

# Bailey & Ehrenberg

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**VIA Regulations.gov Portal**  
Dr. Jeremy Sabloff, Chair  
Cultural Property Advisory Committee  
Cultural Heritage Center (ECA/P/C)  
U.S. Department of State  
2200 C Street, NW  
Washington, DC 20037

**Re: Meeting of the Cultural Property Advisory Committee Regarding  
Proposed Memorandum of Understanding with the Republic of Tunisia  
Federal Register: November 26, 2019 (Volume 84, Number 228 (Page 65209))**

Dear Dr. Sabloff and Cultural Property Advisory Committee Members:

I am writing on behalf of the International Association of Professional Numismatists (“IAPN”)<sup>1</sup> concerning the Cultural Property Advisory Committee’s (“CPAC’s”) review of a proposed Memorandum of Understanding (“MOU”) with the Republic of Tunisia. The small businesses of the numismatic trade ask this Committee to pay close attention to the statutory requirements found in the Cultural Property Implementation Act, 19 U.S.C. §§ 2601-2613 (“CPIA”) before approving yet another MOU on behalf of yet another MENA government with a long history of authoritarianism. If anything, the fact that Tunisia recently held free elections and is on a path to Democracy, is, if anything, more of a reason for CPAC to ensure that its recommendations reflect the rule of law, rather than simply a way to provide the Tunisian

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<sup>1</sup> The IAPN is a nonprofit organization of the leading international numismatic firms founded in 1951. It was formed in the aftermath of WW II to help reestablish relationships amongst professional numismatists that had been badly frayed during years of conflict. The objectives of IAPN are the development of a healthy and prosperous numismatic trade conducted according to the highest standards of business ethics and commercial practice, the encouragement of scientific research and the propagation of numismatics, and the creation of lasting and friendly relations amongst professional numismatists around the world. IAPN members promise “[t]o guarantee that good title accompanies all items sold, and never knowingly to deal in any item stolen from a public or private collection or reasonably suspected to be the direct product of an illicit excavation, and to conduct business in accordance with the laws of the countries in which they do business.” The IAPN has approximately 100 member firms around the world in 23 countries, including 24 in the U.S. More about the IAPN may be found on the internet at <http://www.iapn-coins.org>.

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cultural bureaucracy with the same exceptionally broad import restrictions recently provided to other authoritarian MENA Governments, most recently nearby Algeria.

Few official details have emerged to justify any MOU with Tunisia. Even a “public summary” that recently appeared on the Cultural Heritage Center website provides little more than a fragmentary information about the request. Given the paucity of information provided, CPAC should question whether the patrimony of Tunisia really is in danger from the pillage of archaeological or ethnological material, or whether this is yet another situation where the U.S. Government is in effect being asked to enforce confiscatory local laws promulgated when Algeria was a dictatorship that will do far more to “claw back” “undocumented” material that left Tunisia during a long era of political and economic engagement with France, a colonial power, than address current looting.

Of course, IAPN is particularly interested in how CPAC addresses the issue of historical coins, which are probably amongst the most common ancient artifacts. Leaving aside whether coins that exist in many multiples can be restricted under the CPIA’s “cultural significance” test, or whether there are alternatives to import restrictions, such as the establishment of a Portable Antiquity Scheme, the critical issue is whether it is proper to assume coins of types struck or sometimes found in Tunisia were in fact “first discovered” there so that they would be subject to Tunisian “export control.” 19 U.S.C. § 2601. Indeed, this is particularly true for the imperial mint at Carthage. That mint (or mints) issued huge numbers of coins for the Carthaginians, the Romans, the Vandals, and the Byzantines. Such imperial issues were never intended to circulate only within the confines of modern-day Tunisia. Indeed, scholarly evidence demonstrates that ancient “Tunisian” coins—with the possible exception of some local bronze civic issues -- are often found outside of the confines of modern day “Tunisia,” which would make any restrictions imposed upon them solely predicated on where they were made or are sometimes found contrary to the CPIA’s statutory intent. *Ancient Coin Collectors Guild v. U.S. Customs and Border Protection* (“*ACCG v. CBP*”), 801 F. Supp. 2d 383, 407 n. 25 (D. Md. 2011) (“Congress only authorized the imposition of import restrictions on objects that were ‘first discovered within, and [are] subject to the export control by the State Party.’”).

To the extent CPAC nonetheless approves of restrictions, CPAC should provide explicit direction to U.S. Customs and Border Protection (“CBP”), the U.S. Government enforcement agency, to ensure violence is not done to statutory intent. In particular, any import restrictions on imperial types that circulated throughout the Empires of the Carthaginians, Romans, Vandals and Islamic Dynasties cannot be assumed to be found in Tunisia, and must, therefore, be framed explicitly to make clear that they only apply to coins actually found in Tunisia—and hence which are subject to the export control of Tunisian authorities. 19 U.S.C. §§ 2601, 2604. Furthermore, any such restrictions should also be conditioned on allowing historical coins to leave Tunisia with export permits, an assumption found both in the UNESCO Convention and the CPIA. 1970 UNESCO Convention, Art. 6; 19 U.S.C. § 2606. Allowing U.S. coin collectors

to purchase and legally import such coins would only help stimulate tourism which is essential to the local Tunisian economy.

## I. Background

### A. Tunisia's History

The public summary alludes to the remains of prehistoric cultures found in Tunisia. Subsequently, c. 814 BC, a legendary Phoenician Queen, Dido, is said to have founded the City of Carthage. Over time, Carthage would grow into an Empire that controlled large swaths of the North African coast, the Southern Coast of today's Spain, Corsica, Sardinia, the Balearic Islands, Malta, and parts of Sicily and Southern Italy.

Carthage's expansion led to conflicts first with Sicilian Greeks, and ultimately Rome. After a series of bloody conflicts, the Romans destroyed Carthage at the end of the Third Punic War in 146 BC. Eventually, however, the Romans redeveloped the site, and Carthage again grew to become a major city within the Roman province of Africa. As Roman power declined, Carthage next became the seat of the Germanic Vandal Kingdom, which at its greatest extent also controlled coastal Morocco, Algeria, Tunisia, as well as the Islands of Mallorca, Sicily, Sardinia, and Corsica. In 534, Belisarius conquered the Vandal Kingdom in the name of Byzantine Emperor Justinian the Great and Carthage and the North African coast again became "Roman."

The Byzantine presence lasted over 150 years. However, in 698 AD, Islamic forces from Egypt conquered the area and destroyed Roman Carthage. The Arabs then converted Tunisia's Berber population to Islam and established Tunis, the country's present day capital, as one of the richest and most powerful cities in their Empire. In the 16<sup>th</sup> century, the Barbary pirates made Tunisia part of their pirate stronghold, but were soon expelled by the Ottoman Turks, who ruled Tunisia and brought stability to the area until the 19th century.

Rivalry between French and Italian interests culminated in a French invasion in 1881 and the creation of a French protectorate. Tunisia became a major WWII battlefield as Vichy French territory, loosening French control and ultimately leading to independence in 1956. The country's first president, Habib Bourguiba, established strict one-party rule. He and his cronies dominated the country for 31 years until November 1987, when he was removed from office and replaced by another autocrat, Zine el Abidine Ben Ali, in a bloodless coup.

The "Arab Spring" initiated in Tunisia. Street protests that began in Tunis in December 2010 over high unemployment, corruption, widespread poverty, and high food prices escalated in January 2011, culminating in rioting that led to hundreds of deaths. On January 14, 2011, the same day Ben Ali dismissed the government, he fled the country, and by late January 2011, a

"national unity government" was formed. Elections for the new Constituent Assembly were held in late October 2011, and in December, it elected human rights activist Moncef Marzouki as interim president. The Assembly began drafting a new constitution in February 2012 and, after several iterations and a months-long political crisis that stalled the transition, ratified the document in January 2014. October 2014 saw the first democratic parliamentary elections since the 2011 revolution, resulting in a win by a secularist party with 85 seats in the 217-member assembly and the election of Beji Caid Essbi as the first president under the Country's new constitution. Tunisia remains a developing Democracy today.

**B. Historical Coins that Circulated within Tunisia, Including those Made in Tunisia, but which also Circulated in Numbers Elsewhere.**

The Carthaginians began striking coins in the late 5<sup>th</sup> c. BC, not at Carthage, but within Sicily. These coins were meant to pay mercenaries and were designed to circulate along with the issues of Greek Sicily. Other Carthaginian coins were also struck in Spain, Sardinia, and Southern Italy. It is often difficult for non-specialists to tell where particular Carthaginian coins were made though numismatists believe a mint at Carthage also struck large numbers of bronze, silver, gold and electrum coins that circulated along with these other coins throughout the Carthaginian Empire and beyond.

After Carthage's destruction in 146 BC, Roman coins (typically struck at Rome itself before the 4<sup>th</sup> c. AD) were used in the country throughout the Roman Republican period and early Empire. These were supplemented by sporadic issues of local civic bronze coins attributed to Utica, Hippo Diarrhytus, and Roman Carthage. Finally, there were also some silver denarii issued during the Roman Civil War of 68 AD, which would have had much wider circulation than these local bronze issues.

From 296-313 AD, Carthage also served as a mint for Roman Imperial coins that circulated with other Roman currency throughout the Empire. The Vandals, Byzantines, early Islamic Dynasties, and Ottomans also struck considerable numbers of coins in Tunisia that circulated throughout their empires. During the Byzantine period, the Carthage mint was particularly prolific, striking coinage in the name of Byzantine Emperors in gold, silver, and most abundantly in bronze.

The French mint in Paris struck attractive coins for the protectorate which included intricate ornamental designs. Coins in the name of the Tunisian Republic have been issued since 1960. In 1969, Tunisia issued a memorable set of silver one dinar commemorative coins depicting ancient sites and personages associated with its Carthaginian and Roman history. Presumably, this special issue was designed not only to generate hard currency, but to also associate the Bourghubia regime with the glories of Tunisia's ancient past.

Scholarly evidence confirms that ancient coins struck at Carthage are often found outside the confines of modern Tunisia.<sup>2</sup> Indeed, such evidence that could be put together in the relatively short amount of time allowed for public comment strongly suggests that Carthaginian, Roman and Byzantine Imperial issues from the Carthage mint circulated in quantity throughout these Empires and in certain cases beyond. *See Coin Hoards II* (RNS 1976), 70 (1975 Syrian hoard deposited mid-3<sup>rd</sup> c. BC containing Carthaginian gold coin); *Coin Hoards III* (RNS 1977), 239 (1975 Sardinian hoard of Byzantine bronze coins, including 24 from Carthage); *Coin Hoards IV* (RNS 1978) (Carthaginian coins found in Croatian hoard); *Coin Hoards V* (RNS 1980), 57 (1976 Croatian hoard containing 50 Carthaginian AE coins), 177 (pre-1998 Sardinian hoard containing two late Roman coins from the Carthage mint); *Coin Hoards VI* (RNS 1981), 87 (Spanish hoard completely comprised of Carthaginian electrum coins), 200 (Spanish hoard deposited c. 206 BC of 13 silver coins, of which 8 were struck in Carthage); *Coin Hoards VIII* (RNS 1994), 223 (Sicilian hoard contains one Carthaginian copper coin), 333 (1983 Sicilian hoard containing 212 silver coins including Carthaginian 2 shekels, 9 one half shekels, 13 one quarter shekels), 417 (Greek 1979 hoard containing 3 Carthaginian bronze coins), *Coin Hoards IX* (RNS 2002), 267 (1926 Croatian hoard of 594 bronze coins including 137 Carthaginian coins), 704 (1886 Spanish hoard of three silver coins including 1 Carthaginian shekel), *Coin Hoards X* (RNS and ANS 2010), 404 (1933 Sicilian hoard that includes Carthaginian tetradrachms.); Portable Antiquities Scheme: Roman coin search, Carthage mint (53 records) (<https://finds.org.uk/database/search/results/mint/53/objecttype/COIN/broadperiod/ROMAN> (last visited December 26, 2019)); Portable Antiquities Scheme: Byzantine Coin search, Carthage mint (5 records) (<https://finds.org.uk/database/search/results/mint/1268/objecttype/coin/broadperiod/BYZANTINE> (last visited December 26, 2019)). Indeed, as pointed out in our notes about the Coin Hoard series, there is likely a severe undercount of such coins, particularly for Roman and Byzantine issues of the Carthage Mint, because all too often any information we have is fragmentary, and more often than not, it was thought more important to record issuing authorities than information about a particular mint.

### C. The Numismatic Trade and Collecting

Ancient coins have been found in great numbers for millennia. In an era without modern banks, the ancients typically buried their savings in hoards, many of which were never retrieved, leaving them to be found to even to this day. Most coins found in collectable condition come from such hoards found in pots or other containers that may contain hundreds, if not thousands, of coins. These containers protect the coins from corrosion due to contact with the soil. In an era before modern banking, people typically buried their savings in secret locations. If they did not return to claim them, those coins remained hidden until found by chance or design. Large

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<sup>2</sup> IAPN has uploaded notes about Coin Hoards series, as well as information from the UK's Portable Antiquity scheme and articles about coin circulation.

savings and accumulation hoards are often found outside the archeological stratum.<sup>3</sup> In contrast, coins archeologists typically find are “small change” of bronze that is likely corroded due to exposure to the elements.<sup>4</sup>

In any event, Tunisian coins have been actively and legally collected in Europe and elsewhere well before the French declared Tunisia a protectorate in the 1880’s. (See Donal Bateson, Ian Campbell and Paolo Visona, *The Early Nineteenth-Century Jackson Collection of Coins from Carthage*, 150 *The Numismatic Chronicle* 145 (RNS 1990). Not surprisingly, historical coins, like most common and less valuable Tunisian artifacts now found both here and abroad, have lost their provenance over time. There simply was no reason to keep such information in most cases, and even now, there is no legal requirement either here or in Europe to keep the documentary history of Tunisian artifacts in one’s collection.<sup>5</sup>

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<sup>3</sup> See *Mary Washington College Presents Symposium on Ancient Numismatics*, ANS Magazine 8, 11 (Spring 2002) (hereinafter *Mary Washington Symposium*) (“Coins recovered in good condition from containers, like those found in savings and accumulation hoards, are only found infrequently at archaeological sites.”).

<sup>4</sup> See e.g., John H. Kroll with Alan Walker, *The Athenian Agora XXVI The Greek Coins 1* (American School of Classical Studies at Athens 1993) (“In comparison with museum or hoard specimens, it is in the area of absolute metrology that the Agora specimens are most deficient. Most are worn to some degree; almost all are found in a heavily corroded state.”); Theodore Buttrey, Kenan Erim, Thomas Groves, and R. Ross Holloway, *Morgantina Studies II The Coins at xi* (Princeton University Press 1989) (“The coins found at Morgantina are most entirely of bronze, as is usual in most excavations. The metal, less durable than gold or silver, has suffered not only from wear during the circulating life of the coins, but from the corrosive action of the soil, so that many have remained illegible even after cleaning.”).

<sup>5</sup> Some in the archaeological community have claimed that import restrictions are “much ado about nothing” because it is simple to comply with the CPIA’s documentation requirements. As set forth above, that is patently untrue for low value artifacts like coins. Leaving that aside, it has also become increasingly clear to importers that even *where there is information available that should allow for a legal import, Customs may ask for more and more and more*. Here is what James McAndrew, a retired former senior agent involved with cultural property issues, said on the subject at a recent public forum:

*One of the things that customs does when an object comes in from one of the 14 countries that has a bilateral agreement under the CPIA, the CPIA says that if an object is imported without a permit from the source country then the import can be allowed under the statute by providing “satisfactory information” that the object was out of the country before the imposition of the bilateral, or has been out of the country for more than ten years. And there are two paragraphs that quote what that satisfactory evidence consists of and what it should state. It was out of the country for 10 years prior to import - it was out of the country before the imposition of the bilateral, and so on. Just to show you what happens in that case. An affidavit that satisfies this should be sufficient for the piece to be released, but it is not. You can literally lift that language right out of the law and have your client sign an affidavit that attests to that. Because it states exactly what the statute requires it should be sufficient. The shipment should be released, right? No. The CPIA does not put limitations on customs and homeland security to stop asking for more. The agent or inspector comes back and says, I want more. They say, I don’t like that affidavit, give me another. I don’t know that person, give me one from another person. They continually ask for more and create, at a whim, what they want. The question is do you feed the government more? If you don’t give them more, they seize*

Coins of the sort that circulated within Tunisia are collected as part of the Greek, Roman, Islamic and foreign coin series. In modern times, coins have been traded on the international market in huge numbers, with Tunisian coins a small part of this larger number. They appear on occasion in auctions in all the countries that hold auctions of ancient coins: Australia, Austria, China (Hong Kong), France, Germany, Italy, Japan, Netherlands, Spain, Switzerland, United Kingdom, and others. As far as IAPN knows, none of these countries other than Germany currently have any restrictions on the importation of Tunisian coins.<sup>6</sup> In fact, the vast majority of Tunisian coins are probably worth so little that they have never been offered in auction and would not be offered in auction today, except in large multiple lots. During the past 100 years and more, there are likely thousands of these coins that have changed hands without any provenance being recorded. Any review of auction and sales records should also confirm that early Tunisian coins are available on the marketplace with mostly modest values.

#### D. The Law, Past Actions on Coins, and Their Impact

The CPIA contains significant procedural and substantive constraints on the executive authority to impose import restrictions on cultural goods. Import restrictions may only be applied to archaeological artifacts of “cultural significance” “first discovered within” and “subject to the export control” of a specific UNESCO State Party. 19 U.S.C § 2601. There must be some finding that the cultural patrimony of the UNESCO State Party is in jeopardy. *Id.* § 2602. They must be part of a “concerted international response” “of similar restrictions” of other market nations, and can only be applied after less onerous “self-help” measures are tried. *Id.* They must also 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.*

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*it. If you do give them more, they ask for more again. Maybe they are looking for you to establish that you made a false statement and take you down the path you never intended to go down. Then the case goes from civil to criminal. Don't forget that behind the scenes, any document you give them, they are sending collateral requests to the agents in foreign countries to verify the document. And if they can catch you with a false document or a false statement, intentionally or unintentionally now you have a criminal problem. There is no limitation on what is called quote unquote satisfactory evidence. I have a client who had an object seized in April 2011 – this is April 2014, and I still haven't got it released. This could go on for another 30 years. Again, there is no limitation on what they can ask for and what is satisfactory evidence and that is what is wrong with the CPIA.*

Transcript, Reform of U.S. Cultural Property Policy Accountability, Transparency and Legal Certainty, Cardozo Law School, New York, N.Y. (April 10, 2014) at 11.

<sup>6</sup> Although the E.U. recently approved of import restrictions on cultural goods originating outside of the E.U., it will take several years for the authorities to implement this law.

Congress placed these constraints on executive power hoping to ensure that the United States exercises its “independent judgment” in such matters. As the Senate Committee Report explains,

The Committee intends these limitations to ensure that the United States will reach an independent judgment regarding the need and scope of import controls. That is, U.S. actions need not be coextensive with the broadest declarations of ownership and historical or scientific value made by other nations.

U.S. actions in these complex matters should not be bound by the characterization of other countries, and these other countries should have the benefit of knowing what minimum showing is required to obtain the full range of U.S. cooperation authorized by this bill.

Senate Report 97-564 at 6 (1982).

CPAC is to provide the executive with useful advice about this process. The CPIA contemplates that CPAC is to recommend whether import restrictions are appropriate as a general matter and also specifically whether they should be placed on particular types of cultural goods. *Id.* § 2605.

No import restrictions were imposed on ancient coins for some twenty-five (25) years after the CPIA came into law. This is not surprising. Ancient coins are items of commerce making it difficult for modern nation states to claim them as their “cultural property.” They are widely collected, including in several countries with MOU’s with the United States. Indeed, Mark Feldman, the State Department Deputy Legal Adviser, represented to Congress that “it would be hard...to imagine a case” where coins would be restricted under what would become the CPIA. *Cultural Property Treaty Legislation: Hearing on H.R. 3403 Before the H. Subcomm. on Trade of the Comm. on Ways and Means*, 96th Cong. 8 (1979).

In the past, CPAC also has recommended *against* import restrictions on coins. Initially those recommendations were followed; however, as the late CPAC Chairman Jay Kislak stated in a court declaration that in 2007, CPAC recommended against import restrictions on Cypriot coins, but the State Department rejected that recommendation and then misled the Congress and the public about it. Even more troublingly, that decision was made by the Assistant Secretary, ECA Dina Powell *after* she accepted a job at financial power house Goldman Sachs, where she was recruited by and worked directly for the spouse of the founder of the Antiquities Coalition, an advocacy group that has worked assiduously to promote MOUs with China and MENA



countries.<sup>7</sup> Now, almost thirteen (13) years later, there are now restrictions on coins made in Algeria, Cyprus, China, Italy, Greece, Bulgaria, Syria, Egypt and Libya with new import restrictions on coins promised to Jordan as well. (See Perry Keziah, *Jordan, US Ink Agreement to Curb Artefact Smuggling*, the Jordan Times, via ZAWYA (December 18, 2019) available at [https://www.zawya.com/mena/en/legal/story/Jordan\\_US\\_ink\\_agreement\\_to\\_curb\\_artefact\\_smuggling-SNG\\_162490004/?fbclid=IwAR3I97YMFfMCKwqORx8b7POScREHRuPLaLrZxmukb\\_zB4EZPwVQyjUuFSfl](https://www.zawya.com/mena/en/legal/story/Jordan_US_ink_agreement_to_curb_artefact_smuggling-SNG_162490004/?fbclid=IwAR3I97YMFfMCKwqORx8b7POScREHRuPLaLrZxmukb_zB4EZPwVQyjUuFSfl) (last visited December 26, 2019).

Such import restrictions make it impossible for Americans to legally import collectors' coins widely and legally available worldwide. Foreign sellers are typically unwilling or unable to certify the coin in question (which can retail as little as \$1) left a specific UNESCO State Party before restrictions were imposed as required by the CPIA and CBP rules. The cumulative impact of these restrictions have drastically limited Americans' abilities to purchase historical coins from abroad and have negatively impacted the cultural understanding and people to people contacts collecting fosters.

#### E. The Request

A public summary of the Tunisian request appeared on the Cultural Heritage Center website on or about December 4, 2019. (See [https://eca.state.gov/files/bureau/tunisia\\_request\\_public\\_summary.pdf](https://eca.state.gov/files/bureau/tunisia_request_public_summary.pdf) (last visited December 26, 2019).) That public summary raises more questions than answers about the justifications for the request.

The request confirms that Tunisia seeks import restrictions on archaeological materials dating from 200,000 BCE to 1750 CE, including coins, as well as ethnological materials produced from 1574-1811. (*Id.* at 1.)

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<sup>7</sup> See Antiquities Coalition's #CultureUnderThreat Conference, The Antiquities Coalition (September 12, 2016) available at <https://theantiquitiescoalition.org/antiquities-coalitions-cultureunderthreat-conference/> (last visited December 26, 2019). Recently, information has come to light that raises the question whether these advocacy efforts have been leveraged to benefit the Antiquities Coalition's founder's for profit business. See <https://www.basilinna.com/insights/press-release-edelman-and-basilinna-partner-to-offer-integrated-china-and-middle-east-focused-public-affairs-and-communications-services> (last visited December 26, 2019). Moreover, it should be noted that the Antiquities Coalition 990 for 2017 indicates that the Coalition has received U.S. Government funding to support State Department efforts to close the U.S. border to "illicit antiquities" from MENA countries. From various sources, IAPN believes that the Coalition maintains that any undocumented antiquity (including coins) is also "illicit." Therefore, in addition to advocating for the U.S. State Department imposition of import restrictions, the Coalition receives U.S. government funding for publicizing such import restrictions to the public.

The request maintains that archaeological theft emerged as an organized crime in Tunisia in the 1990's. (*Id.* at 2.) Since the revolution of 2011, 22,000 artifacts are said to have been recovered, but no details about these artifacts are provided, raising the distinct possibility that a large number were not the products of recent looting. (*Id.* at 2.) Indeed, the relatively small number of clandestine excavations said to have been uncovered over a 4 year period (80), suggests that the number of seizures includes far more objects than those traceable to such illicit digs. (*Id.* at 2.) Moreover, the fact that Salafist groups have targeted Sufi shrines, Christian churches and Jewish synagogues cannot be addressed through U.S. import restrictions. (*Id.* at 2.)

We are further informed that Tunisian law prohibits the export of movable property (*Id.* at 2.), but the public summary fails to disclose that archaeological objects may be owned as private property and sold within Tunisia. (Law No. 94-35, dated 14 Feb. 1994, Title I, Art. 1, Title V, Art.58-19.)

The public summary also notes that there is a market for Tunisian coins, mostly sold at relatively low prices, in the United States, but in so doing the public summary fails to indicate if there is any evidence such coins are typically illicitly excavated within Tunisia or typically illicitly exported from that country to the United States. (Public Summary at 3.) There is no discussion whatsoever of any other sources for such coins, most notably France. Indeed, there is no discussion whatsoever about the long French colonial experience in Tunisia, or any discussion about the numbers of cultural items imported into France during this timeframe or the extent to which "Carthage mint" coins are collected within France and the rest of Europe.

What media coverage we could locate suggests that the Ben Ali family was heavily involved in looting and trafficking, that most of what material is looted currently either stays in Tunisia or is exported to Europe, and that "[u]nlike in Libya or Egypt, the antiquities trade in Tunisia is fairly small and disorganized." (Layli Foroudi, *Tunisia Struggles with Looting of Cultural Heritage*, The Daily Star Lebanon 12 (June 20, 2019), available at <https://www.dailystar.com.lb/Arts-and-Ent/Culture/2019/Jun-20/485654-tunisia-struggles-with-looting-of-cultural-heritage.ashx> (last visited December 26, 2019). See also *Negligence, Corruption Threaten Tunisia's Heritage Sites*, ARCS (April 7, 2014) available at <https://www.arcsinfo.org/news-events/entry/266/negligence-corruption-threaten-tunisia-s-heritage-sites> (last visited December 23, 2019). (discusses antiquities trafficking under old regime.) This more nuanced picture contrasts markedly with the lobbying efforts of the Antiquities Coalition, an archaeological advocacy group which has worked with MENA Countries in formulating requests for MOUs. (See Amr Al Azm and Katie A. Paul, *ISIS Eyes Tunisia's Cultural Heritage as Militants Return*, MEI (Nov. 9, 2017)<sup>8</sup> (claiming ISIS fighters returning to Tunisia to loot and destroy cultural

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<sup>8</sup> Dr. Al Azm and Ms. Paul have since formed their own advocacy group, the ATHAR project. During the CPAC hearing concerning proposed MOU's with Yemen and Morocco, Ms. Paul argued that a small number of

sites), available at <https://www.mei.edu/publications/isis-eyes-tunisia-cultural-heritage-militants-return> (last visited December 26, 2019).) It raises a legitimate question whether the “cultural patrimony” of Tunisia really is in jeopardy from the pillage of archaeological and ethnological material.

## II. Analysis

CPAC should ask itself whether the cultural heritage of Tunisia is really in jeopardy, and whether there truly has been a “concerted international response” to looting. 19 U.S.C. §§ 2602 (a) (1) (A) and (C).

Moreover, before restrictions on coins are considered, it needs to be determined whether significant numbers of metal detectors are in use in Tunisia, and, if so, whether there are less drastic remedies available other than more import restrictions on coins. 19 U.S.C. § 2602 (a) (C).

If restrictions are nonetheless imposed on coins, such restrictions must be written in a way to comply with the CPIA’s requirements, i.e., only coins “first discovered within” and “subject to export control by” Tunisia that are illicitly exported after the effective date of the regulations may be restricted. 19 U.S.C. §§ 2601, 2604, 2606, 2610.

Finally, import restrictions—if any—on coins should be conditioned on the provision of export permits for coins purchased in Tunisia. Sales of common coins to U.S. visitors would promote tourism in a way consistent with the UNESCO Convention and the CPIA.

### A. Any Import Restrictions Should Be Limited in Scope and Export Certificates Should be Provided.

#### 1. It is Difficult to Justify Import Restrictions on Coins.

Although the State Department has claimed otherwise in the *ACCG* litigation<sup>9</sup>, the CPIA itself contemplates that CPAC will play an important role in ascertaining what types of objects

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archaeological objects allegedly from Morocco for sale on Facebook justified import restrictions. IAPN disputed small numbers of archaeological objects posted on MENA Facebook pages for sales justifies the imposition of import restrictions on all cultural goods from Yemen or Morocco. In any event, IAPN submits that any problems in this area may best be remedied by working with Facebook itself.

<sup>9</sup> In its test case, the *ACCG* alleged, based on the sworn testimony of Jay Kislak, CPAC’s former Chairman that CPAC recommended against import restrictions on Cypriot coins, but the State Department and U.S. Customs imposed them anyway and then misled the Congress and the public about it. In response, the State Department argued that CPAC’s role is limited to making recommendations as to the general findings found in 19 U.S.C. § 2602(a). Unfortunately, the courts did not reach the merits of the dispute, instead holding that the *ACCG* was not

ultimately appear on the designated list. *See* CPIA, 19 U.S.C. § 2605 (f) (4) (B) (CPAC report shall list “such archaeological or ethnological material of the State Party, specified by type or such other classification as the Committee deems appropriate, which should be covered by such agreement or action.”). *Accord* S. Rep. No. 97-564 (1982) at 8 (“The Secretary [of the Treasury] [now U.S. Customs and Border Protection] will consult with the Director of the United States Information Agency [now Assistant Secretary, Bureau of Educational and Cultural Affairs] before promulgating such a lists [sic], as the latter is responsible for servicing the work of the Advisory Committee that is expected to contribute heavily to the composition of the list.”). Here, CPAC should recommend against import restrictions on coins.

As set forth above, the CPIA contains significant procedural and substantive constraints on the executive authority to impose import restrictions on cultural goods. Import restrictions may only be applied to archaeological artifacts of “cultural significance” “first discovered within” and “subject to the export control” of a specific UNESCO State Party. They must be part of a “concerted international response” “of similar restrictions” of other market nations, and can only be applied after less onerous “self-help” measures are tried. They must also be consistent with the general interest of the international community in the interchange of cultural property among nations for scientific, cultural, and educational purposes.

First, it is hard to claim with a straight face that Tunisian coins—which exist many multiples—are of cultural significance, a prerequisite for restrictions.<sup>10</sup>

Second, as set forth above, given scholarly evidence, CPAC cannot properly conclude that such coins *are only found in the confines of modern day Tunisia*, a prerequisite under the CPIA. 19 U.S.C. § 2601(2) (a) (c).<sup>11</sup>

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entitled to judicial review of State Department and U.S. Customs decision-making. *See Ancient Coin Collectors Guild v. U.S. Customs and Border Protection*, 698 F.3d 171, 175 (4<sup>th</sup> Cir. 2012).

<sup>10</sup> The CPIA requires that restricted archaeological artifacts are of “cultural significance.” CPIA, 19 U.S.C. § 2601 (2) (C) (i) (I). The State Department has misapplied this “cultural significance” requirement when it comes to coins. The large numbers of such coins extant strongly argues against them being considered of “cultural significance.” Archaeologists have claimed that coins are “culturally significant” as dating tools at archaeological sites, but such an “archaeological significance” test finds little support in the CPIA. For “archaeological material” to be restricted, it must be both of “archaeological interest” and “cultural significance.” CPIA, 19 U.S.C. § 2601 (2). While the use of coins that are “archaeological material” for dating at some sites may give them “archaeological interest,” that in itself cannot also make them of “cultural significance” without doing violence to statutory intent. In any event, coins make poor dating tools because ancient types frequently circulated for hundreds of years.

<sup>11</sup> Members of the archaeological community have contended that any coin type that circulated “predominantly” in a given country should be placed on the “designated list” for restrictions because it is easy for them to generalize *based on data about finds of local bronze coins at certain Greco-Roman archaeological sites* that coins circulate “predominantly” where they are made. Even here, however, scholarly research indicates that the number of “foreign” coins as opposed to “local” coins found at archaeological sites can be quite high, with “foreign” coins comprising 91.3% of the coins found at Sardis, in what is now Turkey. Francois de Callatay, *Greek Coins from*

Third, it is doubtful that Tunisia's "cultural patrimony" related to coins is in jeopardy from pillage. While the public summary is silent about coin seizures, even if some coins have been looted from archaeological sites in Tunisia, Tunisia's cultural patrimony is not endangered because coin types exist in multiples and there are likely hundreds, if not thousands, of examples already extant in Tunisian museum collections. . 19 U.S.C. § 2602 (a) (1) (A).

Fourth, it is impossible to assume that the "concerted international response" requirement is met with respect to such coins. Coins struck in Tunisia are widely traded as collector's pieces and curiosities worldwide. Indeed, "Tunisian" coins are widely available for sale, especially in Europe. Yet, no one else (with the possible exception of Germany) currently imposes import restrictions similar to those proposed here.<sup>12</sup> Accordingly, restrictions on American collectors and small businesses will do little, if anything, to limit any damage to Tunisian cultural artifacts. Instead, they will just move our trade abroad to Europe and the burgeoning markets of the Middle East and Asia.

Fifth, another issue is whether less drastic measures can be taken than import restrictions on coins. The public summary makes no mention of the use of metal detectors. If metal detectors are not in widespread use, then there is little possibility that ancient coins are being looted from archaeological sites quantity. If metal detectors are in use, there is no mention to what extent they are being regulated. Unless and until metal detectors are actually regulated, less drastic remedies are available than the imposition of yet more import restrictions on coins. With respect to such regulations, the Numismatic Trade points to the success of the U.K.'s Treasure Act and Portable Antiquities Scheme as something that should be tried elsewhere.

Finally, it is also hard to see how restrictions are consistent with general interests of the international community in cultural interchange. Restrictions on historic coins will only impoverish our ability to appreciate ancient Tunisian culture.

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*Archaeological Excavations: A Conspectus of Conspectuses and a Call for Chronological Tables, in Agoronomia, Studies in Peter G. van Alfen ed., Money and Exchange, Presented to John H. Kroll 177, 185 at Table 5B (ANS 2006).* In any event, the CPIA calls for much more. Assuming other statutory criteria are also met, the CPIA only authorizes seizure and forfeiture of artifacts "first discovered within and...subject to export control by" a given country. 19 U.S.C. § 2601(2) (a) (c). The State Department can comply with the plain meaning of the CPIA by establishing by undisputed scholarly evidence that the coins placed on the designated lists could only have been discovered in a given country for which import restrictions are granted and, hence, must be subject to their export controls. Here, the State Department certainly cannot meet this test for coins struck in Tunisia. As the hoard evidence discussed above suggests it appears most—if not all—coins struck in Tunisia are found well beyond the confines of modern Tunisia. This is not that surprising when one considers that coins are items of commerce that in ancient times were used to pay mercenaries and for foreign trade goods such as amber.

<sup>12</sup> Although the E.U. Parliament has passed what appear to be draconian limits on the imports of cultural goods into the E.U., it should take several years for these restrictions to be written into national law and for any regulations to be promulgated.

Notwithstanding the above, IAPN and PNG would also welcome CPAC recommending that any restrictions specifically mention coins stolen from Tunisian private and public collections. These would likely be considered stolen in any case under CPIA, 19 U.S.C. § 2607 (“Stolen Cultural Property”) or under the terms of the National Stolen Property Act, 18 U.S.C. §§ 2311, 2314–2315.

2. If CPAC Recommends Import Restrictions on Coins they Should Be Limited in Scope and their Impacts Ameliorated.

As set forth above, there is a real question whether import restrictions can lawfully be placed on coins solely based on whether they were minted in the confines of modern day Tunisia or are sometimes found there. Here, scholarly evidence demonstrates that “Tunisian” coins— with the possible exception of some local bronze city issues -- are typically found outside of the confines of modern day “Tunisia,” which would make any restrictions placed upon them by place of minting alone contrary to governing law. *Ancient Coin Collectors Guild v. U.S. Customs and Border Protection* (“*ACCG v. CBP*”), 801 F. Supp. 2d 383, 407 n. 25 (D. Md. 2011) (“Congress only authorized the imposition of import restrictions on objects that were ‘first discovered within, and [are] subject to the export control by the State Party.’”).

Moreover, the CPIA only authorizes detention, seizure and forfeiture of types of objects on designated lists illicitly exported from the country for which restrictions are granted after the effective date of government regulations. 19 U.S.C. § 2606. U.S. Customs and Border Protection (“CBP”) instead, however, has detained and seized coins of types on designated lists imported into the United States after the effective date of the applicable regulations, i.e., an embargo of all coins of restricted types rather than targeted, prospective import restrictions that do not impact the purchase of coins from the legitimate marketplace abroad, mostly within Europe.

As early as 2005, the American Numismatic Society recognized that such embargoes endangered the legitimate collecting and study of coins. According to a “Cultural Property Statement” drafted by academics associated with the Society as well as representatives of collectors,

The American Numismatic Society recognizes the importance of legislative and treaty provisions aimed at curbing illicit traffic in archaeological artifacts.

At the same time the Society is aware that in the case of coins such measures can have the unintended effects of placing an undue burden on lawful collecting, legitimate numismatic trade, and scholarly research.

Historically, coins were produced by the millions and they survive by the hundreds of thousands. Since the Renaissance coins have been avidly collected and studied by princes, scholars, and historically-minded hobbyists alike. While the illicit recovery of coins from archaeological sites and the failure to record hoards properly continues to do irreparable harm to numismatic scholarship, collecting and dealing in coins that have been in private hands for many years does not contribute to the destruction of cultural heritage. Likewise, because most coins in private collections have been traded and held without any provenance, it is unreasonable to assume that a coin is stolen, illegally exported, or illegally imported merely because the holder cannot establish a chain of custody beyond receipt from a reputable source. Taken together, such considerations argue that within the world of artifacts, coins as a class do, in fact, stand apart.

Accordingly, The American Numismatic Society urges that in cultural property deliberations over the importation of artifacts, full attention should be given to these exceptional factors that pertain to historical coins, so as to ensure the continuance of legitimate collecting, the protection of the cultural heritage of countries negatively affected by the ongoing trade in illicit antiquities, and the preservation, analysis and dissemination of knowledge of the past.

*(American Numismatic Society Statement on Cultural Property Concerns, Approved by the Board of Trustees on Oct. 22, 2005, available at <http://numismatics.org/about/culturalpropertystatement/> (last visited December 30, 2019).)*

Fortunately, CPAC can ameliorate these issues.<sup>13</sup> If CPAC recommends import restrictions on coins, CPAC should also ensure that such restrictions are written in a way to comply with the CPIA's requirements, i.e., only coins "first discovered within" and "subject to export control by" Tunisia that are illicitly exported after the effective date of the regulations may be restricted.<sup>14</sup> 19 U.S.C. §§ 2601, 2604, 2606, 2610. That means that prior restrictions based solely on where a coin was made millennia ago or is sometimes found must be replaced by

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<sup>13</sup> While proponents of import controls on coins may claim that the *Ancient Coin Collectors* "green lighted" the State Department's and CBP's handling of import restrictions on coins, that decision was based on the supposition that the issue was a "foreign policy issue" beyond full judicial review. See *Ancient Coin Collectors Guild*, 698 F.3d at 175. That decision in no way precludes CPAC from exercising its supervisory role over how MOU's are implemented. In fact, decision makes CPAC addressing the issue even more important.

<sup>14</sup> Congress also contemplated that CPAC would guide CBP in preparing "designated lists" of material subject to import restrictions. As the Senate Report indicates, "[T]he Advisory Committee ... is expected to contribute heavily to the composition of the list." S. Rep. No. 97-564, at 8 (1982).

a formulation that ensures explicit linkage to coins with Tunisian find spots exported after the effective date of the regulations. This statutorily compliant formulation is found in recent Syrian import restrictions made pursuant to statute (and where the State Department and Customs bureaucracy knew they were under scrutiny from Congressional authorities) (*See* 81 Fed. Reg. 53916 (August 15, 2016).) More recent Libyan and Algerian import restrictions fail this test because they instead suggest any coin types generally found in Libya or Algeria are restricted. (82 Fed. Reg. 57346, 57348 (Dec. 5, 2017) (Libyan emergency restrictions) *superseded at* 83 Fed. Reg. 31654, 31656 (July 9, 2018) (regular restrictions); 84 Fed. Reg. 41909, 41911 (Aug. 16, 2019) (Algerian restrictions).)

Finally, if CPAC considers imposing import restrictions on coins, it should also ensure that U.S. collectors and tourists can import coins openly available for sale within Tunisia itself. Both Article 6 of the 1970 UNESCO Convention and CPIA, 19 U.S.C. § 2606 (a) already contemplate that UNESCO State Parties will issue export permits for common cultural goods like coins. Making the issuance of export permits a pre-requisite for import restrictions on coins will merely allow Tunisian dealers who already operate under Tunisian law the ability to export their coins abroad. Finally, protecting collectors' and tourists' access to such coins will help stimulate interest in Tunisia's history and promote not only tourism, but the appreciation and study of Tunisian history.

### III. Conclusion

In order to comply with the CPIA, CPAC should either recommend against import restrictions on coins or ensure that any restrictions only apply to coins actually found in Tunisia that were illicitly removed from Tunisia after the date of restrictions. If CPAC recommends restrictions, it should also recommend that Tunisia issue export permits for coins sold within its borders. I look forward to addressing CPAC again shortly. In the interim, thank you for your interest in the concerns of the small businesses of the Numismatic Trade as well as the untold numbers of collectors of historical coins both here and abroad.

Sincerely,

/s/

Peter K. Tompa