coins left China prior to 2009. See id. It never so much as attempted to do so.

III.

We now turn to the Guild’s claims under the Administrative Procedure Act. The Guild alleges that State violated the APA by, inter alia, making decisions influenced by “bias and/or prejudgment and/or ex parte contact.” Am. Compl. ¶ 135; see also ACCG, 801 F.Supp.2d at 401. It also alleges that CBP violated the APA by promulgating import restrictions on Cypriot and Chinese coins and by seizing those coins despite the fact that they were not covered by the CPIA. Am. Compl. ¶¶ 102, 117; see also ACCG, 801 F.Supp.2d at 413–14.

The district court held that the APA did not apply to State’s actions because State was acting at the behest of the President and was therefore not an “agency” for APA purposes. ACCG, 801 F.Supp.2d at 403–04. On appeal, the government argues that even if State were an “agency,” the APA’s provisions would still not apply to it because agency action on behalf of the

We have emphasized throughout the restricted scope of judicial review when it comes to the statutory discretion Congress has conferred upon the Executive Branch in carrying out the international obligations of the United States under the Convention. These cautions are nowhere more pertinent than where this nation’s protection and recognition of another’s cultural patrimony is involved. Congress recognized that the CPIA “is important to our foreign relations, including our international cultural relations,” and it enacted the statute to ensure that the United States did not become an illegal market for foreign cultural property, a development that would have “severely strain[ed] our relations with the countries of origin, which often include close allies.” S. Rep. 97–564, at 23 (1982), 1982 U.S.C.C.A.N. 4078 at 4100.

The standard for review under the APA is a familiar one: a reviewing court shall “hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706. Under the APA, the scope of our review is narrow, and we may not “substitute [our own] judgment for that of the agency.” Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). Even were we to assume that State was fully subject to the APA, none of its actions were remotely arbitrary or capricious.

Here, Congress laid out specific procedures for State to follow in concluding Article 9 agreements and imposing import restrictions on covered articles. As discussed above, the Department of State fulfilled each of those statutory requirements and, in doing so, put the Guild on notice that import restrictions were in effect. For the reasons set forth at length in the previous section, the governmental actions challenged herein did not run afoul of any APA standard or otherwise transgress enacted law.

We also agree with the district court that CBP did not violate the APA because it merely promulgated regulations at the behest of State and in full compliance with the CPIA. See ACCG, 801 F.Supp.2d at 413–14. When CBP received instructions from State to promulgate the regulations, it was entirely reasonable for CBP to follow those instructions, given its statutory obligation to do so. 19 U.S.C. § 2612 (indicating that CBP “shall prescribe such rules and regulations as are necessary and appropriate to carry out the provisions of [the CPIA]” (emphasis added)).

* * * * *

6. **Renewal of the Charter of the Cultural Property Advisory Committee**

Effective May 1, 2012, the U.S. Department of State renewed for two years the Charter of the Cultural Property Advisory Committee. See May 18, 2012 State Department media note, available at [www.state.gov/r/pa/prs/ps/2012/05/190320.htm](http://www.state.gov/r/pa/prs/ps/2012/05/190320.htm). The Committee was established pursuant to the Convention on Cultural Property Implementation Act (“the Act”) to review requests for the imposition of import restrictions on archaeological or ethnological material. The media note explained, “the membership of the Committee consists of private sector experts in archaeology, anthropology, ethnology or related fields;
experts in the international sale of cultural property; and representatives of museums and of the general public."

B. PRESERVATION OF AMERICA’S HERITAGE ABROAD

The Commission for the Preservation of America’s Heritage Abroad (“the Commission”) is an independent agency of the U.S. government established in 1985 by § 1303 of Public Law 99-83, 99 Stat. 190, 16 U.S.C. § 469j (1985). Among other things, the Commission negotiates bilateral agreements with foreign governments in Central and Eastern Europe and the former Soviet Union to protect and preserve cultural heritage. The agreements focus on protection of communal properties that represent the cultural heritage of groups that were victims of genocide during World War II. The website of the Commission describes these bilateral agreements, and refers to efforts to negotiate additional agreements, at www.heritageabroad.gov/Agreements.aspx. For additional background, see II Cumulative Digest 1991–1999 at 1793–94.

Cross References

Availability of contempt sanctions in Chabad, Chapter 10.A.3.