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ARTICLE

"Ubirajara" and *Irritator* Belong to Brazil: Achieving Fossil Returns Under German Private Law

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Abstract

While disputes concerning the return of antiquities and artworks have become increasingly prevalent and receive public attention, the parallel issue of returning unlawfully exported fossils is rarely discussed. The fossils of "*Ubirajara jubatus*" and *Irritator challengeri* are prime examples of such disputes: they were taken from Brazil unlawfully, as Brazilian researchers allege, and displayed in German museums. The return disputes were characterized by both parties relying on arguments based almost exclusively on public (international) law. This Article explores private law as an alternative approach to these and similar disputes, discussing whether the fossils are the property of Brazil and could, therefore, be claimed in an action for restitution under German law. It finds that both fossils belong to Brazil since the museums did not acquire good title through a good faith purchase or acquisitive prescription.

Keywords: Repatriation; restitution; cultural property claims; fossil; paleontology

Introduction

In the shadow of increasingly publicized restitution disputes surrounding charismatic objects such as the Benin Bronzes[1] or the Parthenon Marbles[2], a parallel discourse unfolds the struggle to return fossils to their country of origin. The objects of such disputes may have been removed over a century ago during scientific expeditions,[3] under colonial rule,[4] or indeed been smuggled in recent times. The significant issue of illicit fossil trafficking is incrementally acknowledged. Still, it remains virtually unaddressed from a legal point of

[1] "Germany to Return Looted Artifacts to Africa." Deutsche Welle, 19 June 2022. https://www.dw.com/en/germany-to-return-looted-artifacts-to-africa/a-62300419.

[2] Batty, David, and Mark Brown. "Thefts expose British Museum's "ridiculous" stance on return of artifacts, says MP." The Guardian, 27 August 2023. https://www.theguardian.com/culture/2023/aug/27/thefts-expose-british-museums-ridiculous-stance-on-return-of-artifacts-says-mp.

[3] Consider as an example the giant ground sloth remains that were removed from Chile in 1897: Al Jazeera. "Chile Seeks Return of Artifacts from London Museums." Al Jazeera, 5 November 2018. https://www.aljazeera.com/features/2018/11/5/chile-seeks-return-of-artifacts-from-london-museums.

[4] Stewens, Raja and Dunne 2022.

view despite the great similarity of these debates to those concerning "conventional" cultural objects.[5]

This is both surprising and regrettable as the law is clearly relevant for debates concerning the return of fossils, as a recent controversy demonstrates. When a paleontology journal published a study describing a new dinosaur species from Brazil named "*Ubirajara jubatus*"[6] in 2020, Brazilian researchers and members of the public were outraged, arguing that the fossil could not have left Brazil legally. Consequently, they demanded its return.[7] The Staatliches Museum für Naturkunde Karlsruhe (State Museum of Natural History Karlsruhe, SMNK) that housed the fossil at first refused to return the specimen, pointing to the lack of a legal obligation due to the inapplicability of the 1970 UNESCO Convention[8] and Germany's cultural property protection laws in their response.[9] Following a letter rogatory by Brazil in early 2022, however, the Ministry of Science, Research and the Arts of Baden-Württemberg ordered the return of "*Ubirajara*" to Brazil in July 2022.[10] The fossil was returned.[11] Only a month before the repatriation ceremony, a parallel controversy shook paleontology. A team of European scientists published a redescription of *Irritator challengeri*,[12] a Brazilian fossil that was allegedly exported to Germany before 1990 and had been displayed in the collection of the Staatliches Museum für Naturkunde Stuttgart (State Museum of Natural History Stuttgart, SMNS) since 1991. What attracted criticism was the "Ethics Statement" of the paper, which seemed to claim that the fossil had legally become the property of the state of Baden-Württemberg. At the same time, ethical concerns of *stricto sensu* remained unaddressed.[13]

Repatriation debates that relate to fossils are generally characterized by an absence of sophisticated legal argumentation – a direct consequence of the scarce involvement of individuals with legal expertise. However, the legal issues such cases raise, and the recurring references made to the law by paleontologists, warrant increased attention from lawyers and legal scholars. What is striking about the two Brazilian-German cases is that those seeking the return of the fossils have almost exclusively relied on public (international) law to argue in favor of returning the specimens. The assertions made by the SMNK and the authors of the *Irritator* study, respectively, that Baden-Württemberg owned the fossils had not been disputed. This appears to have been a missed opportunity. In the context of the trade in art and antiquities, basing return claims on ownership instead of public law provisions has often proven to be the more promising approach.[14] The automatic designation of title to newly discovered fossils in Brazil provides the point of departure for this Article to explore the potential of private law for return claims concerning fossils through the lens of two recent high-profile cases.

[5] Stewens 2022.

[6] Since the study describing *"Ubirajara" Jubatus* has been retracted, this is no longer a valid name and hence put in quotation marks: Caetano, Delcourt and De Oliveira Ponciano 2023.

[7] Vogel 2020.

[8] UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 14 November 1970 (entry into force: 24 April 1972), 823 UNTS 231.

[9] Statement of the SMNK on Facebook, https://www.facebook.com/naturkundemuseumkarlsruhe/posts/statement-zu-ubirajarain-den-letzten-stunden-haben-uns-viele-kommentare-zum-foss/4885874288106641/ (last accessed 17 June 2022).

[10] Proetel, Stefan. "Naturkundemuseum Karlsruhe muss Dino-Fossil an Brasilien zurückgeben." Badische Neueste Nachrichten, 19 July 2022b. https://bnn.de/karlsruhe/karlsruhe-stadt/innenstadt/naturkundemuseum-muss-dino-fossil-an-brasilien-zurueckgeben-ubirajara-jubatus-ministerium-rio.

[11] Rodrigues 2023.

[12] Schade et al. 2022.

[13] Harry Baker. Massive Dino from Brazil Ate "Like a Pelican," controversial new study finds. Why is it causing an uproar?" Live Science, 25 May 2023. https://www.livescience.com/animals/dinosaurs/massive-dino-from-brazil-ate-like-a-pelican-controversial-new-study-finds-why-is-it-causing-an-uproar.

[14] See below.

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After clarifying the factual and legal background, this Article reviews case law to highlight the deficiencies of public (international) law regarding the return of cultural objects and the potential of the alternatives offered under private law based on national patrimony laws. Such legislation vests ownership of newly discovered artifacts in the government, and many Latin American countries (including Brazil) have such laws covering fossils. The study then turns to German law and the relevant legal remedy, the action for restitution, through which the owner of an object can demand its return from the possessor. The following sections discuss the legal issues arising from a counterfactual repatriation lawsuit for "*Ubirajara*" or a hypothetical action concerning *Irritator.* These case studies explore the options under private law that Brazil as a source country has – other than relying on the benevolence of Germany as a host country.

Factual and Legal Background

The study describing "*Ubirajara jubatus*" as a new species of chicken-sized, maned theropod[15] that lived in Brazil 110 million years ago appeared in the journal *Cretaceous Research* in December 2020.[16] Its authors, who were affiliated with institutions in Germany, the United Kingdom, and Mexico, claimed that they had brought the specimen from Brazil to Germany (where it was subsequently kept in the SMNK) in 1995 with an export authorization provided by the Brazilian Departamento Nacional de Produção Mineral (National Department of Mineral Production, DNPM) within the Ministério de Minas e Energia (Ministry of Mines and Energy, MME).

However, Brazilian paleontologists claimed the fossil could not have left the country legally. They argued that all fossils found in Brazil are property of the nation and cannot be exported without the necessary permits issued by both the DNPM and the Brazilian Ministério da Ciência, Tecnologia e Inovações (Ministry of Science Technology and Innovation, MCTI), and demanded the return of "*Ubirajara.*"[17] These efforts were sidelined by considerable engagement with the issue on social media under #UbirajaraBelongstoBR, which located Brazilian return requests within the wider struggle to decolonize paleontology and science more broadly.[18]

This backlash led the editors of *Cretaceous Research* to withdraw the "*Ubirajara*" study in December 2020 temporarily. More intense scrutiny of the conditions surrounding the fossil's journey from Brazil to the Karlsruhe collection ensued. In September 2021, a spokesperson for the Ministry of Science, Research and the Arts of Baden-Württemberg confirmed that the study's authors had provided false information on the provenance of "*Ubirajara.*" The fossil had been imported by a private company in 2006 and was purchased by the SMNK in 2009.[19] As a response, *Cretaceous Research* withdrew the study entirely. In early 2022, one of the study's authors presented yet another version of the facts, claiming that the fossil had been purchased by the SMNK in 2006, with the import having been carried out by a shipping company and Brazilian intermediaries, who also took care of the customs documentation.[20]

Alternatively, the SMNS acquired the *Irritator challengeri* specimen in Germany in 1991 after it had been exported from Brazil before 1990; the authors did not specify the exact date.[21]

[15] The clade of largely-carnivorous bipedal dinosaurs that include such well-known genuses as *Tyrannosaurus* and *Velociraptor.*

[16] Smyth et al. 2020.

[17] Cisneros et al. 2021.

[18] Cisneros, Ghilardi, and Pinheiro 2021; Lenharo and Rodrigues 2022.

[19] Pérez Ortega 2021.

[20] Lamm 2022.

[21] Schade et al. 2022.

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It is assumed that the fossil had gone through the hands of fossil dealers who altered it to enhance its commercial value. Indeed, *Irritator* got its name from "irritation, the feeling the authors felt [...] when discovering that the snout had been artificially elongated."[22] After its first description in 1996, the specimen was repeatedly studied at the SMNS. Therefore, the backlash under the #IrritatorBelongstoBR against the recent study constitutes a "form of belated outrage"[23] about the specimen's dubious (but publicly known) provenance.

In both cases, German researchers and institutions resorted to a similar line of argumentation that defended the presence of the fossils in Germany. They emphasized that the import of the fossil did not violate German law and that the specimen had rightfully become the property of the state of Baden-Württemberg. An integral part of this reasoning asserts that the 2016 *Kulturgüterschutzgesetz* (Cultural Property Protection Act[24]) cannot be applied retroactively to the import of fossils – nor can the 1970 UNESCO Convention since it only came into force in Germany in 2007.[25] This view is correct. The *Kulturgüterschutzgesetz* explicitly limits its temporal application in a way that excludes the import of the "*Ubirajara*" fossil, and the 1970 UNESCO Convention as an international treaty does not apply retroactively (Art. 28 of the Vienna Convention on the Law of Treaties[26]). The same is true with respect to *Irritator.* Consequently, Brazil is unable to base a return claim on Art. 52 of the Cultural Property Protection Act.[27]

However, this is only half the story. The chapter on the "Return of unlawfully imported cultural property" in the 2016 *Kulturgutschutzgesetz* exclusively limits itself to claims under public law, with civil-law claims remaining unaffected (Art. 49(1)). The private law dimension to fossil disputes is underappreciated due to interstate framing under which paleontologists either call upon the host nation to return the fossil or point to the lack of a legal basis for a return claim under the 1970 UNESCO Convention or implement legislation. The subsequent sections demonstrate that the little explored avenue of private law remedies for the return of fossils as national patrimony might provide a fruitful alternative to the often-unpromising mechanisms available under the system of the 1970 UNESCO Convention – whenever source countries cannot rely on a voluntary return like that of "*Ubirajara.*"

Return claims under private law

Successful return of stolen cultural objects

The inadequacy of public international law

When seeking remedies for illicit cross-border transfers of cultural goods, fossils included, it seems only natural to turn to international law. In the "*Ubirajara*" controversy, the party seeking the fossil's return and the one refusing have pointed to the 1970 UNESCO Convention. Leaving aside that the agreement's late entry into force prevents it from applying directly to this situation; the treaty's drafters mostly relied on domestic legislation, especially on importing and exporting cultural goods, to enforce it.[28] Apart from the cooperation obligation for states parties called upon by another state whose patrimony is in danger (Art. 9), the Convention does not provide for any dispute settlement mechanism. Suppose two UNESCO states enter into negotiations regarding the return of a cultural object. In that case, both can submit the case to the Intergovernmental Committee for Promoting

[22] Martill et al. 1996.
[23] Stewens, cited in Baker 2023.
[24] Gesetz zum Schutz von Kulturgut of 31 July 2016 (Federal Law Gazette [GBG1]) Part I, p. 1914).
[25] Oliveira 2021.
[26] Vienna Convention on the Law of Treaties of 23 May 1969 (entry into force: 27 January 1980), 1155 UNTS 331.
[27] Cisneros et al. 2021.
[28] Graham 1987, 772.

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the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation. UNESCO established[29] this body independently of the Convention with a mandate to promote bilateral negotiations, mediation, and conciliation.[30] While Brazil could, in principle, refer the "*Ubirajara*" case to the Committee, few examples of artifacts were returned after being dealt with.[31] The only other case before the Committee involving a fossil is the Broken Hill Skull, which Zambia seeks to recover from the United Kingdom in negotiations that are hardly progressing.[32]

The inapplicability of export restrictions as foreign public law

This does not make public international law the most promising arena for states seeking the return of cultural objects. Even domestic legislation, which many source countries passed to implement the 1970 UNESCO Convention, regularly faces a major obstacle: its public nature. Laws that prescribe certain restrictions on the export of cultural goods and provide for sanctions fall within the realm of public law. Under the principle of sovereign equality, states exercise governmental power only over their own territory; no state can be required to enforce the public law provisions of another state. This principle was first formulated concerning penal and revenue laws but also covers, for instance, constitutional and administrative provisions.[33] In the context of cultural objects, courts deciding on restitution requests frequently need to rule on the application of foreign cultural property protection laws under *lex fori*, and usually do so in the negative. The principle of the non-applicability of foreign public law has been confirmed across jurisdictions and legal systems.[34] Germany, the forum state of the two Brazilian fossils, is among them. The German Federal Court of Justice considers that no state must make itself the minion (*Büttel*) of a foreign sovereign power by enforcing its public laws.[35] When ruling on the conformity with public policy of a marine insurance contract for the carriage of Nigerian cultural artifacts in the *Nigerian Objets d'Art Export Case*, the court refused to apply the Nigerian export prohibition directly.[36]

Private law as a residual remedy: National ownership laws

However, while foreign public laws that prohibit the export of cultural goods are not typically enforced or applied by courts of the forum state, source countries often rely on a different type of law: an automatic designation of title to an artifact under a foreign public law. Such national patrimony laws vest ownership for yet undiscovered archaeological objects in the state to deter the looting of archaeological sites; consequently, removing such objects constitutes theft if done without permission.[37] The state, having become the owner of the object in question, can rely on this fact in its attempt to retrieve the object. National ownership laws have been repeatedly recognized as a basis for bringing a return claim before a foreign court[38] in Civil and Common Law jurisdictions. This is significant insofar as the insufficient harmonization of private law issues (for example, good faith purchases) has

[29] UNESCO General Conference, 20 C/Resolution 4/7.6/5 of 28 November 1978.
[30] Vrdoljak 2012, 121.
[31] One of them was the return of the Boğazköy Sphinx from Germany: Chechi, Bandle, and Renold 2011.
[32] Stewens, Raja, and Dunne 2022, 87–88.
[33] Baade 1995.
[34] Anton 2010a, paras 3, 41–48.
[35] BGH, Entscheidung des 2. Zivilsenats vom 18. Februar 1957, Az. II ZR 287/54, BGHZ 23, 333, 337.
[36] BGH, Urteil v. 22.06.1972, Az. II ZR 113/70, NJW 1972, 1575, 73 ILR 226 (1987); see also (Müller-Katzenburg 1996, 293–97).
[37] Gerstenblith 2008, 644.
[38] Anton 2010a, paras 3, 49 ff.

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long been recognized as a key obstacle to fighting illicit trafficking in cultural property. The 1995 UNIDROIT Convention[39] was designed to address this problem but fell short of doing so due to the low number of ratifications by market nations.[40] None of the four nations examined below are parties to the 1995 UNIDROIT Convention,[41] and they seem equally unimpressed by initiatives like the 1991 Basel Resolution of the *Institut de Droit International,* whose Art. 3 calls for applying the laws of the country of origin of an unlawfully exported cultural object.[42] Nonetheless, their legal systems permit return claims under private law based on national ownership laws.

Common Law jurisdictions: United Kingdom and United States. In *Attorney General of New Zealand v. George Ortiz*, British courts refused to apply a New Zealand law that banned the export of Māori carvings that were auctioned off in London and provided for their automatic forfeiture at the time of the illegal export.[43] Building on this decision, the Court of Appeal clarified in *Iran v. Barakat Galleries* that British courts would not enforce foreign penal, revenue, and other public laws. To fall into the latter category, a claim would need to involve "the exercise or assertion of a sovereign right."[44] It held that the claim brought by Iran "is not an attempt to enforce export restrictions, but to assert rights of ownership"[45] and that such patrimonial claims required the recognition of title rather than its enforcement.[46] The court also highlighted[47] the parallels between the case at hand and the decision of the U.S. Court of Appeals in *United States v. Schultz* that reaffirmed what has been called the "McClain doctrine":[48] the emphasis on a "true" national ownership law in the country of origin as opposed to "mere" export prohibitions.

Under US law,[49] the National Stolen Property Act (NSPA)[50] criminalizes the trade in goods that have been "stolen, converted or taken by fraud." In *United States v. Hollinshead*, the U.S. Court of Appeals, for the first time, had to determine whether "stolen" within the meaning of the NSPA extended to national patrimony laws of foreign nations (here, Guatemala). The 9th Circuit upheld the judgment, finding a Maya stele to be stolen since, under Guatemalan law, "all such artifacts are the property of the Republic, and may not be removed without permission of the government."[51] Similar circumstances were present in *United States v. McClain,* where the defendants were involved in selling pre-Columbian antiquities removed from Mexico. The Court of Appeals again considered the objects stolen since Mexico's law contained both a declaration of ownership and export restrictions; the latter alone would have been deemed insufficient.[52] This line of reasoning was once again

[39] UNIDROIT Convention on Stolen or Illegally Exported Cultural Property Objects of 24 June 1995 (entry into force: 1 July 1998), 2421 UNTS 457.

[40] Delepierre and Schneider 2015.

[41] Switzerland signed the treaty in 1996 but never ratified it.

[42] *Institut de Droit International*, The International Sale of Works of Art from the Angle of the Protection of the Cultural Heritage, Session of Basel (1991).

[43] *Attorney General of New Zealand v. Ortiz*, [1982] 3 QB 432, rev'd [1983] All ER 432, add'd [1983] 2 All ER 93, add'd [1983] AC 1.

[44] *Government of the Islamic Republic of Iran v. The Barakat Galleries Limited*, [2007] EWCA Civ 1374, para. 125.

[45] *Iran v. Barakat Galleries*, para. 131.

[46] *Iran v. Barakat Galleries*, para. 141.

[47] *Iran v. Barakat Galleries*, para. 150.

[48] See, for instance, Yasaitis 2005.

[49] For an overview, see Gerstenblith 2008, 644–65.

[50] National Stolen Property Act, 18 U.S.C. §§2314, 2315.

[51] *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974), p. 1155.

[52] *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977).

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confirmed in *United States v. Schultz* concerning Egyptian antiquities,[53] indicating no change in the court's reading of the term "stolen" in the NSPA, even 30 years after *Hollinshead.*

Criminal proceedings under the NSPA aside, national patrimony laws have been referenced in several civil litigation cases. In *United States v. Pre-Columbian Artifacts and the Republic of Guatemala*,[54] the District Court accepted the illegal export of cultural goods whose ownership had been assigned to Guatemala by an automatic forfeiture clause as stolen within a private law context, paving the way for claims seeking the enforcement of national patrimony in civil proceedings abroad.[55] Similarly, the District Court for the Southern District of New York applied the doctrine developed in *Hollinshead* and *McClain* in a private law context in *United States v. An Antique Platter of Gold.*[56] Moreover, Turkey successfully relied on its national patrimony laws in two cases that resulted in out-of-court settlements providing for the return of many antiquities.[57] However, a frequent obstacle to such claims is evidence. On several occasions, states could not demonstrate that the disputed artifacts had left their territory after their national ownership law came into force.[58]

Civil Law Jurisdictions: Germany and Switzerland. In recognizing national ownership laws as a valid basis for a return claim under private law, the Civil Law jurisdictions of Switzerland and Germany are not much different from their Common Law counterparts. In *Union de l'Inde c. Crédit Agricole*, the Swiss Federal Tribunal had to review a pledge contract concerning two golden coins that had been illicitly exported from India. It refused to consider the export prohibitions under Indian law and emphasized that such laws did not influence who had title to the object, which was essential to the case.[59]

In the 1989 *Coins* case, the Higher Regional Court Schleswig (Germany) had to rule on a request for mutual legal assistance in criminal matters by Greece concerning a Greek national who had found seventy-five antique coins on inherited premises and brought them to his permanent residence in Germany to sell them. Greek law vests ownership of antiquities in the state and penalizes their appropriation. Still, Greece's request for seizure would only have been admissible if the act had also been illegal under German law. The court did accept the Greek legislation as the equivalent of § 243 of the German Criminal Code (Embezzlement). It highlighted that a similar institution to Greece's national ownership law was also provided for in German law in the form of the *Schatzregal.*[60] In 2006, the Higher Regional Court Berlin had to review a preliminary injunction to prevent the export of Egyptian antiquities following an appropriate request from Egypt. The artifacts were located in Germany and had been sold to a US buyer. Its ruling bears some resemblance with US cases: the court accepted the ownership designation under Egyptian law to be relevant for the assessment of the case (as in *Schultz*) but found that Egypt insufficiently demonstrated

[53] *United States v. Schultz*, 333 F.3d 393 (2nd Cir. 2003).

[54] *United States v. Pre-Columbian Artifacts and the Republic of Guatemala*, 845 F. Supp. 544 (N.D. Ill. 1993).

[55] Anton 2010a, para. 3, 167.

[56] *United States v. An Antique Platter of Gold*, 991 F. Supp 222 (S.D.N.Y. 1997), aff'd on other grounds 184 F.3d 131 (2nd Cir. 1999); see also (ibid., paras 3, 177).

[57] *Republic of Turkey v. OKS Partners*, 1994 U.S. Dist. LEXIS 17032 (D. Mass. 1994) and *Republic of Turkey v. Metropolitan Museum*, 762 F. Supp. 44 (S.D.N.Y. 1990).

[58] *Government of Peru v. Johnson*, 720 F. Supp. 810 (C.D. Calif. 1989), aff'd in 993 F.2d 1013 (9th Cir. 1991); in this case, the District Court even found Peru's legislation not to create national ownership at all since they had "no more effect than export restrictions." See also: *Republic of Croatia v. The Trustee of the Marquess of Northampton* 1987 Settlement, 610 N.Y.S.2d 263 (1st Dept. 1994), appeal denied, 642 N.E.2d 325 (1994), where both Croatia and Hungary failed to retrieve the *Sevso* treasure due to being unable to link its provenance to their respective territory; Lebanon had failed with a similar claim before: *Republic of Lebanon v. Sotheby's*, 167 A.D. 2d 142, 561 N.Y.S. 2d 566 (Sup. Ct. 1990).

[59] *Union de l'Inde c. Crédit Agricole Indosuez (Suisse) SA*, 8 avril 2005, ATF 131 III 418, c. 2.4.4.1. et 2.4.4.2.

[60] OLG Schleswig, Entscheidung vom 10.02.1989, Az: 1 Ausl 2/89, NJW 1989, 3105–06.

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that the artifacts in question were located on its territory when its ownership law came into force in 1983 (as in *Peru v. Johnson*). While the export of the artifacts in violation of Egyptian export restrictions might have been a criminal offense, this was found to be insufficient to infer Egypt's ownership – a necessary substantive condition for the claim (as in *McClain*).[61]

German courts have repeatedly dealt with return claims for pre-Columbian artifacts. After the collection of antiquities dealer Leonardo Patterson was seized in April 2008 by German authorities, based on an international letter rogatory,[62] Guatemala, Mexico, Costa Rica, and Colombia tried to retrieve objects they believed to have been stolen from their respective territories. They based their claim on the *Kulturgüterrückgabegesetz,*[63] but Guatemala, Costa Rica, and Colombia had not designated the artifacts as objects of particular significance by entering them into a public register in due time – a necessary condition for a successful return claim under the German law in force at the time (§ 6(2) *Kulturgüterrückgabegesetz*). Consequently, their claims were rejected.[64] Mexico had indeed entered the objects it sought to retrieve in a register, but the register did not satisfy the German court's requirements for its publicity and accessibility from Germany (pursuant to § 6(2), third sentence *Kulturgüterrückgabegesetz*), leading to the rejection of Mexico's claim, too.[65] Another request from Mexico for the return of pre-Columbian artifacts on auction in Cologne failed since it could not convincingly demonstrate that the export had taken place after the entry into force of the *Kulturgüterrückgabegesetz* or present a satisfactory provenance history for the objects more generally.[66]

Against this background of numerous unsuccessful claims based on the *Kulturgüterrückgabegesetz* as a public law,[67] a case brought before the Regional Court Munich I in 2016 is of particular interest. Peru sought the return of a golden mask through a claim of restitution under § 985 of the German Civil Code (GCC), and retrieved the mask by choosing private law as an alternative avenue. The court accepted the object's authenticity and found the Peruvian state to have been the owner by virtue of its patrimony laws. As a result, it ordered the return of the mask.[68] Although the poor success record of claims under the *Kulturgüterrückgabegesetz* does not prejudice the potential of claims under the more recent *Kulturgüterschutzgesetz* in principle, both laws share the limitation of being inapplicable vis-à-vis non-EU parties to the 1970 UNESCO Convention for exports prior to 2007. In such situations, these states might stand a better chance in a civil court when bringing a restitution claim for cultural objects, such as fossils.

Development of private law solutions

This comparative review highlights that, even without the unifying effect of the 1995 UNIDROIT Convention it is a well-established principle in Civil and Common Law jurisdictions that foreign export prohibitions will not be recognized; countries of origin can only

[61] KG Berlin, Entscheidung vom 16.10.2006, Az: 10 U 286/05, NJW 2007, 705–07.

[62] Splettstößer 2016, 165.

[63] Gesetz zur Ausführung des UNESCO-Übereinkommens vom 14. November 1970 über Maßnahmen zum Verbot und zur Verhütung der rechtswidrigen Einfuhr, Ausfuhr und Übereignung von Kulturgut und zur Umsetzung der Richtlinie 93/7/EWG des Rates vom 15. März 1993 über die Rückgabe von unrechtmäßig aus dem Hoheitsgebiet eines Mitgliedstaats verbrachten Kulturgütern of 18 May 2007 (Federal Law Gazette [BGBl.] Part I, p. 757.

[64] VGH München, Beschluss vom 13.04.2010, Az. 7 CE 10.258, BeckRS 2010, 48583 (for Guatemala), VGH München, Beschluss vom 16.04.2010, Az. 7 CE 10.354, BeckRS 2012, 57877 (for Colombia), and VGH München, Beschluss vom 12.04.2010, Az. 7 CE 10.405, BeckRS 2010, 49160 (for Costa Rica).

[65] VGH München, Beschluss vom 16.07.2010, Az. 7 CE 10.1097, BeckRS 2012, 57876.

[66] OVG Münster, Beschluss vom 08.07.2013, Az. 5 A 1370/12, GRUR 2013, 960.

[67] The German Federal Government itself even noted that the law represented an inadequate basis for foreign states to bring claims: Splettstößer 2016.

[68] LG München I, Beschluss vom 15.12.2016, Az. 6 O 18699/06, BeckRS 2016, 117681.

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rely on national ownership laws to bring a return claim under private law. This remedy is all the more important since most market nations do not seem inclined to ratify the 1995 UNIDROIT Convention, whose Chapter III would permit return claims concerning unlawfully exported cultural objects. Therefore, those source countries with national ownership laws can reasonably hope to see them enforced by courts in most market countries.

Fossils as national patrimony in source countries

Although they receive little attention as a distinct category, fossils are covered by cultural property definitions in most international agreements and by many domestic laws.[69] Consequently, many of the states that enacted national patrimony laws also include paleontological objects in them. Among these are pieces of legislation that have been found to represent "true" ownership laws by foreign courts; for example, Guatemala[70], Peru,[71] and Mexico[72].

Brazil also belongs to this group as it has claimed its fossil deposits to be the property of the nation since 1942, allowing for the extraction of specimens only after prior authorization by the DNPM.[73] Art. 20 IX of the Brazilian Constitution declares "mineral resources, including those in the subsoil," to be the property of the nation, and Art. 226 V defines sites with a paleontological value as part of Brazil's cultural heritage. In 1941, another law had already placed restrictions on "Private Brazilian and all Foreign Expeditions to Brazil," seeking to collect and export fossil materials.[74] A more extensive regulation in the same spirit came into being in 1990 through another law[75] and a corresponding ordinance[76] passed by the MCTI. These oblige foreign parties collecting fossil material in Brazil to cooperate with a Brazilian scientific institution and ban expeditions that export materials without prior authorization provided by the MCTI (Art. 3 and 9 Decree 98.830) and the DNPM (Art. 7 Ordinance 55 in conjunction with Decree-Law 4.146). When applying for a permit, foreign parties must, *inter alia,* declare that they are familiar with Brazilian legislation on collecting scientific materials and that any material collected and later identified as type specimens (that is, specimens that represent the first scientific description of a new species and to which the species name is formally associated) will be returned to Brazil (Art. 21(a) and (d) Ordinance 55). However, a range of objects can never be exported. These include different kinds of type specimens, specimens whose permanence in Brazil is of national interest, and *all* type material (Art. 42 Ordinance 55). Violations of these regulations

[69] Stewens 2022.

[70] Art. 1 in conjunction with Art. 5 Ley sobre protección y conservación de los monumentos, objectos arqueológicos, históricos y típicos of 19 September 1947, as confirmed in *United States v. Hollinshead.* The more recent Ley para la protección del patrimonio cultural de la nación of 29 April 1997 (Diario de Centro America, 256 (46): 1361–65) also classifies paleontological objects as national patrimony in its Art. 2.

[71] Art. 4(2) Ley General de Amparo al Patrimonio Cultural de la Nación (Ley No. 24047) of 3 January 1985. While the District Court in *Peru v. Johnson* found Peru's national ownership legislation to constitute a *de facto* export restriction, the Regional Court Munich I accepted this after Peru extensively illustrated its legislation, starting from 1821. The most recent Peruvian cultural patrimony law (Ley No. 28296 of 21 July 2004) applies to fossils as well, pursuant to Art. 1.2.

[72] See Cisneros et al. 2022, 4–5, for a recognition of Mexico's legislation as a true ownership law. See also, *United States v. McClain.*

[73] Art. 1 Decreto-Lei No. 4.146 of 4 March 1942, Dispõe sobre a proteção dos depósitos fossilíferos.

[74] Decreto No. 6.734 of 21 January 1941, Aprova o Regulamento a que obedecerá as expedições artísticas e científicas no Brasil.

[75] Decreto No. 98.830 of 15 January 1990, Dispõe sobre a coleta, por estrangeiros, de dados e materiais científicos no Brasil, e dá outras providências.

[76] Portaria MCT No. 55 of 14 March 1990.

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may result in the cancellation of a granted authorization, the seizure and forfeiture of the equipment used, and the collected materials – without prejudice to civil and criminal liability (Art. 13 Decree 98.830).[77]

There is little doubt that Brazil claims ownership of fossils found on its territory and restricts its exports. The 1942 national ownership law applies to "*Ubirajara*" and *Irritator*, whereas the 1990 export restriction only covers "*Ubirajara.*"[78] Moreover, both are type specimens, which, in the case of "*Ubirajara*," means that it should not have been exported in the first place or that it needed to be returned to Brazil because, without a declaration assuring such a return, no collection permits could have been obtained in the first place. In either case, Brazil can reasonably expect a foreign court (here: in Germany) to enforce its national ownership law relating to fossils and, in principle, accept return claims.

Action for restitution under the German Civil Code

Applicable law

As a virtually universally accepted principle of private international law, "the law of the State applies where the movable property is situated at the time of the potential transaction *in rem*"[79] (*lex rei sitae*).[80] German law contains this principle in Art. 43(1) of the Introductory Act to the Civil Code (IACC).[81] Consequently, questions relating to the title of the fossils (and, in particular, their respective purchases by the museums) would generally need to be assessed under German property law after their importation.

General requirements

Since the import of both fossils predated the entry into force of the *Kulturgutschutzgesetz*, no special legislation on cultural property applies to it; it falls under the general provisions on the acquisition of movable property of the German Civil Code (§§ 929 et subseq.). The owner of a thing[82] can bring a restitution action (§ 985 GCC) against its possessor, who must then return it. In assessing claims brought under § 985 GCC, a civil court would first need to determine whether the claimant actually owns the disputed thing. The Regional Court Munich I approached this by clarifying first whether Peru had been the original owner before turning to the question of whether it had lost ownership of the artifact at some point. Second, the respondent to the claim needs to be confirmed as the possessor of the thing. Third, the respondent must not be able to claim a right to possession (§ 986 GCC). Last, any legal objections (especially statutes of limitations) must be ruled out.[83] If all of the above is confirmed, the possessor is legally obliged to make the thing available to the owner in its current location. The costs of making the thing available are borne by the possessor, while the owner bears the cost of picking it up.[84]

A comprehensive review of all procedural and substantive questions of a potential legal action by Brazil is beyond the scope of this Article. Rather, the following sections discuss the

[77] For an overview, analysis, and critique of Brazilian legislation, see Kuhn et al. 2022.

[78] This of course presupposes that the authors' vague declaration that the export of *Irritator* took place "prior to 1990" is truthful.

[79] Siehr 1993, 75.

[80] See also Anton 2010c, paras 1, 18 ff.

[81] Introductory Act to the Civil Code in the version promulgated on 21 September 1994, Federal Law Gazette [Bundesgesetzblatt] I, p. 2494, last amended by Article 2 of the Act of 25 June 2021 (Federal Law Gazette I, p. 2133).

[82] The German legal term *Sache* will be translated as "thing" for the purposes of this Article in line with the official translation of the GCC.

[83] Goez 2017; Armbrüster 2001.

[84] Baldus 2020b, paras 95–96.

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key issues that would presumably have arisen or will arise if Brazil (had) brought a claim under § 985 GCC before a German court to retrieve the two fossils.

Brazil's standing

To bring an action for restitution, Brazil would need to have standing; it needs to demonstrate that it is the owner of the fossil. This is irrespective of whether possession had been lost voluntarily or unwillingly and whether Brazil had ever possessed the fossils.[85] Brazilian law is fairly unambiguous in its conferral of ownership of fossils by the Brazilian state. Both the researchers who studied "*Ubirajara*" and the Ministry confirmed that the fossil left the country long after the entry of the respective legislation came into force. The same is true of *Irritator.* While there is some controversy as to whether legal designations under national ownership statutes should be recognized in foreign courts,[86] convincing arguments and case law support such a recognition. National patrimony laws, which are internationally widespread, are often the only means for protecting such objects against illicit excavations, and, under the principle of territoriality, every state has sovereignty over the design of its property law, which, in both Civil and Common Law systems, does not usually regard possession as a necessary condition for acquiring ownership.[87] The mere fact that property was acquired under a foreign law subject to relatively lenient conditions is insufficient to justify rejecting this legal designation, especially when one considers, for instance, the widely uncontested public ownership designation for undiscovered mineral resources.[88]

Therefore, a German court would need to recognize the legal designation made under a foreign national patrimony law. Brazil has been found to have been the initial owner of the fossils above. This, in turn, raises the question of whether Brazil might have lost title to it later, either through a good faith purchase by the museums or through acquisitive prescription.

Good faith purchase by the museum

The two German museums might argue that they acquired good title to their respective fossil from fossil dealers in Germany through a good faith purchase (1991 for *Irritator*, 2009 for "*Ubirajara*"). Acquiring good title from a person not entitled to it is possible through a *bona fide* purchase pursuant to § 932 GCC. However, this is not possible if the thing was stolen from the owner, is missing, or has been lost in any other way (§ 935(1) GCC), with the burden of proof generally being on Brazil in this situation.[89] While the purchase falls under German law, the cross-border provenance of the fossils raises questions as to what law is to be applied in assessing whether the fossil was lost or stolen within the meaning of § 935(1) GCC.

Generally, in situations where a thing is transferred from one jurisdiction to another, the principle of vested rights prescribes that the new forum state must recognize any lawful change of title to the thing under the law of the state of origin, that is another *lex rei sitae* since it leaves a "property law imprint" (*sachenrechtliche Prägung*) on the thing.[90] "[O]nce a right has been acquired under the applicable *lex rei sitae*, this right should not be questioned once the object has changed its situs."[91]

[85] Spohnheimer 2022, para. 43.
[86] Anton 2010a, paras 3, 106 ff.
[87] Kurpiers 2005, 54–55; Müller-Katzenburg 1996, 245.
[88] Müller-Katzenburg 1996, 244–48.
[89] Kindl 2022, para. 2.
[90] Müller-Katzenburg 1996, 237; see also Art. 43(2) IACC.
[91] Siehr 1993, 77.

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This principle is typically subject to a public policy reservation that relieves a forum state from the obligation to apply foreign substantive law if its outcome is incompatible with the fundamental ideas and values of its legal order.[92] Art. 6 IACC establishes such an *ordre public* exception for Germany and seeks to prevent manifest, untenable incompatibilities with German law and its underlying conceptions of justice.[93]

But does German or Brazilian law apply to assessing a potential loss of the Brazilian fossils? In 2000, the Higher Regional Court Brandenburg ruled on a car stolen in Germany and transported to Poland, where it was resold. A German insurance company, which held title to the car, brought an action for restitution under § 985 GCC. Regarding whether the car had been lost, the court ruled that the Polish legal order had taken over the car with its *Prägung* under German property law, thus subjecting the assessment of whether a thing is lost to the laws of the country where the loss occurred.[94] While more ambiguous concerning the applicable law, Armbrüster similarly argues that since loss relates to questions of possession, assessments made under a foreign legal order should be taken into consideration by German courts.[95]

Benecke finds the view expressed by the court to be contrary to the virtually unanimous majority of scholarly literature, instead arguing that being lost is not a legal *Prägung* as, for instance, ownership of the thing would be. Rather, it represents a factual prerequisite within a property-related provision (namely § 935 GCC), the internal consistency of the application being at odds with subjecting parts of it to a foreign legal order. After all, the court faced a harmonious situation where the law of both countries contained rules on the loss of things. In a different case where the loss occurred in a country whose law provides for different requirements or does not regulate the loss of things at all, an appropriate solution seems difficult to obtain while relying on the court's rationale.[96]

Stoll[97] and Anton[98] also suggest qualifying a loss under *lex rei sitae* based on the decision of a US court in *Kunstsammlungen zu Weimar v. Elicofon.*[99] Similarly, the *Amsterdamer Rechtbank* applied Dutch law to determine whether an incunabulum that was stolen in Frankfurt and sold in the Netherlands qualified as "stolen" under the Dutch Civil Code.[100] Consequently, a considerable body of literature and multiple instances of international jurisprudence dealing specifically with cultural artifacts support an assessment of whether the fossils were lost under the criteria enshrined in German law.

For a thing to qualify as lost, the owner or an intermediary possessor must have involuntarily lost immediate possession of it.[101] Based on what is currently known about the provenance of the two fossils, the Brazilian state never had them under its actual control within the meaning of § 854 GCC, thus not obtaining immediate possession of them despite its good title to the fossil. Further, there is no evidence that it had entrusted an intermediary possessor with the indirect possession of the fossil that could have lost it (§§ 868, 935(1), first sentence GCC).

However, the unique conception of ownership clauses for newly discovered artifacts in national patrimony laws might justify a broader reading of § 935(1) GCC – in line with its

[92] Ibid., 90.
[93] Anton 2010c, para. 3, 239.
[94] OLG Brandenburg, Urteil v. 12.12.2000, Az. 11 U 14/00, NJW-RR 2001, 597.
[95] Armbrüster 2001, 3581.
[96] Benecke 2002, 366–67.
[97] Stoll 1994, 58.
[98] Anton 2010c, para. 3, 85; Anton 2010b, para. 2, 99.
[99] *Kunstsammlungen zu Weimar v. Elicofon*, 536 F. Supp. 829 (E.D.N.Y 1981).
[100] Rechtbank Amsterdam, NedJ 1935, 657.
[101] Oechsler 2020b, para. 3.

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object and purpose. The provision attempts to balance two fundamental interests: the protection of property (on the side of the owner) and the security and easiness of transactions (on the side of the purchaser). Generally, the purchaser must be able to trust the possessor's legal appearance (*Rechtsschein*). If the owner passes their property on to an intermediary possessor within the meaning of § 868 GCC who then voluntarily sells it, this cannot qualify as a loss since the owner made the creation of the respective legal appearance possible.[102] The loyalty risk they willingly entered into prevents their interest in property protection from being the overriding one.[103]

However, it would be inappropriate to interpret this to the disadvantage of states with ownership statutes for archaeological or paleontological objects.[104] The legal appearance of the trader's company that brought the fossils to Germany and sold them to the museums would not, arguably, be imputable to the Brazilian state since it did not deliberately make it the intermediary possessor of the fossil. As far as Brazil is concerned, no conscious loyalty risk was involved that would prevent its interest in property protection from prevailing. On the contrary, it actively seeks to keep fossils from being removed from the country. The situation would be different if Brazil had had an opportunity to enforce its ownership but failed to do so. Here, the appropriation of the fossil could be imputed to Brazil, preventing the fossil from being classified as lost.[105] While the deficient provenance information in the two cases at hand prevents a definitive assessment of this question, this does not seem to be a probable scenario. After all, it would be highly inconsistent to recognize Brazil's ownership of the fossil but deny it access to the protection of its property. Instead, an interpretation of § 935 (1) GCC must take into account notions under Brazilian law in such a way that the norm is adapted in its concrete application so that it integrates the property right established under Brazilian law in a way that corresponds to the significance of that legal designation.[106]

The fossils were thus lost to the Brazilian state although it never had them in its possession – Müller-Katzenburg would even go further and accept a classification of the fossil as stolen.[107] An ancillary consequence is that an action for restitution under § 985 GCC is the only remedy available to Brazil; a claim on account of deprivation of possession (§§ 861, 1007 GCC) is not possible.

Brazil's loss must also have occurred involuntarily, i.e., without or against its will. This condition was already met when the owner was unaware of the loss of possession.[108] Again, the provenance of the fossils is too opaque to determine this with certainty but there is no indication that Brazil consented to the loss of possession or was aware of it. However, Brazil could rely on claiming ownership over all fossils found on its territory and subjecting their exportation to an official authorization as evidence of a permanent export; therefore, the export of the "*Ubirajara*" specimen is inconsistent with Brazilian legislation and policy. That makes the case for "*Ubirajara*" as an artifact that falls under a national ownership statute and related export restrictions somewhat stronger than for *Irritator.* However, both fossils were probably unlawfully excavated and must be considered lost without or against Brazil's will.[109]

The fossils should have been classified as lost things belonging to the Brazilian state. The museums could not have acquired title to the fossil in good faith under § 932 GCC pursuant to § 935(1) GCC. After all, even the Ministry of Science, Research and the Arts of Baden-

[102] Kindl 2022, para. 1.
[103] Oechsler 2020b, para. 1.
[104] Anton 2010b, para. 2, 100.
[105] Weidner 2001, 145.
[106] Müller-Katzenburg 1996, 305.
[107] Ibid., 307.
[108] Klinck 2022b, paras 9, 10.
[109] Müller-Katzenburg 1996, 306–7.

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Württemberg doubts the lawful acquisition of the fossil.[110] Consequently, Brazil did not lose ownership of the fossil after the purchases in Germany; the museums merely became the new possessors.

Even if the fossil does not fall under the exception of § 935(1) GCC, the museums would not have acquired a good title since the transaction might violate public policy (§ 138 GCC) and, therefore, be void. In the *Nigerian Objets d'Art Export Case*, the court referred to common values shared by the international community concerning every nation's right to protect its cultural heritage. It declared an insurance agreement incompatible with German public policy. The court had considered drafting and adopting the (inapplicable) 1970 UNESCO Convention as a codification of well-established shared normative principles.[111] Applying the rationale *mutatis mutandis* to the purchases of the fossils could provide a strong subsidiary argument against the museums' acquisition of good title.

Acquisitive prescription

Even if the museums did not acquire title to the fossil through a good faith purchase, it could have done so under the doctrine of acquisitive prescription (*Ersitzung*): § 937(1) GCC provides that a person who has a movable thing in their proprietary possession for ten years acquires ownership. It is worth noting, however, that fossils as property of the Brazilian state qualify as proprietary public goods (*bens públicos dominicais*, Art. 99(III) Brazilian Civil Code, BCC), and while they can, in principle, be alienated in accordance with the law (Art. 101 BCC), acquisitive prescription (*usucapião*) is not possible (Art. 102 BCC). It is well-established that restrictions on the disposal or sale of public goods (for example, a declaration as *res extra commercium*) affect and shape the property law status of a thing. In this crucial respect, they differ from the qualification of a thing as being lost, which is a mere *datum* to be considered within a property-related provision (Art. 935(1) GCC). Unlike the latter, the former needs to be recognized even when the thing transitions into another jurisdiction.[112] This already represents a compelling argument against the possibility of acquisitive prescription in Germany.

Assuming this possibility *arguendo*, the museum would bear the burden of proof concerning its possession of the fossil and the expiry of the acquisition period. It would need to demonstrate that it gained possession of the fossil more than ten years ago and remained in its possession ever since.[113] While it is unclear whether the SMNS documented the purchase of the *Irritator* specimen, the SMNK provided proof that the "*Ubirajara*" specimen was delivered on 15 December 2009.[114] Consequently, the museum would have little difficulty demonstrating that the acquisition period lapsed; although § 939 GCC allows for the suspension of the acquisition period, none of the possible grounds for this (§§ 203-205, 207, 210 and 211 GCC) come into consideration here.[115]

The burden of proof then switches to Brazil, which would need to demonstrate that the possession by the museums was not in good faith, thus preventing acquisitive prescription (§ 937(2) GCC).[116] Here, the due diligence standard varies with time. While knowledge or grossly negligent ignorance on the side of the possessor concerning their own deficient legal position demonstrates bad faith, only gaining positive knowledge (*mala fides superveniens*)

[110] Landtag von Baden-Württemberg, Kleine Anfrage "Umgang mit dem Fossil "*Ubirajara jubatus*" aus dem Naturkundemuseum Karlsruhe," vom 19.9.2022, Drs. 17/3222.

[111] *Nigerian Objets d'Art Export Case*; see also Müller-Katzenburg 1996, 293–97; Baade 1995, 456.

[112] Anton 2010a, para. 3, 235.

[113] Anton 2010b, para. 4, 39.

[114] Landtag von Baden-Württemberg, Kleine Anfrage.

[115] The acquisition period is also independent of the owner's knowledge: Anton 2010b, para. 4 41.

[116] Buchwitz 2022, para. 52.

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does so during the acquisition period.[117] Concerning "*Ubirajara*," the earliest incidents capable of producing a *mala fides supverveniens* came after the study's publication in 2020, after the acquisition period had already lapsed. Concerning *Irritator*, it is difficult to determine whether positive knowledge was obtained prior to 2001.

Therefore, Brazil could not demonstrate the museums' knowledge that they did not have good titles for the respective fossils. Hence, only gross negligence at the time of acquisition remains for consideration. Here, it is crucial to establish the appropriate due diligence standard. The baseline for this is an average standard in the sense of the objectified concept of negligence under consideration of the commercial sphere of the acquirer.[118] Generally, an acquirer must have been able to recognize that they did not acquire good title to the thing without paying particularly close attention and thorough consideration, even though their capacity to notice and recognize it was average.[119] In a second step, this standard is further individualized with a view to the special characteristics of the acquirer, such as outstanding expertise in a relevant field and other aspects of the case under review.[120]

German jurisprudence established an exceptionally high due diligence standard for the acquisitive presumption of artworks: professional art dealers must research the provenance of the work they purchase.[121] While this is generally not accepted regarding movable property, the exceptional quality of artworks that are unique, irreplaceable, and socio-culturally important distinguishes them from conventional commercial goods to a degree that warrants an exception.[122] At the same time, it is debatable whether this applies to most fossils. However, name-bearing specimens like those of "*Ubirajara*" and *Irritator* certainly share many characteristics that justify an exception in an art trade context. Similarly, the two natural history museums must be held to the same high standards as art museums in acquiring artifacts. In the case of the SMNK especially, it would be unreasonable to expect the same due diligence from one of the most important German natural history museums, which hosts 450,000 fossils and supports substantial research activity, *inter alia*, in the field of paleontology, including excavations in Latin America, as from a private layperson.[123]

The parallels between illicitly trafficked antiquities and fossils reveal that the circumstances of the purchases would need to have raised suspicions. In a case concerning the sale of an ancient Greek figurine under suspicious circumstances in 1973, the Higher Regional Court in Munich found the purchaser to be under an obligation to ask about the thing's provenance since it was commonly known that export restrictions in source countries protect valuable antiquities, an obligation which, in that case, required even more than an affidavit from the seller.[124] Such a suspicion arises if the seller of the thing can hardly, or not at all, provide convincing information concerning its provenance and lawful acquisition.[125] After all, *Irritator* got its name from multiple irregularities and confusion on the side of the scientists – a consequence of the specimen's doubtful provenance.[126]

[117] Baldus 2020a, para. 63.

[118] Heinze 2020, para. 49; Klinck 2022a, para. 37.

[119] Application *mutatis mutandis* of the formula developed by the German Federal Court of Justice: BGH, Urteil v. 05.07.1978, Az. VIII ZR 180/77, BeckRS 1978, 31119502.

[120] Anton 2010b, para. 3, 122.

[121] Buchwitz 2022,. Paras 98–100.

[122] Anton 2010b, paras 3, 132 f.; Müller-Katzenburg 1996, 318.

[123] Since there is no clear publicly available information concerning the identity of the individuals that purchased, the due diligence standard cannot be concretized any further here; however, if they were paleontologists, their relevant specialist knowledge would justify raising the standard even further.

[124] OLG München, Urteil v. 10.01.1973, Az: VIII ZR 132/71, cited in Anton 2010b, para. 3, 141.

[125] Oechsler 2020a, para. 67.

[126] Martill et al. 1996.

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As far as the burden of proof is concerned, Brazil would have only needed to demonstrate the factual circumstances that trigger the museums' due diligence obligation (here, private companies selling a fossil imported from a country that strongly restricts such exports). The museums would, in turn, need to prove that they complied with it,[127] both through internal institutional efforts and a consultation with external experts, if necessary.[128]

The museums inquired about the provenance of the fossils to the degree necessary to indicate the fossils' geographical origin in the respective publications. However, the purpose of mandatory provenance inquiries and research is not merely to establish facts – it serves to dispel doubts concerning or verifying ownership of the fossil so that the acquirer can be considered to have good faith in their own title so that acquisitive prescription becomes possible. The question then becomes whether the museums acted with gross negligence when they failed to consider the legal implications of the factual information they retrieved through their inquiry. A company selling a fossil exported directly from Brazil will, with a probability bordering on certainty, not have good title to it, especially if it cannot provide export permits. This presupposes the purchaser's knowledge of Brazilian paleontological legislation – a knowledge that museums should have as professional institutions in the field of paleontology that regularly deal with cross-border fossil transfers. Determining the geographical provenance alone is not sufficient to dispel suspicions relating to the company's title if it is reasonable to require private buyers of extraordinarily valuable cultural goods to contact law enforcement and/or the country of origin to verify the seller's ownership.[129] This certainly can be expected *a fortiori* from large natural history museums.[130] In the case of a cultural good moving across borders, the due diligence obligation of the acquirer must go beyond factually establishing the location of origin and consider the legal implications of origin for title to a thing. Regarding the fossils at hand, a simple request for information on the legislation governing the collection and export of Brazilian fossils to a relevant government body or even a Brazilian paleontologist may have been sufficient to demonstrate that it is unlikely the dealers had title to it. Given the exceptionally high standards applicable to museum professionals, this is not an unreasonable effort – if one assumes that certain fossils are to be treated analogously to artworks.

The museums should have known they could not acquire good title for a fossil exported from Brazil. There is a strong indication that, by failing to research and recognize the legal implications of the fossils' provenance, they violated their due diligence obligation and hence cannot be considered to have acted in good faith. Consequently, they could probably not obtain good titles to "*Ubirajara*" and *Irritator*, respectively, through acquisitive prescription.

Statute of limitations

Although Brazil did not lose ownership of the fossils, its restitution claims might come under a statute of limitations, which, in Germany, would be the case after 30 years (§§ 194(1), 197 (1) No. 2 GCC). After this period lapses, the possessor can refuse to return the thing to the owner (§ 214(1) GCC) even though it is only the claim that lapses, not the ownership of the thing in question.[131] However, it is unclear, *prima facie,* when this period began for the two fossils.

Generally, the 30-year period starts when a claim arises (§ 200 GCC), or, more precisely, as soon as a claim could be asserted for the first time and, if necessary, enforced by way of legal

[127] Anton 2010b, para. 3, 177.
[128] Ibid., para. 3, 167.
[129] As above, para. 3, 166.
[130] Müller-Katzenburg 1996, 315.
[131] Schulze et al. 2022, para. 3.

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action,[132] regardless of whether the owner has knowledge of the circumstances entitling them to a claim or even the identity of the possessor.[133] The fact that both fossils went through the hands of several intermediaries does not suspend or reset the limitation period (§ 198 GCC),[134] irrespective of the qualification of the fossil as being lost within the meaning of § 935(1) GCC.[135]

In principle, the law of Germany as the forum state must recognize and include those parts of the limitation period during which the thing was located in a different legal order – given that it provides for a statute of limitations for bad faith possessors and institutions.[136] This is the case for Brazil. Art. 189 BCC provides that starting from the violation of a right, the right-holder is entitled to a claim that lapsed after ten years (Art. 205 BCC), and an action for restitution (Art. 1.228 BCC) is not among the exceptions listed in Art. 206 BCC.

What is therefore decisive is whether the limitation had already lapsed while the fossil was still in Brazil. Should that be the case, German law would have to recognize this since Art. 43(2) IACC prevents previously concluded facts under a foreign statute from being affected by the new one.[137] In such a situation, the museums could successfully raise the defense of statute of limitations. Should a limitation period have started in Brazil and not have lapsed, this would constitute a so-called *offener gestreckter Erwerbstatbestand*: an open, stretched factual condition pursuant to Art. 43(3) IACC, which is to be considered under German law as if it had taken place in Germany in its entirety. The pre-export period would, therefore, be included in the 30 years.[138]

In any case, the burden of proof for the expiry of the limitation period would be on the museums as the parties raising this as a defense.[139] While Brazil, as the claimant, needs to prove its ownership and the museum's possession of the fossils,[140] this relationship is reversed regarding a defense against a restitution claim under § 986 GCC, the invocation of a right to possession. Here, the SMNK, as the respondent, would need to prove having such a right.[141] In this systematic, the burden of proof concerning the statute of limitations must be analogous to that of § 986 GCC: it also represents a defense, one that is entirely detached from the issue of title that justifies the burden of proof on the claimant under § 985 GCC. Hardly anything is known about the circumstances of the fossils' discoveries, which again complicates the present assessment. The museums would have to demonstrate that the limitation period in Brazil had already lapsed prior to export or that the fossil had been excavated more than 30 years ago. With respect to "*Ubirajara,*" it is doubtful whether it can prevail in the face of this challenge. On the other hand, the return claim for *Irritator* will probably come under the statute of limitations. The SMNS might not be able to prove when the fossil was excavated, but evidence of its acquisition in 1991 would suffice to convincingly argue that Brazil's claim had been barred under the statute of limitations since 2021.

[132] Anton 2010b, para. 5, 69.
[133] Klose 2014, 231; Finkenauer 2014, 481.
[134] Müller-Katzenburg 1999, 2557; Armbrüster 2001, 3586.
[135] Piekenbrock 2022, para. 10.
[136] Kurpiers 2005, 47–49.
[137] Gomille 2017, 60.
[138] See above, 61.
[139] Baumgärtel 1981, 65.
[140] Baldus 2020b, para. 265.
[141] Spohnheimer 2022, para. 120.

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Conclusion

Germany's voluntary return of "*Ubirajara*" represents a welcome resolution to the most high-profile international fossil dispute in recent years. However, there are considerable reasons why Brazil would not have needed to rely on Germany's benevolence; private law would have offered a viable alternative had the German authorities retained their initial reluctant position.

A compelling case can be made in favor of considering the Brazilian state the owner of the two fossils by virtue of its national law. It also seems unlikely that Brazil lost title throughout their respective journeys to Germany. The purchases in Germany probably did not bring about a change in title through an acquisition in good faith either since the fossils qualify as lost things. Also, the museums do not seem to have gained good title through acquisitive prescription since they, arguably, were grossly negligent when they failed to sufficiently enquire about the legality of the export of the fossil. The statute of limitation would only be available as a defense to the SMNS; the SMNK could not rely on it.

Therefore, the assertion that the fossils are the property of Baden-Württemberg is almost certainly wrong. At least, with respect to "*Ubirajara*," a potential Brazilian claim for restitution under § 985 GCC before a German Court could have been successful. The claims that #UbirajaraBelongstoBR and #IrritatorBelongstoBR can legally be substantiated. There are, however, broader implications to this finding. "*Ubirajara*" has received an unusual amount of attention, and the more recent controversy surrounding *Irritator*[142] shows that its overall characteristics as a case of illicit fossil trafficking are far from uncommon.[143] This Article concerns Germany and Brazil, but many present legal considerations are relevant to other situations. Brazil is not the only country that claims national ownership over fossils found in its territory, and Germany is not the only country to allow owners to claim restitution of their property. Other Civil Law countries adopted the Roman *rei vindicatio* or the Common Law doctrine of replevin.

Therefore, property law could play an important role in fossil cases, filling the gap created by the cultural property protection regime established under public (international) law, which might be inapplicable (as in the present case) or contain unreasonably high requirements for source countries that they can virtually never meet in practice (as in the several cases concerning pre-Columbian artifacts in Germany). Therefore, source country governments who meet resistance to fossil return claims or who are unwilling to engage with them in the first place on the diplomatic level might be well advised to consider private law as an alternative means to effect the return of an illicitly exported paleontological object.

At the same time, high-profile cases such as that of "*Ubirajara*" shed an important light on fossils as an often overlooked category of cultural property. Not only did #UbirajaraBelongstoBR quickly attract many passionate supporters from the Brazilian public, but regional[144] and national[145] news outlets featured the story, too. This reporting, *inter alia*, resulted in a parliamentary inquiry in the *Landtag* of Baden-Württemberg. This significantly diversifies

[142] Baker 2023.

[143] Black 2022.

[144] Proetel, Stefan. "Meinung: Ein Makel für das Karlsruher Naturkundemuseum bleibt." Badische Neueste Nachrichten, 18 July 2022a. https://bnn.de/karlsruhe/karlsruhe-stadt/meinung-dino-fossil-streit-karlsruhe-naturkundemuseum-makel-bleibt.

[145] "Wohl illegal beschafftes Dino-Fossil zurückgegeben." Süddeutsche Zeitung, 5 June 2023. https://www.sueddeutsche.de/wissen/wissenschaft-wohl-illegal-beschafftes-dino-fossil-zurueckgegeben-dpa.urn-newsml-dpa-com-20090101-230605-99-951797.

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the discourse on cultural property, whose inclusion of paleontological objects[146] and natural history collections more broadly[147] is more than due.

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[146] Stewens 2022.

[147] Ashby and Machin 2021.

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