

## THE LAW AND PRACTICE REGARDING COIN FINDS

JOHN M. KLEEBERG, ESQ.\*

UNITED STATES LAWS CONCERNING THE TRADE IN  
CULTURAL PROPERTY

This is the third of a series of three articles discussing the laws of the United States relating to coin finds. The first article discussed treasure trove, namely finds on land within the United States;<sup>1</sup> the second article discussed the laws relating to shipwrecks, covering finds on navigable waters;<sup>2</sup> this article discusses the laws relating to the import of cultural property into the United States, which affect the importation of coin finds discovered outside the United States. There are no United States laws concerning the export of cultural property from the United States.

### I. The Control of the Trade in Cultural Property through Federal Statutes.

The United States controls the trade in cultural property through four federal statutes: these are the customs statute against smuggling goods into the United States;<sup>3</sup> the National Stolen Property Act (NSPA);<sup>4</sup> the Convention on Cultural Property Implementation Act (CCPIA);<sup>5</sup> and the Archaeological Resources Preservation Act (ARPA).<sup>6</sup> With the exception of the test case filed by the Ancient Coin Collectors' Guild (ACCG) in Baltimore in February 2010, none of these laws has been applied to coin imports, but what applies to other cultural property could also apply to coins. Other than the ACCG test case, the only U.S. litigation concerning a coin hoard found overseas and imported into the United States was the civil litigation concerning the Elmalı (Decadrachm) Hoard 1984.<sup>7</sup>

\* B.A., Yale, 1979; D.Phil., Oxford, 1988; J.D., New York University School of Law, 2003. The author was Curator of Modern Coins and Currency at the American Numismatic Society, 1990–2000. He now practices law in New York City. The author would like to thank Rick Witschonke of the ANS for helping to track down certain publications.

1 John M. KLEEBERG, *The Law and Practice Regarding Coin Finds: Treasure Trove Law in the United States*, INC, *Compte rendu* 53 (2006), p. 13, available at <http://www.muenzgeschichte.ch/downloads/laws-usa.pdf>.

2 John M. KLEEBERG, *The Law and Practice Regarding Coin Finds: United States Laws Concerning Historic Shipwrecks*, INC, *Compte rendu* 54 (2007), p. 13, available at <http://www.muenzgeschichte.ch/downloads/laws-usa-shipwrecks.pdf>.

3 18 U.S.C. §545 (2006).

4 18 U.S.C. §§2314, 2315 (2006).

5 19 U.S.C. §§2601–2613 (2006).

6 16 U.S.C. §§470aa–470mm (2006).

7 *Coin Hoards* VIII, 48. See *infra* text accompanying notes 112–128.

In the late 1960s, the removal of Mayan steles from Mexico and Central America became «an irretrievable cultural catastrophe.»<sup>8</sup> The U.S. legal response took four forms. First, the United States signed a treaty with Mexico on the recovery of stolen cultural properties.<sup>9</sup> The second response was the United States' negotiation and ratification of the UNESCO Convention.<sup>10</sup> The third response came in 1972 when Congress enacted a statute that banned the importation of pre-Columbian monumental or architectural sculpture or murals unless they came with a certificate from the country of origin. If they lacked that certificate, the pieces were to be forfeited and returned to the country of origin.<sup>11</sup> The fourth response was the prosecution of trafficking in pre-Columbian artifacts using federal anti-theft statutes.

*A. The National Stolen Property Act (NSPA) and the Anti-Smuggling Statute.*

The modern history of U.S. Federal government statutes against theft begins with the Dyer Act of 1919, passed to combat the nationwide market in stolen cars.<sup>12</sup> High profile crimes in the late 1920s and early 1930s (associated with the names of John Dillinger, Clyde Barrow and Bonnie Parker) impelled Congress to pass Federal statutes against thefts that conferred jurisdiction on the Federal Bureau of Investigation and its publicity-hungry director, J. Edgar Hoover.<sup>13</sup> The National Stolen Property Act (NSPA) of 1934 extended the laws against stolen motor vehicles to the theft of other moveable property, notably securities.<sup>14</sup>

<sup>8</sup> Paul M. BATOR, An Essay on the International Trade in Art, 34 *Stan. L. Rev.* 275, 334 (1982). Cf. also Karl MEYER, *The Plundered Past* 26–27, 29–33 (1973) (describing the removal of Mayan steles); William G. PEARLSTEIN, Cultural Property, Congress, the Courts, and Customs. The Decline and Fall of the Antiquities Market? in *Who Owns the Past* 10 (Kate Fitz Gibbon ed. 2005)(stating that it was the removal of Mayan steles that caused the U.S. to act to control the import of cultural property).

<sup>9</sup> See Treaty of Co-operation Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, U.S.-Mex., Jul. 17, 1970, 22 U.S.T. 494.

<sup>10</sup> UNESCO Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231.

<sup>11</sup> 19 U.S.C. §§2091–2095 (2006).

<sup>12</sup> The National Motor Vehicle Theft (Dyer) Act, 41 Stat. 324 (1919) (codified as 18 U.S.C. §§ 2311–2313 (2006)).

<sup>13</sup> See generally the discussion of the history of National Motor Vehicle Theft (Dyer) Act (41 Stat. 324 (1919)), the National Stolen Property Act (48 Stat. 333 (1934)), and the Bank Robbery Act (48 Stat. 304 (1934)) in *Jerome v. United States*, 318 U.S. 101, 102 (1943) (stating that «[b]y 1934, great concern had been expressed over interstate operations by gangsters against banks – activities with which local authorities were frequently unable to cope. ... The Attorney General, in response to that concern, recommended legislation embracing certain new federal offenses») and in *United States v. Canton*, 470 F.2d 861 (2d. Cir. 1972).

<sup>14</sup> 48 Stat. 333 (codified as 18 U.S.C. §§2314, 2315 (2006)).

In the first antiquities case to come before the U.S. courts, an antiquities dealer, Clive Hollinshead, bribed Guatemalan officers to have a Mayan stele, Machaquila Stele Number 2, cut up, transported across the Guatemalan border with British Honduras, packed at a fish packing plant in Belize into boxes labeled «personal effects», and shipped to Miami, Florida. Hollinshead tried to sell the stele in the United States, but was arrested in California. The district court did not address the issue of whether the defendants knew the stele was considered stolen under Guatemalan law, but the appellate court considered this harmless error, because the evidence was overwhelming that the defendants knew that the removal of the stele was against Guatemalan law and that the stele was stolen.<sup>15</sup>

*Hollinshead* was an easy case. The stele was known and documented, so it was easy to prove that it had been illicitly removed from Guatemala. It was not an artifact that had remained in the ground, unknown until it was first discovered by excavation. It was a very different case from *McClain*.

In *McClain*, the defendants were convicted under the NSPA for dealing in artifacts that had been excavated in Mexico. The defendants tried to sell the artifacts to a Cleveland businessman, who called in the FBI. The FBI agents posed as members of the Mafia who wanted to buy stolen antiquities and fly them out of the United States in a private airplane. This showed that the *McClain* defendants had the requisite mental state (*mens rea*), i.e. they knowingly entered into a criminal conspiracy to deal in artifacts that they believed to have been stolen from Mexico. In the first conviction of the *McClain* defendants, the trial court held that Mexico had owned all the pre-Columbian artifacts in the country since the law of 1897, and therefore any artifacts taken out of Mexico had been stolen from that country. This decision clouded the title of most pre-Columbian artifacts in the collections of U.S. museums, since they had been acquired after 1897.<sup>16</sup> The appellate court attacked the lower court's decision through an analysis of Mexican law. The prosecution's expert on Mexican law, Alejandro Gertz Manero,<sup>17</sup> the deputy attorney general

<sup>15</sup> See *United States v. Hollinshead*, 495 F.2d 1154 (9<sup>th</sup> Cir. 1974).

<sup>16</sup> See *Stolen Archaeological Property: Hearing on S.605 before the S. Comm. on the Judiciary*, 99<sup>th</sup> Cong. 158 (1986) (statement of Maureen Robinson, Legis. Dir., Am. Ass'n of Museums).

<sup>17</sup> After the decision of the *McClain* trial court, Gertz Manero published a book about Mexican cultural patrimony laws. Curiously, in this book he confirmed the statement of the subsequent *McClain I* appellate court that it was only in 1972 that Mexico asserted by statute full ownership of all moveable antiquities, which was not what he testified to during the *McClain* case. Compare Alejandro GERTZ MANERO, *La Defensa Jurídica y Social del Patrimonio Cultural [The Juridical and Social defense of Cultural Patrimony]* (Archivo del Fondo, 74, 1976) (stating that the 1897 law only applied to fixed monuments) with *United States v. McClain (McClain I)*, 545 F.2d 988, 993 (5<sup>th</sup> Cir. 1977) (stating «Gertz testified that the ownership of pre-Columbian artifacts has been vested by law in the Mexican government since 1897»).

of Mexico, had testified that ownership of pre-Columbian artifacts had been vested in the government since 1897.<sup>18</sup> The appellate court rejected this contention and determined that Mexico only fully vested itself with ownership of its pre-Columbian artifacts by its federal law of May 6, 1972.<sup>19</sup> The *McClain I* court held that a declaration of national ownership is necessary before illegal exportation of an article can be considered theft under the NSPA.<sup>20</sup> The *McClain II* appellate court<sup>21</sup> summed up the prior appellate holding in these words: «in addition to the rights of ownership as understood by the common law, the NSPA also protects ownership derived from foreign legislative pronouncements, even though the owned objects have never been reduced to possession by the foreign government.»<sup>22</sup>

The holding that a government could make itself the owner of property that had not been reduced to possession was widely criticized as against traditional Anglo-American legal doctrines,<sup>23</sup> and Senator Moynihan attempted to overturn the *McClain* holding by new legislation,<sup>24</sup> but did not succeed.<sup>25</sup> The *McClain* holding, however, has not been widely followed. Only one appellate decision has followed *McClain* in the three decades since, namely *Schultz*.<sup>26</sup>

18 See *McClain I*, at 993.

19 See *id.* at 1000. The law referred to is the Ley Federal Sobre Monumentos y Zonas Arqueológicas, Artísticas y Históricas [LMZAAH] [Federal Law for Monuments and Archaeological, Artistic, and Historic Areas], Diario Oficial de la Federación [DO], 6 de mayo de 1972 (Mexico).

20 See *McClain I*, at 1000.

21 The *McClain* cases had a complicated procedural history. After the Fifth Circuit reversed the convictions in *McClain I*, the trial court convicted the defendants again. In *McClain II*, the Fifth Circuit again reversed the convictions for violation of the NSPA, since the prosecution had not shown that the defendants had removed the objects from Mexico after May 6, 1972, but upheld the defendants' convictions for *conspiracy* to violate the NSPA. See *United States v. McClain (McClain II)*, 593 F.2d 658, 671–72 (5<sup>th</sup> Cir. 1979).

22 See *id.* at 664.

23 See *Stolen Archaeological Property*, *supra* note 16, at 1, 3, 8, 25 (statements of Sens. Paul Laxalt and Joseph R. Biden and of Professor Paul M. Bator); PEARLSTEIN, *supra* note 8, at 14.

24 See *Stolen Archaeological Property*, *supra* note 16; PEARLSTEIN, *supra* note 8, at 19–21.

25 Senator Moynihan's failure to overturn *McClain* can be explained by the period. It was the height of Reagan's «War on Drugs» and any concessions that could be made to Latin American nations in other fields to enlist their co-operation in campaigns against drug trafficking were deemed to be desirable. See *id.* at 41–42 (statement of Ely Maurer, Assistant Legal Advisor, U.S. Dep't of State) («In these countries, particularly the countries of Latin America, with which we have a variety of ongoing law enforcement problems, the elimination of such potential co-operation could prejudice our relations in other areas of primary concern to us.»).

26 333 F.3d 393, 400 (2d. Cir. 2003). But cf. *United States v. An Antique Platter of Gold*, 991 F. Supp. 222, 231–32 (S.D.N.Y. 1997) (a trial court applying the *McClain* holding) *aff'd* on other grounds, 184 F.3d 131 (2d. Cir. 1999).

*McClain* had an odd subsequent history. The *McClain* defendants were arrested and the artifacts seized in March 1974. As of May 1985, «prosecution under the *McClain* theory [had] not yet resulted in recovery of artifacts by either Mexico or Peru, since the *McClain* artifacts themselves [were] still awaiting a piece-by-piece determination of ownership by the Fifth Circuit.»<sup>27</sup>

In between the *McClain* decisions and *Schultz*, two other decisions involving the import of archaeological artifacts were decided on the basis of the customs statute.<sup>28</sup> In each case the importer either concealed the artifacts entirely or made material misrepresentations about the artifacts. In *Davis*, a case that has been ignored in the secondary literature, Eugene John Davis brought seventy-nine pieces of pre-Columbian statuary from Mexico into the United States without declaring them to U.S. customs. The statues were hidden underneath the rear seat and in the spare tire wheel well.<sup>29</sup> Davis was convicted of violating the U.S. anti-smuggling statute.<sup>30</sup> In *Antique Platter*,<sup>31</sup> the Italian government made a Letters Rogatory Request to confiscate a gold phiale in the possession of the financier Michael Steinhardt.<sup>32</sup> The customs declaration stated that the country of origin of the object was Switzerland, even though the piece is said to have been discovered at Caltavuturo in Sicily during electrical work by an Italian utility company.<sup>33</sup> In 1991 the piece was traded for objects worth \$90,000 to the antiquities dealer William Veres of Zurich, who sold it to Robert Haber, acting for Michael Steinhardt, for \$1.2 million; but on the customs declaration the value was given as \$250,000.<sup>34</sup> These material misstatements ensured the forfeiture of the object to the U.S. government, which returned the piece to Italy.<sup>35</sup>

<sup>27</sup> See *id.* at 43 (statement of Ely Maurer, Assistant Legal Advisor, U.S. Dep't of State).

<sup>28</sup> Another reported case concerning archaeological artifacts involved a ruling on a motion for judgment on the pleadings under the Federal Rule of Civil Procedure 12(b)(6), before any discovery had occurred. The court was willing to follow the *McClain* holding that a foreign government could become the owner archaeological objects by statutory declaration, but the decision was issued at an early stage of the litigation when a court seeks to keep all options open and resolve any disputed issues in favor of the non-moving party (here, Guatemala). It thus has little value as a precedent. See *United States v. Pre-Columbian Artifacts*, 845 F. Supp. 544 (N.D. Ill. 1993).

<sup>29</sup> See *United States v. Davis*, 597 F.2d 1237 (9<sup>th</sup> Cir. 1979).

<sup>30</sup> 18 U.S.C. §545 (2006).

<sup>31</sup> See *United States v. an Antique Platter of Gold*, 991 F. Supp. 222 (S.D.N.Y. 1997), *aff'd* in part, 184 F.3d 131 (2d. Cir. 1999).

<sup>32</sup> See *Antique Platter*, at 226–27; 184 F.3d at 134.

<sup>33</sup> See *Antique Platter*, at 224.

<sup>34</sup> See *Antique Platter*, at 225–26; 184 F.3d at 133.

<sup>35</sup> A bizarre twist on *Antique Platter* is the contention that the phiale itself is, in fact, a modern fake. See PEARLSTEIN, *supra* note 8, at 31 n. 31. But although this contention would change the result in the case of a forfeiture under the NSPA and *McClain*, it does not change the result of a material misstatement under the customs statute 19 U.S.C. §545.

An interesting aspect of *Antique Platter* is that when the antiquities dealer Robert Haber gave a deposition, he pled the Fifth Amendment to the United States Constitution,<sup>36</sup> which protects witnesses against self-incrimination.<sup>37</sup> Although Haber's Fifth Amendment plea saved him from criminal prosecution, it made it difficult to argue that the phiale itself had been imported into the United States innocently.<sup>38</sup> A witness's assertion of the Fifth Amendment privilege can be used as evidence for the government in a related civil proceeding.<sup>39</sup>

With the *Schultz* decision of 2004 an appellate court again faced the issue of whether an object that was excavated in a foreign country that claimed ownership of all archaeological artifacts in the ground could be considered stolen under the terms of the NSPA. *Schultz* arose out of the 1997 conviction in the United Kingdom of Jonathan Tokeley-Parry for trading in stolen objects from Egypt. In exchange for a reduction in his sentence, Tokeley-Parry testified against his U.S. associate, the antiquities dealer Frederick Schultz. In upholding Schultz's conviction, the Court of Appeals for the Second Circuit held that a foreign government can, indeed, make itself into the owner of all the antiquities within its borders, even if they are still lying in the ground undiscovered.<sup>40</sup>

*Hollinshead* is the only case where the conviction was based on an actual violation of the NSPA.<sup>41</sup> *McClain II* affirmed the conviction of the defendants of conspiracy to violate the NSPA, but reversed their conviction on the substantive counts.<sup>42</sup> Frederick Schultz was also convicted of one count of conspiracy to violate the NSPA, rather than violation of the NSPA itself.<sup>43</sup> All the

36 See *Antique Platter*, at 232; 184 F.3d at 134 n. 2.

37 «[N]or shall [any person] be compelled in any criminal case to be a witness against himself.» U.S. CONST. amend. V.

38 *Antique Platter*, at 232. Haber's invocation of the Fifth Amendment makes William Pearlstein's comment about «the apparent absence of knowing wrongdoing» in the *Antique Platter* case hard to credit. See PEARLSTEIN, *supra* note 8, at 26. The trial court was also not much impressed by Steinhardt's claim to be an innocent purchaser, writing, «Steinhardt's experience as an art collector (and specifically his experience with Haber) and the fact that, in the purchase agreement, he provided for the risk of seizure that eventually occurred, both detract from his claim of innocence.» *Id.* at 233.

39 See *Baxter v. Palmigiano*, 425 U.S. 308, 318–20 (1976); *Brinks, Inc. v. City of New York*, 717 F.2d 700, 708–10 (2d. Cir. 1983)(applying *Palmigiano*). For another case where a witness's assertion of the Fifth Amendment privilege was used as evidence in a civil forfeiture proceeding, see *United States v. 4408 Hillside Court*, 966 F.2d 1445 (4<sup>th</sup> Cir. 1992) (per curiam) (unpublished).

40 See *United States v. Schultz*, 333 F.3d 393, 400 (2d. Cir. 2003).

41 *Hollinshead* resulted in convictions on both violating the NSPA itself and conspiracy to violate the NSPA. See *United States v. Hollinshead*, 495 F.2d 1154, 1155 (9<sup>th</sup> Cir. 1974).

42 See *United States v. McClain (McClain II)*, 593 F.2d 658, 672 (5<sup>th</sup> Cir. 1979).

43 See *Schultz*, at 395.

government needs to prove a conspiracy is a meeting of the minds to embark upon a criminal conspiracy, and one overt act, even if innocuous in itself, in furtherance of the conspiracy. This makes conspiracy resemble a thought crime,<sup>44</sup> particularly if there is no conviction on the underlying substantive offense. This use of the conspiracy statute to police the antiquities market is disturbing.

*B. Smuggling Objects Out of a Foreign Country Does Not Violate United States Law.*

It was held in *McClain I*,<sup>45</sup> and it has repeatedly been held since,<sup>46</sup> that smuggling goods *out of* a foreign country does not violate the laws of the United States. Thus Norton Simon's memorable comment about his antiquities collection is not an admission that he violated any U.S. law:

*Hell, yes, it was smuggled. I spent between \$15 million and \$16 million over the last two years on Asian art, and most of it was smuggled. I don't know whether it was stolen.*<sup>47</sup>

The United States will, however, enforce another country's anti-smuggling statute if the United States has concluded a Memorandum of Understanding with that country under the Convention on Cultural Property Implementation Act.

<sup>44</sup> See Ari SHAPIRO, Conspiracy Charge Common in Terrorism Cases, *National Public Radio, All Things Considered*, June 24, 2006, available at <http://www.npr.org/templates/story/story.php?storyId=5509369> (quoting George Washington University Law Professor Paul Butler as saying «conspiracy sounds like a thought crime.»).

<sup>45</sup> Cf. *United States v. McClain (McClain I)*, 545 F.2d 988, 996 (5<sup>th</sup> Cir. 1977)(quoting with the approval the statement of Paul M. Bator, «The general rule today in the United States, and I think in almost all other art-importing countries, is that it is not a violation of law to import simply because an item has been illegally exported from another country»); BATOR, *supra* note 8, at 287.

<sup>46</sup> See, e.g., *United States v. Pre-Columbian Artifacts*, 845 F. Supp. 544, 547 (N.D. Ill. 1993); *Peru v. Johnson*, 720 F. Supp. 810, 815 (C. D. Cal. 1989), *aff'd sub nom. Peru v. Wendt*, 933 F.2d 1013 (9<sup>th</sup> Cir. 1991)(unpublished). *Contra United States v. Schultz*, 333 F.3d 393, 412 (2d. Cir. 2003)(incorrectly stating that smuggling items out of Egypt would result in criminal sanctions in the United States). This erroneous holding by the *Schultz* appellate court may have arisen because of the apparent failure by Schultz's lawyers to direct the court's attention to *McClain I* and other cases where it was held that it is not a crime in the United States to smuggle objects *out of* foreign countries. See *id.* at 407 (stating «Schultz contends that it is United States policy not to enforce the export restrictions of foreign nations. Schultz offers no evidence in support of this assertion.»).

<sup>47</sup> MEYER, *supra* note 8, at 145; David L. SHIREY, Norton Simon Bought Smuggled Idol, *N. Y. Times*, May 12, 1973, at 1, 20. Norton Simon also said, «I have clear title to the piece. It entered America legally,» implying that he bought it in good faith from a previous owner, not from a thief, and that he properly declared it and did not violate 18 U.S.C. §§ 542 and 545 when he imported the piece into the United States. MEYER, at 145; SHIREY, at 20.

*C. The Convention on Cultural Property Implementation Act (CCPIA).*

In 1970 the United States participated in negotiating the UNESCO Convention on Cultural Property.<sup>48</sup> The UNESCO secretariat, the Soviet Union and other states of the eastern bloc advocated shutting down the international trade in cultural property, including a worldwide import ban. The Harvard law professor Paul M. Bator negotiated a compromise with Mexico: the source countries would allow a regulated trade in cultural property in exchange for import restrictions imposed by the market countries when pillage rose to the level of an emergency. To Bator's regret, the UNESCO Convention did ban exports.<sup>49</sup> The United States Senate gave its advice and consent to the UNESCO Convention on Cultural Property in August 1972,<sup>50</sup> but since the United States considered the treaty not to be self-executing, it required the passage of a Federal statute before it became law in the United States. The Convention on Cultural Property Implementation Act became law in 1983.<sup>51</sup> Mexico was displeased by the passage of the CCPIA because it did not include an export ban and added a reservation to the UNESCO Convention criticizing the United States.<sup>52</sup>

Under the CCPIA, if a foreign country considers that the pillage has become an emergency, it can request the conclusion of a Memorandum of Understanding (MOU).<sup>53</sup> The U.S. State Department refers the question to the Cultural Property Advisory Committee, which is composed of the competing interests in cultural property: two members from museums, three members from the archaeological profession, three members from the art dealing trade, and three members from the public.<sup>54</sup> The CPAC makes a recommendation, which the President (i.e. the State Department) takes into consideration (although the CPAC recommendation is not binding<sup>55</sup>) when concluding the MOU and the MOU is published in the Federal Register.<sup>56</sup> In recent years

<sup>48</sup> 823 U.N.T.S. 231.

<sup>49</sup> Article 6 of the UNESCO convention says that export will only be permitted on the basis of a government export certificate. Since these export certificates are never issued, Article 6 is, in effect, an export ban. UNESCO Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Cultural Property art. 6, Nov. 14, 1970, 823 U.N.T.S. 231.

<sup>50</sup> See BATOR, *supra* note 8, at 338.

<sup>51</sup> 19 U.S.C. §§2601–13 (2006).

<sup>52</sup> Mexico observed that the reservations of the United States «would have the regrettable result of permitting the import into the United States of America of cultural property and its re-export to other countries, with the possibility that the cultural heritage of Mexico might be affected.» LA/Depositary/1985/40 of Mar. 3, 1986; the text of the UNESCO Convention and the reservations of the signing parties may be found at [portal.unesco.org](http://portal.unesco.org) (last visited on Dec. 15, 2010).

<sup>53</sup> 19 U.S.C. §2602 (2006).

<sup>54</sup> 19 U.S.C. §2605 (2006).



MOUs have proliferated; the United States has concluded them with thirteen countries.<sup>57</sup> Coins were not included in any MOUs until the 2007 MOU renewal with the Republic of Cyprus, which included gold, silver, and bronze coins of Cypriot types.<sup>58</sup> In 2009 the United States concluded an MOU with China, which included coins from the very beginnings of coinage in China through the Tang dynasty (618–907 C.E.).<sup>59</sup> In 2010 the United States received two proposals for MOUs, both of which may include coins (although that is not known for certain): one is for the renewal of its MOU from Italy and the other is for the conclusion of a new MOU from Greece. As of this writing (March 2011), a final MOU has not yet been issued for Greece. The final MOU for Italy was issued on January 19, 2011. It banned the import of coins of «Ital-

55 The CPAC recommended *not* including coins in the renewal of the Cyprus MOU, but it was overruled by the Department of State. See James F. FITZPATRICK, *Falling Short – Profound Failures in the Administration of the 1983 Cultural Property Laws, Art & Cultural Heritage L. Newsl.*, Summer 2010, at 3, available at [http://meetings.abanet.org/webupload/commupload/IC936000/sitesofinterest\\_files/Art\\_&\\_Cultural\\_Heritage\\_Law\\_Committee\\_Summer\\_2010\\_Newsletter.pdf](http://meetings.abanet.org/webupload/commupload/IC936000/sitesofinterest_files/Art_&_Cultural_Heritage_Law_Committee_Summer_2010_Newsletter.pdf).

56 19 U.S.C. §2602 (2006).

57 The thirteen countries, with the date the MOU was first concluded, are Bolivia (2001), Cambodia (2003), Canada (1997–2002), China (2009), Colombia (2006), Cyprus (2002), El Salvador (1995), Guatemala (1997), Honduras (2004), Italy (2001), Mali (1997), Nicaragua (2000) and Peru (1997). All MOUs have been extended after their initial five-year duration, with the exception of the MOU with Canada, which was allowed to lapse. See *Guide to Cultural Property Import Restrictions Imposed by the United States of America*, <http://exchanges.state.gov/heritage/culprop/chart2.pdf> (last visited Nov. 25, 2010). *Treaties in Force*, the official guide issued by the U.S. State Department to treaties concluded by the United States, does not list a renewal for the Guatemala MOU in 2002, so it is possible that that MOU lapsed between 2002 and 2007.

58 The text of the MOU concerning coins reads as follows:

Coins of Cypriot type including, but not limited to:

(1) Issues of the ancient kingdoms of Amathus, Kition, Kourion, Idalion, Lapethos, Marion, Paphos, Soli, and Salamis dating from the end of the 6<sup>th</sup> century B.C. to 332 B.C.

(2) Issues of the Hellenistic period, such as those of Paphos, Salamis, and Kition from 332 B.C. to c. 30 B.C.

(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.

Import Restrictions on Archaeological Objects from Cyprus, 72 Fed. Reg. 38,470, 38,473 (July 13, 2007). The phrase «not limited to» violates the CCPIA, which requires that listings are to be «specific and precise» and must give «fair notice.» 19 U.S.C. §2604 (2006).

59 The Chinese MOU applies to coinage from its beginnings under the Zhou Dynasty through the Tang Dynasty. The MOU is poorly drafted; rather than the simple listing that would be expected from a regulation it gives a narrative history of the development of Chinese coinage. Moreover, rather than stopping its history of Chinese coinage at 907 C.E., with the end of the Tang Dynasty, it goes on to describes coinage developments up through 959 C.E. 74 Fed. Reg. 2838, 2842 (Jan. 16, 2009). This poor drafting violates the «specific and precise» and «fair notice» requirements of the CCPIA. 19 U.S.C. §2604 (2006).

ian type»: *aes rude*, *signatum*, and *grave*; Roman Republican coins down to 211 B.C.E.; the coins of Roman Republican colonies in Italy, Sicily, and Sardinia down to 37 C.E., and the coins of Greek cities in Italy and Sicily down to 200 B.C.E.

The CCPIA also bans the importation of «stolen cultural property» into the United States, but it uses stolen in the more conventional sense of taken from an existing collection, and not the *McClain* sense of excavated from the soil.<sup>60</sup> Thus the U.S. government bans the possession of cultural property that has been stolen in two senses: *McClain* stolen under the NSPA, and *really* stolen under the CCPIA. The use of the word «stolen» in two different senses in U.S. cultural property law has confused at least one federal judge, who cited Professor Paul M. Bator as a supporter of the *McClain* holding that the NSPA should be used against those who trade in stolen artifacts.<sup>61</sup> This is incorrect: Bator opposed the *McClain* decision and testified in favor of Senator Moynihan's bill to overturn it.<sup>62</sup>

Bator said that (1) import controls should be imposed only in crisis situations; (2) the categories of art subject to controls must be narrowly defined; and that (3) the policy must encourage international exchanges of art.<sup>63</sup> In practice, import controls have been imposed as a matter of course and subject to open-ended renewals; the categories of art have been broadly and carelessly defined; and the United States has received small and begrudging loans of art in return. A very overbroad request under the CCPIA was that from China encompassing artifacts through the Revolution of 1912,<sup>64</sup> even though the CCPIA does not apply to objects less than 250 years old.<sup>65</sup> Moreover, the MOUs have been negotiated with a lack of transparency; documents distributed to the CPAC are routinely stamped «Eyes Only»<sup>66</sup> and although the State Department is supposed to file regular reports to Congress about these activities,<sup>67</sup> these reports have not been made.<sup>68</sup> The United States uses cultural

<sup>60</sup> 19 U.S.C. §2607 (2006).

<sup>61</sup> See *United States v. Schultz*, 178 F. Supp. 2d 445, 449 (2002).

<sup>62</sup> See *Stolen Archaeological Property*, *supra* note 16, at 19–22 (statement of Paul M. Bator, Bruce Bromley Professor of Law, Harvard Law Sch.).

<sup>63</sup> See BATOR, *supra* note 8, at 330–31, 336; FITZPATRICK, *supra* note 55, at 26–28.

<sup>64</sup> See Jason M. TAYLOR, The rape and return of China's cultural property: How can bilateral agreements stem the bleeding of China's cultural heritage in a flawed system?, 3 *Loy. U. Chi. Int'l L. Rev.* 233, 250 (2005) (describing how the Chinese request applied to all artifacts through 1911). See also FITZPATRICK, *supra* note 55, at 26 (criticizing overbroad MOUs).

<sup>65</sup> 19 U.S.C. §2601 (2006).

<sup>66</sup> See FITZPATRICK, *supra* note 55, at 28–29; Steven VINCENT, The Secret War of Maria Kouroupas, *Art & Auction*, Mar. 2002, at 62, 67.

<sup>67</sup> 19 U.S.C. §2602(g) (2006).

<sup>68</sup> See VINCENT, *supra* note 66.

property as a tradeoff for other foreign policy goals:<sup>69</sup> the United States concluded a MOU with Canada to assuage that country's objections to the Helms-Burton Act, and included coins in the renewal of the MOU with Cyprus to get that country's co-operation in the so-called global war on terror.<sup>70</sup> Furthermore, although the CCPIA encourages multilateral action – the requesting nations must take their own measures against the plundering of archaeological sites,<sup>71</sup> all nations involved must encourage the international interchange of cultural property<sup>72</sup> and must seek the co-operation of other market nations to restrict the import of plundered material<sup>73</sup> – the U.S. grants and renews MOUs without insisting on significant measures by requesting nations or anyone else. A recent example is the Chinese MOU, which was granted despite China's wide-open market for antiquities.<sup>74</sup>

Under the CCPIA's safe harbor provisions, the law does not apply to an object owned by a museum for at least three years, which was purchased by the museum in good faith and without notice that it was illegally imported, and one of the following: (1) the object was publicized through the press; or (2) exhibited to the public for periods totaling at least one year; or (3) cataloged and the catalog made available to public for at least two years.<sup>75</sup> The CCPIA also does not apply if the object has been in United States for at least ten years and has either (1) been exhibited by a museum for at least five years<sup>76</sup> or (2) the state party received fair notice of its location.<sup>77</sup> Finally, the CCPIA does not apply if the object has been in the United States for at least twenty years and its possessor purchased it without knowledge or reason to believe that the piece was imported in violation of law.<sup>78</sup> Thus litigation concerning cultural property invokes either the NSPA<sup>79</sup> or state laws like replevin and conversion,<sup>80</sup> and not the CCPIA; the CCPIA is most effective at the point of import or soon afterwards.

<sup>69</sup> In the words of one U.S. diplomat, «We are in the business of making other countries happy. The department is always looking for 'deliverables' we can give to other nations.» *Id.* at 69.

<sup>70</sup> See FITZPATRICK, *supra* note 55, at 30; VINCENT, *supra* note 66, at 69.

<sup>71</sup> 19 U.S.C. §2602(a) (1)(B) (2006).

<sup>72</sup> 19 U.S.C. §2602(a) (1)(D) (2006).

<sup>73</sup> 19 U.S.C. §2602(a) (1)(C)(i) (2006).

<sup>74</sup> See James B. CUNO, *Who Owns Antiquity?* 93 (2008) (describing the booming art market within China).

<sup>75</sup> 19 U.S.C. §2611 (2)(A) (2006).

<sup>76</sup> 19 U.S.C. §2611 (2)(B) (2006).

<sup>77</sup> 19 U.S.C. §2611 (2)(C) (2006).

<sup>78</sup> 19 U.S.C. §2611 (2)(D) (2006).

<sup>79</sup> See *supra* text accompanying notes 12–44.

<sup>80</sup> See *infra* text accompanying notes 99–128.

It was not until 2009<sup>81</sup> that there was a reported decision applying the CCPIA.<sup>82</sup> Exipion Ernesto Ortiz-Espinoza, a citizen of Bolivia, brought two paintings of the colonial-era Cuzco school from Bolivia to Washington, DC, and attempted to sell them. The paintings had been crudely cut out of their frames. An appraiser suspected that the paintings were stolen and reported them to the FBI.<sup>83</sup> The FBI, unable to prove that the paintings were stolen, filed a forfeiture proceeding under the CCPIA.<sup>84</sup> The paintings, as colonial era paintings, produced by indigenous people, used for religious evangelism among those people and important to the cultural heritage of those peoples, were subject to the U.S.-Peru MOU.<sup>85</sup> Ortiz-Espinoza defended on the grounds that the paintings, were actually from Bolivia.<sup>86</sup> However, Bolivia also has a MOU banning the export of colonial-era paintings produced by indigenous peoples, and thus the court granted summary judgment to the U.S. government for forfeiture of the paintings.<sup>87</sup> Oddly, the court also held that after forfeiture, the three claimants – Peru, Bolivia, and even Ortiz-Espinoza himself – could apply for the return of the painting from the U.S. government.<sup>88</sup> Presumably a decision in favor of Ortiz-Espinoza would mean that he has a better possessory right than Bolivia or Peru to the paintings – he just does not have the right to import those paintings into the United States, and thus must retain them outside the U.S.

This case has two troubling aspects. First, the U.S. government is using the CCPIA to seize art that it *thinks* is stolen, but which it cannot actually *prove* is stolen.<sup>89</sup> This cuts against the safeguards of the U.S. criminal justice system. Secondly, the definition of paintings as ethnological objects is murky. The court said that one way to tell whether the paintings came from the Cuzco school was that they render «the figures with Andean facial characteristics.»<sup>90</sup> This is too vague for a criminal statute.<sup>91</sup>

81 The trial court and appellate court decisions in *Schultz* did discuss the CCPIA, but held that it was not applicable to the case, using the NSPA instead. See *United States v. Schultz*, 178 F. Supp.2d 445, 449 (S.D.N.Y. 2002), *aff'd*, 303 F.3d 393, 408–9 (2d. Cir. 2003).

82 See *United States v. Eighteenth Century Peruvian Oil on Canvas Painting of the «Doble Trinidad.»* 597 F. Supp. 2d 618 (E.D. Va. 2009).

83 See *id.* at 619–20.

84 Jeffrey MARKON, *Looted Pieces of Cultural Patrimony: 2 Nations Claim Historic Paintings*, *Wash. Post*, Mar. 2, 2009, at B1.

85 See *Doble Trinidad*, at 622.

86 See *id.* at 624.

87 See *id.* at 624–25.

88 See *id.* at 625.

89 See MARKON, *supra* note 84.

90 See *Doble Trinidad*, at 622 n. 1.

91 In particular, it violates the «specific and precise» and «fair notice» requirements of the CCPIA. 19 U.S.C. §2604 (2006).

*D. The Archaeological Resources Protection Act (ARPA).*

A remarkable development has been the application of ARPA to archaeological artifacts from foreign countries.<sup>92</sup> ARPA should apply only to federal and Indian lands within the territory of the United States.<sup>93</sup> In the *Gerber* case, however, a Federal appellate court held that ARPA also bans the trafficking of artifacts acquired in violation of any state and local laws, namely criminal trespass.<sup>94</sup> Since 1996, ARPA has been applied in at least three cases to prosecute the trafficking of foreign archaeological artifacts.<sup>95</sup> The rationale is that the foreign archaeological artifacts are «stolen» in the *McClain* sense; trafficking in them violates state laws against trafficking in stolen property; and thus this also violates ARPA.<sup>96</sup>

It has been suggested that the rationale behind using ARPA is that it cuts out the mens rea requirement (that one act knowingly, or scienter) that is part of the NSPA.<sup>97</sup> This, however, is unlikely; even if there is no scienter requirement in ARPA, the underlying state statutes that forbid trafficking in stolen objects do have a scienter requirement, which cannot be evaded merely by incorporating them in ARPA.

The likeliest explanation is that this use of ARPA arises from the difficult circumstances of the *Gerber* case. Arthur Gerber was the nation's leading trafficker in illegally acquired Indian artifacts, who had pled guilty to criminal trespass twice before and was sued for \$100,000 for conversion by one landowner, but found not liable because the statute of limitations had passed.<sup>98</sup> Gerber and his associates committed criminal trespass when they

<sup>92</sup> See Andrew ADLER, An Unintended and Absurd Expansion: The Application of the Archaeological Resources Protection Act to Foreign Lands, 38 *N.M. L. Rev.* 133 (2008).

<sup>93</sup> See *id.* at 145–47; KLEEBERG, *supra* note 1, at 22–23.

<sup>94</sup> See *United States v. Gerber*, 999 F.2d 1112 (7<sup>th</sup> Cir. 1993). On the background to *Gerber*, see Cheryl Ann MUNSON, Marjorie Melvin JONES, & Robert E. FRY, Forum: The GE Mound: An ARPA Case Study, 60 *Am. Antiquity* 131 (1995). Although the FBI recovered the artifacts from the GE Mound from the artifact collectors, the ultimate fate of the artifacts was to be reburied at the insistence of Native American pressure groups who claimed to be related to the Native Americans of the Hopewell Mound Culture. See *id.* at 147–52.

<sup>95</sup> See ADLER, *supra* note 92, at 143–44. The three cases are *Etruscan Vase* (concerning the seizure of an Etruscan vase located at Antiquarium, Ltd., 948 Madison Avenue in December 1996), *Barchitta* (concerning the prosecution of the 74-year-old collector of Peruvian antiquities, Taddeo Barchitta, in May 2003), and *Asian Antiquities* (concerning massive raids in January 2008 on museums in Los Angeles in connection with donations of Asian antiquities as part of a tax evasion scheme).

<sup>96</sup> See *id.* at 144–45.

<sup>97</sup> See *id.* at 156–57.

<sup>98</sup> See MUNSON, JONES & FRY, *supra* note 94, at 145.

removed the objects from the land of the General Electric Company in Indiana. Although Gerber resided in Indiana, his associates resided in other states and could not be extradited because criminal trespass is a misdemeanor and misdemeanors are not extraditable offenses. The meaning of a Federal statute, ARPA, was stretched to convict Gerber and his associates. Once one Federal prosecutor had used ARPA in this unusual fashion, others were tempted to go down the same route.

## II. Private Litigation Concerning Antiquities.

### A. *The Defendant Prevails: Peru v. Johnson and the Sevso Treasure.*

Foreign governments have also sued as private litigants in U.S. courts to reclaim antiquities. These cases are brought under the state laws of replevin (a demand for the return of the actual object) and conversion (a demand for the proceeds from the sale of the object). In *Peru v. Johnson*,<sup>99</sup> the trial court found for the defendants for three reasons, geographical, temporal, and legal. The geographical defense was that Peru had not proved that the artifacts were actually found in Peru; Peru's expert witness, the archaeologist Francisco Iriarte Brenner, admitted that the artifacts could also have been found in Ecuador or Bolivia, or even Polynesia, as well as in Peru, and one customs declaration stated that the artifacts came from Colombia.<sup>100</sup> The temporal defense was that Peru could not prove that the artifacts were excavated after Peru's enactment of an ownership law in 1985.<sup>101</sup> The legal defense was that the ownership law did not apply to collectors within Peru, and thus acted as an export restriction rather than a true ownership law.<sup>102</sup> In the case concerning the Sevso treasure of Roman silver, the defendant, the Marquess of Northampton, prevailed because Croatia and Hungary both claimed that the treasure had been illegally exported from their land, and the jury found neither claim convincing. Here the geographical defense prevailed again.<sup>103</sup>

<sup>99</sup> *Peru v. Johnson*, 720 F. Supp. 810 (C. D. Cal. 1989), *aff'd sub nom. Peru v. Wendt*, 933 F.2d 1013 (9th Cir. 1991)(unpublished).

<sup>100</sup> See *id.* at 812. It is not clear from the record if Iriarte Brenner meant by the reference to Polynesia that he accepted Thor Heyerdahl's «Kon-Tiki» hypothesis, which most archaeologists, anthropologists and historians reject, or if Iriarte Brenner was only saying that there are enough stylistic similarities between artifacts found in Peru and those found in Polynesia that the artifacts cannot be definitely assigned to a find spot.

<sup>101</sup> See *id.* at 812–15.

<sup>102</sup> See *id.* at 814–15. U.S. courts will not enforce an export restriction because they do not enforce smuggling *out of* foreign countries.

<sup>103</sup> See Harvey KURZWEIL, Leo V. GAGION & Ludovic DE WALDEN, The Trial of the Sevso Treasure: What a Nation Will Do in the Name of Its Heritage, in *Who Owns the Past?* 93–95 (Kate Fitz Gibbon ed., 2005).

*B. The Plaintiff Prevails: The Karun Treasure and the Elmalı Hoard.*

1. THE KARUN (LYDIAN) TREASURE.

Turkey has prevailed in two private actions brought against collectors of antiquities. In a case against the Metropolitan Museum of Art concerning the Lydian hoard (also called the Karun treasure) from Uşak, commenced by Turkey in May 1987, the Metropolitan Museum argued that the statute of limitations of three years had already passed, and in the alternative that it was entitled to the equitable defense of laches because it had been prejudiced by the plaintiff's unreasonable delay in commencing the action. In New York, the statute of limitations only begins to run once the claimant demands the return of the object and the possessor refuses.<sup>104</sup> The trial court accordingly dismissed the Met's motion for summary judgment.<sup>105</sup> Turkey's complaint argued in the alternative that the Met was either a good faith purchaser, but Turkey had sued within the statute of limitations, or that, even if Turkey had delayed its suit beyond the statutory period, the Met was a bad faith purchaser when it bought the Karun hoard.<sup>106</sup> Usually a plaintiff suing in conversion only asserts that the defendant is a good faith purchaser, since bad faith is difficult to prove. In discovery, the Met's own documents proved that the Met had, indeed, acted in bad faith when it bought the Karun treasure and hid it away in its basement.<sup>107</sup> As the Met itself admitted, «we learned through the legal process of discovery that our own records suggested that some museum staff during the 1960s were likely aware, even as they acquired these objects, that their provenance was controversial.»<sup>108</sup> This affair epitomizes the disastrous Met directorship of Thomas P. F. Hoving.<sup>109</sup> The Karun treasure was returned to Turkey;<sup>110</sup> sadly, a prize specimen of the Karun treasure, a gold hippocampus, has since been stolen from the Uşak Museum as part of an inside job.<sup>111</sup>

<sup>104</sup> *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E. 2d 426 (N.Y. 1991) is the controlling decision.

<sup>105</sup> *Republic of Turkey v. Metro. Museum of Art*, 762 F. Supp. 44 (S.D.N.Y. 1990).

<sup>106</sup> See *id.*

<sup>107</sup> See John L. HESS, *The Grand Acquisitors* 138–40 (1974); MEYER, *supra* note 8, at 65–67; Sharon WAXMAN, *Loot: The Battle over the Stolen Treasures of the Ancient World* 144–51 (2008).

<sup>108</sup> WAXMAN, *supra* note 107, at 151.

<sup>109</sup> See HESS, *supra* note 107.

<sup>110</sup> See WAXMAN, *supra* note 107, at 151.

<sup>111</sup> See *id.* at 157–62, 166.

## 2. THE ELMALI (DECADRACHM) HOARD.

*Turkey v. OKS Partners* is the only case that actually involves a coin hoard.<sup>112</sup> It concerned a hoard of 2,000 Greek and Lydian coins that was dug up in Elmali, Turkey and bought by a partnership of the petroleum heir William I. Koch,<sup>113</sup> the New York investment banker Jonathan Kagan, and the academic Jeffrey Spier. The two matters of contention involved the statute of limitations<sup>114</sup> and the geographical defense.

A July 1984 letter from the Swiss coin dealer Silvia Hurter to the Boston curator Cornelius Clarkson Vermeule III was a crucial piece of evidence. The letter read:

*The main reason for this letter, however, is an interesting piece of gossip. Rumors have it that the hoard that could reasonably be called the «Hoard of the Century» is slowly moving to your part of the world. Or wouldn't you agree that any hoard that contains 7 decadrachms of Athens is the Hoard of the Century? There may be one snag I'd like you to be aware of. We heard from a reasonably reliable source of information that the Turkish authorities are aware of it. The word Interpol was mentioned though I don't know if actual steps were taken. It seems that one of the peasants on the find spot bought a Mercedes or did something similarly intelligent. Maybe this piece of information is of use to you some day, but please make sure that it cannot be traced back to us.<sup>115</sup>*

Vermeule told Koch about this letter shortly after it arrived.<sup>116</sup> And in 1988, Vermeule warned Koch to keep a low profile: «It would be wise to let the dust settle before exhibiting the coins. One doesn't want a process server from the Turkish Embassy's New York lawyers.»<sup>117</sup>

<sup>112</sup> See Özgen ACAR & Melik KAYLAN, *The Hoard of the Century*, *Connoisseur*, Jul. 1988, 74; Barry MEIER, *The Case of the Contested Coins: A Modern Day Battle over Ancient Objects*, *N. Y. Times*, Sept. 24, 1998, at C1.

<sup>113</sup> William Koch is the brother of David and Charles Koch, the petroleum industrialists who finance the Tea Party and other right-wing causes. See Jane MAYER, *Covert Operations: The billionaire brothers who are waging a war against Obama*, *New Yorker*, Aug. 30, 2010, at 44. William Koch quarreled with David and Charles and settled his litigation against them for \$470 million in 1984. See MEIER, *supra* note 112, at C1.

<sup>114</sup> Turkey sued under conversion, replevin, and the Federal conspiracy statute, RICO, plus a Massachusetts consumer protection statute. Conversion and replevin have a three-year statute of limitations in Massachusetts; RICO has a four-year statute of limitations.

<sup>115</sup> MEIER, *supra* note 112, at C1.

<sup>116</sup> See *id.* at C23.

<sup>117</sup> *Id.* at C23.



Although the Hurter letter to Vermeule shows that the Turkish authorities were aware of the abstraction of the coins as early as July 1984, Turkey did all that could be reasonably expected, including having Interpol issue red notices for two of the traffickers in the hoard, Fuat Aydiner and Edip Telliğaoğlu.<sup>118</sup> And since Koch was informed of the letter around the same time (and about the involvement of Interpol), he was not a good faith purchaser, which tolls the statute of limitations. The subsequent Vermeule letter likewise proves that, as of 1988, Koch was in receipt of information that he possessed coins to which he did not have good title.

The *OKS Partners* court also held, in its ruling on a motion for summary judgment in 1994, that under Turkish law as it has existed since 1906, Turkey has an unconditional right to possession of any coin hoard found in its lands, thus following the precedent established in *McClain I*.<sup>119</sup> This left the defendants only with the possibility of the geographical defense.

The defendants did a good job of sabotaging their own geographical defense. Jeffrey Spier, in his Oxford doctoral dissertation, stated that the Decadrachm Hoard had been found in «Lycia.»<sup>120</sup> Jonathan Kagan's wife, Sallie Fried, said in a paper delivered at Oxford and published in *British Archaeological Reports* that «the find spot is probably somewhere in southern Anatolia.»<sup>121</sup> Although the Turkish authorities developed their own sources for determining the find spot, including confessions from the initial finders, the defendants planned to attack these confessions as extracted under duress.<sup>122</sup> These admissions contrary to interest by the defendants, by contrast, would be accepted into evidence without objection. The defendants responded to Turkey's «embarrassing catalogue of their self-inflicted wounds with a cauldron of scalding rhetoric» and «some weasling.»<sup>123</sup> However, since the court had restricted discovery to the Elmalı Hoard on Turkey's assurances that it could prove that the coins possessed by the defendants were indeed the Elmalı Hoard the court held that it could not grant summary judgment to Turkey but had to let the case proceed to trial to produce a full airing of all the facts.<sup>124</sup>

The defendants' obstructive litigation annoyed the court. In 1993, when the litigants were conducting discovery on the Turkish laws concerning cultural

<sup>118</sup> See ACAR & KAYLAN, *supra* note 112, at 77.

<sup>119</sup> See *Republic of Turkey v. OKS Partners*, No. 89-3061-WJS, 1994 U.S. Dist. LEXIS 17032 (D. Mass. June 8, 1994), at \*8-\*9.

<sup>120</sup> See *Republic of Turkey v. OKS Partners*, No. 89-CV-3061-RGS, 1998 U.S. Dist. LEXIS 23526 (D. Mass. Jan. 23, 1998), at \*4.

<sup>121</sup> See *id.*

<sup>122</sup> See MEIER, *supra* note 112, at C23.

<sup>123</sup> See *OKS Partners*, at \*5.

<sup>124</sup> See *id.*

property, they sought to take depositions of Turkish ministers and civil servants involved in drafting the laws. The court struck down this demand as overbroad.<sup>125</sup> In 1998, in ruling on a third defense motion for summary judgment, the same judge who noted the defendants' «cauldron of scalding rhetoric» and their «weasling» also curtly observed, «Judge Skinner has ruled twice before on this motion. Three times is too many and the third time is too late.»<sup>126</sup> In March 1999 the defendants settled and returned the coins to Turkey.<sup>127</sup>

Acar and Kaylan raise an interesting hypothetical: U.S. museums, including the American Numismatic Society and the Boston Museum of Fine Arts, at various times had parts of the Elmalı hoard in their possession. Could they have been criminally prosecuted under the NSPA?<sup>128</sup> Although Acar and Kaylan find this prospect improbable, there is nothing in the language of the NSPA that would gainsay such a prosecution.

### III. Defenses against Claims for Antiquities from the U.S. Federal Government and Private Litigants.

Litigants have used several defenses with varying success: the legal defense, which contends that the foreign state seeking the return of the objects has not passed a true ownership law; the temporal defense, which contends that the foreign objects that are sought were removed from the foreign state before the passage of the ownership law; the statute of limitations defense, which did not prevail in either of the cases brought by Turkey because in both cases there was evidence that the defendants were bad faith, rather than good faith, purchasers; and the geographical defense, which contends that the objects were not found within the modern borders of the foreign state. The defense that has proved most powerful has been the geographical defense, which prevailed in *Peru v. Johnson* and in the Sevso treasure case.

One defense raised and rejected in *Schultz* was of mistake of law.<sup>129</sup> This defense deserves more consideration than the short shrift given it by the *Schultz* court. The *McClain* holding in effect incorporates foreign antiquities laws into United States law. It imposes on the would-be purchaser of an antiquity the duty to learn the laws of dozens of countries, many of which are not pub-

<sup>125</sup> See *Republic of Turkey v. OKS Partners*, 146 F. R. D. 24 (D. Mass. 1993).

<sup>126</sup> See *Republic of Turkey v. OKS Partners*, No. 89-CV-3061-RGS, 1998 U.S. Dist. LEXIS 23526 (D. Mass. Jan. 23, 1998), at \*9.

<sup>127</sup> See Barry MEIER, International Business: Turkish Government 1,700; a U.S. Investor, 1, *N. Y. Times*, Mar. 5, 1999, at C4.

<sup>128</sup> See ACAR & KAYLAN, *supra* note 112, at 80.

<sup>129</sup> See *United States v. Schultz*, 333 F.3d 393, 410–12 (2d. Cir. 2003).

lished in English or in any of the major European languages.<sup>130</sup> Learning all these laws is practically impossible for an international lawyer, let alone for an art dealer or a collector. Even the U.S. Department of Justice is not entirely clear about the status of cultural property laws; in 1985 its Deputy Assistant Attorney General testified to the U.S. Senate, «Except for Mexico, most foreign nations, according to our understanding, have not passed appropriate statutes which are sufficiently enforced to give rise to such proof.»<sup>131</sup> Courts have since held to the contrary that the statutes of Egypt (enacted in 1983),<sup>132</sup> Italy (enacted in 1939),<sup>133</sup> and Turkey (enacted in 1906)<sup>134</sup> are sufficiently enforced to give rise to such proof.

One defense, which has not been adequately litigated, even though it was specifically referred to in Footnote 12 of *McClain I*,<sup>135</sup> relies on the takings clause of the Fifth Amendment to the U.S. Constitution.<sup>136</sup> Supreme Court Justice William Brennan defined what is *not* a taking of moveable personal property in the following terms: «The regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them.»<sup>137</sup> This suggests what *is* a taking: where an artifact *is* required to be surrendered for public use and the owner loses the entire bundle of property rights. Since in each case considered the foreign government was seeking that the artifact be surrendered to it, all these cases involve tak-

<sup>130</sup> MEYER, *supra* note 8, at 240–53, enumerates laws on cultural property as of 1973. UNESCO has established a database of cultural property laws. UNESCO Database of National Cultural Heritage Laws, <http://www.unesco.org/culture/natlaws/index.php?&lng=en> (last visited on Dec. 12, 2010).

<sup>131</sup> *Stolen Archaeological Property*, *supra* note 16, at 35 (statement of James I. K. Knapp, Deputy Assistant Att’y Gen., Criminal Div., U.S. Dep’t of Justice).

<sup>132</sup> See *United States v. Schultz*, 333 F.3d 393, 398–402 (2d. Cir. 2003).

<sup>133</sup> See *United States v. An Antique Platter of Gold*, 991 F. Supp. 222, 231–32 (S.D.N.Y. 1997).

<sup>134</sup> See *Republic of Turkey v. OKS Partners*, No. 89-3061-WJS, 1994 U.S. Dist. LEXIS 17032 (D. Mass. June 8, 1994), at \*8–\*9.

<sup>135</sup> Footnote 12 in *McClain I*, although expressed in terms of a confusing double negative, outlines a takings defense. It reads: «We do not mean to imply that there is no possibility that a due process argument in defense could prevail even if, for example, a defendant were prosecuted for removing his own property to this country as a result of a foreign country’s national declaration of ownership that did not provide for just compensation or did not comply with other American notions of fundamental fairness. This type of defense was not raised here and we do not, therefore, face the issue.» *United States v. McClain (McClain I)*, 545 F.2d 988, 996 n. 12 (5<sup>th</sup> Cir. 1977).

<sup>136</sup> «[N]or shall private property be taken for public use, without just compensation.» U.S. CONST. amend. V. For an example of a U.S. court applying a Fifth Amendment takings analysis to a foreign government (here Nicaragua), see *Bandes v. Harlow & Jones*, 852 F.2d 661, 666–667 (2d. Cir. 1988).

<sup>137</sup> *Andrus v. Allard*, 444 U.S. 51, 63–64 (1979)(Brennan, J.).

ings. The analysis then moves to whether the person who surrenders the archaeological artifact has received «just compensation.» «Just compensation» is considered by U.S. courts to be the fair market value of the object.<sup>138</sup> The Mexican and Egyptian laws<sup>139</sup> provide for no compensation at all; the Turkish statute allows for a «reward,» not a purchase price, which cannot exceed the fair value of the find, as determined by state officials.<sup>140</sup> The only foreign statute that can be certain to comply with U.S. constitutional standards is the United Kingdom Treasure Act of 1996.<sup>141</sup>

Both *Schultz* courts asserted that Egypt compensated its citizens for takings, but the trial court did admit that a finder of an antiquity after 1983 would not receive compensation, but was eligible for a reward paid at the discretion of the Egyptian government.<sup>142</sup> Egypt's government witness was more frank, when he said, «The person who found the antiquity is not compensated for the item, because it never belonged to the finder.»<sup>143</sup> United States law recognizes that the owner of the land also owns everything under it: *cuius est solum eius est usque ad coelum et ad inferos*, or, in an alternative formulation, *ab orco usque ad coelum*.<sup>144</sup> When a government claims ownership of all the undiscovered antiquities in its soil, it can either compensate landowners for this taking by paying for the contingent interest at the time of the legal declaration, or it can compensate the landowner/finder when this contingent interest vests, i.e. by paying market value for the antiquity at the time of discovery. Countries that do neither will be vulnerable to a takings defense in U.S. litigation.

There is a second part to the analysis in *McClain I*, Footnote 12: a defense could also succeed where a foreign country's national declaration of ownership «did not comply with other American notions of fundamental fairness.»<sup>145</sup> An example is provided by the very law relied upon in *McClain I*, Mexico's Law of May 6, 1972 and its connection to the violent death of Miguel Malo Zozaya. Malo Zozaya was a local historian of San Miguel de Allende. After the passage of the Mexican law of May 6, 1972, Malo Zozaya was told that he would have to register his collection with the government or hand

<sup>138</sup> See *United States v. 564.54 Acres of Land*, 441 U.S. 506 (1979).

<sup>139</sup> See *United States v. Schultz*, 333 F.3d 393, 400 (2d. Cir. 2003).

<sup>140</sup> *Republic of Turkey v. OKS Partners*, No. 89-3061-WJS, 1994 U.S. Dist. LEXIS 17032 (D. Mass. June 8, 1994), at \*5.

<sup>141</sup> Treasure Act 1996, c. 24 (applies in England, Wales, and Northern Ireland, but not in Scotland).

<sup>142</sup> See *United States v. Schultz*, 178 F. Supp.2d 445, 448 n. 5 (S.D.N.Y. 2002), *aff'd*, 333 F.3d 393, 400 n. 6 (2d. Cir. 2003).

<sup>143</sup> *Schultz*, at 400.

<sup>144</sup> *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 419 (1922)(Brandeis, J., dissenting).

<sup>145</sup> *United States v. McClain (McClain I)*, 545 F.2d 988, 996 n. 12 (5<sup>th</sup> Cir. 1977).

the artifacts over. He was ready to register his collection, but officers of the Mexican federal government, led by the same Alejandro Gertz Manero who testified before the trial court in *McClain I*, came not to register it but to seize it. Malo Zozaya then died violently under mysterious circumstances. The Mexican government asserted that Malo Zozaya had been systematically looting archaeological sites in the area and that he shot himself out of shame when his crimes were revealed.<sup>146</sup> Malo Zozaya's death offends all notions of «fundamental fairness.»

Miguel Malo Zozaya is not the only person who has met an untimely death because of overzealous enforcement of archaeological laws. The Peruvian *huaquero* Ernil Bernal was shot dead in a raid on his home arranged by the archaeologist Walter Alva.<sup>147</sup> The American art historian Roxanna Brown, a 62-year-old amputee, died of untreated peritonitis while imprisoned in Seattle by the U.S. Immigration and Customs Enforcement as part of an investigation concerning tax evasion involving Southeast Asian artifacts.<sup>148</sup> The FBI investigation into trafficking in Indian artifacts from the Four Corners region has caused three suicides.<sup>149</sup>

#### IV. Summary.

Although U.S. laws against trafficking in cultural property seem formidable on their face, they are less so than they appear. No court has applied these laws to coins except for the private litigation about the Elmalı Hoard. Peru and Turkey have been discouraged by their experience with private litigation, Peru because of its setback in *Peru v. Johnson*,<sup>150</sup> Turkey because of the high cost of litigating in the United States.<sup>151</sup> The subsequent fates of the artifacts

<sup>146</sup> See Norte. *Revista Hispano-Americana*, No. 252 (Mar.–Apr. 1973), available at [www.hispanista.org](http://www.hispanista.org) (last visited on Nov. 26, 2010)(issue of the magazine produced in memory of Malo Zozaya and attacking the actions of the Mexican police that caused his death); Acusa el politólogo Fredo Arias King: Dejó Fox en manos de Luis Echeverría los mandos de la policíes federales, [The political scientist Fredo Arias King makes an accusation: Fox is handing over the control of the federal police to Luis Echeverría], *El Heraldo de Chihuahua* (Apr. 6, 2006), available at <http://www.ariasking.com/files/HeraldoChih4.pdf> (last visited on Nov. 26, 2010)(detailing the death of Malo Zozaya). MEYER, *supra* note 8, at 150, gives the official version of the death of Malo Zozaya.

<sup>147</sup> See Roger ATWOOD, *Stealing History: Tomb Raiders, Smugglers, and the Looting of the Ancient World* 56–58 (2004).

<sup>148</sup> See Jason FELCH, A Life in Shards, *Los Angeles Times*, Sept. 11, 2008, at A1, Sept. 12, 2008, at A1, Sept. 13, 2008, at B1.

<sup>149</sup> See Pat REAVY, Indian artifact informant Ted Gardiner commits suicide, *Deseret News*, Mar. 3, 2010, at B1.

<sup>150</sup> ATWOOD, *supra* note 147, at 90.

<sup>151</sup> WAXMAN, *supra* note 107, at 151, 164–65.

are discouraging: the *McClain* artifacts were still tied up in litigation eleven years after the arrests, the *Gerber* artifacts were never made available for serious archaeological study and were reburied, and the prize piece in the Karun Treasure was stolen from the Uşak Museum. The *Asian Antiquities* investigation, commenced with huge fanfare, resulted in the death of Roxanna Brown while in custody, the repatriation of some artifacts to Cambodia, and not a single conviction. The Four Corners investigation has had equally harrowing results – three suicides.

U.S. cultural property law will thus evolve along these lines: Immigration and Customs Enforcement, part of the Department of Homeland Security, will continue to make opportunistic seizures of artifacts. Since the value of the artifacts seized is less than the cost of litigation, these will go uncontested. The returns of these objects to their countries of origin provide nice «photo ops» for diplomats and other U.S. officials.

The Department of State will continue to conclude MOUs under the CCPIA, but the sloppy drafting makes these MOUs virtually meaningless.

The Department of Justice was very cautious about choosing its criminal prosecutions in the past, and, after the fiascos of *Asian Antiquities* and Four Corners, should be more cautious in the future. It would be surprising if Justice embarks on more prosecutions after those two investigations turned out so badly.

In short, the United States has formidable laws controlling the trade in cultural property on paper, but actual enforcement is haphazard and sloppy. In this way the United States laws on cultural property bear a strong resemblance to those of nearly every other nation in the world, with the exception of the United Kingdom.