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Antiquities, Archeology and Cultural Diplomacy in the 21st Century

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Introduction. Buying and selling ancient art requires the prudent purchaser to research the provenience (origin) and provenance (history of ownership) of an object and to evaluate the available information in the context of the legal framework discussed below. In my experience, objects that have a plausible history of ownership and origin, even if not fully documented, can be safely purchased; the absence of documentation does not necessarily indicate fresh looting or illegal export. Objects on the market that lack history may be problematic or not. Nevertheless, potential penalties for the unwitting purchaser of smuggled objects include civil forfeiture (for which even bona fide purchasers are rarely compensated), and, for those who knew, or in retrospect “consciously avoided” knowledge, jail. The good news is that prudence and diligent investigation will be rewarded--even well-provenanced antiquities at the top of the antiquities market can be undervalued compared to other segments of today’s art market and will afford satisfaction for decades and validate the owner’s good taste and erudition.

1. **US Legal Framework Governing Purchases and Sales of Ancient Art**

a. **Express Import Restrictions**

(i) **1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property**

A. UNESCO is widely perceived as the first multi-national legislation recognizing and attempting to remedy the growing problem of looting of cultural artifacts. (Note: See the attached State Dept. International Cultural Property Protection Home Page for statutory cites and hyperlinks to cited laws).

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B. But UNESCO is often cited for what it is not. It is not a universal declaration that all cultural objects be returned to the country of origin. It is not self-executing and requires implementation by each signatory “State Party.” UNESCO invites “State Parties” to negotiate and implement multi- or bi-lateral import restrictions. It also requires “State Parties” to regulate and reform their internal markets.

(ii) (1972).

A. Restricts imports into the U.S. of stone carvings and wall art which are “pre-Columbian monumental or architectural sculpture or murals.”

B. Applies to any stone carving or wall art which--(i) is the product of a pre-Columbian Indian culture of Mexico, Central America, South America, or the Caribbean Islands; (ii) was an immobile monument or architectural structure or was a part of, or affixed to, any such monument or structure; and (iii) is subject to export control by the country of origin; or (B) any fragment or part of any stone carving or wall art.

C. Importation requires certification by the country of origin or “Satisfactory Evidence” that such sculpture or mural was exported from the country of origin on or before the effective date of the customs regulation listing such sculpture or mural; or (3) satisfactory evidence that such sculpture or mural is not covered by the list covered by customs regulation.

(iii) with Mexico, Peru, Guatemala and Ecuador. As a result, the Pre-Columbian market is largely confined to provenanced materials.

(iv) Unilateral US Embargoes.

A. Iraq (since 1991); emergency restrictions under CPIA since 2008.

B. Iran

C. Sudan

D. Syria

(1) The Iran, Sudan and Syria embargoes are administered by Office of Foreign Asset Control together with Customs. Problems are not necessarily easily addressed with OFAC. (In addition, certain Iranian objects may be confused with other objects of “Near-Eastern” origin, certain Syrian objects may be confused with classical antiquities from around the Mediterranean, and certain Nubian objects could be confused with Egyptian.)

(v) Convention on Cultural Property Implementation Act of 1983

A. CPIA is the Act by which Congress implemented UNESCO.

B. The 13 year long implementation process is marked by lengthy Congressional hearings, and was largely informed by the views of Prof. Paul M. Bator, whose “*Essay on the International Trade in Art*,” 34 Stan. L. Rev. 275 (1982), remains the most thorough and balanced examination of the different perspectives on the antiquities trade. See *Proceedings of the Panel on the U.S. Enabling Legislation of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 4 Syracuse Journal of International Law and Commerce 97 (Summer 1976).

C. Restricts importation of “Archeological and Ethnological Materials” designated for restriction by the President (i.e., State Department) upon review of “State Party’s” application for restrictions and the recommendation of the 11-member Cultural Property Advisory Committee (“CPAC”)

D. Theory: Import Restrictions are limited by terms of CPIA

1. Archeological Materials must be “culturally significant”, 250 years old and ordinarily discovered by digging.

2. Ethnological Materials must be tribal, distinctive, comparatively rare, “non-redundant”

3. Multi-National Response Requirement

(x) other significant market nations must impose similar import restrictions

4. Applicant must satisfy “Self-Help” Requirements

5. Less drastic remedies not available

6. Restrictions would be “consistent with the general interest of the international community in the interchange of cultural property among nations for scientific, cultural, and educational purposes”. (Implied requirement for museum loans?).

7. Restrictions have an initial five year term; 3 year renewal terms upon CPAC review

8. “Emergency Restrictions” may be unilaterally imposed by the US on the recommendation of CPAC if an “emergency condition” exists with respect to “*newly discovered type of material*”, “*sites recognized to be of high cultural significance*”, or pillage of “*crisis proportions*.”

9. “Satisfactory Evidence” Exemption. Designated Materials may be legally imported if the importer can provide Satisfactory Evidence (Consignor’s Statement and Importer’s Declaration) that the object was either:

(x) exported prior to the date of the import regulations under CPIA, or

(y) exported from country of origin not less than 10 years prior to the date of entry into the US (and importer did not acquire an interest more than one year prior to entry). This exemption can be extremely useful.

10. “Stolen Property”. Objects may be forfeited by Customs if stolen from “the inventory of a museum or religious or secular public monument or similar institution in any State Party” after the later of the effective date of this title, or after the date of entry into force of the Convention for the State Party.

11. “Museum Safe Harbor.” Designated materials are exempt from seizure if held in the United States for a period of not less than three consecutive years by a recognized museum or religious or secular monument or similar institution, and was purchased by that institution for value, in good faith, and without notice that such material or article was imported in violation of this chapter, if the material is published and exhibited for specified periods.

E. Reality: Import Restrictions are Underused but Overbroad.

1. Emergency and bilateral restrictions have been granted to: Bolivia, Columbia, Canada, Columbia, Cypress, El Salvador, Guatemala, Honduras, Italy, Mali, Nicaragua and Peru.

2. The trend is for unilaterally-granted emergency restrictions to be converted into bilateral treaties, and for restrictions to apply to all objects created before a specified date.

3. Severe disagreement as to the meaning and application of the statutory criteria between the collecting constituencies, that feel increasingly disenfranchised by the CPAC process, the State Department bureaucracy that administers the Act, and the archeological community which is generally opposed to the acquisition of unprovenanced objects and private ownership generally and in favor of the broadest possible import restrictions.

4. The disagreements came to a head in the 2005 request by The People’s Republic of China for blanket restrictions on all cultural

objects from prehistoric times through 1911, including stone, pottery, ceramics, bamboo, painting, silk, etc. The proposed restrictions were labeled by a pro-archeology journalist as a “gross-overreach.” Opponents argued that the vast and growing domestic Chinese market dwarfed the external markets and would render any US import restrictions pointless, especially in the absence of a multi-national response, and the presence of a vibrant Hong Kong market. There was a perception among the opposition that this time the State Dept. and CPAC had really pushed the interpretative limits of the CPIA past any plausible bounds. I told the State Department’s chief lawyer that if the Department was unable to administer the CPIA in good faith then State could expect to receive letters from Senators. Which is what happened, and China’s application remains stalled.

(x) Of particular interest were two letters of comment submitted by Sotheby’s, which suggested that, in the absence of statutory guidance, the “significance” of archeological objects proposed for restriction should be determined according to certain factors, including: quality and state of the existing archeological and art historical record; site specificity, portability and documentary importance; mass production and lack of rarity; frequent and long-term market incidence. Sotheby’s Asian Art specialist applied these criteria to the realities of the market for ancient Chinese art and proposed a discrete list of categories of ancient art that could plausibly be restricted, subject to satisfaction of the other statutory criteria. In my view, this analysis was the finest piece of thinking done in the field in the last 30 years and represents a cutting-edge application of the Bator/Moynihan viewpoint.

b. Case Law Framework

(i) Criminal.

A. *US v. McClain*. Basic rule: knowing violation of a foreign ownership law may result in criminal liability under the National Stolen Property Act. *United States v. McClain*, 545 F.2d 988, 1000-01 (5th Cir. 1977), *reh'g denied*, 551 F.2d 52 (5th Cir. 1977); *aff'd in part, rev'd in part*, 593 F.2d 658 (5th Cir. 1979); *cert. denied*, 444 U.S. 918 (1979).

1. Note: foreign ownership laws are enforced; foreign export controls are not. But foreign laws are not always clear—except to expert witnesses.

2. Rule of *McClain* is fundamentally inconsistent with the original theory behind CPIA.

(x) Under *McClain* the country of origin determines the legality of importation (regardless whether the object is site-specific or freshly-excavated). Because national ownership laws are all-inclusive, *McClain* potentially criminalizes the importation of any object exported from the claiming nation after the date of its ownership law. (e.g., 1902 for Italy). (Note that *McClain* promotes

the retention of national patrimony by the putative country of origin, not the preservation of archeological sites and context.)

(y) Under CPIA, the US determines the legality of importation and reserves judgment as to the scope of foreign ownership claims. The idea was to create selective import filters prospective from the date of the restrictions (e.g., 2001 for Italy not 1902), not all-inclusive barriers retroactive to the date of the foreign law. *“The [Senate Finance] Committee intends these limitations to ensure that the United States will reach an independent judgment regarding the need and scope of import controls. That is, U.S. actions need not be coextensive with the broadest declarations of ownership and historical or scientific value made by other nations. U.S. actions in these complex matters should not be bound by the characterization of other countries... .”* Senate Report. No. 97-564 (1982).

(z) Professor Bator never resolved the tension between the two theories. Senator Moynihan sponsored legislation that would have limited the application of McClain to provenanced objects only, but S. 605, which Senator Moynihan claimed was the intended companion piece to the CPIA, failed in 1985 under opposition by State and Justice Departments. *“My general position is that the UNESCO legislation which deals with the specific problem of the looting of archeological sites, and which represents a very elaborately crafted compromise, is the law that should be used to deal with this problem. General American criminal legislation should not be artificially manipulated in order to deal with the problem of the possession of artifacts of wholly uncertain and unknown origin. [Furthermore, the Stolen Property Act should be limited to] cases of real theft, where it is shown and proved that somebody took something from somebody else’s ownership, and it is a real ownership and not simply one of those abstract vesting statutes saying that everything belongs to the State.”* Testimony of Paul Bator, *Hearing before the Subcommittee on Criminal Law of the Committee on the Judiciary, United States Senate, Ninety-Ninth Congress, First Session, on S. 605, May 22, 1985, Serial No. J-99-27, at 19, 20.*

3. The importer must always perform a *McClain* analysis regardless of the object’s status under CPIA.

(x) The purchaser or importer must try to determine:

(i) country of origin (which is not always possible because the geography of ancient cultures doesn’t always match modern national borders—Classical, Near Eastern and Pre-Columbian objects may often have multiple potential countries of origin). See *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);

(ii) date of export (records are often nonexistent or simply unavailable);

(iii) whether the likely country or countries of origin had enacted a national ownership law at the date of export. (Foreign ownership laws are extremely difficult to obtain, in translation or otherwise and local lawyers can be difficult and expensive to retain for the purpose of obtaining reliable interpretive advice.)

4. In my view, the CPAC process, which was intended by Prof. Bator and Senator Moynihan to be the centerpiece of US policy has become a sideshow. In the view of Malcolm Bell, a prominent archeologist, the CPIA provides useful belt and suspenders supplement to the *McClain* rule.

5. The recent UK criminal statute, “*Dealing in Cultural Objects (Offences) Act 2003*,” makes much more sense to me than the *McClain* rule, because, in principal, the UK Act makes it a crime to deal knowingly in objects that are from an archeological site or monument rather than to violate a law that nationalizes objects that may neither have been freshly excavated nor, indeed, excavated at all.

B. *US. v. Schultz*. Fred Schultz was convicted under the NSPA for conspiring to market smuggled Egyptian artifacts for Jonathan Tokely Parry, who was convicted in the UK. Schultz was held either to know that Parry’s activities were illegal or to have “consciously avoided” knowledge of the facts and of the requirements of Egyptian law. The Second Circuit overrode arguments against triggering US criminal liability on the vagaries of foreign law by concluding that importers could take comfort in the knowledge requirement under the NSPA. But “conscious avoidance” is a slippery slope for the importer. Although it seems self-evidently prudent not to turn a blind eye to suspicious facts that may indicate smuggling or recent clandestine exportation, it not self-evident that a US buyer should engage foreign counsel to obtain a working knowledge of foreign laws that may or may not apply to the object in question. (Perhaps the 2d Circuit created an implied price point above which a purchaser should be seen as having consciously avoided learning the requirements of foreign by failing to engage foreign counsel.) *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003), *aff’g* 178 F. Supp. 2d 445 (S.D.N.Y 2002); *cert. denied* _____.

(ii) Civil

A. To date, to my knowledge, no US federal or state court decision has upheld a civil claim for replevin or conversion based on breach of a foreign ownership law.

1. Note: Foreign claimants tend to rely on US enforcement agencies to bring claims. That way the US taxpayer pays their legal fees and the foreign claimant is not subject to defenses, such as statute of limitations (they waited too long to bring a claim) and laches (and did nothing until they did and thereby prejudiced the defendant), which are being applied with increasing stringency against plaintiffs in other art world actions, such as Holocaust claims.

B. In December 2007, the UK Court of Appeal reversed the trial court’s decision in *Government of the Islamic Republic of Iran v The Barakat Galleries Ltd*, [2007] EWCA Civ 1374 [2007] WLR (D) 343. The case involved the suit by Iran for the recovery of objects of Iranian origin (and perhaps freshly excavated). The trial court held for the defense, characterizing Iran’s law as the kind of “public”, “penal” or customs law that the courts of another nation will not enforce, citing *Ortiz v. New Zealand* (New Zealand lost a claim to Maori objects illegally exported to the UK). *Attorney-General of New Zealand v. Ortiz and Others*, 3 All ER 432, 2 W.L.R 10, 1 Lloyd’s Rep 173 (QB 1982); [1982] 3 W.L.R. 570 (Eng.C.A.), aff’d [1983] 2 W.L.R. 809 (Engl.H.L). The Court of Appeal reversed, stating the Iranian law stated a valid ownership claim and that the general trend of international law was to recognize such claims. The result is as if *McClain* were extended to civil claims, without any need to show actual knowledge or conscious avoidance.

(iii) Customs

A. *Steinhardt*. Customs seized an ancient gold Phiale from Michael Steinhardt, a prominent collector. The Second Circuit affirmed the forfeiture because the importer’s customs agent identified the country of origin as Switzerland instead of Italy. *United States v. An Antique Platter of Gold*, 991 F.Supp. 222 (S.D.N.Y. 1997); *aff’d* 184 F 3d. 131 (2d Cir. 1999). This was held to be a “material misstatement” because US customs agents would have been on notice of Italy’s potential claim—presumably under *McClain*—had Italy been correctly identified as the country of origin. (The Southern District of New York had also summarily upheld the forfeiture on grounds of *McClain*, without any showing of scienter.) The problem with the material misstatement claim is, again, the absence of scienter—according to Robert Haber, Steinhardt’s then dealer, there was no intentional misstatement of country of origin; instead, Steinhardt’s customs agent automatically assumed that the country of export was the country of origin. (This happened to me when I bought a fine and rare vintage Gibson guitar built in Kalamazoo, Michigan from a French collector who shipped by DHL and successfully appealed a claim for several thousand dollars of duty owed on goods of foreign manufacture. I sent in photos of the guitar and stressed that Elvis played a Gibson). *Steinhardt* thus achieves the neat trick of upholding a claim for civil forfeiture based, ultimately, on a criminal statute, without any showing of scienter either for the primary offense—the material misstatement—or the underlying offense of breach of Italy’s ownership law via *McClain*.

B. Any perceived defect in information declared to Customs can become the basis for civil forfeiture, with or without scienter. If possible, provide only country of origin and declared value.

2. Italian and Greek claims against US Museums and Collectors. A few observations about the recent, well-publicized repatriations by US museums and collectors to Italy and Greece:

a. At least one hard-core smuggling ring was operated in Italy by Medici, from the Freeport of Geneva, who sold through Hecht in Paris and a London dealer to US institutions and collectors. When the Italian police raided Medici's warehouse, they found photographs and records of 20,000 or more objects that had been illegally excavated and smuggled out of Italy. These documents allowed authorities to identify objects in US collections to Medici's warehouse and in some cases to find sites.

b. In some cases, the purchasers either knew at the time, or learned shortly after, that the purchased objects were smuggled. At The Getty Museum, as early as the tenure of Jiri Frel, who preceded Marion True, Arthur Houghton, then a curator, resigned in protest at questionable acquisition practices and predicted that such practices would ultimately lead to claims from countries of origin. According to The Los Angeles Times, senior management, in consultation with counsel, later concluded that it had acquired objects known to be "fenced." The Getty's practice thereafter was to try to retain the acquisitions while adopting increasingly stricter acquisition policies. Today, Marion True and Hecht are still on trial in Italy.

c. In other cases, the purchaser acted in good faith on the basis of affirmative representations and warranties by the seller and the absence of evidence of fresh excavation. For example, the Italians have at all times publicly stated that Shelby White was a bona fide purchaser to whom no wrongdoing attached. Philippe de Montebello of the Metropolitan Museum protested at the quality of some of the evidence presented by the Italians, stating that "there are lots of holes in the ground in Sicily." And The Getty negotiated a settlement with Greece for the return of four objects, for one of which, a grave stele, there was virtually no evidence as to when the piece left Greece.

d. The current trend at the high-end of the antiquities market is towards transparency in negotiations, heavily negotiated representations and warranties regarding provenance and provenience, and corresponding indemnities. It seems clear that many of the challenged transactions would not have survived scrutiny under today's market standards. (It seems equally clear that no prudent seller should make the blanket representation customarily demanded by museum purchasers to the effect that the "Object has been imported to and exported from all applicable countries in accordance with all applicable laws." Disclose and represent only what you know; negotiate the indemnity for repatriation claims separately).

3. The Fate of Looted Iraqi Antiquities

a. At a CLE panel in New York in Spring 2008, Col. Matthew Bogdanos, USMCR, insisted that antiquities fund terrorism. One of his slides showed solid lines purporting to demonstrate that Iraq is connected with New York and other western capitals by a global antiquities smuggling network. Yet when I asked how much looted Iraqi material is entering New York, he answered: "None, yet."

b. The reality is that despite looting of Iraqi archeological sites on a massive scale, looted materials do not seem to be appearing on the Western markets in any

quantity. (Near Eastern objects did appear on Western Markets in quantity after the first Gulf War in the 1990s). While there have been isolated seizures of a small number of objects in the US, thousands of objects have been seized in and repatriated from Jordan and Syria. On the other hand, according to Donny George, former head of the Iraqi antiquities department, Turkey has made no effort to interdict looted Iraqi materials and Iran only began to do so in late 2008. Does this undercut the moral authority of their repatriation claims?

c. Iraqi cultural objects have been subject to a US embargo since 1991 and are now subject to emergency import restrictions under CPIA. They can not be safely marketed, displayed or exhibited in the US. No wonder they are shunned by US collectors. So where are they going? Perhaps to collectors of means and taste in the Persian Gulf States, where such objects are simply unregulated.

5. New AAMD Acquisition Guidelines. The Association of American Museum Directors has recently adopted new guidelines for its members regarding acquisitions of ancient art. Subject to limited exceptions, which should not be expected to swallow the rule, member museums are advised not to acquire objects by purchase or gift that do not have documented provenance to 1970 (or an export permit from the country of origin.) Apparently, museums are generally deemed to be incapable of or ill-equipped to make the kind of informed decisions that are routinely made in the private market. (With all due respect, from my somewhat limited dealings with potential museum acquirors, I would have to agree).

6. IRS Challenge to Deductions for Repatriated Objects. The IRS has recently challenged the appraised value of ancient objects donated to a US institution (with a corresponding deduction by the donor) in anticipation of their repatriation to a country of origin. For example, when a prominent private collector donated an object to a US university with ties to the country of origin, the IRS challenged the multi-million dollar appraised value on the grounds that, absent documented provenance, no market existed for the object and the object had no value. The IRS position is clearly uninformed and incorrect under US law; was the challenge motivated by the archeological lobby?

7. What does the future hold? A Two-Tier Market?

a. It is hard to predict the future of the antiquities market. Clearly there is a continued demand for ancient art among private collectors and curators. But there is already solid evidence from auction house sales that provenanced pieces sell at a premium and that unprovenanced pieces of equal quality may not sell at all.

b. Will separate markets evolve for museum-worthy pieces with documentation to 1970 and a second tier of objects marketable only to private sellers?

8. The Act for Transparent Antiquities Markets (a/ka/ the Open Kimono).

a. One way to restore certainty and liquidity to the antiquities markets would be to enact my proposed “Act for Transparent Antiquities Markets.” In essence, ATAM would allow objects to be anonymously published on an electronic database, with known information about provenance and provenience. If not claimed within one year by a country of origin, “Seasoned Objects” would be free and clear of any claims under US federal and state law. Compensation would be paid to “Bona Fide Purchasers” and claims could be brought after one year if “Fresh Evidence” arises. Although the devil is in the details, the advantages are clear and compelling: transparency should merit repose. See the attached presentation outline.

d. What are the prospects for legislative reform? Realistically, slim. Market participants would have to decide that the risk to their livelihood or the value of their collections was high enough to warrant legal and consulting fees. But why bother to pay lawyers in Washington to lobby when you pay lawyers in New York to safely negotiate the acquisition of underpriced, under-provenanced objects?