In the
United States Court of Appeals
For the Eleventh Circuit

No. 10-10319-J

In re

ODYSSEY MARINE EXPLORATION, INC.,
Plaintiff,

v.

THE UNIDENTIFIED SHIPWRECKED VESSEL,
Defendant, *in rem*,

and

THE KINGDOM OF SPAIN, THE REPUBLIC OF PERU, et al.,
Claimants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF OF THE APPELLANT
THE REPUBLIC OF PERU

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Statement Regarding Oral Argument

The Republic of Peru respectfully requests oral argument. The Republic of Peru also requests that it be allowed oral argument separately from the other Appellants, because the Republic of Peru's claims are distinct from the claims of the private parties and deserve separate consideration. The Republic of Peru notes that its requests for oral argument to the Magistrate Judge during a status conference and to the District Court (Dkt. 250) were denied without explanation.

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Statement of Jurisdiction

The District Court had subject matter jurisdiction over this admiralty and maritime claim under Rule 9(h) of the Federal Rules of Civil Procedure and Supplemental Admiralty Rules C and D, and original jurisdiction over this *in rem* matter pursuant to 28 U.S.C. §§ 1331 and 1333.

This Court has appellate jurisdiction under 28 U.S.C. § 1291, because this appeal is from a final and appealable Order in the District Court.

This appeal is timely. The Order appealed from was entered on December 22, 2009, Dkt. 270; judgment was entered on December 28, 2009, and the Republic of Peru's Notice of Appeal was filed on January 19, 2010, Dkt. 276.

Statement of the Issues

This case presents several important issues.

1) Did the District Court err in treating the Republic of Peru's ownership claim differently than Spain's claim to own the same property?

2) Did the District Court err by failing to follow the rule enunciated by the Supreme Court in *California v. Deep Sea Research*, 523 U.S. 491 (1998), and by this Court in *Agua Log, Inc. v. Georgia*, 594 F.3d 1330 (11th Cir. 2010), that "a foreign government cannot claim sovereign immunity with respect to a vessel not in its possession," *id.* at 1135 n. 8, by allowing Spain to simultaneously request affirmative relief as to property not within its possession while invoking a cloak of sovereign immunity as to the same property?

3) Did the District Court err in refusing to apply the relevant international law to Peru's ownership claim?

Statement of the Case

Peru appeals from the Order of the District Court ("Order") adopting the Report and Recommendation of the Magistrate Judge ("Recommendation") and dismissing Peru's claim for lack of subject matter jurisdiction under FED. R. CIV. P. 12(b)(1) based on Spain's purported sovereign immunity.

1. Nature of the case.

As between Peru and Spain, this case is about which sovereign owns 17 tons of treasure sitting in a bonded warehouse outside of Tampa Florida under the direct control of the District Court. The treasure chiefly consists of approximately 600,000 silver and gold coins. The majority of the coins were minted in Lima from 1773 to 1804 from silver and gold mined and refined in the territory that is now the Republic of Peru. *E.g.*, Dkt. 141 at 3; Dkt. 131 at 14. In addition to the treasure, there are a few remnants of the vessel that carried the treasure.

The treasure is believed to have been lost with the *Nuestra Señora de las Mercedes* (the "*Mercedes*"), a Spanish naval vessel sunk by the British Royal Navy on October 5, 1804, while it was traveling from Peru to Spain laden with silver and gold from the Viceroyalty of Peru. The treasure was discovered in 2007, having been lost for more than 200 years.

Four parties claim to own all or part of the treasure.

(1) Odyssey Marine Exploration, Inc. ("Odyssey"), the company that discovered the treasure, claims ownership of the *res* through the law of finds. In the alternative, Odyssey seeks a salvage award.

(2) The Kingdom of Spain claims to own the treasure, the few remains of the *Mercedes*, and everything else within the wreck site.

(3) The Republic of Peru claims to own the treasure that originated within its territory and with its people (the "Treasure").[1]

(4) The Individual Claimants claim to descend from the owners of private property allegedly aboard the *Mercedes* when it was lost. They claim ownership of the treasure traceable to their ancestors.

2. *Course of the Proceedings.*

On April 9, 2007, Odyssey deposited a symbolic artifact with the District Court and initiated an *in rem* action to determine rights to the treasure and to the ongoing salvage of the wreck site. Dkt. 1; *see also* Dkt. 25 (amended complaint). Three days later, Magistrate Judge Pizzo directed the issuance of a warrant of arrest and ordered that Odyssey act as substitute custodian. Dkt. 5, 8.

The lower court's jurisdiction, however, was not based solely on constructive jurisdiction of the wreckage site. Odyssey has recovered and placed within the

[1] A small portion of the treasure was made in other Latin American countries. There is even one coin from Mexico. Peru claims only that treasure that originated in its territory (the "Treasure").

jurisdiction of the District Court about 17 tons of treasure from the wreck site. Dkt. 131 at 10-11.

Spain filed its claim on May 31, 2007. Dkt. 13.

Peru filed its claim on August 19, 2008, asserting its ownership of any "contents, artifacts, and cargo that are or may become the subject of this proceeding, ***which originated in the Republic of Peru***." Dkt. 120 (emphasis added).[2]

In September 2008, Spain moved pursuant to Rule 12(b)(1) to dismiss ***Odyssey's claims*** against the Treasure on the basis of Spain's purported sovereign immunity. Dkt. 131 at 17-26. In the alternative, Spain moved for summary judgment against ***Odyssey's claims*** on the basis that Spain had not abandoned its ownership interests and had refused salvage. Dkt. 131 at 26-34.

On June 3, 2009, Magistrate Judge Mark A. Pizzo issued his Recommendation that the District Court grant Spain's 12(b)(1) motion to dismiss Odyssey's claims on the basis of sovereign immunity. Dkt. 209. Despite the limited nature of Spain's requested relief, the Recommendation states that Peru's ownership claim should be dismissed along with Odyssey's claims. Dkt. 209 at 34. Peru timely objected to the Recommendation. Dkt. 231.

[2] Peru's original claim was denominated as conditional because Peru had not yet been provided access to the Treasure and to Odyssey's confidential information about the Treasure's provenance. Dkt. 120. Both Peru's and Spain's experts have since confirmed that the Treasure originated within Peru's territorial confines. *E.g.*, Dkt. 141 at 3.

At Spain's request, on September 27, 2009, the United States filed an official Statement of Interest. Dkt. 247. The Statement notes (a) that pursuant to a specific treaty Spain's sovereign vessels are entitled to the same immunity as sovereign vessels of the United States, Dkt. 247 at 2-4, and (b) that the United States does not abandon its interests in its maritime property absent an express statement of such intent, Dkt. 247 at 4-10.

More importantly, the Statement of Interest declares that the United States "takes no position on any dispute between Peru and Spain." Dkt. 247 at 10.

On December 22, 2009, Judge Merryday issued an Order overruling Peru's objections and adopting the Recommendation. Pursuant to Rule 12(b)(1), the Order dismissed Peru's claims, along with those of Odyssey and the descendants, without prejudice. Dkt. 270. The District Court's Order held:

- The Recommendation is adopted without change. Dkt. 270 at 4.
- Because the *Mercedes* was a Spanish warship, modern Spain owns the remains of the "vessel, the vessel's cargo, and any human remains" within the wreck site. Dkt. 270 at 4.
- Spain is entitled to sovereign immunity against all other claimants, including the Republic of Peru. Dkt. 270 at 4-5.

Judgment was entered on December 28, 2009. Dkt. 271.

The Republic of Peru timely filed its notice of appeal. Dkt. 276.

3. *Statement of the Facts.*

Peru's ownership claim does not depend on any disputed facts. Peru agrees the Treasure was carried by the *Mercedes*, a Spanish naval vessel in 1804.

Peru's ownership of the Treasure is based on application of international and admiralty law to the following historical facts:

- The Treasure originated in the territory that is now Peru and with the Peruvian people.
- The Treasure never reached, and is not linked to, the territory of modern Spain.
- The Treasure has been lost to humankind for two centuries.
- Following the loss of the Treasure at sea in 1804, Peru became independent of Spain.
- Peru and modern Spain are two of the independent nations that once comprised the Empire of Spain in 1804.

Standard of Review

This Court reviews *de novo* the District Court's legal decision to dismiss Peru's Claims under Rule 12(b)(1) for lack of subject matter jurisdiction. *See McElmurray v. Consol. Gov't of Augusta-Richmond County*, 501 F.3d 1244, 1250 (11th Cir. 2007); *see also Pintando v. Miami-Dade Housing Agency*, 501 F.3d 1241, 1242 (11th Cir. 2007).

Summary of the Argument

Sitting in a Florida warehouse is 17 tons of Peruvian gold and silver – the Treasure. Two equal sovereigns stand before this Court claiming to own that Treasure. Spain owned the *Mercedes* and also claims to own anything that was on board, including human remains. Pursuant to well-established principles of international law, Peru claims the Treasure is its sovereign patrimony.

The lower court did not address the merits of Peru's and Spain's competing claims. Instead, the lower court assumed Spain owns the Treasure, and then, based on that assumption, held that the Treasure is immune from Peru's contrary ownership claim. The lower court's avoidance of the relevant international law, however, leads to a perverse result – the lower court has awarded the Treasure to a nation that under internationally accepted legal principles does not own it, yet the lower court's award is premised on assuming that very ownership. The lower court's error appears to stem from a fundamental misunderstanding of Peru's claim. Peru is not asserting a claim against "Spain's Treasure," but is claiming that, pursuant to applicable international and admiralty law, Peru owns the Treasure (or at least an equitable portion of it).

The lower court was obviously reluctant to adjudicate a dispute between two sovereigns, but the court chose the wrong path to avoid that responsibility. In fact, the available paths were severely limited because the Treasure lies physically in Florida and will ultimately have to be awarded to some party. The lower court was also led

astray by the confusing nature of Spain's argument, which relies on shifting terminology and classic philosophical traps.

One way through the confusion and the self-serving rhetoric is by analogy. Assume Odyssey finds a Soviet era warship filled with Ukrainian gold and physically brings the ship and its gold to Tampa. The ship was lost before, but found after, the collapse of the Soviet Union. The first claimant is Russia, which, like Spain here, claims it owns the vessel and the gold as the continuation of the USSR. Then, Ukraine and perhaps others of the 15 nations that once formed the USSR come to court, claiming they too own a share of the vessel and its treasure.

In such a case, the court would have three options.

The court could address the competing ownership claims directly. In that case, it is conceivable (albeit unlikely) that Russia could support its assertion that it, and it alone, succeeds to the non-territorial property of the former Soviet Union, even property originating in another state. In fact, Russia originally but unsuccessfully claimed the entire Soviet naval fleet on that very basis. If Russia prevailed on its legal claim, the court would appropriately grant it possession of the ship and its gold.

The court might also decide that determining ownership of the vessel and its treasure is outside its judicial competence, and therefore that the court should defer an award until the parties agree to a division or another forum decides the issue. In this case, the court would hold the vessel and its gold until that resolution.

What should not happen is that the court awards the Soviet vessel and the Ukrainian gold it carried to Russia without even considering the merits of Ukraine's claim, or even the merits of Russia's claim in light of the manifest changes in its sovereignty. That, however, is the course the lower court adopted in this case.

In the analogy, the Soviet warship was owned by a nation comprised of what became 15 independent nations. That change in territorial sovereignty raises an issue of international law as to their respective rights to the vessel and its contents, with Ukraine having the upper hand as to the gold mined in its territory. The property division should not be decided by fiat, with the most powerful state taking everything. Nor would Russia necessarily win if it decided to retain the name USSR or reached the courthouse first. This is a question of law and equity, not power or semantics.

The Treasure under this Court's direct jurisdiction had its genesis in Peru's mountains before Francisco Pizarro arrived there. The Treasure was mined, refined, minted, and then lost while Spain exercised dominion over Peru and claimed Peru as an indivisible part of Spain. The Treasure was not found until after Peru's undeniable independence from, and equality with, Spain.

Given that history, the ultimate legal question is, What are the rights of Peru and Spain to the Treasure? Unfortunately, that question was neither raised below nor addressed by the lower court. Instead, Peru has been denied its day in court on the specious basis that Peru's own Treasure is somehow endowed with sovereign immunity against Peru's claim to its own patrimony.

Argument

1. The only issue before this Court is sovereign immunity.

A. As to Peru, Spain's motion was limited to sovereign immunity.

Spain's motion to dismiss was limited to two issues: sovereign immunity and refusal of salvage. Dkt 131. Spain's requested relief was also expressly limited to the dismissal of ***Odyssey's claims*** to the *res*, although Spain did ask for possession of the Treasure. Dkt. 131 at 34-35.

Only the sovereign immunity argument even arguably applies to Peru's ownership claim. Peru has never raised any salvage or other claim against the Treasure.

Sovereign immunity is therefore the only issue before this Court.

B. The merits of Peru's ownership claim have not been placed in issue and have not been addressed.

Spain never moved against Peru's ownership claim on any basis, and certainly never moved pursuant to Rule 12(b)(6) that Peru had failed to state a cognizable claim of ownership. As a result, the merits of Peru's claims were never fully briefed and were not decided. Instead, the lower court held that Spain's claimed ownership of the Treasure foreclosed on jurisdictional grounds Peru's claim to own the Treasure. Dkt. 270.

Although the merits of Peru's claims are not before this Court, some review of the basis of its claims is necessary to understand the errors made by the court below.

C. Spain's entitlement to immunity cannot be premised on a bare assertion of Spanish ownership of the Treasure in 1804.

(1) Spanish ownership in 1804 does not necessarily equate to Spanish ownership in 2010.

A lot has changed since 1804, when the Spanish Empire claimed dominion over much of the world. Throughout the course of the Nineteenth Century, the Spanish Empire fragmented into numerous independent nations (including much of ours and Peru). Today, the territory of modern European Spain contains less than 5% of the territory under Spanish control in 1804. Despite this dramatic change in its territorial sovereignty, Spain nostalgically continues to claim dominion over all property that originated in "Spain" to the fullest reach of its former imperial realm.

According to Spanish law, in 1804 Peru was an indivisible part of Spain. *E.g.,* Dkt. 161 at 2. In reality, Peru was merely subjected to Spain's dominion. According to this view, Spain has no rights to Peru's patrimony, including the Treasure. In any event, when the Treasure was lost, it was either owned by Peru and Spain as a single sovereign or was Peru's sole property.

As a result, the legal question presented by the dispute between Peru and Spain is: What are Peru's and Spain's respective rights to the Treasure under international law?

The lower court never reached that question. It assumed Spanish ownership and dismissed Peru's claims on the basis of sovereign immunity. In part, the lower court appears to have been confused by Spain's shifting use of the terms "Spain" and "Spanish." At times, Spain uses the terms "Spain" and "Spanish" as distinct from "Peru;" at times the terms "Spain" and "Peru" are synonymous. Thus, according to Spain, the Treasure was "Spanish" because it originated in "Peru" (in this case "Spain"), but "Peru" (now distinct from "Spain") cannot claim any part of the Treasure now, because the Treasure is "Spanish" (now meaning Spain of today, not then). It is all very confusing, and intentionally so.

It is not enough for Spain to declare the Treasure to be "Spanish" and claim sovereign immunity. Spain must establish that the Treasure is ***presently*** owned by Spain, which entails an examination of Peru's competing claim of sovereign ownership. But, Peru's ownership claim has never been addressed.

(2) Well-established principles of international law recognize Peru's ownership of at least an equitable share of the Treasure.

Peru's ownership claim is based on general equitable principles set out in UNCLOS Article 149 and in international law authorities dating from at least the American Civil War. Peru provided the lower court with a series of legal references and the expert opinion of the preeminent legal scholar on international and admiralty law, Ambassador John Norton Moore of the University of Virginia School of Law.

Dkt. 206 at exhibit A. Ambassador Moore confirms the legal basis for Peru's ownership claim: "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…." Dkt. 206 at exhibit A ¶ 28.

The first basis for Peru's ownership claim is Article 149 of the United Nations Convention on the Law of the Sea (UNCLOS), entitled "Archaeological and historical objects." Article 149 states:

> All objects of an archaeological and historical nature found in the Area [defined as "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction," Article 1] 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.

Ambassador Moore explains that UNCLOS Article 149 sets forth binding rules of decision and that any reasonable reading of its provisions would award the Treasure to Peru. Dkt. 206 at exhibit A ¶¶ 32-38. The United States confirms in its Statement of Interest that UNCLOS reflects customary international law. Dkt. 247 at 9.

The second foundation for Peru's ownership is the international law governing changes in territorial sovereignty. Following a change in territorial sovereignty, non-territorial property is divided equitably among ***all*** States resulting from the change in sovereignty, with preference given to any state territorially linked to the property.

Dkt. 206 at exhibit A ¶ 39; *see also* authority cited at Dkt. 231 at 36-40. The United States Supreme Court was one of the first courts to address this area of international law, and in doing so, "helped shape world opinion on issues such as succession to the rights and responsibilities of successor states." C.T. Ebenroth & M.J. Kemner, *The Enduring Political Nature of Questions of State Succession and Secession and the Quest for Objective Standards*, 17 U. PA. J. INT'L ECON. L. 753, 786 (1996). In addressing West Virginia's secession from Virginia during the Civil War, the Supreme Court stated:

> Writers on public law speak of the principle ***as well established***, that where a State is divided into two or more States, in the adjustment of liabilities between each other, the debts of the parent State should be ratably apportioned among them.

Hartman v. Greenhow, 102 U.S. 672, 677 (1880) (emphasis added); *see also Antoni v. Greenhow*, 107 U.S. 769, 788 (1883) ("It is a ***well-settled doctrine of public law*** that upon a division of a state into two or more states, her debts shall be ratably apportioned among them.") (citation omitted; emphasis added). The Supreme Court did not limit the rule to division of debts, but held that an equitable division required apportioning non-territorial assets along with the debts. *Commonwealth of Virginia v. State of West Virginia*, 234 U.S. 117 (1914), 238 U.S. 202 (1915).

In contrast, Spain posits an anachronistic view of international law that, when colonies gain independence, only the former imperial power has rights to non-

territorial property.[3] Spain's argument is reminiscent of Russia's claim to succeed to all property of the former Soviet Union, including the Soviet naval and merchant fleets, Embassy properties, and other foreign property. Even though Russia successfully continued the Soviet Union's legal status as to treaties and UN membership, Russia was compelled by international law to share property outside its territory equitably among all nations that had formed the Soviet Union. *See* P. Williams and J. Harris, *State Succession to Debts and Assets: The Modern Law and Policy*, 43 HARV. L. REV. 355, 379 (2001). The similar claim by the Federal Republic of Yugoslavia to the foreign and moveable property of the former Socialist Federal Republic of Yugoslavia was likewise rejected. *E.g.*, C. Stahn, *The Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia*, 96 AM. J. INT'L L. 379 (2002).

Peru owns the Treasure under well-established legal principles, and its legal claim is entitled to the same consideration as Spain's contrary assertion of ownership.

[3] In brief, Spain claims that, as a matter of law, Peru did not become a sovereign nation when it declared its independence on July 28, 1821, or even when the United States recognized it as a nation in 1822; nor when the United States issued the Monroe Doctrine of 1823, prohibiting further Spanish colonial aggression in the Americas. Instead, Spain asserts that Spain bestowed independence on Peru and unilaterally set the limits of Peru's rights as a sovereign in the 1824 Capitulation of Ayacucho, the document by which the Spanish Army surrendered to the Peruvian Army. Dkt. 161 at 3-5. But, the argument that Spain's surrender to the Peruvian army was the operative act establishing Peru's rights as a nation is nonsensical. Spain was surrendering to Peru, not Peru to Spain. Surely, Spain does not suggest that it created Peru in order to surrender to it. Spain's protestations notwithstanding, Peru's sovereign rights are set by international law, not Spain.

A reluctance to adjudicate a dispute between two sovereigns is not an excuse for the inequitable treatment of two equal sovereigns.

2. *The dispute between Peru and Spain cannot be decided on the basis of sovereign immunity.*

A. *Peru claims to own the same property as Spain.*

The District Court misinterpreted Peru's claim. Peru is not making a claim ***against*** Spain or the property of Spain. Peru claims direct ownership of the Treasure.

The Recommendation incorrectly describes Peru's claim "as an equitable one grounded in claims of exploitation by its former colonial ruler." Dkt. 209 at 29 (footnote omitted). Peru's reference to "equity" in its responses to Spain's motion, however, does not refer to an equitable claim for relief against Spain or its property, but to international law establishing ownership rights to non-territorial property when there is a change in territorial sovereignty. Dkt. 141 at 17-31.

Under the principles of international comity, Peru's ownership claim is entitled the same consideration and respect as Spain's.

B. *The doctrine of sovereign immunity does not allow for weighing competing sovereign claims of ownership.*

(1) *The sovereign must own the property for it to be immune.*

The law is clear: in an *in rem* action, sovereign immunity applies solely to property shown to be owned by the sovereign. In fact, a footnote in the Recommendation sets forth the applicable rule that, before reaching the merits of an

immunity question, the sovereign must establish that the property in question is sovereign property. Dkt. 209 at 16 n. 14. A party claiming sovereign immunity under the Foreign Sovereign Immunities Act (the FSIA) bears the initial burden of proof of establishing that it satisfies the FSIA's definition of a foreign state or that its property is sovereign property. *E.g.*, *O'Bryan v. Holy See*, 556 F.3d 361, 376 (6th Cir.), *cert. denied*, 130 S. Ct. 361 (2009); *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 388 (5th Cir. 1999). As the Recommendation notes, this Court's jurisprudence is consistent with this rule. *S & Davis Int'l, Inc. v. The Republic of Yemen*, 218 F.3d 1292, 1298-99 (11th Cir. 2000); Dkt. 209 at 16 n. 14; *see also Guevara v. Republic of Peru*, 468 F.3d 1289, 1297 (11th Cir. 2006).

(2) The District Court's sovereign immunity decision begs the question of who owns the Treasure.

Even though Peru claims to own the same property as Spain, the District Court found that the property in question is immune from Peru's ownership claim. The court's conclusion suffers from the classic logical fallacy first recognized by Aristotle of begging the question to be decided. In this case the question begged is, "Who owns the Treasure?" The logical fallacy was illustrated by one philosopher with a story:

> [T]hree thieves were arguing about how to divide up seven pearls they had just obtained. One of the thieves cut off the discussion by handing two pearls to each of the other two, and announcing, "I will keep three!" The other two thieves were not too happy with this arrangement, and one

> of them asked, "Why do you get to keep three of the pearls?" The reply: "Because I am the leader." The questioner was still not satisfied by this reply, and asked another question: "Why are you the leader?" To this the man with the three pearls responded, "Because I have more pearls."

D. Walton, BEGGING THE QUESTION: CIRCULAR REASONING AS A TACTIC OF ARGUMENTATION at xiii (Greenwood Press 1991).

Spain's version of the story goes like this: Spain and Peru were arguing about how to divide up the Treasure. Spain cuts off the discussion, proclaiming, "I will keep all the Treasure." Unhappy with that arrangement, Peru asks, "Why do you get to keep it all when the Treasure came from my land and my people?" The reply: "Because I own it." Still unsatisfied, Peru asks another question: "But why do you own all the Treasure?" To this Spain replies: "I'm sorry; my Treasure is immune from such questions."

If the ploy worked, it would work for Peru as well: Peru claims the Treasure, and therefore, Peru's Treasure should be immune from Spain's ownership claim. Immunity, however, should not be decided by a race to the courthouse with the first sovereign to claim immunity prevailing.

(3) The District Court's sovereign immunity determination violates international comity by treating Peru's ownership claim differently than Spain's.

Another rationale raised by the Recommendation for avoiding the question of who owns the Treasure is international comity. Dkt. 209 at 32. The

Recommendation and Order, however, apply international comity in a decidedly one-sided fashion, so that Spain's interests are protected, and Peru's ignored. The Recommendation also stresses the admonition of the *Titanic* court that this Court "carefully" consider matters involving historic wrecks, particularly when "a foreign sovereign's patrimonial interests" are at stake, but once again the Recommendation fails to apply that admonition to Peru's claim. Dkt. 209 at 14 (citing, *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 966 (4th Cir. 1999)).

There is simply no basis in international or domestic law for the District Court's wholesale failure to address Peru's claim of sovereign ownership with the same respect, dignity and process as Spain's. The Order and Recommendation distort the principles of comity and sovereign immunity into a purported legal basis for discrimination against Peru's interest.

This Court should not be misled by the District Court's inference that dismissal on the basis of sovereign immunity somehow means this Court is avoiding an international dispute. By awarding Spain possession of the Treasure, the District Court did not merely refuse to entertain a dispute between two sovereigns; the District Court decided what nation receives the immensely valuable Treasure in the court's control, albeit on an improper and indirect basis.

C. *Immunity cannot be based on equating the Mercedes and her cargo.*

The District Court also appears to have concluded that Spain met its burden of establishing that the Treasure is sovereign property of Spain because of the proposition (uncontested by Peru) that Spain owned the *Mercedes*. The District Court describes as an "ineffable truth" that since the *Mercedes* was a Spanish naval vessel, Spain owns "this naval vessel, the vessel's cargo, and any human remains" that were on board. Dkt. 270 at 4; see also Dkt. 209 at 23 ("a vessel and her cargo are inextricably intertwined."). The inclusion of human remains in the list of Spain's purported property is a telling indication of the breadth of the lower court's assumptions about sovereign ownership. The *Mercedes* carried seven Peruvian slaves when it was lost. The lower court's anachronistic application of law continues their subjugation.

Before addressing the legal proposition, Peru notes that this legal issue is more important for the private claimants, than for Peru. Even if the Mercedes and her cargo were a unified entity, incapable of being legally divided, a sovereign vessel can have more than one sovereign owner. *See, e.g.*, *Mangattu v. M/V IBN Hayyan*, 35 F.3d 205, 208 (5th Cir. 1994) (vessel owned by consortium of sovereign owners immune). Thus, there is no legal barrier to Peru and Spain jointly owning the sovereign property before the Court as a result of the change in territorial sovereignty since the sinking of the *Mercedes*.

More directly, the District Court's legal conclusion that ownership of the remains of the *Mercedes* necessarily equates to ownership of the Treasure is contrary to current and historical admiralty law.[4] For example, in *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, the Fourth Circuit separately discussed ownership rights to the vessel, to the cargo, and to the passenger's personal property. 974 F.2d 450, 465-68 (4th Cir. 1992). Ultimately, the court found that the vessel owners and the passengers had abandoned their rights by not making a claim, but that the commercial cargo owners had not. *Id.*

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[4] The lower court's legal proposition appears to confuse constructive jurisdiction and ownership. In support of its conclusion that vessel ownership equates to cargo ownership, the Recommendation refers to the *Titanic* court's jurisdictional discussion. Dkt. 209 at 23 (citing, *Titanic*, 171 F.3d at 964). The cited portion of *Titanic* explains that presenting one item from a wreck site to the court allows the court to take constructive jurisdiction over the entire wreck site, including the vessel, cargo and individual persons and property. But, taking jurisdiction over a vessel and her cargo does not allow (much less require) that the court award ownership of the cargo to the owner of the vessel, anymore than taking control over a bank account requires the court to give all the funds to the account holder. Certainly, the *Titanic* court did not rule that the *Titanic*'s owners magically became owners of the jewels of the *Titanic*'s passengers once the ship sank.

The only other authority cited by the Recommendation on this issue is the Sunken Military Craft Act (the SMA), codified at 10 U.S.C. § 113. Dkt. 209 at 23. The SMA, however, is limited to U.S. territorial waters and has no application here. More importantly, while the SMA defines the statutory term "sunken military craft" as including its contents, that definition means only that the statute's restrictions encompass both vessel and contents. Nothing in the statute equates ownership of the vessel with ownership of its contents. Nor does the statute change existing admiralty law. To the contrary, the SMA is expressly to "be applied in accordance with generally recognized principles of international law …." *Id.* at § 1406(b). The SMA's proscriptions also do not apply to foreigners "except in accordance with … (A) generally recognized principles of international law." *Id.* at § 1402(c)(2).

The court in the *Lusitania* case expressly rejected the argument that ownership of the ship translated into ownership of the cargo or personal effects of the passengers. *Bemis v. RMS Lusitania*, 884 F. Supp. 1042, 1047-50 (E.D.Va. 1995), *aff'd mem.*, 99 F.3d 1129 (4th Cir. 1996).

The Supreme Court impliedly addressed this issue in *California v. Deep Sea Research, Inc.*, discussed extensively below. 523 U.S. 491 (1998). Like *Columbus-America*, some of the relevant cargo in *Deep Sea Research* was insured. Insurers asserted ownership of the insured portion of the wreck, with the uninsured portions being abandoned, and therefore property of the State of California. However, the Ninth Circuit Court of Appeals declined to divide the wreck into abandoned and un-abandoned portions because it feared treading on California's sovereign immunity. *Deep Sea Research v. The Brother Jonathan*, 102 F.3d 379, 389 (9th Cir. 1996), *rev'd*, 523 U.S. 491 (1998). After rejecting application of sovereign immunity, the Court remanded with directions to the trial court to reevaluate its abandonment determination, indicating that it is permissible to divide a shipwreck and determine that only a portion of the wreck is sovereign property. 523 U.S. at 508.

Finally, the District Court's refusal to question Spain's claim to own everything carried by the *Mercedes* directly conflicts with the Supreme Court's holding in one of the most historic cases in United States jurisprudence: *The Amistad*, 40 U.S. 518 (1841). The *Amistad* was a Spanish schooner. During a trip from Havana to Principe Cuba, fifty-four Africans, held as slaves on the ship, revolted. The Africans spared

two officers in exchange for their promise to return the Africans to their homes. Instead of traveling to Africa as promised, each night, the officers headed east, eventually reaching the United States.

Spain, represented by the United States Attorney General, claimed the *Amistad* and all "property" on board, including the Africans. The Africans, represented by former President John Quincy Adams, claimed they were free men. At the time, slavery was legal in territories under Spanish jurisdiction and in the Southern United States, but the African Slave Trade had been abolished. Spain provided documents from Spanish Authorities stating the Africans were lawful slaves captured before abolishment of the slave trade, but the Africans testified that they had been recently kidnapped in Africa in violation of international law.

Spain argued that international comity and sovereign immunity prevented a United States court from questioning its ownership claim over the Africans. *Id.* at 595.[5] The Supreme Court disagreed and allowed the challenge to the Spanish legal documents, and ultimately ruled that the Africans had been illegally kidnapped in Africa and were free men. *Id.* at 595-96.

In its attempt to avoid treading into difficult legal areas, the District Court has instead created bad law. According to the rule set out in the Order and Recommendation, any time a wreck is discovered, all of the contents of that vessel

[5] While the opinion does not use the term "immunity," the opinion refers to *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, Chief Justice Marshall's classic description of sovereign immunity. *Amistad*, 40 U.S. at 548.

(even human remains and personal possessions) are, as a matter of law, the property of the vessel's historic owner. Such a rule is not only unprecedented; it is unjust and would immunize known violations of international law. For example, if Odyssey raises a Nazi u-boat filled with plundered treasures from occupied France, the new rule would foreclose claims by the original owners. A pirate ship would receive the same misplaced consideration. However, no rule of international law grants a country's cultural treasures to whatever nation's vessel was carrying it away from their shores. *See, e.g.*, W. Sandholtz, PROHIBITING PLUNDER: HOW NORMS CHANGE (OXFORD 2007); J. Merryman, IMPERIALISM, ART AND RESTITUTION at 132 (2006); J. Greenfield, THE RETURN OF CULTURAL TREASURES (2007); A. Vrdoljak, INTERNATIONAL LAW, MUSEUMS AND THE RETURN OF OBJECTS (2008).

3. *Independently, Spain cannot claim sovereign immunity because Spain does not possess the Treasure.*

The Treasure is not in Spain's possession. In fact, the Treasure never reached the shores of European Spain (the claimant here) and has been lost for more than 200 years. The Treasure is currently in Florida in the *custodia legis* of the District Court.

A. *The District Court's Order contradicts Supreme Court precedent by applying sovereign immunity when Spain does not possess the Treasure.*

The District Court failed to grasp the significance of Spain's lack of possession. As explained by the Supreme Court, when assessing sovereign immunity, lack of possession is ***determinative*** of the issue of sovereign immunity.

(1) California v. Deep Sea Research, 523 U.S. 491 (1998).

Spain's immunity in this case is controlled by the possession rule enunciated in *Deep Sea Research*. 523 U.S. 491. The *Deep Sea Research* opinion is best understood in relation to the Court's earlier opinion in *Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982).

Treasure Salvors dealt with the wreck of a "Spanish" galleon. Florida took possession of artifacts from the wreck, and when the salvors sought a salvage award, Florida asserted its sovereign immunity from suit. The Court issued three opinions with a plurality holding that the admiralty court could not adjudicate Florida's interest in salvaged property ***in the State's possession***. *Treasure Salvors*, 458 U.S. at 711.

The holding in *Treasure Salvors* was clarified in *Deep Sea Research*. California claimed the remains of a ship lost at sea in 1865 carrying California gold. Unlike Florida in *Treasure Salvors*, however, California did not have physical possession of the gold and other artifacts. The Court revisited *Treasure Salvors* and held that federal courts have *in rem* admiralty jurisdiction when a sovereign seeks ownership of the *res*, ***so long as the res in question is not in the actual possession of the sovereign***. 523 U.S. at 507-08. In contrast to the divergent opinions in *Treasure Salvors,* the *Deep Sea Research* Court was unanimous. The Court noted the possible confusion created by *Treasure Salvors* and clarified that *Treasure Salvors*' holding was limited to cases in which the *res* in question was in the sovereign's ***actual possession***:

> It is true that statements in the fractured Opinions in *Treasure Salvors* might be read to suggest that a federal court may not undertake *In Rem* adjudication of the state's interest in property without the state's consent, regardless of the status of the *res*, but this Court's consistent interpretation of the respective but related immunity doctrines pertaining to such vessels has been, upon proper presentation that the sovereign entity claims ownership *of a res in its possession,* to dismiss the suit or modify its judgment accordingly.

Id. at 505 (citations omitted; emphasis in original); *see also id.* at 507 (constructive possession insufficient).

The reason for differing rules when a sovereign possesses a *res* and when it does not is manifest. It is one thing for a United States court to seize property in a sovereign's possession, wresting it from the sovereign's control. *See id.* at 505-06. Even if the court does not need to seize the property, enforcement of a court order over property held by the sovereign might create conflicts in enforcing the court's orders. *Id.* There is no such potential conflict when a foreign nation (like Spain) voluntarily appears in United States court to claim, as Spain does here, that the court must award it the property in the court's *custodia legis.*

This Court is not being asked to remove property from Spain's grasp or to determine rights in property in Spain's possession. To the contrary, Spain affirmatively requests that the court declare it the owner of the *res* and grant it possession of the Treasure. *See* Dkt. 131 at 35; Dkt. 270 at 5.

The District Court's Order also conflicts with opinions from three different Courts of Appeals, including this Court, issued after *Deep Sea Research*.

(2) Agua Log, Inc. v. Georgia, 594 F.3d 1330 (11th Cir. 2010); Sea Services of the Keys, Inc. v. State of Florida, 156 F.3d 1151 (11th Cir. 1998).

This Court has twice applied the possession rule of *Deep Sea Research*, most recently in *Agua Log*. Aqua Log filed "two in rem admiralty actions" seeking to salvage logs lying at the bottom of Georgia rivers. 594 F.3d at 1331. The State of Georgia intervened in both cases and filed motions to dismiss "arguing the court lacked subject matter jurisdiction because the Eleventh Amendment prohibited a federal court from adjudicating its interest in the logs." *Id.* at 1331-32. This Court extensively analyzed the basis for the possession rule, including that a different rule is warranted "when the suit 'does not require that the property shall be taken out of the possession of the'" sovereign. *Id.* at 1334 (quoting, *The Davis*, 77 U.S. 15 (1869)). Ultimately, this Court concluded that "Georgia could not claim Eleventh Amendment immunity because it lacked actual possession of the *res*." *Id.* at 1332. The ruling in *Sea Services of the Keys* was similar. 156 F.3d at 1153.

(3) <u>Great Lakes Exploration Group LLC v. Unidentified Wrecked and (For Salvage-Right Purposes), Abandoned Sailing Vessel</u>, 522 F.3d 682 (6th Cir. 2008); <u>Fairport Int'l Exploration, Inc. v. The Captain Lawrence</u>, 177 F.3d 491 (6th Cir. 1998).

Fairport Int'l Exploration is one of the first opinions to apply the rule of *Deep Sea Research* and demonstrates the errors in the District Court's Order.

According to legend, when the Captain Lawrence sank in Lake Michigan in 1933, it was carrying a ship's log showing the location of gold lost during the Civil War. When rediscovered in 1984, it "was embedded in the bottom of Lake Michigan." *Id.* at 493. When the finder sought an "*in rem* arrest warrant for the vessel," the State of Michigan intervened and claimed it owned the wreck under the Abandoned Shipwreck Act of 1987 (the ASA), 43 U.S.C. §§ 2101-2106. The district court granted Michigan's motion to dismiss contrary ownership claims on the basis of sovereign immunity. *Id.* at 494. The Sixth Circuit affirmed, but, five days after issuing *Deep Sea Research,* the Supreme Court vacated the Sixth Circuit's original opinion and remanded the matter for reconsideration in light of *Deep Sea Research*. *Id.* at 496.

On remand, the Sixth Circuit reexamined the question of "*Determining the Owner of the Captain Lawrence*." *Id.* With the Supreme Court's guidance, the Sixth Circuit described Michigan's sovereign immunity claim as a "red herring." *Id.* Based on *Deep Sea Research*, the court concluded "no jurisdictional bar exists" to determining ownership of a sunken wreck outside the possession of a sovereign: *Deep Sea Research*

"definitively instructs us that, if a State does not possess a shipwreck, the Eleventh Amendment does not prevent a federal court from entertaining claims under the ASA to the shipwreck. The Court explicitly distinguished past cases on this ground." *Id.* at 497; *see also Great Lakes Exploration*, 522 F.3d at 688.

Spain's immunity claim is likewise a "red herring" that unfortunately led the lower court away from the core issue of who owns the Treasure.

(4) Sea Hunt, Inc. v. Spain, 47 F. Supp. 2d 678 (E.D. Va. 1999), aff'd in part, rev'd in part, 221 F.3d 634 (4th Cir. 2000).

"*Sea Hunt* marked the first time in history that Spain laid legal claim to one of its many shipwrecks and prevailed in its legal battles to retain title to the shipwrecks and to refuse salvage activities." *Comment, Sea Hunt, Inc. v. The Unidentified Shipwrecked Vessels: How the Fourth Circuit Rocked the Boat*, 67 BROOK. L. REV. 1249, 1262 (2002). The *Sea Hunt* matter is remarkably similar to this case. At issue were two Spanish frigates lost in 1802 and 1750. The claimants were (1) Spain, (2) another sovereign, Virginia, and (3) the finding company, Sea Hunt.

The *Sea Hunt* opinions post-date *Deep Sea Research*, but do not discuss its possession rule. Instead, the *Sea Hunt* courts addressed the competing claims of two sovereigns, Spain and Virginia, without even a hint that the respective rights of these two sovereigns were not entitled to be addressed directly. 47 F. Supp. 2d at 685-86; 221 F.3d at 640.

B. Deep Sea Research's possession rule cannot be distinguished.

The lower court attempted to distinguish *Deep Sea Research* on the grounds that it applied only to Eleventh Amendment immunity. The distinction is unavailing.

(1) Deep Sea Research states that its possession rule applies to questions of foreign sovereign immunity.

In *Deep Sea Research*, the Supreme Court expressly applied the possession rule to foreign sovereign immunity: "The Court's jurisprudence respecting ***the sovereign immunity of foreign governments*** has likewise turned on the sovereign's possession of the *res* at issue." *Deep Sea Research*, 523 U.S. at 507 (emphasis added) (citing *The Pesaro*, 255 U.S. 216, 219 (1921)). The Court also cited with approval Justice White's opinion in *Treasure Salvors*, in which he discussed an "analogy between immunity in '*in rem* actions brought against vessels in which an official of the State, the Federal Government, ***or a foreign government*** has asserted ownership of the res.'" 458 U.S. at 710 (emphasis added).

(2) The possession rule affirmed in Deep Sea Research has historically been applied to foreign sovereigns.

As part of its historical review of the possession rule in *Aqua Log*, this Court noted that the Supreme Court has historically applied the possession rule to claims of foreign sovereign immunity. 594 F.3d at 1335 and 1335 n. 8 (citing *Compania Espanola De Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68 (1938) and *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945)). This Court also noted: "Federal district and circuit

courts have likewise held ***a foreign government cannot claim sovereign immunity with respect to a vessel not in its possession***." *Id.* at 1335 n. 8 (emphasis added) (citing *United States v. Jardine*, 81 F.2d 745 (5th Cir. 1935); *The Carlo Poma*, 259 F. 369 (2d Cir. 1919), *rev'd on other grounds*, 255 U.S. 219 (1921); *The Attualita*, 238 F. 909 (4th Cir. 1916); *The Johnson Lighterage Co. No. 24*, 231 F. 365 (D.N.J. 1916); *Long v. The Tampico*, 16 F. 491 (S.D.N.Y. 1883)).

The Navemar involved an *in rem* admiralty suit brought against a Spanish steamship. The Spanish government claimed ownership of the vessel and asserted sovereign immunity. 303 U.S. at 70-71. The Court stated, to claim immunity, the Spanish government would need to demonstrate "actual possession by some act of physical dominion or control." *Id.* at 75-76.

Hoffman involved "very similar facts" to *Navemar*. *Agua Log*, 594 F.3d at 1335 n. 8. In *Hoffman*, Justice Stone stated:

> The lower federal courts have ***consistently*** refused to allow claims of immunity based on title of the claimant foreign government without possession.
>
> Whether this distinction between possession and title may be thought to depend upon the aggravation or the indignity where the interference with the vessel ousts the possession of a foreign state, it is plain that the distinction is supported by the ***overwhelming weight of authority***.

324 U.S. at 37-38 (extensive citations omitted; emphasis added).

(3) The rule of Deep Sea Research applies to the federal government, and by treaty Spain is to be treated in the same manner.

Spain's sovereign immunity in this case is not determined by the FSIA, but by treaty. The FSIA is expressly made "[s]ubject to existing international agreements to which the United States is a party" at the time of its enactment. 28 U.S.C. § 1604. According to Spain, Spain's sovereign immunity is governed by the Treaty of Friendship and General Relations between Spain and the United States of 1904, and not the FSIA. Dkt. 131 at 24. Both the Recommendation (Dkt. 209 at 24) and the United States in its Statement of Interest (Dkt. 247 at 2 n.1) agree.

The Treaty provides that, "[i]n cases of shipwreck," "each party shall afford to the vessels of the other . . . the same immunities which would have been granted to its own vessels in similar cases." Treaty of Friendship and General Relations between the United States and Spain, art. X, July 3, 1902, 33 Stat. 2105, 2110.

Thus, according to the Treaty, Spain's vessels are to be treated the same as sovereign vessels of the United States (not better, the same).

Deep Sea Research's possession rule applies to military craft owned by the United States, and therefore, the possession rule governs Spain's immunity claim regardless of whether the FSIA grants immunity or not. The *Deep Sea Research* Court turned to the "guidance" provided by analogous rules for federal sovereign immunity. 523 U.S. at at 507 ("In one such case, *The Davis,* 10 Wall. 15, 19 L.Ed. 875 (1869), the Court

explained that 'proceedings *in rem* to enforce a lien against property of the United States are only forbidden in cases where, in order to sustain the proceeding, the possession of the United States must be invaded under process of the court.'").[6]

The *Deep Sea Research* rule was applied directly to a United States military vessel in *International Aircraft Recovery, LLC v. The Unidentified Wrecked and Abandoned Aircraft*, 54 F. Supp. 2d 1172 (S.D. Fla. 1999), *rev'd on other grounds*, 218 F.3d 1255 (11th Cir. 2000). This case involved a World War II aircraft described by the United States government as "one of the rarest and most historic military aircraft still in existence." *Id.* at 1175. The United States' assertion of sovereign immunity against the finders was rejected because:

> Based upon last year's Supreme Court decision [in *Deep Sea Research*] governing all *In Rem* admiralty actions involving *In Rem* Defendants in which an official of a state, the federal government ***or foreign government*** asserts ownership, without actual possession, this Court now holds that the salvage services advanced by the Plaintiff/Salvor International Aircraft Recovery, LLC., and its predecessors in interest, constitute a valid maritime lien against the *In Rem* Defendant.

Id. at 1178 (emphasis added).

The United States also relies on the holding of *International Aircraft* in its Statement of Interest, again showing the applicability of *Deep Sea Research* to Spain in this case. Dkt. 247 at 5-6.

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[6] Notably, even active United States Navy vessels in the direct control of the Navy are not immune from salvage claims. *E.g.*, *Nicholas E. Vernicos Shipping Co. v. United States*, 349 F.2d 465 (2d Cir. 1965).

(4) The FSIA does not establish a different rule than Deep Sea Research.

(a) Deep Sea Research's possession rule is consistent with the defensive nature of foreign sovereign immunity under the FSIA.

Even if the FSIA applies, the analysis of *Deep Sea Research* is consistent with FSIA jurisprudence. In fact, *Deep Sea Research*'s reference to prior practice is compelling because the FSIA codified United States practice on foreign sovereign immunity and did not establish a broader immunity for foreign sovereigns than before its adoption or that was granted the United States and the individual States. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, Chapter Five, Introductory Note (1987). As this Court has noted: "The FSIA is only thirty years old, but the view of sovereign immunity that it embodies is much older. Originally, the United States recognized only a limited form of sovereign immunity." *Guevara*, 468 F.3d at 1295 (citing, D.J. Bederman, *Admiralty and the Eleventh Amendment*, 72 NOTRE DAME L. REV. 935, 939-40 (1997)).

The Supreme Court in *Deep Sea Research* explained the basis of the possession rule: Eleventh Amendment immunity is a defense to be used by a sovereign to avoid the jurisdiction of United States courts.[7] When a sovereign seeks an award of

[7] Although *Deep Sea Research* discusses sovereign immunity under the Eleventh Amendment, sovereign immunity under the FSIA is also a defense. A "claim of sovereign immunity … merely raises a jurisdictional defense." *Republic of Austria v. Altmann*, 540 U.S. 677, 700 (2004); *see also Dole Food Co. v. Patrickson*, 538 U.S. 468, 481

property not in its possession (as does Spain), however, the sovereign is requesting an affirmative exercise of jurisdiction. In such case, there can be no sovereign immunity. To make its point, the Court quoted former Justice Story, who stated: "the jurisdiction of the court is founded upon the possession of the thing; and if the State should interpose a claim for the property, it does not act merely in the character of a defendant, but as an actor." *Id.* at 1470 (*quoting,* 2 J. Story, Commentaries on the Constitution of the United States § 1689, at 491-92 (5th ed. 1891)).[8] The Court further explained, in the context of *Treasure Salvors,* that sovereign immunity applies to

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(2003) ("The Foreign Sovereign Immunities Act of 1976 (FSIA) sets forth legal criteria for determining when a 'foreign state,' 28 U.S.C. § 1603(a), can assert a defense of sovereign immunity.") (Breyer, J., concurring in part, dissenting in part); *Southway v. Central Bank of Nigeria*, 198 F.3d 1210, 1215 (10th Cir. 1999) ("Congress viewed sovereign immunity under the FSIA as an affirmative defense").

[8] The Court also relied on a quotation from Justice Washington, riding Circuit:

> [I]n cases of admiralty and maritime jurisdiction the property in dispute is generally in the possession of the court, or of persons bound to produce it, or its equivalent, and the proceedings are *in rem*. The court decides in whom the right is, and distributes the proceeds accordingly. In such a case the court need not depend upon the good will of a state claiming an interest in the thing to enable it to execute its decree. All the world are parties to such a suit, and of course are bound by the sentence. The state may interpose her claim and have it decided. But she cannot lie by, and, after the decree is passed say that she was a party, and therefore not bound, for want of jurisdiction in the court.

Id. at 503 (citing, *United States v. Bright*, 24 F. Cas. 1232, 1236 (C.C. Pa. 1809)).

property in the sovereign's possession because the doctrine shields the sovereign from the invasion caused by seizing property. *Id.* at 504-08.

There is no seizure here, and Spain is not avoiding the District Court's jurisdiction, but utilizing it to obtain the Treasure.

A good example of the defensive nature of sovereign immunity under the FSIA is *Lord, Day & Lord v. Socialist Republic of Vietnam*, 134 F. Supp. 2d 549 (S.D.N.Y. 2001). In that case, a cargo of rice owned by the former Republic of Vietnam was lost following a collision in the Panama Canal. The Republic of Vietnam and its insurers settled the loss claim. Shortly after the settlement check was delivered to Vietnam's lawyers in New York, however, the Republic of Vietnam fell to the Socialist Republic of Vietnam, and the United States banned all transfers to the new Vietnamese government. Years later, the law firm interpleaded the settlement funds and listed as possible claimants the Socialist Republic of Vietnam ("Vietnam") and its insurers.

Like Spain in this case, Vietnam claimed the funds while at the same time trying to invoke sovereign immunity as a means of foreclosing any contravening ownership claims. As stated by the court: "Effectively, Vietnam seeks to grant this Court jurisdiction solely for the purpose of awarding it the funds. This, Vietnam cannot do." *Id.* at 557. Applying the FSIA's counterclaim exception, the court ruled that Vietnam, by claiming the funds, had waived immunity to contrary ownership claims. *Id.* at 558.

On the other hand, neither the District Court nor Spain cite to any authority that indicates that a sovereign can request affirmative relief as to a *res* not in its possession and at the same time maintain immunity against contrary claims. Spain cannot invoke the lower court's jurisdiction merely to obtain an award of the Treasure. *Lord, Day & Lord*, 134 F. Supp. 2d at 557.

(b) The FSIA does not establish a different rule for the Treasure because it was aboard a former warship.

The Recommendation also attempts to distinguish *Deep Sea Research* on the basis that the wreck of the *Mercedes* is purportedly entitled to heightened immunity protections as a warship. *See, e.g.*, Dkt. 209 at 18, 23. For an ***active*** warship in possession of its sovereign owner, there is a real need for special protection. It would be a serious invasion of foreign interests for a United States court to review the contents of one of Spain's (or Peru's) active warships.

As to the few remains of the *Mercedes*, however, such "special status" is misplaced and contrary to the relevant provisions of the FSIA. Military property is governed by FSIA Section 1611, which gives heightened protection to certain listed property. That section, however, has two restrictions related to military property.

First, Section 1611 limits military property to property that "is, or is intended to be, used in connection with a military activity." 28 U.S.C. § 1611(b)(2). To meet that definition, the foreign state must "establish that there is some ***present or future*** intended use for the property that is ***connected to military activity***." *Ministry of*

Defense and Support for Armed Forces of Islamic Republic of Iran v. Cubic Defense Systems, Inc., 385 F.3d 1206, 1223 (9th Cir. 2004) (emphasis added), *rev'd on other grounds*, 546 U.S. 450 (2006); *see also All American Trading Corp. v. Cuartel General Fuerza Aerea Guardia Nacional De Nicaragua*, 818 F. Supp. 1552, 1555 (S.D. Fla. 1993).

Second, even if the property meets that definition, the property must either be "of a military character" or "under the control of a military authority or defense agency," a codification of the possession rule. 28 U.S.C. § 1611(b)(2). The Treasure is neither.

Today, neither the Treasure nor the scattered remains of the *Mercedes* are military property, and whether they were in 1804 is irrelevant to the issue of sovereign immunity today.

(5) The Supreme Court's opinion in The Republic of the Philippines v. Pimental did not change the rule of Deep Sea Research.

To distinguish *Deep Sea Research*, the Recommendation placed substantial reliance on *Republic of the Philippines v. Pimentel*, 128 S. Ct. 2180 (2008). Dkt. 209 at 22. That reliance is misplaced.

(a) Philippines does not address sovereign immunity or Deep Sea Research.

In relation to the rule of *Deep Sea Research*, the most notable feature of the *Philippines* opinion is that it does not address the basis for a claim to sovereign immunity.

Philippines involved a dispute over a bank account held in the name of Ferdinand Marcos. One of the potential claimants was the Philippines, which had initiated proceedings in the Philippines to establish ownership of the funds on the basis that they were stolen property. The other principal claimants were holders of a multi-billion dollar judgment against Marcos for human rights abuses. Faced with competing claims, the bank interpleaded the funds before the district court.

Unlike Spain, however, the Philippines did ***not*** make a claim against the interpleaded funds. "After being named as defendants in the interpleader action, the Republic [of the Philippines] asserted sovereign immunity" under the FSIA and "moved to dismiss pursuant to Rule 19(b), based on the premise that the action could not proceed without them." *Id.* at 2186. Thus, the Philippines sought to invoke sovereign immunity in its traditional formula to avoid the jurisdiction of the United States court, ***even to the extent of presenting a claim to the funds***. Instead, the Philippines asserted its immunity and argued that the court lacked the power to award ownership of the funds to any party remaining in the action, because the court could not exercise jurisdiction over a necessary party to the litigation – the Philippines.

No party in the case challenged the Philippine's assertion of sovereign immunity, so the Supreme Court did not address the issue. *Id.* at 2191 ("Immunity in this case, then, is uncontested….").

Philippines cannot contradict the rule of *Deep Sea Research* for at least four reasons: (1) the opinion did not address sovereign immunity; (2) the opinion did not refer to admiralty jurisdiction; (3) the opinion did not mention *Deep Sea Research* or the possession rule set out in that opinion; and finally (4) the Philippines invoked sovereign immunity solely as a defense and did not make any affirmative claim to the *res* in question.

(b) Philippines instructs that Peru's claim should be addressed on the merits.

Philippines supports Peru's position on sovereign immunity. The Supreme Court in *Philippines* held that awarding property in the Philippines' absence would improperly adjudicate the Philippine's claimed property interest *in absentia*, because awarding the account to one of the other claimants would moot any interest the Philippines might have in the property:

> The Court of Appeals erred in not giving the necessary weight to the absent entities' assertion of sovereign immunity. The court in effect decided the merits of the Republic and the Commission's claims to the Arelma assets. Once it was recognized that those claims were not frivolous, it was error for the Court of Appeals to address them on their merits when the required entities had been granted sovereign immunity. The court's consideration of

> the merits was itself an infringement on foreign sovereign immunity . . . .

Id. at 2189-90.

The same thing can be said about the District Court's Order awarding property to Spain without addressing Peru's contrary ownership claim – it is an "infringement" of Peru's sovereign rights because the award "in effect" decides "the merits of the Republic" of Peru's claim without actually addressing those merits.

4. This Court should remand this matter with instructions to the District Court to decide the merits of the dispute between Peru and Spain based on the applicable international law.

Although the lower court's decision is limited to sovereign immunity, the Order and Recommendation clearly manifest the lower court's reluctance to adjudicate a dispute between two sovereigns. However, a dislike for difficult decisions is not a basis to prefer Spain's ownership claim to Peru's. Thus, while this Court can simply reverse the immunity decision and remand with no instructions, the Republic of Peru respectfully requests that this Court provide guidance on some of the rationales provided by the lower court for avoiding the difficult questions.

A. There is no principled basis for the District Court to avoid the dispute between Peru and Spain.

(1) The District Court's jurisdiction was not tenuous.

According to the Recommendation, the lower court properly ignored Peru's ownership claim at least in part because of the court's allegedly "tenuous grip over the *res*:"

> Peru overlooks this Court's tenuous grip over the *res*. This is not the typical *in rem* action involving a maritime lien on a cargo vessel docked at a port within the district. Here, the *res* lacks any nexus to our nation's sovereign boundaries. Instead of the usual jurisdictional ties, *in rem* jurisdiction has precariously rested on the concepts of *jus gentium* and constructive possession of the wreck, the bases for the Court's initial exercise of authority upon Odyssey's verified complaint.

Dkt. 209 at 29-30.

There is however nothing tenuous about the Court's jurisdictional grip on the Treasure. All 17 tons of it sits in a warehouse located in the Middle District of Florida in the direct *custodia legis* of the District Court. The court's jurisdiction over the Treasure was also not based on a legal "fiction," but on direct control over property present in the United States. *Id.* at 13-14; *see also* Dkt. 270 at 4.

(2) If the lower court lacked jurisdiction over the Treasure, it lacked the authority to award the Treasure to Spain.

The lower court court's musings on its jurisdictions further demonstrates the problems with basing a ruling on sovereign immunity and jurisdiction when the

property is not in the sovereign's possession. The court either has jurisdiction or it does not. If the court lacks jurisdiction, it cannot rule, and if it cannot rule, it cannot award possession to any party. There is no precedent for refusing a party's substantive claims based on the nature of the court's jurisdiction.

In a similar manner, the Recommendation errs in stating that a court can exercise discretion as to whether to address claims based on equitable principles. Dkt. 209 at 30 n. 25. According to the cited authority, a court has discretion in applying equitable claims, not in deciding whether to accept jurisdiction over cases that raise equitable issues. *Id.* (citing, *Dresdner Bank AG v. M/V Olympia Voyager*, 465 F.3d 1267, 1273 (11th Cir. 2006)).

(3) The District Court cannot avoid this dispute; possession of the Treasure must be decided, directly or indirectly.

The District Court's Order relegates the international law principles supporting Peru's ownership to other forums, stating those principles "may govern in another forum on another day in resolving Peru's challenge to Spain's retention of the dispute items," but not in a United States court. Dkt. 270 at 4. But, when the lower court awarded the Treasure to Spain, it *de facto* determined Peru's competing ownership claim. As *Deep Sea Research* makes clear, if Spain is given possession of the Treasure, the dispute between Peru and Spain is over. No court will be able to decide Peru's claim to its patrimony.

In addition, Peru is not challenging "Spain's retention" of the Treasure – Spain does not have the Treasure and will possess it only if the court grants it possession. Because the court ultimately must award the Treasure to someone, Peru asks that the disposition be made based on relevant and applicable law.

(4) The District Court should be instructed to apply the applicable international law.

International law is United States law. As the Supreme Court has stated: "For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729-30 (2004) (citations omitted); *see also The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) (Marshall, C.J.) ("[T]he Court is bound by the law of nations which is a part of the law of the land.").

Critically, when looking for the appropriate rule, the courts should look to the modern rule, not international law of the past: "Thus it is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today." *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980) (citations omitted).

Particularly in this admiralty matter, the lower court should defer to the international *jus gentium* governing maritime affairs, derived from "the common consent of civilized communities." *Titanic*, 171 F.3d at 961 (citations omitted); *see also The Paquete Habana*, 175 U.S. 677, 700 (1900) (citation omitted).

UNCLOS Article 149 codifies the international community's uniform judgment as to the appropriate disposition of historical objects found at sea. According to the Statement of Interest submitted by the United States, UNCLOS reflects the customary international law applicable to this matter. Dkt. 247 at 9.

B. This matter cannot be decided on the basis of justiciability.

Spain's justiciability argument is similar to its sovereign immunity argument. Spain claims that, if the dispute between Peru and Spain is not justiciable, Spain wins. The argument fails at every level.

(1) This matter is justiciable.

The Recommendation and Order at least infer that US courts are incompetent to address the dispute between Spain and Peru because the dispute touches upon foreign relations. *See* Dkt. 209 at 32-33.

(a) The lower court is competent to divide the res.

The United States Supreme Court, however, has already determined the competency of United States courts to apply the required rules. When Virginia and West Virginia could not agree on the equitable division of their non-territorial assets and debts, the first question addressed by the Supreme Court was whether it was competent to make the determination. Justice Holmes answered that "what is just and equitable is a judicial question similar to many that arise in private litigation, and

in nowise beyond the competence of a tribunal to decide." *Commonwealth of Virginia v. State of West Virginia*, 220 U.S. 1, 31 (1911).

(b) The Executive Branch does not oppose resolution of the dispute between Peru and Spain.

Spain also tries to turn this dispute into a political question, but the Executive Branch has already officially stated that it "takes no position on any dispute between Peru and Spain." Dkt. 247 at 10. There is, therefore, no political question in this case. The express statement by the Executive Branch that it has no interest means this Court "need have no concern that interference with important governmental interests warrants rejection" of Peru'c claim. *See Kadic v. Karadzic*, 70 F.3d 232, 250 (2d Cir. 1995).

In contrast, the authorities cited by Spain deal with cases in which the Executive Branch opposed judicial relief because it had entered into the dispute and, in most cases, had frozen the property in question. In *Federal Republic of Yugoslavia v. Park-71st Corp.*, for example, the court determined that division of the property was a political question because the United States had frozen the assets in question and "a judicial decision on who has title to the frozen assets would affect the executive's use of those assets in present or contemplated negotiations." 913 F. Supp. 191, 194 (S.D.N.Y. 1995) (citation omitted); Dkt. 237 at 21. The court in Spain's other chief case on justiciability, *Can v. United States*, also dealt with property frozen by the United States, so that any judicial decision regarding such property would interfere with the

Executive Branch's foreign policy. 14 F.3d 160 (2d 1994); *see* Dkt. 237 at 22. Spain also cites to *Yucyo, Ltd. v. Republic of Slovenia*, which states: "Matters involving state succession do not always present nonjusticiable political questions. The political question doctrine should not be invoked merely because a case involves controversial matters or issues that are of some political significance." 984 F. Supp. 209, 218 (S.D.N.Y. 1997) (footnote omitted; cited at Dkt. 237 at 22).

Given the Executive's Statement of Interest indicating that it takes no position on the dispute between Peru and Spain, there is no basis to avoid this dispute on justiciability grounds.

(2) If the matter is not justiciable, then the District Court cannot award possession of the Treasure.

Spain argues and the Recommendation and Order imply that, if the dispute between Peru and Spain is not justiciable, then the Treasure must be awarded to Spain. The conclusion, however, does not follow from the premise. If a matter is not justiciable, the court cannot rule. Spain's own authority defeats its argument. *Federal Republic of Yugoslavia v. Park-71st Corp.*, 913 F. Supp. 191 (S.D.N.Y. 1995).[9] This opinion was one of a series of cases involving assets of the former Socialist Federal Republic of Yugoslavia ("Yugoslavia"), in this case the official residence of the Yugoslavia's Ambassador to the United Nations. The Federal Republic of Yugoslavia

[9] *See, e.g.*, *767 Third Ave. Assoc. v. Consulate General of Socialist Federal Republic of Yugoslavia*, 60 F. Supp. 2d 267 (S.D.N.Y. 1999), *aff'd in part*, 218 F.3d 152, 157 (2d Cir. 2000); *Bank of New York v. Yugoimport SDPR J.P.*, 2007 WL 1378426 (S.D.N.Y. 2007).

filed the action, claiming it was sole owner of the residence. The other successor states to the former Yugoslavia intervened to "oppose the relief requested by Plaintiff and [to] claim an interest in the Property." *Id.* at 193. Ultimately, the court held that apportioning ownership among the sovereign claimants was not a justiciable question, but only because the US government had taken control of the property in question. *Id.*

The point Spain and the lower court miss is that, after the court concluded that it could not determine ownership, it did ***not*** award the property to any of the sovereign claimants. Instead, the court held that, until the United States government endorsed a division, the claims of all successor states were incapable of judicial resolution, so the property would remain frozen. *Id.*

The Recommendation also notes that property divisions among nations are "best resolved through direct negotiations between the two [sovereigns] and not in this forum." Dkt. 209 at 33. While it is true that negotiations are preferable, that does not mean that courts have no role. Peru recognizes that international law encourages amicable resolutions, but such negotiations should be done on an equal footing, not with one party's having already been granted total control over the subject of the negotiations.

If the lower court wants to encourage negotiation, it should maintain control over the Treasure for a period of time to allow the parties to agree to a division or to

an alternate forum to decide the matter. If the parties cannot agree, the court should rule. There is ample precedent for such a procedure. First, that is the procedure set by international law: "In sum, the principal rule for redistributing assets and liabilities in separation or dissolution is that the states concerned have to agree on the issue. Failing an agreement there shall be distribution in equitable proportions." T. Langstrom, TRANSFORMATION IN RUSSIA AND INTERNATIONAL LAW 223 (2003).

United States courts follow the recommended course. *See, e.g.*, *Bank of New York v. Yugoimport SDPR J.P.*, 2007 WL 1378426 (S.D.N.Y. 2007). The court in *Yugoimport* determined the best course was to hold interpleaded funds for a period of time to allow the successor states to negotiate or to turn to another forum.[10] The court noted that, absent agreement, the court would resolve the matter. *Id.* at *11. In other cases, such as *Federal Republic of Yugoslavia* and *Can v. United States*, the property in question was held by the Executive Branch for the express purpose of encouraging negotiations on the successor state issues. *See Federal Republic of Yugoslavia*, 913 F. Supp. at 194; *Can*, 14 F.3d at 164.

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[10] The District Court suggests the existence of "another forum" that would more appropriately address Peru's claim. Dkt. 270 at 4. While Spain and Peru could agree to an international forum, the absence of such an agreement does not negate the lower court's obligation to determine ownership of the property before it on principled grounds. This is especially true in this case, because Spain has declined to agree to another forum.

The Supreme Court endorsed this procedure in *Philippines* – the interpleaded funds could not be awarded until the Philippines' ownership interests could be adjudicated on their merits. 128 S. Ct. at 2189-90.

The Treasure is in Florida within this Court's jurisdiction. This Court should not allow any party to possess the Treasure until some authority resolves the legal issues related to its ownership.

Conclusion

This matter will decide ownership of a Treasure of historic importance, but the legal precedent it will create will be of even greater importance. Indeed, Peru believes that judicial recognition of its sovereign rights to its historical patrimony is more valuable than the Treasure, and not just to Peru. This Court will set precedent that will affect the rights of all former colonies, including the United States, and not to mere money, but potentially priceless cultural heritage.

Treasure hunters might next find more than mere currency or bullion. Treasure hunters could, for example, find a Spanish galleon containing pre-Columbian Incan art. Without question, such a treasure would be intimately tied to the history and culture of Peru. A mere handful of examples of Incan art in gold remain after Spanish treasure fleets shipped all the then-known examples to Spain so they could be melted into coins.

The loss to Peru of the Treasure sitting in Florida would, in Peru's view, be wrong. The loss to Peru or to any other former colony of another priceless piece of their pre-colonial history would be tragic. The rule set by the lower court, however, draws no such distinctions and cannot, because it is not based on Peru's rights, but on avoiding consideration of those rights. Peru is barred from court not because its claim is not based on recognized principles of international law, but on the purported

basis of the sovereign immunity of a nation that has no rightful claim to the property in issue.

In fact, Peru's rights under international law are clear. The international community has created one of the most uniformly accepted international agreements in history that sets out the appropriate rule – UNCLOS.

The District Court avoided application of the relevant law on the basis of assumed predicates and due to an unwarranted reluctance to decide an important dispute involving two sovereigns, but Peru's claims are far too important to be side-stepped without consideration.

Moreover, the Treasure sits in Florida under the lower court's direct control, so the court can ignore the international law, but it cannot avoid the dispute. Possession of the Treasure will eventually be granted to some party. If the lower court's ruling is not reversed, the Treasure will go to the wrong party under international law.

For these reasons, the District Court's Order should be reversed, and this matter remanded with instructions to the lower court to address the merits of Peru's ownership claim and to apply the relevant international law.

Respectfully submitted,

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Dated: May 11, 2010

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CERTIFICATE OF SERVICE

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