

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ANCIENT COIN COLLECTORS GUILD

PLAINTIFF

VS.

CIVIL NO. CCB-10-0322

U.S. CUSTOMS AND BORDER
PROTECTION, DEPARTMENT
OF HOMELAND SECURITY, et al.,

DEFENDANTS

Baltimore, Maryland

February 14, 2011

The above-entitled case came on for a motions
hearing before the Honorable Catherine C. Blake,
United States District Judge

A P P E A R A N C E S

For the Plaintiff:

Peter K. Tompa, Esquire
Jason H. Ehrenberg, Esquire

For the Defendants:

Larry D. Adams, Esquire
Lorie J. Nierenberg, Esquire
Philip F. Carpio, Esquire

Gail A. Simpkins, RPR
Official Court Reporter

P R O C E E D I N G S

1
2 THE CLERK: The matter now pending before this
3 Court is Civil Docket Number CCB-10-0322, Ancient Coin
4 Collectors Guild versus U.S. Customs and Border
5 Protection, Department of Homeland Security, et al.
6 Counsel for the plaintiff, Mr. Peter Tompa and Mr.
7 Jason Ehrenberg. Counsel for the defendants, Mr.
8 Larry Adams. This matter now comes before the Court
9 for the purpose of a motions hearing.

10 THE COURT: All right. Good afternoon again,
11 everybody, and thank you. I'm glad we finally got
12 this scheduled.

13 We are here obviously on the government's motion
14 to dismiss, so I will start with Mr. Adams. There
15 are, I will just say, a lot of complicated issues in
16 this case, which I am hoping to hear more about.

17 Specifically, I guess what I would be asking you
18 both to start out with, I want to be absolutely clear
19 that we agree on the statutory and regulatory scheme
20 and exactly how coins got onto the List.

21 There's obviously an issue of delegation of
22 authority, and some authority goes to the Secretary of
23 State, but certainly some of it goes to Customs.
24 There's what looks like a final rule, that List of
25 items that includes the coins, and I just want to

1 focus exactly on what all the steps in this are and
2 what you think is Presidential authority as compared
3 to something that would be subject to APA review,
4 because I think there may be something.

5 But, Mr. Adams, why don't you go ahead and tell
6 me your understanding of how this all works.

7 MR. ADAMS: I'm sure this will be a dialogue as
8 we go along.

9 THE COURT: Sure.

10 MR. ADAMS: So let me try and take it in small
11 bites, I suppose.

12 Your Honor, what's at issue here really
13 fundamentally is the statute, Convention on Cultural
14 Property found at 19 U.S.C., 2601, and that entire
15 carefully crafted legislative framework involving the
16 State Department in fashioning these bilateral
17 agreements in order to effectuate the 1970 UNESCO
18 agreement on cultural property.

19 It is of necessity the way Congress envisioned
20 adhering to that treaty a process that goes on between
21 the Secretary of State and his delegate, which in this
22 case is the Assistant Secretary for Educational and
23 Cultural Affairs, to negotiate with countries that are
24 seeking these import protections, really restrictions,
25 on the import of cultural goods.

1 I am sure Your Honor is familiar with this
2 designation between archeological and ethnological
3 goods, and thing of that nature.

4 So that makes --

5 THE COURT: We're talking about archeological
6 here.

7 MR. ADAMS: Archeological.

8 THE COURT: Right. The coins are.

9 MR. ADAMS: Yes, right, and that's the problem.
10 There's a lot involved here, but it also has that
11 other element. Some of the cases, like the Peruvian
12 painting, are ethnological.

13 But be that as it may, what was envisioned here
14 is that the Assistant Secretary would entertain a
15 Diplomatic Note or a request from --

16 THE COURT: Can we back up a little bit more?

17 MR. ADAMS: Sure.

18 THE COURT: I mean it starts with the President
19 being given this authority.

20 MR. ADAMS: I'm sorry?

21 THE COURT: Does the President have anything to
22 do with this initially?

23 MR. ADAMS: Well, insofar as the President is
24 involved in fashioning foreign affairs and entering
25 into treaties with foreign governments.

1 THE COURT: What I am talking about is the
2 statute originally gives the authority to the
3 President, right? Section 2602(a)(1) is the
4 President.

5 MR. ADAMS: Yes, Your Honor.

6 THE COURT: My understanding was that the
7 President had delegated by Executive Order?

8 MR. ADAMS: Yes. I don't have that number, but
9 yes, it was delegated to the Assistant Secretary for
10 Educational and Cultural Affairs.

11 THE COURT: Have you seen -- do we have in the
12 record somewhere, and I could have missed it, the
13 Executive Order? It may not be a determinative
14 question at all; but, for example, does the Executive
15 Order reserve any authority back to the President if
16 there were a disagreement or dispute, or is it just a
17 pure delegation to the State?

18 MR. ADAMS: It's my understanding it's a pure
19 delegation. Mr. Carpio, the counsel for Customs, put
20 before me Executive Order 12555, dated March 10th of
21 1986. It is labeled Protection of Cultural Property.

22 At that time, the instrumentality effectuating
23 this was I guess the USIA, the United States
24 Information Agency. In the meantime, those duties, as
25 the USIA became incorporated in the State Department,

1 have been given over to the Assistant Secretary for
2 Educational and Cultural Affairs.

3 THE COURT: Okay. Could I take a look at that
4 Executive Order if you've got it right there?

5 MR. ADAMS: Sure.

6 THE COURT: Thank you.

7 (Pause.)

8 Okay. Thank you.

9 MR. ADAMS: I don't want to give too much of an
10 organizational chart, but as I understand it from
11 counsel for the Department of State, it's the
12 President, to the Secretary of State, then to the
13 Under Secretary of State for Public Diplomacy and
14 Public Affairs, and then ultimately to the Assistant
15 Secretary for Educational and Cultural Affairs.

16 So there is that mechanism to get it down to the
17 working people, frankly, who are going to be receiving
18 the information from the government, perhaps most
19 pertinent to this case, the Republic of Cyprus, asking
20 for this particular protection. And so over time,
21 this has developed into a more elaborate mechanism
22 than at first blush may seem necessary.

23 In discussing the evolution of these matters
24 with the Department of State, one of the things that
25 helps explain why suddenly coins are in the mix is the

1 prevalence now of metal detectors. In other words,
2 Cyprus was discovering that people with metal
3 detectors were suddenly able to uncover metal objects,
4 including coins, without much difficulty, particularly
5 because of the way the soil is stratified into thin
6 layers.

7 So as a result, a small country, particularly
8 like Cyprus, in order to prevent the pillage of its
9 archeological sites, needed to reach out to this
10 government, as this country being the primary market,
11 or certainly one of the biggest market for
12 archeological matters, to seek some protection.

13 As the Court is aware, there is a whole litany
14 in the statute about the kinds of dialogue that has to
15 go on between the State Department and the host
16 government.

17 In other words, it's not just the request coming
18 forward from this particular country to include these
19 objects. Then there is a determination that has to be
20 made by the State Department, and using its expertise,
21 and that's at 2602. You have there the four
22 determinations, (A), (B), (C) and (D).

23 The request comes in from the State Government.
24 The allegation I suppose is made that it has to do
25 with the cultural patrimony of the State.

1 Of course, in a country like Cyprus, we are
2 going back to the Olympic times, and we are going back
3 through many different empires that controlled that
4 small aisles land state.

5 THE COURT: So you are saying that a request
6 comes in, focusing on Cyprus, to the State Department --

7 MR. ADAMS: Right.

8 THE COURT: -- the particular official in the
9 State Department, saying we've already got this
10 Memorandum of Understanding, we've already got a list
11 of designated articles, we want to add coins.

12 MR. ADAMS: That's precisely right, because we
13 are experiencing problems now with the looting, the
14 pillage, the desecration of the sites, and the coins
15 are invaluable in helping to date and to investigate
16 that particular site.

17 I mean as the Court may well understand, because
18 they have some date because they relate to a
19 particular ruler or a particular time period, they
20 perhaps are more indicative of events that occurred
21 than perhaps other objects.

22 I may be overstating that, but one can
23 understand that coins have a particular significance
24 when it comes to trying to find out what forces were
25 at work in a particular period of time.

1 THE COURT: So what does the State Department
2 official do next when they've gotten this request from
3 the government of Cyprus?

4 MR. ADAMS: Well, the first thing is that the
5 State Party, as you see from (B) there, that the State
6 Party, in this case, Cyprus, has taken measures
7 consistent with the Convention.

8 In other words, we're not just going to be
9 running interference for you. You have to have done
10 something yourself, either in your laws, in your
11 police efforts, all kinds of matters, to make sure
12 that he's not simply relying upon us, that in fact,
13 there is an effort, that you are serious about this.

14 I mean that's the first criteria that they look
15 at at the State, at this particular section, this
16 particular bureau that handles these matters.

17 Then it goes on in a more complicated section.
18 2602(C) talks about there is this give and take.

19 If applied in concert with similar restrictions
20 implemented, or to be implemented within a reasonable
21 period of time, by those nations (whether or not a
22 State Party) individually having a significant import
23 trade in such material, would be of substantial
24 benefit in deterring a serious situation of pillage.

25 So in other words, the State Department is

1 making a determination through various academic
2 researches, both in the traditional sense of going to
3 the library, but also now in the modern sense of going
4 to the Internet and looking at what would be the
5 equivalent, say, of eBay for trading in coins, to see
6 what is really going on, what is actually taking
7 effect down on the ground, what kind of magnitude are
8 we talking about, and is this significant?

9 In other sections of this, I am sure the Court
10 is aware from your reading, that this agreement only
11 lasts for five years. It has to be renewed. You may
12 have made mentioned of that earlier.

13 In the Cyprus case, they were coming in for the
14 renewal close to the five-year period, and at the same
15 time they said, and we're having a problem with coins.
16 There is a market for our coins, whether they are
17 unique to Cyprus or not, or in international trade.

18 Whatever justified the Cypriot government in
19 coming forward and making that claim, they did it.
20 That was somewhat different, but it certainly was
21 within the category of claims of objects, so to speak,
22 that the State Department had been looking at.

23 Because really, what happens as a practical
24 matter is that the State Department, and Customs
25 relies on this too, looks at the media that these

1 things are fashioned in, whether it's stone or glass
2 or metal.

3 So in some sense, when the State Department got
4 this additional Diplomatic Note with reference to
5 coins, their initial thought was well, metals are
6 covered, why is it that coins are now coming forward?

7 Because, and Mr. Tompa I'm sure going to go into
8 this point quite extensively, because coins were of
9 some concern to people who collected coins, and that's
10 understandable.

11 But nevertheless, they, particularly a country
12 like Cyprus, where there are thousands of years of
13 history, the research was done that indicated that in
14 fact there was a major problem with this market, with
15 these coins of Cypriot origin, I believe is the term
16 of art we used, and that consequently, they should be
17 included in the Designated List that ultimately
18 Customs has to implement, because after all, you have
19 the Customs Border Patrol agent right there. He may
20 not have much sophisticated knowledge, so he has to
21 have a pretty specific understanding of what is to be
22 restricted on import and what can pass muster.

23 Then just to complete this thought, you can see
24 the final section (D), that the application of the
25 import restrictions set forth in 2606 of this title in

1 the particular circumstances is consistent with the
2 general interest of the international community in the
3 interchange of cultural property for scientific,
4 cultural, and educational purposes.

5 I don't think that's just verbiage because we
6 are looking at an international-type market. So this
7 country recognizes that it has a big role to play,
8 because it is a primary market for these things, but
9 it also wants to make sure that other entities, like
10 the European Union, or perhaps Japan, or other
11 entities, are not taking advantage of this situation
12 and we are somehow depriving our citizens of something
13 that citizens of other countries would be able to get.

14 So this is a very deliberate process, and what
15 is also incorporated here, and we will get into this
16 in more detail, I am sure, is that this Advisory
17 Committee is then set up.

18 As the Court is aware, it is made up of a number
19 of people. I think it even lays out the designation
20 of their background, such as from the archeological
21 community, from the museum community, if you will.
22 You have two members from museums, three members from
23 archeology, anthropology, and ethnology-related areas,
24 three members in international sale, such as --

25 THE COURT: Is it the State Department, the

1 State Department official who has this request from
2 Cyprus to include coins?

3 MR. ADAMS: Right.

4 THE COURT: The State Department official, what,
5 takes that request and sends it to CPAC, at least is
6 the initials for it, they send that request to the
7 Committee and get something back from the Committee?

8 MR. ADAMS: Well, the Committee is only
9 advisory. The Committee is not controlling what the
10 Secretary does.

11 THE COURT: Right. I understand. It's only
12 advisory, but still, there's a process, right?

13 MR. ADAMS: There's a process. It's sort of
14 multilayered because they are getting that information
15 and they are asking for more specifics from the
16 country that is making the request.

17 Then a person like Mr. Cohen is doing the
18 research. I believe it's archeology by training.

19 MR. COHEN: Cohen.

20 MR. ADAMS: An archeologist. He does the
21 research to make sure that it is legitimate, and to
22 what extent it is a problem, and to what extent
23 imposing these restrictions are actually going to have
24 an impact on international trade.

25 So his research has to be very fine-tuned to

1 make sure that the kinds of conditions that are going
2 to be imposed on our citizens are going to help to
3 assuage the condition, that actually it is an effort.

4 THE COURT: Mr. Cohen is with the State
5 Department?

6 MR. ADAMS: He's the State Department. He's on
7 that staff. As you can see, they are very interested
8 in this discussion, and as we have gone over it in the
9 past few weeks about the multiplicity of concerns and
10 the integrity of their research, it's obvious to me
11 that this is not done lightly.

12 That's one reason why they called in the
13 Advisory Committee, because they want the private
14 sector that knows this from different perspectives to
15 have some input, not a controlling input, as basically
16 the Guild would like the Court to believe they should
17 have; but nevertheless, they want them to be heard,
18 and they want to involve them in the decision-making
19 process.

20 But ultimately, it is the President's designee,
21 through his chain of command, the Assistant Secretary,
22 who makes that decision and then reaches an MOU with
23 the host country. So this MOU, it becomes sort of a
24 mini treaty, for lack of a better word.

25 THE COURT: Right.

1 MR. ADAMS: I mean we are getting that
2 find-tuned in international relations that an MOU will
3 control the bilateral relations between this country
4 and an island nation like Cyprus.

5 THE COURT: Now I have the MOU here. Let's see.
6 It looks like August of 2006. Then there is something
7 from the Diplomatic Note. There are some
8 communications in 2007. There's an Article 2 revised,
9 2007.

10 Where is the first place that coins show up as a
11 word? I mean am I missing it? Is it in the MOU
12 somewhere that they have decided that this is going to
13 include coins, or is it not until we have the
14 Department of Homeland Security and Customs publishing
15 regulations, which the regulations, effective July 16,
16 2007, yeah, I see there's metal and I see there's
17 coins in there.

18 MR. ADAMS: Okay.

19 THE COURT: Have I seen coins anywhere else?
20 Has the State Department said somewhere we are
21 including coins?

22 MR. ADAMS: Well, before I pretend to know the
23 answer, let me check.

24 THE COURT: Okay.

25 (Pause.)

1 MR. ADAMS: The first time that it appears,
2 after all this consideration goes on, is in the
3 Designated List that is ironed out between Customs and
4 the State Department.

5 THE COURT: Okay. Why is that Designated List,
6 which is published in the Register, and it's a final
7 rule and all of that, why is that not subject to
8 review under the Administrative Procedure Act?

9 MR. ADAMS: There is no rule-making with regard
10 to that. It is simply the notice that Customs is
11 putting out to the world, and that's one of the
12 conditions, really, for the APA.

13 For instance, in an environmental case, where
14 you reach a settlement about a toxic substance, like I
15 have ship in Baltimore Harbor, there may be a
16 settlement that will be published in the Federal
17 Register, a notice about that for public comment, and
18 then presumably it will be approved.

19 There's nothing like that with respect to this
20 Designated List. I believe it's contained in the
21 statute we are looking at, the Designated List that
22 Customs --

23 THE COURT: Perhaps the question was badly
24 phrased. Why is it not final agency action?

25 MR. ADAMS: Why is the Designated List not final

1 agency action?

2 THE COURT: Yes.

3 MR. ADAMS: It's our position that the real
4 decision is the MOU. It's that bilateral treaty, if
5 you will, or treaty-ette that has been entered into
6 between the Secretary of State's designee, the
7 President's designee, and that country.

8 What Customs does is simply take that list and
9 put it in the format to give notice to the world as to
10 what actions it will take, what it will be looking for
11 when these goods are imported.

12 THE COURT: Then where do I see in the record
13 that this is a State Department list?

14 MR. ADAMS: It's not --

15 THE COURT: This is covered by the MOU.

16 MR. ADAMS: Well, that's true. It's not a State
17 Department list, but Customs didn't come up with that
18 on its own. It got the information from the State
19 Department.

20 There is a meeting, if you will. The State
21 Department will submit its MOU, its recommendation to
22 Customs, and Customs will take that and format it as a
23 Designated List.

24 Let me see if I understand that correctly.

25 THE COURT: Okay.

1 (Pause.)

2 MR. ADAMS: As co-counsel indicates to me, in
3 one of the designations on that Designated List is a
4 reference to 5 U.S.C. 553(a)(1) that says this is an
5 exception to the normal publication in the Federal
6 Register. If I understand correctly from Customs,
7 that's the exception they are relying upon to say this
8 is not in the usual course of business with
9 rule-making and the rest of it. Here is the notice of
10 what we will do, period.

11 THE COURT: Right. I mean there might be a
12 distinction between whether notice and comment is
13 required and whether something nonetheless constitutes
14 final agency action, and whether it's the action of
15 the President or not.

16 MR. ADAMS: I understand that rationale because
17 the instinct is this is the final thing. This is the
18 final action, so to speak, of the government.
19 Therefore, it ought to be reviewable.

20 But the whole thrust of plaintiff's claim here
21 is to attack, if you will, the functioning of this
22 Advisory Committee and its relationship to having the
23 input that resulted in the MOU, that then resulted in
24 the Designated List.

25 So our position has been that we believe this is

1 so much in the nature of the foreign relations power
2 because, as I said, this is a mini treaty with regard
3 to these archeological artifacts, and in particular,
4 to these coins, that, really, for the Court to weigh
5 into that is to suddenly be in a position, as it might
6 in some other kinds of matters, of being sort of an
7 appellate court in APA review matters for a
8 Presidential power.

9 Now if the Court takes the view that this is in
10 fact reviewable, and that the Designated List is the
11 final agency action, even then, and we'll get into
12 these arguments later, there is every reason to
13 believe that these decisions have been not arbitrary,
14 not capricious, not in violation of the law, and,
15 therefore, entirely supportable, and we can get there
16 eventually.

17 But we have taken the much stronger position
18 that it is very dangerous for the Court to assume that
19 it's the kind of bureaucratic procedure, and I know
20 I'm being somewhat slighting when I say that, that can
21 be reviewed as other agency actions are, because there
22 is a delicacy of negotiations that goes on between the
23 State Department and the host government. They are
24 concerned about --

25 The information that is required, as I

1 understand it from the people that are looking at
2 these requests, not only is it the location of where
3 pillage is going on, but also the names of individuals
4 perhaps involved in crime, even organized crime, and
5 it can get even more extensive than that with regard
6 to government ministers, and things of that nature.

7 So there is a real delicacy that we want to
8 protect and shield, the disclosure of that information
9 and those Diplomatic Notes from public disclosure, and
10 that's the problem that we foresee if we go down that
11 route.

12 Court's indulgence.

13 THE COURT: I'll certainly come back to you, but
14 I think it may be helpful if we sort of go back and
15 forth a little bit, and let me get Mr. Tompa's
16 perspective on this.

17 MR. TOMPA: Thank you, Your Honor.

18 We just heard from Mr. Adams on why this is
19 premature to throw this out at this point, why we need
20 discovery. Mr. Adams just referred to a whole bunch
21 of things that are not in the record before you, Your
22 Honor. I think most of his argument was stuff that
23 was not put in the record.

24 I would also point out that we would not be here
25 today, we would not be talking about the APA at all if

1 Mr. Adams' clients did what they were supposed to do,
2 which was file a forfeiture action. We only filed
3 this action after our coins were seized back in April
4 2009. We waited almost ten months.

5 THE COURT: Well, let me ask you more about
6 that. You would expect then to file a forfeiture
7 action where, right here, the same court?

8 MR. TOMPA: Yeah, that's right.

9 THE COURT: And you would defend it how?

10 MR. TOMPA: I think we would defend it on a
11 number of bases. We would defend it based upon the
12 fact that we believe that the government is applying
13 the restrictions wrongfully to coins of Cypriot type
14 as opposed to coins found in Cyprus, where there is
15 some showing of that.

16 We believe that the government has to prove
17 every element of the CPIA before there's a seizure,
18 and that is certainly an element in the CPIA that was
19 not. The government hasn't even tried to do that.

20 THE COURT: Well, let me jump ahead on that a
21 moment. I'm sorry to jump around.

22 MR. TOMPA: If I can go back to the other two.

23 THE COURT: We can go back to the other two,
24 because that is one thing.

25 It seemed to me, if I'm following you, the

1 logical end point of your argument would apply to
2 every single thing on the Designated List.

3 MR. TOMPA: I don't believe so.

4 THE COURT: That if there was a forfeiture --
5 you're saying the burden should be on the government
6 to prove that that item was first discovered,
7 literally pulled out of the ground or whatever, first
8 discovered in the host country.

9 MR. TOMPA: I think that actually is a
10 requirement of the CPIA, but I think they can do it in
11 different ways. They can either do it by actual
12 evidence or by un rebuttable evidence from a scholarly
13 perspective that the coins could only have been found
14 in Cyprus.

15 THE COURT: But do they have to do that now? As
16 I said, I mean I understand your particular concern is
17 coins; but obviously a decision about coins could
18 affect everything else.

19 MR. TOMPA: We believe they do have to do that
20 now, Your Honor. One reason why coins have never been
21 on the Designated List is because you can't do that.

22 What Mr. Adams has not mentioned is that the
23 Cultural Property Advisory Committee certainly did not
24 agree with the State Department on Cyprus. The first
25 time around, the State Department adopted that

1 recommendation. The second time around, they did not.

2 THE COURT: Right.

3 MR. TOMPA: There is an affidavit from Mr.
4 Kislyak in there. Not only did they not adopt it,
5 they misled Congress and then the public as to what
6 they did about it, and that's a concern.

7 I think the bottom line here, Your Honor, we
8 don't believe that the government is above the law.
9 That's why we brought this case.

10 THE COURT: Well, I understand that, you know,
11 that basic principle. But the way this system is set
12 up now, looking at the Federal Register, for example,
13 and all these various archeological objects, let's
14 just suppose that your client were importing a vessel
15 from the Bronze Age.

16 MR. TOMPA: Well, I'm not an expert on that,
17 Your Honor, but I think there may be scholarly
18 evidence that could be brought to bear that that type
19 of artifact is only found in Cyprus.

20 THE COURT: What do you rely on to say that the
21 burden of proof initially has to be on the government?
22 I mean I'm talking about a forfeiture action.

23 MR. TOMPA: Right.

24 THE COURT: I mean the statute itself I think
25 has a provision which essentially says if it's

1 something on the Designated List -- it's 2606. It's
2 the import restrictions. It seems to me that it says
3 that if it's on this list, it can't come in unless the
4 importer presents satisfactory evidence. I mean the
5 burden is on the importer.

6 MR. TOMPA: Right. We think that the way the
7 List was drawn up by Customs was drawn up improperly.
8 First of all, we believe that instead of it being
9 phrased as coins of Cypriot type, it should have been
10 coins found in Cyprus. Then they could have
11 established that either by actual evidence, if they
12 could, or scholarly evidence if they couldn't.

13 We don't think they have scholarly evidence. We
14 think that they could, for coins that really are found
15 in archeological sites, they probably could have, in
16 many cases have an opportunity to do that through help
17 with the Cypriot officials, etcetera.

18 You know, it is important that the CPAC did not
19 accept these import restriction on coins before. They
20 are the experts. The problem here is there is
21 evidently an effort to go around that, and the
22 allegations in our complaint go beyond just discretion
23 issues. We think that there is potentially some
24 cronyism involved here.

25 You know, it's interesting that Mr. Adams

1 mentioned all these different issues that the State
2 Department has to look at, but that certainly shows
3 that this is not an issue of unbridled discretion.
4 This is an issue that courts can look at. That's our
5 position.

6 THE COURT: Okay. Let's go back to the
7 beginning again and let's see what your understanding
8 is.

9 Do you agree with the general kind of path or
10 chronology that Mr. Adams was describing, that we
11 start with an MOU that's in existence?

12 MR. TOMPA: That's correct.

13 THE COURT: Then Cyprus reaches out in some way
14 and says we would like to include the coins.

15 MR. TOMPA: Apparently they did.

16 THE COURT: Apparently they did.

17 Then there's whatever, research by Mr. Cohen,
18 consultation with CPAC. They get whatever they got
19 from CPAC.

20 What is your understanding about how it goes
21 from there, from State to Customs, and to that List,
22 and what are you saying is the final agency action
23 that's reviewable under the APA?

24 MR. TOMPA: We believe the final agency action
25 is that of Customs.

1 I mean it's unclear to us because the record has
2 not been developed exactly what is the interplay
3 between Customs and State. I mean State presumably
4 makes some general recommendations as to coins, but
5 that's not in the record here. Okay?

6 Once that happens, though, the Designated List
7 has to be drawn up. The Designated List here is not
8 all coins from Cyprus. It's only certain ones.

9 THE COURT: Right.

10 MR. TOMPA: So if you look at the case law as to
11 the APA, it really relates to what is the final agency
12 action, what is the thing that brings liability to a
13 party, and here, it's certainly the regulations.

14 The coins were seized not because of an MOU.
15 The coins were seized based upon the regulations, and
16 that's actually the seizure notice and the detention
17 notice.

18 THE COURT: Okay. So that's what you are
19 challenging as final agency action --

20 MR. TOMPA: Yes, Your Honor.

21 THE COURT: -- the Customs List. Okay.

22 MR. TOMPA: I would just mention one thing. Mr.
23 Adams talked about the foreign policy considerations;
24 but I would note, there's no affidavit before you
25 about what are the concerns with respect to Cyprus.

1 He makes some general allegations.

2 We would think that there really would not be
3 many foreign policy considerations related to coins,
4 particularly because Cypriots themselves can collect
5 these things, and there are other aspects of this,
6 particularly the concerted international response
7 requirement, which is not met.

8 I like to give your clerk -- I gave this to Mr.
9 Adams before -- a letter from the Bavarian Minister of
10 Economic Affairs with respect to the subsequent MOU,
11 which talks about how Germany has noticed some more
12 regulations, and that certainly goes to the concerted
13 international response.

14 May I hand this up to your clerk, Your Honor?

15 THE COURT: Sure. Under what theory is that?

16 MR. ADAMS: Your Honor, I'm going to object to
17 that because even though Mr. Tompa did show it to me
18 last week, sent me an e-mail with that, it's not from
19 the German government. It is in fact from a land in
20 Germany, Bavaria, and it is written by the Minister of
21 Trade. It's like a lobbying effort. It says it may
22 affect this, it may affect that.

23 I think that's contrary. We are not dealing
24 with Germany at all. So I don't think it has any
25 relevance to this case.

1 MR. TOMPA: Well, it does go to the concerted
2 international response, Your Honor.

3 THE COURT: But how do I get into considering
4 the concerted international response? Why are you
5 suggesting that I am going to wind up --

6 MR. TOMPA: If you allow this matter to go
7 forward, Your Honor, we will be able to put on
8 evidence that no other country has similar
9 restrictions as the United States has put on Cypriot
10 coins, none, zero. Therefore, the concerted
11 international response cannot be met.

12 THE COURT: But that decision, which is in the
13 statute --

14 MR. TOMPA: Right. I think we are going to the
15 unbridled discretion issue, Your Honor.

16 The Chamber of Commerce Court, as well as the
17 Mountain States Legal Foundation Court, certainly drew
18 a distinction between cases where the President or his
19 designee has unbridled discretion and what we have
20 here, which we believe is not unbridled discretion. I
21 think we are in that, that area.

22 MR. ADAMS: Since this is a dialogue, if I
23 could --

24 MR. TOMPA: I let you talk.

25 THE COURT: Hold that thought. You can have a

1 chance when we come back, but let me finish looking
2 here.

3 I mean this is interesting. This is from
4 obviously in 2010, which is --

5 MR. TOMPA: That's correct. But I think the
6 statements are general, Your Honor, with respect to
7 ancient coins, and I think they apply across the board
8 to Cypriot coins, Chinese coins, anything, if you read
9 what he says. I think it's wrong to dismiss, be so
10 dismissive of the Minister of Economic Affairs of one
11 of the major states of Germany, which is much bigger
12 than Cyprus or Greece or a lot of these other
13 countries.

14 THE COURT: Okay. Assuming that the final
15 agency action is the Customs List, tell me in what
16 specific ways you think it's arbitrary and capricious.

17 MR. TOMPA: Well, I think the major one is the
18 one that I mentioned previously. It's phrased in the
19 terms of coins of Cypriot type as opposed to coins
20 found in Cyprus.

21 The government actually -- if you look at their
22 briefs, it's a bit confused, but they did seize our
23 Cypriot coins when we have no knowledge of where they
24 came from. So they are obviously seizing them based
25 upon the type, which is consistent with the reading of

1 the statute, as opposed to any kind of evidence that
2 they were actually found in Cyprus.

3 Now they say because we identified the country
4 of origin on our commercial invoice as Cyprus, that's
5 enough; but we also said find spot unknown, and that
6 was elaborated on in correspondence, which is in the
7 record, where I say to the Customs people that we
8 don't know where these coins were found.

9 These coins were actually bought in England, by
10 the way.

11 THE COURT: Right.

12 MR. TOMPA: There's attached to the
13 correspondence also British Export Guidance, which
14 shows that they too -- that's another major market of
15 coins -- they too have no export controls for these
16 type of coins.

17 THE COURT: Saying that their coin is first
18 found in Cyprus gets me back to worrying a little bit
19 about whether you're asking for something, the
20 consequence of which would be to invalidate
21 essentially the whole List, because I'm just not
22 seeing anywhere --

23 I mean it's just a list of archeological objects
24 from Cyprus, and obviously a lot of them were in here
25 long before coins.

1 MR. TOMPA: That's correct.

2 THE COURT: Unless I'm missing it, none of them
3 say -- again, stone vessels first found in Cyprus.

4 MR. TOMPA: None of them say that, and that's
5 our concern with how the regulations are written, Your
6 Honor.

7 THE COURT: So your concern would apply to the
8 entire --

9 MR. TOMPA: To the way the regulations are --

10 THE COURT: List.

11 MR. TOMPA: Yes, that's correct. Yes, it does
12 apply to everything.

13 I would say, though, it could be easily changed
14 by changing the regulations to say first found in
15 Cyprus. I think that would actually be more
16 consistent with the statute, which if you read the
17 statute, and I think it is cited in our briefs, it
18 does say that the item that is restricted has to be
19 first discovered in that country. But they didn't
20 phrase the regulations that way, Your Honor. That's
21 one of our primary concerns.

22 THE COURT: Okay. Any other specific way you
23 would say that it's arbitrary and capricious?

24 MR. TOMPA: And capricious?

25 Well, I think the whole issue, first of all, it

1 is set forth in our complaint more fully, but the
2 whole issue of the Advisory Committee, it is an
3 advisory committee, but it is nothing that should be
4 necessarily just thrown out with no good reason.

5 Here, unfortunately, if you look at our
6 complaint, we believe the reason that it was thrown
7 out is because Nicholas Burns, who was Under Secretary
8 of State at that time, got an award from the Cypriot
9 Group. The next day, and this is in our papers, the
10 next day a message came down from his subordinate to
11 the decision-maker saying, you know, how important
12 coins are. There's something there, Your Honor.

13 THE COURT: Well, supposing it was a
14 conversation at dinner that persuaded him about
15 something?

16 MR. TOMPA: There is a concept of improper
17 political influence changing a decision, and I think
18 it's potentially here.

19 THE COURT: How would you want me to get into
20 that?

21 MR. TOMPA: Well, I think like other cases where
22 that happens. I mean there's just general discovery.
23 You know, look at the logs of Under Secretary Burns.

24 We have a FOIA case that's going on. They
25 refused to actually even look at those. That's part

1 of the issue before the D.C. Circuit. But I would
2 note that FOIA rules and discovery rules are
3 different, so it's not exactly the same.

4 THE COURT: The case in front of the D.C., you
5 got a certain amount of documents I believe at the
6 District Court level.

7 MR. TOMPA: Right. We did. We did. Yes,
8 that's correct. We did.

9 So that's arbitrary and capricious also, just
10 the way coins were added to the Designated List, the
11 way the regulations read.

12 And not only are they, we believe that they are
13 contrary to the way the statute reads, we also believe
14 it does raise First Amendment concerns, and the Berman
15 Act and Free Trade in Ideas Act concerns as well
16 because, again, the phraseology of all of this, which
17 is by type rather than by where it is found.

18 THE COURT: Okay. Thank you.

19 MR. ADAMS: Your Honor, can I have a certain
20 amount of time?

21 THE COURT: Yes. Hold on.

22 Thank you, Mr. Tompa.

23 Yes, Mr. Adams.

24 MR. ADAMS: Forgive me for my impatience, but a
25 number of things have to be corrected.

1 I understand that these, as the Court pointed
2 out, on that Designated List, with the Cypriot coins,
3 they are not all Cypriot, ancient Cypriot coins, but
4 certain periods. So the research that was done
5 indicated that they were once really peculiar to
6 Cyprus.

7 I mean that's part of the -- I'm pretty certain
8 that that particular document is part of what has been
9 excluded in the FOIA.

10 I mean that FOIA case, Judge Leon wrote an
11 opinion. I think they got 50 documents. They got 19
12 that were partially redacted, and I think there were a
13 number of others that were withheld.

14 I saw that argument before Judge Tatel, Judge
15 Henderson, and Senior Judge Williams, and frankly, one
16 could never know from the questions, but from somebody
17 with experience, it seemed like the appellants -- and
18 Mr. Hodes argued that for the Guild -- really had a
19 rough road to hoe. The questions that were given to
20 the AUSA really revolved around are these exemptions
21 under FOIA overlapping or not in certain cases, and
22 particularly where a private party requests
23 confidentiality, is that sufficient in and of itself?

24 So no decision as of yesterday has been issued
25 in the case. The argument was held on the 24th of

1 January, but I think it probably is going to uphold,
2 affirm the District Court.

3 Now this suit I think was brought in part as an
4 end run in order to try and get those documents that
5 may have been considered the actual --

6 THE COURT: Or maybe partly the other way
7 around. They were hoping to get more documents under
8 FOIA because they can't seem to get them from you in
9 discovery.

10 MR. ADAMS: Right, but now that they are
11 directing here and trying to get at the documents that
12 may be open.

13 They cited the Chippewa case in their briefing
14 about the extra discovery, which is really something
15 that the Court should not engage in, this extra
16 record, particularly telephone logs and e-mails and
17 things of that nature. They don't have much of a
18 ground. They just make some blanket accusation
19 against a former State Department official and say
20 that that must have led invariably to this
21 consideration of Cypriot coins. I think that is truly
22 a red herring, and the Court should not countenance
23 that.

24 The burden -- well, the coins that were
25 introduced here, I mean they devised this case. They

1 went and they bought these coins at Spink in London,
2 labeled to meet these criteria to fall within these
3 certain time periods for the Chinese and the Cypriot
4 coins. So when it comes into Customs, they can only
5 go with the evidence of record.

6 They were given an opportunity to supply -- the
7 letter is sent by Customs to the Guild saying please
8 supply us documentation. I mean under 2606(b), they
9 can provide documentation about the origin.

10 Presumably Spink may have had some history. I
11 suggest that maybe Spink got them, let us say, from
12 some retired British colonel who was stationed in
13 Cyprus back in the '60s, got some coins at the local
14 antique shop, brought them back to England. When he
15 died, it went into his estate.

16 MR. TOMPA: Your Honor, now I have to object
17 because this is sheer speculation.

18 MR. ADAMS: I'm not saying this is the truth.
19 I'm just --

20 THE COURT: Let's suppose we don't know.

21 MR. ADAMS: Right. We don't know.

22 THE COURT: Let's suppose Mr. Spink doesn't know
23 and nobody really has the answer that is currently
24 around and able to prove that to us. You're
25 suggesting that it is fair, despite what the statute

1 says about first discovered in, to essentially put
2 that burden on the importer.

3 MR. ADAMS: Yes, Your Honor, it is fair because
4 otherwise, to place the burden on the government, how
5 can the government possibly do it? There has to be a
6 probable cause, if you will. Okay, these are coins
7 from 55 BC of Cypriot origin.

8 Well, have they been in England for a hundred
9 years? Were they dug up in Cyprus last week? You
10 know, how could they possibly?

11 Now the threshold, I don't think it's very high.
12 Something has to be provided.

13 We have these coins that arguably meet the test
14 on the Designated List that was negotiated through the
15 MOU. What is the government supposed to do but to go
16 ahead and seize them and say okay, provide us with the
17 documentation. Tell us something about where you got
18 these and what their origin is.

19 That doesn't seem to be a heavy burden, and they
20 really haven't tested it.

21 That's why when this case is decided about the
22 APA, when the forfeiture case begins, then perhaps
23 they can bring that documentation forward and then you
24 can make a reasoned decision.

25 They certainly have it within their power to

1 provide. The government doesn't have it within its
2 power, because after all, it's a clandestine
3 operation. It was somebody who went out with a metal
4 detector presumably, or maybe an organized gang, and
5 found these coins at a location that may not have been
6 disclosed and tried to keep it secret, precisely
7 because it may be punishable by criminal penalties.
8 They not may not be allowed the export the coins.

9 THE COURT: Or maybe it's someone who took them
10 out perfectly legally before there were any import
11 restrictions in place.

12 MR. ADAMS: And that's why I suggested the
13 colonel blip example. It could be, but we don't know.

14 But the burden -- they have the possession and
15 control. They are bringing it past Customs and saying
16 pass on it, you prove that in fact it was dug up last
17 week or last year in Cyprus. How can that possibly
18 happen?

19 THE COURT: Let me ask you another question.
20 The statute it seems to me says that one of the things
21 that the President or, in this case, his designee has
22 to do is report to Congress whatever differences there
23 may have been between the recommendations.

24 Let's see. Yeah. I'm in 2602 (g), it looks
25 like, Information on Presidential Action, that the

1 President has to report to Congress on any differences
2 between the action that the President or the State
3 Department decides to take and the recommendations of
4 the Committee report.

5 How do I know that that has been done?

6 MR. ADAMS: Well, you wouldn't at this point
7 because we haven't submitted that, that as the record.
8 So if I understand where the Court is going with this,
9 then it would be possible to submit those reports in
10 camera for the Court's inspection.

11 We are loath to even provide them under a
12 protective order to the other side because the Guild
13 is engaged in lobbying efforts. Some of its members
14 have sat on the Committee. They have inside knowledge
15 of what happens in the Committee. The whole
16 confidentiality that is the foundation for the
17 relationship between, in this case, the Cypriot
18 government and the Department of State, this
19 government, would be jeopardized by making it an
20 administrative record as you normally see in APA
21 cases.

22 But understanding what the Court is saying, then
23 that is something that could happen. We could get
24 that report and make it available for an in camera
25 inspection.

1 THE COURT: If there were going to be some
2 discovery or some APA type of review, and I'm not
3 saying there is or there isn't at this point -- I
4 guess I will hear again from both of you -- what the
5 administrative record would consist of could be, it
6 seems to me, fairly limited on one side if we are just
7 saying something like what was the report to Congress
8 as compared to what Mr. Tompa is suggesting he would
9 like to see, which is logs of the Under Secretary.

10 MR. ADAMS: Right. That goes way beyond the
11 APA.

12 THE COURT: Well, he says it doesn't because it
13 goes to arbitrary and capricious, and if there was
14 some kind of improper influence on the process.

15 MR. ADAMS: But there has to be some foundation
16 for that.

17 The Chippewa case that he cited, that was Indian
18 casinos. An Indian Reservation comes and wants to get
19 an exemption for another casino. Interior denies
20 them. They then have sufficient evidence that
21 political pressure was brought to bear, that other
22 Indian tribes in the area -- I think it was Minnesota
23 or someplace -- had casinos.

24 I mean that's a much more dynamic and
25 understandable situation than there was a threshold of

1 evidence that was met. There's nothing like this.
2 This is just really almost, I don't say this lightly,
3 it's almost character assassination.

4 I mean diplomats such as Mr. Burns are in a
5 position where they will receive recognition from
6 governments all the time. To say without anything
7 else that it influenced the decision of this section
8 of this Department of State is really an extraordinary
9 leap, and absent anything else, the Court should not
10 allow them to venture into this arena. There's
11 nothing to support it, except their bald allegations.
12 I don't think that's sufficient.

13 THE COURT: Going back to forfeiture for a
14 moment, do you see any advantage or disadvantage to
15 the forfeiture action?

16 MR. ADAMS: No, not really. I mean as we said
17 in our briefs, if the Court wants us to start that,
18 Mr. Casella heads up the forfeiture unit. We have
19 been in consultation with him.

20 One reason we didn't bring it was simply because
21 all these issues that are not related to forfeiture
22 would have had to have been decided first. So what
23 would have happened is they would have brought the
24 action. It would have been stayed until the
25 resolution of all this other, which is really what

1 they are after. I mean they want these coins
2 specifically to fit within the category specifically
3 to be seized specifically to raise the issue about the
4 authority --

5 THE COURT: Sure.

6 MR. ADAMS: -- under the CPIA. So it's not like
7 there's anything really pressing with regard. It's
8 not like somebody's home in a drug forfeiture case or
9 something of that. I mean it is simply the test goods
10 that were brought into this. So it is kind of a red
11 herring for them to keep insisting that somehow they
12 haven't had --

13 It's true, we have been aggressive in attacking
14 their complaint, especially when they filed an amended
15 complaint when they realized they had made some
16 mistakes with regard to the forfeiture. But that
17 being said, this is where the case is, not these coins
18 in and of themselves.

19 THE COURT: Mr. Tompa.

20 MR. TOMPA: A couple issues, Your Honor. First
21 of all, Mr. Adams seems to think -- he takes issue
22 with the fact that the CPIA makes the government's
23 case to be hard, as identifying coins. But as Urice
24 and Adler explained in their Law Review article,
25 merely identifying coins by country of origin is

1 statutorily insufficient, for if this were all that
2 were required, Congress would have emphasized the
3 place of production rather than the place of
4 discovery.

5 Congress looked at it, Your Honor. I'm sorry
6 it's hard for the government, but that's what Congress
7 said. We want that to be given effect.

8 A couple of other small issues. I don't know
9 where Mr. Adams got this, but he claimed that one of
10 the CPAC members is an Ancient Coin Collectors Guild
11 member, and that's not true.

12 Again we are getting into a lot of issues, which
13 just goes to show that he is putting the cart before
14 the horse. We need discovery. He wants you to throw
15 this out without any consideration of the facts of
16 this case, and we think we just deserve a day in court
17 on this.

18 THE COURT: Okay.

19 MR. ADAMS: Your Honor, can I have the Court's
20 indulgence for a second?

21 THE COURT: Actually I'm going to take just
22 about a five-minute recess. There's something I
23 wanted to check on, and I'll be right back to you. So
24 go ahead and talk, and I'll be right back.

25 (A recess was taken.)

1 THE COURT: If there is something else?

2 MR. TOMPA: Your Honor, may I?

3 THE COURT: Sure. Go ahead.

4 MR. TOMPA: Just to summarize, I think what we
5 think is arbitrary and capricious here is the actual
6 decision to include coins on the Designated List and
7 then how the import restrictions are actually applied
8 by Customs, this whole issue, by type or by find spot.
9 We think it should be by find spot under the statute.

10 Secondly, I think the government is putting the
11 cart before the horse because we are really here today
12 just on a motion to dismiss. The issue before the
13 Court is whether or not the Court should take this
14 case. It's not the extent of discovery. We could
15 have that battle later on. I think that's important
16 to consider.

17 Then finally, Mr. Adams made reference to some
18 concerns he has about the amount of discovery in this
19 case. All I can say is in the FOIA case, the amount
20 of information that was provided was relatively minor.
21 I think he said 50 documents. I think it was more
22 than that. It was maybe a Redwell's worth.

23 So I don't think we are talking about a whole
24 lot of discovery necessarily. You know, we don't know
25 because, you know, we haven't started yet, but it

1 wouldn't seem to be insurmountable.

2 THE COURT: How, if at all -- I think there are
3 some confidentiality provisions in this.

4 MR. TOMPA: That's right, Your Honor. In the
5 statute itself?

6 THE COURT: In the statute itself.

7 MR. TOMPA: That's right. That would relate to
8 how much of the record we might potentially be able to
9 have. Again, I think it would be an issue of first
10 impression, whether or not that would apply here for
11 discovery in a court case because typically --

12 I think when it was written, they were probably
13 considering more FOIA than discovery in a court case.
14 But that would be a decision, you know, in the future
15 for the Court I would imagine.

16 THE COURT: Is your understanding that the
17 report to Congress that we were talking about is
18 normally kept confidential?

19 MR. TOMPA: I can say that, and this is from my
20 knowledge in FOIA, before we, they actually released
21 an Italian import restrictions, a CPAC report.

22 Subsequently, after the Cypriot decision came
23 around, they started not releasing these materials.
24 They did release them in redacted form.

25 I think what we would say there is the statute

1 also says that the report has to be produced to
2 Congress, and not only does it have to be produced to
3 Congress, but there has to be an indication if there
4 are any differences between the report and what the
5 State Department ultimately did.

6 So, you know, arguably maybe it's not as
7 confidential as they seem to say it is, but again, I
8 think that's an issue for the future. The issue here
9 is whether or not the Court has the power to look into
10 this issue, and we believe that the statute as it is
11 written really does not give the Executive unbridled
12 discretion.

13 That relates just to three of our counts.
14 There's a whole bunch of other counts which presumably
15 should go forward, no matter what the Court concludes
16 there, particularly this whole issue of whether or not
17 the proper terminology is coins of Cypriot type or
18 first found in the ground.

19 THE COURT: Okay. Give me your last point
20 again. Which count do you think on that basis --

21 MR. TOMPA: I was going through the complaint,
22 Your Honor. I think generally speaking, Mr. Adams'
23 concerns, the first count, the first three counts
24 really are in the nature of, really go to this whole
25 issue of, you know, why didn't they file a forfeiture

1 action. So that really doesn't go to this issue of
2 APA review.

3 The fourth one certainly does go to the APA
4 review, as does the fifth cause of action, and the
5 ninth cause of action. The ninth cause of action is
6 our cause of action which relates to the Chamber of
7 Commerce case.

8 Now the sixth, seventh and eighth causes of
9 action really relate to how the import restrictions
10 are applied by Customs. So we don't think it really
11 goes necessarily to the arguments that they are
12 raising about justiciability.

13 I would also note, to the extent that
14 constitutional claims are raised, this Court has
15 original jurisdiction as to them. So the APA issues
16 that Mr. Adams raises just don't apply.

17 THE COURT: Right. But I understand his motion
18 to dismiss to be addressed at all of the claims.

19 MR. TOMPA: They did generally, but I think if
20 you look through the complaints, the counts of the
21 complaint, you could see what goes to APA and what
22 really doesn't.

23 THE COURT: Right.

24 MR. TOMPA: I mean that's for you to determine.

25 THE COURT: Right.

1 MR. TOMPA: They made a general -- I would agree
2 with you. They made a general motion to dismiss as to
3 everything.

4 THE COURT: Okay. One other thing, we have been
5 focusing on Cypriot coins. Why don't you tell me what
6 your understanding is of how Chinese coins got onto
7 the List.

8 MR. TOMPA: That's also a mystery, Your Honor.
9 I think we allege in our complaint that the State
10 Department added them by themselves, without China
11 actually asking for it.

12 Again, if you look at the Urice and Adler
13 article, they say that's improper because it just does
14 not comport with the requirements of the statute, that
15 the request actually has to come from the foreign
16 country.

17 THE COURT: Okay. Thank you.

18 Mr. Adams.

19 MR. ADAMS: Your Honor, I need to consult on the
20 Chinese issue. But no, I think that's incorrect to
21 say that the State Department did it on its own. My
22 understanding is that there was a Diplomatic Note from
23 the Chinese government about these particular coins.

24 THE COURT: Do you want to go consult with your
25 experts?

1 MR. TOMPA: Your Honor, if I might, that's not
2 in the record before you. So again --

3 THE COURT: I understand.

4 MR. TOMPA: -- that's an issue we have a concern
5 about.

6 THE COURT: Yes. I'm not -- no matter what he
7 says, that is not in the record. It is not something
8 that I will be considering in terms of the motion to
9 dismiss, because I don't have it.

10 MR. ADAMS: Your Honor, China came in and asked
11 for it. The Cypriot situation was a separate request
12 later, but the Chinese initial request to be included
13 in this MOU, this bilateral discussion, included coins
14 for a particular period, not all coins. I think it's
15 the Zhou and the Tang Dynasties that are affected.

16 So it was a particular concern they had about
17 some of the preeminent dynasties that they wanted
18 protected. So in that regard, I think once again that
19 Mr. Tompa goes too far.

20 I also have to correct his characterization
21 of -- it's true that the way our government does this
22 may be a little bit more deliberate than what you see
23 elsewhere. But I am told that in Germany and the
24 Netherlands, the regime is also very strict.

25 We didn't argue that in the briefs. But insofar

1 as that aside was made, I want to put on the record
2 that we are not unique in having this kind of focus,
3 and that there are other regimes that may be more
4 stringent with regard to these kinds of coins.

5 Our motion is to the entire -- we have briefed
6 all the issues, and our motion is to dismiss the
7 entire complaint.

8 THE COURT: Assuming that there is not APA
9 review, are you saying that there is not some sort of
10 facial review, some ultra vires review? Did the
11 President comply with the statute's review?

12 MR. ADAMS: Well, theoretically, if there was
13 ultra vires review, I would have to concede, but there
14 are no facts that they have alleged that it would
15 really comport with ultra vires.

16 As was pointed out in the colloquy we had when
17 Your Honor took a short break, diplomacy is a matter
18 of meeting with people, a certain amount of
19 salesmanship, and things of that nature. That's one
20 reason that discussions go on, quid pro quos, and
21 things like that. It really ought not to be a matter
22 of judicial review. It really is in the realm beyond
23 this sovereignty in the international arena.

24 When he says that the Assistant Secretary or
25 Under Secretary Burns -- I'm not sure what his title

1 was -- had dinner with the Cyprus officials, that
2 doesn't really comport with anything with regard to
3 how this regulation or this particular MOU with regard
4 to the coins was implemented.

5 THE COURT: Do you see any issue in this case of
6 statutory interpretation of a --

7 Is there to your understanding a difference in
8 how the State and/or Customs is interpreting the first
9 discovered in language, yes, the first discovered in
10 language? Is there any Chevron question here?

11 MR. ADAMS: Do you mean should deference be
12 given to --

13 THE COURT: Yes. Is there some question of
14 statutory interpretation?

15 MR. ADAMS: What I would point to Your Honor is
16 under 19 U.S.C. 1615, Customs only has to have
17 probable cause, as I mentioned before. That's the
18 statute that we are relying upon as to the initial
19 burden.

20 So this whole language about first discovered
21 and the rest of it, once we have established that
22 these coins were marked for that particular period
23 that fits in within the Designated List, that's all
24 they need. Then it is up, when the forfeiture action
25 commences, for them to come back with its other proof

1 otherwise.

2 THE COURT: But you are interpreting first
3 discovered in then the same way that the coin
4 collectors are. It's just a difference in who has got
5 the burden?

6 I mean are you agreeing that first discovered in
7 is not the same as first made in, first produced in?
8 It has got to be something that is discovered later.

9 MR. ADAMS: What the statute, what we are aimed
10 at is, yes, discovered in the sense that it had to be
11 unearthed, that it had to be part of the archeological
12 findings, if you will, that was made in that country.

13 That's what we are concerned about stopping.
14 It's my understanding that these particular Cypriot
15 coins were ones not of wide distribution. That's what
16 Cyprus was concerned about.

17 Now I understand that that thinking or that
18 reasoning is not in the record, but that is part of
19 what the agency did.

20 THE COURT: The agency is not advancing a
21 different understanding of the statute, though. You
22 would agree that at some level, wherever it's being
23 decided, we're not just talking about a coin that just
24 happens to have been made in Cyprus. We are talking
25 about a coin that it was made, and it falls within the

1 particular category, but it also was discovered in the
2 sense of being found in the course of excavation or
3 digging or exploration or those sorts of things that
4 are mentioned in the statute?

5 MR. ADAMS: I think that is what our concern is,
6 yes, and the burden shifts to create a rebuttable
7 presumption, yes.

8 Yes. The short answer is yes, but I don't want
9 to get too far afield on that because --

10 THE COURT: Okay.

11 MR. ADAMS: -- it could lead us down some
12 strange paths, to say the least.

13 THE COURT: Mr. Tompa, anything else you want to
14 say?

15 MR. TOMPA: A couple of things, Your Honor.

16 First of all, working backwards on this first
17 discovered requirement, if you look at the cases that
18 we cited in our surreply brief, they make clear that
19 the government has to prove every element of the CPIA
20 to show probable cause.

21 The two cases that were cited were in an
22 ethnological context, not in an archeological context,
23 but we believe the same principle applies.

24 With respect to the foreign policy
25 considerations, I would note that the APA itself talks

1 about foreign policy considerations, but that only
2 goes to the details of notice, of comment,
3 rule-making, not justiciability, which they suggest.

4 To the extent that they want to bring that up,
5 there is nothing in the record to show how this will
6 affect U.S. relations with Cyprus. As I believe I
7 stated before, Cypriot collectors are quite free to
8 import these coins.

9 So it's hard for me to believe that that will be
10 an issue. That allegation, it's in our complaint.
11 The bottom line is there's nothing in the record to
12 support that. That's a contention on their part.

13 THE COURT: Do you still want them to go ahead
14 and initiate the forfeiture proceeding?

15 MR. TOMPA: Yes. I think they should.

16 THE COURT: Okay.

17 MR. TOMPA: I think it's a requirement, and they
18 should do it.

19 THE COURT: All right. Anything else? Okay.

20 Thank you. I will repeat what I said when I
21 came in here, which is this is a complicated case.
22 But I appreciate your time, and I will try to get you
23 a ruling reasonably soon.

24 MR. TOMPA: Thank you, Your Honor.

25 THE COURT: Let me know if the FOIA thing gets

1 decided in the meantime.

2 MR. TOMPA: We will, Your Honor.

3 THE COURT: Thank you.

4 (The proceedings concluded.)

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REPORTER'S CERTIFICATE

I hereby certify that the foregoing transcript in the matter of Ancient Coin Collectors Guild, Plaintiff vs. U.S. Customs and Border Protection, Department of Homeland Security, et al., Defendants, Civil Action No. CCB-10-0322, before the Honorable Catherine C. Blake, United States District Judge, on February 14, 2011 is true and accurate.

Gail A. Simpkins

Official Court Reporter

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