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Overview of Public Comments to FinCEN's ANPRM on Regulating Antiquities

By: Liz Fraccaro[1]

After almost twenty years without major reform, on January 1, 2021, Congress passed H.R.6395, the National Defense Authorization Act for Fiscal Year 2021 (NDAA), which among other things will soon apply the Bank Secrecy Act's (BSA) anti-money laundering (AML) requirements, in some fashion, to individuals and companies involved in the antiquities market.

Beyond applicability to the antiquities market, the AML Act is a much-needed update to the BSA, requiring new provisions that adequately address present day challenges and opportunities, and provides for the establishment of a coherent set of risk-based priorities.

The overarching goal in making these changes is to broaden the mission of the BSA to safeguard national security. The update closes significant gaps in AML and counter-terrorism financing efforts, including by adding the trade in antiquities to coverage under the BSA. In addition, the U.S. Department of Treasury and its law enforcement partners will conduct a study on the risks posed by the facilitation of money laundering through the art market.

Specifically, the AML Act applies the BSA to "a person engaged in the trade of antiquities, including an advisor, consultant, or any other person who engages as a business in the solicitation or the sale of antiquities."

Importantly, the Secretary of the Treasury (acting through the Director of FinCEN), in coordination with the FBI, HSI, and Attorney General, is required to consider the appropriate scope for the rulemaking before issuing a proposed rule. The antiquities market's input is critical to tailoring effective rules during the "notice and comment" period to come.

FinCEN can choose to involve the public *before* publishing proposed rules, by holding informal conversations with interested people and organizations. It can also publish an "Advanced Notice of Proposed Rulemaking" or ANPRM in the Federal Register, to which interested individuals may respond by submitting comments and recommendations.

The ANPRM regarding the trade in antiquities

On September 23, 2021: FinCEN issued an Advance Notice of Proposed Rulemaking (ANPRM) to solicit public comment on a range of questions related to the implementation of amendments to the Bank Secrecy Act (BSA) regarding the trade in antiquities. This ANPRM is the first in a series of regulatory actions that FinCEN will undertake. The ANPRM contained sixteen questions regarding the antiquities market and regulation of the industry. Members of the public were able to comment on these questions until October 25, 2021.

The antiquities market's input is critical to tailoring effective rules during the "notice and comment" period to come.

There were 37 comments submitted. Many market participants responded, including individuals, businesses, and groups such as archaeologists, antiquities dealers, auction houses, cultural property advocates and advocacy groups, heritage groups, and museums. This ANPRM did not receive comments from the financial industry. It is likely that the financial industry will have more to say when the proposed rules are issued and they can offer their perspective on the practical implementation of the proposed AML regulations.

Questions of risk

One of the main points upon which commenters disagreed was the need for AML regulation of the industry at all. Market participants claim that the risk of money laundering (ML) and terrorist financing (TF) are minimal or non-existent. Other commenters claim that certain characteristics of the antiquities market make it vulnerable to ML and TF, among other financial crimes.

Many small and independent businesses submitted comments, having reasonable concerns that complex or stringent requirements would be

difficult or impossible to meet. These commenters also contended that ML and TF risks were extremely low or non-existent in their businesses, due to the small size of their business and relatively low transactional value — especially compared to major auction houses. Moreover, many of these commenters stated that they do not consider themselves dealers in antiquities.

Because FinCEN is required to issue a rule on the antiquities market, this disagreement over the scope (or even existence) of the problem underscores the importance of drafting rules that are scaled appropriately to the industry.

Defining 'antiquities'

Even amongst 37 different comments submitted by people and organizations that work in this field, there was little agreement as to how exactly to define antiquities, other than the fact that an antiquity can be described as "old" and general agreement that there is overlap in defining 'art' and 'antiquities.'

Several commenters suggested a cutoff date, though when that date should fall varied widely. Some suggested going by the object's age, such as anything that is at least 100 years old, others said that it should apply to anything created before a particular date (such as 500 CE, or 1100 CE).

Beyond age, commenters raised numerous other qualifiers that could be used to narrow the definition. An object's purpose may be used in narrowing the definition, for example, excluding items made for domestic purposes, or excluding coins manufactured for use in trade. An object's place of origin could also be used to narrow the definition, with some comments suggesting that 'antiquities' only be defined as objects geographically originating in places such as Egypt, the Near East, Europe, China, Africa, South-East Asia, and South America. Other considerations of origin were less tied to geography, and instead suggested that antiquities be defined as objects originating from burials on land or underwater.

The U.S. Committee of the Blue Shield suggested considering both age and purpose, applying the definition to "all objects that are at least one hundred years in age, that are the product of human activity, and that are of cultural, historical, art historical, archaeological, scientific, or religious significance." The Art Dealers Association of America echoed this archaeological approach, and defined "antiquities" as "an object of archaeological interest," while Bonhams' traditional definition of antiquities is objects from 4000 BCE to the 12th Century CE and adds in the question of place of origin, defining antiquities as geographically originating from Egypt, the Near East and Europe. However, as Bonhams notes, while other major auction houses are consistent in this approach, they may use the term more broadly to include ancient Chinese, Tibetan, African, South-East Asian and South American objects.

Hindman Auctions emphasized the difficulty of separating antiquity and art, and defined an antiquity as "remnants of ancient culture that were preserved through burial on land or in the ocean. Antiquities were created with artistic intent, so we refer to them as works of art. The only difference between an antiquity and another work of art is the fact that an antiquity was preserved through burial on land or in the ocean." ArtAML noted the difficulty as well, writing "An antiquity may be a work of art (The Mona Lisa) or may not be (a Roman sword). Attempting to make a distinction between the two on anything other than date of creation will be extremely difficult." Sotheby's, likewise, stated "Generally speaking, antiquity may be classified as a category of art." and concluded, "For this reason, it is important that any such definition of antiquity is defined clearly to ensure clarity for participants operating in the market."

FinCEN certainly has a challenge before it, because appropriately defining 'antiquities' will determine who is a 'dealer in antiquities' — meaning it will determine the scope of the rule. Another interesting challenge before FinCEN is the requirement under the AML Act that the rule apply to the antiquities market - but the art market is considered separate and distinct, requiring a study to determine the appropriateness of regulating the art market under the BSA. Many commenters raised the issue of trying to define 'art' and 'antiquity' separately; the overlap between the two is arbitrary and aesthetic: more often it is a value-judgement based on the beholder's personal philosophy. There were many suggestions for alternate terms that would avoid the challenge of defining 'art' and 'antiquities,' which pointed to the terms in existing AML legislation on the art and antiquities market in the EU and UK, terms in international conventions on preserving cultural property, and terms in existing US legislation.

FinCEN certainly has a challenge before it, because appropriately defining 'antiquities' will determine who is a 'dealer in antiquities' — meaning it will determine the scope of the rule.

Monetary thresholds

Differences over other questions regarding the market arose, too. Given that overseas AML/CFT rules already establish monetary thresholds, several commenters argued for the adoption of a minimum dollar value that would serve as a predicate before the BSA's requirements would kick in. However, what that minimum dollar value is varied enormously - in addition, arguments were made for both a minimum dollar threshold per transaction, and annual minimum dollar thresholds.

Auction houses Christie's, Sotheby's, and Hindman Auctions, as well as groups such as the U.S. Committee of the Blue Shield and Antiquities Coalition, suggested minimums roughly equivalent to the minimums used by the AML/CFT regulations of the two other major antiquities markets, the United Kingdom and the European Union. These minimums were suggested on an individual transaction basis, with a minimum threshold of either $10,000 USD or 10,000 Euro. Hindman Auctions also urged an annual transaction threshold of $100,000.

Smaller business owners were very concerned that regulations based on low thresholds would be overly burdensome or even impossible to comply with, and urged the highest thresholds, even going as high as $5 million annually. Contrast this to the Clooney foundation, who expressed concern that complexity of the supply chain that exists in the trade of antiquities could not be captured if some transactions or businesses were exempted, and recommended that FinCEN not establish a monetary threshold for activities involving trade in antiquities at all.

Consideration of the size and scale of a businesses' individual transactions, compared and contrasted to annual transactions, is essential to drafting rules that are not overly burdensome on individual and small business owners, while also ensuring they remain protected from bad actors. A very low threshold could be overly burdensome for small businesses to meet AML requirements- either sending them out of business, or driving transactions underground, defeating the purpose of the rule. Similarly, too high a threshold could leave the US and its national security at risk, making the US art and antiquities market an attractive opportunity for criminals.

Exemptions, distinctions, and carve-outs

Several dealers in ethnological objects and art urged FinCEN to exclude ethnographic art from the definition of 'antiquities' — thereby excluding dealers in these materials from any forthcoming AML requirements on dealers in antiquities. Without an exemption, should FinCEN adopt an age threshold in defining antiquities, further specification as to geographic origin, or a specific exemption for ethnological objects and art, would be the only way to ensure these dealers are not included in the eventual rule.

Similarly, numismatic advocacy groups emphasized the distinction between ancient coins and antiquities, and highlighted the coin dealer exemption in the UK's money laundering regulations as a potential model for the forthcoming regulations.

Other questions raised by FinCEN addressed whether there was a need to differentiate between non-profit and for-profit transactions.

There was little consensus on this topic; the Association of Art Museum Directors urged FinCEN to exclude non-profit museums from any definition of participants in the trade in antiquities, while others pointed to distinguishing between commercial and charitable activity. Others still claimed that there was no reason to distinguish between non-profit and for-profit transactions.

Another proposed exemption was members in good standing of the top dealer's organizations, such as International Federation of Art and Antique Dealer Associations (CINOA), International Association of Dealers in Ancient Art, and Art and Antique Dealers League of America, as they are already required to observe strict business practices that preclude suspicious transactions.

Another comment suggested excluding online marketplaces, because the marketplace is neither a buyer nor a seller, and support a broad range of items and generally are not specialized or limited to antiquities.

Christie's, meanwhile, pointed to existing AML regulations on precious metals dealers as a possible model for the forthcoming regulations. Under the BSA, precious metals dealers are encouraged, but not required, to file Suspicious Activity Reports.

Key Takeaways

The antiquities market is incredibly complex, in terms of material, and in terms of the actors who are potentially going to be regulated.

Across the comments, there is significant concern about the appropriateness, applicability, and scale of AML regulations on small businesses. Similarly, businesses and entities who do not consider themselves to be dealers in antiquities commented on their concern that they may be included (accidentally or intentionally) in forthcoming AML regulations on the trade in antiquities. Most comments were in favor of monetary thresholds, but there was little agreement as to what those thresholds should be, and whether per transaction or annually, or both. There was very little agreement over how to define an antiquity, and therefore, to what or to whom the proposed regulations will apply. FinCEN is required to issue proposed rules within 360 days of January 1, 2021; after which, another notice and comment period will open for further feedback from market participants and stakeholders.♦

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Why Would the U.S. Government Trust the Taliban to Protect Afghanistan's Cultural Heritage?

By: Kate Fitz Gibbon[1]

September 26, 2021, six weeks after the Taliban took Kabul and just five days after giving notice in the Federal Register, the Cultural Property Advisory Committee (CPAC) took written testimony on a request from the "former government of Afghanistan" for import restrictions under the Cultural Property Implementation Act (CPIA). This article summarizes some of the logical, legal, and practical issues with the proposed MOU that were raised.[2]

The hearing of the request by CPAC was precipitate. Five days is not sufficient time for a public response. Although Afghanistan had become a State Party to the 1970 UNESCO Convention in 2005, the government that requested the MOU had fled the country. There was no evidence that the new Taliban government would protect Afghanistan's cultural heritage.

The announcement failed to state whether a bilateral MOU or emergency restrictions were being sought, but the request did not appear to meet the statutory criteria for either one. No evidence was produced of significant current looting of archaeological or historic sites. Instead, the request appeared to be based upon speculation that looting would take place.

The relevant statute requires that for a bilateral MOU, the requesting State Party protect its cultural patrimony, and show that an MOU would deter pillage and be in the general interest of the international community in the interchange of cultural property. Emergency Restrictions apply to newly discovered types of material, coming from any site recognized to be of high cultural significance, part of a particular culture or civilization in jeopardy from pillage, dismantling, dispersal, or fragmentation of crisis proportions; and a finding that temporary import restrictions would reduce the incentive for such destruction. The State Party must make the request and supply information showing that an emergency condition exists.

Since the request was not made public, it wasn't known if the "former government" identified particular objects at risk. This raised questions not only about how a Designated List could be created without current information, but also how lower level State Department Staff at the Cultural Heritage Center would confer with a State Party government that U.S. did not recognize.

If an MOU were issued, would Customs simply seize objects and give them back to the Taliban? Under 19 U.S.C. § 2609, any archaeological material seized and forfeited to the U.S. must be returned to the State Party.[3] Several proponents of Afghanistan restrictions have argued that under § 1216 of the National Defense Authorization Act of 2021 the U.S. could provide safe harbor to seized objects, but this only applies to institutional loans that the Afghan government has authorized. There is no safe place in Afghanistan to return objects.

The greatest danger to cultural heritage now in Afghanistan is not opportunistic criminal looting of sites. It is more likely to be the Taliban's deliberate destruction of artworks for 'moral' reasons and expansion of its mining industry through concessions granted to foreign governments

Afghanistan's Ministry of the Interior/Submministry of Culture is headed by a wanted terrorist, Sirajuddin Haqqani, on whose head the FBI has placed a $10 million bounty. The Taliban do not recognize any final authority except their own interpretation of Sharia. After taking power in August 2021, one of Taliban Supreme Leader Mawlawi Hibatullah Akhundzada's first announcements was that Afghanistan would respect international laws and treaties "that are not in conflict with Islamic law and the country's national values."[4] Yet when they previously ruled the country, the Taliban violated every UN convention ever signed by an Afghan government – as well as fundamental Islamic proscriptions against rape, murder, and genocide of fellow Muslims, Afghanistan's Shi'a Hazara citizens. Why would the Taliban honor a commitment to protect art they have already deemed immoral and idolatrous?

It seems more likely that after lulling interna-

tional fears and inducing the West to resume humanitarian aid, the Taliban will target - not protect - cultural heritage associated with other religions or contrary to its perception of Islamic norms, especially when there are excellent economic reasons to allow their destruction.

The greatest danger to cultural heritage now in Afghanistan is not opportunistic criminal looting of sites. It is more likely to be the Taliban's deliberate destruction of artworks for 'moral' reasons and expansion of its mining industry through concessions granted to foreign governments, notably China, that will turn archaeological sites along ancient routes of trade into pit mines.

Photograph by Brent Huffman all rights reserved

The real looting of Afghanistan has been of its mineral riches – by powerful families, politicians, warlords, and the Taliban.[5] Integrity Watch Afghanistan reported that not a single "legitimate" mine followed legal requirements at any stage of the exploration or mining processes, obtained permits or paid royalties or taxes.[6] Illegal mining, together with poppy agriculture, were the chief money-making activities of the Taliban long before they took Kabul.

In 2020, the Taliban were already earning $400 million per year from mining.[7] Their shadow Ministry of Mines issued mining licenses, supplied community labor, collected taxes (sometimes at the same time as the government or ISIS-K) and ran a hundred or more trucks loaded with minerals every day across the Pakistan border.[8] China already held a concession from the former Karzai government to mine copper at Mes Aynak, one of the most remarkable Buddhist sites in the world,[9] but its staff had been driven off by Taliban fighters. Mes Aynak is Afghanistan's single most concentrated economic asset, situated directly on $80-100 billion dollars' worth of copper and other minerals.[10] Now it belongs to the Taliban.

Finally, inaccurate assumptions about Afghanistan's laws between 1958 and 2004 should not guide U.S. policy. Looting and illegal export do not alone account for the circulation of many objects to Western museum collections and the art market. From 1960-1980, when tourists first arrived in Afghanistan, there was an enormous backlog of accidental finds in Kabul's licensed antique shops; antique ceramics and Islamic metalwork filled storefront windows. Less affluent traders displayed antiquities daily on cloths laid on the ground in a nearby park. The Kabul intelligentsia, museum staffers, diplomats and foreign archeologists mingled with shopping tourists.

There was legal export of a wide variety of objects from textiles to ancient beads, although export of Gandharan and Hellenistic objects was prohibited. Under Afghanistan's 1958 law, an archaeologist at the National Museum vetted objects and granted or refused permission for export.[11] These museum permits were only required for Afghanistan Customs; written in Persian, they were not used for entry to the U.S. or Europe.

In 1980, a year after the Soviet invasion, a new cultural heritage law was instituted by the Soviet puppet government.[12] It deemed objects of "outstanding historical, scientific or cultural value" to be State-owned. This law, like others instituted at this time, was never enforced, as the government did not even hold all of Kabul.[13]

Professional artifact hunting was uncommon before the Soviet invasion. Finds in fields and villages, located in scattered graves or emergency caches, were usually accidental, although a rich discovery could prompt speculative digging. Certainly, during the war, some mujahedin took advantage of connections with Pakistani military and government officials to move important antiquities to Europe or Japan. However, the opium and heroin trade was a far more reliable and lucrative form of income for both mujahid and military than the uncertain returns of the artifact trade.

Twenty years ago, the Bamiyan Buddhas were blown to pieces and the storerooms of the Kabul museum smashed with sledgehammers by the people who are ruling Afghanistan today. This is the clearest example possible of the dark and

dangerous side of cultural nationalism. The fact that the State Department would even contemplate a request from Afghanistan at this time raises serious questions about policies so extreme that they would grant exclusive control of a nation's artistic history to a government of terrorists. ♦

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[2] This article is drawn from the Comment to Cultural Property Advisory Committee on Proposed MOU with the Former Government of Afghanistan, September 26, 2021, submitted by the Committee for Cultural Policy and Global Heritage Alliance. The full written testimony is available at https://www.regulations.gov/comment/DOS-2021-0032-0068. To access all comments, visit https://www.regulations.gov/document/DOS-2021-0032-0001/comment.

[3] 19 U.S.C. § 2609 (b).

[4] https://www.bbc.com/news/world-asia-58479750

[5] William A. Byrd and Javed Noorani, Industrial Scale Looting of Afghanistan's Mineral Resources, Special Report 404, June 2017, United States Institute of Peace, https://www.usip.org/sites/default/files/2017-05/sr404-industrial-scale-looting-of-afghanistan-s-mineral-resources.pdf

[6] Javeed Noorani, "The Plunderers of Hope? Political Economy of Five Major Mines in Afghanistan" Integrity Watch Afghanistan, 2015, p. 64.

[7] Lynne O'Donnell, The Taliban, at Least, Are Striking Gold in Afghanistan, Foreign Policy, September 22, 2020, https://foreignpolicy.com/2020/09/22/taliban-afghanistan-mining-peace-talks/

[8] UNDP, National Human Development Report 2020, Pitfalls and Promise – Minerals Extraction in Afghanistan, August 25, 2020, https://www.af.undp.org/content/afghanistan/en/home/library/human_development/NHDR-2020.html.

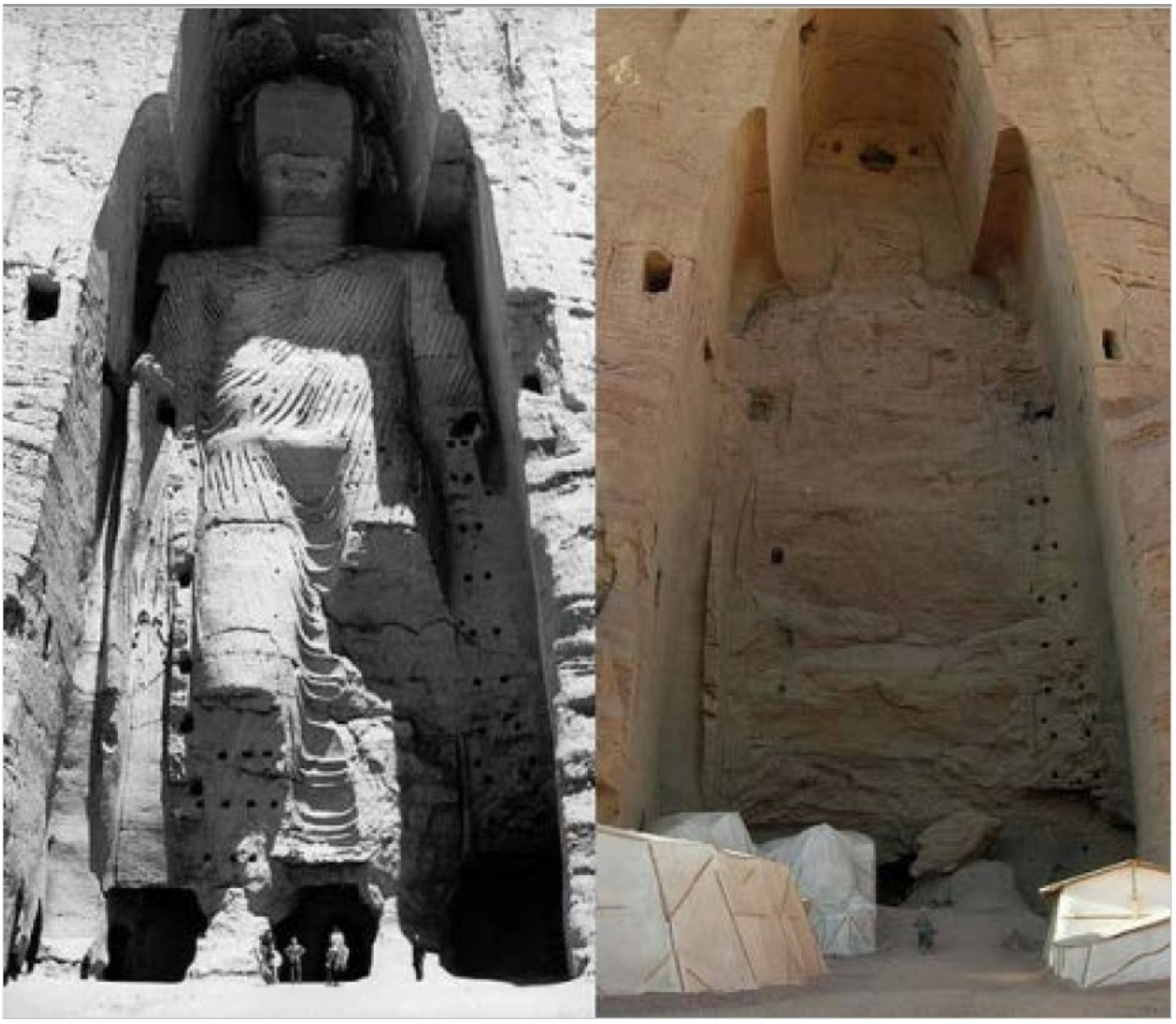
[9] Kate Fitz Gibbon, Mes Aynak- Corruption, Copper, and a Nation's Heritage, Cultural Property News, August 23, 2018, https://culturalpropertynews.org/mes-aynak-corruption-copper-and-a-nations-heritage/.

[10] In 2007, a Chinese government-owned mining conglomerate made a $30-billion-dollar agreement with the Afghan government to build a giant open-pit copper mine at Mes Aynak. Chinese workers abandoned it after threats from the Taliban while salvage archaeology continued. The Chinese company MJAM failed entirely to deliver on promised relocations, new housing, and decent jobs for local Afghans.

[11] Code for the protection of antiquities in Afghanistan, 1958, https://en.unesco.org/sites/default/files/afghanistan_code_for_protection_antiquities_1958_eng_tno.pdf

[12] Democratic Republic of Afghanistan, Law on the preservation of the historical and cultural heritage, 1980-12-21, https://sherloc.unodc.org/cld/en/legislation/afg/law_on_the_preservation_of_the_historical_and_cultural_heritage/chapter_3/article_31/law_on_the_preservation_of_the_historical_and_cultural_heritage.html

[13] Ralph Pinder-Wilson, head of the British Institute, was the only person prosecuted under the 1980 law. He was falsely charged with spying and illegally exporting Kushan coins and sentenced to death by a Revolutionary Council Court in 1982. The penalty was later reduced and he was allowed to leave the country.



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Dutch Appellate Court Affirms Decision Awarding Possession of Scythian Gold to Ukraine, and Not Crimea

By: Armen Vartian[1]

In 2016, the Amsterdam District Administrative Court ruled that 565 items of Scythian gold and other artifacts worth over $1,500,000, loaned by four museums in Crimea to be displayed in the Netherlands while Crimea was still subject the Ukrainian Government, should be returned not to those museums (which have been under Russian control since 2014), but instead to the Government in Kyiv. See Art & Cultural Heritage Law Newsletter, Spring 2017, p. 1. On appeal, that decision has now been affirmed by the Court of Appeal, in a decision dated October 26, 2021.

The Court of Appeal began by analyzing in some detail the applicability of The Netherlands' Heritage Act, relating to illegally excavated or exported items of cultural property. The Court concluded that the Act did not apply, and neither did international conventions from UNESCO or UNIDROIT dealing with those issues. The Court likewise determined that an EU Directive relating to return of unlawfully exported cultural items should not be deemed to have been incorporated into Dutch law and applied to this case because Ukraine is not, and never has been, an EU member.

Instead, the Court examined Ukraine's own domestic laws, and particularly those laws relating to ownership of these pieces in particular, and items of Ukrainian cultural heritage generally. The Court emphasized that the parties did not dispute that the pieces belonged either to the Ukrainian Government or to the Ukrainian Museum Fund, under Ukraine's Museum Act of 1995. Although the Crimean museums contended that the Kyiv Government had given them "operational management" of the pieces (and certain rights in rem to the pieces themselves) by placing them in their museums, the Court focused on the documents underlying the loans to the Netherlands museum, and the export licenses issued when the items left Ukraine, which referred to them being regulated by the "Museum Fund of Ukraine". The Court also pointed to Ukrainian Government regulations authorizing the Minister of Culture to take control of items subject to the Museum Act if those items are in danger of destruction, loss or damage. While the Crimean museums argued that this situation did not exist, the Court rejected that argument as disingenuous given that the museums are now operated by Russian entities and would be outside Ukraine's current governing authority should they be returned to Crimea.

The Court then considered evidence that title to the pieces resided in Crimea and not in Ukraine. A confusing set of regulations and statements from Ukraine and from Crimea led to the Court concluding that it was unable to find that the pieces had not become property of Crimea, at least to some extent. However, the Court reiterated its finding that the pieces had been property of Ukraine's Museum Fund when they were exported in 2012, and were unquestionably items of Ukrainian cultural heritage covered by the regulations empowering the Minister of Culture to demand their possession in times of instability. In translation, the Court stated:

> "Although the museum exhibits originate from Crimea and to that extent can also be regarded as Crimean heritage, they are part of the cultural heritage of Ukraine as the latter has existed as an independent state since 1991. In light of this, the cultural interest in preserving the museum pieces must be regarded as an important public interest of the State of Ukraine.
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> ….
>
> "The fact that this concerns the enforcement of important public interests and that the present case is closely linked to the State of Ukraine is in view of the purpose and purport of the Museum Act and the measures based on it (as mentioned, the protection and preservation of Ukrainian cultural heritage) cannot reasonably be disputed. These are therefore undeniable regulations that intervene in private-law relationships for the sake of important cultural interests, which interests must be deemed to outweigh those of the legal subjects involved, in this case the Crimean Museums…."

The Court of Appeal avoided the tricky question of who *owns* the Scythian Gold in favor of the – possibly – easier one of whether the Kyiv Government was entitled to *possession* of them. While this may have been the right decision, it is of questionable use as precedent, in that in cases of secession or changes of governing authority it may not always be appropriate to apply the laws of one competing party only. ♦

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