

# OUT OF CONTEXT: EXAMINING THE ROLE OF CONTEXT IN ACTIVE ENFORCEMENT FOREIGN PATRIMONY LAW DISPUTES

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*Foreign patrimony laws nationalize ownership of cultural property found within a nation's borders and prohibit export or private ownership. They are enforceable in the United States under the McClain doctrine. In defending against McClain-doctrine suits to repatriate stolen cultural property, defendants have begun to assert the "inactivity defense," which is premised on the theory that enforcing certain patrimony laws would be contrary to public policy. Specifically, the inactivity defense claims that when a foreign nation has not actively enforced its patrimony law, or when it enforces its patrimony law only after illegal export, such nonenforcement transforms the patrimony law from an ownership law to an export regulation.*

*This Note asserts that the inactivity defense has been wielded in ways that threaten to undermine the McClain doctrine. In particular, it has been used without regard for the context surrounding nonenforcement. By way of solution, this Note proposes that inactivity be treated as an affirmative defense with some procedural uniqueness. First, an "inactive" patrimony law should be defined as a law that intentionally uses the guise of a patrimony law to in fact function as an export regulation. Second, courts should treat the inactivity defense as a mixed question of fact and law, with the level of active enforcement as a question of fact and the intent behind the law as a question of law.*

## INTRODUCTION

After spending more than a decade and almost \$300 million, the United Nations–backed Khmer Rouge tribunal convicted three men in April 2017 for the Cambodian genocide of the 1970s.<sup>1</sup> Between 1975 and 1979, the Khmer Rouge regime killed an estimated 2.2 to 2.8 million people.<sup>2</sup> The Khmer Rouge—and the civil war it birthed—also saw forced displacement, malnutrition and starvation, serious lasting disabilities

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1. Seth Mydans, *11 Years, \$300 Million and 3 Convictions. Was the Khmer Rouge Tribunal Worth It?*, N.Y. Times (Apr. 10, 2017), <https://www.nytimes.com/2017/04/10/world/asia/cambodia-khmer-rouge-united-nations-tribunal.html> (on file with the *Columbia Law Review*).

2. Damien de Walque, *The Socio-Demographic Legacy of the Khmer Rouge Period in Cambodia*, 60 *Population Stud.* 223, 223 (2006) (examining the long-term effect of the Khmer Rouge genocide).

from landmines and other wartime weapons, and the decimation of the education system.<sup>3</sup>

Amidst this chaos, looters descended upon Cambodia's ancient Hindu and Buddhist temples.<sup>4</sup> Before the start of the civil war in 1970, Cambodia's temples had remained largely intact.<sup>5</sup> Yet during the war, the Cambodian army, the Khmer Rouge, various paramilitary factions, and rogue soldiers all took part in deconstructing the ancient temples and trafficking their prizes through organized black-market trade routes.<sup>6</sup> Often local villagers were "invited" to loot temples for the benefit and under the watchful eye of these armed groups.<sup>7</sup>

One casualty of this sustained cultural theft—and the center of a recent U.S. federal district court case—is the Duryodhana, a statue allegedly removed from the Prasat Chen Temple at Koh Ker in the 1970s.<sup>8</sup> When the Duryodhana surfaced in the United States in 2010 at Sotheby's auction house, the U.S. government initiated civil forfeiture actions.<sup>9</sup> The U.S. government premised these civil forfeiture actions on Cambodia's patrimony laws—laws that nationalize ownership of cultural property found within a nation's borders.<sup>10</sup> In particular, the U.S. government had to rely on Cambodia's colonial patrimony laws because the original theft had occurred in the 1970s, prior to the enactment of Cambodia's modern patrimony laws.<sup>11</sup> In response, Sotheby's asserted a defense unique to foreign-patrimony-law litigation: Because Cambodia never actively enforced these colonial patrimony laws, neither should the United States.<sup>12</sup>

Although the case eventually settled, it raised important questions in the struggle to protect looted cultural property.<sup>13</sup> Does this "inactivity" claim have merit? Should context play a role in deciding the legitimacy of inactivity defenses? More pointedly, should a court consider an inactivity defense if that inactivity transpired during a bloody, decade-long civil war? These queries are made all the more difficult by the rarity of

3. *Id.* at 224–25.

4. Tess Davis & Simon Mackenzie, *Crime and Conflict: Temple Looting in Cambodia*, in *Cultural Property Crime: An Overview and Analysis of Contemporary Perspectives and Trends* 292, 292 (Joris D. Kila & Marc Balcells eds., 2014) (estimating that almost eighty percent of Cambodian temples had been looted by 1993, when the Khmer Rouge regime ended).

5. *Id.* at 297.

6. *Id.* at 299.

7. Abby Seiff, *How Cambodia's Temples Fell to Looters*, Deutsche Welle (June 25, 2014), <http://www.dw.com/en/how-cambodias-temples-fell-to-looters/a-17735835> [<https://perma.cc/F4MJ-D5J7>].

8. See *United States v. A 10th Century Cambodian Sandstone Sculpture (Duryodhana)*, No. 12 Civ. 2600(GBD), 2013 WL 1290515, at \*1 (S.D.N.Y. Mar. 28, 2013).

9. *Id.*

10. *Id.* at \*6–7; see also *infra* section I.B.

11. *Duryodhana*, 2013 WL 1290515, at \*7.

12. See *id.* at \*8; see also *infra* section II.B.

13. See *infra* note 172 and accompanying text (describing the case's settlement).

precedent, a natural result of the rarity of foreign-patrimony-law cases in general.

This Note argues that courts should consider context in making inactivity determinations. Part I begins by introducing existing U.S.-based mechanisms for protecting stolen cultural property. It focuses on the *McClain* doctrine, which validated enforcement of foreign patrimony laws in U.S. courts via the National Stolen Property Act. This Part then proceeds with a fact-intensive discussion of what constitutes an enforceable foreign patrimony law. Part II argues that the inactivity defense as currently wielded fails to consider context and thus threatens to undermine the purpose of the *McClain* doctrine. Finally, Part III proposes a solution by way of procedural intervention: Inactivity should be treated as an affirmative defense that places a factual burden on the claimant and, if met, shifts a legal burden that incorporates context to the government.

### I. FOREIGN PATRIMONY LAWS IN THE UNITED STATES

Foreign patrimony laws nationalize ownership of cultural property found within a nation's borders and prohibit export or private ownership of those items.<sup>14</sup> These laws are enforceable in U.S. courts under the *McClain* doctrine.<sup>15</sup> Given the limited protections for cultural property in the United States, the *McClain* doctrine theoretically serves as an important bulwark. However, underdevelopment of the *McClain* doctrine has given rise to questions such as those surrounding the inactivity defense. In order to address these questions, it is first necessary to consider the history and underlying values of the *McClain* doctrine.

To that effect, section I.A describes how patrimony laws act as necessary protections for cultural property in lieu of insufficient U.S. alternatives. Section I.B describes how patrimony laws walk the delicate line between two conflicting U.S. values: protecting foreign ownership and upholding public policy prohibiting the enforcement of foreign regulation. Section I.C explains how these twin concerns birthed the *McClain* doctrine.

#### A. *Patrimony Laws as Necessary Cultural Property Protections in the United States*

Cultural property finds protection in a patchwork of legal mechanisms in the United States, including the Convention on Cultural Property Implementation Act (CPIA)<sup>16</sup> as well as the combination of the

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14. See, e.g., *United States v. Schultz*, 333 F.3d 393, 396 (2d Cir. 2003) (describing the Egyptian patrimony law at issue, which “declared all antiquities found in Egypt after 1983 to be the property of the Egyptian government”); see also *infra* section I.B.

15. See *infra* section I.C.1 (introducing the *McClain* doctrine).

16. 19 U.S.C. §§ 2601–2613 (2012).

National Stolen Property Act (NSPA)<sup>17</sup> and various patrimony laws. The limited utility of the allegedly preeminent CPIA underscores the continuing importance of patrimony laws as a U.S. enforcement mechanism. The CPIA is the United States' implementing legislation for the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership on Cultural Property.<sup>18</sup> The international community convened the UNESCO Convention in response to rampant looting following World War II—looting that systematically stripped countries of their cultural heritage, deprived individuals of their history and property, and prevented researchers from examining artifacts in their original contexts.<sup>19</sup> By 1970, protection was already long overdue.<sup>20</sup>

The UNESCO Convention holds that “[t]he import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this convention by the States Parties thereto, shall be

17. 18 U.S.C. §§ 2314–2315 (2012).

18. Convention on Cultural Property Implementation Act, Pub. L. No. 97-446, 96 Stat. 2329 (codified as amended at 19 U.S.C. §§ 2601–2613); Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, T.I.A.S. No. 83-1202, 823 U.N.T.S. 231 [hereinafter UNESCO Convention]. Two other major international agreements speak to cultural property. See UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 2421 U.N.T.S. 457; Final Act of the Intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215. Only the UNESCO Convention is relevant for the purposes of this Note, however, because the United States is not a signatory to UNIDROIT, and the Hague Convention covers only emergency situations. See Andrea Cunning, U.S. Policy on the Enforcement of Foreign Export Restrictions on Cultural Property & Destructive Aspects of Retention Schemes, 26 Hous. J. Int'l L. 449, 469 (2004) (comparing various national and international instruments used to protect cultural property).

19. See UNESCO Convention, *supra* note 18, pmbl. (noting that “cultural property constitutes one of the basic elements of civilization and national culture, and that its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting”); Patty Gerstenblith, For Better and For Worse: Evolving United States Policy on Cultural Property Litigation and Restitution, 22 Int'l J. Cultural Prop. 357, 361–62 (2015) [hereinafter Gerstenblith, For Better and For Worse] (describing how the looting of archaeological objects destroys the scientific data necessary for understanding the context of those objects, such as “stratigraphic association” of objects and their surroundings).

20. See, e.g., Clemency Coggins, Illicit Traffic of Pre-Columbian Antiquities, 29 Art J. 94, 94 (1969) (“In the last ten years there has been an incalculable increase in the number of monuments systematically stolen, mutilated and illicitly exported from Guatemala and Mexico in order to feed the international art market.”); Folarin Shyllon, Looting and Illicit Traffic in Antiquities in Africa, *in* Crime in the Art and Antiquities World: Illegal Trafficking in Cultural Property 135, 135 (Stefano Manacorda & Duncan Chappell eds., 2011) (describing how “the plundering of African cultural property assumed gigantic proportions” in the 1960s and 1970s, and quoting a Nigerian official who warned, in 1971, that “unless the theft of Nigerian collections [is] arrested, nothing will be left of Nigerian antiquities in about ten years”).

illicit.”<sup>21</sup> It defines cultural property as “property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science” and that belongs to an enumerated list of categories including: rare fauna, flora, and paleontology; scientific, technological, and social history; archaeology and antiquities; ethnology; and art of all mediums.<sup>22</sup>

The United States ratified the UNESCO Convention in 1972.<sup>23</sup> Significantly, it entered a reservation refusing to enforce foreign export restrictions except by agreement or in an emergency.<sup>24</sup> This reservation reflects the United States’ long-held position against enforcement of foreign export restrictions.<sup>25</sup> Finally, more than a decade after signing the UNESCO Convention, the United States passed implementing legislation in 1982: the CPIA.<sup>26</sup> Due in part to the ferocity of the legislative debate that birthed it, the CPIA represents an “elaborate compromise” that ultimately has limited utility.<sup>27</sup> It introduced a mechanism for entering into bilateral treaties with other nations, whereby the United States can impose import restrictions on narrow categories of a foreign nation’s property upon request by that nation.<sup>28</sup> Yet so narrow are the criteria that only

21. UNESCO Convention, *supra* note 18, art. 3.

22. See *id.* art. 1.

23. See *id.*

24. Cunning, *supra* note 18, at 474 (noting that the United States specifically refused to recognize “export controls of foreign countries solely on the basis of illicit trafficking of cultural property” (internal quotation marks omitted) (quoting James A.R. Nafziger, *Seizure and Forfeiture of Cultural Property by the United States*, 5 *Vill. Sports & Ent. L.J.* 19, 26 (1998))).

25. See *infra* notes 54–58 and accompanying text (discussing U.S. policy on enforcing foreign export restrictions).

26. 19 U.S.C. §§ 2601–2613 (2012).

27. Andrew L. Adler & Stephen K. Urice, *Resolving the Disjunction Between Cultural Property Policy and Law: A Call for Reform*, 64 *Rutgers L. Rev.* 117, 139 (2011) (quoting William G. Pearlstein, *Cultural Property, Congress, the Courts, and Customs: The Decline and Fall of the Antiquities Market?*, in *Who Owns the Past?: Cultural Policy, Cultural Property, and the Law* 9, 10 (Kate Fitz Gibbon ed., 2005)); see also Cunning, *supra* note 18, at 474 (noting that “the specificity required to impose . . . emergency actions [under the CPIA] . . . severely limit[ed] their effectiveness”). The debate and decade-long delay in implementing the CPIA was largely due to conflict between various interested groups, including “archaeologists, dealers, collectors, museums, and governmental institutions.” See Adler & Urice, *supra*, at 138.

28. See 19 U.S.C. § 2602. Four substantive criteria must be met before the Executive can impose import restrictions: (1) The foreign nation’s cultural heritage must be “in jeopardy” of looting; (2) the foreign nation must have taken “measures consistent with the [1970 UNESCO] Convention to protect its cultural [heritage]”; (3) U.S. import restrictions must be “of substantial benefit in deterring a serious situation of pillage,” and the country must have exhausted “remedies less drastic” than import restrictions; and finally, (4) U.S. import restrictions must be “consistent with the general interest of the international community in the interchange of cultural property among nations for scientific, cultural, and educational purposes.” *Id.* The CPIA also provides protections for “emergency” situations of pillage. *Id.* Given a bilateral agreement, the CPIA then (1) bars import of designated archaeological or ethnological material that is exported from the nation;

seventeen nations today have such bilateral treaties with the United States.<sup>29</sup> Additionally, even if a foreign state clears the preliminary hurdles to treat with the United States, the agreements are not retrospective: Any object stolen prior to the implementation of the treaty remains unprotected.<sup>30</sup> The treaties also expire after five years and can be renewed only if the same criteria are again found satisfied upon reexamination.<sup>31</sup>

In contrast to CPIA treaties, patrimony laws allow nations to assert broader protections over their cultural property in U.S. courts.<sup>32</sup> Patrimony laws also allow nations greater control over that protection.<sup>33</sup> They protect categories of cultural property as broad or narrow as a nation desires, so long as the language is clear and unambiguous and the property is found within the nation's borders.<sup>34</sup> They do not require the foreign nation to show that its cultural heritage is "in jeopardy" of looting.<sup>35</sup> They also do not require the nation to be involved in—or even aware of—the international playing field.<sup>36</sup> They can be enforced against any

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(2) bars import of cultural property stolen from "a museum or religious or secular public monument or similar institution" from the nation; and (3) allows forfeiture of any such designated cultural property imported in violation of the CPIA. Daniel A. Klein, Annotation, Construction and Application of Convention on Cultural Property Implementation Act (CPIA), 19 U.S.C.A. §§ 2601 et seq., 54 A.L.R. Fed. 2d 91 (2011).

29. See U.S. Dep't of State, Bilateral Agreements, Bureau of Educ. & Cultural Affairs, <http://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements> [<https://perma.cc/YH4U-XBF9>] (last visited Sept. 12, 2018). These nations are Belize, Bolivia, Bulgaria, Cambodia, China, Colombia, Cyprus, Egypt, El Salvador, Greece, Guatemala, Honduras, Italy, Libya, Mali, Nicaragua, and Peru. *Id.*

30. See 19 U.S.C. § 2602.

31. *Id.* § 2602(e).

32. Compare, e.g., *supra* note 28 (describing the narrow requirements of CPIA treaties), with *infra* notes 87–90 and accompanying text (describing the broad boundaries of Egyptian Law 117).

33. Rather than rely on the specified U.S.-crafted protections of CPIA treaties, patrimony laws represent foreign nations' respective decisionmaking processes. Compare, e.g., *infra* notes 87–90 and accompanying text (describing the stricter standards of Egyptian Law 117), with *infra* notes 99–100, 102 and accompanying text (describing the looser standards of Turkish patrimony laws). The right to self-determination—or the right of the "peoples of one state to be protected from interference by other states"—is inherently valuable in and of itself. Rosalyn Higgins, *Problems and Process: International Law and How We Use It* 112 (1994) (explaining that the UN Charter's protection of "equal rights" and "self-determination" relates to states, not individuals); see also Gaetano Pentassuglia, *State Sovereignty, Minorities and Self-Determination: A Comprehensive Legal View*, 9 *Int'l J. on Minority & Group Rts.* 303, 304–07 (2002) (tracking the development of self-determination as a legal right and in particular the link between the concept of self-determination and the process of decolonization).

34. See *infra* note 59 and accompanying text (describing U.S. requirements for enforcing patrimony laws).

35. Cf. 19 U.S.C. § 2602(a)(1)(A) (requiring the foreign nation to show that its cultural heritage is "in jeopardy" of looting in order to create a CPIA treaty).

36. Cf. 19 U.S.C. § 2602(a)(1)(B) (requiring the foreign nation to have taken measures consistent with the 1970 UNESCO Convention to protect its cultural heritage in order to create a CPIA treaty).

property discovered after the patrimony law's implementation, sometimes stretching far into the past rather than only the oft-brief and oft-recent lifespan of a CPIA treaty.<sup>37</sup> And they never expire.<sup>38</sup>

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37. See, e.g., *Duryodhana*, No. 12 Civ. 2600(GBD), 2013 WL 1290515, at \*1–2 (S.D.N.Y. Mar. 28, 2013) (wielding patrimony laws against an alleged forty-year-old cultural property theft). In comparison, CPIA treaties in force today are on average only fourteen years old. See U.S. Dep't of State, Belize, Bureau of Educ. & Cultural Affairs, <https://eca.state.gov/cultural-heritage-center/international-cultural-property-protection/bilateral-agreements/belize> [<https://perma.cc/PN7Q-5GWG>] (last visited Sept. 28, 2018) (five years); U.S. Dep't of State, Bolivia, Bureau of Educ. & Cultural Affairs, <https://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements/bolivia> [<https://perma.cc/39K6-SEBU>] (last visited Sept. 28, 2018) (seven years); U.S. Dep't of State, Bulgaria, Bureau of Educ. & Cultural Affairs, <https://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements/bulgaria> [<https://perma.cc/59R3-ACVL>] (last visited Sept. 28, 2018) (four years); U.S. Dep't of State, Cambodia, Bureau of Educ. & Cultural Affairs, <https://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements/cambodia> [<https://perma.cc/9MG3-8JK6>] (last visited Sept. 28, 2018) (nineteen years); U.S. Dep't of State, China, Bureau of Educ. & Cultural Affairs, <https://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements/china> [<https://perma.cc/4SXZ-BFF9>] (last visited Sept. 28, 2018) (nine years); U.S. Dep't of State, Colombia, Bureau of Educ. & Cultural Affairs, <https://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements/colombia> [<https://perma.cc/EYB2-9TFS>] (last visited Sept. 28, 2018) (twelve years); U.S. Dep't of State, Cyprus, Bureau of Educ. & Cultural Affairs, <https://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements/cyprus> [<https://perma.cc/8XZW-PD8K>] (last visited Sept. 28, 2018) (nineteen years); U.S. Dep't of State, Egypt, Bureau of Educ. & Cultural Affairs, <https://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements/egypt> [<https://perma.cc/BE3L-M3JB>] (last visited Sept. 28, 2018) (two years); U.S. Dep't of State, El Salvador, Bureau of Educ. & Cultural Affairs, <https://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements/el-salvador> [<https://perma.cc/YWF7-XCPZ>] (last visited Sept. 28, 2018) (thirty-one years); U.S. Dep't of State, Greece, Bureau of Educ. & Cultural Affairs, <https://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements/greece> [<https://perma.cc/9BRR-WVLY>] (last visited Sept. 28, 2018) (seven years); U.S. Dep't of State, Guatemala, Bureau of Educ. & Cultural Affairs, <https://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements/guatemala> [<https://perma.cc/P4HS-5UF3>] (last visited Sept. 28, 2018) (twenty-seven years); U.S. Dep't of State, Honduras, Bureau of Educ. & Cultural Affairs, <https://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements/honduras> [<https://perma.cc/N45E-6PW4>] (last visited Sept. 28, 2018) (fourteen years); U.S. Dep't of State, Italy, Bureau of Educ. & Cultural Affairs, <https://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements/italy> [<https://perma.cc/45HD-WBG5>] (last visited Sept. 28, 2018) (seventeen years); U.S. Dep't of State, Libya, Bureau of Educ. & Cultural Affairs, <https://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements/libya> [<https://perma.cc/DST7-AGJF>] (last visited Sept. 28, 2018) (one year); U.S. Dep't of State, Mali, Bureau of Educ. & Cultural Affairs, <https://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements/mali> [<https://perma.cc/88QX-8A4R>] (last visited Sept. 28, 2018) (twenty-five years); U.S. Dep't of State, Nicaragua, Bureau of Educ. & Cultural Affairs, <https://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements/nicaragua> [<https://perma.cc/XFL4-9WPE>] (last visited Sept. 28, 2018) (eighteen years); U.S. Dep't of State, Peru, Bureau of Educ. & Cultural Affairs, <https://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements/peru> [<https://perma.cc/CHJ6-8YZY>] (last visited Sept.

When paired with U.S. judicial enforcement mechanisms, patrimony laws provide dual methods of recovery for foreign nations. First, as discussed further in subsection I.C.3, nations can bring individual civil actions to recover stolen property.<sup>39</sup> These actions can take various forms,<sup>40</sup> but all are premised on the theory that the relevant patrimony law vested true ownership in the nation. Second, also as discussed further in subsection I.C.3, the U.S. government can bring a civil forfeiture action and transfer the forfeited property to the foreign nation.

The United States has three main statutory options for civil forfeiture actions premised on patrimony laws. Each option requires one additional predicate vehicle: the NSPA.<sup>41</sup> First, 18 U.S.C. § 981(a)(1)(C) subjects to civil forfeiture any property that “constitutes or is derived from proceeds traceable to a violation of . . . any offense constituting ‘specified unlawful activity.’”<sup>42</sup> Second, 18 U.S.C. § 545 subjects to civil forfeiture any property “fraudulently or knowingly import[ed] or [brought] into the United States . . . *contrary to law.*”<sup>43</sup> And third, 19 U.S.C. § 1595a(c) subjects

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28, 2018) (twenty-one years). Note that this computation includes both bilateral treaties (Memoranda of Understanding) and emergency import restrictions, the latter of which tend to be narrower in their protective scope. See 19 U.S.C. § 2603 (providing the requirements for emergency implementation of import restrictions); see also, e.g., Import Restrictions Imposed on Certain Khmer Stone Archaeological Material of the Kingdom of Cambodia, 64 Fed. Reg. 67,479, 67,480–81 (Dec. 2, 1999) (codified at 19 C.F.R. § 12.104g(b) (2000)) (imposing an emergency import restriction to protect Khmer stone sculpture and architectural elements from Cambodia but not Khmer archaeological material in any other media).

38. However, in theory “expiration” could be implied from nonenforcement. Cf. *infra* Part II.

39. See, e.g., *Republic of Turkey v. OKS Partners (OKS Partners I)*, 797 F. Supp. 64, 66, 70 (D. Mass. 1992) (denying a motion to dismiss in a civil dispute over ownership of almost two thousand ancient Greek and Lycian silver coins).

40. The actions most prominently include replevin and conversion but can also take the form of claims brought under the Racketeer Influenced and Corrupt Organizations Act (RICO) or state law statutory claims. See *id.* at 66–67.

41. See 18 U.S.C. §§ 2314–2315 (2012). The government also has the option of bringing a civil forfeiture action under a false-Customs-declaration theory, which does not necessarily require an NSPA violation but is generally *related* to an NSPA violation. See *id.* § 542. Section 542 prohibits the making of “materially false statements” on various official documents, including on Customs forms. *Id.*; see also *United States v. Holmquist*, 36 F.3d 154, 159 (1st Cir. 1994) (applying a broad materiality standard whereby the statement is material if it affects or facilitates importation in any way); cf. *United States v. Teraoka*, 669 F.2d 577, 578 (9th Cir. 1982) (applying a rigid but-for materiality standard whereby the government must show that the object entered into the country “by means of” the false statements). Among the surely myriad reasons to lie on Customs forms, importing a stolen object ranks high; accordingly, making a materially false statement to avoid an NSPA violation is often the reason for the § 542 violation. In *United States v. An Antique Platter of Gold*, for example, the court found probable cause for § 542 forfeiture when the claimant misidentified the object’s country of origin as Switzerland instead of Italy in order to avoid Italy’s strict patrimony laws. See 991 F. Supp. 222, 228–30 (S.D.N.Y. 1997).

42. 18 U.S.C. § 981(a)(1)(C) (emphasis added).

43. *Id.* § 545 (emphasis added).



to civil forfeiture any merchandise “introduced or attempted to be introduced into the United States *contrary to law*.”<sup>44</sup> In each of these three provisions, NSPA violations fulfill the “specified unlawful activity” and “contrary to law” language, as explained further in the following subsection.<sup>45</sup>

### B. *The National Stolen Property Act: Ownership Versus Regulation*

Originally enacted in 1934 as an expansion of the National Motor Vehicle Act, the NSPA extended protection to forms of property beyond cars.<sup>46</sup> It provides for a fine or maximum imprisonment of ten years, or both, if three elements are proven: “(1) the transportation in interstate or foreign commerce of property, (2) valued at \$5,000 or more, (3) with knowledge that the property was stolen, converted, or taken by fraud.”<sup>47</sup> A defendant may defend herself against an NSPA charge by claiming she was ignorant of a certain fact that made her conduct criminal—for example, that she did not know that the objects were indeed stolen. But a defendant cannot defend herself by claiming ignorance of the law itself, whether of the NSPA or of any underlying law.<sup>48</sup>

The NSPA can be used to enforce certain foreign claims that would not otherwise be enforceable in federal courts. In general, the courts of one nation do not enforce either the criminal or regulatory laws of another nation. The inapplicability of foreign criminal law reflects the tradition, as articulated by Chief Justice Marshall, that “[t]he Courts of no country execute the penal laws of another.”<sup>49</sup> This tradition, in turn,

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44. 19 U.S.C. § 1595a(c) (2012) (emphasis added). Title 19 Customs violations, unlike violations of Title 18, require a relatively low probable cause burden of proof and provide for no innocent-owner defense. Gerstenblith, *For Better and For Worse*, supra note 19, at 360, 371 n.20.

45. See, e.g., *Duryodhana*, No. 12 Civ. 2600(GBD), 2013 WL 1290515, at \*5–6 (S.D.N.Y. Mar. 28, 2013); *United States v. One Tyrannosaurus Bataar Skeleton*, No. 12 Civ. 4760(PKC), 2012 WL 5834899, at \*4–8 (S.D.N.Y. Nov. 14, 2012). Note that the “law” in “unlawful activity” and “contrary to law” refers to U.S. law; a patrimony law thus cannot fulfill these statutory requirements itself and requires the intermediate vehicle of the NSPA.

46. See Stephen K. Urice, *Between Rocks and Hard Places: Unprovenanced Antiquities and the National Stolen Property Act*, 40 N.M. L. Rev. 123, 133 (2010) (explaining the origins of the NSPA).

47. *United States v. Portrait of Wally*, 663 F. Supp. 2d 232, 250 (S.D.N.Y. 2009) (citing 18 U.S.C. §§ 2314–2315). The relevant portion of the NSPA targets the “transport[ation], transmi[ssion], or transfer[] in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud,” or anyone who “receives, possesses, conceals, stores, barter[s], sells, or disposes of” any such items. 18 U.S.C. §§ 2314–2315.

48. See, e.g., *United States v. Schultz*, 333 F.3d 393, 410 (2d Cir. 2003) (citing *Ratzlaf v. United States*, 510 U.S. 135, 149 (1994)) (affirming the district court’s rejection of appellant’s mistake of law defense regarding the relevant patrimony law because “ignorance of the law generally is no defense to a criminal charge”).

49. *The Antelope*, 23 U.S. (10 Wheat.) 66, 123 (1825) (rejecting the argument, in considering whether to return slaves on seized ships to Spanish and Portuguese illegal

reflects the policy against judicial interference with international relations.<sup>50</sup>

Although the NSPA does not allow enforcement of the criminal laws of another country, it does expand federal courts' jurisdiction. Consider, for example, *United States v. Portrait of Wally*.<sup>51</sup> This case involved a painting allegedly stolen by Nazis during the German occupation of Austria in 1938.<sup>52</sup> The U.S. government sued the Leopold Museum for recovery under the NSPA, claiming that the painting had been imported into the United States as stolen property and was thus subject to civil forfeiture.<sup>53</sup> The theft itself did not trigger the NSPA and thus it cannot be said that the United States was able to enforce foreign criminal law; rather, the act of importing stolen property triggered the NSPA.

The inapplicability of foreign regulatory law reflects a similar policy as does the inapplicability of foreign criminal law but lacks the benefit of the NSPA's jurisdictional expansion. For the purpose of this Note, "foreign regulatory law" primarily refers to foreign export restrictions.<sup>54</sup> Export restrictions have long been considered unenforceable outside a nation's jurisdictional borders, absent a specific statute to the contrary.<sup>55</sup> The ability to enact export restrictions is considered a regulatory police power, not an ownership right; thus, illegal export is considered a crime against the state, not against an individual.<sup>56</sup> Professor Paul Bator provides

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slave traders, that the United States should enforce Spanish and Portuguese criminal mandates against the slave trade).

50. See *Republic of Colombia v. Diageo N. Am., Inc.*, 531 F. Supp. 2d 365, 399 (E.D.N.Y. 2007) (quoting *Moore v. Mitchell*, 30 F.2d 600, 604 (2d Cir. 1929) (Hand, J., concurring)) (explaining that courts should not rule on another nation's penal laws because they are "incompetent to deal" with international relations).

51. 663 F. Supp. 2d 232.

52. See *id.* at 236.

53. See *id.* The parties ultimately reached a \$19 million settlement. Press Release, U.S. Dep't of Justice, *United States Announces \$19 Million Settlement in Case of Painting Stolen by Nazi* (July 20, 2010), <https://www.justice.gov/archive/usao/nys/pressreleases/July10/portraitofwallysettlementpr.pdf> [<https://perma.cc/VF2M-GLKV>].

54. Foreign revenue laws are another form of foreign regulatory law. For example, in determining whether to enforce foreign judgments, federal courts may discretionarily decide that a foreign judgment that is otherwise valid and applicable is nevertheless contrary to public policy because it involves the enforcement of foreign revenue law. See, e.g., *Overseas Inns S.A. P.A. v. United States*, 685 F. Supp. 968, 968 (N.D. Tex. 1988) (invoking a public policy prohibition against enforcing foreign revenue laws).

55. See, e.g., *supra* section I.A (discussing the CPIA); *infra* note 190 (noting the Lacey Act's prohibition on importing wild animals or plants in violation of "any" foreign law, including foreign export restrictions).

56. See John Henry Merryman, *The Retention of Cultural Property*, 21 U.C. Davis L. Rev. 477, 484 (1988) [hereinafter Merryman, *Retention of Cultural Property*] ("The non-enforceability of export restrictions abroad can be seen as an application of the principle of private international law that courts of one nation will not enforce claims based on the public law (as distinguished from claims based on private rights, like ownership) of another nation.").

the customary international law position on foreign export restrictions, within the context of cultural property:

The fact that an art object has been illegally exported does not in itself bar it from lawful importation into the United States; illegal export does not itself render the importer (or one who took from him) in any way actionable in a U.S. court; the possession of an art object cannot be lawfully disturbed in the United States solely because it was illegally exported from another county.<sup>57</sup>

In other words, violation of a foreign export restriction does not affect an otherwise-rightful title. This policy sounds partly in a practical concern with remedy. When the penalty for illegal export is seizure of the object by the importee state and return to the exportee state, the remedy is “a return only in the geographical sense; in practical terms it is a transfer of ownership to the foreign state.”<sup>58</sup> Such a remedy could theoretically entail the transfer of title from a rightful, good faith owner to the foreign nation merely for lack of proper permit.

Given this interplay between the NSPA and public policy, patrimony laws walk a fragile line in the United States. If they are considered to be ownership laws, then property taken in violation of a patrimony law can be considered “stolen” under the NSPA. But if patrimony laws are instead considered to be regulatory laws—that is, export restrictions—then such property cannot be considered “stolen” under the NSPA. This

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57. Paul M. Bator, *An Essay on the International Trade in Art*, 34 *Stan. L. Rev.* 275, 287 (1982) (emphasis omitted); see also *Jeanneret v. Vichy*, 693 F.2d 259, 267 (2d Cir. 1982) (quoting Professor Bator’s position in finding that there was “no reasonable prospect that the United States or any other government would act on Italy’s request for help in securing the return” of an Henri Matisse painting). There are three qualifications to this principle. First, it has been lightly modified by various multilateral treaties (and their corresponding implementing legislation) to give greater respect to foreign export restrictions. See John Henry Merryman, *The Free International Movement of Cultural Property*, 31 *NYU. J. Int’l L. & Pol.* 1, 6 (1998) [hereinafter Merryman, *Free International Movement*] (listing the three treaties in question, including the UNESCO Convention). Second, as a response to the Mayan looting crisis, in 1972 the United States passed a true exception to the rule that prohibits the importation of illegally exported “pre-Columbian monumental or architectural sculpture or mural.” Bator, *supra*, at 287–88 (internal quotation marks omitted) (quoting *Importation of Pre-Columbian Monumental or Architectural Sculpture of Murals*, Pub. L. No. 92-587, §§ 201–205, 86 Stat. 1296, 1297–98 (1972) (codified at 19 U.S.C. §§ 2091–2095 (2012))). And third, outside the context of cultural property, the Lacey Act prohibits the importation of plants or animals contrary to “any foreign law,” including foreign regulation. See 16 U.S.C. § 3372(a)(2)(A)–(B) (2012); *infra* note 190.

Regardless of the legality of importation, the legality of export also plays a role in a cultural object’s commercial life; most museums and collectors follow voluntary ethics policies preventing the purchase or display of art lacking a proper pedigree. See *United States v. McClain (McClain I)*, 545 F.2d 988, 996 n.14 (5th Cir. 1977) (noting that collectors such as the University of Pennsylvania, Harvard University, the Field Museum of Natural History in Chicago, the University of California Museum in Berkeley, the Brooklyn Museum, the Arizona State Museum, and the Smithsonian Institution all have similar such policies).

58. Merryman, *Retention of Cultural Property*, *supra* note 56, at 485.

determination hinges on the extent to which an object can be considered “stolen” from a foreign nation rather than from a private individual. The *McClain* doctrine, a series of holdings from three circuit court cases, begins to answer this question.

### C. *The NSPA and the McClain Doctrine*

The *McClain* doctrine establishes four criteria for determining whether a foreign patrimony law in a given context is enforceable in U.S. courts: (1) The law must be “clear and unambiguous”; (2) the law must be more than a mere export restriction; (3) the property at issue must have been found within the modern boundaries of the country asserting ownership; and (4) the property must have been discovered after enactment of the law.<sup>59</sup> This section focuses on the two more litigious elements: what constitutes a “clear and unambiguous” patrimony law and what constitutes a mere export restriction. It begins, in subsection I.C.1, by presenting the criminal case law that laid the foundation of the *McClain* doctrine. It proceeds, in subsection I.C.2, by describing the case that affirmed the *McClain* doctrine and brought it into the twenty-first century. Finally, it ends, in subsection I.C.3, by explaining the *McClain* doctrine’s evolution as a civil tool.

1. *Foundation: Hollinshead and McClain.* — *United States v. Hollinshead* heralded the first application of the NSPA to the cultural-property context.<sup>60</sup> At issue in *Hollinshead* were several pre-Columbian artifacts, in particular a rare and valuable stele known as Machaquila Stele 2.<sup>61</sup> The Ninth Circuit upheld convictions under the NSPA for transporting stolen property in foreign commerce.<sup>62</sup> That said, the Ninth Circuit spared little discussion of the legitimacy of the relevant patrimony law because the defendants did not attempt to argue that the patrimony law at issue was unenforceable.<sup>63</sup>

Three years later, the eponymous case *United States v. McClain* officially addressed the enforceability of foreign patrimony laws in U.S.

59. Gerstenblith, *For Better and For Worse*, supra note 19, at 362–63. The first and second criteria focus on the characteristics of the patrimony law itself. The third and fourth criteria focus on the characteristics of the property at issue in a given dispute.

60. 495 F.2d 1154, 1155 (9th Cir. 1974).

61. See *id.* *Hollinshead* and his co-conspirators financed the procurement of the stele from a Mayan ruin in the Guatemalan jungle, sawed it into pieces, packed it into boxes marked “personal effects,” bribed Guatemalan officers, and finally shipped the deconstructed stele to California. *Id.*

62. See *id.* at 1156.

63. See *id.* at 1155. On appeal, the defendants argued only the insufficiency of the evidence and, in reference to the patrimony law, that “the court erroneously instructed the jury that there is a presumption that every person knows what the law forbids.” *Id.* The court found that defendants’ “knowledge of Guatemalan law is relevant only to the extent that it bears upon the issue of their knowledge that the stele was stolen.” *Id.* at 1156.

courts.<sup>64</sup> Defendants were charged under the NSPA for conduct related to their transport of pre-Columbian artifacts from Mexico, including terra cotta figures, pottery, beads, and stucco pieces.<sup>65</sup> At trial, despite strong evidence of defendants' knowledge of the illegality of their conduct under Mexican law, the government was unable to prove the precise provenance of the goods.<sup>66</sup> Without provenance, the government could not prove specific instances of theft. Thus, in lieu of attempting to prove specific illegal conduct, prosecutors applied Mexico's patrimony law.<sup>67</sup> Application of the patrimony law required proof only that the objects were stolen from anywhere in Mexico at any time after the enactment of the law, thus rendering them "stolen" from the Mexican government.<sup>68</sup> The trial court instructed the jury that Mexican patrimony laws had vested ownership in the State since 1897, and thus the jury should convict if the defendants had taken possession of the antiquities any time after 1897.<sup>69</sup>

*McClain* represented a significant expansion of cultural property law.<sup>70</sup> It stands for the proposition that cultural property taken in

64. *McClain I*, 545 F.2d 988 (5th Cir. 1977). The case was remanded and appealed to the Fifth Circuit once again. *United States v. McClain (McClain II)*, 593 F.2d 658 (5th Cir. 1979).

65. See *McClain I*, 545 F.2d at 991–92.

66. See *McClain II*, 593 F.2d at 660–61 (describing repeated statements by defendants referencing the "stolen" and "smuggled" nature of the artifacts in their possession).

67. *McClain I*, 545 F.2d at 992.

68. *Id.*

69. *Id.* The jury did indeed convict. *Id.* However, as discussed below, the Fifth Circuit found that the district court's jury instructions regarding the specific date were erroneous and thus remanded the case to the district court. See *infra* notes 76–78 and accompanying text.

70. This expansion is underscored by the heavy criticism the decision faced from the commercial art world at the time—and continues to face to this day. See *McClain I*, 545 F.2d at 991 & n.1 (noting that "[m]useum directors, art dealers, and innumerable private collectors throughout this country must have been in a state of shock" upon learning of the *McClain* convictions); John Alan Cohan, *An Examination of Archaeological Ethics and the Repatriation Movement Respecting Cultural Property (Part Two)*, 28 *Environ. L. & Pol'y J.* 1, 55 (2004) (criticizing foreign patrimony laws as being "susceptible to spotty enforcement and bribery" and "exacerbating the antiquities trade on the black market"); Cuning, *supra* note 18, at 505 (concluding that the *McClain* doctrine "undermines the intent of the CPIA and free trade in cultural property"); William G. Pearlstein, *White Paper: A Proposal to Reform U.S. Law and Policy Relating to the International Exchange of Cultural Property*, 32 *Cardozo Arts & Ent. L.J.* 561, 585 (2014) ("The *McClain* doctrine is a crude, judicially crafted approach to a complex problem that was neither designed to address such matters nor intended to survive passage of the Implementation Act."). Despite the plethora of opinions concerning its ineffectiveness, U.S. enforcement of foreign patrimony laws has led to the repeated and successful repatriation of cultural objects from all over the world. See *infra* section I.C.3 (tracking the success of the *McClain* doctrine in civil suits). Even critics recognize that there is scant legislative traction for reform. See Pearlstein, *supra*, at 561 (asserting that the "last[] time Congress focused on cultural property issues" was in the 1980s). Accordingly, this Note is forward-looking in considering the continued evolution of this doctrine.

violation of a foreign nation's patrimony laws renders that property "stolen" under the NSPA.<sup>71</sup> Yet in so holding, the court was careful to distinguish foreign patrimony laws from foreign export restrictions.<sup>72</sup> Although a nation may exert police power—such as price regulation, prohibition on discriminatory use, antitrust laws, or export controls—over property within its borders, this police power is merely regulatory.<sup>73</sup> And neither the police power to regulate property nor the fact that a state *has* regulated property in itself constitutes ownership.<sup>74</sup> Rather, the court specified that the NSPA covers only property over which a foreign nation has made a "declaration of national ownership" and whose export the foreign nation restricts.<sup>75</sup> This dichotomy serves as the foundation of the *McClain* doctrine.

Despite the Fifth Circuit's legitimization of patrimony laws via the NSPA, it nevertheless reversed the convictions of McClain and her codefendants due to judicial error.<sup>76</sup> As discussed, the trial court had instructed the jury that Mexican law had vested ownership in the state since 1897.<sup>77</sup> Yet the Fifth Circuit found this date incorrect; although Mexico had been "concerned with the *preservation and regulation* of pre-Columbian artifacts since 1897, . . . *ownership* of all pre-Columbian objects by legislative fiat . . . did not come until much later."<sup>78</sup> This ruling

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71. *McClain I*, 545 F.2d at 1000–01. The court specifically recognized that the term "stolen" had already been given broad scope in precedent, compatible with congressional intent behind the NSPA to "discourage both the receiving of stolen goods and the initial taking." *Id.* at 994. The court also noted that the Supreme Court found that "stolen" has been interpreted to include, variously: a vehicle "rightfully acquired but wrongfully converted by a bailee," *id.* at 994–95 (citing *United States v. Turley*, 352 U.S. 407, 411 (1957)); embezzled property, see *id.*; and indeed, "any dishonest transaction whereby one person obtains that which rightfully belongs to another and deprives the owner of the rights and benefits of ownership," *id.* at 995.

72. See *id.* at 996 ("We do not base this conclusion on illegal exportation of the antiquities."); see also *supra* section I.B (discussing the customary international law position that nations will not enforce the export restrictions of other nations).

73. See *McClain I*, 545 F.2d at 1002.

74. See *id.*

75. *Id.* at 1000–01 ("[A declaration of] national ownership is necessary before illegal exportation of an article can be considered theft, and the exported article considered 'stolen,' within the meaning of the [NSPA]. Such a declaration combined with a restriction on exportation . . . is sufficient to bring the NSPA into play.")

76. See *id.* at 992.

77. *Id.* at 997.

78. *Id.* (emphasis added). In so finding, the Fifth Circuit provided an extensive factual analysis of the relevant patrimony laws and their relative power. For example, the 1897 law was insufficient because it declared ownership only of archaeological monuments and merely placed export restrictions on moveable objects such as the antiquities at issue in the case. See *id.* at 997–98. The 1930 and 1934 laws were both lacking because they "implicitly recognized the right to private ownership," which meant the prosecution could not have proven that antiquities were necessarily stolen. *Id.* at 998. The 1970 law created a presumption that unregistered moveable objects were owned by the nation yet had no explicit statement to that effect. *Id.* at 999. In denying a petition for rehearing, the Fifth

emphasized the court's distinction between regulation and ownership.<sup>79</sup> On remand, defendants were again convicted.<sup>80</sup>

2. *Affirmation: United States v. Schultz.* — Because of the general rarity of patrimony law claims, the issue did not reach the federal appellate level again until 2003 in *United States v. Schultz*.<sup>81</sup> In this seminal case, prominent New York art dealer Frederick Schultz conspired with infamous art thief Jonathan Tokeley Parry to smuggle ancient Egyptian artifacts into New York.<sup>82</sup> The Second Circuit, in affirming their convictions

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Circuit later held that predicating criminal liability on such a presumption would infringe upon due process. See *United States v. McClain*, 551 F.2d 52, 54 (5th Cir. 1977). In fact, not until 1972 did Mexican law “unequivocally establish[.]” state ownership of the cultural artifacts at issue by dictating state ownership of all moveable cultural artifacts, extending to private collections, forbidding exportation, and requiring registration for preexisting private ownership rights that were grandfathered in. *McClain I*, 545 F.2d at 1000.

79. In addition to objective ownership values, the *McClain* court also paid homage to the foreign nation's subjective intent. In justifying its initial holding regarding application of patrimony laws under the NSPA, the court found that to deny the effect of patrimony laws would be to deny the foreign nation protection “after it had done all it reasonably could do—vested itself with ownership—to protect its interest in the [relevant] artifacts.” *McClain I*, 545 F.2d at 1001. Yet later, in its second judgment in the case regarding the district court's instructions, the Fifth Circuit held that even if “Mexico has considered itself the owner of all pre-Columbian artifacts for almost 100 years[.] . . . it has not expressed that view with sufficient clarity to survive translation into terms understandable by and binding upon American citizens.” *McClain II*, 593 F.2d 658, 670 (5th Cir. 1979). For further discussion of the significance of intent, see *infra* Part III.

80. See *McClain II*, 593 F.2d at 668–69. However, defendants returned for their second appearance before the Fifth Circuit based on claims that the district court *again* gave erroneous jury instructions, this time for improperly putting to the jury the question of “whether and when Mexico validly enacted national ownership of the artifacts involved.” *Id.* at 668 (emphasis omitted). The Fifth Circuit held that this question was indeed a proper question of foreign law, which under Federal Rule of Criminal Procedure 26.1 is a question of law and thus should be decided by the judge, not the jury. See *id.* at 669 & n.17 (noting that although Federal Rule of Criminal Procedure 26.1 “refrains from allocating functions between judge and jury,” the “pre-Rule cases make clear that the proper procedure is for the judge rather than the jury to determine questions of foreign law”); see also Fed. R. Crim. P. 26.1; *infra* section II.D.2. The court held this to be reversible error on the substantive count under the NSPA because the jury had likely misinterpreted the complicated foreign law. See *McClain II*, 593 F.2d at 670. The Fifth Circuit did, however, uphold the conspiracy count under the NSPA. *Id.* at 672.

81. 333 F.3d 393 (2d Cir. 2003).

82. See *id.* at 396. Schultz and Parry used various techniques for their smuggling endeavor. Some artifacts they dipped in clear plastic and painted to resemble cheap souvenirs; others they restored using techniques from the 1920s, affixed with labels that had been baked and tea-stained for authenticity, and claimed were part of a fictional “Thomas Alcock Collection” that had been privately owned before the codification of Egyptian patrimony laws. See *id.*; Kelly Elizabeth Yasaitis, National Ownership Laws as Cultural Property Protection Policy: The Emerging Trend in *United States v. Schultz*, 12 Int'l J. Cultural Prop. 95, 103 (2005) (describing the facts of the *Schultz* case).

under the NSPA,<sup>83</sup> joined the Fifth Circuit<sup>84</sup> in endorsing the application of the NSPA to foreign patrimony laws. The Second Circuit found that the relevant patrimony law, Egyptian Law 117, was “clear and unambiguous” and thus enforceable.<sup>85</sup>

Like *McClain*, *Schultz* provided a detailed factual analysis of what made the relevant law an enforceable ownership law as opposed to an unenforceable export restriction. Based largely on the testimony of two expert witnesses,<sup>86</sup> the court found that Egyptian Law 117 asserted state ownership of all antiquities found after 1983 with no exceptions;<sup>87</sup> clearly defined “antiquity”;<sup>88</sup> described the procedure to be followed upon discovery of an antiquity; mandated serious criminal penalties for violations; provided for licensure of foreign archaeological missions and subsequent potential government donations to foreign museums; and directed its influence at both activity within and export out of Egypt.<sup>89</sup> Significantly, the *Schultz* court also noted that Egypt’s active enforcement of Law 117 confirmed the “intent of the law.”<sup>90</sup>

*Schultz* claimed, as did *McClain* before him, that despite the legitimacy of Egyptian Law 117 specifically, foreign patrimony laws in general

83. See *Schultz*, 333 F.3d at 393. The district court had found on the evidence that Egyptian Law 117 “vests with the state most, and perhaps all, the rights ordinarily associated with ownership of property, including title, possession, and right to transfer,” which was “far more than a licensing scheme or export regulation.” *United States v. Schultz*, 178 F. Supp. 2d 445, 447 (S.D.N.Y. 2002).

84. See *supra* note 71 and accompanying text (describing the Fifth Circuit’s holding in *McClain I*).

85. *Schultz*, 333 F.3d at 402.

86. These two witnesses were Dr. Gaballa Ali Gaballa, Secretary General of Egypt’s Supreme Council of Antiquities, part of the Ministry of Culture; and General El Sobky, Director of Criminal Investigations for the Egyptian Antiquities Police. *Id.* at 400–01.

87. See *id.* at 400 (“Dr. Gaballa asserted that there are no circumstances under which a person who finds an antiquity in Egypt may keep the antiquity legally. The person who found the antiquity is not compensated for the item, because it never belonged to the finder.”).

88. Article I of Egyptian Law 117 reads:

An ‘Antiquity’ is any movable or immovable property that is a product of any of the various civilizations or any of the arts, sciences, humanities and religions of the successive historical periods extending from prehistoric times down to a point one hundred years before the present, so long as it has either a value or importance archaeologically or historically that symbolizes one of the various civilizations that have been established in the land of Egypt or that has a historical relation to it, as well as human and animal remains from any such period.

*Id.* at 399; cf. *McClain I*, 545 F.2d at 997–1000 (finding that the definition of protected cultural property in Mexico’s patrimony laws did not clearly include the object at stake until the 1972 version).

89. See *Schultz*, 333 F.3d at 402.

90. *Id.*



should not trigger the NSPA's definition of "stolen."<sup>91</sup> And the Second Circuit held, as did the Fifth Circuit before it,<sup>92</sup> that the NSPA should be interpreted expansively to include violations of foreign patrimony laws.<sup>93</sup>

Thus, the *McClain*-doctrine cases—*Hollinshead*, *McClain*, and *Schultz*—differentiate patrimony laws from export restrictions based on the underlying ownership values. Under this doctrine, a patrimony law is enforceable when a foreign nation clearly and intentionally declares itself owner, and particularly when it backs up that declaration with proof of its intention, such as active enforcement.

3. *Evolution: The McClain Doctrine as a Civil Tool.* — Even after *McClain* legitimized the use of patrimony laws in the criminal context, it was unclear to what extent patrimony laws could be enforced in civil actions. But beginning in 1989 with what Professor Patty Gerstenblith calls the "first generation cases," foreign nations began bringing their own civil actions in U.S. courts against alleged thieves.<sup>94</sup> Soon thereafter, the U.S. government followed suit by bringing civil forfeiture actions on behalf of foreign governments<sup>95</sup>—what Gerstenblith calls the "second generation cases."<sup>96</sup> This section analyzes how both of these types of civil cases utilized and transformed the *McClain* doctrine.

Gerstenblith's "first generation" cases dragged patrimony laws into the civil context. In *Republic of Turkey v. OKS Partners*, for example, Turkey tapped patrimony laws via the NSPA to recover an ancient Greek coin hoard worth an estimated \$7.5 to \$10 million.<sup>97</sup> Amidst protracted

91. *Id.* Schultz also argued that application of the NSPA to foreign patrimony laws was preempted by the implementation of the CPIA—an argument that many scholars and practitioners have since echoed. See *id.* at 408; *supra* note 70 and accompanying text (summarizing common critiques of the NSPA's application to patrimony laws). The court found that "nothing in the language of the CPIA supports that interpretation," and that in fact the CPIA explicitly states that it "neither pre-empts state law in any way, nor modifies any Federal or State remedies that may pertain to articles to which [the CPIA's] provisions . . . apply." *Schultz*, 333 F.3d at 408.

92. See *supra* note 71 and accompanying text (describing the Fifth Circuit's holding in *McClain I*).

93. See *Schultz*, 333 F.3d at 402–03 ("[I]t does not matter that the antiquities at issue here were stolen in a foreign country, or that their putative owner is a foreign entity.").

94. Gerstenblith, *For Better and For Worse*, *supra* note 19, at 358–59.

95. See, e.g., *United States v. Pre-Columbian Artifacts*, 845 F. Supp. 544, 545 (N.D. Ill. 1993).

96. Gerstenblith, *For Better and For Worse*, *supra* note 19, at 359–61.

97. See *OKS Partners I*, 797 F. Supp. 64, 66 (D. Mass. 1992); see also Barry Meier, *The Case of the Contested Coins; A Modern-Day Battle over Ancient Objects*, N.Y. Times (Sept. 24, 1998), <http://www.nytimes.com/1998/09/24/business/the-case-of-the-contested-coins-a-modern-day-battle-over-ancient-objects.html> (on file with the *Columbia Law Review*). Turkey claimed possession under five different theories: (1) equitable replevin, (2) conversion, (3) breach of a constructive trust, (4) RICO, and (5) the Massachusetts Consumer Protection Act. See *OKS Partners I*, 797 F. Supp. at 66. Turkey argued that an NSPA violation based on its patrimony laws fulfilled RICO's predicate-act requirement. *Id.* at 66–67. A civil RICO

litigation, the district court held that Turkey's patrimony laws vested it with "an immediate and unconditional right of possession" of the hoard.<sup>98</sup> This finding of right of possession was based largely on the fact that individuals who discover "movable antiquities" in Turkey must report and deliver the antiquities to the government.<sup>99</sup> Thereafter, if the antiquities are deemed deserving of protection and if the finder complied with the notice and delivery requirements, the state pays a reward to the finder.<sup>100</sup>

Notably, the Turkish laws were more forgiving than the Egyptian law at issue in *Schultz*.<sup>101</sup> The Turkish laws referred to the finder as "owner," allowed private possession of antiquities deemed undeserving of state protection, and provided a reward for compliance.<sup>102</sup> Egyptian Law 117, in contrast, explicitly stated that finders had no ownership rights, provided no reward for compliance, and granted no exceptions for private ownership.<sup>103</sup> Indeed, patrimony laws need not follow specific parameters to meet the enforceability threshold of the *McClain* doctrine. Rather, a case-by-case, fact-intensive analysis focused on the underlying ownership values and the specific property at issue determines enforceability.<sup>104</sup>

Gerstenblith's "second generation cases" encompass the move from private civil actions to government-initiated civil forfeiture actions. This shift may reflect a general expansion in the use of civil forfeiture.<sup>105</sup> It also may reflect greater U.S. appreciation for international comity, since the shift necessarily transferred litigation costs from foreign nations to

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action requires a predicate act, an enterprise, and a pattern of racketeering. See *id.*; see also 18 U.S.C. §§ 1961–1968 (2012).

98. Republic of Turkey v. OKS Partners (*OKS Partners II*), No. 89-3061-WJS, 1994 U.S. Dist. LEXIS 17032, at \*6 (D. Mass. June 8, 1994). The district court ultimately denied defendants' motion for summary judgment because the ownership right was sufficient to support actions for at least replevin and conversion. See *id.* at \*8–9. The issue turned on whether a change in language of the relevant law signified a "change from outright ownership to ownership of a lesser extent." *Id.* at \*4. Specifically, the imperial decree of 1906 referred to ancient cultural objects as "*devlet malidir*," which translates to "state property"; but in 1983, the new law referred to them as "*devlet mali niteliğindedir*," which translates to "having the quality of state property." *Id.* at \*3. The case eventually settled out of court in 1999, nearly a decade after it began. See Janet Blake, Turkey, in *Handbook on the Law of Cultural Heritage and International Trade* 437, 456 (James A.R. Nafziger & Robert Kirkwood Paterson eds., 2014). The coin hoard was returned to Turkey in return for an agreement to display it with a plaque dedicated to William I. Koch, a partner at OKS Partners. *Id.*

99. *OKS Partners II*, 1994 U.S. Dist. LEXIS 17032, at \*4–5.

100. *Id.* at \*5.

101. See *supra* section I.C.2 (discussing the *Schultz* case).

102. *OKS Partners II*, 1994 U.S. Dist. LEXIS 17032, at \*6–8.

103. See *supra* notes 86–89 and accompanying text.

104. See *supra* notes 78–79, 86–90 and accompanying text (describing the fact-intensive analyses in *McClain* and *Schultz*).

105. See George C. Pratt & William B. Petersen, Civil Forfeiture in the Second Circuit, 65 St. John's L. Rev. 653, 664–65 (1991) (describing how Congress "extensively expanded the scope of civil forfeiture" in the 1970s and 1980s).

the U.S. government. This cost shifting is appropriate: Foreign nations seeking recovery of stolen cultural property are often under-resourced or underadministrated (often the reason for the property theft in the first place) and may lack the ability to successfully repatriate on their own. The shift also generated significant advantages for foreign nations. The increased use of Customs civil forfeiture in particular allows for greater protections for stolen property compared to “first generation” civil actions. Customs violations under Title 19 of the U.S. Code carry a five-year statute of limitations that runs from the time the U.S. government first discovers the violation.<sup>106</sup> The statute of limitations for civil actions, in contrast, runs from the time of theft, thus rendering an old theft—such as the Nazi-era looting at issue in *Portrait of Wally*—likely barred.<sup>107</sup>

One such Customs case is *United States v. An Antique Platter of Gold*, which concerned a gold phiale (or ceremonial bowl) looted from Italy.<sup>108</sup> In the midst of investigating an international smuggling ring, Italy requested assistance from the United States.<sup>109</sup> The relevant Italian patrimony law inspired no controversy.<sup>110</sup> The U.S. government sought civil forfeiture based on three theories, including one pursuant to 19 U.S.C. § 1595a(c).<sup>111</sup> As discussed above, § 1595a(c) subjects items to civil forfeiture when they have been imported “contrary to law.”<sup>112</sup> Violation of Italy’s patrimony law triggered the NSPA, which in turn triggered § 1595a(c)’s

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106. 19 U.S.C. § 1621 (2012) (stating that the statute of limitations is “five years after the time when the alleged offense was discovered”).

107. The painting in *Portrait of Wally* was allegedly involuntarily “sold” to Friedrich Welz, a Nazi, in 1938. See *United States v. Portrait of Wally*, 663 F. Supp. 2d 232, 236, 238 (S.D.N.Y. 2009). It was imported into the United States for exhibit in September of 1997, and the New York District Attorney’s Office issued a subpoena for the painting in January 1998. *Id.* at 246. The statute of limitations for the civil forfeiture would have run until 2002. See *supra* note 106 and accompanying text. Yet, under New York state law, the statute of limitations would have ended in 1942—five years after the theft itself. See N.Y. Penal Law § 165.54 (McKinney 2018) (providing that “criminal possession of stolen property in the first degree” is a class B felony); see also N.Y. Crim. Proc. Law § 30.10 (McKinney 2018) (requiring that a prosecution for any felony other than class A “be commenced within five years of the commission thereof”).

108. See 991 F. Supp. 222, 224 (S.D.N.Y. 1997), *aff’d*, 184 F.3d 131 (2d Cir. 1999).

109. See *id.* at 226–27; see also Gerstenblith, *For Better and For Worse*, *supra* note 19, at 359 (describing the Italian smuggling ring that led to the theft of the phiale).

110. See *Antique Platter*, 991 F. Supp. at 227. The extent of the court’s discussion of the law in question amounted to a footnote, wherein the court noted that it had been supplied with a translation of the Italian law and an accompanying analysis by an expert witness (an Italian lawyer and expert on cultural property). See *id.* at 227 n.25. The law provides that all antiquities belong to the state unless a party can establish legitimate private ownership that predates the first Italian patrimony law in 1902. *Id.*

111. *Id.* at 227.

112. *Id.* at 231.

“contrary to law” language.<sup>113</sup> The district court ultimately granted summary judgment in favor of the government pursuant to § 1595a(c).<sup>114</sup>

*Antique Platter* is just one of the increasing number of foreign patrimony law civil forfeiture claims being brought by the U.S. government.<sup>115</sup> As this number grows and the doctrine evolves, new questions come to light.

## II. INACTIVITY UNDERMINES THE *McCLAIN* DOCTRINE

One such question that has emerged within patrimony law litigation, and especially in the burgeoning civil forfeiture realm, regards the active-enforcement claim—here known as the “inactivity” defense. In defending against patrimony law repatriation claims, defendants wield the inactivity defense by citing to the domestic effect of the patrimony law. Specifically, defendants claim that a foreign nation’s poor history of domestic enforcement of the patrimony law should invalidate the legitimacy of the patrimony law in U.S. courts. This claim has dual difficulties: First, courts have not yet fleshed out what role inactivity should play in the litigation process; and second, in part due to this limited understanding, inactivity has been wielded in ways that threaten to forgo important contextual considerations. Section II.A introduces the origins of the inactivity defense. Section II.B describes the inactivity defense’s current, uncertain state. In light of this uncertainty, section II.C explains the importance of context in understanding inactivity, and how forgoing consideration of context threatens the *McClain* doctrine. Finally, section II.D discusses the procedural problems inherent in inactivity defenses that inhibit proper consideration of context.

### A. *The Creation of “Inactivity”*: *Government of Peru v. Johnson*

The inactivity defense leverages the fragile balance between enforceable foreign patrimony laws and unenforceable foreign export restrictions.<sup>116</sup> This defense asserts that a nation’s patrimony laws are not “true” patrimony laws when they have little or no domestic effect. The underlying theory is that a nation could cheat the U.S. public policy (and the customary international law policy more broadly) against enforcing foreign export restrictions by enacting a “patrimony law” in name only. Imagine that a foreign nation passes a law that comports with the facial requirements of the *McClain* doctrine: It clearly and unambiguously

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113. *Id.*

114. See *id.* at 232.

115. See *infra* section II.B (discussing *United States v. One Tyrannosaurus Bataar Skeleton*); *infra* section II.C (discussing *Duryodhana*).

116. See *supra* section I.B (explaining the public policy against enforcing foreign regulation, including foreign export restrictions).

declares national ownership of cultural property.<sup>117</sup> Imagine further, however, that the foreign nation has a sparse history of enforcing this law within its own borders. Perhaps the law provides criminal penalties for ownership,<sup>118</sup> but the foreign nation never enforces those penalties within its own borders; perhaps the law provides procedures to be followed upon discovery of cultural property,<sup>119</sup> but the mechanisms for those procedures are not functional; perhaps ownership of cultural property without proper permit is considered theft,<sup>120</sup> but the nation brings conversion claims only against property that has left the country. Such a system would allow free movement of cultural property within the nation's own borders while simultaneously allowing the nation to assert ownership rights in U.S. courts when cultural property is illegally exported. The inactivity defense finds this duality problematic and seeks to invalidate such laws by "revealing" them as mere export restrictions.

This strategy is not new. It dates back to *Government of Peru v. Johnson*, a 1989 case involving stolen pre-Columbian artifacts.<sup>121</sup> Seeking to recover the artifacts, Peru sued the alleged thieves for conversion predicated on Peru's patrimony law and the NSPA.<sup>122</sup> Yet the action failed, in part on account of Peru's inability to prove that its patrimony laws were not just export restrictions in disguise.<sup>123</sup> Specifically, the district court

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117. See supra note 59 and accompanying text (providing the criteria for determining whether a given foreign patrimony law is enforceable in U.S. courts, including whether the law is (1) clear and unambiguous and (2) whether the law is more than a mere export restriction); supra note 75 and accompanying text (noting that in determining whether a law is more than a mere export restriction, the dispositive question is whether the foreign nation has made a "declaration of national ownership" with a parallel restriction on export).

118. See, e.g., supra note 89 and accompanying text (noting that Egyptian Law 117, at issue in *Schultz*, mandated serious criminal penalties for violations).

119. See, e.g., supra note 99 (noting that Turkey's patrimony law, at issue in *OKS Partners I* and *OKS Partners II*, described procedures to be followed upon discovery of an antiquity).

120. See, e.g., supra note 68 (noting that Mexico's patrimony law, at issue in *McClain I* and *McClain II*, considered an object to be stolen from the Mexican government if it was removed from Mexico).

121. See 720 F. Supp. 810, 811 (C.D. Cal. 1989), aff'd sub nom. *Government of Peru v. Wendt*, 933 F.2d 1013 (9th Cir. 1991) (affirming based on failure to prove that the artifacts at issue originated in modern-day Peru). Against a background of rampant looting of ancient Moche sites in Peru, thieves had broken into a royal burial site at Sipán, home to a vast trove of gold. See Marion P. Forsyth, International Cultural Property Trusts: One Response to Burden of Proof Challenges in Stolen Antiquities Litigation, 8 Chi. J. Int'l L. 197, 199 (2007). Any artifacts not made of gold or silver were destroyed in the process of looting. Id. Eventually, a conspirator alerted the United States that antiquities dealers in California had procured some of the stolen artifacts. Id. at 200. Although the government seized those artifacts located in California, a significant portion of the stolen artifacts have not been repatriated to Peru. Id.

122. See *Johnson*, 720 F. Supp. at 811.

123. See id. at 815. The court also found additional weaknesses in Peru's case: (1) Peru was unable to prove that the artifacts were indeed excavated from Sipán in modern-day

expressed skepticism about the patrimony laws' domestic effect.<sup>124</sup> Despite those laws' seemingly clear proclamations of national ownership,<sup>125</sup> Peru allowed artifacts to remain in private possession and be privately transferred by various methods.<sup>126</sup> The court found "no indication in the record that Peru ever ha[d] sought to exercise its ownership rights in such property, so long as there [was] no removal from that country."<sup>127</sup> Thus the laws functioned effectively as mere export restrictions.<sup>128</sup>

*Johnson* signaled to defendants that a foreign nation's less-than-ardent enforcement of its patrimony laws could be wielded as a defense to patrimony law claims—even when the patrimony law facially followed the explicit requirements of the *McClain* doctrine. Yet uncertainty plagues the inactivity defense today. In particular, it suffers from the lack of a cohesive framework, as discussed in the following section.

### B. *The Uncertain State of Inactivity*

The inactivity defense is underdeveloped in part due simply to lack of precedent, because patrimony laws, in general, are so rare. Yet the inactivity defense has been cited consistently throughout the few patrimony law cases that have been brought. For example, an Illinois district court cited *Johnson* for the general proposition that export regulations do not create ownership rights under the NSPA.<sup>129</sup> More significantly, the Second Circuit implicitly referenced the inactivity defense in *United States v. Schultz*, discussed in subsection I.C.2 above, by emphasizing that Egypt's "active enforcement of its ownership rights confirm[ed] the intent of" its

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Peru, rather than from one of many similar pre-Columbian sites scattered across Bolivia and Ecuador; (2) Peru was unable to prove when the excavation occurred and consequently was unable to show which historical patrimony law applied; and (3) the older Peruvian patrimony law at issue was unclear. See *id.* at 812–13; *supra* note 59 and accompanying text (providing the four criteria for enforcing a given foreign patrimony law in U.S. courts).

124. See *Johnson*, 720 F. Supp. at 814 (noting that although Peru's 1929 patrimony law does make a declaration of national ownership, "the domestic effect" of that declaration "appears to be extremely limited").

125. See *id.* ("[The 1929 law] proclaim[s] that artifacts in historical monuments are 'the property of the State' and that unregistered artifacts 'shall be considered to be the property of the State.'").

126. *Id.*

127. *Id.*

128. *Id.* ("The laws of Peru concerning its artifacts could reasonably be considered to have no more effect than export restrictions, and, as was pointed out in [*McClain*], export restrictions constitute an exercise of the police power of a state; '[t]hey do not create "ownership" in the state.'" (second alteration in original) (quoting *McClain I*, 545 F.2d 988, 1002 (5th Cir. 1977))).

129. See *United States v. Pre-Columbian Artifacts*, 845 F. Supp. 544, 547 (N.D. Ill. 1993) (finding that Guatemala's patrimony law sufficiently vested national ownership of stolen artifacts to deny the motion to dismiss).

patrimony law.<sup>130</sup> District courts have also discussed inactivity in each of the three cases since *Schultz* that concerned novel patrimony laws, two of which are discussed in this section and the third of which is considered in the following section.

The first case was *United States v. One Lucite Ball Containing Lunar Material*, a sensational story about a stolen lunar rock that President Richard Nixon had gifted to Honduras in 1973.<sup>131</sup> The court in *Lucite Ball* distinguished *Johnson*, in somewhat conclusory fashion, because “all of the factors identified by the district court in that case are absent here.”<sup>132</sup> It is true that, in contrast to *Johnson*, there were no issues in *Lucite Ball* with determining the provenance of the property.<sup>133</sup> In light of these factual differences, the court’s decision could be understood as a distancing from *Johnson*, a determination that inactivity is relevant only when the case is plagued by additional factual uncertainties.

Inactivity did not appear again until 2012 in *United States v. One Tyrannosaurus Bataar Skeleton*.<sup>134</sup> *Bataar Skeleton* involved a commercial paleontologist, Eric Prokopi, who removed a Tyrannosaurus bataar skeleton from Mongolia.<sup>135</sup> In defending against the government’s civil

130. 333 F.3d 393, 402 (2d Cir. 2003). For additional discussion of the significance of the court’s emphasis on Egypt’s active enforcement of its patrimony law, see Adler & Urice, *supra* note 27, at 129 n.63 (“Although most of the literature assumes that *Schultz* adopted *McClain* wholesale, we believe that *Schultz*’s reliance on Egypt’s active, domestic enforcement of its patrimony law meaningfully distinguishes the case from *McClain*, where such enforcement was absent.”).

131. 252 F. Supp. 2d 1367, 1369 (S.D. Fla. 2003) (finding that the object was stolen from Honduras and illegally imported into the United States in violation of customs provision 19 U.S.C. § 1595a(c) (2012)). The lunar rock was eventually recovered in a sting operation by NASA officials in 1998. *Id.* at 1370–72.

132. *Id.* at 1381. *Lucite Ball* also distinguished *Johnson* on the grounds that *Johnson* did “not appear to involve forfeiture under 19 U.S.C. § 1595a(c)” and that it was “unclear from the [*Johnson*] opinion what substantive law governed or was applied.” *Id.* This is an unpersuasive differentiation. Firstly, the vehicle by which a patrimony law is introduced into court should not occasion any change in how the court interprets the patrimony law itself. Secondly, the court’s focus on substantive law is ironic given that *Lucite Ball* also fails to specify the substantive U.S. law at issue. *Lucite Ball* never indicated which U.S. law it relied upon to determine that import was “contrary to law” under § 1595a(c), instead focusing solely on Honduran law. See *id.* at 1379 (“First, Honduras has title to the moon rock and plaque under its law . . . . Second, it is uncontested that the moon rock and plaque were introduced into the United States. . . . Accordingly, the United States has met its burden of showing probable cause under §[ ] 1595a(c) . . . .”). The case could be read to implicitly invoke the NSPA—and probably should be read as such, given that the United States cannot invoke foreign patrimony laws on its own authority. See *supra* section I.B (describing the public policy against enforcing foreign penal laws).

133. See *Lucite Ball*, 252 F. Supp. 2d at 1379–81.

134. No. 12 Civ. 4760(PKC), 2012 WL 5834899 (S.D.N.Y. Nov. 14, 2012).

135. See *id.* at \*2. “Bataar” comes from a Mongolian word for “hero.” Ralph Blumenthal, Dinosaur Skeleton to Be Returned to Mongolia, *N.Y. Times* (May 5, 2013), <http://www.nytimes.com/2013/05/06/arts/design/dinosaur-skeleton-to-be-returned-to-mongolians.html> (on file with the *Columbia Law Review*). The skeleton is unique in its

forfeiture complaint, Prokopi drew on *Johnson* to claim that “[w]hile facial clarity [of the patrimony law] is necessary, it alone is not sufficient.”<sup>136</sup> Specifically, he described the purpose of the inactivity rule as “prevent[ing] a country unwilling to take the politically unpopular step of seizing antiquities from its own people from asking the United States to do so on its behalf” or from “‘rediscovering’ laws that have previously not been enforced, thereby unsettling the reasonable expectations that have developed about the meaning of those laws.”<sup>137</sup> Like the defendants in *Johnson*, Prokopi asserted that the government’s complaint failed because it did not allege that Mongolia had ever enforced its patrimony laws.<sup>138</sup> The district court was unconvinced: It held that *Schultz*, despite emphasizing active enforcement as probative of the intent motivating a foreign law, still “falls short of making active enforcement a pleading requirement.”<sup>139</sup>

Although significant, *Bataar Skeleton* was hardly surprising given the circumstances. The government’s civil forfeiture action accompanied significant criminal charges against Prokopi, who eventually pled guilty and agreed to return the skeleton to Mongolia.<sup>140</sup> Furthermore, there was little question regarding the provenance of the skeleton, specifically that the skeleton was *recently* stolen from the Nemegt Formation in Mongolia.<sup>141</sup> This meant that the most recent iterations of Mongolian patrimony law were available for prosecutorial use—and the most recent iterations of Mongolian patrimony laws were clear and clearly applicable.<sup>142</sup>

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completeness, and the international melodrama has made it something of a celebrity in Mongolia. *Id.*

136. Memorandum of Law in Support of Claimant Eric Prokopi’s Motion to Dismiss at 19, *Bataar Skeleton*, No. 12 Civ. 4760(PKC), 2012 WL 3582955 [hereinafter *Bataar Claimant’s Memo*].

137. *Id.*

138. *Id.* at 19–20 (“The Complaint is silent on whether Mongolia has *ever before*, in *any* context, enforced its laws granting the state ownership of paleontological objects.”).

139. *Bataar Skeleton*, 2012 WL 5834899, at \*10.

140. Paige Williams, The Black Market for Dinosaurs, *New Yorker* (June 7, 2014), <https://www.newyorker.com/tech/elements/the-black-market-for-dinosaurs> [<https://perma.cc/PZR3-Y3G8>].

141. See *Bataar Skeleton*, 2012 WL 5834899, at \*2 (“According to paleontological experts, the Defendant Property is a Bataar skeleton that almost certainly came from the Nemegt Formation and was most likely excavated between 1995 and 2005.”).

142. See *id.* at \*8 (noting that although “Prokopi may ultimately prevail by demonstrating that Mongolian law is improperly vague,” this did not “appear on the face of the well-pleaded complaint”). The court found three provisions of Mongolian law particularly relevant. First, the 1924 Mongolian Rules to Protect the Antiquities provide “that ‘all antique items and relics of the past found within the territory of Mongolia shall be owned by Mongolia’” and “define ‘antiques and relics’ to include ‘[p]aleontological items such as remnants of ancient plants and animals.’” *Id.* at \*9 (alteration in original) (quoting First Amended Verified Complaint at 6, *Bataar Skeleton*, No. 12 Civ. 4760(PKC), 2012 WL 5834899 [hereinafter *Bataar Complaint*]). Second, the 1992 Mongolian Constitution “states that ‘[h]istorical, cultural, scientific and intellectual heritages of the Mongolian People shall be under State protection.’” *Id.* (alteration in original) (quoting *Bataar*



But what result for an inactivity defense when the theft dates back many decades? Such claims are particularly important to consider because they are less likely to be protected under alternative, comparably recent mechanisms such as the CPIA.<sup>143</sup> Yet no case law speaks firmly to such retrospective hypotheticals.<sup>144</sup> Furthermore, all of the existing case law on inactivity involves defendants whose mens rea was unambiguous. In *Johnson*, there existed “substantial evidence that Mr. Johnson purchased the subject items in good faith”<sup>145</sup>—and the court wielded inactivity in support of the defendant.<sup>146</sup> In *Schultz*, the government produced significant evidence regarding defendants’ awareness of the illegality of their actions<sup>147</sup>—and the court wielded activity against the defendants.<sup>148</sup> And in *Bataar Skeleton*, the government again presented ample evidence that claimant knew that his actions were illegal<sup>149</sup>—and the court refused to wield inactivity in support of the claimant.<sup>150</sup> Mens rea is a requisite aspect of NSPA claims, but what role, if any, does it play in determining the legitimacy of the patrimony laws themselves, especially when the defendant’s mens rea is not so black-and-white?

Despite its pervasiveness in patrimony law litigation, *Johnson* and its descendants fail to clearly delineate the role that the inactivity defense should play.<sup>151</sup> As a result, inactivity is an uncertain standard with an uncertain future, and that uncertainty burdens parties on both sides.

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Complaint, *supra*, at 6). And third, the 2001 Mongolian Law on Cultural Heritage asserts “that ‘[t]he territory and land bowels where historically, culturally and scientifically significant objects exist shall be under state protection and any such findings shall be a state property,’” explicitly including fossils and animal imprints. *Id.* (alteration in original) (quoting *Bataar* Complaint, *supra*, at 7).

143. See *supra* section I.A (describing the CPIA).

144. But see *infra* section II.C (discussing the uncertain role of active enforcement in regards to colonial laws in *Duryodhana*).

145. *Government of Peru v. Johnson*, 720 F. Supp. 810, 812 (C.D. Cal. 1989).

146. See *id.* at 815.

147. See *United States v. Schultz*, 333 F.3d 393, 398 (2d Cir. 2003) (describing the details of the conspiracy between the defendants, including letters introduced into evidence that “indicate[d] an awareness that there was a great legal risk in what they were doing”).

148. See *id.* at 402.

149. See *United States v. One Tyrannosaurus Bataar Skeleton*, No. 12 Civ. 4760(PKC), 2012 WL 5834899, at \*2, \*8 (S.D.N.Y. Nov. 14, 2012) (noting that, as a paleontologist, claimant likely knew that the fossil was “almost certainly [excavated] . . . from the Nemegt Formation . . . between 1995 and 2005,” especially given that he intentionally “changed the country of origin on the . . . [export documents] from Mongolia to Japan”).

150. See *id.* at \*10.

151. This is also in part due to the fact that, first, there are simply very few patrimony law cases in general, and second, so many patrimony law cases end in settlement, thereby stunting the law’s growth.

C. *The Importance of Context: United States v. A 10th Century Cambodian Sandstone Sculpture*

One significant uncertainty that still lurks within the inactivity defense is what role context should play in the determination that a foreign nation has not actively enforced its patrimony law. *United States v. A 10th Century Cambodian Sandstone Sculpture (Duryodhana)*, the third and most recent case involving inactivity since *Schultz*, illustrates this problem.<sup>152</sup> As discussed briefly in the Introduction, in this case the U.S. government sought forfeiture of the Duryodhana, a statue allegedly removed from the Prasat Chen Temple in Cambodia.<sup>153</sup> The statue had been broken off at the ankles, with the feet and pedestal remaining in situ, and was purchased by a Belgian collector in the 1970s.<sup>154</sup> In 2010, the collector's widow signed a Consignment Agreement with Sotheby's.<sup>155</sup> Sotheby's contacted the Cambodian government to ensure the auction would run smoothly, but Cambodia reacted by demanding the statue's return.<sup>156</sup> The U.S. government intervened upon Sotheby's refusal to comply with Cambodia's demand: It brought civil forfeiture allegations predicated on Cambodia's patrimony laws via the NSPA.<sup>157</sup>

The government premised its complaint in part on a series of colonial decrees vesting ownership in Cambodia.<sup>158</sup> The government alleged that the force of these colonial decrees carried over through Cambodia's independence: While still under French rule, the Cambodian king signed a 1947 constitution that laid the foundation for independence and provided for existing laws consistent with its terms to "remain in force" until repealed or replaced.<sup>159</sup> A 1950 convention then transferred from France to the Royal Government of Cambodia the power to protect,

152. No. 12 Civ. 2600(GBD), 2013 WL 1290515, at \*1 (S.D.N.Y. Mar. 28, 2013).

153. See *id.* The Duryodhana depicts a mythological warrior poised for epic battle against its twin statue, the Bhima—also looted—as chronicled in the *Mahabharata*. See Verified Amended Complaint at 4, *Duryodhana*, No. 12 Civ. 2600(GBD) (S.D.N.Y. filed Apr. 9, 2013), 2013 WL 1290515 [hereinafter *Duryodhana* Complaint].

154. See *Duryodhana* Complaint, *supra* note 153, at 5, 9.

155. *Id.* at 11.

156. *Id.* at 19–22.

157. See *Duryodhana*, 2013 WL 1290515, at \*1.

158. A 1900 decree recognized all art and archaeology, including statues, that "exist on or in the soil" as part of the "national domain" of French Indochina. *Duryodhana* Complaint, *supra* note 153, at 24. The decree also established a classification system that granted additional protections to items whose preservation was in the historical or artistic public interest. *Id.* at 25. An April 1925 decree affirmed "colonial" ownership of historical monuments and objects, followed by a May 1925 decree that specifically designated Koh Ker and the Prasat Chen temple as being a historical monument of the colonial domain. *Id.* at 25–26; see also Memorandum of Law in Support of Claimants' Motion for Judgment on the Pleadings & for a Stay of Discovery at 21, *Duryodhana*, No. 12 Civ. 2600(GBD) (S.D.N.Y. filed Sept. 9, 2013), 2013 WL 11068057. In July 1925, a new decree criminalized violations of the law related to historical monuments and objects. *Duryodhana* Complaint, *supra* note 153, at 26.

159. *Duryodhana* Complaint, *supra* note 153, at 26.

classify, and conserve historic monuments.<sup>160</sup> And finally, in 1953, Cambodia formally declared and was granted independence.<sup>161</sup> Its 1972 constitution, establishing the Khmer Republic, similarly preserved the previous government's institutions.<sup>162</sup>

As a sovereign nation on the international playing field, Cambodia continued to voice its support for the protection and conservation of cultural property. It was part of the international outcry against the rampant looting in the 1960s that culminated in the 1970 UNESCO Convention<sup>163</sup> and was the seventh state to ratify the Convention.<sup>164</sup> Control over cultural property faltered during Cambodia's bloody civil war.<sup>165</sup> Yet since the return of relative stability in the mid-1990s,<sup>166</sup> the Cambodian government has actively sought return of looted artifacts.<sup>167</sup>

160. *Id.*

161. *Id.*; see also Independence, Cambodia, Encyc. Britannica, <https://www.britannica.com/place/Cambodia/Independence> [<https://perma.cc/JLZ7-973R>] (last visited Sept. 14, 2018) (“Sihanouk’s government was recognized as the sole legitimate authority within Cambodia at the Geneva Conference convened in 1954 to reach a political settlement to the First Indochina War (the Geneva Accords).”).

162. *Duryodhana* Complaint, *supra* note 153, at 27.

163. See *supra* section I.A (discussing the 1970 UNESCO Convention).

164. *Duryodhana* Complaint, *supra* note 153, at 27.

165. *Id.*

166. See Joshua Birch & Julie Kornfeld, Documentation Ctr. of Cambodia, Picked Clean: The Legality and Politics of Cambodian Cultural Heritage Objects 8–9 (2014), [http://www.d.dccam.org/About/Intern/Cambodia\\_Cultural\\_Heritage\\_Objects\\_Research\\_Paper.pdf](http://www.d.dccam.org/About/Intern/Cambodia_Cultural_Heritage_Objects_Research_Paper.pdf) [<https://perma.cc/XN2H-JCE4>] (providing a detailed overview of looting in Cambodia). The Cambodian Civil War “occur[ed] in several stages from 1970 to 1998.” *Id.* at 7. Although the country stabilized after its elections in 1993 and the official Khmer Rouge surrender in 1998, systematic looting did not dissipate with stability. *Id.* Lasting poverty, new accessibility to sites, and the country’s focus on reconciliation and economic development in lieu of rule of law “meant that organized looting adapted rather than disappeared.” *Id.* at 9.

167. *Duryodhana* Complaint, *supra* note 153, at 27 (claiming that the government has sought the return of looted artifacts since the end of the civil war); see also Birch & Kornfeld, *supra* note 166, at 53 (noting that the Cambodian government claims it has repatriated “numerous” cultural objects since 1985); Manus Brinkman, Reflexions on the Causes of Illicit Traffic in Cultural Property and Some Potential Cures, *in* Art and Cultural Heritage 64, 66 (Barbara T. Hoffman ed., 2006) (describing the repatriation of an eleventh-century statue of the god Brahma in 1996, a tenth-century statue of the god Shiva in 1997, and an eleventh-century statue of a feminine figure in 1997); Bill Myers, Ancient Khmer Artifacts Returned From US, *Cambodia Daily* (Apr. 27, 2002), <https://www.cambodiadaily.com/news/ancient-khmer-artifacts-returned-from-us-31796/> [<https://perma.cc/NB89-98Y6>] (describing the repatriation of two stolen Cambodian sandstone heads in 2002). Cambodia has continued to support repatriation following the conclusion of the *Duryodhana* case. See Letter from Thomas R. Kline, President, Lawyers’ Comm. for Cultural Heritage Pres., to the Cultural Prop. Advisory Comm., U.S. Dep’t of State (Oct. 14, 2017), <https://www.culturalheritagelaw.org/resources/Documents/CPAC%20Cambodia%20LCCHP.pdf> [<https://perma.cc/J6LU-YSLB>] (outlining recent measures that Cambodia has taken to protect its cultural patrimony, including instances of repatriation in 2013, 2015, and 2016).

In *Duryodhana*, claimants asserted several defenses in their motion to dismiss, including that the government's interpretation of the colonial decrees was incorrect.<sup>168</sup> Significantly, claimants also cited to *Johnson* and *Schultz* for the proposition that “[e]ven an apparently clear foreign law does not vest ownership if the foreign state has not actually enforced its own law as granting it title.”<sup>169</sup> That is, even if the colonial decrees succeeded under the *McClain* doctrine, they were nevertheless unenforceable under the inactivity-defense theory.

In support of their assertions, claimants painted a damning picture of the Cambodian colonial decrees. They noted that the government's expert witness submitted an affidavit “conspicuous[ly]” devoid of “any instance prior to this litigation in which anyone—the French Government, the Cambodian government, or even a legal scholar or art historian—has taken the position that the 1925 decree on which this case is based transferred title to antiquities like the Statue to the State.”<sup>170</sup> Even Cambodia's Culture Minister apparently had no intention of seeking the return of cultural objects that had been removed from the country before Cambodia's modern 1992 law expressly nationalized antiquities.<sup>171</sup>

Unfortunately, the case settled before trial, raising more questions than it answered. Had it gone to trial, the likely outcome of claimants' inactivity defense is uncertain.<sup>172</sup> Some information can be gleaned from the court's decision on claimants' motion to dismiss. The district court ultimately denied the motion on the grounds that further evidence was necessary to determine the enforceability of the laws.<sup>173</sup> In doing so, the

168. See Memorandum of Law in Support of Claimants' Sotheby's, Inc. & Ms. Ruspoli di Poggio Suasa's Motion to Dismiss at 13–17, *Duryodhana*, No. 12 Civ. 2600(GBD) (S.D.N.Y. filed June 5, 2012), 2012 WL 5871202 [hereinafter *Duryodhana* Claimant's Memo, June 5, 2012] (arguing that the colonial decrees do not “clearly and unambiguously” vest ownership of the statue in Cambodia, contrary to the government's interpretation); see also *id.* at 18–19 (arguing that the government had not met its burden of showing that the statue was removed without Cambodia's permission); *id.* at 20–22 (arguing that the government had not met its burden of showing that the statue was stolen after the adoption of the colonial decrees).

169. See *id.* at 17.

170. Reply Memorandum of Law in Support of Claimants' Sotheby's, Inc. & Ms. Ruspoli Di Poggio Suasa's Motion to Dismiss at 10, *Duryodhana*, No. 12 Civ. 2600(GBD) (filed Sept. 17, 2012), 2012 WL 5871204.

171. *Duryodhana* Claimant's Memo, June 5, 2012, *supra* note 168, at 18. In particular, Cambodia had made no effort to recover the Bhima twin statue in the possession of a Los Angeles museum, despite the statue being “similarly situated” to the *Duryodhana* statue in regard to the Cambodian patrimony laws. *Id.*

172. See Pearlstein, *supra* note 70, at 608 n.111 (claiming that “[t]he final scorecard in the Khmer Statue Case is troublesome” and arguing that “[t]he District Court was arguably spared the embarrassment of having to rule against Cambodia under *McClain/Schultz*”).

173. See *Duryodhana*, 2013 WL 1290515, at \*8 (“Here, where the subject law is in a foreign language and the parties argue that its literal translation is subject to more than one interpretation, further evidence is necessary to determine whether the law at issue unequivocally vests ownership in the Cambodian State.”).

court explicitly denigrated claimants' reference to *Johnson* on the grounds that *Johnson* was decided post-trial and was thus irrelevant to determining pleading sufficiency in a motion to dismiss.<sup>174</sup> The court also cited to *Bataar Skeleton* for substantially the same proposition: *Schultz* does not require the government to plead active enforcement.<sup>175</sup> The court's ambivalence regarding the inactivity defense may indicate that courts in general are now less inclined to consider inactivity. But, on the other hand, one scholar dubbed *Duryodhana* "an apparent departure from *Schultz*."<sup>176</sup>

At a hypothetical *Duryodhana* trial, perhaps the government could have found instances of active enforcement and subverted the inactivity defense altogether. More likely, however, the government would have had to confront the inactivity question directly. The simplest method of confrontation is to assert that *Johnson*, a Central District of California case, is not good law in the Second Circuit. Yet this is rather unconvincing, given the Second Circuit's implicit affirmance of *Johnson* in *Schultz*.<sup>177</sup> Instead, *Schultz* may be more easily hedged by arguing that active enforcement, while probative, is not necessary. Or, as it asserted in *Bataar Skeleton*, the government could claim that active enforcement is relevant only when the underlying patrimony law is unclear or ambiguous.

However, succeeding on any of these arguments only forces the government to confront another question immediately thereafter: why any *particular* patrimony law should be allowed reprieve from *Johnson's* demands. In theory, this answer should be context specific and fact intensive. On the one hand, as the claimant in *Bataar Skeleton* theorized, perhaps the nation did not enforce its patrimony law because it was unwilling to take from its citizens yet had no similar qualms about asking the United States to take from *its* own citizens.<sup>178</sup> In such a case, the so-called patrimony law would indeed function as merely an export restriction. On the other hand, perhaps the nation was embroiled in a decade-long, bloody civil war at the time of the theft and protecting cultural heritage

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174. See *id.* (noting that *Johnson* "offers no guidance on whether the Government needs to plead in its complaint that Cambodia's laws were actively enforced").

175. See *United States v. One Tyrannosaurus Bataar Skeleton*, No. 12 Civ. 4760(PKC), 2012 WL 5834899, at \*10 (S.D.N.Y. Nov. 14, 2012) (describing *Schultz* as "fall[ing] short of making active enforcement a pleading requirement").

176. Pearlstein, *supra* note 70, at 608 n.111.

177. See *United States v. Schultz*, 333 F.3d 393, 402 (2d Cir. 2003) ("[A]ctive enforcement of [a nation's] ownership rights confirms the intent of the Law.").

178. See *Bataar Claimant's Memo*, *supra* note 136, at 19 (describing the inactivity defense's purpose as "prevent[ing] a country unwilling to . . . seiz[e] antiquities from its own people from asking the United States to do so on its behalf" or from "rediscover[ing] laws that have previously not been enforced, thereby unsettling the reasonable expectations . . . about the meaning of those laws"); see also *supra* notes 136–137 and accompanying text (describing the claimant's inactivity defense in *Bataar Skeleton*). Note that this language from the *Bataar Claimant's Memo* is copied verbatim in the *Duryodhana Claimant's Memo*, June 5, 2012, *supra* note 168, at 18.

in the midst of the upheaval was not a priority.<sup>179</sup> In such a case, dismissing a case on an inactivity defense could read as callous—or even predatory.

Such contextual facts are essential to understanding patrimony laws in nations across the world. For example, one scholar has written of China that “[i]t is virtually impossible for the government to halt the illegal flow of cultural property out of—and within—China.”<sup>180</sup> Specifically, “[i]nstitutional insecurity, lack of funding, inadequate procedures, and corruption” prevent the active enforcement of Chinese patrimony laws.<sup>181</sup> Similarly, Nigerian patrimony laws are underenforced due to corruption and “undermining by the Nigerian authorities at the highest level.”<sup>182</sup> Even scholars otherwise wary of patrimony laws have admitted that “[e]nforcement is notoriously ineffective.”<sup>183</sup>

Accordingly, inactivity is often reflective of inability, not apathy. It makes sense to avoid acting as cultural-heritage guardian for countries who “discover” their interest in protecting cultural heritage only when a particularly valuable piece shows up on the market. But it is circular and unfair to deny protection to countries rich in heritage but poor in administrative and enforcement resources—countries that have evinced interest in protecting their heritage yet are prevented from realizing that goal. It is these nations that are most in need of help from the international community. It is these nations that suffer most under a pure “inactivity” defense standard that does not consider context.

#### D. *The Procedural Roadblocks to Incorporating Context*

A proper understanding of inactivity takes context into consideration. Yet two procedural hurdles prevent this consideration. First, as subsection II.D.1 discusses, inactivity must be appreciated as a public policy protection rather than as a fairness protection. Second, as subsection II.D.2 describes, inactivity is currently restrained by the mandates of the various Federal Rules, including the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure.

1. *Inactivity Is a Public Policy Protection, Not a Due Process Protection.* — Contrary to recent claimants’ assertions, inactivity should not be wielded as a fair notice or due process protection for the defendant. *Bataar*

179. See *supra* notes 1–7.

180. Michael L. Dutra, Sir, How Much Is That Ming Vase in the Window?: Protecting Cultural Relics in the People’s Republic of China, 5 *Asian-Pac. L. & Pol’y J.* 62, 73 (2004).

181. J. David Murphy, The Imperilment of Cultural Property in the People’s Republic of China, 29 *U.B.C. L. Rev. (Special Issue)* 91, 105 (1995).

182. Shyllon, *supra* note 20, at 138. For example, in 1973 General Yakubu Gowon, then Head of State of Nigeria, stole a seventeenth-century Benin bronze from the national museum in Lagos to present to Queen Elizabeth II. *Id.*

183. Merryman, *Free International Movement*, *supra* note 57, at 5 (questioning, from a normative perspective, the legal effect that nations should give to foreign export restrictions on privately held property).

*Skeleton* claimant Prokopi emphasized the importance of “the reasonable expectations that have developed about the meaning of [patrimony] laws.”<sup>184</sup> Yet this assertion is negated by analyses of the *McClain* doctrine, the NSPA, the inactivity defense itself, and comparable legal mechanisms. Such analyses instead comport with an understanding of inactivity as a public policy protection. A public policy protection, unlike a due process protection, is more flexible with regard to considering context.

First, the importance of integrating context into the inactivity defense accords with the purposes of both the *McClain* doctrine and the inactivity defense itself. The NSPA’s purpose is to protect the proprietary interests of owners of stolen property.<sup>185</sup> Similarly, the *McClain* doctrine’s purpose in extending the NSPA to include patrimony laws is to expand protection beyond “ownership as understood by the common law” to include “ownership derived from foreign legislative pronouncements.”<sup>186</sup> It would be hollow expansion indeed to find that such ownership is diminished when the owner is *unable* to assert its interest. Incorporating context into the inactivity consideration extends protection to good faith owners who are unable to assert their interest while simultaneously rejecting protection to regulators-in-disguise who simply choose not to assert their interest. If this distinction sounds lightly in due process, it rings louder in public policy.

Second, the *McClain* doctrine also protects fairness in other ways distinct from inactivity. The very requirement that a patrimony law be “clear and unambiguous” ensures fairness.<sup>187</sup> Similarly, the NSPA’s scienter requirement mandates that the defendant know that the object at issue is indeed stolen, thus “eliminat[ing] the possibility that a defendant is convicted for an offense he could not have understood to exist.”<sup>188</sup> And, as discussed in section I.B, the NSPA makes concessions only for mistake of fact, not for mistake of law.<sup>189</sup>

Finally, understanding inactivity as a public policy protection rather than a fairness protection comports with comparable legal mechanisms that incorporate violations of foreign law as a predicate offense. No other comparable legal mechanisms spare any consideration to active

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184. *Bataar* Claimant’s Memo, *supra* note 136, at 19.

185. See *McClain I*, 545 F.2d 988, 994 (5th Cir. 1977) (“The apparent purpose of Congress in enacting stolen property statutes was to discourage both the receiving of stolen goods and the initial taking. . . . The ultimate beneficiary of the law, of course, is the property owner who thereby enjoys greater governmental protection of property rights.”).

186. *McClain II*, 593 F.2d 658, 664 (5th Cir. 1979).

187. *United States v. Schultz*, 333 F.3d 393, 402 (2d Cir. 2003). *McClain II* held that under “basic standards of due process and notice,” the NSPA “cannot properly be applied to items deemed stolen only on the basis of unclear pronouncements by a foreign legislature.” *McClain II*, 593 F.2d at 671.

188. *McClain I*, 545 F.2d at 1001 n.30; see also *supra* section I.B (discussing the elements necessary to prove a violation of the NSPA).

189. See *supra* note 48 and accompanying text.

enforcement. In Lacey Act prosecutions against wildlife trafficking, for example, “[t]he underlying foreign law violation does not have to be . . . one actively enforced in the foreign country.”<sup>190</sup> Similarly, in *Republic of Colombia v. Diageo North America Inc.*, the court found inactive enforcement to be “irrelevant” to a civil Racketeer Influenced and Corrupt Organizations Act suit.<sup>191</sup> If active enforcement were an essential fairness protection, it would not be unique to foreign patrimony laws. Instead, inactivity as a patrimony law defense is merely an expression of the public policy that the United States will not enforce foreign export restrictions absent specific agreement.

2. *The Federal Rules on Determining Foreign Law.* — The inactivity defense also suffers under the confused mandates of the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure. Patrimony laws, like foreign law, are governed by Federal Rule of Civil Procedure 44.1 and its substantially similar criminal analogue Federal Rule of Criminal Procedure 26.1. Both Rules require that foreign law be treated as a question of law.<sup>192</sup> But the uncertainties of Federal Rule of Civil

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190. U.S. Dep’t of Agric., *Lacey Act Primer and Updates 7* (2013), [https://www.aphis.usda.gov/plant\\_health/lacey\\_act/downloads/LaceyActPrimer.pdf](https://www.aphis.usda.gov/plant_health/lacey_act/downloads/LaceyActPrimer.pdf) [<https://perma.cc/H5W7-DJQ9>]. The Lacey Act prohibits the unlawful import, export, transport, sale, receipt, acquirement, or purchase “in interstate or foreign commerce” of “any plant” or “any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law.” 16 U.S.C. § 3372(a)(2)(A)–(B) (2012). Unlike the NSPA, the Lacey Act can be used even when the foreign law at issue is merely regulatory. Courts have broadly interpreted the language of the Lacey Act—“any foreign law”—to include foreign regulation, thus explicitly preempting the public policy against enforcing foreign export regulations. See *United States v. 594,464 Pounds of Salmon*, 871 F.2d 824, 826–28 (9th Cir. 1989) (analyzing legislative history to find that the phrase “any foreign law” in the Lacey Act included the Taiwanese fishing export regulation at issue); see also *United States v. McNab*, 331 F.3d 1228, 1239, 1247 (11th Cir. 2003) (finding that the Lacey Act included the Honduran lobster export regulation at issue); *United States v. One Afghan Uril Ovis Orientalis Blanfordi Fully Mounted Sheep*, 964 F.2d 474, 477 (5th Cir. 1992) (finding that the Lacey Act included the Pakistani animal-skins export regulation at issue).

191. 531 F. Supp. 2d 365, 396 (E.D.N.Y. 2007). Colombia alleged that liquor manufacturers and distributors were members of a RICO enterprise composed of illegal narcotics traffickers. See *id.* at 375. Defendants boldly claimed that Colombia’s own failure to enforce its tax laws led to the development of the enterprise. See *id.* at 396. In response, and rather unsurprisingly, the court held that the fact that Colombia “could have done a better job of enforcing [its] tax and other laws in no way means that Defendants are somehow less liable for money laundering.” *Id.*

192. The original 1966 Advisory Committee Notes describe Criminal Rule 26.1 as being “substantially the same as Civil Rule 44.1” and indeed cite to Federal Rule of Civil Procedure 44.1’s Advisory Committee Notes for “[a] full explanation of the merits and practicability of the rule.” Fed. R. Crim. P. 26.1 advisory committee’s note to 1966 amendment. There is only one difference of any significance between the two, besides their diverging procedural foundations: Although both Federal Rules allow courts to consider any relevant evidence without reference to the Federal Rules of Evidence, the Advisory Committee Notes for Criminal Rule 26.1 specify that such freedom must not encroach on the defendant’s constitutional right to confront witnesses. *Id.*



Procedure 44.1 and Federal Rule of Criminal Procedure 26.1 compound the already-uncertain state of the inactivity defense, making it procedurally difficult to incorporate context.

Although, traditionally, foreign law was treated as a question of fact, the Federal Rules explicitly codified foreign law as a question of law in 1966.<sup>193</sup> This change was in direct response to sustained confusion caused by the treatment of foreign law as a question of fact.<sup>194</sup> Thus the change heralded a significant evolution, manifesting as both a simplification and a liberalization.

First, the switch affected the method of notice. Prior to the adoption of the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, a party intending to invoke foreign law had to do so in the pleadings with all the requisite fact-finding. Disagreement over the content of the foreign law necessarily precluded summary judgment, since, by definition, there existed a genuine issue of material fact under Federal Rule of Civil Procedure 56.<sup>195</sup> Under the new 1966 Federal Rules, however, foreign law need not be pled; rather, a party could provide notice “by a pleading or other writing,” so long as it was within a “reasonable” time.<sup>196</sup> This also negates the summary judgment problem; today, courts regularly issue summary judgment on disputed issues of foreign law.<sup>197</sup>

Second, the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure have liberalized methods of proof. Courts may consider “any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of

193. See Fed. R. Civ. P. 44.1 (“The court’s determination must be treated as a ruling on a question of law.”); Fed. R. Crim. P. 26.1 (“Issues of foreign law are questions of law . . .”); see also Fed. R. Civ. P. 44.1 advisory committee’s note to 1966 amendment; Fed. R. Crim. P. 26.1 advisory committee’s note to 1966 amendment.

194. See *Liechti v. Roche*, 198 F.2d 174, 176 (5th Cir. 1952) (noting the existence of “considerable controversy whether the proof of foreign law should be addressed to and the state of the foreign law determined by the court or by the jury”); see also *supra* note 80 (discussing reversal of one of the *McClain* decisions based on the district court having improperly put a question of foreign law to the jury).

195. See Fed. R. Civ. P. 56(a) (“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact . . .”).

196. Fed. R. Civ. P. 44.1; Fed. R. Civ. P. 44.1 advisory committee’s note to 1966 amendment. In determining “reasonableness,” courts should consider: (i) the stage of the case at the time of notice; (ii) the party’s reason for failure to give earlier notice; and (iii) the importance of the foreign law to the case. See *id.* In fact, the Advisory Committee Notes specifically differentiate between cases in which “the pertinence of foreign law is apparent from the outset,” and thus “the necessary investigation of that law will have been accomplished by the party at the pleading stage,” and cases in which “the pertinence of foreign law may remain doubtful until the case is further developed,” and thus “[a] requirement that notice of foreign law be given only through the medium of the pleadings would tend . . . to force the party to engage in a peculiarly burdensome type of investigation.” *Id.*

197. Carolyn B. Lamm & K. Elizabeth Tang, Rule 44.1 and Proof of Foreign Law in Federal Court, *Litigation*, Fall 2003, at 31, 31 (explaining the changes wrought by adoption of Federal Rule of Civil Procedure 44.1).

Evidence.”<sup>198</sup> This change is significant in two ways. First, parties are no longer constricted by rules of hearsay,<sup>199</sup> expert witness qualification,<sup>200</sup> or the like. They may present “English-language or translated books, treatises, statutes, cases, [or] legal aids” regardless of their would-be applicability as factual evidence.<sup>201</sup> The most common and impactful form of evidence on foreign law remains expert witnesses.<sup>202</sup> Given judicial unfamiliarity with foreign law,<sup>203</sup> expert witnesses provide necessary guidance through often complex, murky, or archaic foreign law.<sup>204</sup> Second, the liberalization allows the court to engage in sua sponte research by conducting its own investigation, reviewing the evidence on its own terms, presenting its own material, and even calling its own witnesses.<sup>205</sup> This is especially useful when parties seek to “muddy the waters” by presenting conflicting or overcomplicated pictures of the foreign law so as to encourage judges either to dismiss or to choose the forum law over the foreign law.<sup>206</sup>

A third change wrought by the Federal Rules is the treatment of foreign law on appeal. As a question of fact, foreign law was reviewed under the “clearly erroneous” standard of Federal Rule of Civil Procedure 52(a).<sup>207</sup> As a question of law, however, foreign law is now subject to

198. Fed. R. Civ. P. 44.1.

199. See Fed. R. Evid. 801–807.

200. See Fed. R. Evid. 702.

201. Matthew J. Wilson, *Demystifying the Determination of Foreign Law in U.S. Courts: Opening the Door to a Greater Global Understanding*, 46 *Wake Forest L. Rev.* 887, 891 (2011).

202. *Id.* at 904 (“In practice, the primary method used to establish foreign law is through an affidavit or declaration submitted by foreign-law experts hired by the litigants. This sworn statement is generally accompanied by extracts from relevant foreign codes and statutes.” (footnote omitted)).

203. See *id.* at 890–91 (noting the hesitancy of judges to “delve into territory comprised of unfamiliar legal rules and norms” and their subsequent tendency to seek ways to dismiss foreign law cases on often-unjustifiable grounds).

204. See, e.g., *de Fontbrune v. Wofsy*, 838 F.3d 992, 994, 1000 (9th Cir. 2016) (noting that “foreign legal systems can appear to the uninitiated ‘like a wall of stone,’” and allowing district courts to consider foreign legal materials not included in the pleadings when ruling on a motion to dismiss (quoting *Diaz v. Gonzales*, 261 U.S. 102, 106 (1923))); *Universe Sales Co. v. Silver Castle, Ltd.*, 182 F.3d 1036, 1037–38 (9th Cir. 1999) (holding that the district court should have considered the declaration of an expert witness on Japanese law).

205. See Wilson, *supra* note 201, at 902, 907.

206. *Id.* at 891; see also *Haywin Textile Prods., Inc. v. Int’l Fin. Inv. & Commerce Bank*, 152 F. Supp. 2d 409, 411–13 (S.D.N.Y. 2001) (relying on expert affidavits from both parties concerning Bangladeshi law in partly granting a motion to dismiss).

207. See Fed. R. Civ. P. 52(a)(6). The Federal Rules of Criminal Procedure contain no precise analogue, see *United States v. Curcio*, 694 F.2d 14, 20 (2d Cir. 1982), but courts apply the same standard of review in criminal cases as in civil cases, see, e.g., *United States v. Roelandt*, 827 F.3d 746, 748 (8th Cir. 2016) (holding that the Court of Appeals reviews the district court’s findings of fact for clear error in criminal cases); *United States v. Slone*,

independent judicial investigation and open for de novo appellate review.<sup>208</sup>

Finally, the fact–law distinction is also significant for determining *who* may act as fact-finder. Under the old Federal Rules treating foreign law as a question of fact, the issue was often sent to the jury.<sup>209</sup> However, under the new Federal Rules, foreign law is determined by the judge.<sup>210</sup>

As such, the Federal Rules transformed the determination of foreign law. Yet despite their purported emphasis on foreign law as a question of law, the Federal Rules still perpetuate the treatment of foreign law as a question of fact in some regards. For example, Rule of Civil Procedure 44.1 retains the “adversarial” elements of questions of fact, such as burdening the parties to provide notice and evidence concerning the foreign law.<sup>211</sup> When not sufficiently pled, such failure can lead to automatic dismissal or to application of forum law (even under the looser pleading standards of questions of law).<sup>212</sup> Indeed, scholars have variously criticized this duality as “conceptually incoherent,”<sup>213</sup> a “procedural minefield,”<sup>214</sup> and an “ignominious and unseemly spectacle.”<sup>215</sup>

Even half a century later, some courts simply ignore the mandate of Rule of Civil Procedure 44.1 to treat foreign law as a question of law. The

636 F.3d 845, 848 (7th Cir. 2011) (same); *United States v. Vinton*, 594 F.3d 14, 19 (D.C. Cir. 2010) (same).

208. See Fed. R. Civ. P. 44.1 advisory committee’s note to 1966 amendment (“[T]he court’s determination of an issue of foreign law is to be treated as a ruling on a question of ‘law,’ not ‘fact,’ so that appellate review will not be narrowly confined by the ‘clearly erroneous’ standard of Rule 52(a).”); see also *Wilson*, supra note 201, at 902.

209. See supra note 194 and accompanying text.

210. See Fed. R. Civ. P. 44.1 advisory committee’s note to 1966 amendment (noting that although “the Rules refrain from allocating functions as between the court and the jury . . . [i]t has long been thought . . . that the jury is not the appropriate body to determine issues of foreign law”); see also, e.g., supra note 80 (discussing reversal of one of the *McClain* decisions based on the district court having improperly put a question of foreign law to the jury).

211. See Roger M. Michalski, Pleading and Proving Foreign Law in the Age of Plausibility Pleading, 59 *Buff. L. Rev.* 1207, 1210, 1219 (2011).

212. See Thomas O. Main, The Word Commons and Foreign Laws, 46 *Cornell Int’l L.J.* 219, 275 (2013) (noting that courts often “avoid the question of foreign law by blaming the parties for failure of proof,” thus perpetuating the use of “the wrong law” in legal disputes).

213. Michalski, supra note 211, at 1215 (“Instead of having the best of both worlds, we are stuck with a conceptually incoherent regime for pleading and proving foreign law that is inconsistent, depending on whether it relies on parties or on courts.”). Professor Roger Michalski also argues that the introduction of plausibility pleading as applied to the determination of foreign law “sharpens to a breaking point already existing tensions within the current approach.” *Id.*

214. Matthew J. Ahn, Note, 44.1 Luftballons: The Communication Breakdown of Foreign Law in the Federal Courts, 89 *N.Y.U. L. Rev.* 1343, 1343 (2014).

215. John Henry Merryman, Foreign Law as a Problem, 19 *Stan. J. Int’l L.* 151, 158 (1983) (referring particularly to the high potential for a “battle of the experts” in determining foreign law).

Fifth Circuit in particular seems keen on reanimating the pre-1966 Federal Rules: *Banque Libanaise pour le Commerce v. Khreich*<sup>216</sup> acts as a tuning fork. In *Banque Libanaise*, a French bank operating in the Emirate of Abu Dhabi sued a contractor to recover money from an overdraft agreement pursuant to an Abu Dhabi judgment.<sup>217</sup> The Fifth Circuit found for the defendant because the bank “fail[ed] to adequately prove . . . the applicable Abu Dhabi law.”<sup>218</sup> Specifically, the bank did not provide “sufficient proof to establish with reasonable certainty the substance of the foreign principles of law.”<sup>219</sup> Thus, although the court explicitly noted Rule 44.1’s requirement that foreign law is to be treated as a question of law, it still considered the pleading materials related to the relevant foreign law under a factual standard. This sufficiency language in *Khreich*—and its seemingly open-eyed denial of Rule 44.1—echoes throughout the rest of the Fifth Circuit and has even cropped up in the courts of other circuits.<sup>220</sup>

The effect of this Federal Rules-wrought confusion on the inactivity defense is twofold. First, to the extent that Federal Rule of Civil

216. 915 F.2d 1000 (5th Cir. 1990).

217. See *id.* at 1001. Defendant Khreich fled to England after the ruling sheik banished him from Abu Dhabi for allegedly donating money to the Lebanese Christians following the outbreak of war. *Id.* Wahab, an Abu Dhabi contractor, offered to buy what remained in Abu Dhabi of Khreich’s contracting firm’s construction equipment. *Id.* at 1002. However, Wahab owed money to the bank that he would not be able to pay until he completed certain defense contracts. *Id.* To prevent Wahab from being jailed for his debts before completion of the defense contracts, Khreich signed documents that allowed the bank to exceed its lending limits on Wahab’s account and to advance Wahab sufficient funds to cover his current debt—allegedly with the understanding that Khreich himself would not be liable for any funds extended to Wahab on the basis of the executed documents. *Id.* In return, the bank would pass along Wahab’s debt payments back to Khreich. *Id.* Yet after Wahab partially repaid the bank, the bank, instead of repaying Khreich, demanded Khreich repay Wahab’s outstanding debt. *Id.* The bank filed suit in the Northern District of Texas, and Khreich countersued in Abu Dhabi. See *id.* Abu Dhabi entered judgment in favor of the bank. *Id.* at 1003.

218. *Id.* at 1006. The court also held, separately, that Khreich met his burden of proving that the Abu Dhabi judgment should not be recognized on grounds of nonreciprocity. See *id.* at 1005. Specifically, Khreich presented an affidavit from an American attorney practicing in Abu Dhabi that neither he nor any members of his firm were aware of any Abu Dhabi courts enforcing U.S. judgments and that local Abu Dhabi courts favored resolution under local law. See *id.*

219. *Id.* at 1006.

220. See *In re Griffin Trading Co.*, 683 F.3d 819, 823–24 (7th Cir. 2012) (noting that the party wishing to rely on foreign law had the “responsibility” to prove that foreign law); *McGee v. Arkel Int’l, LLC*, 671 F.3d 539, 546 (5th Cir. 2012) (“The plaintiffs have the burden of proving foreign law. These plaintiffs were ‘obligated to present to the district court clear proof of the relevant . . . legal principles.’” (alteration in original) (citation omitted) (quoting *Banque Libanaise*, 915 F.2d at 1006)); *McNeilab, Inc. v. Scandipharm, Inc.*, 862 F. Supp. 1351, 1355 (E.D. Pa. 1994) (“When neither party proves with reasonable certainty the substance of foreign principles of law, it is generally appropriate to apply the law of the local forum.”), *rev’d on other grounds*, No. 94-1508, 1996 WL 431352 (Fed. Cir. July 31, 1996).

Procedure 44.1 incorporates characteristics of both questions of law and questions of fact, it introduces an additional confusion into the already-uncertain inactivity defense. This confusion further muddies the role that both inactivity and context should play in litigation: Are they questions of fact necessitating full pleading, or questions of law requiring substantially less notice?

Second, following Rule 44.1's explicit direction to treat foreign law as a question of law only worsens the situation. Treating inactivity as a question of law goes against a facial understanding of inactivity. It instinctively makes sense to treat the analysis of foreign patrimony law as a question of law—it is a clearly legal, albeit foreign, issue. Yet the level of enforcement itself—the threshold question of whether a patrimony law is actively enforced—is facially a factual issue. The procedural problem with incorrectly treating an issue as a question of law is, as discussed, the comparably lower pleading requirement.<sup>221</sup> In theory, under the loose pleading requirements of Rule 44.1, asserting inactivity could be as simple as presenting an expert witness who testifies that, for example, “a few shopkeepers in Costa Rica told an investigator that the law was not enforced.”<sup>222</sup> In short, the pleading standards under Rule 44.1 as applied to patrimony laws are both too confusing and too loose, and as such would allow too many inactivity defenses to move forward.

### III. CREATING AN INACTIVITY AFFIRMATIVE DEFENSE

As described in Part II, inactivity is an uncertain standard. Context is both substantively underappreciated and procedurally inhibited. Inactivity defenses create uncertainty even in what is usually certain: being able to take foreign countries at their word that a foreign law is indeed what it purports to be.<sup>223</sup> Given this uncertainty, either the courts or Congress must assert control over the inactivity narrative. This Part proposes a formal standard that could be implemented either via further judicial interpretation of the *McClain* doctrine—itsself a judicial creation—or as a

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221. See *supra* notes 195–197 and accompanying text.

222. James R. McAlee, *From the Boston Raphael to Peruvian Pots: Limitations on the Importation of Art into the United States*, 85 *Dick. L. Rev.* 565, 596 n.133 (1981) (describing a case in which the court rejected such a claim as a basis for dismissal). Although this district court rejected this claim as a basis for dismissal, it is not inconceivable that another court might uphold something similar under the loose Rule 44.1 pleading requirements.

223. In fact, there is an interesting act-of-state doctrine question lurking in the inactivity defense. Under the act-of-state doctrine, U.S. courts do not presume to rule on the validity of foreign law, even when it conflicts with domestic or international law. See Patty Gerstenblith, *The Public Interest in the Restitution of Cultural Objects*, 16 *Conn. J. Int'l L.* 197, 235 (2001) (“[T]he sovereign nation has always been able to adjust the exact boundaries between private and public property. . . . [The] lines dividing public and private property are recognized by other nations, as a result of comity and of respect . . . in accordance with the act of state doctrine.”). Yet despite this doctrine, the inactivity claim seems to take as its premise the idea that a foreign law could be invalid.

statutory remedy.<sup>224</sup> Section III.A presents a substantive standard for determining when inactivity should invalidate a patrimony law. Section III.B describes how that standard should be procedurally implemented as an affirmative defense.

A. *An Inactivity Standard that Incorporates Context via Intent*

The key consideration in analyzing the context behind inactivity is, as discussed in Part II, whether it belies inability or apathy. Inability implies a greater need for U.S. protection. Apathy implies an export restriction in disguise, which triggers the U.S. policy against enforcing foreign regulations. The difference between inability and apathy boils down to intent. With this in mind, an “inactive” patrimony law should be defined as a law that intentionally uses the guise of a patrimony law to in fact function as an export restriction. This standard includes two distinct factors: (1) the factual level of active enforcement and (2) the legal intent behind the law.

The factual-enforcement inquiry should focus on the actual frequency of enforcement. This includes whether the patrimony law has ever been enforced in the home courts of the foreign nation; if so, whether it is only or usually upon illegal export; and whether it has ever been used in nonhome courts, such as in the United States. The analysis should not be made more complex than necessary. Focus should remain on whether the patrimony law has ever been utilized for the purpose of retaining cultural property, not on the precise prior interpretation of that law. Prior interpretation may be relevant for determining whether the law is “clear and unambiguous”<sup>225</sup> but not for determining inactivity.

The legal-intent inquiry introduces context. This factor respects the extent to which a nation has attempted to assert control, as opposed to the extent to which it has actually asserted control. Focusing on intent comports with previous NSPA rulings, both within and outside the cultural-property context. In *McClain I* itself, the Fifth Circuit expanded the NSPA partly because Mexico “had done all it reasonably could do—vested itself with ownership—to protect its interest in the artifacts.”<sup>226</sup> This reasoning reflects an emphasis on (or at least an acknowledgement of) both legal intent and factual context. In particular, the Fifth Circuit’s

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224. Given the immensely controversial nature of the *McClain* doctrine itself, see *supra* note 70, it is unlikely that any offshoots of the *McClain* doctrine—even an offshoot that legitimizes the inactivity defense, which favors claimants—would gain any traction in Congress. Instead, it is more likely that such a standard will be a further judicial interpretation of the *McClain* doctrine. The public policy concerns of ownership versus regulation are indeed well suited to judicial interpretation. Cf. *supra* note 54 (discussing courts’ broad ability to consider public policy in determining whether to enforce foreign judgments).

225. See *United States v. Schultz*, 333 F.3d 393, 402 (2d Cir. 2003) (“Law 117 is clear and unambiguous . . .”).

226. *McClain I*, 545 F.2d 988, 1001 (5th Cir. 1977) (noting that the purpose of the NSPA is to protect owners of stolen property).

use of “reasonable” is meaningful. “Reasonable” is flexible and implies case-by-case analysis. “Reasonable” means that Mexico’s assertion of control should not necessarily be used to judge Cambodia’s or Mongolia’s assertion of control, because these countries claim vastly diverging histories. “Reasonable” is context dependent.

Domestic NSPA cases, such as *United States v. Tomlinson*, also support a focus on intent.<sup>227</sup> *Tomlinson*, which involved the illegal transportation of wild horses, turned on how intent factored into the difference between ownership and regulation.<sup>228</sup> Defendants alleged that the law in question, the Wild Free-Roaming Horses and Burros Act (“Burros Act”), did not vest ownership of the wild horses in the federal government because it did not reduce the horses to “actual possession or control.”<sup>229</sup> The court disagreed.<sup>230</sup> Rather, it was “abundantly clear that Congress . . . intended to exercise substantial dominion and control over [the wild horses] to the exclusion of private parties.”<sup>231</sup> The court further noted that it would be “hard to conceive any way in which the Congress could have chosen to exercise a greater dominion and control over such animals without reducing them to actual possession, an alternative Congress expressly rejected as contrary to its intent.”<sup>232</sup>

*Tomlinson* is relevant for its focus on intent in determining whether the law at issue was proprietary or regulatory in nature. In finding that the Burros Act did indeed confer ownership, the court looked at the extent to which Congress could have reasonably enforced the law given its intent. Viewing the low level of active engagement in a vacuum, the Burros Act did indeed seem regulatory; although it explicitly deemed wild horses and burros to be “property of the United States,” in practice it acted merely as a management tool.<sup>233</sup> Yet factoring intent into the

227. 574 F. Supp. 1531, 1535 (D. Wyo. 1983) (emphasizing the importance of congressional intent in denying defendants’ motion to dismiss their NSPA indictment). *Tomlinson* concerned defendants charged with removing wild horses from federal public lands in Wyoming, illegally transporting the horses under the NSPA, and selling them to a slaughterhouse in New Mexico. *Id.* at 1532. Before determining whether defendants had indeed stolen the horses, the court had to determine who owned the horses in the first place. *Id.* at 1534.

228. See *id.* at 1535 (“Congress’ intent in enacting both the NSPA and the Burros Act would be substantially undermined should this Court construe the term ‘stolen’ in the narrow manner requested by the Defendants here-in.”).

229. *Tomlinson*, 574 F. Supp. at 1534 (noting that “[w]hether or not Congress intended to assert a proprietary interest over wild and free-roaming horses by enacting the Burros Act” is an open question); see also 16 U.S.C. §§ 1331–1340 (2012).

230. *Tomlinson*, 574 F. Supp. at 1534.

231. *Id.* (emphasis added).

232. *Id.* at 1535 (noting that Congress’s intent in passing the Burros Act was to preserve “the natural, esthetic value” of the wild horses).

233. *Id.* at 1534. The Burros Act placed wild horses and burros under the jurisdiction of the Secretary of the Interior for “management purposes.” *Id.* It forbade removal of the animals without notice to and approval by the Secretary, and required the Secretary to “monitor and control herd populations,” “capture and leas[e] . . . excessive animals,”

analysis revealed a different picture. In the Senate Report accompanying the bill, wild horses were declared “national esthetic resources” that belonged not to any one person but to “all of the American people.”<sup>234</sup> In that context, Congress’s choice not to exercise actual possession over the animals was *reasonable*, because asserting actual possession would have destroyed that “esthetic resource.”

Granted, there is a difference between the government conduct in *Tomlinson*—intentional restraint from total control—and the theoretical foreign government conduct at issue in inactivity defenses—inability to assert total control. But the focus on government intent is the takeaway. Just as “Congress could [not] have chosen to exercise a greater dominion and control over [the wild horses] without reducing them to actual possession,”<sup>235</sup> foreign nations could not choose to exercise greater control over cultural property that has not yet been discovered or cultural property that is part of an immoveable structure without either acting contrary to the intent of patrimony laws or using resources beyond their capabilities. In *Bataar Skeleton*, for example, reducing all dinosaur fossils in Mongolia to actual possession would require a massive archeological undertaking. In *Duryodhana*, reducing all temple statues to actual possession would require either the deconstruction of the temples (expensive and contrary to the preservational intent of the patrimony laws) or the construction of bulwarks to protect the temples (a difficult and expensive enterprise even in modern times, rendered impossible during the Cambodian civil war in the 1970s).

With this in mind, it is useful to reconsider the validity of claimant’s assertions in *Bataar Skeleton*. Claimant Prokopi wrote in his motion to dismiss that the purpose of inactivity was twofold: (1) “prevent[ing] a country unwilling to take the politically unpopular step of seizing antiquities from its own people from asking the United States to do so on its behalf” and (2) preventing a country from “rediscover[ing] laws that have previously not been enforced, thereby unsettling the reasonable expectations that have developed about the meaning of those laws.”<sup>236</sup> As discussed in Part II, Prokopi’s second assertion speaks to fairness, with which inactivity is unconcerned. But Prokopi’s first assertion speaks to intent and therefore should be a legitimate consideration in determining

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ensure that any killing was humane, and otherwise prevent “unlawful capture, branding, harassment or death.” *Id.*

234. *Id.* (internal quotation marks omitted) (quoting S. Rep. No. 92-242, at 2149–58 (1971)); see also *Kleppe v. New Mexico*, 426 U.S. 529, 535–36 (1976) (describing Congress’s purpose in protecting wild horses under the Burros Act as “contribut[ing] to the diversity of life forms within the Nation and enrich[ing] the lives of the American people” by symbolizing “the historic and pioneer spirit of the West” (internal quotation marks omitted) (quoting 16 U.S.C. § 1331)).

235. *Tomlinson*, 574 F. Supp. at 1535.

236. *Bataar* Claimant’s Memo, *supra* note 136, at 19; see also *supra* notes 136–137 and accompanying text (describing the claimant’s inactivity defense in *Bataar Skeleton*).



inactivity. Despite the denial of his motion to dismiss, at least part of Prokopi's theory was correct. Defining inactivity as coextensive with intent ensures proper acknowledgement of context. It comports with the purpose of the NSPA in general and with the *McClain* doctrine in particular, while simultaneously respecting the public policy of nonenforcement of foreign regulation.

### B. *Inactivity as an Affirmative Defense*

While section III.A reconsiders the substantive content of inactivity, this section reconsiders the procedural treatment of inactivity. As described in subsection II.D.2, Federal Rule of Civil Procedure 44.1 is problematic when applied to inactivity because it offers conflicting, incorrect guidance (in the form of mixed signals and overly loose pleading requirements). Instead, inactivity should be treated as a mixed question of fact and law, under which (1) the level of active enforcement is a question of fact and (2) the intent behind the law is a question of law.

As an affirmative defense, the claimant should be allowed to plead as a question of fact that the foreign nation has not actively enforced its relevant patrimony laws.<sup>237</sup> This burden distribution comports with recent district court decisions on pleading inactivity. As discussed in Part II, the district court in *Bataar Skeleton* held that while active enforcement may be probative, it is not a pleading requirement.<sup>238</sup> Similarly, in *Duryodhana*, the court found that *Johnson's* active-enforcement consideration was made post-trial and thus irrelevant to the pleading stage.<sup>239</sup>

If sufficiently pled, the burden should shift to the government. The government may plead, as a question of law, that the foreign nation was not *intentionally* using the guise of a patrimony law to give extraterritorial effect to mere regulation. This is the stage at which context becomes integrated—and integral. Under the looser pleading requirements applying to questions of foreign law under Federal Rule of Civil Procedure 44.1,<sup>240</sup> the government may present contextual evidence of intent—specifically, that the foreign nation's lack of active enforcement was due to inability, not apathy. Perhaps the foreign nation was at war, or lacked sufficient resources, or suffered from advanced corruption.

Treating an aspect of foreign law as a question of fact is contrary to a normal understanding of foreign law under the mandates of Rule 44.1.<sup>241</sup> Yet understanding inactivity as a mixed question of fact and law properly

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237. For a discussion of how to substantively plead inactivity, see *supra* section III.A.

238. See *United States v. One Tyrannosaurus Bataar Skeleton*, No. 12 Civ. 4760(PKC), 2012 WL 5834899, at \*10 (S.D.N.Y. Nov. 14, 2012).

239. *Duryodhana*, No. 12 Civ. 2600(GBD), 2013 WL 1290515, at \*8 (S.D.N.Y. Mar. 28, 2013).

240. These requirements stand in contrast to the pleading requirements applying to questions of fact. See *supra* notes 195–197.

241. See *supra* section II.D.2.

respects context in a way that a pure question of foreign law under Rule 44.1 could not. The purpose of treating the claimant's burden as a question of fact is to force it to conform to the requisite higher pleading standards. Under the standard articulated in *Bell Atlantic Corp. v. Twombly*<sup>242</sup> and *Ashcroft v. Iqbal*,<sup>243</sup> an affirmative defense must "state a claim to relief that is plausible on its face."<sup>244</sup> As clarified in *Iqbal*, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."<sup>245</sup> One district court described the minimum requirement for affirmative defenses as a "brief narrative stating facts sufficient to give the plaintiff 'fair notice of what the . . . [defense] is and the grounds upon which it rests,'"<sup>246</sup> such that "the facts stated plausibly suggest cognizable defenses under applicable law."<sup>247</sup> Thus, a claimant may not simply assert inactivity without presenting sufficient supporting evidence.<sup>248</sup>

This method of treating foreign law as a question of fact finds similarity (if not perfect symmetry) in a recent district court decision. In *SEC v. Jackson*, a Texas district court found that the government failed in

242. 550 U.S. 544, 570 (2007) (introducing the plausibility pleading standard).

243. 556 U.S. 662, 678 (2009) (clarifying the plausibility pleading standard).

244. *Twombly*, 550 U.S. at 570. The question of whether the heightened plausibility pleading standards of *Twombly* and *Iqbal* extend to pleading affirmative defenses is unsettled. See Leslie Paul Machado & C. Matthew Haynes, Do *Twombly* and *Iqbal* Apply to Affirmative Defenses?, Fed. Law., July 2012, at 56, 57. On the one hand, the majority view in favor of extension notes that both Rule 8(a)(2) and Rule 8(b) require "short and plain" statements in support of their assertions (the complaint and the answer, respectively) and that the purpose of each is to provide notice to the opposing party; thus, both plaintiff and defendant (or claimant, in the case of civil forfeiture) should have similar burdens. See *AirWair Int'l v. Schultz*, 84 F. Supp. 3d 943, 950 (N.D. Cal. 2015). Additionally, the public policy reasons for heightened pleading standards apply with equal force to both plaintiff and defendant: preventing frivolous litigation and discovery. See *Castillo v. Roche Labs. Inc.*, No. 10-20876-CIV, 2010 WL 3027726, at \*2 (S.D. Fla. Aug. 2, 2010). In fact, because defendants may amend their answers to assert an omitted affirmative defense in certain cases (by written consent of the opposing party or leave of the district court), the imposition is not overly burdensome—the defendant may state a plausible defense after facts become available. See *Barnes v. AT&T Pension Benefit Plan—Nonbargained Program*, 718 F. Supp. 2d 1167, 1173 (N.D. Cal. 2010).

On the other hand, the minority view holds that plausibility pleading (a heightened pleading standard) should not extend to affirmative defenses. Specifically, these courts note that whereas Rule 8(a)(2) requires the initial complaint to "show[] that the pleader is entitled to relief," Rule 8(c)(1) merely requires a defendant to "affirmatively state any avoidance or affirmative defense," without any requirement of "show[ing] any facts at all." *Charleswell v. Chase Manhattan Bank, N.A.*, No. 01-119, 2009 WL 4981730, at \*4 (D.V.I. Dec. 8, 2009). Because exploring the annals of this discussion is beyond the scope of this Note, the proposed inactivity affirmative defense operates here under the majority opinion that plausibility pleading does extend to affirmative defenses.

245. *Iqbal*, 556 U.S. at 678.

246. *Piontek v. Serv. Ctrs.*, No. PJM 10-1202, 2010 WL 4449419, at \*3 (D. Md. Nov. 5, 2010) (quoting *Twombly*, 550 U.S. at 555).

247. *Id.* (quoting *Iqbal*, 556 U.S. at 681).

248. See *supra* note 222.

its Foreign Corrupt Practices Act (FCPA) action to sufficiently plead the contents of a Nigerian law under the *Twombly* and *Iqbal* standard.<sup>249</sup> Specifically, the court held that the SEC did not plead sufficient facts to support its allegation that the defendants “knew that [their] payments would be used to influence a discretionary decision of a foreign official,” because they failed to sufficiently plead that the foreign official’s conduct was in fact a “discretionary” action under Nigerian law.<sup>250</sup> The court justified its decision to treat foreign law as a question of fact by noting that the Nigerian law was “not the decisional law” but rather “relevant as *fact*[].”<sup>251</sup> The court explained that although the actual Nigerian law provision need not have been pled, the SEC *was* required to “plead some facts that would render plausible its allegation” that the relevant conduct was indeed discretionary.<sup>252</sup> Instead, the SEC merely made “repeated incantations” that the conduct was discretionary without any apparent support.<sup>253</sup>

Although *Jackson* occurred in a district within the jurisdiction of the Fifth Circuit—and as discussed in subsection II.D.2, the Fifth Circuit has a history of disregarding the mandates of Federal Rule of Civil Procedure 44.1<sup>254</sup>—this particular case does something more complex than simply treat foreign law as a question of fact. It differs from other Fifth Circuit precedent in that it specifically delineates the relevant Nigerian law as being tangential (“relevant as *fact*[]” rather than as “decisional law”). This treatment is comparable to the inactivity defense. If the patrimony law itself is the governing law, then the factual circumstances surrounding its enforcement frequency—as opposed to its method of use—are the tangential facts similar to the “discretionary” nature of the conduct at issue in *Jackson*. Thus, treating ostensible foreign law as a mixed question of law and fact has precedent.

Treating active enforcement as an affirmative defense that operates as a mixed question of fact and law properly allows consideration of context. Although seemingly novel, it comports with existing precedent both on foreign law generally and patrimony law specifically.

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249. 908 F. Supp. 2d 834, 858 (S.D. Tex. 2012). The SEC filed a civil enforcement FCPA action against officers of Noble Corporation, an international offshore-drilling services provider. *Id.* at 839. Noble had seven drilling rigs operating offshore in Nigeria. *Id.* Under Nigerian law, the owner of offshore drilling rigs must either pay permanent import duties or obtain a Temporary Import Permit (TIP). *Id.* The SEC alleged that Noble authorized the payment of bribes to Nigerian government officials to obtain false documents necessary for TIPs and TIP extensions that allowed Noble to avoid paying permanent import duties. *Id.*

250. *Id.*

251. *Id.* at 859 n.15.

252. *Id.*

253. *Id.* at 858.

254. See *supra* notes 216–220 and accompanying text.

## CONCLUSION

The heart of the NSPA—and thus the *McClain* doctrine—is protecting ownership. Yet despite the otherwise complementary public policy goals that birthed it, the inactivity defense has the potential to undermine that purpose. In order to harmonize both ownership rights and public policy within the inactivity defense, courts should consider context in determining whether a patrimony law is enforceable. The best procedural mechanism to allow this contextual consideration is an affirmative defense. Specifically, the factual burden should lie with the claimant to show inactivity, and if met, should shift to a legal burden on the government to show context. This method prevents inadvertent U.S. enforcement of foreign export restrictions while simultaneously respecting foreign ownership.

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