EXHIBIT A

Case No.: 8:07-cv-00614-SDM-MAP
Peru's Sur-Reply in Opposition to Spain's Motion to Dismiss or for Summary Judgment

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

In re:

PERUVIAN ARTIFACTS
Case No. 8:07-CV-00614-SDM-MAP

AFFIDAVIT

JOHN NORTON MOORE, being duly sworn, deposes and says:

I. CREDENTIALS

1. I was born on June 12, 1937, in New York, New York. I reside at 824 Flordon Drive, Charlottesville, Virginia.

2. I am the Walter L. Brown Professor of Law at the University of Virginia School of Law. I have been a member of the law faculty at Virginia since 1966, with the exception of approximately four years out for full-time service in the United States Department of State, and then at the Woodrow Wilson International Center for Scholars, in the period from 1972-76. At present, I teach the basic course in International Law at the Law School, as well as a number of specialized courses in international and national security law, including the basic course in Oceans Law & Policy. I served as the Director of the Graduate Law Program at the University of Virginia for approximately twenty years (ending in 1993), and was a Sesquicentennial Associate of the Center for Advanced Studies there in 1971-72.

3. I am also an Adjunct Professor of Law at Georgetown University Law Center, where I have taught courses, including Oceans Law and National Security Law. I have also lectured periodically on matters of international law at the Naval War College and the Judge Advocate General's School of the Army.

4. I am the Director of the Center for Oceans Law & Policy (since 1976) and the Center for National Security Law (since 1984) at the University of Virginia. As Director of the Center for Oceans Law and Policy I serve as a founding director of the Rhodes Academy of Oceans Law in Rhodes, Greece (a preeminent international training program in oceans law). As Director of the Center for Oceans Law & Policy I also oversaw preparation of the definitive article by article analysis of the 1982 United Nations Convention on the Law of the Sea (M. Nordquist, ed., United Nations Convention on the Law of the Sea 1982: A Commentary – multiple volumes (1989-2002), and I oversee the annual Oceans Law Conference of the Center which has become a preeminent international oceans law conference.

5. I am a member of the Florida Bar, and beginning in 1963 I served as a member of the Law Faculty of the University of Florida, until leaving to do graduate work at Yale Law School.

6. I am the author or editor of more than thirty-nine books and 176 articles, principally in the areas of international law. A list of those books and articles is attached.

7. From 1972-73 I served as the Counselor on International Law to the Department of State. In that capacity I chaired the 75-member United States Delegation to the March/April meeting of the United Nations Seabeds Committee, the ongoing negotiations leading to the 1982 United Nations Convention on the Law of the Sea.

8. From 1973 to 1976 I worked full time at the Department of State and the National Security Counsel on Law of the Sea matters. This included serving as the presidentially appointed Chairman of the National Security Counsel Interagency Task Force on the Law of the Sea which coordinated United States oceans policy on an interagency basis, as the Director of D/LOS, the State Department Office concerned with law of the sea matters, and as a United States Ambassador and Deputy Special Representative of the President to the Law of the Sea Conference. In those capacities I oversaw development during my term in office of United States oceans policy with respect to the law of the sea negotiations, ran the State Department office implementing law of the sea negotiations policy for the United States, and served as a principal negotiator for the United States in the negotiations leading to the 1982 United Nations Convention on the Law of the Sea.

9. Subsequently I was also appointed by the President as a member of the United States National Advisory Committee on Oceans and Atmosphere (1984-85).

10. Further, I was appointed by the President and confirmed by the Senate as the first Chairman of the Board of Directors of the United States Institute of Peace (1985-89). I served a second term as Chairman, following Presidential appointment, Senate confirmation, and election by the Board of the Institute as the first elected Chairman of the Board. I set up this new federal agency and headed it for its first half decade.

11. I served as a Deputy Agent and Counsel for the United States in Nicaragua v. United States of America before the International Court of Justice (1984). I also served as a Special Counsel for the United States in the Gulf of Maine Case before the International Court of Justice (1981-84).

12. During March of 1990 I served as the Co-Chairman, with the Deputy Attorney General of the United States, for the United States – U.S.S.R. talks on the Rule of Law, held in Moscow and Leningrad.

13. By way of other international law service to the United States Government, I have served as:

- Consultant to the President's Intelligence Oversight Board (1972-73);
- Consultant to the Arms Control and Disarmament Agency (1987-91);
- Consultant to the United States Information Agency (1992);
- Member of the U.S. Delegation to the Conference on Security and Cooperation in Europe (Athens 1984);
- Member of the U.S. Delegation to the United Nations General Assembly (1972-75);
- Member of the Department of State International Law Advisory Committee (1986-91);
- Member of the Presidential Delegation of the United States to observe the elections in El Salvador (1984); and
- Member, DCI's Historical Review Panel (1998-02).

14. Among other duties as Counselor on International Law to the Department of State I drafted portions of the procedural provisions and supervised interagency preparation and clearance for congressional introduction of the joint State-Justice Department sovereign immunity bill which became the Foreign Sovereign Immunities Act (28 U.S.C. § 1603 et seq) when subsequently enacted by the Congress in 1976. I also drafted the United States-sponsored treaty to prevent the spread of terrorism in the aftermath of the Munich massacre; I worked extensively on constitutional issues concerning Legislative-Executive relations in the conduct of foreign affairs (including international treaties and other agreements and the State Department Circular 175 on international agreement practice); and I drafted a study on a new recognition policy for the United States which was subsequently adopted as the official position of the United States.

15. My other international law experience includes serving as the four-term Chairman of the American Bar Association Standing Committee on Law and National Security; a Vice Chairman of the Section of International Law and Practice of the American Bar Association; a Member of the Council of the Section of International Law and Practice; a Member for approximately two decades of the Board of Editors of the American Journal of International Law of which I am currently an Honorary Member; a Fellow of the Woodrow Wilson International Center for Scholars; Chairman of the United Nations Advisory Panel of the Hamilton Shirley Amerasinghe Memorial Fellowship on the Law of the Sea; Arbitrator in International Bank v. Overseas Private Investment Corporation; Lecturer in Law, People's University, Beijing; Observer on behalf of the Foundation for Democracy in Namibia of the constitutional drafting process in Namibia; a founding member of the Board of Directors of the Rhodes Academy in Greece; and Legal Adviser to the Ambassador of Kuwait to the United States in the 1991 Gulf Crisis (including

serving as the Legal Advisor to the Kuwait Representative to the United Nations Iraq-Kuwait Boundary Demarcation Commission).

16. I am, or have been, a member of many professional organizations, including the Order of the Coif, Phi Beta Kappa, Omicron Delta Kappa National Leadership Honor Society, the American Society of International Law, the Section of International Law of the American Bar Association, the American Branch of the International Law Association, the American Law Institute, the International Law Advisory Board of the Institute of International Law at the University of Kiel (Germany), the International Studies Advisory Board at the Hoover Institution, the Board of Research Consultants to the Institute for Foreign Policy Analysis at Tufts University, the International Research Council of the Center for Strategic & International Studies, the Washington Institute of Foreign Affairs, the Board of Directors of Freedom House, and the Council on Foreign Relations.

17. At present I am a member of the Bars of Florida, Illinois, Virginia, the District of Columbia, the United States Supreme Court, the Court of Appeals for the District of Columbia and other courts.

18. I have a life-long commitment to the rule of law, both in national and international matters. I am a vigorous advocate for, and proponent of, the cause of international human rights and democracy.

19. For example, I initiated an effort, and took the lead in that effort, to have the Reagan Administration support Senate advice and consent and United States ratification of the Genocide Convention, after many years of national inaction. That initiative was successful, and in recognition of my work for United States adherence to the Genocide Convention, I participated in the Presidential signing ceremony for the law implementing and permitting United States ratification of the Convention that was held in Chicago, Illinois, on November 4, 1988. Previously, I had testified in support of United States ratification of the Convention on behalf of the American Bar Association. Similarly, I drafted for Freedom House the first draft of what has become the functioning international Community of Democracies, and I co-drafted an initiative for a Democracy/Rule of Law Training Center for Africa currently being implemented by Freedom House as a Good Governance Institute for Africa.

20. With respect to the effort to obtain Senate advice and consent to the United Nations Convention on the Law of the Sea I have testified about the Convention in support of prompt advice and consent to the Senate Foreign Relations Committee, the Senate Armed Services Committee and the House International Relations Committee. At the request of staff members of the Senate Foreign Relations Committee I have also briefed individual Senators about the Convention.

21. I have been requested by counsel for the Republic of Peru to provide an opinion on the law concerning the rights of Peru to the artifacts which are the subject of their intervention in this action. In that connection I have reviewed the "Motion to Dismiss or

for Summary Judgment" filed by counsel for the Kingdom of Spain, the "Response" filed by counsel for the Republic of Peru, and the "Reply" filed by the Kingdom of Spain.

22. For purposes of this affidavit, I have assumed that the factual allegations by Spain, as accepted by Peru, are true. My opinions in this Affidavit are confined solely to the legal consequences under international law (principally oceans law as a particular subject of expertise) that follow from these factual allegations.

23. My opinions are also solely my responsibility and are not undertaken on behalf of any present or past affiliation.

II. INTRODUCTION AND OVERVIEW: SERVING THE RULE OF LAW

24. The Kingdom of Spain requests in this case that the 500,000 gold and silver coins and other artifacts physically located in this court's district, not now in the possession of Spain, originating in Peru, culturally and historically pertaining to Peru, and the fruits of colonial exploitation of Peru, "be promptly returned to . . . Spain." Claimant Kingdom of Spain's Motion to Dismiss or for Summary Judgment, at 35. Peru has now joined this action with an obvious interest in property which physically, culturally and historically originated in Peru and which was taken from Peru in a period now widely understood as a period of shameful exploitation of the native population of Peru. Indeed, it is striking that this case harks back to Spanish colonialism in the New World, a subject of the classic writings of the great Spanish theologian, Francisco de Vitoria, who is considered by many the father of international law for his writings on just war and his objections to the barbarism of colonialism led in the New World by his native country Spain. The barbarism of Spanish colonialism, railed against by de Vitoria whose statue now stands before the United Nations in New York, is evident in the shocking decline of the native population of colonial Peru. "During the first century of Spanish domination, the Indian population declined by almost 80 percent – due to overwork, malnutrition, and the introduction of such diseases as smallpox and measles. . . . [It took] more than 300 years to replace the population lost in the first century of Spanish domination." 25 The New Enclylopaedia Britannica 513 (Fifteenth edition 1990).

25. As between Peru and Spain this case is not about the *Mercedes*, or any other ship. Nor specifically is it about sovereign rights over wrecks, including rights over 200 year-old sunken warships or the dispute between salvors and sovereigns. For my understanding is that Peru has not disturbed any wreck or archaeological site and seeks no rights in the *Mercedes*. Moreover, in this case it is clearly not responsive to the protection of archaeological and historical objects to seek to return the artifacts at issue here to the site of the *Mercedes*. Rather, as between Peru and Spain this case is about future custody of property physically, culturally and historically originating in Peru.

26. Similarly, as between Peru and Spain this case is not about a private individual seeking to bring an action against a sovereign. Rather, Spain, as a sovereign has requested this court to determine that property located in this court's district, which has not been in the physical possession of Spain for over 200 years, and which has never

been within the boundaries of modern Spain, should be turned over to Spain. This case, then, inevitably does not present a simple sovereign request for immunity. Rather, Spain is here requesting to use the court affirmatively to obtain an order for culturally and historically sensitive property now located in this district to be handed over to it. Peru, however, another sovereign and a successor state to Spain, has superior rights to the coins and other artifacts which originated physically, culturally and historically in Peru.

27. The rule of law, one of the great strengths of human experience, suggests that this issue of comparative rights to these culturally and historically sensitive artifacts should be addressed and resolved by this court. For to ignore the plea of Peru that it has superior rights to possession of this property, and to turn these artifacts over to Spain without addressing the matter, would amount to a *de facto* adjudication -- but an adjudication without considering the merits of Peru's claim and which would effectively set aside modern principles of international law and the law of the sea repudiating colonialism and protecting national cultural heritage. Surely, as against a superior claim of Peru to these artifacts, this court should not turn them over to Spain. And just as surely Peru is entitled to a hearing and adjudication of its rights to establish its superior claim. The argument in the Kingdom of Spain's "Reply" (page 24) that "[t]his Court should not undertake to become the arbiter of relations between Spain and Peru" is hypocritical as that is effectively what the Kingdom of Spain asks this court to do in its request that Spain be awarded the artifacts now before this court to which Peru has preferential rights.

III. THE RIGHTS OF PERU TO THE ARTIFACTS BEFORE THIS COURT

28. The Republic of Peru, as a sovereign nation, is entitled to all or a substantial portion of the culturally sensitive artifacts which physically and historically originated in Peru, and which are now before this court, on multiple grounds which include the law of the sea, the law of state succession, and considerations of equity and international policy concerning condemnation of colonialism, protection of permanent sovereignty over natural wealth and resources, the protection of cultural heritage and the prohibition against pillage of occupied countries.

A. The Law of the Sea

29. With respect to the respective rights of Peru and Spain to the historical artifacts before this court the relevant law of the sea issue under the facts as set out in the motions of Spain and Peru is simply what the law of the sea has to say about preferential rights to cultural and historical objects.

30. In ascertaining the answer to that question the relevant source is quite clearly the 1982 United Nations Convention on the Law of the Sea (UNCLOS). This Convention is now in force for over 156 nations and is widely regarded as the core source for contemporary law of the sea. Indeed, I and many others have long asserted that the Convention's level of general acceptance, coupled with its over quarter-century of negotiation at the highest levels of governments, indicates that its normative provisions are now customary international law. While the United States is not yet a party it too

recognizes the normative provisions of the Convention as generally reflective of customary international law. Further, every President of both parties since the successful renegotiation of Part XI on deep seabed mining has supported United States ratification and the Convention has now twice been favorably reported out of the Senate Foreign Relations Committee pursuant to overwhelming committee vote. Prompt United States adherence is supported by affected oceans interests, including the Joint Chiefs of Staff, the United States Chamber of Commerce, the petroleum industry, environmental groups and others. It is hoped and expected by supporters that the United States will in the early term of the current Congress join the other permanent members of the United Nations Security Counsel in adhering to the Convention following Senate Advice and Consent.

31. The United States is not only bound by the normative provisions of the UNCLOS Convention as customary international law but it also has an "obligation not to defeat the object and purpose of the treaty prior to its entry into force for the United States." Thus, Article 18 of the Vienna Convention on the Law of Treaties provides: "A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when . . . it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty . . . ." The United States made its intention clear to become a party to UNCLOS in 1994 following completion of the renegotiation on Part XI and, of course, as a nation intending to adhere to the Convention it has never "made its intention clear not to become a party to the treaty." Further, the UNCLOS Convention creates in Article 149, as discussed below, rights in third states, whether or not they are parties to the Convention, for that article is not limited as are others in the Convention to "states parties" and it is clearly intended to set out a universal right applying to all states of origin of archeological and historical objects. In this connection, Article 36 of the Vienna Convention on the Law of Treaties indicates that in the circumstances set out above the assent of third states to these rights "shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides." Thus, Article 35 provides in relevant part: "A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides." The Vienna Convention on the Law of Treaties is generally regarded by the United States as declaratory of customary international law in its normative provisions.

32. Article 149 of the UNCLOS Convention provides: "All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin." This is a clear indication that with respect to rights in artifacts of an archaeological and historical nature the relevant criteria is country of "origin," country of "cultural origin," and country of "historical and archaeological origin." In the case at bar the Republic of Peru is at minimum a country of physical origin, cultural origin and historical origin."

33. While technically Article 149 applies only to "the Area," that is the seafloor in areas beyond national jurisdiction (meaning beyond the 200 nautical mile Exclusive Economic Zone (EEZ) and the Continental Shelf (CS)), this article has broader significance as the only indication in the Convention specifically addressing criteria for "preferential rights" of States to historical and archaeological objects. Indeed, this criteria was suggested in March 1980 of the negotiations by the United States itself to be included in the Part XVI "General Provisions" of the Convention that would have applied to all ocean areas, whether EEZ, CS or "the Area" beyond national jurisdiction. This United States proposal is clear that it was referring to issues of sale or disposal in application of these criteria as the relevant criteria for determination of *possessory* rights; criteria applicable in all marine areas. Thus, this original United States proposal provided: "All States have the duty to protect objects of an archaeological and historical nature found in the marine environment. Particular regard shall be given to the State of origin, or the State of cultural origin, or the State of historical and archaeological origin of any objects of an archaeological and historical nature found in the marine environment in the case of sale or any other disposal, resulting in the removal of such objects from a State which has possession of such objects." *See* Informal document GP/4 (27 March 1980), reproduced in XII R. Platzoder, ed., Third United Nations Conference on the Law of the Sea: Documents (1987), at 299, and reprinted in Moritaka Hayashi, Archaeological and Historical Objects under the United Nations Convention on the Law of the Sea 20 Marine Policy 291, at 294-95 (1996). This specification of preferential rights set out in Article 149 of the 1982 Convention, and the earlier 1980 United States draft article for archaeological and historical objects found at sea, is the appropriate contemporary international law normative criteria for determining the relative rights to such objects for there is no other specification in the Convention. As between Spain and Peru, Peru is a State of physical, historical and cultural origin of the coins and other artifacts before this court and, as such, Peru would seem to have the better preferential rights to these artifacts.

34. Efforts by other nations to change the character of the 200 nautical mile Exclusive Economic Zone or Continental Shelf to include coastal nation jurisdiction over archaeological and historical objects, rather than simply to set out the criteria for determining preferential rights of the state of origin to such objects, resulted in the United States ultimately agreeing simply to the inclusion of the current Article 303 of the UNCLOS Convention which provides coastal state jurisdiction over such objects only through the contiguous zone, a zone of limited coastal nation specified functional jurisdiction beyond the territorial sea to a maximum breadth of 24 nautical miles. While Article 303 does create a duty applying to all ocean areas including the contiguous zone "to protect objects of an archaeological and historical nature found at sea" and "to cooperate for this purpose," it does not provide criteria for determining preferential rights as does Article 149. Moreover, since Article 303(4) provides that "this Article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature," Article 303 does not interfere with the only specification in the Convention concerning preferential rights to archeological and historical objects found at sea which is that set out in Article 149 and earlier embodied in the United States March 1980 proposal specifically designed to apply

to all ocean areas. For the history of the negotiations leading to Articles 149 and 303 *see* VI M. Nordquist, ed., United Nations Convention on the Law of the Sea (2002), at 226-32 (Article 149), and V M. Nordquist, ed., ibid (1989), at 158-62.

35. It is also relevant that other principal suggestions to deal with archaeological and historical objects found at sea, offered in the negotiations leading to the 1982 U.N. Convention by Turkey and Greece, also gave preferential rights to either the "country of origin" (proposal of Turkey), or the "country of cultural origin" (proposal of Greece). *See* VI, M. Nordquist, ed., United Nations Convention on the Law of the Sea (2002), at 227-28.

36. While the 1982 United Nations Convention, with its rich negotiating history, provides the relevant normative criteria for determining the respective rights of Peru and Spain to the artifacts before this court, the newly in-force UNESCO Convention on the Protection of Underwater Cultural Heritage (entered into force on January 2, 2009), also reflects the general oceans law recognizing the importance of "cultural, historical or archaeological link[s]" to artifacts concerning underwater cultural heritage. For though this Convention is not intended itself to deal with determinations, such as those before this court, concerning preferential rights to underwater cultural artifacts, articles 6, 7 and 9 of this Convention refer specifically to this "cultural, historical or archaeological" linkage as the crucial linkage for recognizing sovereign state interest. Similarly, this Convention provides a clear definition of "underwater cultural heritage" as meaning "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 . . . ." UNESCO Convention on the Protection of Underwater Cultural Heritage, article 1. Clearly artifacts such as those before this court which have been under water for more than 200 years meet both this definition of "underwater cultural heritage" and any reasonable interpretation of "objects of an archaeological and historical nature" as set forth in Article 149 of the 1982 United Nations Convention on the Law of the Sea. Indeed, the negotiating history of the 1982 U.N. Convention even reflects a "50 years old" underwater standard which was embodied in one proposal. *See* the cite to the negotiating history above with respect to Article 149 of the U.N. Convention, at 229. There is certainly no question but that the artifacts before this court are "objects of an archaeological and historical nature," and thus that the rights to them should be resolved based on that decisive character as reflected both in UNCLOS and the UNESCO Convention.

37. A principal thrust of the UNESCO Convention is preservation of underwater cultural heritage through in situ preservation as a preferred option. Thus, in Article 4 the Convention severely restricts "the law of salvage or law of finds" with respect to defined underwater cultural heritage. This UNESCO Convention entered into force on January 2, 2009, following ratification by the twentieth state. The United States is not a party to this Convention but Spain is. For a discussion of United States concerns during the negotiation of the UNESCO Convention *see* R. Blumberg, "International Protection of Underwater Cultural Heritage," in M. Nordquist, J. Moore, K. Fu, eds., Recent Developments in the Law of the Sea and China (2006), at 491.

38. The Kingdom of Spain's "Reply" seeks to deny that under the UNCLOS standard Peru is the country entitled to these artifacts. Thus, Spain argues "[T]he fact is that Spain, not Peru, was the place 'of origin' of the *Mercedes*. And when the *Mercedes* sailed from El Callao, everything placed on board "originated" in what was part of Spain. Peru cites no authority for the proposition that a state not in existence at the time a vessel sinks can be its 'State or country of origin' for purposes of UNCLOS. The term 'State or country of origin' has a meaning – the 'State or country' is the sovereign in existence at the time something 'originates.' Subsequent changes in the 'State or country''s sovereignty cannot change an object's 'State or country of origin,' because the object had already 'originated.'" "Reply" at 8. This argument, which is essentially an exercise in logic chopping, ignores the full language of the UNCLOS standard, which speaks not only of "State or country of origin" but also of "the State of cultural origin," and "the State of historical and archaeological origin." And it assumes, without authority and in celebration of the classic logic error of begging the question, that the meaning of "State or country" of origin refers simply to the then colonial power, that is "the sovereign in existence at the time something 'originates,'" rather than the country which was the victim of colonial exploitation. But that is not the language used in UNCLOS, but rather is the Kingdom of Spains' rewriting of that language. Moreover, it is significant that the UNCLOS standard does not include any referent to the "state of the flag," which is really the interpretation sought by the Kingdom of Spain. In addition, why should language of "cultural," "historical" and "archaeological" be included in Article 149 if preferential rights were to be determined simply as a matter of temporarily cabined sovereignty. In any event, certainly it was not the intent of this broadly inclusive UNCLOS language simply to support the claims of colonial powers to the loot of the colonies which they brutalized. It is far-fetched indeed that a United Nations conference with a clear majority of developing countries powerfully opposed to colonialism would have had any such intent. Moreover, the issue between Spain and Peru is not the *Mercedes* as Peru has not intervened in this action to seek custody of the *Mercedes*, but rather to recover artifacts which are Peruvian in origin and which are now before this court. These artifacts originated in the territory of Peru, indeed they were taken from Peru during a period of brutal colonial rule initiated by Pizarro's dreams of Inca gold. No amount of logic chopping can remove these artifacts from their physical, cultural and historical origin in Peru.

B. The Law of State Succession

39. The discussion of the rights of Peru as a successor state to the Spain of 1804, the time of sinking of the *Mercedes*, as set out in the Republic of Peru's Response to the Kingdom of Spain's Motion (at 23-28) reflects another principle of international law with respect to equitable apportionment of state property with successor states and is yet another reason why the rights of Peru to these important national artifacts deserve respect. It should be emphasized in this connection that a core activity of Spanish colonialism in the new world was precisely to loot the gold and silver of the inhabitants. Thus the gold and silver coins before this court, along with the other metal ingots, which originated in Peru and were in process of transport to Spain were virtually certain to be of

a category of property "connected with the territory" of Peru within the meaning of the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, as discussed within the Republic of Peru's Response. As such, there is a strong policy argument that these artifacts should be granted to the Republic of Peru. *See generally* for a discussion of successor state rights to property P.Williams & J.Harris, "State Succession to Debts and Assets: The Modern Law and Policy," 42 Harv. Int'l L.J. 355 (2001)

C. Considerations of Equity and International Policy Concerning Self-Determination, Colonialism, the Protection of Cultural Heritage, and Prohibitions Against Pillage of Occupied Countries.

40. The issue before this court is of great importance for appropriate recognition of the preferential rights of the state of cultural and historical origin to archaeological and historical objects found at sea. Modern international consideration of rights to such artifacts, which are a part of mankind's underwater cultural heritage, has clearly and consistently recognized the preferential rights of the state of cultural and historical origin of such artifacts. But where the objects in question were removed during a period of odious colonialism, with a widespread looting of gold, silver and other precious commodities as the fruits of forced labor, there is an equally compelling additional reason to recognize the preferential rights of the state of origin. Both of these reasons support the claim of Peru before this court.

41. The relevant law of the sea has been dealt with above. But it is also useful in this connection to note the universal modern authority in opposition to colonialism, supporting preservation of culture, and protecting national sovereignty over natural wealth and resources. Thus, with respect to the rejection of colonialism the important Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXXV) 25 GAOR, Supp. (No. 28) 121; *reprinted in* 9 I.L.M. 1292 (1970), provides: "the subjection of peoples to alien subjugation, domination and exploitation constitutes a major obstacle to the promotion of international peace and security . . . ," and this resolution discusses the duty to "bring a speedy end of colonialism," and emphasizes again "that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter."

42. The treaty obligations of the United States also reflect the importance of respect for the cultural values of Peru and other fellow American countries, an issue certainly at stake with respect to the treatment of important Peruvian artifacts of archaeological and historical significance to Peru. Thus, Article 3 of the Charter of the Organization of American States, OAS, Treaty Series, Nos. 1-C and 61, 1948, reaffirms the following principle: "The spiritual unity of the continent is based on respect for the cultural values of the American countries and requires their close cooperation for the high purpose of civilization." The American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (March 30-May

2, 1948), Bogotá, O.A.S. Off. Rec. OEA/Ser. L/V/I.4 Rev. (1965), again illustrates the high importance attached to preservation of culture by the American States. The preamble includes the phrase: "Since culture is the highest social and historical expression of that spiritual development, it is the duty of man to preserve, practice and foster culture by every means within his power."

43. And, similarly, international law reflects strong support for protection of the rights of peoples and nations to permanent sovereignty over their natural wealth and resources. Thus, the General Assembly Resolution on Permanent Sovereignty over Natural Resources, G.A. Res. 1803 (XVII) (1962), *reprinted in* 2 I.L.M. 223 (1963), speaks of "the right of peoples and nations to permanent sovereignty over their natural wealth and resources," and says: "[v]iolation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international cooperation and the maintenance of peace." The 1973 General Assembly Resolution on the same subject, G.A. Res. 3171 (XXVIII) (1973), *reprinted in* 13 I.L.M. 238 (1974) adds to this: "The General Assembly . . . *[s]trongly reaffirms* the inalienable rights of States to permanent sovereignty over all their natural resources, on land within their international boundaries as well as those in the sea-bed and the subsoil thereof within their national jurisdiction and in the superjacent waters; [and] *[s]upports resolutely* the efforts of the developing countries and of the peoples of the territories under colonial and racist domination and foreign occupation in their struggle to regain effective control over their natural resources."

44. Modern international law also protects the property rights of the inhabitants of occupied countries, forbids pillage, and respects religious practices, historic monuments and works of art. Thus, Article 47 of the Annex to Hague Convention (No. IV) Respecting the Laws and Customs of War on Land, 36 Stat. 2277, T.S. No 539, 1 Bevans 631 (1907), known as "the Hague Regulations," prohibits "pillage." Similarly, Article 46 provides: "Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated." Article 56 of the Hague Regulations also provides: "The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings." Sadly, such forbidden practices were routine during the period of colonialism in the New World. Further, Article 33 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (1949), known as "the Fourth Geneva Convention," also expressly prohibits "pillage." These Conventions were, of course, adopted after the period of Spanish colonialism beginning in the early 16th Century with the expeditions of Francisco Pizzaro who was attracted by the wealth of the Inca Empire. But with respect to their relevance to occupation resulting from armed conflict, the period of Spanish colonialism from 1532 down until 1824 when Peruvian independence was assured was marked by repeated armed struggles for liberation culminating in the battles of Junin (August 6,

1824) and Ayacucho (December 9, 1824); battles where Spanish power was broken by Simon Bolivar's forces. In one such struggle for liberation, from 1780-1783, only several decades before the sinking of the *Mercedes*, "the Indians, who had from the time of the conquest suffered oppressive taxation and enforced labor, revolted . . . ." *See* 25 The New Encyclopaedia Britannica 508 at 513-17 (Fifteenth Edition 1990). These Conventions certainly reflect the modern view that pillage of occupied countries is forbidden. Spain and Peru are parties to both Conventions.

IV. A FEW THOUGHTS ON SOVEREIGN IMMUNITY ISSUES BEFORE THE COURT

45. The Kingdom of Spain's Motion to Dismiss or for Summary Judgment in this action does not simply assert sovereign immunity with respect to Odyssey's claims against the *res* of the *Mercedes*. Rather, it affirmatively requests this court to "direct that the artifacts in Odyssey's custody be promptly returned to the custody of Spain." The Kingdom of Spain's Motion to Dismiss or for Summary Judgment at 36. That is, Spain does not simply seek to block a claim against it filed in this court, the usual plain vanilla assertion of immunity, but rather it accompanies its plea for immunity with the affirmative request for action from this court that important archaeological and historical objects located in this district, and not under the physical control of Spain for over 200 years, be returned to Spain as the property of Spain. But that request for action from this court necessarily waives any immunity from jurisdiction for determination as to whether the artifacts before this court are returnable to Peru, their State of cultural and historical origin, rather than Spain. For this request inevitably requires this court to determine that the artifacts are properly to be turned over to "the custody of Spain," and, as such, constitutes a waiver of immunity under § 1605(a)(1) of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602 *et seq* (1976), at least for the question of determining the appropriate legal disposition of the artifacts between Peru and Spain. Further, a core purpose of the FSIA is to protect the interests of foreign sovereign states. But in this case the interests of Peru, a foreign sovereign state of origin of the artifacts in question which, as such, has preferential rights to them, would be severely impacted by a decision of this court to turn the artifacts over to Spain. That is, the issue here is between *two* sovereigns and in that setting there is certainly no reason to respect any sovereign rights of Spain over sovereign rights of Peru.

46. Section 1605(a)(1) of the FSIA provides: "A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case – (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver." Spain could have simply sought the dismissal of this action brought by Odyssey against the *res* of the *Mercedes*. But it made a deliberate choice not to do that but instead *both* to seek dismissal of the action brought against the *res* of the *Mercedes and* to seek to obtain custody of the archaeological and historical artifacts located in this district. Had Odyssey not brought its action the only option available for Spain in seeking custody of these assets located in

this district and which have not been in the physical control of Spain for over 200 years would have been to file a legal action in the United States, thus waiving its immunity. Spain should not be able to sidestep its loss of immunity for this affirmative action sought from a United States court simply because of immunity with respect to the *res* even were it to have immunity with respect to the action against the *res* of the *Mercedes* brought by Odyssey.

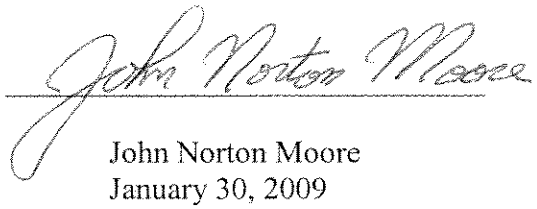
47. It is, of course, generally accepted that implied waivers of immunity under § 1605(a)(1) of the FSIA are not to be favored simply from unrelated actions of the foreign state which would not reasonably be understood as waiving immunity. *See, e.g., Hilao v. Estate of Marcos*, 94 F.3d 539 (CA 9 1996). But equally clearly district courts have discretion to determine whether a waiver has occurred in a particular case. *See Drexel Burnham Lambert Group v. Committee of Receivers for Galadari,* 12 F.3d 317 (CA 2 1993). Certainly a decision by a foreign sovereign affirmatively to seek judicial action in the United States requesting an award of custody of property located in the United States inevitably waives immunity for the necessary resulting judicial determination as to the appropriate legal disposition of the property. That is precisely the decision and resulting action of Spain in this case and, as such, it clearly has waived any immunity it may have had for the limited purpose of determining the appropriate legal disposition of the artifacts now before this court as between the Republic of Peru, the country of origin, and the Kingdom of Spain. Indeed, Spain requesting the affirmative action from this court of turning over custody of artifacts located in the United States cannot reasonably be viewed as not waiving immunity for determination by this court of rights to the artifacts, the action requested.

48. Further, once an exception to immunity is identified then under generally accepted FSIA jurisprudence the burden of persuasion that the exception is not applicable remains with the foreign sovereign, here the Kingdom of Spain. *See Antares Aircraft, L.P. v. Federal Republic of Nigeria,* 948 F.2d 90 (CA 2 1991); *Gates v. Victor Fine Foods,* 54 F.3d 1457 (CA 9 1995); *Brown v. Valmet-Appleton,* 77 F.3d 860 (CA 5 1996); *Randolph v. Budget Rent-A-Car,* 97 F.3d 319 (CA 9 1996); *Phaneuf v. Republic of Indonesia,* 106 F.3d 302 (CA 9 1997); *Aquamar S.A. v. Del Monte Fresh Produce N.A.,* 179 F.3d 1279 (CA 11 1999); *Transamerican S.S. Corp v. Somali Democratic Republic,* 767 F.2d 998 (D.C. 1985).

49. As has been discussed in the Republic of Peru's response to the Kingdom of Spain's Motion in this case, the case of *Lord, Day & Lord v. Socialist Republic of Vietnam,* 134 F.Supp.2d 549 (S.D.N.Y. 2001), provides an illustration of why a sovereign cannot seek an affirmative order turning over artifacts to it without this request working a waiver of immunity. Of course Spain cannot grant this court jurisdiction solely for the purpose of awarding it the artifacts. As in the *Lord, Day & Lord* case, by its appearance and claim to the funds the Kingdom of Spain "has impliedly waived its immunity to the extent necessary to determine all pre-existing claims relating to legal title" to the artifacts before this court. *See, id.*at 558-59, for the parallel in the *Lord, Day & Lord* case as discussed at page 10 in the Republic of Peru's response.

50. Also, importantly as has been discussed in the Republic of Peru's response to the Kingdom of Spain's Motion, when the *Mercedes* sank in 1804 Peru was part of Spain and is thus today a successor State. As such, "[w]hile Peru and/or Spain might have immunity from other claimants, Spain cannot have immunity as against Peru, because, if Spain has any rights to the cargo, it is as a co-owner with Peru." Republic of Peru response at 4.

51, Pursuant to 28 U.S.C, § 1746, I declare under penalty of perjury that the foregoing is a true and correct statement of my professional opinion.



John Norton Moore
January 30, 2009