Archeological Resources Protection
Federal Prosecution Sourcebook

SUPPLEMENT

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TABLE OF CONTENTS

Page

ADMINISTRATIVE, EXECUTIVE AND LEGISLATIVE MATERIALS

International and Maritime

5 UNESCO Convention on the Protection of the Underwater Cultural Heritage, opened for ratification, acceptance, approval, or accession Nov. 6, 2001, 41 I.L.M. 40 (Jan. 2002), <www.unesco.org/culture/legalprotection/water/html_eng/convention.shtml> (accessed Dec. 4, 2001)

Other

27 U.S. Sentencing Commission, Cultural Heritage, in "Reader Friendly" Version of the 2002 Amendments Sent to Congress 23 (2002), <www.ussc.gov/guidelin.htm> (accessed June 27, 2002)

CASES

ARPA

38 U.S. v. Lynch, Case No. K98-001 CR (JMF) (D. Alaska filed ____, 2001) (on remand from 9th Cir.) (superseding indictment)

International Trafficking

41 U.S. v. Schultz, 178 F. Supp.2d 445 (S.D.N.Y. 2002)

- 41 a. Govt.'s mem. in opposition to defendant's motion to dismiss indictment (w/o exhibits)
- 97 b. Summary of argument and interest of amici Archaeological Institute of America, American Anthropological Association, Society for American Archaeology, Society for Historical Archaeology, and U.S. Committee for International Council on Museums and Sites
- 107 c. District court opinion

Page

NAGPRA

111 U.S. v. One Eagle-Feathered War Bonnet, Civil Action No. 00-599 (E.D. Pa. Nov. 6, 2001)

111 a. Govt.'s motion to dismiss claims of Indian tribes or in the alternative for summary judgment (Sept. 25, 2001)

113 b. Mem. of law in support of Govt.'s motion (Sept. 25, 2001)

127 c. Order: Govt.'s motion for summary judgment granted; war bonnet to be forfeited to U.S.; title to war bonnet in U.S.; U.S. Marshal to dispose of war bonnet to Dept. of Interior; forfeiture of war bonnet to U.S. subject and subordinate to NAGPRA claims of Indian tribes; NAGPRA proceedings to begin forthwith: and Federal court review of Dept. of Interior proceedings available (Nov. 6, 2001)

Marine Environment

129 Tug Allie-B, Inc. v. U.S., 273 F.3d 936 (11th Cir. 2001)

150 R.M.S. Titanic, Incorporated v. Wrecked and Abandoned Vessel, 286 F.3d 194 (4th Cir. 2002)

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Other

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Page

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CONVENTION ON THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE

UNESCO
Paris, 2 November 2001

CONVENTION ON THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE

The General Conference of the United Nations Educational, Scientific and Cultural Organization, meeting in Paris from 15 October to 3 November 2001, at its 31st session,

Acknowledging the importance of underwater cultural heritage as an integral part of the cultural heritage of humanity and a particularly important element in the history of peoples, nations, and their relations with each other concerning their common heritage,

Realizing the importance of protecting and preserving the underwater cultural heritage and that responsibility therefor rests with all States,

Noting growing public interest in and public appreciation of underwater cultural heritage,

Convinced of the importance of research, information and education to the protection and preservation of underwater cultural heritage,

Convinced of the public's right to enjoy the educational and recreational benefits of responsible non-intrusive access to *in situ* underwater cultural heritage, and of the value of public education to contribute to awareness, appreciation and protection of that heritage,

Aware of the fact that underwater cultural heritage is threatened by unauthorized activities directed at it, and of the need for stronger measures to prevent such activities,

Conscious of the need to respond appropriately to the possible negative impact on underwater cultural heritage of legitimate activities that may incidentally affect it,

Deeply concerned by the increasing commercial exploitation of underwater cultural heritage, and in particular by certain activities aimed at the sale, acquisition or barter of underwater cultural heritage,

Aware of the availability of advanced technology that enhances discovery of and access to underwater cultural heritage,

Believing that cooperation among States, international organizations, scientific institutions, professional organizations, archaeologists, divers, other interested parties and the public at large is essential for the protection of underwater cultural heritage,

Considering that survey, excavation and protection of underwater cultural heritage necessitate the availability and application of special scientific methods and the use of suitable techniques and equipment as well as a high degree of professional specialization, all of which indicate a need for uniform governing criteria,

Realizing the need to codify and progressively develop rules relating to the protection and preservation of underwater cultural heritage in conformity with international law and practice, including the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 14 November 1970, the UNESCO Convention for the Protection of the World Cultural and Natural Heritage of 16 November 1972 and the United Nations Convention on the Law of the Sea of 10 December 1982,

Committed to improving the effectiveness of measures at international, regional and national levels for the preservation *in situ* or, if necessary for scientific or protective purposes, the careful recovery of underwater cultural heritage,

Having decided at its twenty-ninth session that this question should be made the subject of an international convention,

Adopts this second day of November 2001 this Convention.

Article 1 – Definitions

For the purposes of this Convention:

1. (a) "Underwater cultural heritage" means all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years such as:

   (i) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context;

   (ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and

   (iii) objects of prehistoric character.

   (b) Pipelines and cables placed on the seabed shall not be considered as underwater cultural heritage.

   (c) Installations other than pipelines and cables, placed on the seabed and still in use, shall not be considered as underwater cultural heritage.

2. (a) "States Parties" means States which have consented to be bound by this Convention and for which this Convention is in force.

   (b) This Convention applies *mutatis mutandis* to those territories referred to in Article 26, paragraph 2(b), which become Parties to this Convention in accordance with the conditions set out in that paragraph, and to that extent "States Parties" refers to those territories.

3. "UNESCO" means the United Nations Educational, Scientific and Cultural Organization.

4. "Director-General" means the Director-General of UNESCO.

5. "Area" means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.

6. "Activities directed at underwater cultural heritage" means activities having underwater cultural heritage as their primary object and which may, directly or indirectly, physically disturb or otherwise damage underwater cultural heritage.

7. "Activities incidentally affecting underwater cultural heritage" means activities which, despite not having underwater cultural heritage as their primary object or one of their objects, may physically disturb or otherwise damage underwater cultural heritage.

8. "State vessels and aircraft" means warships, and other vessels or aircraft that were owned or operated by a State and used, at the time of sinking, only for government non-commercial purposes, that are identified as such and that meet the definition of underwater cultural heritage.

9. "Rules" means the Rules concerning activities directed at underwater cultural heritage, as referred to in Article 33 of this Convention.

Article 2 – Objectives and general principles

1. This Convention aims to ensure and strengthen the protection of underwater cultural heritage.

2. States Parties shall cooperate in the protection of underwater cultural heritage.

3. States Parties shall preserve underwater cultural heritage for the benefit of humanity in conformity with the provisions of this Convention.

4. States Parties shall, individually or jointly as appropriate, take all appropriate measures in conformity with this Convention and with international law that are necessary to protect underwater cultural heritage, using for this purpose the best practicable means at their disposal and in accordance with their capabilities.

5. The preservation *in situ* of underwater cultural heritage shall be considered as the first option before allowing or engaging in any activities directed at this heritage.

6. Recovered underwater cultural heritage shall be deposited, conserved and managed in a manner that ensures its long-term preservation.

7. Underwater cultural heritage shall not be commercially exploited.

8. Consistent with State practice and international law, including the United Nations Convention on the Law of the Sea, nothing in this Convention shall be interpreted as modifying the rules of international law and State practice pertaining to sovereign immunities, nor any State's rights with respect to its State vessels and aircraft.

9. States Parties shall ensure that proper respect is given to all human remains located in maritime waters.

10. Responsible non-intrusive access to observe or document *in situ* underwater cultural heritage shall be encouraged to create public awareness, appreciation, and protection of the heritage except where such access is incompatible with its protection and management.

11. No act or activity undertaken on the basis of this Convention shall constitute grounds for claiming, contending or disputing any claim to national sovereignty or jurisdiction.

Article 3 – Relationship between this Convention and the United Nations Convention on the Law of the Sea

Nothing in this Convention shall prejudice the rights, jurisdiction and duties of States under international law, including the United Nations Convention on the Law of the Sea. This Convention shall be interpreted and applied in the context of and in a manner consistent with international law, including the United Nations Convention on the Law of the Sea.

Article 4 – Relationship to law of salvage and law of finds

Any activity relating to underwater cultural heritage to which this Convention applies shall not be subject to the law of salvage or law of finds, unless it:

(a) is authorized by the competent authorities, and

(b) is in full conformity with this Convention, and

(c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection.

Article 5 – Activities incidentally affecting underwater cultural heritage

Each State Party shall use the best practicable means at its disposal to prevent or mitigate any adverse effects that might arise from activities under its jurisdiction incidentally affecting underwater cultural heritage.

Article 6 – Bilateral, regional or other multilateral agreements

1. States Parties are encouraged to enter into bilateral, regional or other multilateral agreements or develop existing agreements, for the preservation of underwater cultural heritage. All such agreements shall be in full conformity with the provisions of this Convention and shall not dilute its universal character. States may, in such agreements, adopt rules and regulations which would ensure better protection of underwater cultural heritage than those adopted in this Convention.

2. The Parties to such bilateral, regional or other multilateral agreements may invite States with a verifiable link, especially a cultural, historical or archaeological link, to the underwater cultural heritage concerned to join such agreements.

3. This Convention shall not alter the rights and obligations of States Parties regarding the protection of sunken vessels, arising from other bilateral, regional or other multilateral agreements concluded before its adoption, and, in particular, those that are in conformity with the purposes of this Convention.

Article 7 – Underwater cultural heritage in internal waters, archipelagic waters and territorial sea

1. States Parties, in the exercise of their sovereignty, have the exclusive right to regulate and authorize activities directed at underwater cultural heritage in their internal waters, archipelagic waters and territorial sea.

2. Without prejudice to other international agreements and rules of international law regarding the protection of underwater cultural heritage, States Parties shall require that the Rules be applied to activities directed at underwater cultural heritage in their internal waters, archipelagic waters and territorial sea.

3. Within their archipelagic waters and territorial sea, in the exercise of their sovereignty and in recognition of general practice among States, States Parties, with a view to cooperating on the best methods of protecting State vessels and aircraft, should inform the flag State Party to this Convention and, if applicable, other States with a verifiable link, especially a cultural, historical or archaeological link, with respect to the discovery of such identifiable State vessels and aircraft.

Article 8 – Underwater cultural heritage in the contiguous zone

Without prejudice to and in addition to Articles 9 and 10, and in accordance with Article 303, paragraph 2, of the United Nations Convention on the Law of the Sea, States Parties may regulate and authorize activities directed at underwater cultural heritage within their contiguous zone. In so doing, they shall require that the Rules be applied.

Article 9 – Reporting and notification in the exclusive economic zone and on the continental shelf

1. All States Parties have a responsibility to protect underwater cultural heritage in the exclusive economic zone and on the continental shelf in conformity with this Convention.

Accordingly:

(a) a State Party shall require that when its national, or a vessel flying its flag, discovers or intends to engage in activities directed at underwater cultural heritage located in its exclusive economic zone or on its continental shelf, the national or the master of the vessel shall report such discovery or activity to it;

(b) in the exclusive economic zone or on the continental shelf of another State Party:

(i) States Parties shall require the national or the master of the vessel to report such discovery or activity to them and to that other State Party;

(ii) alternatively, a State Party shall require the national or master of the vessel to report such discovery or activity to it and shall ensure the rapid and effective transmission of such reports to all other States Parties.

2. On depositing its instrument of ratification, acceptance, approval or accession, a State Party shall declare the manner in which reports will be transmitted under paragraph 1(b) of this Article.

3. A State Party shall notify the Director-General of discoveries or activities reported to it under paragraph 1 of this Article.

4. The Director-General shall promptly make available to all States Parties any information notified to him under paragraph 3 of this Article.

5. Any State Party may declare to the State Party in whose exclusive economic zone or on whose continental shelf the underwater cultural heritage is located its interest in being consulted on how to ensure the effective protection of that underwater cultural heritage. Such declaration shall be based on a verifiable link, especially a cultural, historical or archaeological link, to the underwater cultural heritage concerned.

Article 10 – Protection of underwater cultural heritage in the exclusive economic zone and on the continental shelf

1. No authorization shall be granted for an activity directed at underwater cultural heritage located in the exclusive economic zone or on the continental shelf except in conformity with the provisions of this Article.

2. A State Party in whose exclusive economic zone or on whose continental shelf underwater cultural heritage is located has the right to prohibit or authorize any activity directed at such heritage to prevent interference with its sovereign rights or jurisdiction as provided for by international law including the United Nations Convention on the Law of the Sea.

3. Where there is a discovery of underwater cultural heritage or it is intended that activity shall be directed at underwater cultural heritage in a State Party's exclusive economic zone or on its continental shelf, that State Party shall:

(a) consult all other States Parties which have declared an interest under Article 9, paragraph 5, on how best to protect the underwater cultural heritage;

(b) coordinate such consultations as "Coordinating State", unless it expressly declares that it does not wish to do so, in which case the States Parties which have declared an interest under Article 9, paragraph 5, shall appoint a Coordinating State.

4. Without prejudice to the duty of all States Parties to protect underwater cultural heritage by way of all practicable measures taken in accordance with international law to prevent immediate danger to the underwater cultural heritage, including looting, the Coordinating State may take all practicable measures, and/or issue any necessary authorizations in conformity with this Convention and, if necessary prior to consultations, to prevent any immediate danger to the underwater cultural heritage, whether arising from human activities or any other cause, including looting. In taking such measures assistance may be requested from other States Parties.

5. The Coordinating State:

(a) shall implement measures of protection which have been agreed by the consulting States, which include the Coordinating State, unless the consulting States, which include the Coordinating State, agree that another State Party shall implement those measures;

(b) shall issue all necessary authorizations for such agreed measures in conformity with the Rules, unless the consulting States, which include the Coordinating State, agree that another State Party shall issue those authorizations;

(c) may conduct any necessary preliminary research on the underwater cultural heritage and shall issue all necessary authorizations therefor, and shall promptly inform the Director-General of the results, who in turn will make such information promptly available to other States Parties.

6. In coordinating consultations, taking measures, conducting preliminary research and/or issuing authorizations pursuant to this Article, the Coordinating State shall act on behalf of the States Parties as a whole and not in its own interest. Any such action shall not in itself constitute a basis for the assertion of any preferential or jurisdictional rights not provided for in international law, including the United Nations Convention on the Law of the Sea.

7. Subject to the provisions of paragraphs 2 and 4 of this Article, no activity directed at State vessels and aircraft shall be conducted without the agreement of the flag State and the collaboration of the Coordinating State.

Article 11 – Reporting and notification in the Area

1. States Parties have a responsibility to protect underwater cultural heritage in the Area in conformity with this Convention and Article 149 of the United Nations Convention on the Law of the Sea. Accordingly when a national, or a vessel flying the flag of a State Party, discovers or intends to engage in activities directed at underwater cultural heritage located in the Area, that State Party shall require its national, or the master of the vessel, to report such discovery or activity to it.

2. States Parties shall notify the Director-General and the Secretary-General of the International Seabed Authority of such discoveries or activities reported to them.

3. The Director-General shall promptly make available to all States Parties any such information supplied by States Parties.

4. Any State Party may declare to the Director-General its interest in being consulted on how to ensure the effective protection of that underwater cultural heritage. Such declaration shall be based on a verifiable link to the underwater cultural heritage concerned, particular regard being paid to the preferential rights of States of cultural, historical or archaeological origin.

Article 12 – Protection of underwater cultural heritage in the Area

1. No authorization shall be granted for any activity directed at underwater cultural heritage located in the Area except in conformity with the provisions of this Article.

2. The Director-General shall invite all States Parties which have declared an interest under Article 11, paragraph 4, to consult on how best to protect the underwater cultural heritage, and to appoint a State Party to coordinate such consultations as the "Coordinating State". The Director-General shall also invite the International Seabed Authority to participate in such consultations.

3. All States Parties may take all practicable measures in conformity with this Convention, if necessary prior to consultations, to prevent any immediate danger to the underwater cultural heritage, whether arising from human activity or any other cause including looting.

4. The Coordinating State shall:

(a) implement measures of protection which have been agreed by the consulting States, which include the Coordinating State, unless the consulting States, which include the Coordinating State, agree that another State Party shall implement those measures; and

(b) issue all necessary authorizations for such agreed measures, in conformity with this Convention, unless the consulting States, which include the Coordinating State, agree that another State Party shall issue those authorizations.

5. The Coordinating State may conduct any necessary preliminary research on the underwater cultural heritage and shall issue all necessary authorizations therefor, and shall promptly inform the Director-General of the results, who in turn shall make such information available to other States Parties.

6. In coordinating consultations, taking measures, conducting preliminary research, and/or issuing authorizations pursuant to this Article, the Coordinating State shall act for the benefit of humanity as a whole, on behalf of all States Parties. Particular regard shall be paid to the preferential rights of States of cultural, historical or archaeological origin in respect of the underwater cultural heritage concerned.

7. No State Party shall undertake or authorize activities directed at State vessels and aircraft in the Area without the consent of the flag State.

Article 13 – Sovereign immunity

Warships and other government ships or military aircraft with sovereign immunity, operated for non-commercial purposes, undertaking their normal mode of operations, and not engaged in activities directed at underwater cultural heritage, shall not be obliged to report discoveries of underwater cultural heritage under Articles 9, 10, 11 and 12 of this Convention. However States Parties shall ensure, by the adoption of appropriate measures not impairing the operations or operational capabilities of their warships or other government ships or military aircraft with sovereign immunity operated for non-commercial purposes, that they comply, as far as is reasonable and practicable, with Articles 9, 10, 11 and 12 of this Convention.

Article 14 – Control of entry into the territory, dealing and possession

States Parties shall take measures to prevent the entry into their territory, the dealing in, or the possession of, underwater cultural heritage illicitly exported and/or recovered, where recovery was contrary to this Convention.

Article 15 – Non-use of areas under the jurisdiction of States Parties

States Parties shall take measures to prohibit the use of their territory, including their maritime ports, as well as artificial islands, installations and structures under their exclusive jurisdiction or control, in support of any activity directed at underwater cultural heritage which is not in conformity with this Convention.

Article 16 – Measures relating to nationals and vessels

States Parties shall take all practicable measures to ensure that their nationals and vessels flying their flag do not engage in any activity directed at underwater cultural heritage in a manner not in conformity with this Convention.

Article 17 – Sanctions

1. Each State Party shall impose sanctions for violations of measures it has taken to implement this Convention.

2. Sanctions applicable in respect of violations shall be adequate in severity to be effective in securing compliance with this Convention and to discourage violations wherever they occur and shall deprive offenders of the benefit deriving from their illegal activities.

3. States Parties shall cooperate to ensure enforcement of sanctions imposed under this Article.

Article 18 – Seizure and disposition of underwater cultural heritage

1. Each State Party shall take measures providing for the seizure of underwater cultural heritage in its territory that has been recovered in a manner not in conformity with this Convention.

2. Each State Party shall record, protect and take all reasonable measures to stabilize underwater cultural heritage seized under this Convention.

3. Each State Party shall notify the Director-General and any other State with a verifiable link, especially a cultural, historical or archaeological link, to the underwater cultural heritage concerned of any seizure of underwater cultural heritage that it has made under this Convention.

4. A State Party which has seized underwater cultural heritage shall ensure that its disposition be for the public benefit, taking into account the need for conservation and research; the need for reassembly of a dispersed collection; the need for public access, exhibition and education; and the interests of any State with a verifiable link, especially a cultural, historical or archaeological link, in respect of the underwater cultural heritage concerned.

Article 19 – Cooperation and information-sharing

1. States Parties shall cooperate and assist each other in the protection and management of underwater cultural heritage under this Convention, including, where practicable, collaborating in the investigation, excavation, documentation, conservation, study and presentation of such heritage.

2. To the extent compatible with the purposes of this Convention, each State Party undertakes to share information with other States Parties concerning underwater cultural heritage, including discovery of heritage, location of heritage, heritage excavated or recovered contrary to this Convention or otherwise in violation of international law, pertinent scientific methodology and technology, and legal developments relating to such heritage.

3. Information shared between States Parties, or between UNESCO and States Parties, regarding the discovery or location of underwater cultural heritage shall, to the extent compatible with their national legislation, be kept confidential and reserved to competent authorities of States Parties as long as the disclosure of such information might endanger or otherwise put at risk the preservation of such underwater cultural heritage.

4. Each State Party shall take all practicable measures to disseminate information, including where feasible through appropriate international databases, about underwater cultural heritage excavated or recovered contrary to this Convention or otherwise in violation of international law.

Article 20 – Public awareness

Each State Party shall take all practicable measures to raise public awareness regarding the value and significance of underwater cultural heritage and the importance of protecting it under this Convention.

Article 21 – Training in underwater archaeology

States Parties shall cooperate in the provision of training in underwater archaeology, in techniques for the conservation of underwater cultural heritage and, on agreed terms, in the transfer of technology relating to underwater cultural heritage.

Article 22 – Competent authorities

1. In order to ensure the proper implementation of this Convention, States Parties shall establish competent authorities or reinforce the existing ones where appropriate, with the aim of providing for the establishment, maintenance and updating of an inventory of underwater cultural heritage, the effective protection, conservation, presentation and management of underwater cultural heritage, as well as research and education.

2. States Parties shall communicate to the Director-General the names and addresses of their competent authorities relating to underwater cultural heritage.

Article 23 – Meetings of States Parties

1. The Director-General shall convene a Meeting of States Parties within one year of the entry into force of this Convention and thereafter at least once every two years. At the request of a majority of States Parties, the Director-General shall convene an Extraordinary Meeting of States Parties.

2. The Meeting of States Parties shall decide on its functions and responsibilities.

3. The Meeting of States Parties shall adopt its own Rules of Procedure.

4. The Meeting of States Parties may establish a Scientific and Technical Advisory Body composed of experts nominated by the States Parties with due regard to the principle of equitable geographical distribution and the desirability of a gender balance.

5. The Scientific and Technical Advisory Body shall appropriately assist the Meeting of States Parties in questions of a scientific or technical nature regarding the implementation of the Rules.

Article 24 – Secretariat for this Convention

1. The Director-General shall be responsible for the functions of the Secretariat for this Convention.

2. The duties of the Secretariat shall include:

(a) organizing Meetings of States Parties as provided for in Article 23, paragraph 1; and

(b) assisting States Parties in implementing the decisions of the Meetings of States Parties.

Article 25 – Peaceful settlement of disputes

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention shall be subject to negotiations in good faith or other peaceful means of settlement of their own choice.

2. If those negotiations do not settle the dispute within a reasonable period of time, it may be submitted to UNESCO for mediation, by agreement between the States Parties concerned.

3. If mediation is not undertaken or if there is no settlement by mediation, the provisions relating to the settlement of disputes set out in Part XV of the United

Nations Convention on the Law of the Sea apply *mutatis mutandis* to any dispute between States Parties to this Convention concerning the interpretation or application of this Convention, whether or not they are also Parties to the United Nations Convention on the Law of the Sea.

4. Any procedure chosen by a State Party to this Convention and to the United Nations Convention on the Law of the Sea pursuant to Article 287 of the latter shall apply to the settlement of disputes under this Article, unless that State Party, when ratifying, accepting, approving or acceding to this Convention, or at any time thereafter, chooses another procedure pursuant to Article 287 for the purpose of the settlement of disputes arising out of this Convention.

5. A State Party to this Convention which is not a Party to the United Nations Convention on the Law of the Sea, when ratifying, accepting, approving or acceding to this Convention or at any time thereafter shall be free to choose, by means of a written declaration, one or more of the means set out in Article 287, paragraph 1, of the United Nations Convention on the Law of the Sea for the purpose of settlement of disputes under this Article. Article 287 shall apply to such a declaration, as well as to any dispute to which such State is party, which is not covered by a declaration in force. For the purpose of conciliation and arbitration, in accordance with Annexes V and VII of the United Nations Convention on the Law of the Sea, such State shall be entitled to nominate conciliators and arbitrators to be included in the lists referred to in Annex V, Article 2, and Annex VII, Article 2, for the settlement of disputes arising out of this Convention.

Article 26 – Ratification, acceptance, approval or accession

1. This Convention shall be subject to ratification, acceptance or approval by Member States of UNESCO.

2. This Convention shall be subject to accession:

(a) by States that are not members of UNESCO but are members of the United Nations or of a specialized agency within the United Nations system or of the International Atomic Energy Agency, as well as by States Parties to the Statute of the International Court of Justice and any other State invited to accede to this Convention by the General Conference of UNESCO;

(b) by territories which enjoy full internal self-government, recognized as such by the United Nations, but have not attained full independence in accordance with General Assembly resolution 1514 (XV) and which have competence over the matters governed by this Convention, including the competence to enter into treaties in respect of those matters.

3. The instruments of ratification, acceptance, approval or accession shall be deposited with the Director-General.

Article 27 – Entry into force

This Convention shall enter into force three months after the date of the deposit of the twentieth instrument referred to in Article 26, but solely with respect to the twenty States or territories that have so deposited their instruments. It shall enter into force for each other State or territory three months after the date on which that State or territory has deposited its instrument.

Article 28 – Declaration as to inland waters

When ratifying, accepting, approving or acceding to this Convention or at any time thereafter, any State or territory may declare that the Rules shall apply to inland waters not of a maritime character.

Article 29 – Limitations to geographical scope

At the time of ratifying, accepting, approving or acceding to this Convention, a State or territory may make a declaration to the depositary that this Convention shall not be applicable to specific parts of its territory, internal waters, archipelagic waters or territorial sea, and shall identify therein the reasons for such declaration. Such State shall, to the extent practicable and as quickly as possible, promote conditions under which this Convention will apply to the areas specified in its declaration, and to that end shall also withdraw its declaration in whole or in part as soon as that has been achieved.

Article 30 – Reservations

With the exception of Article 29, no reservations may be made to this Convention.

Article 31 – Amendments

1. A State Party may, by written communication addressed to the Director-General, propose amendments to this Convention. The Director-General shall circulate such communication to all States Parties. If, within six months from the date of the circulation of the communication, not less than one half of the States Parties reply favourably to the request, the Director-General shall present such proposal to the next Meeting of States Parties for discussion and possible adoption.

2. Amendments shall be adopted by a two-thirds majority of States Parties present and voting.

3. Once adopted, amendments to this Convention shall be subject to ratification, acceptance, approval or accession by the States Parties.

4. Amendments shall enter into force, but solely with respect to the States Parties that have ratified, accepted, approved or acceded to them, three months after the deposit of the instruments referred to in paragraph 3 of this Article by two thirds of

the States Parties. Thereafter, for each State or territory that ratifies, accepts, approves or accedes to it, the amendment shall enter into force three months after the date of deposit by that Party of its instrument of ratification, acceptance, approval or accession.

5. A State or territory which becomes a Party to this Convention after the entry into force of amendments in conformity with paragraph 4 of this Article shall, failing an expression of different intention by that State or territory, be considered:

(a) as a Party to this Convention as so amended; and

(b) as a Party to the unamended Convention in relation to any State Party not bound by the amendment.

Article 32 – Denunciation

1. A State Party may, by written notification addressed to the Director-General, denounce this Convention.

2. The denunciation shall take effect twelve months after the date of receipt of the notification, unless the notification specifies a later date.

3. The denunciation shall not in any way affect the duty of any State Party to fulfil any obligation embodied in this Convention to which it would be subject under international law independently of this Convention.

Article 33 – The Rules

The Rules annexed to this Convention form an integral part of it and, unless expressly provided otherwise, a reference to this Convention includes a reference to the Rules.

Article 34 – Registration with the United Nations

In conformity with Article 102 of the Charter of the United Nations, this Convention shall be registered with the Secretariat of the United Nations at the request of the Director-General.

Article 35 – Authoritative texts

This Convention has been drawn up in Arabic, Chinese, English, French, Russian and Spanish, the six texts being equally authoritative.

Annex

Rules concerning activities directed at underwater cultural heritage

I. General principles

Rule 1. The protection of underwater cultural heritage through *in situ* preservation shall be considered as the first option. Accordingly, activities directed at underwater cultural heritage shall be authorized in a manner consistent with the protection of that heritage, and subject to that requirement may be authorized for the purpose of making a significant contribution to protection or knowledge or enhancement of underwater cultural heritage.

Rule 2. The commercial exploitation of underwater cultural heritage for trade or speculation or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of underwater cultural heritage. Underwater cultural heritage shall not be traded, sold, bought or bartered as commercial goods.

This Rule cannot be interpreted as preventing:

(a) the provision of professional archaeological services or necessary services incidental thereto whose nature and purpose are in full conformity with this Convention and are subject to the authorization of the competent authorities;

(b) the deposition of underwater cultural heritage, recovered in the course of a research project in conformity with this Convention, provided such deposition does not prejudice the scientific or cultural interest or integrity of the recovered material or result in its irretrievable dispersal; is in accordance with the provisions of Rules 33 and 34; and is subject to the authorization of the competent authorities.

Rule 3. Activities directed at underwater cultural heritage shall not adversely affect the underwater cultural heritage more than is necessary for the objectives of the project.

Rule 4. Activities directed at underwater cultural heritage must use non-destructive techniques and survey methods in preference to recovery of objects. If excavation or recovery is necessary for the purpose of scientific studies or for the ultimate protection of the underwater cultural heritage, the methods and techniques used must be as non-destructive as possible and contribute to the preservation of the remains.

Rule 5. Activities directed at underwater cultural heritage shall avoid the unnecessary disturbance of human remains or venerated sites.

Rule 6. Activities directed at underwater cultural heritage shall be strictly regulated to ensure proper recording of cultural, historical and archaeological information.

Rule 7. Public access to *in situ* underwater cultural heritage shall be promoted, except where such access is incompatible with protection and management.

Rule 8. International cooperation in the conduct of activities directed at underwater cultural heritage shall be encouraged in order to further the effective exchange or use of archaeologists and other relevant professionals.

II. Project design

Rule 9. Prior to any activity directed at underwater cultural heritage, a project design for the activity shall be developed and submitted to the competent authorities for authorization and appropriate peer review.

Rule 10. The project design shall include:

(a) an evaluation of previous or preliminary studies;

(b) the project statement and objectives;

(c) the methodology to be used and the techniques to be employed;

(d) the anticipated funding;

(e) an expected timetable for completion of the project;

(f) the composition of the team and the qualifications, responsibilities and experience of each team member;

(g) plans for post-fieldwork analysis and other activities;

(h) a conservation programme for artefacts and the site in close cooperation with the competent authorities;

(i) a site management and maintenance policy for the whole duration of the project;

(j) a documentation programme;

(k) a safety policy;

(l) an environmental policy;

(m) arrangements for collaboration with museums and other institutions, in particular scientific institutions;

(n) report preparation;

(o) deposition of archives, including underwater cultural heritage removed; and

(p) a programme for publication.

Rule 11. Activities directed at underwater cultural heritage shall be carried out in accordance with the project design approved by the competent authorities.

Rule 12. Where unexpected discoveries are made or circumstances change, the project design shall be reviewed and amended with the approval of the competent authorities.

Rule 13. In cases of urgency or chance discoveries, activities directed at the underwater cultural heritage, including conservation measures or activities for a period of short duration, in particular site stabilization, may be authorized in the absence of a project design in order to protect the underwater cultural heritage.

III. Preliminary work

Rule 14. The preliminary work referred to in Rule 10 (a) shall include an assessment that evaluates the significance and vulnerability of the underwater cultural heritage and the surrounding natural environment to damage by the proposed project, and the potential to obtain data that would meet the project objectives.

Rule 15. The assessment shall also include background studies of available historical and archaeological evidence, the archaeological and environmental characteristics of the site, and the consequences of any potential intrusion for the long-term stability of the underwater cultural heritage affected by the activities.

IV. Project objective, methodology and techniques

Rule 16. The methodology shall comply with the project objectives, and the techniques employed shall be as non-intrusive as possible.

V. Funding

Rule 17. Except in cases of emergency to protect underwater cultural heritage, an adequate funding base shall be assured in advance of any activity, sufficient to complete all stages of the project design, including conservation, documentation and curation of recovered artefacts, and report preparation and dissemination.

Rule 18. The project design shall demonstrate an ability, such as by securing a bond, to fund the project through to completion.

Rule 19. The project design shall include a contingency plan that will ensure conservation of underwater cultural heritage and supporting documentation in the event of any interruption of anticipated funding.

VI. Project duration - timetable

Rule 20. An adequate timetable shall be developed to assure in advance of any activity directed at underwater cultural heritage the completion of all stages of the project design, including conservation, documentation and curation of recovered underwater cultural heritage, as well as report preparation and dissemination.

Rule 21. The project design shall include a contingency plan that will ensure conservation of underwater cultural heritage and supporting documentation in the event of any interruption or termination of the project.

VII. Competence and qualifications

Rule 22. Activities directed at underwater cultural heritage shall only be undertaken under the direction and control of, and in the regular presence of, a qualified underwater archaeologist with scientific competence appropriate to the project.

Rule 23. All persons on the project team shall be qualified and have demonstrated competence appropriate to their roles in the project.

VIII. Conservation and site management

Rule 24. The conservation programme shall provide for the treatment of the archaeological remains during the activities directed at underwater cultural heritage, during transit and in the long term. Conservation shall be carried out in accordance with current professional standards.

Rule 25. The site management programme shall provide for the protection and management *in situ* of underwater cultural heritage, in the course of and upon termination of fieldwork. The programme shall include public information, reasonable provision for site stabilization, monitoring, and protection against interference.

IX. Documentation

Rule 26. The documentation programme shall set out thorough documentation including a progress report of activities directed at underwater cultural heritage, in accordance with current professional standards of archaeological documentation.

Rule 27. Documentation shall include, at a minimum, a comprehensive record of the site, including the provenance of underwater cultural heritage moved or removed in the course of the activities directed at underwater cultural heritage, field notes, plans, drawings, sections, and photographs or recording in other media.

X. Safety

Rule 28. A safety policy shall be prepared that is adequate to ensure the safety and health of the project team and third parties and that is in conformity with any applicable statutory and professional requirements.

XI. Environment

Rule 29. An environmental policy shall be prepared that is adequate to ensure that the seabed and marine life are not unduly disturbed.

XII. Reporting

Rule 30. Interim and final reports shall be made available according to the timetable set out in the project design, and deposited in relevant public records.

Rule 31. Reports shall include:

(a) an account of the objectives;

(b) an account of the methods and techniques employed;

(c) an account of the results achieved;

(d) basic graphic and photographic documentation on all phases of the activity;

(e) recommendations concerning conservation and curation of the site and of any underwater cultural heritage removed; and

(f) recommendations for future activities.

XIII. Curation of project archives

Rule 32. Arrangements for curation of the project archives shall be agreed to before any activity commences, and shall be set out in the project design.

Rule 33. The project archives, including any underwater cultural heritage removed and a copy of all supporting documentation shall, as far as possible, be kept together and intact as a collection in a manner that is available for professional and public access as well as for the curation of the archives. This should be done as rapidly as possible and in any case not later than ten years from the completion of the project, in so far as may be compatible with conservation of the underwater cultural heritage.

Rule 34. The project archives shall be managed according to international professional standards, and subject to the authorization of the competent authorities.

XIV. Dissemination

Rule 35. Projects shall provide for public education and popular presentation of the project results where appropriate.

Rule 36. A final synthesis of a project shall be:

(a) made public as soon as possible, having regard to the complexity of the project and the confidential or sensitive nature of the information; and

(b) deposited in relevant public records.

2. CULTURAL HERITAGE

Synopsis of Amendment: *This amendment provides a new guideline at §2B1.5 (Theft of, Damage to, Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources) for offenses involving cultural heritage resources. This amendment reflects the Commission's conclusion that the existing sentencing guidelines for economic and property destruction crimes are inadequate to punish in an appropriate and proportional way the variety of federal crimes involving the theft of, damage to, destruction of, or illicit trafficking in, cultural heritage resources. The Commission has determined that a separate guideline, which specifically recognizes both the federal government's long-standing obligation and role in preserving such resources, and the harm caused to both the nation and its inhabitants when its history is degraded through the destruction of cultural heritage resources, is needed.*

Cultural heritage resources include national memorials, landmarks, parks, archaeological and other historic and cultural resources, specifically designated by Congress and the President for the preservation of the cultural heritage of this nation and its ancestors. The federal government acts either as a trustee for the public generally, or as a fiduciary on behalf of American Indians, Alaska Natives and Native Hawaiian Organizations, to protect these cultural heritage resources. Because individuals, communities, and nations identify themselves through intellectual, emotional, and spiritual connections to places and objects, the effects of cultural heritage resource crimes transcend mere monetary considerations. Accordingly, this new guideline takes into account the transcendent and irreplaceable value of cultural heritage resources and punishes in a proportionate way the aggravating conduct associated with cultural heritage resource crimes.

This guideline incorporates into the definition of "cultural heritage resource" a broad range of existing federal statutory definitions for various historical, cultural, and archaeological items. If a defendant is convicted of an offense that charges illegal conduct involving a cultural heritage resource, this guideline will apply, irrespective of whether the conviction is obtained under general property theft or damage statutes, such as laws concerning the theft and destruction of government property, 18 U.S.C. § 641, interstate sale or receipt of stolen property, 18 U.S.C. §§ 2314-15, and smuggling, 18 U.S.C. §§ 541 et seq., or under specific cultural heritage statutes, such as the Archaeological Resources Protection Act of 1979, 16 U.S.C. § 470ee (ARPA), the criminal provisions of the Native American Graves Protection and Repatriation Act (NAGPRA) at 18 U.S.C. § 1170, and 18 U.S.C. § 668, which concerns theft from museums. In addition, if a more general offense is charged that is referenced in Appendix A to §2B1.1, this guideline will apply by cross reference if the offense conduct involves a cultural heritage resource and results in a higher offense level.

This new guideline has a base offense level of level 8, which is two levels higher than the base offense level for general economic and property destruction crimes. The higher base offense level represents the Commission's determination that offenses involving cultural heritage resources are more serious because they involve essentially irreplaceable resources and cause intangible harm to society.

The new guideline also provides that the monetary value of the cultural heritage resource is an important, although not the sole, factor in determining the appropriate punishment. The Commission has elected not to use the concept of "loss," which is an integral part of the theft, fraud, and property destruction guideline at §2B1.1 (Theft, Property Destruction, and Fraud), because cultural heritage offenses do not involve the same fungible and compensatory values embodied in "loss." Instead, under this new guideline, value is to be based on commercial value, archaeological value, and the cost of restoration and repair. These methods of valuation are derived from existing federal law. See 16 U.S.C. § 470ee(d);

43 C.F.R. § 7.14.

The Commission has recognized that archaeological value shall be used in calculating the value of archaeological resources but has provided flexibility for the sentencing court to determine whether either commercial value or the cost of restoration and repair, or both, should be added to archaeological value in determining the appropriate value of archaeological resources. For all other types of cultural heritage resources covered by this guideline, the Commission has provided flexibility for the sentencing court regarding whether and when to use all or some of the methods of valuation, as appropriate, for calculating the total value associated with the harm to the particular resource caused by the defendant's offense conduct. The value of the cultural heritage resource is then referenced to the monetary table provided at §2B1.1(b)(1) in order to determine appropriate and proportionate offense levels in a manner consistent with the overall guidelines structure.

The new guideline provides five additional specific offense characteristics to provide proportionate enhancements for aggravating conduct that may occur in connection with cultural heritage resource offenses. In providing enhancements for these nonpecuniary aggravating factors, the Commission seeks to ensure that the nonquantifiable harm caused by the offense to affected cultural groups, and society as a whole, is adequately reflected in the penalty structure.

The first two of these enhancements, at subsections (b)(2) and (b)(3), relate to whether the offense involves a place or resource that Congress has designated for special protection. A two level enhancement attaches if the offense involves a resource from one of eight locations specifically designated by Congress for historic commemoration, resource preservation, or public education. These are the national park system, national historic landmarks, national monuments, national memorials, national marine sanctuaries, national cemeteries, sites contained on the World Heritage List, and museums.

Consistent with the definition in 18 U.S.C. § 668(a)(1), museums are defined broadly to include all organized and permanent institutions, with an essentially educational or aesthetic purpose, which exhibit tangible objects to the public on a regular schedule. Adoption of this definition reflects the Commission's recognition that cultural heritage resource crimes affecting institutions dedicated to the preservation of resources and associated knowledge, irrespective of the institution's size, ownership, or funding, deprive the public and future generations of the opportunity to learn and appreciate the richness of the nation's heritage. Similarly, this enhancement reflects the Commission's assessment that damage to the other listed places degrades not only the resource itself but also the historical and cultural aspects which the resource commemorates.

An additional two level enhancement attaches to offense conduct that involves any of a number of specified resources, including human remains and other resources that have been designated by Congress for special treatment and heightened protection under federal law. Funerary objects, items of cultural patrimony, and sacred objects are included because they are domestic cultural heritage resources protected under NAGPRA. See 25 U.S.C. § 3001. Cultural property, designated archaeological and ethnological material, and pre-Columbian monumental and architectural sculpture and murals are included in the enhancement because these are cultural heritage resources of foreign provenance for which Congress has chosen, in the implementation of international treaties and bilateral agreements, to impose import restrictions. See 19 U.S.C. §§ 2092, 2606, and 2607.

This guideline also provides a two level enhancement at subsection (b)(4) if the offense was committed for pecuniary gain or otherwise involved a commercial purpose. This increase is based on a determination

that offenders who are motivated by financial gain or other commercial incentive are more culpable than offenders who are motivated solely by their personal interest in possessing cultural heritage resources. Those motivated by financial gain contribute to illicit trafficking and support dealers and brokers who earn a livelihood from illegal activities. Mindful of INTERPOL's findings, as reported by the Department of Justice, that the annual dollar value of art and cultural property theft is exceeded only by trafficking in illicit narcotics, money laundering, and arms trafficking, the Commission seeks to ensure that the penalty structure adequately accounts for these increased harms.

This guideline also provides a two level enhancement at subsection (b)(5) if the offense involves a pattern of misconduct, and provides a definition of "pattern" that is designed to interact with other requirements of the guidelines regarding relevant conduct and criminal history. "Pattern of misconduct" is defined as "two or more separate instances of offense conduct involving cultural heritage resources that did not occur during the course of the instant offense (i.e., that did not occur during the offense of conviction and all relevant conduct under §1B1.3 (Relevant Conduct))". Accordingly, under this guideline, separate instances of offense conduct need not result in a criminal conviction or legal adjudication in order for this enhancement to apply. Separate instances of offense conduct involving cultural heritage resources that are included in the defendant's criminal history may also form the factual basis for the application of this enhancement. The Commission considers such increased punishment to be appropriate for offenders who repeatedly disregard cultural heritage resource laws and regulations and the social values underlying them. These repeat offenders cause serious harm, not only to the resources themselves, but to the nation and the individuals who treasure them.

This guideline also provides at subsection (b)(6) a two level enhancement and a minimum offense level of level 14 if a dangerous weapon, including a firearm, is brandished or its use threatened. This enhancement reflects the increased culpability of offenders who pose a threat to law enforcement officers and innocent passersby. Recognizing that there are legitimate uses in remote expanses of tribal and federal land for certain tools and firearms that may otherwise qualify as "dangerous weapons" under the guideline definitions, the Commission has limited the scope of this enhancement by requiring that the dangerous weapon or firearm be brandished or its use threatened, in order for increased punishment to attach under this provision.

In light of the increased potential for the symbols of our nation's heritage and culture to be targets of violent individuals, including terrorists, the Commission also has provided for increased punishment through a cross reference to §2K1.4 (Arson; Property Damage by Use of Explosives), if the offense involved arson or property damage by the use of any explosive, explosive material, or destructive devices, when the resulting offense level is greater under §2K1.4 than the offense level under this guideline.

This guideline also includes a special rule in the Commentary to address multiple counts of cultural heritage resource offenses, as well as multiple counts of conviction involving offenses under this and other guidelines. Consistent with the principles underlying the rules for grouping multiple counts of conviction in §3D1.2 (Groups of Closely Related Counts) and the unique concerns sought to be addressed by this amendment, the new guideline provides that multiple counts of cultural heritage resource offenses are to be grouped under §3D1.2(d). However, because the monetary harm is measured differently, a count of conviction for an offense sentenced under §2B1.5 may not be grouped under this provision with a conviction for an offense sentenced under a different guideline.

This guideline also invites an upward departure if the determined offense level substantially understates the seriousness of the cultural heritage resource offense. Two illustrations of such situations are given. Finally, this amendment provides a cross reference within §2B1.1. Theft, fraud, and property destruction

offenses which also involve cultural heritage resources are cross referenced to the new guideline at §2B1.5 if the resulting offense level under it would be greater than under §2B1.1. When a case involving a cultural heritage resource is sentenced under §2B1.1, loss attributable to that cultural heritage resource is to be determined using the definition of "value of the cultural heritage resource" from §2B1.5.

The Commission recognizes that the full implementation of this new guideline for the most serious offenders often will be limited in its application because of the extremely low statutory maxima of some of the potentially applicable statutes, such as the criminal provisions of ARPA, NAGPRA, and 18 U.S.C. § 1163 (covering the theft of tribal property). Currently ARPA has either a one year or two year statutory maximum term of imprisonment for the first offense, depending on whether the value exceeds $500, and NAGPRA has a statutory maximum term of imprisonment of one year for the first offense irrespective of value. These statutes all have five year statutory maximum terms of imprisonment for second and subsequent offenses. Consequently, the statutory ceiling may limit the full range of proportionate guideline sentencing, but the Commission has promulgated this new guideline to cover the wide variety of potential offense conduct that can occur in connection with cultural heritage resources. The Commission has recommended to Congress that the statutory maximum terms of imprisonment for these offenses be raised appropriately.

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

* * *

(c) Cross References

* * *

(4) If the offense involved a cultural heritage resource, apply §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources), if the resulting offense level is greater than that determined above.

* * *

Commentary

Application Notes: * * *

1. Definitions.—For purposes of this guideline:

"Cultural heritage resource" has the meaning given that term in Application Note 1 of the Commentary to §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources).

* * *

2. *Loss Under Subsection (b)(1).—This application note applies to the determination of loss under subsection (b)(1).*

* * *

(F) Special Rules.—Notwithstanding subdivision (A), the following special rules shall be used to assist in determining loss in the cases indicated:

* * *

(vii) Value of Cultural Heritage Resources.—In a case involving a cultural heritage resource, loss attributable to that cultural heritage resource shall be determined in accordance with the rules for determining the "value of the cultural heritage resource" set forth in Application Note 2 of the Commentary to §2B1.5.

* * *

§2B1.5. Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources

(a) Base Offense Level: **8**

(b) Specific Offense Characteristics

(1) If the value of the cultural heritage resource (A) exceeded $2,000 but did not exceed $5,000, increase by **1** level; or (B) exceeded $5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

(2) If the offense involved a cultural heritage resource from, or that, prior to the offense, was on, in, or in the custody of (A) the national park system; (B) a National Historic Landmark; (C) a national monument or national memorial; (D) a national marine sanctuary; (E) a national cemetery; (F) a museum; or (G) the World Heritage List, increase by **2** levels.

(3) If the offense involved a cultural heritage resource constituting (A) human remains; (B) a funerary object; (C) cultural patrimony; (D) a sacred object; (E) cultural property; (F) designated archaeological or ethnological material; or (G) a pre-Columbian monumental or architectural sculpture or mural, increase by **2** levels.

(4) If the offense was committed for pecuniary gain or otherwise involved a commercial purpose, increase by **2** levels.

(5) If the defendant engaged in a pattern of misconduct involving cultural heritage resources, increase by **2** levels.

(6) If a dangerous weapon was brandished or its use was threatened, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.

(c) Cross Reference

(1) If the offense involved arson, or property damage by the use of any explosive, explosive material, or destructive device, apply §2K1.4 (Arson; Property Damage by Use of Explosives), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 16 U.S.C. §§ 470ee, 668(a), 707(b); 18 U.S.C. §§ 541-546, 641, 661-662, 666, 668, 1152-1153, 1163, 1168, 1170, 1361, 2232, 2314-2315.

Application Notes:

1. *"Cultural Heritage Resource" Defined.—For purposes of this guideline, "cultural heritage resource" means any of the following:*

   (A) A historic property, as defined in 16 U.S.C. § 470w(5) (see also section 16(l) of 36 C.F.R. pt. 800).

   (B) A historic resource, as defined in 16 U.S.C. § 470w(5).

   (C) An archaeological resource, as defined in 16 U.S.C. § 470bb(1) (see also section 3(a) of 43 C.F.R. pt. 7; 36 C.F.R. pt. 296; 32 C.F.R. pt. 299; 18 C.F.R. pt. 1312).

   (D) A cultural item, as defined in section 2(3) of the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001(3) (see also 43 C.F.R. § 10.2(d)).

   (E) A commemorative work. "Commemorative work" (A) has the meaning given that term in section 2(c) of Public Law 99–652 (40 U.S.C. § 1002(c)); and (B) includes any national monument or national memorial.

   (F) An object of cultural heritage, as defined in 18 U.S.C. § 668(a)(2).

   (G) Designated ethnological material, as described in 19 U.S.C. §§ 2601(2)(ii), 2601(7), and 2604.

2. *Value of the Cultural Heritage Resource Under Subsection (b)(1).—This application note applies to the determination of the value of the cultural heritage resource under subsection (b)(1).*

   (A) General Rule.—For purposes of subsection (b)(1), the value of the cultural heritage resource shall include, as applicable to the particular resource involved, the following:

      (i) The archaeological value. (Archaeological value shall be included in the case of any cultural heritage resource that is an archaeological resource.)

      (ii) The commercial value.

      (iii) The cost of restoration and repair.

(B) *Estimation of Value.—For purposes of subsection (b)(1), the court need only make a reasonable estimate of the value of the cultural heritage resource based on available information.*

(C) *Definitions.—For purposes of this application note:*

(i) *"Archaeological value" of a cultural heritage resource means the cost of the retrieval of the scientific information which would have been obtainable prior to the offense, including the cost of preparing a research design, conducting field work, conducting laboratory analysis, and preparing reports, as would be necessary to realize the information potential. (See 43 C.F.R. § 7.14(a); 36 C.F.R. § 296.14(a); 32 C.F.R. § 229.14(a); 18 C.F.R. § 1312.14(a).)*

(ii) *"Commercial value" of a cultural heritage resource means the fair market value of the cultural heritage resource at the time of the offense. (See 43 C.F.R. § 7.14(b); 36 C.F.R. § 296.14(b); 32 C.F.R. § 229.14(b); 18 C.F.R. § 1312.14(b).)*

(iii) *"Cost of restoration and repair" includes all actual and projected costs of curation, disposition, and appropriate reburial of, and consultation with respect to, the cultural heritage resource; and any other actual and projected costs to complete restoration and repair of the cultural heritage resource, including (I) its reconstruction and stabilization; (II) reconstruction and stabilization of ground contour and surface; (III) research necessary to conduct reconstruction and stabilization; (IV) the construction of physical barriers and other protective devices; (V) examination and analysis of the cultural heritage resource as part of efforts to salvage remaining information about the resource; and (VI) preparation of reports. (See 43 C.F.R. § 7.14(c); 36 C.F.R. § 296.14(c); 32 C.F.R. § 229.14(c); 18 C.F.R. § 1312.14(c).)*

(D) *Determination of Value in Cases Involving a Variety of Cultural Heritage Resources.—In a case involving a variety of cultural heritage resources, the value of the cultural heritage resources is the sum of all calculations made for those resources under this application note.*

3. *Enhancement in Subsection (b)(2).—For purposes of subsection (b)(2):*

(A) *"Museum" has the meaning given that term in 18 U.S.C. § 668(a)(1) except that the museum may be situated outside the United States.*

(B) *"National cemetery" has the meaning given that term in Application Note 1 of the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud).*

(C) *"National Historic Landmark" means a property designated as such pursuant to 16 U.S.C. § 470(a)(1)(B).*

(D) *"National marine sanctuary" means a national marine sanctuary designated as such by the Secretary of Commerce pursuant to 16 U.S.C. § 1433.*

(E) *"National monument or national memorial" means any national monument or national memorial established as such by Act of Congress or by proclamation pursuant to the Antiquities Act of 1906 (16 U.S.C. § 431).*

(F) *"National park system" has the meaning given that term in 16 U.S.C. § 1c(a).*

(G) *"World Heritage List" means the World Heritage List maintained by the World Heritage Committee of the United Nations Educational, Scientific, and Cultural Organization in accordance with the Convention Concerning the Protection of the World Cultural and Natural Heritage.*

4. *Enhancement in Subsection (b)(3).—For purposes of subsection (b)(3):*

(A) *"Cultural patrimony" has the meaning given that term in 25 U.S.C. § 3001(3)(D) (see also 43 C.F.R. 10.2(d)(4)).*

(B) *"Cultural property" has the meaning given that term in 19 U.S.C. § 2601(6).*

(C) *"Designated archaeological or ethnological material" means archaeological or ethnological material described in 19 U.S.C. § 2601(7) (see also 19 U.S.C. §§ 2601(2) and 2604).*

(D) *"Funerary object" means an object that, as a part of the death rite or ceremony of a culture, was placed intentionally, at the time of death or later, with or near human remains.*

(E) *"Human remains" (i) means the physical remains of the body of a human; and (ii) does not include remains that reasonably may be determined to have been freely disposed of or naturally shed by the human from whose body the remains were obtained, such as hair made into ropes or nets.*

(F) *"Pre-Columbian monumental or architectural sculpture or mural" has the meaning given that term in 19 U.S.C. § 2095(3).*

(G) *"Sacred object" has the meaning given that term in 25 U.S.C. § 3001(3)(C) (see also 43 C.F.R. § 10.2(d)(3)).*

5. *Pecuniary Gain and Commercial Purpose Enhancement Under Subsection (b)(4).—*

(A) *"For Pecuniary Gain".—For purposes of subsection (b)(4), "for pecuniary gain" means for receipt of, or in anticipation of receipt of, anything of value, whether monetary or in goods or services. Therefore, offenses committed for pecuniary gain include both monetary and barter transactions, as well as activities designed to increase gross revenue.*

(B) *Commercial Purpose.—The acquisition of cultural heritage resources for display to the public, whether for a fee or donation and whether by an individual or an organization, including a governmental entity, a private non-profit organization, or a private for-profit organization, shall be considered to involve a "commercial purpose" for purposes of*

subsection (b)(4).

6. *Pattern of Misconduct Enhancement Under Subsection (b)(5).—*

   (A) Definition.—For purposes of subsection (b)(5), "pattern of misconduct involving cultural heritage resources" means two or more separate instances of offense conduct involving a cultural heritage resource that did not occur during the course of the offense (i.e., that did not occur during the course of the instant offense of conviction and all relevant conduct under §1B1.3 (Relevant Conduct)). Offense conduct involving a cultural heritage resource may be considered for purposes of subsection (b)(5) regardless of whether the defendant was convicted of that conduct.

   (B) Computation of Criminal History Points.—A conviction taken into account under subsection (b)(5) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).

7. *Dangerous Weapons Enhancement Under Subsection (b)(6).—For purposes of subsection (b)(6), "brandished" and "dangerous weapon" have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).*

8. *Multiple Counts.—For purposes of Chapter Three, Part D (Multiple Counts), multiple counts involving cultural heritage offenses covered by this guideline are grouped together under subsection (d) of §3D1.2 (Groups of Closely Related Counts). Multiple counts involving cultural heritage offenses covered by this guideline and offenses covered by other guidelines are not to be grouped under §3D1.2(d).*

9. *Upward Departure Provision.—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. For example, an upward departure may be warranted if (A) in addition to cultural heritage resources, the offense involved theft of, damage to, or destruction of, items that are not cultural heritage resources (such as an offense involving the theft from a national cemetery of lawnmowers and other administrative property in addition to historic gravemarkers or other cultural heritage resources); or (B) the offense involved a cultural heritage resource that has profound significance to cultural identity (e.g., the Statue of Liberty or the Liberty Bell).*

§2Q2.1. Offenses Involving Fish, Wildlife, and Plants

* * *

(c) Cross Reference

(1) If the offense involved a cultural heritage resource, apply §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources), if the resulting offense level is greater than that determined above.

* * *

Commentary

* * *

Application Notes:

* * *

6. *For purposes of subsection (c)(1), "cultural heritage resource" has the meaning given that term in Application Note 1 of the Commentary to §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources).*

* * *

§3D1.2 Groups of Closely Related Counts

(d) * * *

Offenses covered by the following guidelines are to be grouped under this subsection:

§§2B1.1, 2B1.4, 2B1.5, 2B4.1, 2B5.1, 2B6.1;

* * *

APPENDIX A - STATUTORY INDEX

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~~16 U.S.C. § 433~~	~~2B1.1~~
16 U.S.C. § 470ee	2B1.5
16 U.S.C. § 668(a)	2B1.5, 2Q2.1
16 U.S.C. § 707(b)	2B1.5, 2Q2.1
	* * *
18 U.S.C. § 541	2B1.5, 2T3.1
18 U.S.C. § 542	2B1.5, 2T3.1
18 U.S.C. § 543	2B1.5, 2T3.1
18 U.S.C. § 544	2B1.5, 2T3.1
18 U.S.C. § 545	2B1.5, 2Q2.1, 2T3.1
18 U.S.C. § 546	2B1.5
	* * *
18 U.S.C. § 641	2B1.1, 2B1.5
	* * *
18 U.S.C. § 661	2B1.1, 2B1.5
18 U.S.C. § 662	2B1.1, 2B1.5
	* * *
18 U.S.C. § 666(a)(1)(A)	2B1.1, 2B1.5
	* * *
18 U.S.C. § 668	~~2B1.1~~2B1.5

	* * *
18 U.S.C. § 1152	2B1.5
18 U.S.C. § 1153	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A3.1, 2A3.2, 2A3.3, 2A3.4, 2A4.1, 2B1.1, 2B1.5, 2B2.1, 2B3.1, 2K1.4
	* * *
18 U.S.C. § 1163	2B1.1, 2B1.5
	* * *
18 U.S.C. § 1170	2B1.5
	* * *
18 U.S.C. § 1361	2B1.1, 2B1.5
	* * *
18 U.S.C. § 2232	2B1.5, 2J1.2
	* * *
18 U.S.C. § 2314	2B1.1, 2B1.5
18 U.S.C. § 2315	2B1.1, 2B1.5 * * *

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	Case No. K98-001 CR
	)	(JMF)
	)	
Plaintiff,	)	COUNT ONE
	)	ARCHEOLOGICAL
	)	RESOURCES
vs.	)	PROTECTION ACT
	)	
	)	VIO. 16 U.S.C.
	)	§470ee(a)
IAN MARTIN LYNCH	)	
	)	
Defendant.	)	

SUPERSEDING INDICTMENT

STATUTORY BACKGROUND

The following allegations were true at all times relevant to this indictment.

(a) The United States Congress finds that:

1. Archeological resources on public lands are an accessible and irreplaceable part of the Nation's Heritage as found in Title 16 United States Code Section 470aa.

2. The Archeological Resources Protection Act makes it unlawful to, among other things, excavate, remove, damage or otherwise alter or deface, or attempt to excavate, remove, damage or otherwise alter or deface any archeological resource located on public land unless such activity is done with and pursuant to a validly issued permit.

(A) The term "archeological resource" means any material remains of human life or activities which are at least 100 years of age and are of archeological interest as defined in 36 Code of Federal Regulations §296.3(a).

(B) The term "archeological interest" means capable of providing scientific or humanistic understanding of past human behavior, cultural adaption, and related topics through the application of scientific or scholarly techniques such as controlled observation, contextual measurement, controlled collection, analysis, interpretation and explanation as found in 36 Code of Federal Regulations § 296.3(1).

(C) "Material remains" means physical evidence of human habitation, occupation, use, or activity, including the site, location, or context in which such evidence is situated as found in 36 Code of Federal Regulations § 296.3(2).

(D) Title 36 of the Code of Federal Regulations, section 296.3(i)(vi) and (viii) defines the following classes of material remains, if they are at least 100 years of age, as being of archeological interest, and as being an archeological resource:

(i) Surface or subsurface structures, shelters ... including but not limited to burial pits or graves.

(vi) Human remains (including but not limited to, bone, teeth, and burials)

(viii) Rockshelters and caves or portions thereof containing any of the above material remains.

3) As used in this indictment, "public lands" means lands which are owned and administered by the United States as part of the national forest system as found in 36 Code of Federal Regulations § 296.3(d)(1).

4) The grand jury incorporates and realleges by reference the proceeding Statutory Background set forth in Paragraphs 1-3 into each and every count of this indictment.

THE GRAND JURY CHARGES THAT:

COUNT ONE

On or about August 1, 1997, on public lands of the United States, to wit, the Tongass National Forest, in the State and District of Alaska, the defendant,

IAN MARTIN LYNCH

did knowingly excavate, remove, damage and otherwise alter a human skull and skeleton without applying for or having a permit to do so; knowing said human skeletal materials were over 100 years of age and constituted an archeological resource under the Archeological Resources Protection Act of 1979; the archeological value and cost of restoration and repair involved with the archeological resource and this offense exceed $500.

All in violation of Title 16, United States Code, Section 470ee(a).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff

-v.- 01 Cr. 683 (JSR)

FREDERICK SCHULTZ,

Defendant.
----------x

GOVERNMENT'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE INDICTMENT

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- Of Counsel -

CORRECTED VERSION

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....

PRELIMINARY STATEMENT.....1

ARGUMENT.....3

I. THE NATIONAL STOLEN PROPERTY ACT IS THE APPROPRIATE VEHICLE TO PROSECUTE THE KNOWING RECEIPT OF ANTIQUITIES THAT WERE LOOTED FROM THE NATIONS THAT OWNED THEM.....3

A. The NSPA Covers Thefts of Antiquities Stolen from Abroad 4

B. This Prosecution Does Not Require the Enforcement of Foreign Law..... 6

C. Courts Have Long Recognized That Foreign National Ownership Laws Establish Valid Foreign Government Ownership of Antiquities In Both NSPA and Civil Cases.....9

II. UNITED STATES COURTS MUST RECOGNIZE A FOREIGN SOVEREIGN'S DECLARATION OF OWNERSHIP OVER PROPERTY.....14

III. NEITHER THE DUE PROCESS CLAUSE NOR THE TAKINGS CLAUSE IS VIOLATED BY NATIONAL OWNERSHIP LAWS THAT CLEARLY DECLARE OWNERSHIP.....19

IV. CRIMINAL PROSECUTIONS UNDER THE NATIONAL STOLEN PROPERTY ACT AND MCCLAIN ARE NOT INCONSISTENT WITH THE CULTURAL PROPERTY IMPLEMENTATION ACT.....24

A. Basic Principles of Statutory Construction Demonstrate that Congress Did Not Overrule McClain or Limit the NSPA in Passing the CPIA.....26

B. The Legislative History Of The CPIA Demonstrates That The CPIA Did Not Affect Preexisting Remedies Under The NSPA Or McClain.....30

V. THE EGYPTIAN ANTIQUITIES LAW IS SUFFICIENTLY CLEAR TO PUT A PERSON OF ORDINARY INTELLIGENCE ON NOTICE THAT EGYPT OWNS ANTIQUITIES DISCOVERED AFTER 1983.....33

A. Law 117's Provisions Clearly Demonstrate That Egypt Owns Its Antiquities And Schultz's Arguments

To The Contrary Are To No Avail.....35

1. Articles 6 and 24.....36

2. Article 1.....37

3. Articles 7,8 and 9.....39

B. Schultz's Other Criticisms of Law 117 Are Without Merit.....40

1. Article 12.....40

2. Articles 13 and 23.....42

C. McClain and Johnson Support a Finding that Law 117 Is Clear on Its Face.....43

D. Egypt Sufficiently Enforces Its Antiquities Law.....45

TABLE OF AUTHORITIES

FEDERAL CASES

Allied Bank International v. Banco Credito Agrociola De Cartago, 757 F.2d 516 (2d Cir. 1985) 16

Amoco Corp. v. Commissioner of Internal Revenue, 138 F.3d 1139 (7th cir. 1998) 18

Bader v. Purdom, 841 F.2d 38 (2d Cir. 1988) 14

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) 15, 20

Boyce Motor Lines v. United States, 342 U.S. 337 (1952) 34, 42

Compania de Gas de Nuevo Laredo, S.A. v. Entex, 686 F.2d 322 (5th Cir. 1982), cert. denied, 460 U.S. 1041 (1983) 15

FDA v. Brown & Williamson Tobacco Corp., 112 S. Ct. 1 (2000) 27

Finnish Fur Sales v. Juliette Shulof Furs, 770 F. Supp. 139 (S.D.N.Y. 1991) 15

Grynberg Production Corp. v. British Gas, P.L.C., 817 F. Supp. 1338 (E.D. Tex. 1993) 18

Hilton v. Guyot, 159 U.S. 113 (1895) 14

Jerome v. United States, 318 U.S. 101 (1943) 21

Moskal v. United States, 498 U.S. 103 (1990) 24

Palicio v. Brush, 256 F. Supp. 481 (S.D.N.Y. 1966) 20

Peru v. Johnson, 720 F. Supp. 810 (C.D. Cal. 1989), aff'd sub nom., Peru v. Wendt, 933 F.2d 1013 (9th Cir. 1991) 10, 45

Peru v. Wendt, 933 F.2d 1013 (9th Cir. 1991) 45

Pravin Banker v. Banco Popular, 109 F.3d 850 (2d Cir. 1997) . 16

Republic of Turkey v. OKS Partners, No. 89-3061-WJS, 1994 U.S. Dist. LEXIS 17032 (D. Mass. June 8, 1994) 12

Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa
482 U.S. 522 (1987) 16

Underhill v. Hernandez,
168 U.S. 250 (1897) 15

United States v. An Antique Platter of Gold,
184 F.3d 131 (2d Cir. 1999) 11

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 (2d Cir. 1999), cert. denied, 528 U.S. 1136 (2000) 11

United States v. Austin,
902 F.2d 743 (9th Cir.) cert. denied, 498 U.S. 874 (1990) ... 37

United States v. Dowling,
473 U.S. 207 (1985) 5

United States v. Feola,
420 U.S. 671 (1975) 39

United States v. Gerber,
999 F.2d 1112 (7th Cir. 1993) 18

United States v. Handler,
142 F.2d 351 (2d Cir.)
cert. denied, 323 U.S. 741 (1944) 5

United States v. Hollinshead,
495 F.2d 1154 (9th Cir. 1974) 10

United States v. Long Cove Seafood, Inc.,
582 F.2d 159 (2d Cir. 1978) 7, 8, 9, 11

United States v. McClain,
545 F.2d 988 (5th Cir., 1977).....passim

United States v. McClain,593 F.2d 658 (5th Cir.)
cert. denied, 444 U.S. 918 (1979).....passim

United States v. Malter,
Cr. 00-300 (WD, OK).....13

United States v. Pierce,
224 F.3d 158 (2d Cir. 2000) 8

United States v. Portrait of Wally,
105 F. Supp. 2d 288 (S.D.N.Y. 2000) 7, 22, 23

United States v. Pre-Columbian Artifacts and the Republic of Guatemala, 845 F. Supp. 544 (N.D. Ill. 1993) 11

United States v. Rosa, 71 F.3d 1531 (2d Cir.), cert. denied, 513 U.S. 879 (1994) 5

United States v. Stephenson, 895 F.2d 867 (2d Cir. 1990) 27

United States v. Tidwell, 191 F.3d 976 (9th Cir. 1999) 38

United States v. Trapilo, 130 F.3d 547 (2d Cir. 1997) 8

United States v. Turley, 352 U.S. 407 (1957) 5

United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) 20

United States v. Wiltberger, 18 U.S. 76 (1820) 27

STATE CASES

Indiana State Highway v. Ziliak, 428 N.E.2d 275 (Ind. Ct. App. 1981) 18

Republic of Croatia v. Trustee of the Marquess of Northampton 1987 Settlement, 610 N.Y.S.2d 263, 203 A.D.2d 167 (1994), appeal denied, 84 N.Y.2d 805, 642 N.E.2d 325 (1994) 12

State of Washington v. Lightle, 88 Wn. App. 470; 944 P.2d 1114 (Wash. App. 1997).....38

Whitacre v. State, 619 N.E.2d 605 (Ind. Ct. App. 1993) aff'd, 629 N.W. 1236 (Ind. 1994) 18

FEDERAL STATUTES

16 U.S.C. §§ 470aa-470mm 8

16 U.S.C. §§ 470ee-70mm 17

18 U.S.C. § 2314, ...

18 U.S.C. § 2315 3,4

19 U.S.C. §§ 2091-95 30

19 U.S.C. §§ 2601 et. seq.....24

19 U.S.C. § 2601.....26

19 U.S.C. § 2602 26

19 U.S.C. § 2603 26

19 U.S.C. § 2607 26,29

19 U.S.C. § 2609 29

25 U.S.C. §§ 3001 et seq 17

43 U.S.C. 2101 et seq.....17

OTHER FEDERAL MATERIALS

S. Rep. 97-564 at 21 (2d Sess. 1982)..... 25,31

MISCELLANEOUS

Bator, An Essay on the International Trade in Art,
34 Stan. L. Rev. 275 (1982) 13

Foreign Ownership Claims in the Antiquities Market,
97 Yale L.J. 466 (1988) 13

Barbara B. Rosecrance, Harmonious Meeting: The McClain Decision and the Cultural
Property Implementation Act, 9 Cornell Int'l. L.J. 311 (1986) 13

Patty Gerstenblith, The Public Interest in the Restitution of Cultural Objects, 16 Conn. J.
Int'l L. 197 (2000) 13

U. S. Customs Directive No. 5230-15 (Apr. 18, 1991) 12

W. LaFave, Search and Seizure 20

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA :

-v.- :

01 Cr. 683 (JSR)

FREDERICK SCHULTZ, :

Defendant. :

- x

Preliminary Statement

Defendant Frederick Schultz, a prominent New York antiquities dealer, is charged with conspiring to violate the National Stolen Property Act, Title 18, United States Code, Sections 2314, 2315 ("NSPA"), by conspiring to receive Egyptian antiquities that he knew had been looted and removed from the Arab Republic of Egypt after Egypt passed a law declaring its ownership of such items. Schultz argues that the Indictment in this case should be dismissed because this kind of theft should not be a crime in the United States. He fails, however, to provide any persuasive reason, based on law or policy, why the criminal laws of the United States should not apply to him.

In 1983, Egypt passed a law under which it declared that, among other things, it owned all newly-discovered antiquities. Schultz believes that a foreign nation should not be able to own undiscovered antiquities, and thus he should be able to ignore a foreign nation's claim to such objects, receiving and trading in them at will. In support of this

argument, Schultz claims that using the NSPA to prosecute the theft of another nation's undiscovered antiquities is tantamount to enforcing foreign law, which this Court should not do. This is simply incorrect. In cases such as this, foreign law is relevant to only one issue: whether the foreign nation has clearly declared ownership of its antiquities, which Egypt has done here. Courts routinely look to the applicable local or foreign law, including foreign patrimony laws, to determine the underlying ownership interests in NSPA cases. Contrary to Schultz's arguments, using the NSPA to prosecute the theft of another nation's undiscovered antiquities is in accord with well-established principles.

Schultz further argues that because the United States does not own objects of cultural heritage, respecting another nation's sovereign claim to own such objects violates constitutional principles and United States policy. As reflected in numerous domestic statutes, the United States strives to protect cultural heritage from plunder, both here and abroad. Moreover, United States courts are bound by basic notions of comity to accord complete respect to a sovereign nation's declaration of ownership over antiquities discovered within that nation, even if those laws are not the same as those in the United States.

In a final attempt to skirt the proper application of

the NSPA to this case, Schultz claims that a Customs statute, the Convention on Cultural Property Implementation Act ("CPIA"), precludes the United States from recognizing all foreign national ownership laws and from prosecuting under the NSPA those who receive stolen cultural objects. The CPIA, however, contains no such language. The CPIA seeks to deter looting and theft of archaeological resources through the imposition of import prohibitions on certain categories of cultural objects. It is unreasonable to believe that this legislation, which is aimed at preventing and deterring the destruction of archaeological sites, rejects foreign cultural patrimony laws or eliminates prosecution of those who would knowingly receive such stolen property. Schultz also neglects to inform the Court that the legislative history to the CPIA demonstrates that it did not pre-empt other remedies.

Accordingly, the Government respectfully submits that the defendant's motion to dismiss the Indictment should be denied.

ARGUMENT

I. THE NATIONAL STOLEN PROPERTY ACT IS THE APPROPRIATE VEHICLE TO PROSECUTE THE KNOWING RECEIPT OF ANTIQUITIES THAT WERE LOOTED FROM THE NATIONS THAT OWNED THEM.

The National Stolen Property Act, 18 U.S.C. 2314, 2315, penalizes the knowing transportation and receipt of antiquities that are stolen from other nations that own those antiquities

pursuant to national ownership laws.[1] Defendant is simply wrong that the NSPA is not broad enough to apply to the thefts of such antiquities. Further, contrary to the defendant's arguments, charging the NSPA to prosecute such crimes in no way entails the enforcement of foreign law. As set forth below, the only relevance of foreign law in such prosecutions is to determine whether, under that country's law, it owns the antiquities at issue.

A. The NSPA Covers Thefts of Antiquities Stolen from Abroad

The defendant argues that the meaning of stolen in the NSPA was not intended to reach antiquities taken from foreign nations in contravention of national ownership laws, and that the legal analysis of stolen property articulated in McClain, and all the cases that have followed, "stretches the NSPA beyond recognition." Memorandum of Law in Support of Defendant's Motion to Dismiss the Indictment ("Br") at 26. This is plainly not the

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[1] National ownership laws, including Egypt's Law 117, are the means by which many foreign nations establish ownership of, inter alia, undiscovered antiquities that may be unearthed in the nation's own territory. National ownership laws declare that the sovereign is deemed to have title to certain property, usually culturally significant archeological artifacts, found within a nation's borders. As the Fifth Circuit recognized in McClain, national ownership laws do not dictate to a United States court whether the elements of the NSPA or other criminal statutes have been satisfied in determining whether such property has been stolen. McClain I, 545 F.2d 988, 996 (5th Cir., 1977); McClain III, 593 F.2d 658, 664 (5th Cir.) cert. denied, 444 U.S. 918 (1979).

case.[2]

As the defendant acknowledges, the meaning of "stolen" as used in the NSPA has been consistently construed as broad in scope. (Br. 27). See United States v. Turley, 352 U.S. 407 (1957) (under NSPA, "stolen" has a broad and wide-ranging application); McClain I, 545 F.2d 988, 994 (noting that "post-Turley cases have continued to give the term 'stolen' a wide-ranging meaning"); United States v. Handler, 142 F.2d 351, 353 (2d Cir.)(holding that the NSPA is applicable to any taking whereby a person dishonestly obtains goods belonging to another with the intent to deprive the owner of the rights and benefit of ownership.") cert. denied, 323 U.S. 741 (1944).

Searching for a way to skirt this principle, the defendant argues that courts have construed "the types of property interests covered by the NSPA narrowly" and that foreign declarations of ownership like that contained in Egyptian Law 117 ("Law 117") are not included. (Br. 27.) The one case the defendant cites for this point, United States v. Dowling, 473

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[2] The gravamen of an NSPA offense is transporting, receiving, or selling stolen or converted property. To prove a Section 2315 offense the Government must show: (1) the goods were stolen, converted or taken by fraud; (2) the defendant received, possessed, concealed, stored, sold or disposed of the property; (3) the property had moved in interstate or foreign commerce; (4) the property was worth $5,000 or more, and; (5) the defendant knew the property had been stolen, converted or unlawfully taken. 18 U.S.C. § 2315; United States v. Rosa, 71 F.3d 1531, 1543 (2d Cir.), cert. denied, 513 U.S. 879 (1994).

U.S. 207 (1985), contains no such holding. In Dowling, the Supreme Court held that bootleg records were not stolen property within the meaning of the NSPA because there was no physical taking of any object but only an interference with intangible, non-physical copyright interests. Id. at 216. This case involves a conspiracy to receive stolen antiquities, which are obviously tangible property, thus Dowling is not applicable here. Nor did the Court in Dowling in any way suggest that there should be a narrow definition of property rights for purposes of the NSPA.

B. This Prosecution Does Not Require the Enforcement of Foreign Law

The defendant's motion rests on a fundamental error: he argues that the Government is asking this Court to enforce Egypt's national ownership law which, he asserts, conflicts with United States policy and law. This prosecution does not involve the enforcement of any foreign law; no part of this trial will involve a determination that the defendant has violated the criminal laws of Egypt. Egyptian law is relevant with respect to one issue in this case: whether Egypt owns the antiquities that the defendant conspired to receive and possess. Should this Court decide that Egypt's declaration of ownership, as contained in Law 117, is sufficiently clear, it will not be enforcing Egyptian law, but will merely accord appropriate recognition to

Egypt's sovereign declaration of ownership to previously undiscovered antiquities found within its borders. The jury will then determine whether the defendant is guilty of conspiring to violate the NSPA, strictly by reference to the law of the United States.

Courts, including those in this Circuit, have long looked to local and foreign laws in this manner to define property rights for purposes of the NSPA and other types of prosecutions. Most recently, in United States v. Portrait of Wally, 105 F. Supp.2d 288 (S.D.N.Y. 2000), Chief Judge Mukasey analyzed in the context of a civil forfeiture action the application of the NSPA to a painting by Austrian artist Egon Schiele alleged to have been stolen and converted in a foreign country. The Court determined that federal law controls the question of whether an item is stolen, whereas local law, in that case the law of Austria, "controls the analytically prior issues of (a) whether any person or entity has a property interest in the item such that it can be stolen, and (b) whether the receiver of the item has a property interest in it." Id. at 292. The court cited McClain as precedent for its holding that foreign law was examined "only to determine whether the artifacts were owned such that they could be stolen." Id. at 291. As in McClain, the court in Wally looked "exclusively to federal law to determine whether the artifacts were stolen." Id.

United States v. Long Cove Seafood, Inc., 582 F.2d 159 (2d Cir. 1978) is also fully in accord with this analysis. That case involved the alleged theft of clams dug in violation of state regulation. In Long Cove, the court found that to determine whether there has been a theft it is necessary to look at the underlying property rights. The question was "whether New York has asserted a true ownership interest in wildlife such as the Fifth Circuit, in McClain I, 545 F.2d at 1000-3, held that Mexico had done since 1972 with respect to pre-Columbian artifacts." Id. at 165. Similarly, other Second Circuit cases have looked to foreign law to define underlying property interests. See e.g., United States v. Pierce, 224 F. 3d 158 (2d Cir. 2000) (evidence of foreign tax law had to be introduced at trial to establish foreign property interest, even though that tax law could not be enforced in the United States); United States v. Trapilo, 130 F.3d 547 (2d Cir. 1997) (holding in context of wire fraud statute that scheme to defraud foreign nation of taxes interferes with foreign government property interest, even though "revenue rule" would prohibit enforcement of foreign tax law in the United States).[3]

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[3] The defendant cites a passage from a 1978 journal note stating that foreign legislation does not create sufficient ownership of objects not in the foreign government's physical possession. (Br. 29.) This viewpoint is not only contrary to case law, but ignores legislation in this country establishing government ownership over certain items not in government possession. See Archaeological Resources Protection Act of 1979,

Despite the above authority looking to foreign law to determine the underlying property interests in NSPA cases, the defendant claims that the "NSPA does not once make reference to foreign laws, revealing Congress' intent not to incorporate those laws into the statute." (Br. 29.) First, as discussed above, foreign law is not being "incorporated" into the NSPA. United States law applies foreign law only to determine whether there is a property interest. Second, the NSPA expressly applies to interstate and foreign commerce. Consistent with the express statutory reference to foreign commerce, the NSPA has been applied to items stolen in foreign countries. McClain I, 545 F.2d at 994. The explicit inclusion of the phrase "foreign commerce" in the statute forecloses the defendant's argument that the NSPA does not recognize foreign thefts.[4]

C. Courts Have Long Recognized That Foreign National Ownership Laws Establish Valid Foreign Government Ownership of Antiquities In Both NSPA and Civil Cases

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16 U.S.C. §§ 470aa-470mm (2001) ("ARPA") (providing that archaeological resources excavated from federal lands remain the property of the United States regardless of physical possession).

[4] The defendant claims that if Congress intended the NSPA to apply to stolen foreign property it would have stated so expressly, as it did in the Lacey Act. Br. At 29. First, the NSPA does contain express reference to foreign commerce. Moreover, the Lacey Act is not a property theft statute. It makes it a federal crime to transport wildlife in violation of local or foreign law, (regardless of who has an ownership interest in the wildlife), thus, the underlying violation of law is an element of the offense, and there is no parallel to the NSPA. Long Cove Seafood, 582 F.2d 159, 162-4.

Lacking any meritorious challenge to McClain's sound analysis of the NSPA, the defendant devotes significant effort to creating the false impression that McClain is an "outdated," "discredited" and "obsolete aberration" that should be rejected. (See, e.g., Br. 1, 18, 20, 21, 23). In this vein, the defendant also asserts that "not a single court's decision favors this Court's application of McClain." (Br. 22.) These statements are puzzling at best, given that the analysis of the NSPA contained in McClain has been expressly adopted and applied to nationally owned archeological property by every court to have considered such an issue. The central holding of McClain - that "stolen" property under the NSPA includes property that a foreign nation owns pursuant to national ownership laws and which is knowingly stolen from that nation - has never been overruled, or even criticized by any other court.

Rather, courts have consistently looked to foreign national ownership laws to determine who has title to property in both criminal and civil proceedings. United States v. Hollinshead, 495 F.2d 1154, 1155 (9th Cir. 1974) (upholding pre-McClain an NSPA conspiracy conviction of dealers and smugglers for conspiring to transport in foreign and interstate commerce a Mayan stele stolen from ruins in the jungle of Guatemala; expert testimony had established that under Guatemalan law, " all such artifacts are the property of the Republic, and may not be

removed without permission of the government"); Peru v. Johnson, 720 F. Supp. 810 (C.D. Cal. 1989), aff'd sub nom., Peru v. Wendt, 933 F.2d 1013 (9th Cir. 1991) (adopting the McClain analysis that the NSPA applies to property owned by foreign nations pursuant to clear governmental declaration, but denying claim because of a lack of evidence that the artifacts came from Peru and, in the district court, because the foreign statute at issue was unclear); United States v. An Antique Platter of Gold, 991 F. Supp. 222 (S.D.N.Y. 1997) ("[U]nder Section 2314, an object may be considered 'stolen' if a foreign nation has assumed ownership of the object through its artistic and cultural patrimony laws."), aff'd on other grounds, 184 F.3d 131 (2d Cir. 1999), cert. denied, 528 U.S. 1136 (2000)[5]; United States v. Pre-

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[5] The defendant distorts the Second Circuit's opinion in United States v. An Antique Platter of Gold, 184 F.3d 131 (2d Cir. 1999), inaccurately asserting that the decision reflected "skepticism" for McClain. (Br. 12-13, 23.) The district court in that case granted summary judgment on two grounds: (1) that the platter was subject to forfeiture because it was imported into the United States by means of a materially false declaration on Customs forms, and (2) that it was stolen property transported in interstate and foreign commerce in violation of the NSPA. On appeal, the Court affirmed the forfeiture judgment on the basis of the material false statement claim and did not address the NSPA claim. Nothing in the opinion can be read to reflect criticism of McClain, as the defendant suggests. Indeed, the Court relied on McClain in deciding the materiality issue, stating, "[s]eizure of the Phiale would clearly be authorized by this provision [Customs Directive No. 5230-15] under McClain I, 545 F.2d 988, which held that violations of a nation's patrimony laws are covered by the NSPA." United States v. An Antique Platter of Gold, 184 F.3d at 137. In response to the claimant's argument in Antique Platter that McClain is bad law, the Court explained that whether or not McClain is ultimately followed - "an issue we need not address" -

Columbian Artifacts and the Republic of Guatemala, 845 F. Supp. 544, 547 (N.D. Ill. 1993) (adopting McClain holding that NSPA protects ownership over artifacts derived from foreign legislative pronouncements); Republic of Turkey v. OKS Partners, No. 89-3061-WJS, 1994 U.S. Dist. LEXIS 17032 (D. Mass. June 8, 1994) (civil claim by foreign sovereign to antiquities based on ownership); and Republic of Croatia v. Trustee of the Marquess of Northampton 1987 Settlement, 610 N.Y.S.2d 263, 203 A.D.2d 167 (1994), appeal denied, 84 N.Y.2d 805, 642 N.E.2d 325 (1994) (same, but denying claim because of lack of evidence that antiquities came from claimant nation); see also U. S. Customs Directive No. 5230-15 (Apr. 18, 1991) (recognizing foreign national ownership of undiscovered antiquities in reliance on the McClain decision (cited in United States v. An Antique Platter, 184 F.3d at 137)).

The defendant attempts to minimize the importance of these cases, claiming that they are limited to civil disputes over title. (Br. 22.) However, Hollinshead was a criminal

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was irrelevant, because the information as to country of origin was of importance to Customs and was falsely reported. The Court in no way suggested that McClain should not be followed.

Moreover, as discussed above, a prior NSPA decision of the Second Circuit, Long Cove Seafood, 582 F.2d at 165, cited and quoted McClain with approval for the principle that a state's declaration of ownership could create a property interest sufficient for the NSPA to apply where such property is stolen from the state.

prosecution under the NSPA; Antique Platter involved a quasi-criminal forfeiture claim, and Pre-Columbian Artifacts was a United States government initiated interpleader. Further, all of these cases, whether civil or criminal, expressly adopt McClain's substantive analysis in resolving the question of title, which is the only purpose for which Egyptian law is used in this Indictment.[6] The defendant simply fails to explain how the civil procedural context makes any difference.[7]

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[6] The defendant asserts that McClain was "truly the only prosecution of its kind." (Br. 14 n. 11.) However, Hollinshead was an NSPA prosecution, and the Government is aware of at least one additional similar prosecution, United States v. Malter 00 Cr. 300 (WD. Okl.).

[7] In urging this Court to reject the McClain line of cases, the defendant also relies heavily on articles by persons who are affiliated either as counsel or as members of art dealerships and trade groups, including amicus NADAOPA. For example, James Fitzpatrick and James McAlee, cited extensively in the defendant's brief, are both counsel and former counsel respectively to NADAOPA. These attorneys are practitioners who have consistently advocated on behalf of the views of their clients' interests. The defendant also cites to Bator, An Essay on the International Trade in Art, 34 Stan. L. Rev. 275 (1982), in which Bator stated that recognizing other nations' declarations of ownership would cause the exporting country, without affecting any changes at home, to invoke the criminal legislation of the United States to enforce its export laws. However, Schultz omits that Bator does not claim that McClain should never be used, but rather says it should be reserved for clear and egregious cases, such as where "a national monument is dismembered and smuggled out of a country, or where there is a specific showing that antiquities were unlawfully appropriated and that the defendant knew that this had occurred," Id. at 353, which is precisely this case. The defendant also omits mention of the numerous commentators that have embraced McClain and the legal analysis supporting application of the NSPA in this context. See e.g., Patty Gerstenblith, The Public Interest in the Restitution of Cultural Objects, 16 Conn. J. Int'l L. 197 (2000); Barbara B. Rosecrance, Harmonious Meeting: The McClain Decision and the

II. UNITED STATES COURTS MUST RECOGNIZE A FOREIGN SOVEREIGN'S DECLARATION OF OWNERSHIP OVER PROPERTY.

The defendant argues that, despite the case law to the contrary, this Court should ignore Egypt's declaration of ownership because it, and in the defendant's view all such laws, are hopelessly in conflict with the United States policy toward archaeological resources and with United States notions of private property. He suggests that for a foreign government to own its antiquities is "un-American," and therefore it should not be a crime in this country to receive such property even if it is knowingly stolen from the foreign nation.

Having identified a fictional conflict between United States policy and foreign ownership laws, the defendant incorrectly concludes that comity compels this Court to disregard Egypt's ownership law. The defendant's argument turns the concept of international comity on its head. The presumption under the doctrine of comity is that our courts will recognize and respect the laws of foreign jurisdictions wherever possible.[8]

Cultural Property Implementation Act, 19 Cornell Int'l. L.J. 311 (1986); Jonathan S. Moore, Enforcing Foreign Ownership Claims in the Antiquities Market, 97 Yale L.J. 466 (1988).

[8] The classic formulation of the doctrine of comity is from Hilton v. Guyot, 159 U.S. 113, 163-4 (1895):

> "Comity" in the legal sense, is neither a matter of absolute obligation ... nor of mere courtesy and good will ... But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard to both international duty and convenience, and to the rights of its own citizens or of

While principles of comity may call for foreign law to be disregarded in rare cases where there is a direct conflict with fundamental United States principles,[9] that aspect of the doctrine has no application here, where the foreign law governs matters purely within a sovereign nation's own territory. "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory." Underhill v. Hernandez, 168 U.S. 250, 252 (1897); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416 (1964). Courts in this country are precluded "from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." Id. at 401. See also Restatement (Second) of Foreign Relations Law of the United States § 41 (2000); accord Compania de Gas de Nuevo Laredo, S.A. v. Entex, 686 F.2d 322, 326, (5th Cir.) cert. denied, 460 U.S. 1041 (1983).

There is no occasion for a United States court to

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other persons who are under the protection of its laws.

[9] Where public policy is asserted to escape the consequences of foreign law, as it is here, the court's inquiry is limited. See Bader v. Purdom, 841 F.2d 38, 40 (2d Cir. 1988) (party seeking to invoke public policy to avoid application of foreign law has "heavy burden" of showing that such application "would violate some fundamental principle of justice, some prevalent conception of good morals, or some deep-rooted tradition of the common weal"); Finnish Fur Sales v. Juliette Shulof Furs, 770 F. Supp. 139, 143-46 (S.D.N.Y. 1991).

assess the wisdom or validity of Egyptian Law 117, which is fully executed within the borders of that country. As the Fifth Circuit in McClain put it:

> This Court, of course, recognizes the sovereign right of Mexico to declare, by legislative fiat, that it is the owner of its art, archaeological, or historic national treasures, or of whatever is within its jurisdiction.

McClain I, 545 F.2d at 992.

The cases defendant relies on are inapposite, as they involve situations where foreign law altered existing rights of United States litigants, and deference to the foreign law directly infringed on the litigants' pre-existing rights. For example, in Pravin Banker v. Banco Popular, 109 F.3d 850, 854 (2d Cir. 1997) the government of Peru sought to stay a lawsuit while it re-negotiated its unpaid debt to foreign creditors. The Court found that because Peru's actions undermined the ability of creditors to enforce valid existing contractual debts, international comity did not require deference to Peru's request for a stay. Id. at 854-6. Allied Bank International v. Banco Credito Agrociola De Cartago, 757 F.2d 516 (2d Cir. 1985) also involved a foreign government's unilateral restructuring of debt that the Court found affected pre-existing property interests in the United States.[10] These cases are not analogous to this one,

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[10] In Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa, 482 U.S. 522(1987) also cited by the defendant, the Court held that the Hague Convention

where the foreign government's declaration of ownership is executed solely within its territory and has no impact on preexisting extraterritorial rights, interests or property.

Furthermore, even if it were relevant, the defendant is plainly incorrect in asserting that foreign national ownership laws are "antithetical" to the way Americans think about property. There are numerous laws in the United States designed expressly to protect cultural resources from looting and theft, as are foreign patrimony laws. In fact, a variety of federal and state laws in the United States vest title in the Government to archaeological resources and property in comparable fashion to the ownership laws of numerous foreign legal regimes.[11] Thus,

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was not the exclusive method of obtaining discovery from a foreign litigant over whom the federal district court had personal jurisdiction. The Court referred to principles of international comity in the context of considering the application of United States discovery procedures in foreign countries, which is in no way analogous to the facts of this case.

[11] The Archeological Resources Protection Act (ARPA), 16 U.S.C. §§ 470ee-70mm provides, among other things, that resources excavated or removed from federally owned or controlled lands remain the property of the United States. Similarly, every state has a statute vesting ownership of archaeological property found on state owned or controlled lands in the state government. Gerstenblith, supra n. 7 at 232 n. 154. Native American Indian Protection and Repatriation Act of 1991 (NAGPRA), 25 U.S.C. §§ 3001 et seq. provides that Indian burials and funerary objects on federal land be returned to lineal descendants or tribe. See also, Abandoned Shipwreck Act, 43 U.S.C. § 2101 et seq. (United States asserts title to abandoned shipwrecks embedded in submerged state lands.) These statutes establish United States and state government ownership of various forms of cultural and archaeological property, reflecting legal efforts in the United States to protect heritage resources and prevent illicit excavation

even though not identical to American laws, foreign national ownership laws designed to prevent and deter looting and plundering of archaeological resources are consistent, not "antithetical," to comparable laws of the United States.[12]

In any event, courts in the United States regularly recognize the ownership rights of foreign nations over things that the United States Government itself does not "own," such as natural resources, oil, minerals found on private land. See, e.g. Grynberg Production Corp. v. British Gas, P.L.C., 817 F. Supp. 1338, 1359-60 (E.D. Tex. 1993) (recognizing ownership by the nation of Kazakhstan to mineral resources located within its borders); Amoco Corp. v. Commissioner of Internal Revenue, 138 F.3d 1139, 1140 (7th cir. 1998) (recognizing that under Egyptian Constitution and implementing law Egypt owns all the country's

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and trafficking in such objects.

[12] The defendant's citation to Gerber 999 F.2d 1112 (7th Cir. 1993), cert. denied, 510 U.S. 1071 (1994), in support of his contention that the United States does not regulate archaeological property located on private land is misleading. Gerber held that the criminal penalties imposed under Section 470ee(c) of ARPA for trafficking in stolen archaeological resources applied to items taken from private as well as federally owned land. Gerber, 999 F.2d 1112, 1115. The defendant's citation to Indiana State Highway v. Ziliak, 428 N.E.2d 275 (Ind. Ct. App. 1981) is likewise misleading. That case involved the government's attempt to conduct an excavation on private property, not the ability of a government to own or regulate archaeological resources. Further, Indiana law prohibits excavation on privately owned land by the owner without state approval, reflecting the state's intent to preserve and protect undiscovered cultural resources. Whitacre v. State, 619 N.E.2d 605 (Ind. Ct. App. 1993) aff'd, 629 N.W. 1236 (Ind. 1994).

natural resources including oil and gas). In contrast, the defendant's argument if applied to other areas would permit United States courts to disregard foreign sovereign ownership laws of any kind, merely because such ownership would not be possible under United States law. As demonstrated, this conflicts with time honored principles of comity.[13]

III. NEITHER THE DUE PROCESS CLAUSE NOR THE TAKINGS CLAUSE IS VIOLATED BY NATIONAL OWNERSHIP LAWS THAT CLEARLY DECLARE OWNERSHIP

The defendant alleges the Indictment should be dismissed because foreign national ownership laws conflict with the Takings Clause of the Fifth Amendment and are insufficiently clear to give fair notice of what they proscribe. (Br. 17, 30.) Because the Takings Clause has no application to the internally

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[13] It is worth noting that similar "policy conflict" arguments were raised and rejected in McClain. The defendants in McClain argued that the United States had a policy of encouraging the importation of art which conflicted with application of the NSPA to antiquities stolen from a foreign nation. The Fifth Circuit held that even if there were such a policy, no statute, treaty or "public policy" of the United States could be read to narrow the NSPA:

> the appellants argue that an asserted national policy of encouraging the importation of works of art precludes the application of the National Stolen Property Act in this area. Assuming that there is such a national policy, we note that there is also a national policy to penalize those who trade in stolen merchandise. It is within the power accorded to the executive branch of government to say when the policy embedded in the criminal statute should prevail and prosecution be instituted. (citation omitted).

McClain I , 1002, n. 30 (emphasis added).

executed property laws of a foreign country and because Egypt's Law 117 clearly declares that Egypt owns antiquities discovered after 1983, defendant's arguments are without merit.

The Takings Clause is not implicated in this case. As discussed above, it is well-established that courts must afford absolute recognition to foreign laws operating wholly within a nation's own territory and do not view them through the lens of the United States Constitution. Banco Nacional de Cuba, v. Sabbatino, 376 U.S. 398, 416 (1964). Just as the Fourth Amendment does not apply to search and seizures conducted abroad at the initiative of foreign officials on persons without any relationship with the United States, the Takings Clause has no application to a foreign nation's law declaring government ownership over antiquities discovered within that nation's territorial borders. See 1 W. LaFave, Search and Seizure § 1.8(h), at 282-3 (1996); United States v. Verdugo-Urquidez, 494 U.S. 259, 275 (1990) (holding that Fourth Amendment does not apply to extraterritorial seizures having no involvement with the United States, and reaffirming the "undoubted proposition that the Constitution does not create, nor do general principles of law create, any juridical relation between our country and some undefined, limitless class of noncitizens who are beyond our

territory.") (Kennedy, J. concurring).[14]

There simply was no "taking" or confiscation from the defendant in this case. There was no "taking" by the United States government. And there was no "taking" anywhere within the United States.[15] While the Fifth Amendment is of course applicable to the defendant, he does not and cannot claim to have any prior, existing right, claim or interest in any of the property at issue in this case.[16] The passage of Law 117 did not in any way affect, much less constitute a taking of his property interests.

Second, the defendant's argument that application of the NSPA to items stolen from foreign nations "deprives American citizens of their Constitutional due process right to fair notice of what conduct that statute proscribes" (Br. 30-32) misses the point, and has been rejected by other courts.

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[14] Even if Law 117 were a confiscatory statute, which it is not, the court would still be bound to honor it. See Palicio v. Brush, 256 F. Supp. 481, 488 (S.D.N.Y. 1966) (court refused to invalidate Cuban government's expropriation of ownership over companies, where the take-over was fully executed in Cuba, tangible property was located in Cuba and no pre-existing debts or obligations were located in the United States).

[15] No "taking" is involved in the case at all, as under Egyptian law antiquities are not capable of being privately owned and thus there is no confiscation of such property from any private owner.

[16] As McClain I recognized, the case might be different if the defendant were being prosecuted for removing his own property to this country, but that is clearly not this case. McClain I, 545 F.2d 988, 996 n.12.

In the first McClain appeal, the defendants made this exact argument, citing Jerome v. United States, 318 U.S. 101 (1943) for the principle that federal criminal statutes should not be interpreted according to diverse local or foreign laws, because of the vagueness and fair notice problems that would arise. The Court dismissed the argument explaining:

> Here our decision to refer to foreign declarations of ownership does not create the state-by-state divergence avoided in Jerome. It poses the possibility, of course, that similar exportations from different countries might lead to different results in the United States. But the National Stolen Property Act has a specific scienter requirement knowledge that stolen goods are stolen that protects a defendant who might otherwise be trapped by such differences.

545 F.2d at 1001 n. 30. The Court thus squarely held that the NSPA's scienter requirement protects against "the possibility that a defendant is convicted for an offense he could not have understood to exist." Id. (quoting Boyce Motor Lines v. United States, 342 U.S. 337, 340 for the proposition that it is not "unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line"). The court also addressed due process by requiring that the foreign national ownership law declare ownership with "sufficient clarity to survive translation into terms understandable by and binding upon American citizens." McClain II, 593 F.2d at 670. This same holding was reaffirmed on

appeal after retrial. McClain II, 593 F.2d at 665.[17]

Similarly, in Portrait of Wally, 105 F. Supp.2d at 291, the Court expressly adopted this same due process analysis in the NSPA context. The Court recognized that under Jerome criminally proscribed conduct may not vary from one jurisdiction to another, and further explained that defining underlying property rights by reference to foreign law does not implicate vagueness concerns because the concept of what is stolen under the NSPA is determined uniformly by reference to federal law:

> Jerome does not imply that the core of proscribed conduct must lead to the same consequences for property from every jurisdiction - "different results" are permissible so long as there is a mechanism that protects defendants 'who might otherwise be trapped by such difference.' In the case of § 2314 that mechanism is a uniformly applied scienter requirement.

Id. That foreign nations have different laws that are drafted in different languages, (Br. 31), may mean, as Chief Judge Mukasey observed in Portrait of Wally, that there will be different results depending on from which nation the property is stolen; but the uniform scienter requirement and the requirement that the foreign pronouncement of ownership be set forth in reasonably clear terms protects against the void for vagueness concerns.

The defendant also professes concern that "American

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[17] The court vacated the substantive convictions on other grounds relating to the clarity of the specific Mexican laws at issue, and affirmed the NSPA conspiracy convictions under Mexico's 1972 patrimony law. McClain III, 593 F.2d at 671.

museums, dealers and collectors have no way of knowing which of these laws will be criminally enforced here under the NSPA." (Br. 31). However, whenever a foreign nation claims to have an ownership law, persons of reasonable intelligence, including museum personnel, art dealers, collectors and others who are regularly engaged in the antiquities business, are certainly on notice. Nonetheless, as discussed above, no NSPA prosecution will succeed unless the Government satisfies the scienter requirement, fully taking care of this alleged concern. Further, courts have recognized that it would be impossible for a statute to expressly describe every type of theft that might fall within its scope. See Moskal v. United States, 498 U.S. 103, 111 (1990) (the Constitution has "never required that every permissible application of a statute be expressly referred to in its legislative history.").

IV. CRIMINAL PROSECUTIONS UNDER THE NATIONAL STOLEN PROPERTY ACT AND MCCLAIN ARE NOT INCONSISTENT WITH THE CULTURAL PROPERTY IMPLEMENTATION ACT.

In a desperate search for some way to avoid the sound legal basis for McClain-type prosecutions under the NSPA, Schultz urges that the instant indictment be dismissed because "[f]oreign patrimony laws are inconsistent with the CPIA" and the criminal prosecution of knowing traffickers in such property would "contradict Congress' clear intention" (Br. 15, 16). The defendant contends that the Convention on Cultural Property

Implementation Act, 19 U.S.C. §§ 2601 et. seq., ("CPIA") "flatly rejects" the application of the NSPA to antiquities stolen from foreign nations (Br. 2) and that Congress intended the CPIA to be the sole expression of the policy and response of the United States to such thefts. (Br. at 18.) Defendant's certainty is apparently unaffected by the fact that in the 1983 passage of the CPIA Congress mentioned neither foreign patrimony laws, the NSPA or McClain and *expressly* stated in the legislative history that the CPIA did not preempt other remedies.

The CPIA is aimed at deterring worldwide looting and trafficking in archaeological and cultural resources through import rules that prohibit persons from bringing certain categories of such items into the United States.[18] Given that the very purpose of the CPIA is to create enhanced protection in this area, it strains credulity to describe it as legislation that forecloses criminal prosecution of those who transport and receive looted objects. The CPIA is a Customs statute, codified in Title 19, prohibiting importation of certain categories of archaeological resources into this country. The CPIA is not a criminal law and it says nothing about criminal penalties.

Schultz's invitation for this Court to amend the NSPA

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[18] "The purpose of this bill is to ... achiev[e] greater international cooperation toward preserving cultural treasures that not only are of importance to the nations whence they originate, but also to greater international understanding of our common heritage." S. Rep. 97-564 at 21 (2d Sess. 1982).

to exclude prosecutions for receiving stolen antiquities owned by a foreign nation should be firmly rejected. The CPIA does not purport to address the prosecution of perpetrators seeking to trade in stolen antiquities. Preemption of the NSPA by the CPIA in such cases would leave a gaping hole in available enforcement procedures, something Congress manifestly did not intend.

A. Basic Principles of Statutory Construction Demonstrate that Congress Did Not Overrule McClain or Limit the NSPA in Passing the CPIA.

The CPIA is the means by which the United States implemented the 1970 UNESCO Convention. This statute authorizes two basic types of import restrictions. First, the President may: a) enter into bilateral agreements with other nations that are parties to the UNESCO Convention ("State Parties") to apply import restrictions on certain archaeological and ethnological artifacts of the State Party, 19 U.S.C. §§ 2601, 2602(a); and b) impose similar import restrictions unilaterally in "emergency" situations. 19 U.S.C. § 2603. Second, the CPIA prohibits importation and provides for the seizure and return of stolen objects that are documented as appertaining to the inventory of a museum, or religious or secular public monument or similar institution in a State Party. 19 U.S.C. §§ 2607 and 2609.

Schultz's argument that Congress intended the CPIA to bar prosecutions under the NSPA must be rejected for several reasons. First, it is a basic rule of statutory construction

that the plain language of a statute controls on matters of intent. "The intention of the legislature is to be collected from the words they employ. . . . The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words . . . in search of an intention which the words themselves did not suggest." United States v. Wiltberger, 18 U.S. 76, 95-96 (1820) (Marshall, C.J.). To infer that the CPIA preempts criminal prosecution under the NSPA for theft of foreign government owned cultural property would require just the type of departure warned against in Wiltberger. There is nothing in the text of the CPIA that expresses a Congressional intent to preclude a NSPA prosecution involving stolen antiquities, nor any reference, negative or otherwise, to foreign national ownership laws. To conclude that passage of the CPIA bars prosecutions for receiving stolen antiquities under the NSPA is inconsistent with the statute's plain language.[19]

Second, it is well settled that where Congress enacts

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[19] Amici suggest that FDA v. Brown & Williamson Tobacco Corp., 112 S. Ct. 1 291, 1301 (2000) supports their argument that the CPIA pre-preempts the NSPA. In Brown and Williamson, the FDA attempted to regulate tobacco products pursuant to the general regulatory scheme of the Food Drug and Cosmetic Act. The Supreme Court rejected the FDA's reading of the FDCA, finding that Congress had rejected proposals to give the FDA jurisdiction over tobacco and had precluded any agency from exercising significant policy making authority in the area. Brown & Williamson in fact supports the Government's case. In contrast to the clear legislative pronouncements regarding cigarettes, there is absolutely nothing in the CPIA to indicate Congressional intent to preclude application of the NSPA to theft of objects of foreign cultural patrimony.

two overlapping statutes, they "should be permitted to co-exist unless the two are mutually exclusive." United States v. Stephenson, 895 F.2d 867, 872 (2d Cir. 1990) (quoting United States v. Jackson, 805 F.2d 457, 461 (2d Cir. 1986), cert. denied, 480 U.S. 922 (1987)). There is nothing inconsistent between the Customs provisions of the CPIA and criminal prosecution for theft of cultural property under the NSPA.

Each statute has different requirements and applies to different contexts. The CPIA is a Customs statute that establishes import restrictions and seizure remedies that apply to certain categories of archaeological and cultural resources that may not cross our borders; the NSPA is a criminal law. The two are not mutually exclusive.

It makes no sense to say, as the defendant does, that the CPIA "embodies a clear U.S. policy against blanket enforcement of foreign patrimony laws." (Br. 21.) The CPIA is silent on national ownership laws, given that it is not necessary under the CPIA for a State Party seeking to have import restrictions implemented to have a foreign ownership law. However, the lack of a national ownership statute is fatal to a McClain type prosecution under the NSPA.[20]

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[20] For example, a State Party with export regulations but no national ownership law covering archaeological resources (such as Canada) is eligible to request a bilateral import restriction agreement under the CPIA, but there could be no McClain-type NSPA prosecution for theft absent some other basis for ownership.

Further, the CPIA provides enhanced protection through Customs regulation and forfeiture against importation of certain types of cultural property, authorizing the United States to recognize a foreign nation's export controls, which was not otherwise authorized under existing law and could not be done in the absence of specific legislation. The CPIA also created a new statutory basis to seize and forfeit cultural property stolen from museums, churches, public monuments and similar institutions. 19 U.S.C. §§ 2607 and 2609. The forfeiture requirements under Section 2609 are less burdensome than under other pre-existing forfeiture provisions in that they do not require the Government to show that the importation of such objects was done with knowledge that they were stolen, only that they were in fact stolen. Nothing in the CPIA states that the definition of "stolen cultural property" contained in Section 2607 applies outside of the CPIA context. Congress' decision to ease the Government's proof for forfeiting a special category of stolen cultural property reflects intent to more effectively deter such theft and to facilitate the repatriation of such property; it does not suggest any intent to "narrow" otherwise applicable criminal laws, such as the NSPA, to eliminate prosecution or limit what can be considered stolen outside the

CPIA.[21] The NSPA and CPIA are patently different in context, focus and remedy. There is no conflict and thus this Court should reject defendant's request that it judicially amend the NSPA.[22]

B. The Legislative History Shows That The CPIA Did Not Affect Preexisting Remedies Under The NSPA and McClain.

Schultz's claim that the CPIA barred McClain type prosecutions under the NSPA is flatly contradicted by the

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[21] Furthermore, none of the cases following both McClain and the enactment of the CPIA considered the CPIA to have overruled McClain or precluded NSPA prosecution.

[22] The defendants in McClain raised an analogous preemption argument, contending the NSPA should not cover property stolen from foreign countries in violation of national ownership laws because the NSPA was superseded by the 1972 Law on Pre-Columbian Monumental or Architectural Sculpture or Murals, 19 U.S.C. §§ 2091-95. They argued that the enactment of the 1972 law reflected: (1) clear Congressional belief that the NSPA did not apply and (2) clear intent that the 1972 law is the exclusive and sole remedy for the illegal importation of items thereby precluding criminal prosecution. The Fifth Circuit dismissed these contentions with reasoning that applies with equal force to the CPIA context. The legislative history of the 1972 law revealed no such express or implied intent. The importation restrictions in the 1972 law applied to many countries, some that had ownership laws and some that did not, like the CPIA. The Fifth Circuit concluded:

> Since it covers artifacts from such a large number of countries, the Act is better seen not as an indication that other available penalties were thereby precluded, but rather as a recognition that additional deterrents were needed. We cannot see in this congressional intent any desire to prevent application of criminal sanctions for dealing in items classified as stolen because a particular country has enacted national ownership of its patrimony.

593 F.2d 658, 665.

statute's legislative history. The Senate Report that was part of the legislative history of the CPIA contains a clear and unequivocal statement that the CPIA did not supplant other available remedies:

> Further, [the CPIA] neither pre-empts state law in any way, nor modifies any Federal or State remedies that may pertain to articles to which [the Act's] provisions...may apply.

S.Rep. No. 97-564, at 25 (2d Sess. 1982), reprinted in 1982 U.S.C.C.A.N. 4078, 4099. NSPA prosecutions as per McClain are clearly such federal remedies that pertain to articles (i.e. antiquities) to which the CPIA may apply. To maintain in the face of such language that this prosecution "would contradict Congress' clear intention to the contrary" (Br. at 16) is patently false.

Moreover, in recognition of the fact that Congress had clearly not overruled McClain in passing the CPIA, legislation to amend the NSPA to explicitly preclude prosecutions such as this one was unsuccessfully introduced three times, in 1982 (S. 2963), in 1983 (S. 1559) and in 1985 (S. 605). The proposed legislation would have achieved exactly the results sought by defendant here: amendment of the NSPA to preclude the application of the NSPA to the taking of archaeological or ethnological materials from a foreign country where the claim of ownership was not based on actual possession but on a declaration by the foreign country of national ownership of the material, even where defendant was

aware of the foreign government's legal claim and the fact that the material had been illegally smuggled out of the country. For sure, Congress did not conduct extensive hearings on a bill to codify law that was already in place. Obviously, one must conclude that the CPIA did not overrule NSPA prosecutions as per McClain.

Schultz's argument that the CPIA is the exclusive "definitive statement" pertaining to nationally owned cultural property would lead to absurd results. If, as the defendant suggests, the CPIA carves out the entire realm of stolen cultural property and only the seizure and forfeiture remedies of the CPIA apply in the cultural property context, then no criminal penalties could be imposed where individuals steal cultural artifacts from public government owned institutions, since those institutions are within the scope of Section 2607. Likewise, defendant's view of the CPIA would eliminate a wide spectrum of private civil causes of action involving stolen cultural property, whether such property is stolen from private or public owners, because the sole remedy, according to the defendant, is forfeiture as set forth in Section 2609. These results make no sense and are clearly not intended.

Schultz also makes the foreboding prediction that if prosecutions like his are allowed to go forward, the CPIA will be rendered obsolete because foreign nations will forego import

restrictions in favor of criminal prosecutions. (Br. at 18). It makes no sense to think any nation would forego seeking import restrictions for broad categories of endangered items under the CPIA in favor of a policy of making criminal referrals to the United States for criminal prosecution under the NSPA. The evidentiary requirements of a criminal prosecution alone are enough to make it highly implausible that criminal prosecution would be favored over CPIA bilateral agreements, or even over civil replevin actions.[23]

V. THE EGYPTIAN ANTIQUITIES LAW IS SUFFICIENTLY CLEAR TO PUT A PERSON OF ORDINARY INTELLIGENCE ON NOTICE THAT EGYPT OWNS ANTIQUITIES DISCOVERED AFTER 1983

In declaring that all antiquities, with the exception of religious endowments, are public property, Egyptian Law 117, issued on August 6, 1983, Promulgating the Law on the Protection of Antiquities ("Law 117") puts the ordinary citizen, not to mention the experienced antiquities dealer, on notice that Egypt owns its newly discovered antiquities.[24] Obviously concerned by

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[23] It is ironic that the defendant appears to be championing bilateral agreements under CPIA as the favored method of dealing with looting, given that each time a State Party has applied for protection under the CPIA, the art dealer community has launched virulent opposition. See, e.g., N.Y. Times, Feb. 28, 2001, at E1, col. 5; James F. Fitzpatrick, Stealth Unidroit: Is USIA the Villian?, 31 N.Y.U. Int'l L. & Pol. 47 (1998).

[24] Egypt, of course, also owns antiquities that it legally owned prior to 1983. However, because this case concerns the removal from Egypt of newly discovered antiquities, this brief addresses Egypt's ownership of these antiquities.

this clear pronouncement, defendant Schultz seeks to confuse the issue of foreign law before this Court by grossly mischaracterizing the applicable United States law, distorting the plain meaning of the provisions of Law 117 and gratuitously and unfairly attacking Egypt's record in seeking to protect its antiquities. This Court should not countenance Schultz's efforts to complicate a straightforward review of foreign law.

As stated above, the McClain cases set forth the inquiry that this Court should make in examining Egyptian law in order to satisfy due process: whether the foreign national ownership law declares ownership with "sufficient clarity to survive translation into terms understandable by and binding upon American citizens." McClain II, 593 F.2d at 670. In assessing a law's clarity, the words of the Supreme Court in Boyce Motor Lines v. United States, 342 U.S. 337 (1952), relied on by the court in McClain, provide useful guidance:

> But few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.

Boyce Motor Lines, 342 U.S. at 340.

The defendant, citing Rule 26.1 of the Federal Rules of Criminal Procedure, asks this Court to conduct a pre-trial

evidentiary hearing on Law 117. The Government does not believe that such a hearing is necessary. First, as set forth below, Law 117 makes it clear that Egypt owns all movable antiquities discovered after 1983. Second, unlike in McClain and Johnson where numerous antiquities laws were at issue and, in McClain, where it was the jury that was charged with determining the meaning of the Mexican law, here there is only one law that is applicable and it is this Court that is making the determination. Third, the persons that the defense intends to call as expert witnesses do not appear to have any special knowledge of Law 117, making it unlikely that their testimony would assist this Court in its examination of law 117.[25]

A. Law 117's Provisions Clearly Demonstrate That Egypt Owns Its Antiquities And Schultz's Arguments To The Contrary Are To No Avail

Applying Boyce to the declaration of ownership

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[25] The defense has informed us by letter that should there be a hearing on November 20, it may call four witnesses, including Jack Josephson, an art collector, "who would testify about issues concerning Egyptology and the CPIA as they relate to Egypt's law." The Government believes that such testimony is entirely irrelevant to the topic of the clarity of Law 117. Further, the other experts listed by the defense include an Egyptian lawyer who resides in New York, an Egyptian lawyer from Egypt and a professor in Islamic law from the University of California at Los Angeles. From conversations with defense counsel, it appears that none of these persons have any special expertise relating to Law 117. Accordingly, the Government does not believe that it is necessary to hold a hearing to receive their testimony. However, should this Court decide to hold a hearing, the Government respectfully requests that this Court indicate the areas of Law 117 on which it seeks clarification.

contained in Law 117 demonstrates that referring to Egyptian law to determine Egypt's ownership interest in its antiquities causes no due process problem. As set forth below, contrary to Schultz's arguments, Law 117 as a whole, as well as its component parts, clearly and consistently declare that Egypt is the owner of its antiquities.

1. Articles 6 and 24

Article 6 clearly and simply declares that all antiquities are public, as opposed to private, property. Specifically, Article 6 states,

> All antiquities with the exception of religious endowments (waqfs) shall be deemed public property, and the ownership, possession and disposition of them shall be subject to the terms and conditions set forth in this law and regulations made thereunder.[26]

Article 24 also provides that every movable antiquity that is fortuitously discovered shall be deemed public property. Article 23 makes a similar declaration as to immovable antiquities. Schultz gives no explanation, much less any legal support, for his suggestion that this declaratory language is somehow muddled.[27]

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[26]The term "deemed" certainly does not create any confusion. By definition, a declaration of ownership statute deems or declares something to be public property. For example, Black's Law Dictionary in defining the term "deem" states, "When by statute certain acts are "deemed" to be a crime of a particular nature, they are such a crime, and not a semblance of it...."

[27]Schultz does offer the conclusory statement that from the standpoint of "American jurisprudence" Egypt's declaration of

2. Article 1

Article 1 provides a broad definition of an antiquity, putting persons on notice that Egypt, under Article 6, owns a wide range of objects.[28] Schultz makes two arguments with regard to Article 1's definition, neither of which has any merit.

First, Schultz claims that the words "archaeological or historical value or significance" are confusing. In United States v. Austin, 902 F.2d 743, 745 (9th Cir.) cert. denied, 498 U.S. 874 (1990), the court rejected an argument similar to the one Schultz makes here. In Austin, the defendant was convicted under ARPA for having excavated obsidian weapon projectile points and tools such as scrapers from an archaeological site. The defendant challenged his conviction on the grounds that ARPA's use of the terms "tools and weapons" made it unconstitutionally vague. The court rejected Austin's argument, finding that he had fair notice that the law applied to him because it was clear that

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ownership is unclear. (Br.. 36). However, he does not provide citations, let alone explain, what he means by this reference.

[28] Article 1 broadly defines an antiquity as "any movable or immovable property that is a product of any of the various civilizations or any of the arts, sciences, literatures and religions of the successive historical periods extending from prehistoric times down to a point one hundred years before the present and that has archaeological or historical value or significance as a relic of one of the various civilizations that have been established in the land of Egypt or historically related to it, as well as human and animal remains from any such period."

the items that he was charged with excavating were clearly weapons and tools. Accordingly, it was not necessary, as Austin urged, to examine the application of the law to the conduct of others. See also United States v. Tidwell, 191 F.3d 976, 980 (9th Cir. 1999)(holding that NAGPRA's definition of the term "cultural patrimony" as objects having "ongoing historical...importance" was not void for vagueness as applied to a defendant who was a dealer in Native American art); State of Washington v. Lightle, 88 Wn. App. 470; 944 P.2d 1114 (Wash. App. 1997) (upholding as sufficiently clear state statute that included in definition of "archeological resource" all objects of "archeological interest".)

Included in the stolen antiquities that Schultz is charged with conspiring to receive are a stone head of the pharaoh Amenhotep III, which Schultz described in a letter as "the finest ancient Egyptian object on the market" and sought to sell for $2.5 million (Indictment at ¶8c); a statue of a limestone striding figure, known to Schultz as "George," which Schultz sought to sell for $825,000 (Indictment at ¶8k); and a collection of Egyptian antiquities, specifically reliefs known as stelae, for which Schultz paid nearly $100,000 (Indictment at ¶¶8s-z). Quite simply, as in Austin, Schultz cannot credibly argue that he would have paid and sought to sell antiquities for such high sums and would have described them in such glowing

terms if he did not have reason to believe they were of archaeological or historical significance.[29]

Second, Schultz attempts to defend looting by suggesting that items, such as those mentioned in the Indictment, cannot be antiquities because once an item is clandestinely dug out of the ground, it loses its archaeological significance because it is impossible to examine its find site. Schultz is right that a great deal of information is lost when an item is clandestinely dug out of the ground. But this hardly means that the item loses its archaeological significance and certainly does not mean that people should be permitted to steal antiquities with abandon from unknown tombs and other sites.

3. Articles 7,8 and 9

Articles 7, 8, and 9 are all "grandfather" provisions that address the rights of persons who privately held antiquities prior to 1983, when Law 117 was enacted.

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[29]Schultz has indicated that he wishes to examine the antiquities at issue here prior to any hearing on Egyptian law in order to show that the antiquities are fakes or over-restored. This court should reject this request. First, the point of a hearing on foreign law is to examine foreign law, not to hold a mini trial on the evidence. Second, Schultz is charged with conspiring to receive stolen antiquities. Even if an antiquity, such as the head of Amenhotep III, were fake, which the Government has no reason to believe, it would not matter. The point of the conspiracy was clearly for Schultz to receive items of great archeological and historic value. United States v. Feola, 420 U.S. 671, 694 (1975)(criminal liability for conspiracy attaches for agreement to engage in a criminal venture "plus an overt act in pursuit of it, regardless of whether the crime agreed upon is ever committed."

Schultz claims that by permitting persons who lawfully held antiquities prior to 1983 to remain in possession of them, Articles 7,8 and 9 contradict Egypt's declaration of ownership. First, given that Schultz is not charged with conspiring to receive antiquities that were discovered prior to 1983, this argument is irrelevant here. Moreover, it was squarely rejected in McClain where the court found a similar grandfather provision in Mexico's 1972 law to be perfectly acceptable. McClain I, 545 F.2d at 1003.

Second, the grandfather clause does not confuse the clear declaration of ownership in Articles 6 and 24. If under Law 117 Egypt did not own all antiquities discovered after 1983, there would have been no need for the Law to address the ownership rights of persons who owned antiquities prior to then.[30]

B. Schultz's Other Criticisms of Law 117 Are Without Merit

Schultz also argues that Articles 12, 13 and 23 are confusing and contradict Egypt's declaration of ownership. As set forth below, these Articles mainly address the ministerial and practical circumstances that arise when dealing with antiquities.

1. Article 12

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[30] Schultz, of course, tried to make it appear that the antiquities he obtained from Co-conspirator 1 were discovered and removed from Egypt prior to 1983. Indictment ¶7e.

Schultz argues that Article 12 of Law 117, which provides that antiquities "shall be registered by decision of the minister responsible for cultural affairs" makes Egypt's ownership interest in any given antiquity contingent upon the decision of this minister. This contention is contrary to the plain language of the law.

Article 12 on its face neither states nor implies that registration is a prerequisite to ownership. If Egypt's ownership interest in antiquities were contingent on the decision of a minister, this would be clearly set forth in the articles that address ownership. However, neither Article 1, which defines an antiquity, nor Article 6, which declares Egypt the owner of its antiquities, provides that whether an object is an antiquity is contingent on a decision of a minister. Similarly, Article 24, which deems finds of movable antiquities to be public property, makes no reference to registration.[31] Moreover, it is clear from Law 117 itself that registration of antiquities is merely ministerial. See Article 26, et. seq. ("The Antiquities Organization shall be responsible for inventorying,

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[31]Schultz suggests (Br. 35) that Law 117 is like the 1897 Mexican statue criticized in McClain I, 545 F.2d at 998. This is inaccurate. The 1897 statute required a government official to declare an object to be "interesting" in order for it to be covered by the law involved there. As stated above, there is no such requirement under Law 117. Egypt automatically owns antiquities upon their discovery and ownership is not contingent on action by the minister of culture.

photographing, making drawings of and registering all movable and immovable antiquities and for entering all data pertaining thereto in records established for that purpose.") Certainly if the framers had wanted to make ownership contingent on registration, they could have included an express provision.

2. Articles 13 and 23

Unable to attack the clear declarations of ownership of newly discovered movable antiquities in Articles 6 and 24, Schultz turns his attention instead to Articles 13 and 23. Because these articles relate to immovable antiquities, such as structures, monuments and houses in which people live, they are of no relevance here; Schultz is not charged with conspiring to receive stolen immovable antiquities Given the practical problems posed by immovable antiquities, it is entirely appropriate that Law 117 makes special provisions for them. See Boyce Motor Lines, 342 U.S. at 340 ("most statutes must deal with untold and unforseen variations in factual situations and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out the prohibitions.") Regardless, contrary to Schultz's claim, Articles 13 and 23 are not confusing.

In any event, Shultz' discussion of Article 13 is misleading. Article 13 does not address immovable antiquities discovered after 1983. Rather, these are dealt with in Article

23, which clearly states that all newly discovered immovable antiquities are the property of Egypt.

Schultz, of course, ignores this provision of Article 23, myopically focusing instead on the Article's third sentence that provides that when an immovable property is discovered on private property, the Antiquities Organization does not have to move it or expropriate the land on which it is found but can leave it in its place. Schultz claims that this provision contradicts Egypt's claim to own all of its antiquities. Given that the first sentence of Article 23 states that all newly discovered immovable antiquities are public property, it is obvious that there is no contradiction. This provision simply addresses the situation where it is impractical for the Antiquities Organization to remove the immovable antiquity or expropriate the land on which it is found (as opposed to the antiquity itself.) It in no way cedes ownership of the immovable antiquity to the owner of the land on which it was discovered.[32]

C. McClain and Johnson Support a Finding that Law 117 Is Clear on Its Face

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[32] Schultz also incorrectly states that Article 35 permits foreign excavators to donate objects that they have discovered to foreign museums and thereby contradicts Egypt's declaration of ownership. Article 35 makes no such provision. Article 35 firmly declares that all antiquities found by archaeological missions are the property of Egypt. Although it allows Egypt to make a sovereign gift of an antiquity to a foreign archaeological mission to display in a museum, it in no way permits archaeologists to donate such objects.

Schultz acknowledges that the McClain opinions require a national ownership law to declare ownership with "sufficient clarity to survive translation into terms understandable and binding upon American citizens." (Br. at 34, quoting McClain II, 593 F.2d at 670.) Schultz, however, misconstrues the application of the McClain holdings to this case.

In McClain, the issue was whether and when Mexico declared itself the owner of all movable antiquities, the type of antiquities that the defendants in McClain were charged with stealing. The court found that it was not until 1972 that the Mexican law announced this with sufficient clarity. Schultz' suggestion (Br. 34) that the McClain Court found that declarations of ownership in two of Mexico's earlier laws (1934 and 1970) were deficient because of the type of declaratory language used is misleading. Rather, unlike Mexico's 1972 enactment and Egypt's Law 117, those laws did not provide that all newly discovered antiquities were public property.[33] Thus, the declaratory language was sufficient, but the category of antiquities to which the grant of ownership applied was too narrow.

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[33] For example, the Court found that Article 4 of the 1934 Mexican law (which provided that "objects which are found (in or on) immovable archaeological monuments are considered as immovable property, and they therefore belong to the Nation") did not give Mexico ownership of the movable antiquities involved there only because there was no evidence that they had been found in or on an immovable antiquity. McClain I, 545 F.2d at 998-99.

Schultz similarly takes the opinion in Peru v. Johnson out of context. Schultz claims that the court in Johnson found that declarations in Peru's laws that all historical monuments were "property of the state" and that unregistered artifacts "shall be considered the property of the State" lacked clarity. Schultz's analysis is misleading. It was not that these words lacked clarity but that other parts of the laws were confusing. Peru v. Johnson, 720 F. Supp. at 813.

Furthermore, in Johnson, Peru's case was woefully weak. It presented no direct evidence that any of the antiquities actually came from Peru, as opposed to Ecuador or Bolivia. Nor could it show when the antiquities left Peru and hence which of the various Peruvian antiquities laws applied to them. This dearth of evidence was the principal reason that the district court rejected Peru's claim and was the only basis on which the court of appeals affirmed the district court's opinion. Peru v. Wendt, 933 F.2d 1013 (9th Cir. 1991).[34]

D. Egypt Sufficiently Enforces Its Antiquities Law

Johnson is the only case - civil or criminal - that has

[34] Although this lack of evidence was clearly the death-knell of Peru's claim, the district court nevertheless reviewed several of the Peruvian antiquities laws and found them to be confusing. Johnson, 720 F. Supp. at 813. While certain statutes appeared to provide that some antiquities could belong to the state if they were unregistered for one year, other provisions contemplated private possession and transfer of these very same objects. Id. at 814.

been brought under the NSPA where a court has analyzed whether the foreign nation enforced its ownership laws. The Government does not believe that this is an appropriate area of inquiry. First, enforcement has nothing to do with the due process requirement that a foreign law be clear. Second, it threatens to embroil the judicial system of the United States in debates over the law enforcement priorities of another nation. Certainly another nation should not be prevented from owning its cultural heritage simply because it does not have the same resources as the United States does to protect it.

Schultz argues that "United States courts should not enforce foreign patrimony laws, such as Egypt's Law, that purport to make antiquities public property but that have the practical effect only of restricting their exportation." (Br. 41).

In McClain the court distinguished between a nation merely regulating property and a nation owning it:

> [R]estrictions on exportation are just like any other police power restrictions. They do not create "ownership" in the state. The state comes to own property only when it acquires such property in the general manner by which private persons come to own property, or when it declares itself the owner: the declaration is an attribute of sovereignty.

McClain I, 545 F.2d at 1002-03. Nowhere in McClain does the court suggest that an American court should question the sincerity of a sovereign's proper declaration of ownership by dissecting the manner in which it enforces it law. Such an

exercise would fly in the face of well-established principles of comity.

Contrary to Schultz's argument, Law 117 is not an export law. As required by McClain, it contains a clear declaration of ownership. Accordingly, pursuant to McClain, there is no basis to examine Egypt's enforcement record.

Even if this court were to examine Egypt's enforcement record, it would find ample evidence that Egypt treasures its antiquities. Not only does it enforce Law 117 by criminally prosecuting persons who steal antiquities but it also urges international bodies to give antiquities greater legal protection.[35]

Schultz's allegation that Egypt has not taken action to protect its cultural property is simply not true. As Schultz himself acknowledges, Egypt prosecuted numerous persons, both British and Egyptian, in connection with the crimes charged in the instant indictment. As the attached newspaper article illustrates, Egypt brought civil actions in England, seeking and

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[35] Although the Government does not think it is necessary, should this Court decide to inquire into Egypt's enforcement of its antiquities laws, the Government is prepared to offer the testimony of Ali Soubki, a police general with the Egyptian Tourist and Antiquities police. General Soubki, as well as the Government's other experts are available on November 20th. However, their schedules do not permit them to remain in the United States past Wednesday November 21st. Should this Court envision a lengthier hearing, the Government respectfully requests that the Court schedule another date.

obtaining the return of some of the items involved in this case. (See Exhibit A). As the Government will show should this Court determine that a hearing is necessary, Egypt not only has brought countless enforcement actions within Egypt, but also has secured the return of its antiquities from Canada, Israel, Syria and the United States.[36]

Similarly Schultz's contention that Egypt has not "even bothered" to become a signatory to the recent 1995 Unidroit Convention on Stolen and Illegally Exported Cultural Objects (Br. at 42) is grossly misleading.

First, the international standard for protection of cultural property was established in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its First Protocol and in the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. Egypt ratified the Hague Convention in 1955 and the UNESCO Convention in 1973. This demonstrates that Egypt is committed to the protection of antiquities.

Second, with regard to Unidroit, Schultz is, at best, ill-informed. In January 2000, a Joint National Seminar on

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[36]Proof that Egypt enforces its antiquities laws was seen in an exhibition that took place in 1999 at the Egyptian Museum in Cairo. 155 objects that had been retrieved by the Egyptian police were displayed along with the stories of how the pieces had been stolen and recovered were displayed. (See Exhibit B.)

Unidroit, sponsored by the Ministry of Justice of the Arab Republic of Egypt and Unidroit was held in Cairo. The Egyptian delegates explained that Egypt did not support Unidroit because it fell short of the protections provided in the Egyptian law and offered too little protection to countries that had been the victims of despoliation for centuries. Unidroit News: 2000-2, at 10, http://www.unidroit.org/english/news/news-2000-2.htm. In other words, rather than demonstrating Egypt's lack of interest in enforcing its antiquities laws, this proves the opposite.

CONCLUSION

For the reasons stated above the Government respectfully submits that the defendant's motion to dismiss the indictment should be denied.

Respectfully Submitted,

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SUMMARY of ARGUMENT and INTEREST of the AMICI

The Archaeological Institute of America, American Anthropological Association, Society for American Archaeology, Society for Historical Archaeology, and the United States Committee for the International Council on Monuments and Sites [AIA amici] are academic, educational and professional organizations devoted to the study of the past and to humankind. Essential to that study is the preservation of archaeological sites, architecture and historic and prehistor_c monuments. Amici believe that it is in the interest of the international community and of the United States, in particular, that the law should work to encourage such preservation. A complex regime of national and state laws protects the archaeological and cultural heritage of the United States and, through such distinct mechanisms as the National Stolen Property Act, 18 U.S.C. §§ 2314 et seq., and the Cultural Property Implementation Act, 19 U.S.C. §§ 2601-2613, assist as well in the preservation of the international heritage from which we all benefit. While amici recognize the role that is played in the cultural and educational life of the United States through an aesthetic appreciation of artistic and cultural objects, largely through the efforts of United States museums, we suggest that these goals are best achieved through the legal and cooperative international exchange of cultural materials.

AIA Amici lack knowledge of and will not address the factual allegations involved in this case, including such issues as intent or knowledge of the defendant and details of Egyptian law. Amici support the legal principles underlying this indictment are essential to the preservation of the past and effectuate the best interests of the United States public. Amici therefore support the legal principles underlying the indictment in United States v. Schultz.

I. The Public Interest in Preservation of Archaeological Sites

Archaeological sites, architectural remains and historic and prehistoric monuments are the remains of past cultures. The study of the past is essential to an understanding of who we are in the present and serves as a guide to the future. Such study is crucial to the creation of a wealth of historic and cultural knowledge and is fascinating to the American public. A recent Harris Interactive Survey documented that ninety-nine percent of the survey respondents believe that the value of archaeological

sites is educational and scientific.[1]

The educational and scientific value of sites is realized through careful excavation. Sites contain complexes of material culture, including architecture, pottery, floral and faunal remains, religious and artistic objects, implements and tools, jewelry, and sometimes written texts. These remains are preserved within strata that represent a contemporary culture or civilization. Through careful stratigraphic excavation of objects in association with architectural features and habitation layers, it is possible for archaeologists, working with many different types of scientists, to reconstruct the culture of each time period during which a site was inhabited and to understand the various features of that culture, including the way of life, religion, trade, social structure, literature and economy. In a similar way, tombs are time capsules preserving human remains and associated funerary objects. The placement of the human remains and their association with other skeletons and objects may indicate social status, religious beliefs and kinship relationships.

The scientific excavation of habitation sites and burials thus allows the reconstruction of the past and increases our understanding of history and culture. This knowledge is of significant value to all peoples and nations throughout the world, including the United States. Yet archaeological sites throughout the world are looted on a massive scale. It is difficult to quantify this destruction and the value of the looted objects that then appear on the illegal market,[2] but the economic motive that drives the looting seems clear. Most countries in the world, including the United States,[3] have not been spared this

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[1]Maria Ramos & David Duganne, Exploring Public Perceptions and Attitudes about Archaeology, Harris Interactive (Feb. 2000), available at: http://www.saa.org/pubrel/publiced-poll.html.

[2]Interpol and other law enforcement agencies now estimate the illicit trade in cultural property at $4.5 billion per year and place the illegal art market among the three largest international criminal activities, including illegal drugs and weapons. Simon Robinson, et al., Endangered Art, Time, June 18, 2001. Links to violent crime and the Mafia have been established. Interview of Lynne Chaffinch, Program Manager for the Art Theft Program at the FBI, and Angela Meadows, Cultural Property Program Manager at INTERPOL-U.S. National Central Bureau, In Search of Stolen Art (transcript of Live Online discussion, Aug. 10, 2000), available at: http://discuss.washingtpost.com/wp-srv/zforum/00/fbi0810.htm; Rory Carroll, Tomb Raiders Plunder Italy's Past: Looters of the Night Get Rich on Worldwide Trade in Antiquities, Guardian (London), June 20, 2000, at 16.

[3]Looting of archaeological sites in the United States is a continuing problem. See, e.g., Mike Toner, Past in Peril: America the Looted, Atlanta J. & Const., Feb. 13, 2000, at 1C (describing looting in the United

devastation. We all suffer loss from this destruction of the past and its impact on our ability to understanding our culture, our society and our history.

II. The Law Should Work to Preserve the Past

Most countries have adopted legal regimes to reduce and eliminate this destruction of the past. These regimes generally incorporate a variety of laws including restrictions on excavation, vesting of ownership of monuments, sites and archaeological objects in the national government, and export controls. Each type of law is distinct and addresses different aspects of the problem. Statutes that vest ownership of undiscovered antiquities in the national government deprive the looter and subsequent purchasers of title to archaeological objects, thereby reducing the ability and the incentive to deal in such objects on the international market. It is essential to the accomplishment of their purpose to deter looting that such laws apply to unexcavated antiquities that have never been in the actual possession of the national government. Amici National Association of Dealers in Ancient, Oriental, and Primitive Art, et al. [NADAOPA] suggest that the vesting of ownership of undiscovered antiquities in the national government and the recognition of such ownership as the basis for a prosecution under the National Stolen Property Act is contrary to United States public policy. Their argument is essentially two-fold: that such a foreign legal regime conflicts significantly with the regime by which the United States protects its own cultural heritage and that recognition of such ownership violates the Takings Clause of the Fifth Amendment.

A. Protection of Archaeological Heritage in the United States

In the 19th and early 20th centuries many nations enacted such vesting laws. The United States did so with the Antiquities Act of 1906, 16 U.S.C. §§ 431-433m (2001), which penalizes the destruction,

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States and the increasing prices for Native American material on the international art market); Antonia M. DeMeo, More Effective Protection for Native American Cultural Property Through Regulation of Export, 19 Am. Indian L. Rev. 1, 8-10, 70 (1994) (documenting increasing values of Native American artifacts on the international art market and the extensive destruction and desecration of archaeological sites and cemeteries that have resulted from this increase); Veletta Canouts & Francis P. McManamon, Protecting the Past for the Future: Federal Archaeology in the United States, in Trade in illicit antiquities: the destruction of the world's archaeological heritage 97-110 (Neil Brodie, Jennifer Doole, & Colin Renfrew, eds, 2001) (describing extent of archaeological looting in the United States).

damage, excavation, appropriation or injury of historic or prehistoric ruins or monuments, as well as objects of antiquity, located on federally-owned or controlled land. The Antiquities Act was passed, in large part, because of concern over the looting of sites in the American Southwest and the removal of archaeological objects to foreign countries.[4] The Antiquities Act was followed by the Archaeological Resources Protection Act of 1979, 16 U.S.C. §§ 470aa-470mm (2001) [ARPA], the primary federal law protecting archaeological sites. Among other provisions, this Act abrogates the law of finds and specifies that "resources which are excavated or removed from public lands will remain the property of the United States." 16 U.S.C. § 470cc(b)(3). Throughout the 20th century, all fifty states did likewise, vesting ownership and control of archaeological sites and objects from state owned- or controlled-land in the state government.[5] Both ARPA and these state statutes vest ownership in the government[6] based on its constructive possession of everything contained on the land and below the surface, despite the owner's lack of actual possession.

These statutes embody the Congressional and state legislatures' determination of the United States public interest in preservation of our domestic cultural heritage. While this protection is largely limited to public lands,[7] this situation has changed in recent years. In 1993, the Seventh Circuit interpreted

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[4]In one well-known case, a Swedish explorer dug in Cliff Palace (Colorado) and removed a large collection of prehistoric objects to Scandinavia, where they are still in Finland's National Museum. Ronald F. Lee, The Antiquities Act of 1906 29-38 (1970).

[5]See, e.g., N.Y. Educ. Law § 233-4 (2001)(stating that "no person shall appropriate, excavate, injure, or destroy any object of archaeological and paleontological interest, situated on or under the lands owned by the state of New York, without the written permission of the commissioner of education"). NADAOPA amici state, referring to export controls, that protection is limited to "historically, architecturally, or archaeologically significant objects." Brief at 2 n. 2. Yet this language appears in neither ARPA, nor the Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 [NAGPRA], nor state statutes. ARPA, for example, defines archaeological resources as "any material remains of past human life or activities which are of archaeological interest" and that are more than 100 years old.16 U.S.C. § 470bb.

[6]See, e.g., 16 U.S.C. § 470cc(b)(3)(stating that "resources which are excavated or removed from public lands will remain the property of the United States.").

[7]State and federal governments own or control approximately 40% of the land in the United States, thus granting considerable protection to archaeological sites, particularly in the Southwest where many unexcavated sites are located. See U.S. General Accounting Office, Cultural Resources: Problems Protecting and Preserving Federal Archeological Resources (1987); Federal Lands: Information on Land Owned and on Acreage With Conservation Restrictions (1995).

ARPA expansively, holding that it protected archaeological sites located on private land by criminalizing the interstate transport of artifacts taken in violation of state and local laws, including those that prohibit removal of objects taken without the consent of the landowner.[8] United States v. Gerber, 999, F.2d 1112 (7th Cir. 1993), cert. denied, 510 U.S. 1071 (1994). Of greater significance, twenty-four states protect burials and associated funerary objects found on both public and private land,[9] and two states regulate all archaeological resources found on private land. Ind. Code § 14-3-3.4 (1999); Wash. Rev. Code § 27.53.060(1) (2000). In most states with such regulation, human remains and burial objects are given to lineal descendants or those who are culturally affiliated for reburial purposes.[10] In a few states, grave artifacts that cannot be returned are held by the state in trust for the people of the state,[11] thus eliminating

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[8]Judge Posner justified this expansive approach by relying on the public policy embodied in Congress' efforts to protect archaeological sites, stating:

> . . . it is almost inconceivable that Congress would have wanted to encourage amateur archaeologists to violate state laws in order to amass valuable collections of Indian artifacts, especially as many of these amateurs do not appreciate the importance to scholarship of leaving an archaeological site intact and undisturbed until the location of each object in it has been carefully mapped to enable inferences concerning the design, layout, size, and age of the site, and the practices and culture of the inhabitants, to be drawn.

999 F.2d at 1115-16.

[9]For a list of state statutes, see Patty Gerstenblith, The Public Interest in the Restitution of Cultural Objects, 16 Conn. J. Int'l L. 197, 233 n. 156. For more general information concerning state regulation of archaeological remains on private land, see Carol L. Carnett, A Survey of State Statutes Protecting Archeological Resources, Preservation Law Reporter: Special Report, 3 Archeological Assistance Study (National Trust for Historic Preservation: U.S. Department of the Interior, National Park Service, Cultural Resources, Archeological Assistance Division 1995). NADAOPA amici emphasize that the United States government does not "own" or regulate cultural property found on private land. Brief at 2. This is correct but ingenuous, as the regulation of private land is predominantly left to the state governments under the powers reserved to the people and the states by the 9th and 10th Amendments to the Constitution.

[10]See, e.g., Ariz. Rev. Stat. Ann. § 41-865(C)(5); N.H. Rev. Stat. Ann. § 227-C:8-g (2000). That NAGPRA and state statutes generally return human remains and burial objects to lineal descendants or culturally affiliated tribes in no way detracts from the clearly articulated policy of the federal and state governments to protect archaeological sites from looting and to deny the looter ownership of such remains as one means of reducing such looting.

[11]See, e.g., Ala. Code § 41-3-1 (2000); 20 Ill. Comp. Stat. § 3440/14 (2000); La. Rev. Stat. Ann. § 8:681C (2000); W. Va. Stat. § 29-1-8a(h) (2000). The Georgia Code states, in part, "[h]uman remains and burial objects are not the property to be owned by the person or the entity which owns the land or water where the human remains and burial objects are interred or discovered." Ga. Code Ann. § 36-72-1 (1999).

private ownership of such newly-discovered objects. Other states criminalize or otherwise prohibit the sale or transfer of Native American artifacts taken after the effective date of the statute from a grave located on private land.[12]

Four of these state statutes have been subject to challenge and interpretation in state court and in all cases the statute has been upheld. Two of the cases involved direct constitutional challenge on the basis that the statute was a taking of private property without compensation, as required by the Constitution. Hunziker v. Iowa, 519 N.W.2d 367 (Iowa 1994), and Thompson v. City of Red Wing, 455 N.W.2d 512 (Minn. Ct. App. 1990). Two state statutes that apply to all archaeological resources on both public and private land (and not just to burials) were considered in State v. Lightle, 944 P.2d 1114 (Wash. Ct. App. 1997),[13] and Whitacre v. State, 619 N.E.2d 605 (Ind. Ct. App. 1993), aff'd, 629 N.W.2d 1236 (Ind. 1994). In Whitacre, amateur archaeologists had purchased land with a Hopewell site for the explicit purpose of excavating it and they claimed that they did not need state permission to conduct such excavations. The court interpreted 1989 amendments to the statute as requiring state permission for excavation on private, as well as public, land, but the court did not need to reach the constitutional issue. 619 N.E.2d at 606-08.[14] The state appellate court further articulated the public policy underlying the

[12]See, e.g., Ala. Code § 41-3-1 (2001); Ark. Stat. Ann. §13-6-406 (2001); Cal. Pub. Res. Code § 5097.99(b) (2001); Ga. Code Ann. § 12-3-622 (2001); Mo. Rev. Stat. § 194.410 (2001).

[13]In State v. Lightle, the defendants challenged the statute on the basis that it was unconstitutionally vague. The court concluded that the statute's definition of "archaeological resource" was sufficiently clear to put ordinary citizens on notice of the prohibited conduct and to avoid risk of arbitrary enforcement. 944 P.2d at 1116. Although the statute applies to artifacts on both private and public land, the artifacts at issue in the case seem to have been found on public, rather than private land.

[14]The NADAOPA amici refer to an older Indiana case, Indiana St. Highway Comm'n v. Zillek, 428 N.E.2d 275, 279 (Ind. App. 1981), for the proposition that state authorities cannot conduct an excavation on private land. This question is not at issue in any aspect of this case. The question of whether government authorities can enter private land for an extended period of time without the land owner's consent (and which is likely to trigger a taking for 5th Amendment purposes) is entirely distinct from the question of the limitations government can place on an owner's use of private property. See Palazzolo v. Rhode Island, 121 S. Ct. 2448, 2457 (2001) (stating that "[t]he clearest sort of taking occurs when the government encroaches upon or occupies private land for its own proposed use. Our cases establish that even a minimal 'permanent physical occupation of real property' requires compensation under the [Takings] Clause." (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427 (1982)). Furthermore, there is a significant distinction in the permissible extent of government regulation of real as opposed to personal property, as will be discussed, infra.

statute as:

> [T]he state may regulate activities on private property that affect our historical and archeological culture; thus, the state is better able to discover and preserve more of our heritage. This is the purpose of the Act and is best effectuated by construing the Act to include private, as well as state owned, property.

Id. at 608.

B. Takings Clause Policy

At its most basic level, the argument that recognition of a foreign government's ownership of undiscovered antiquities constitutes a taking of property is without basis. If the antiquity is owned by a government and its removal constitutes theft, then the purchaser of the antiquity has no title to be "taken" by the United States government and there is no deprivation. On the other hand, the notion that recognition of a foreign vesting law as a basis for ownership violates the public policy underlying the Takings Clause touches upon the inherent nature of property and its relationship to national sovereignty.

The ability of a nation to define what constitutes property is an essential aspect of its sovereignty and nations routinely readjust the exact boundaries between private and public property.[15] Furthermore, different nations and different legal traditions draw these boundaries in different places.[16] Under the act of state doctrine, one nation recognizes the legal rules of other nations as a matter of comity and of respect for their sovereignty. The Supreme Court has stated that courts are "preclude[d] . . . from inquiring into the validity of the public acts a recognized foreign sovereign power commit[s] within its own territory." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964). See also W.S. Kirkpatrick & Co., Inc. v. Envtl. Tectonics Corp., Int'l, 493 U.S. 400, 404 (1990); World Wide Minerals Ltd. v. Republic of Kazakhstahn, 116 F. Supp. 2d 98, 104 (D.D.C. 2000). The nationalization of property is one such

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[15]See Joseph W. Singer, Sovereignty and Property, 86 Nw. U.L. Rev. 1, 41-42, 47 (1991) (describing how the state makes choices about which interests to define as property). Much of the following discussion is based on Gerstenblith, supra note 9, at 234-41.

[16]See, e.g., Richard A. Posner, Savigny, Holmes, and the Law of Economics of Possession, 86 Va. L. Rev. 535, 544 (2000) (describing how in some legal systems buried treasure could be owned by someone other than the landowner because the treasure and the land were severable).

sovereign act that has been consistently recognized as legitimate by the courts of the United States.[17] The same principle was applied in the context of works of art in Stroganoff-Scherbatoff v. Weldon, 420 F. Supp. 18, 20-21 (S.D.N.Y. 1976), and indirectly in Kunstsammlungen zu Weimar v. Elicofon, 678 F.2d 1150, 1160 (2d Cir. 1982).[18] It also underlies the decisions in which courts have recognized foreign national ownership of undiscovered antiquities. United States v. Hollinshead, 495 F.2d 1154 (9th Cir. 1974); United States v. McClain, 545 F.2d 988 (5th Cir. 1977); 593 F.2d 658 (5th Cir. 1979); Peru v. Johnson, 720 F. Supp. 810 (C.D. Cal. 1989), aff'd sub nom., Peru v. Wendt, 933 F.2d 1013 (9th Cir. 1991); Lebanon v. Sotheby's, 167 A.D.2d 142 (N.Y. App. Div. 1990); 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 (2d 1994); United States v. Pre-Columbian Artifacts, 845 F. Supp. 544, 547 (N.D. Ill. 1993); Turkey v. OKS Partners, No. 89-3061-WJS, 1994 U.S. Dist. LEXIS 17032 (D. Mass. June 8, 1994); Croatia v. Tr. of the Marquess of Northampton 1987 Settlement, 203 A.D.2d 167 (1994), appeal denied, 84 N.Y.2d 805, 642 N.E.2d 325 (1994).[19]

The United States government and individual states have also shifted the boundaries between

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[17]The requirements for the act of state doctrine to apply include: the act must be that of a foreign sovereign government; the affected property must be located within the territorial boundaries of the state at the time of the legislative decree; the government must be extant and recognized by the United States at the time of suit; the act must not violate a treaty obligation. See generally Kunstsammlungen zu Weimar v. Elicofon, 678 F.2d 1150, 1160 & n.17 (2d Cir. 1982); Republic of Iraq v. First National City Bank, 353 F.2d 47, 51 (2d Cir. 1965); Restatement, Third, Foreign Relations Law of the United States, § 443, Reporter's Note 1 and comment b (1986).

[18]See also Lawrence M. Kaye, Art Wars: The Repatriation Battle, 31 N.Y.U. J. Int'l L. & Pol. 79, 80 (1998); Oliver Metzger, Making the Doctrine of Res Extra Commercium Visible in United States Law, 74 Tex. L. Rev. 615, 651(1996); Barbara B. Rosecrance, Harmonious Meeting: The *McClain* Decision and the Cultural Property Implementation Act, 19 Cornell Int'l. L.J. 311, 323 (1986).

[19]In Peru v. Johnson and Croatia v. Tr. of the Marquess of Northampton Settlement 1987, the claimant nation was unable to establish that the antiquities were discovered within their national boundaries, one of the prerequisites of the act of state doctrine. In Peru, the court also found that the national vesting law was not sufficiently clear. Nonetheless, both cases and the others cited in the text support the principle that a nation can vest ownership of antiquities in its government and that this ownership will be recognized in American courts. Similarly, in Attorney-General of New Zealand v. Ortiz, 2 All E.R. 93 (Eng. 1982), ownership of the Maori carved wood panels did not vest in the New Zealand government until after they had been illegally exported. The vesting statute thus acted on the objects when they were no longer within New Zealand's sovereign territory.

public and private property. For example, the Antiquities Act of 1906 and ARPA both vested objects in the federal government that might have belonged to the finder, particularly in cases of treasure trove.[20] The Abandoned Shipwreck Act of 1987 had a similar effect on some claims to ownership of historic shipwrecks by finders and salvors. 43 U.S.C. §§ 2101-2106 (vesting title to abandoned historic shipwrecks in the federal government).

While the Takings Clause of the Fifth Amendment requires compensation to be paid to owners whose land has been taken by the federal or, in combination with the 14th Amendment, a state government, most of the jurisprudence applies to land.[21] Courts have consistently held that the goal of historic preservation is a legitimate exercise of government authority, see, e.g., Penn Cent. Transp. v. City of New York, 438 U.S. 104 (1978). There is little case law that addresses the relationship between the takings doctrine and the regulation of personal property. However, in Andrus v. Allard, 444 U.S. 51, 58-63 (1979), the Supreme Court held that a prohibition on the commercial sale of objects composed of eagle parts and other protected species did not constitute a taking, even though the objects had been acquired before enactment of the statute. Furthermore, in Lucas v. South Carolina Coastal Council, Justice Scalia emphasized the distinction between regulation of land and regulation of personal property, stating: "in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [the owner] ought to be aware of the possibility that new regulation might even render his property economically worthless . . . ." 505 U.S. 1003, 1027-28 (1992). See also Glenn P. Sugameli, *Lucas v. South Carolina Coastal Council*: The Categorical and Other "Exceptions" to Liability for Fifth

[20]Under the doctrine of treasure trove, objects that satisfy the definition of treasure trove belong to the finder, often even if the finder was trespassing at the time of the discovery. See Leanna Izuel, Property Owners' Constructive Possession of Treasure Trove: Rethinking the Finders Keepers Rule, 38 UCLA L. Rev. 1659, 1669-70 (1991). Britain, where treasure trove belongs to the Crown, recently expanded through the Treasure Act of 1996 the definition of treasure trove so as to vest ownership of a larger category of archaeological finds in the government. James Carleton, Protecting the National Heritage: Implications of the British Treasure Act 1996, 6 Int'l J. Cult. Prop. 343, 344 (1997).

[21]Under the regulatory takings doctrine, a government regulation that goes "too far" in regulating the owner's use of land may also be considered a taking. See, e.g., Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). Under Lucas v. S. Carolina Coastal Council, 505 U.S. 1003 (1992) and Palazzolo v. Rhode Island, 121 S. Ct. 2448 (2001), the doctrine seems to hold that regulatory takings occur only when the owner has been deprived of all economic value of the land.

Amendment Takings of Private Property Far Outweigh the "Rule," 29 Envtl. L. 939, 985-87 (1999)(stating that Lucas' exception for regulation of private property has been used in takings clause challenges to endangered species protection). This brief review of Takings Clause jurisprudence demonstrates that regulation of ownership of objects of archaeological, historic and cultural value and recognition of foreign government ownership of such objects violate neither the Takings Clause nor the policies underlying it.

In conclusion, AIA amici support the recognition of foreign government claims to ownership of archaeological objects. The amici believe that such recognition accords with the public interest of the United States, as articulated in numerous state and federal legislative enactments and judicial decisions, it furthers the goals of historic preservation and knowledge, and it represents the beliefs of the American people, who value the world's cultural heritage.

United States District Court,
S.D. New York.

UNITED STATES of America,
v.
Frederick SCHULTZ, Defendant.

No. 01 CR 683 JSR.

Jan. 3, 2002.

Defendant charged with conspiracy to receive and possess stolen properties, specifically Egyptian artifacts, moved to dismiss indictment. The District Court, Rakoff, J., held that: (1) defendant's alleged conduct was a theft under Egyptian law, and (2) Cultural Property Implementation Act of 1983 did not preclude defendant from being charged with a crime.

Motion denied.

West Headnotes

[1] Conspiracy 28(3)
91k28(3) Most Cited Cases

Egyptian law providing that as of 1983, all Egyptian antiquities are considered to be public property was not a licensing and export regulation, but rather an unequivocal assertion of state ownership, and therefore, defendant's alleged conduct of conspiring to steal ancient Egyptian artifacts and "fence" them in New York was a theft of property that could be charged as conspiracy to receive and possess stolen properties. 18 U.S.C.A. § 2315.

[2] Conspiracy 28(3)
91k28(3) Most Cited Cases

Cultural Property Implementation Act of 1983 did not preclude defendant, who allegedly conspired to steal ancient Egyptian artifacts and "fence" them in New York, from being charged under federal statute prohibiting conspiracy to receive and possess stolen properties; Act was primarily concerned with balancing foreign and domestic import and export laws and policies, not with deterring theft. Convention on Cultural Property Implementation Act, § 302 et seq., 19 U.S.C.A. § 2601 et seq.

***446** Marcia Isaacson, New York City, Peter Neiman, New York City, for U.S.

Linda Imes, Daniel C. Zinman, Richards Spears Kibbe & Orbe, New York, NY, for defendant.

OPINION AND ORDER

RAKOFF, District Judge.

The marvelous artifacts of ancient Egypt, so wondrous in their beauty and in what they teach of the advent of civilization, inevitably invite the attention, not just of scholars and aesthetes, but of tomb-robbers, smugglers, black-marketeers, and assorted thieves. Every pharaoh, it seems, has a price on his head (at least if the head is cast in stone); and if the price is right, a head-hunter will be found to sever the head from its lawful owner. So, at least, is the theory of the instant indictment, which alleges, in effect, that the defendant and one or more co-conspirators arranged to steal highly valuable ancient Egyptian artifacts--including a million-dollar head of Amenhotep III--and "fence" them in New York. This, says the indictment, makes the defendant guilty of conspiracy to violate section 2315 of Title 18, United States Code, which provides, in pertinent part, that "[w]hoever receives, possesses, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise ... which have crossed a State or United States boundary after being stolen ... knowing the same to have been stolen ... [is guilty of a crime]."

The defendanthas pleaded not guilty and is presumed innocent. For purposes of this pre-trial motion, however, he assumes the facts as stated in the indictment and maintains that the indictment nonetheless fails to state a conspiracy to violate section 2315 because it presupposes, wrongly in his view, that someone who conspires to smuggle ancient artifacts out of Egypt is thereby guilty of, among other things, dealing in stolen goods, by virtue of Egyptian Law 117. *See* Indictment ¶ ¶ 1-6. That law provides that, as of 1983, all Egyptian "antiquities"--that is, objects over a century old having archeological or historical importance (Law 117, Art. 1) [FN1]--"are considered to be public property," that is, property of the state. Law 117, Art. 6. The defendant principally argues: (i) that Law 117, despite its assertion of state ownership, is really more in the nature of a licensing and export regulation, the violation of which does not constitute theft of property in the sense covered by section 2315; (ii) that, assuming Law 117 really does work an expropriation of property by Egypt, the special kind of property thereby vested in that foreign state does not give rise to interests entitled to protection under United States law; and (iii) that even if such

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foreign interests might sometimes be entitled to such protection, here ***447** Congress, in enacting the Cultural Property Implementation Act of 1983, 19 U.S.C. § § 2601 *et seq.*, chose to substitute a civil enforcement regime for criminal prosecution.

FN1. While the defendant expends much time and energy in arguing that the definition of "antiquities" under Law 117 is too vague to afford fair notice of what is covered and what is not, none of the ancient Egyptian artifacts that is the subject of the instant indictment (and corresponding bill of particulars)--such as a pharaoh's head and two old Kingdom painted reliefs, *see* Indictment, ¶ ¶ 8(a),8(g)--remotely raises questions of fair notice under any reasonable interpretation of that definition. That a definition may be fuzzy around the edges does not render it meaningless, or inapplicable to what it clearly covers at its core.

[1] The primary problem with defendant's first argument--that Law 117 is really regulatory in nature--is the language of the law itself, which unequivocally asserts state ownership of all antiquities (Art. 6), requires their recording by the state (Art. 26), prohibits (with certain practical exceptions) private ownership, possession, or disposal of such antiquities (Arts.6-8), and requires anyone finding or discovering a new antiquity to promptly notify the Antiquities Authority (Arts.23-24), which, in the case of movable antiquities, then takes physical possession and stores the antiquities in the museums and storage facilities of the Authority (Art. 28). Thus, so far as Egyptian antiquities are concerned, Law 117 on its face vests with the state most, and perhaps all, the rights ordinarily associated with ownership of property, including title, possession, and right to transfer. This, on its face, is far more than a licensing scheme or export regulation.

To be sure, Law 117 qualifies certain aspects of state ownership where obvious practicalities so require. For example, while every newly-discovered but immovable antiquity is still deemed state owned, nonetheless "where the find is located on private property, the Authority shall decide within three months whether to remove the find, to initiate measures for expropriating the land upon which it is located, or to leave the antiquity in its place and register it in accordance with the provisions of this law." (Art. 23). Similarly, pre-1983 owners or possessors of antiquities, though now required to register their antiquities with the state if they have not already done so, may in certain circumstances maintain possession or even dispose of their antiquities, but only with permission of the Authority. *See, e.g.* Arts. 7, 8, 9, 13. These adjustments to physical and historical circumstances only serve to confirm, however, that the statute's primary purpose is to transfer ownership to the state to the extent reasonably practicable. [FN2]

FN2. Moreover, the conspiracy here alleged relates only to movable antiquities, and the Government has formally disclaimed any intention to argue to the jury that the defendant knew that any pre-1983 antiquities were stolen. *See* Government's Post-Hearing Memorandum In Opposition to Defendant's Motion to Dismiss the Indictment, at 3 fn.2.

Despite the plain language of Law 117, however, defendant argues that, in practice, even those antiquities discovered after 1983 have been left in the hands of their discoverers or other private transferees and that the law in operation really works more like a licensing or export regulation than like a transfer of property. But when, in response to these and other defense assertions, the Court convened an evidentiary hearing, pursuant to Rule 26.1 of the Federal Rules of Criminal Procedure, the defendant was unable to adduce any material, let alone persuasive evidence to support this contention. The most he could offer in this respect was the opinion of Professor Abou El Fadl, a professor of Islamic and Middle Eastern law at UCLA Law School, to the effect that nothing in Law 117 definitively prevents the Antiquities Authority from leaving physical possession of even an antiquity discovered after 1983 in the hands of a private finder, so long as the private finder promptly notifies the Authority of his find. *See* transcript of hearing of November 20, 2001 ("Tr."), at A20. [FN3]

FN3. The transcript pages of the first portion of the November 20 hearing, taken by the Court Reporters, are denoted "A" followed by the page number. The transcript pages of the second portion of the November 20 hearing, originally taped and then transcribed by the Transcription Service, are denoted "B" followed by the page number.

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***448** In response to this purely hypothetical opinion, the Government presented, among much else, the testimony of Dr. Gaballa Ali Gaballa, Secretary General to the Supreme Council of Antiquities, that in fact the state takes immediate physical custody of newly discovered antiquities, sometimes by the tens of thousands, tr. A77-79. Another Government witness, General Ali Sobky, Director of Criminal Investigations for the Antiquities Police (which employs more than 400 police officers), testified that his department regularly investigates and prosecutes dozens of serious violations of Law 117, of which relatively few are for smuggling and most are for trafficking within Egypt (including unlawfully possessing and disposing of state-owned antiquities), tr. B51-55. [FN4] General Sobky also testified that even in the case where someone is acquitted of stealing a newly discovered antiquity, the antiquity is confiscated by the state as the lawful owner, tr. B69.

FN4. The defendant objected to certain of this testimony on hearsay and "due process" grounds, as well as on the ground that the underlying Egyptian documents that General Ali El Sobky summarized were not made available to the defendant. However, a "court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." Rule 26.1, Fed.R.Crim.P. At the November 20 hearing, the Court reserved on defendant's objections until the defendant had been provided with the underlying documents and had had a further opportunity to brief his objections. This having been done (*see, e.g.,* Government's letter of December 18, 2001 and attachments thereto), the Court hereby determines that the objected-to evidence shall be received. It may also be noted that, even if the Court were to exclude this evidence, that would in no way change the result, since the provisions of Law 117 transferring ownership and right to possession to the state (which, contrary to defendant's argument, the Court finds to be unambiguous) must be presumed to be in force unless the defendant comes forward with at least some material evidence to the contrary--which, as noted, he has wholly failed to do.

It is clear, therefore, that Law 117, far from being a disguised licensing scheme or export regulation, is precisely what it purports to be: a transfer of ownership of Egyptian antiquities to the state, effective 1983.

As for defendant's second argument--to the effect that American law does not, or should not, recognize the kind of "special" property interest created by "patrimony" laws like Law 117, *see United States v. McClain,* 545 F.2d 988, 994 (5th Cir.1977) (Wisdom, J.) (rejecting such an argument)--it should first be noted that section 2315, which expressly refers to foreign commerce, has consistently "been applied to thefts in foreign countries and subsequent transportation into the United States," *McClain,* 545 F.2d at 994 (citing cases): an implicit recognition of the interest of the United States in deterring its residents from dealing in the spoils of foreign thefts. In effectuating this policy, why should it make any difference that a foreign nation, in order to safeguard its precious cultural heritage, has chosen to assume ownership of those objects in its domain that have historical or archeological importance, rather than leaving them in private hands? [FN5] If an American conspired to steal the Liberty Bell and sell it to a foreign collector of artifacts, there is ***449** no question he could be prosecuted under section 2315. *Mutatis mutandis,* the same is true when, as here alleged, a United States resident conspires to steal Egypt's antiquities.

FN5. Egyptian law, like United States law, requires just compensation for takings, tr. A57. Accordingly, Law 117 expressly provides for full compensation to those who owned Egyptian antiquities prior to the state's assumption of ownership in 1983 or, even thereafter, to those whose land the state chooses to take by eminent domain in order to preserve the immovable antiquities upon it. *See, e.g.,* Arts. 7, 13, 14, 16, 25. Furthermore, even those persons who discover antiquities after 1983 and are therefore on notice of the state's ownership qualify, in the discretion of the Antiquities Authority, for financial rewards for their efforts. *See* Arts. 23, 24.

To be sure, even if the Government proves the defendant knew he was importing antiquities that were smuggled out of Egypt--an act that may not be inherently violative of United States law and policy, *see McClain,* 545 F.2d at 996-- there may still be a

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jury question as to whether he knew he was dealing in stolen goods, an essential element of a section 2315 violation. But the indictment alleges he possessed such knowledge, and the Government asserts that it will prove, *inter alia,* that the defendant knew that at least two of the items he conspired to import had been stolen from the Antiquities Police. This is more than sufficient for purposes of the present motion.

[2] Finally, as for defendant's argument that the Cultural Property Implementation Act of 1983, a civil customs law, somehow supersedes section 2315 when applied to the same subject matter, suffice to say that there is nothing in the language or the history of the Cultural Property Implementation Act to support this unlikely result. On the contrary, the Senate, in reporting out the Cultural Property Implementation Act, expressly stated that the Act "neither pre-empts state law in any way, nor modifies any Federal or State remedies ...." S.Rep.No. 97-564, at 25 (2d Sess.1982).

Nor, indeed, is there any inconsistency between the application of the Cultural Property Implementation Act and the application of section 2315 to the "cultural property" involved in this case. *See United States v. Stephenson,* 895 F.2d 867, 872 (2d Cir.1990). The Cultural Property Implementation Act, rather than banning the importation of all cultural property exported in violation of foreign law, takes a more nuanced and complicated approach to when and under what circumstances such property can be imported into the United States; but this is because the Act is chiefly concerned with balancing foreign and domestic import and export laws and policies, not with deterring theft. Section 2315, by contrast, only applies in cases of intentional theft and knowing disposal of stolen goods, a situation in which even the primary academic proponent of the Cultural Property Implementation Act has stated that criminal prosecution is appropriate. *See* Paul M. Bator, *An Essay on the International Trade in Art,* 34 Stan. L.Rev. 275, 353 (1982).

While defendant raises still other arguments in support of his motion to dismiss the indictment, the Court finds them sufficiently meritless as not to warrant discussion here. [FN6]

FN6. For example, the fact that an Egyptian court, in connection with a criminal prosecution of certain of defendant's co-conspirators, did not name the defendant as a co-conspirator, in no way constitutes, as defendant here argues, a judicial determination of defendant's innocence binding on this Court. Defendant, indeed, was not even a party to the other proceeding.

Accordingly, the Court, confirming its Order of December 27, 2001, hereby denies defendant's motion to dismiss the indictment.

SO ORDERED.

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