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FINDERS, WEEPERS—LOSERS, KEEPERS? FLORIDA COURT SAYS U.S. COMPANY MUST RETURN RECOVERED TREASURE TO KINGDOM OF SPAIN

Michael R. Nelson*

I. INTRODUCTION

ON June 3, 2009, Magistrate Mark Pizzo, sitting in U.S. Federal Court in Tampa, Florida, ruled that Odyssey Marine Exploration (the “Odyssey”), an American marine archaeology company, should return an estimated \$500 million worth of bullion to the Spanish government after it was removed from the site of a centuries-old shipwreck in the Atlantic Ocean.¹ Odyssey recovered seventeen tons of gold and silver coins from the site—located in international waters about 100 miles west of the Straits of Gibraltar—in 2007, and promptly hauled them back to its Florida base.² Odyssey’s decision to move the treasures infuriated the Spanish government, which filed legal claims demanding their return, insisting that the wreck was the *Nuestra Senora de las Mercedes* (“the *Mercedes*”), a Spanish warship that was sunk by the British Royal Navy in 1804.³ Peru further complicated matters in 2008 when it filed a conditional claim stating that the treasure may be part of its country’s heritage, arguing that it is entitled to any property that originated in Peru or was produced by Peruvian people.⁴

Odyssey insists that there is not enough evidence to prove that what it found at the site, code named “Black Swan,” was indeed part of the *Mercedes* and alternatively, that if it *is* the wreckage of the *Mercedes*, then the “ship was on a commercial mission and its *cargo* could be legitimately

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1. Cahal Milmo, *Why Is There A Storm Brewing Over the Right to Plunder Shipwrecks?*, INDEPENDENT, June 9, 2009, <http://www.independent.co.uk/news/world/politics/why-is-there-a-storm-brewing-over-the-right-to-plunder-shipwrecks-1700207.html>.

2. Posting of Hans Verstraate to PEACE PALACE LIBRARY, <http://peacepalacelibrary-weekly.blogspot.com/2009/06/maritime-cultural-property-and-treasure.html> (June 16, 2006, 12:18 EST).

3. Milmo, *supra* note 1.

4. Verstraate, *supra* note 2.

recovered under salvage law and shared among salvors and claimants.”⁵ Not surprisingly, Spain continues to demand the full return of the un-earthed riches to Madrid,⁶ while Peru contends that its right to the treasure is superior to Spain’s because the property “physically, culturally, and historically originat[ed] in Peru.”⁷

A. A UNIQUE INTERSECTION OF INTERNATIONAL LAW, TREATIES, AND AGREEMENTS

Odyssey’s purported ignorance as to the identity of the vessel at the discovery site and alternative claim that the ship was on a commercial mission are calculated attempts to circumvent an array of international policies. Proving either contention could create waves in what otherwise looks like smooth sailing for Spain.

The International Maritime Organization’s 1989 International Convention on Salvage declares that most wrecks found in international waters are there for the taking, *except* for around “3,000 sovereign immune vessels which litter the world’s seabeds.”⁸ State-owned ships, “including *all* naval vessels, remain the inalienable property of their originating nation.”⁹ Such language exists, among other places, in the Geneva Convention on the High Seas.¹⁰ In fact, this notion is so prevalent that it is generally accepted in admiralty law that a sovereign government’s naval ships “belong in perpetuity to the countries that owned them” and cannot be abandoned.¹¹ Merchant vessels, on the other hand, may be fair game for treasure hunters.¹²

Recent action by the United Nations may also modify the status of admiralty law as it relates to sunken shipwreck discovery.¹³ The 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage, much to the chagrin of private sector marine explorers, allows for the government of whichever coastal nation is closest to the discovery site to claim title to a sunken vessel and its cargo, as long as it rests on the continental shelf or is less than 200 miles offshore.¹⁴ Under the

5. Milmo, *supra* note 1 (emphasis added).

6. Unopposed Mot. for Admis. to Appear Pro Hac Vice and Written Designation and Consent to Act (Docket No. 12) at ¶ 5, *Odyssey Marine Exploration, Inc. v. The Unidentified, Shipwrecked Vessel*, No. 8:07-cv-00614 (M.D. Fla. June 1, 2007).

7. Ex. A to Peru’s Sur-Reply in Opp’n to Spain’s Mot. to Dismiss (Docket No. 206) at ¶ 25, *Odyssey*, No. 8:07-cv-00614 (May 4, 2009); *see also* Report and Recommendation at 29, *Odyssey*, No. 8:07-cv-00614 (June 3, 2009).

8. Milmo, *supra* note 1.

9. *Id.*

10. Convention on the High Seas art. 8, Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200 (“Warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State”).

11. *See, e.g.*, Mike Celizic, *Sunken Treasure Stirs International Booty Battle*, MSNBC-TODAY, Mar. 24, 2009, <http://today.msnbc.msn.com/id/29856469>.

12. *Id.*

13. Mark A. Wilder, *Application of Salvage Law and the Law of Finds to Sunken Shipwreck Discoveries*, 67 DEF. COUNS. J. 92, 104 (2000).

14. *Id.*

UNESCO Convention, there is a presumption of abandonment of title to a vessel and its cargo twenty-five years after sinking, and it declares absolute abandonment after fifty years.¹⁵ Again, the only exception is that “sovereign” shipwrecks—naval vessels, aircraft and, naval auxiliaries—are deemed the property of the original government in perpetuity.¹⁶ But, to date, only fifteen countries have formally signed this convention, and twenty signatories are required for it to come into force.¹⁷

Instead of relying on the collection of jurisdictional legislation and multilateral treaties that make up the bulk of admiralty law, the Spanish government has proceeded by asking the court to honor the U.S. Foreign Sovereign Immunities Act (“FSIA”).¹⁸ Section 1609 of the FSIA provides that “property in the United States of a foreign state shall be immune from attachment, arrest and execution.”¹⁹ Spain also cited the 1902 Treaty of Friendship and General Relations between the United States and Spain in their request to extend protection to their submerged warship and its cargo—even if the cargo was being transported commercially. Per the treaty’s provisions, “in cases of shipwreck . . . each party shall afford to the vessels of the other, whether belonging to the State or to individuals, the same assistance and protection and the same immunities which would have been granted to its own vessels in similar cases.”²⁰ Because the United States is a party to the aforementioned Geneva Convention on the High Seas and acknowledges that naval vessels are forever the property of their flag country, *Odyssey* looks like it is destined to be left high and dry.²¹ To be precise, if the bullion that *Odyssey* discovered *did* come from a sovereign warship, whether it was on a naval mission or a commercial mission, then by law it is the property of Spain. It has never been abandoned, and it cannot be awarded to another party in a U.S. court. Enter *Odyssey*’s doubt about the identity of the supposed *Mercedes*.

B. LA NUESTRA SENORA DE LAS MERCEDES

Somewhat surprisingly, the history of the *Mercedes*, from its construction at the Spanish Navy Shipyard in Havana, Cuba, to its destruction in the Battle of Cape Saint Mary, is extremely well documented.²² The *Mercedes* distinguished tenure in the Royal Spanish Navy began in 1789 and

15. *Id.*

16. *See id.*; *see also* Peter Hess, *Legalized Plunder?*, UNESCO, May 14, 1998, <http://www.imadigest.com/unesco.html>.

17. Milmo, *supra* note 1.

18. Mot. to Dismiss and for Other Relief of Claimant-Def. Kingdom of Spain (Docket No. 37) at 13, *Odyssey*, No. 8:07-cv-00614 (Sept. 19, 2007).

19. 28 U.S.C. § 1609 (2006).

20. Treaty of Friendship and General Relations, U.S.-Spain, art. X, July 3, 1902, 33 Stat. 2105.

21. *See* Report and Recommendation (Docket No. 209) at 25, *Odyssey*, No. 8:07-cv-00614.

22. *See* Claimant Kingdom of Spain’s Mot. to Dismiss or for Summ. J. (Docket No. 131) at 4-7, *Odyssey*, No. 8:07-cv-00614 (Sept. 22, 2008).

“included diverse missions that ranged from participation in combat operations to the secure transportation of troops, specie, and government officials.”²³ The *Mercedes*’ final voyage took place during a period marked by constant warring among Europe’s superpowers.²⁴ Spain’s King Carlos IV had allied Spain with Napoleonic France in their struggle against Great Britain by pledging his financial and military support in the Treaty of San Ildefonso in 1800.²⁵

The Treaty of Amiens brought about a temporary peace between the warring nations in 1802; however, the Spanish government worried that Spain would be forced back into hostilities with Great Britain if, as anticipated, war between Great Britain and France resumed.²⁶ Fearing that continued involvement in Napoleon’s conflict with Great Britain would be disastrous to the future of his country, King Carlos secretly agreed to pay France a generous monetary subsidy in lieu of furnishing the military aid required by the Treaty of San Ildefonso.²⁷ The King thus directed the Minister of the Spanish Navy to dispatch warships to gather precious metals and other valuables from their Viceroyalties in South America.²⁸ Consequently, the *Mercedes* and her sister ship, the *Clara*, began their voyage across the Atlantic in 1803 “with the objective of bringing back the specie and effects of the Royal Treasury which [were] ready in America.”²⁹ As predicted, hostilities between France and Great Britain resumed shortly thereafter, delaying the return trips of both warships until August of 1804.³⁰

Anticipating that the Spanish warships returning from the Americas would be feeding the coffers of its French archenemy, the “British government ordered its Navy to intercept any Spanish homeward-bound Ships of War with treasure on board.”³¹ On the morning of October 5, 1804, the British fleet intercepted the Spanish squadron just south of Portugal, opened fire, and the Battle of Cape Saint Mary commenced.³² Minutes later, “the *Mercedes* was rocked by a catastrophic explosion and sank,” killing over 250 military personnel and several civilians.³³

23. *Id.* at 4.

24. *Id.*

25. See Report and Recommendation (Docket No. 209) at 5, *Odyssey*, No. 8:07-cv-00614.

26. Kingdom of Spain’s Motion to Dismiss or for Summary Judgment, *supra* note 22, at 4.

27. Report and Recommendation (Docket No. 209) at 5-6, *Odyssey*, No. 8:07-cv-00614.

28. Kingdom of Spain’s Mot. to Dismiss or for Summ. J. (Docket No. 131) at 5, *Odyssey*, No. 8:07-cv-00614.

29. *Id.* (internal quotations omitted).

30. *Id.* at 6.

31. *Id.* (quoting Decl. of James P. Delgado, Ph.D, Ex. D to Claimant Kingdom of Spain’s Mot. to Dismiss or for Summ. J. at ¶ 15, *Odyssey*, No. 8:07-cv-00614 (Sept. 22, 2008)).

32. *Id.*

33. *Id.* at 7.

II. APPLICATION

A. CAN THE LAW OF FINDS OR THE LAW OF SALVAGE HELP ODYSSEY?

Finding a half a billion dollars on the ocean floor seems like it would be perfect fodder for an adventure novel or a Hollywood feature film, but history and reality have proven that the protagonist rarely, if ever, sails into the proverbial "sunset" in such cases.³⁴ Instead, expensive litigation over ownership rights and interests almost always ensues. The *Columbus-America Discovery Group* ("*Columbus-America*") may well be the poster-child for this assertion, as they were forced into a protracted legal battle after discovering the *S.S. Central America*, a steam ship that went down in a hurricane off the coast of South Carolina in 1857.³⁵

When the *Central America* sank, so did 425 passengers making the journey from California to New York after striking it rich in the gold rush, as well as close to \$2 million of bullion (valued in 1857 dollars).³⁶ In litigation to determine the ownership rights surrounding the bullion, the federal district court awarded *Columbus-America* title when it ruled that the ship had been abandoned; but on appeal, the Fourth Circuit reversed, refusing to conclude that full abandonment of the gold had taken place.³⁷ On remand, the district court took the Court of Appeals' suggestion, but still awarded *Columbus-America* a ninety percent salvage award for the recovery of the gold.³⁸ The victory, however, was moral rather than substantive as the whole debacle resulted in harsh losses for *Columbia-America*. Their projected costs for exploration, recovery, and litigation at the date of the award were \$30 million, compared with the final salvage award of roughly \$19 million.³⁹

Albeit frustrating, jockeying between claims of title and questions of abandonment is present in almost every case involving the discovery of sunken treasure. This confusion is wholly attributable to the need to apply either "the law of finds" or the "law of salvage" to such recovered goods.⁴⁰ While its application has become less and less common, "the law of finds necessarily assumes that the property involved was never owned or was abandoned, and therefore the ancient and honorable principle of 'finders, keepers' applies."⁴¹ The key element to the law of finds is that

34. See Wilder, *supra* note 13, at 92.

35. See *id.* at 99-100; see also *Columbus-Am. Discovery Group v. Atl. Mut. Ins. Co.*, 974 F.2d 450 (4th Cir. 1992).

36. Wilder, *supra* note 13, at 99.

37. *Id.* at 100.

38. See *id.*; see also *Columbus-Am. Discovery Group v. Unidentified, Wrecked, & Abandoned Sailing Vessel*, its Engines, Tackle, Apparel, Appurtenances, Cargo, Etc., 1993 WL 580900, at *32 (E.D. Va. Nov. 18, 1993); *Columbus-Am. Discovery Group v. Unidentified, Wrecked, & Abandoned Sailing Vessel*, 742 F. Supp. 1327 (E.D. Va. 1990).

39. Wilder, *supra* note 13, at 100.

40. See *id.* at 93-94.

41. *Id.* at 93 (quoting Craig N. McLean, *Law of Salvage Reclaimed: Columbus-Am. Discovery v. Atl. Mut.*, 13 BRIDGEPORT L. REV. 477, 499 (1993)).

of “abandonment,” which, considering the ramifications, courts are justifiably reluctant to find.⁴² It is not often that owners expressly and publicly abandon their property, and although a court can infer abandonment from circumstantial evidence, like lapse of time and nonuse by the owner, its doing so requires support by “strong and convincing evidence.”⁴³ Instead, courts tend to err on the side of caution by applying the law of salvage.

The origins of the law of salvage reaches back almost 3000 years to the Rhodian era.⁴⁴ Salvage law does not address the title to recovered property as the law of finds does. Rather, it provides for “liberal compensation” for a successful salvor in return for “labor expended. . .in rendering salvage service[;]. . .the promptitude, skill, and energy displayed in rendering the service and saving the property[;]. . .the risk incurred by the salvors in securing the property from impending peril[;]. . .and the value of the property saved.”⁴⁵ A plaintiff is permitted to plead both salvage law and the law of finds, so that if the court denies finds, salvage law can serve as a backup, as Odyssey has done in this case. It should be noted that courts in admiralty favor the application of salvage law over the law of finds because salvage law “is more consonant” with the standards of marine activity, encourages less secretive forms of conduct, and aims to preserve property, “saving it from destruction, damage, or loss.”⁴⁶

In light of his pleadings to the Court and unwavering assertions to the press, it appears that Odyssey’s CEO, Greg Stemm, is determined to hold on to the notion that the bullion did not come from the *Mercedes*.⁴⁷ Of course, if that ends up being the case, the entire discovery could then be awarded to Odyssey under the law of finds.⁴⁸ But, the location of the site, the type of coins they recovered there, as well as the presence of other artifacts (unique cannons and copper plating), cast a lot of doubt on his already self-serving assertion.⁴⁹ Likewise, despite Odyssey’s efforts, Judge Pizzo does not agree with its assertion that admiralty law requires a distinction between a vessel and its cargo.⁵⁰ According to Judge Pizzo, the idea that the actual ship-wreckage of the *Mercedes* is sovereign but the cargo she was carrying was not is unacceptable because “a vessel and

42. See Wilder, *supra* note 13, at 93; see also *Columbus-Am. Discovery Group*, 974 F.2d at 460-61.

43. *Zych v. The Unidentified, Wrecked, and Abandoned Vessel, Believed to be the SB “Lady Elgin”*, 755 F. Supp. 213, 214 (N.D. Ill. 1990).

44. Wilder, *supra* note 13, at 92.

45. *The Blackwall*, 77 U.S. 1, 14 (1869); see also Wilder, *supra* note 13, at 92-93.

46. *Hener v. U.S.*, 525 F.Supp. 350, 356 (D.C.N.Y. 1981).

47. See Celizic, *supra* note 11 (“One difficulty in doing that is that the Mercedes was hit in its powder magazine during the battle and blew up, leaving little actual wreckage at the bottom of the ocean.”).

48. See *id.*

49. Report and Recommendation (Docket No. 209) at 7-11, *Odyssey*, No. 8:07-cv-00614.

50. *Id.* at 23.

its cargo are inextricably intertwined.”⁵¹

It seems then, that what the “liberal compensation” salvage law calls for may be the best bet for *Odyssey*, which has already expended a considerable amount of time and money exploring, excavating, and transporting the treasure—not to mention mounting litigation costs. Nevertheless, Spain and their counsel have navigated these turbulent legal waters with expert efficiency. By focusing on the identity of the sovereign warship and the aforementioned FSIA, Spain has all but capsized *Odyssey*’s claim. If Judge Pizzo’s Report and Recommendation, which concludes that the site and cargo are indeed the remnants of the *Mercedes* and thus the sovereign property of Spain, is not overturned, then it will be jurisdictionally impossible for any U.S. court to award *Odyssey* anything, let alone “liberal compensation.”⁵²

B. WHY IS PERUVIAN METAL CLAIMED BY SPAIN AND FOUND NEAR PORTUGAL BEING LITIGATED IN THE MIDDLE DISTRICT OF FLORIDA?

At first glance, it might seem odd that a U.S. federal court in Florida would be charged with resolving salvage claims to the remnants of a colonial-era shipwreck discovered near the European continental shelf in international waters.⁵³ But, this is not the first time that such an issue has been presented within the jurisdiction of U.S. courts. In fact, “the exercise of admiralty subject matter jurisdiction has never been limited to maritime causes arising solely in the United States territorial waters.”⁵⁴ U.S. Courts ascribe their authority in these types of cases to two legal principles—(1) *jus gentium* and (2) constructive *in rem* jurisdiction,⁵⁵ as well as the language of the U.S. Constitution. Under Article III, section two, clause one of the U.S. Constitution, “the judicial power of federal courts extends to *all* cases of admiralty and maritime jurisdiction.”⁵⁶ Indeed, “since our nation’s founding, federal courts sitting in admiralty, and particularly when adjudicating salvage claims, have applied the *jus gentium*, or customary law of the sea. . .irrespective of the nationality of

51. *Id.* (quoting Sunken Military Craft Act, §§ 1401, 1408(1), (3), 10 U.S.C. § 113 note (2004) (The Act defines a “sunken military craft” to include “associated contents,” which means “(A) the equipment, cargo, and contents of a sunken military craft that are within its debris field; and (B) the remains and personal effects of the crew and passengers of a sunken military craft that are within its debris field.”)).

52. Report and Recommendation (Docket No. 209) at 12 n.10, *Odyssey*, No. 8:07-cv-00614 (“I find the evidence as to the res’s identity so one-sided that Spain would prevail as a matter of law, which is the standard for granting summary judgment under Rule 56.”).

53. *Id.*

54. *Wilder*, *supra* note 13, at 102-05; *R.M.S. Titanic Inc. v. Haver*, 171 F.3d 943, 961 (4th Cir. 1999).

55. Report and Recommendation (Docket No. 209) at 12, *Odyssey*, No. 8:07-cv-00614.

56. Stephen P. Coolbaugh, *Raiders of the Lost. . .Sub? The Potential for Private Claims of Ownership to Military Shipwrecks in International Waters: The Case of Japanese Submarine I-52*, 49 BUFF. L. REV. 929, 952 (2001) (citing U.S. CONST. art. III, § 2, cl. 1) (emphasis added).

ships, sailors, or seas involved.”⁵⁷

Constructive *in rem* jurisdiction, which is applied even more frequently, requires that the property in question be deposited into the court’s possession.⁵⁸ Since doing so can be a monumental task in some situations, over time courts have allowed for one or two items of a discovery that may consist of hundreds of thousands of different pieces to serve as the “fictional equivalent” of the entire cache.⁵⁹ Once the property is *in custodia legis*—or in the court’s possession—they have dominion over the property and can adjudicate accordingly.⁶⁰ As Judge Pizzo pointed out though,

[A] court should wade carefully into international waters to adjudicate a salvage claim, particularly one that concerns a historical wreck with significant loss of life. . . .this admonition is even more appropriate when the salvor’s claim implicates a foreign sovereign’s patrimonial interests and that sovereign’s asserted independence from suit per the FSIA.⁶¹

This line of thought seems to have resonated with Judge Pizzo, who, after evaluating the proceedings of the case, decided that he was ready to return the treasure to Spain and let *Odyssey* fight for what would, at best, probably be limited to a salvage fee in Spanish courts.

C. HISTORY? PATRIMONY? TREASURE? OR POLITICS?

The implications of the outcome of this case are not exactly far-reaching; still, it would be hasty to write off the proceedings as legally insignificant simply because they involve naval battles, ancient history, precious metals, and treasure hunters. In fact, several of the issues under examination are just as practical as they are quixotic. For example, it is important to remember that when Judge Pizzo accepted Spain’s belief that the wreck in question is that of the *Mercedes*, he also accepted that the wreck-site is the graveyard of over 250 Spanish citizens. Whether or not such an area should be treated with the reverence of a cemetery or whether is instead fair game for exploration is a culturally significant matter that touches a large number of people.

In addition, the relationship between the FSIA and the principle that a warship belongs to its flag country in perpetuity probably piques the interest of any sea-faring nation. Given the proclivity of treasure hunters to discover downed ships, any countries whose naval vessels are currently resting on the ocean floor are likely to agree with Spain’s Minister of Culture in believing that this is “a hugely important ruling and one that

57. Report and Recommendation (Docket No. 209) at 12, *Odyssey*, No. 8:07-cv-00614; see also *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 640 F.2d 560, 567 (5th Cir. 1981).

58. See *R.M.S. Titanic*, 171 F.3d at 967-968.

59. Report and Recommendation (Docket No. 209) at 12, *Odyssey*, No. 8:07-cv-00614; see also *Cal. v. Deep Research, Inc.*, 523 U.S. 491, 496 (1988).

60. See *U.S. v. Rizzo*, 297 U.S. 530, 535-36 (1936).

61. Report and Recommendation (Docket No. 209) at 14, *Odyssey*, No. 8:07-cv-00614.

will set a precedent for future claims.”⁶² Interestingly enough, the United States, while not a party to this lawsuit, submitted a brief in support of Spain’s claim to all items recovered from the site.⁶³ Accordingly, the U.S. Department of Justice defended such a position by declaring that “the United States seeks to make sure that its own warships that are sunk. . . be treated as sovereign vessels and honored tombs not subject to exploration or exploitation without authorization.”⁶⁴

It is tough to discount Spain’s concern for the gravesite of its soldiers and their desire to have any cultural artifacts returned. But at the same time, it is easy to speculate as to whether or not their attention to the matter would be so focused without the half a billion dollars worth of bullion that Odyssey recovered. Spanish officials have moved to quash such suspicions by openly declaring that they are not after the gold, but rather the “history. . . the memory, [and] the respect, essentially, for what is a marine graveyard of [its] people.”⁶⁵ Yet, past inquiries for cooperation, and numerous recent offers to arrange some sort of division⁶⁶ of the valuables recovered by Odyssey CEO Greg Stemm have been brushed aside by Spain, which repeats that everything on the ship is cultural heritage, and that the Kingdom of Spain “does not do commercial deals.”⁶⁷ Stemm may take offense to the characterization of his company’s work as simply “commercial,” though.⁶⁸ He has always maintained that Odyssey’s archaeological prowess is “unsurpassed,” and has pointed out that they have been “thoroughly documenting and recording the site,” noting its “immense historical significance.”⁶⁹ On the other hand, a different selection of commentators are much harsher than Spain even, alleging that Stemm’s salvage work on shipwrecks constituted “theft of public history and world history” and that Odyssey is only out to make money because “they’re a corporation with enormous expenses. . . they’re not there to preserve history.”⁷⁰

Considering Peru’s position in this matter, it is ironic to see supporters

62. Brendan Borrell, *Treasure Hunter Odyssey Ordered to Give Booty Back to Spain*, SCIENTIFIC AM. NEWS, June 8, 2009, <http://www.scientificamerican.com/blog/post.cfm?id=treasure-hunter-odyssey-ordered-to-2009-06-08>.

63. See Statement of Interest and Brief of the U.S. as Amicus Curiae in Supp. of the Kingdom of Spain (Docket No. 247), *Odyssey Marine Exploration, Inc., v. The Unidentified, Shipwrecked Vessel, & the Kingdom of Spain*, the Rep. of Peru, et al., No. 8:07-cv-00614-SCB-MAP (M.D. Fl. filed Sept. 29, 2009).

64. *OMEX Firm Asks Court to Reject U.S. Brief in Spain Treasure Fight*, TRADINGMARKETS.COM, Sept. 11, 2009, <http://www.tradingmarkets.com/site/news/Stock%20News/2524546/>.

65. Al Goodman, *Spain’s Lost Treasure Battle in U.S. Court*, CNN, June 9, 2008, <http://edition.cnn.com/2008/WORLD/europe/06/08/spain.treasure/index.html>.

66. See Celizic, *supra* note 11.

67. *Id.*

68. Terry Aguayo, *A Bountiful Undersea Find, Sure to Invite Debate*, N.Y. TIMES, May 19, 2007, <http://travel.nytimes.com/2007/05/19/us/19treasure.html>.

69. *Id.*

70. *Id.*

of Spain's claim brand Odyssey as "thieves"⁷¹ and "looters."⁷² Although Peru was a Spanish Viceroyalty at the time, the coins that were aboard the *Mercedes* were minted in Lima in 1803 and crafted with Peruvian silver from the mines of Potosí.⁷³ Obviously then, with the *Mercedes* being destroyed before she reached her final destination, the coins that are being so hotly contested and claimed as sovereign property by Spain have never even been on Spanish soil. Moreover, even if they had gotten there, their stay would have been extremely brief. As admitted in their Motion to Dismiss or for Summary Judgment, as soon as the coins were to arrive in Spain they would have been transferred directly to France in lieu of furnishing soldiers and military equipment.⁷⁴ Such historical observations are not as legally significant in a court of law as the FSIA or the Geneva Convention are, but with Odyssey and Spain both straining to claim a moral high ground, it is easy to wonder if the most legitimate claim to the treasure belongs to Peru.

Peru's Foreign Minister, Jose Garcia Belaunde, does not think that the claims are as complicated as the intensity of the litigation would lead one to believe.⁷⁵ Everyone admits that the "500,000 gold coins on Spanish warship Nuestra Senora de las Mercedes were minted in Peru," thus giving Peru ownership "as this was and continues to be Peruvian territory."⁷⁶ He continued, asserting that the precious metals belong to Peru "through the principle of succession of states."⁷⁷ Odyssey CEO Stemm has gone on record advocating Peru's position, but one would be hard pressed to view his support as being completely genuine and not out of spite for the vehement opposition that the Kingdom of Spain has maintained throughout this controversy.⁷⁸ In either case, Stemm noted that "Peru's filing raises a significant and timely question relating to whether a former colonial power or the colonized indigenous peoples should receive the cultural and financial benefit of underwater cultural heritage derived from

71. *Id.* ("[their] salvage work on shipwrecks constituted "theft of public history and world history").

72. Ben Sills, *Odyssey Treasure is from Spanish Warship, Spain Says*, BLOOMBERG, May 8, 2008, http://www.bloomberg.com/apps/news?pid=20601103&sid=AMcAp_5mOIf4&refer=US. ("looting the Mercedes was akin to raiding the wreck of the USS Arizona sunk by Japanese bombers at Pearl Harbor in 1941.").

73. *Odyssey Marine Exploration in More Choppy Water: Peru Pushes Legal Claim Over Rights to Sunken Treasure*, ANDEAN AIRMAIL & PERUVIAN TIMES, Jan. 31, 2009, <http://www.peruviantimes.com/odyssey-marine-exploration-in-more-choppy-water-peru-pushes-legal-claim-over-rights-to-sunken-treasure/311556> [hereinafter *Odyssey Marine Exploration in More Choppy Water*].

74. Kingdom of Spain's Mot. to Dismiss or for Summ. J. Claimant Kingdom of Spain's Mot. to Dismiss or for Summ. J. (Docket No. 131) at 4-5, *Odyssey*, No. 8:07-cv-00614.

75. Alex Emery, *Peru Demands Return of Odyssey Treasure, Garcia Belaunde Says*, BLOOMBERG, Sept. 8, 2008, <http://www.bloomberg.com/apps/news?pid=20601086&sid=A1jLoR2XHJ988>.

76. *Id.*

77. *Id.*

78. Odyssey Marine Exploration, *Peru Filing Claim in "Black Swan" Case*, COIN-LINK, Aug. 22, 2008, <http://www.coinlink.com/News/shipwrecks-treasure/peru-filing-claim-in-black-swan-case/>.

the previously colonized nations.”⁷⁹

D. OVERBOARD AND MAROONED? OR HOPE FOR RECOVERY?

It is interesting to point out that if not for a few thousand feet of water covering the *Mercedes* wreck site, this issue would almost certainly not be litigated. Disputes of this nature are hardly seen on land, but the fact that the case at bar concerns an undersea discovery seems to alter the perspective of parties involved and casual observers alike. As one commentator points out, “If these guys went and planted a bunch of dynamite around the Sphinx, or tore up the floor of the Acropolis, they’d be in jail in a minute.”⁸⁰ One could surmise that the Kingdom of Spain would not hesitate to group the purported wreck site of the *Mercedes* with the Sphinx or the Acropolis, standing strongly by the fact that they do “not want their [sunken] warships interfered with. . . at all.”⁸¹ But now that it is past that point and “what’s done is done,” what should happen to all of that gold?

As alluded to previously, Spain has refused to partner, more than once, with Odyssey for any sort of recovery mission, and there is no reason to suspect that their position will change.⁸² Spain’s Minister of Culture has been unwavering about the country’s position by stating that Spain is “positively against Odyssey and people like Odyssey.”⁸³ Surely, Mr. Stemm does not take such a comment personally. But the fact that Spain probably has more treasure-laden ships at the bottom of the ocean than any other country must be frustrating for a man who has devoted his life to treasure hunting.⁸⁴ In spite of its colossal tensions with Spain, however, Odyssey is not on unfriendly terms with any other country.

As a matter of precaution, and to avoid these expensive legal battles, Odyssey tends to try to negotiate arrangements with nations that may have a claim to a wreck it is working to excavate.⁸⁵ Recently, Odyssey came to an agreement with the government of Great Britain to recover *HMS Sussex*, a British frigate that sank with as much as \$500 million worth of gold ingots aboard.⁸⁶ As per their arrangement, as “owner” of the wreck, the British government retains all “historically significant” artifacts that are found. Odyssey and Great Britain will then split the overall value of the cargo—eighty percent to Odyssey and twenty percent to the government for the first \$45 million, a 50-50 split of the value of the remaining artifacts up to \$500 million, and a 60-40 split, the bigger share

79. *Id.*

80. Aguayo, *supra* note 68.

81. Jim Flannery, *Court Will Decide Who Gets \$500M Haul*, SOUNDINGS, Nov. 2009, <http://www.soundingsonline.com/features/in-depth/243142-court-will-decide-who-gets-500m-haul>.

82. *Id.*

83. *Id.*

84. Sills, *supra* note 72.

85. *Id.*

86. *See id.*; *see also HMS Sussex*, BRITISH ARCHAEOLOGICAL TRUST, <http://www.rescue-archaeology.freereserve.co.uk/news/hms-sussex.html>.

going to Odyssey, for anything after that.⁸⁷ Odyssey is seeking similar arrangements with the British to recover two other vessels—*HMS Victory* and the *Laconia*.⁸⁸

III. CONCLUSION

In spite of Judge Pizzo's findings, it is clear that not all of the parties to this lawsuit are convinced that the rights to the *Mercedes* and her precious cargo have been adequately resolved. Peruvian Chief Prosecutor Katty Aguize insists that Peru has "sufficient and reasonable indications, as well as rights to claim the treasure and have it returned to Peru."⁸⁹ But the fact that Peru was not a part of this case until late 2008 put their position at a significant disadvantage. Despite swiftly dispatching Peru's interests, Judge Pizzo himself admitted "that the Viceroyalty of Peru might have claims, but that there was no jurisdiction to handle those claims," having already concluded that the wreckage was a Spanish naval vessel, and thus, subject to sovereign immunity.⁹⁰ Nevertheless, Peru intends to appeal Judge Pizzo's recommendation that Odyssey return the rescued treasure to Spain.⁹¹ Unlike Odyssey, the Peruvian government does not dispute that the vessel carrying the gold and silver was the *Mercedes* that belonged to Spain, but instead relies on the fact that all of the valuable objects whose ownership is being determined originated in Peru.⁹² In short, Peru claims that it has the right to the trove of treasure "because it was looted in the first place."⁹³

Odyssey will also appeal Judge Pizzo's recommendation, and has claimed that it is "surprised at the outcome" of the case thus far.⁹⁴ Odyssey CEO Stemm remains confident that his firm will prevail and that "ultimately the judge or the appellate court will see the legal and evidentiary flaws in Spain's claim, and [they'll] be back to argue the merits of the case."⁹⁵ With all the political and legal pressure mounting on Judge Pizzo and the Eastern District of Florida, though, it remains to be seen if either appeal will gain any traction or if Odyssey will be forced to mount its offensive in Spanish Courts. As it relates to future discoveries, Spain obviously has a different viewpoint of treasure-recovery than Great Britain, but as it concerns the *Mercedes*, it seems, what is done is done. So again, what is to be done with all of that gold?

87. *Id.*

88. *See* Milmo, *supra* note 1.

89. *Peru Joins Odyssey/Spain Dispute Over Recovered Sunken Treasure*, MERCOPRESS, June 6, 2009, <http://en.mercopress.com/2009/06/06/peru-joins-odysseyspain-dispute-over-recovered-sunken-treasure> [hereinafter *Peru Joins Odyssey*].

90. David L. Ganz, *Odyssey Could Lose Treasure*, NUMISMATIC, June 11, 2009, <http://www.numismaster.com/ta/numis/Article.jsp?ad=Article&ArticleId=6782>.

91. *Peru Joins Odyssey*, *supra* note 89.

92. *Id.*

93. *Odyssey Marine Exploration in More Choppy Water*, *supra* note 73.

94. *Id.*

95. *Id.*

It is doubtful that Spain would elect to dump the silver and gold coins back into the sea, and there are hundreds of thousands of duplicates of whichever coins they could select to display in museums. Although the specific amount is unknown, Odyssey has incurred “millions and millions of dollars” in costs associated with the exploration and excavation of the Black Swan site.⁹⁶ If Spain is to keep everything brought up, should Odyssey not be compensated for its salvage work? Why is an arrangement like the one Odyssey reached with Great Britain so out of the question? Should the favored Law of Salvage fall by the wayside because cargo found on the ocean floor was aboard a naval vessel and not a merchant vessel? What about Peru’s claim? Perhaps light will be shed on these questions should litigation continue in Spain.

As mentioned previously, the concepts involved in this sort of litigation have existed for thousands upon thousands of years. Among other things, this particular case is demonstrative of the high costs involved in this sort of litigation and “highlights the need to resolve the issue of ownership for ancient wrecks found in international waters.”⁹⁷ It is a prime example of the conflicts that exist “among finders/salvors, owners, governments, preservationists, and cultural property advocates,” and invites questions as to whether or not “the current laws governing shipwrecks in international waters” are simply “inadequate.”⁹⁸ Dozens of sunken vessels are discovered every year, yet there has been little, if any, progress in arriving at a method of dealing with shipwrecks that would alleviate the need for such costly international litigation. That being said, predicting what sort of guidelines the international community could agree upon to help the current situation is difficult given the subject matter and wide range of opinions. Instructing private firms like Odyssey to stop looking for ship wreck locations may inhibit the discovery and preservation of any such wrecks at all.⁹⁹ In addition, unfounded guidelines for staying away from locations that could literally be bursting at the seams with valuable artifacts promises to “promote clandestine behavior on the part of salvors” and could move interesting specimens that are already out of human touch into the abyss of the black market.¹⁰⁰ Hopefully a compromise can be made that would protect the sanctity of such sites while providing an opportunity to ensure that any cultural artifacts are given an opportunity to be admired by the public and not selfishly poached or exploited.

96. Celizic, *supra* note 11.

97. David Curfman, *Thar Be Treasure Here*, 86 WASH. U. L.R. 181, 187 (2008).

98. *Id.* at 207.

99. See Wilder, *supra* note 13, at 105.

100. *Id.*

Updates

