

## Piracy in the Courtroom: How to Salvage \$500 Million in Sunken Treasure Without Making a Cent

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Two hundred years after igniting Spain's entry into the Napoleonic Wars, the *Nuestra Señora de las Mercedes*, a Spanish Frigate, once again was at the heart of an international conflict—*Odyssey Marine Exploration, Inc. v. The Unidentified Shipwrecked Vessel*. This case, which pitted a U.S.-based deep-sea salvage firm against Spain, examined the merits of salvage claims and rights against the sovereign immunity of a vessel. To successfully recover shipwrecks from the ocean floor, salvage firms undertake an arduous, complicated, and exhaustive endeavor. However, a court can transfer possession of a find to a sovereign nation, without compensation, based on the doctrine of sovereign immunity. Courts often grant a commercial exception to this doctrine when a party to suit behaves as a market participant, but the Eleventh Circuit chose to narrowly construe this exception by seemingly ignoring applicable case law.

This article scrutinizes the Eleventh Circuit's holding by focusing on how its overbroad application of the doctrine of sovereign immunity negatively impacts the deep-sea salvage industry. Part II traces the history of the *Mercedes* and chronicles its tenure as a frigate during the age of colonialism, its eventual loss at sea, its re-discovery by Odyssey Marine, and the filing of the case with the Middle District. Part III details the bodies of law analyzed by the Eleventh Circuit in its holding, including international law, maritime law, United States statutory law, United States common law, and international treaties. Part IV examines the holdings of the Eleventh Circuit and the Middle District. Lastly, Part V analyzes how this holding impacts the business model of Odyssey Marine and how it may affect the deep-sea salvage industry. Part V will also demonstrate how the Eleventh Circuit inconsistently applied modern law and ancient, customary maritime law throughout its holding. Lastly, Part V will also proffer alternative solutions that better encourages deep-sea exploration while still respecting the sovereignty of foreign nations.

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I. INTRODUCTION

Only a few minutes after the battle began, the *Mercedes* exploded. Captain Alvear, whose family was aboard the *Mercedes*, later wrote “the *Mercedes* jumped through the air making a horrible racket, cov-

ering us [on the *Medea*] with a thick rain of debris and smoke.”<sup>1</sup>

Two hundred years after the Spanish frigate *Nuestra Señora de las Mercedes* sank during the Battle of Cape Saint Mary, Odyssey Marine Exploration, Inc., a Florida-based salvage firm, discovered the ship one hundred miles off the coast of Gibraltar on the bed of the Atlantic Ocean. Following this discovery, Odyssey Marine sought title to the wreck, as well as salvage rights for its \$500 million treasure, by filing a complaint *in rem* against the shipwreck. However, title to the wreck was challenged by, and eventually surrendered to, the Spanish government.

In *Odyssey Marine Exploration, Inc. v. The Unidentified Shipwrecked Vessel*, the United States Court of Appeals for the Eleventh Circuit, sitting in admiralty, affirmed the United States District Court for the Middle District of Florida, holding that the Middle District correctly granted Spain’s motion to dismiss Odyssey Marine’s complaint *in rem*.<sup>2</sup> While the genesis of the case was a debate between the application of the law of finds versus the law of salvage, the holding focused on the application of sovereign immunity from arrest and suit under the Federal Sovereign Immunities Act.<sup>3</sup> The Eleventh Circuit ultimately held that (1) the *res* is the *Mercedes*, (2) it acted as an agent of the sovereign nation of Spain at the time of its demise, and (3) it is immune from arrest.<sup>4</sup> Because the court lacked jurisdiction to arrest the *Mercedes*, the Middle District ordered the release of the *res* from its custody and its return to Spain.

This article scrutinizes the Eleventh Circuit’s holding by focusing on how its overbroad application of the doctrine of sovereign immunity negatively impacts the deep-sea salvage industry. Part II traces the history of the *Mercedes* and chronicles its tenure as a frigate during the age of colonialism, its eventual loss at sea, its re-discovery by Odyssey Marine, and the filing of the case with the Middle District. Part III details the bodies of law analyzed by the Eleventh Circuit in its holding, including international law, maritime law, United States statutory law, United States common law, and international treaties. Part IV examines the holdings of the Eleventh Circuit and the Middle District. Lastly, Part V analyzes how this holding impacts the business model of Odyssey Marine and how it may affect the deep-sea salvage industry. Part V will also demonstrate how the Eleventh Circuit inconsistently applied modern law and ancient, customary maritime law throughout its holding.

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1. *Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*, 657 F.3d 1159, 1173 (11th Cir. 2011).

2. *Id.* at 1166.

3. Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–1611 (2006).

4. *Id.*

Lastly, Part V will also proffer alternative solutions that better encourages deep-sea exploration while still respecting the sovereignty of foreign nations.

## II. SHIPYARD TO THE OCEAN FLOOR TO THE COURTROOM: THE LIFE OF THE *MERCEDES*

The *Mercedes*, thought to be forever lost to the depths of the ocean following its sinking in 1804, found life once again following its discovery in 2007 by Odyssey Marine. After serving as a catalyst for Spain's entry into a war with Great Britain in 1804, the *Mercedes* led Spain into another international conflict over two hundred years later. This section traces the history of the ship to provide insight into the ship's interaction with the various laws consulted by the court in *Odyssey Marine*. This section also gives a brief overview of the political and military environment during the ship's life to provide a deeper understanding of the *Mercedes'* historical context.

### A. *The Mercedes in Service to Spain*

Built in Havana in 1788, the frigate *Mercedes* originally served the Kingdom of Spain as a warship.<sup>5</sup> When fully manned, the vessel required a crew of three hundred sailors and supported a full complement of armaments, including variously sized cannon and mortar.<sup>6</sup> Although intended to serve as a warship, the *Mercedes* served in other capacities, including as a troop and personnel transport.<sup>7</sup>

The late eighteenth century was a period of upheaval in Europe in which Spain was allied with Great Britain against France, but in a span of a few years found itself allied with France fighting Great Britain. Spain and Great Britain allied against France from 1793 to 1795 during the War of Convention.<sup>8</sup> The Peace of Basel, signed in 1795, ended hostilities between Spain and France.<sup>9</sup> Fearing the expansion of France and Napoleon's rise to power, Spain entered into the Second Treaty of San Ildefonso with France in 1796, effectively positioning itself against Great Britain.<sup>10</sup> In 1803, as hostilities ratcheted up between Great Britain and France, Spain positioned to rearm itself and prepared for more

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5. Report and Recommendation at 17, *Odyssey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel*, 675 F. Supp. 2d 1126, 1128 (M.D. Fla. 2009), *aff'd* 657 F.3d 1159 (11th Cir. 2011), No. 8:07-CV-614 [hereinafter Report and Recommendation].

6. *Odyssey Marine*, 657 F.3d at 1174.

7. *See id.* at 1170–74.

8. Report and Recommendation, *supra* note 5, at 5.

9. *Id.*

10. This treaty bound Spain to aid France (and vice versa) in a war with naval ships, foot soldiers, and the requisite supplies. It has been described by historians as “a monument to

conflict. This about-face in alliances meant that the *Mercedes* soon thereafter engaged in a naval engagement against Britain, despite fighting alongside the nation during the War of Convention several years prior.<sup>11</sup>

Due to its alliance with France, Spain had to raise funds to support French military efforts. Spain ceded territory to France to pay its debts,<sup>12</sup> but Spain also had to gather wealth from its American colonies to maintain its payments. The *Mercedes* became entangled in this affair when Spain assigned it to a fleet of ships transporting cargo and people between its American colonies and the European mainland.<sup>13</sup> To affirm that this assignment was customary during the early 1800s, Spain cites law in its Eleventh Circuit brief authorizing U.S. naval vessels to transport people and goods in such a manner during this era.<sup>14</sup>

### B. *The Final Voyage of the Mercedes*

Spain dispatched the *Mercedes* in 1803 to the port of El Callao (now Lima in modern-day Peru) to convoy precious metals and cargo in support of Spain's alliance with France.<sup>15</sup> Once it was laden with cargo and passengers, the *Mercedes* left El Callao to join three other Spanish frigates in Montevideo before departing for Europe.<sup>16</sup> When the *Mercedes* embarked for Spain from South America, the ship had a crew of 337, including nine officers, sixty-nine artillerymen and gunners, and sixty-three marines.<sup>17</sup> Passengers on the ship included the families of military men, civilians, and other personnel.<sup>18</sup> The ship's cargo hold was fraught with coins, ingots, precious metals, and other wares. In all, the

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imbecility" and only guaranteed future warfare for Spain. See DENIS BINGHAM, 2 THE MARRIAGES OF THE BONAPARTES 7 (1882).

11. *Id.*

12. Spain ceded the Louisiana Territory in North America to France in the Third Treaty of San Ildefonso in 1800. Mary P. Adams, *Jefferson's Reaction to the Treaty of San Ildefonso*, 21 J. S. HIST. 173, 173 (1955).

13. *Id.*

14. In an April 23, 1800, Act "For the Better Government of the Navy," the U.S. Congress specifically authorized U.S. Navy ships to take on board "gold, silver and jewels" of U.S. citizens. Standing orders of the U.S. Secretary of the Navy authorized and directed U.S. Navy officers to provide "protection to the persons and property of our citizens and for the transportation of specie to the United States." U.S. Navy officers were authorized to assess charges for providing military transport for specie.

Brief of Appellee Kingdom of Spain at 19–20, *Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*, 657 F.3d 1159 (11th Cir. 2011) (No. 10-10269) [hereinafter Brief of Spain].

15. *Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*, 657 F.3d 1159, 1173 (11th Cir. 2011).

16. *Id.* The three other Spanish frigates were the *Clara*, the *Medea*, and the *Fama*.

17. *Id.*

18. *Id.*

*Mercedes* was loaded with approximately 900,000 silver pesos, 5,809 gold pesos, and 2,000 copper and tin ingots.<sup>19</sup> The *Mercedes* also had a full complement of its defensive instruments and was further loaded with two obsolete bronze cannons, commonly called culverins.<sup>20</sup>

During this tumultuous period, British ships were charged with seizing Spanish military and merchant ships to prevent their cargo holds from filling the coffers of Napoleon and fueling his war effort.<sup>21</sup> As the *Mercedes* neared Spain, the fleet was intercepted by a squadron of British warships on October 5, 1804.<sup>22</sup> When the fleet refused to surrender, the Battle of Cape Saint Mary commenced. Unfortunately for the *Mercedes*, within minutes of the onslaught, the ship's munitions store exploded, destroyed the entire ship, and killed all but fifty of the people aboard.<sup>23</sup> The battle ceased shortly thereafter when the other three Spanish ships surrendered to the British.<sup>24</sup>

### C. *Facts Disputed, to No Avail, by Odyssey Marine*

The Eleventh Circuit rejected Odyssey Marine's depiction of the final voyage of the *Mercedes*. Odyssey Marine contended that the *Mercedes* was not a warship, but instead had been recommissioned for a commercial purpose.<sup>25</sup> The *Mercedes* carried between twenty-four and forty passengers and cargo, with both receiving passage to Europe for a price.<sup>26</sup> Diplomatic cables between Spain and Britain, cited by Odyssey Marine, indicate that seventy-five percent of the cargo aboard the ship was privately held.<sup>27</sup> Furthermore, Spain referred specifically to the ship in its declaration of war against Great Britain in 1804 following the sinking of the *Mercedes*. In the course of detailing the atrocities committed by Britain against Spain, Spain went to great lengths to indicate that the *Mercedes* was on a peaceful mission carrying civilians and their cargo and not serving as a warship.<sup>28</sup>

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19. *Id.* at 1172.

20. *Id.* at 1172-73.

21. BINGHAM, *supra* note 10, at 7.

22. *Odyssey Marine*, 657 F.3d at 1173.

23. *Id.*

24. *Id.*

25. Appellant's Opening Brief at 8, *Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*, 657 F.3d 1159 (11th Cir. 2011) (No. 10-10269) [hereinafter Brief of Odyssey Marine].

26. *Id.*

27. *Id.*

28. What civilized nation, until this hour, has made use of means so unjust and violent to exact securities of another? Although England should find, at last, any claim to exact from Spain, in what manner could she justify it, after a similar atrocity? What satisfaction could she be able to give for the lamentable destruction of the frigate

#### D. *The Discovery and Recovery of the Mercedes*

In 2006, Gregory Stemm, the CEO of Odyssey Marine, approached Spain's Ministry of Culture to discuss the company's desire to begin searching for wrecks, including several Spanish ships, in the Atlantic Ocean.<sup>29</sup> This project, code-named the "Amsterdam Project," sought to discover the remains of nearly thirty ships, all of which carried valuable cargo and sank in a high traffic area of the sea.<sup>30</sup> Recognizing that these wrecks may have participated in the Battle of Cape Saint Mary, Odyssey Marine sought Spain's permission to proceed with its planned expedition.<sup>31</sup> Spain claimed that Odyssey Marine "pledged respect for the special status of sunken warships as 'the graveyards of marines who died while serving their homelands' and acknowledged that 'they should be properly handled by the State they served, which must take steps to prevent interference from foreign elements in that relationship.'" <sup>32</sup> Spain then claimed that it withheld permission from Odyssey Marine to proceed with the project and disturb any sunken Spanish vessels, while Odyssey Marine contended that Spain never responded to its request.<sup>33</sup>

Regardless of the conclusion to Odyssey Marine's meeting with Spain, the company proceeded with the Amsterdam Project using sonar and magnetometer equipment to scour the ocean floor for potential shipwrecks.<sup>34</sup> In March 2007, the company struck underwater gold when it found a wreck on the floor of the Atlantic Ocean under more than 1,100 meters (3,600 feet) of water.<sup>35</sup> After surveying the wreck site, documenting the findings, and conducting a non-invasive archaeological survey, Odyssey Marine began salvaging the site, located one hundred miles west of Gibraltar.<sup>36</sup> The wreck, now code-named by Odyssey Marine as the "Black Swan,"<sup>37</sup> would eventually yield approximately 594,000 coins minted of various precious metals, as well as numerous

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Mercedes, with all its cargo, its equipage, and the great number of distinguished passengers who have perished, the innocent victims of a policy so detestable? William Cobbett, *War with Spain-Declaration of War by Spain Against England, Dated Madrid, 12th Dec. 1804*, 7 COBBETT'S WEEKLY POLITICAL REGISTER, 45, 47 (1805).

29. Susan Berfield, *Odyssey and the Lost Spanish Treasures*, BUSINESSWEEK, (June 7, 2012), <http://www.businessweek.com/articles/2012-06-07/odyssey-and-the-lost-spanish-treasure>.

30. Odyssey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel, 675 F. Supp. 2d 1126, 1130 (M.D. Fla. 2009), *aff'd* 657 F.3d 1159 (11th Cir. 2011).

31. Brief of Spain, *supra* note 14, at 29.

32. *Id.* at 4–5.

33. *Odyssey Marine Exploration*, 675 F. Supp. 2d at 1130.

34. Brief of Spain, *supra* note 14, at 5.

35. Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel, 657 F.3d 1159, 1166 (11th Cir. 2011).

36. Brief of Spain, *supra* note 14, at 7.

37. Kimberly L. Alderman, *High Seas Shipwreck Pits Treasure Hunters Against a Sovereign Nation: The Black Swan Case*, 1 CULTURAL HERITAGE & ARTS REV. 3, 3 (2010).

artifacts.<sup>38</sup>

E. *The Short Journey from the Seabed to the Courthouse*

On April 9, 2007, Odyssey Marine filed a two-count complaint against “The Unidentified Shipwrecked Vessel”—the “Black Swan”—with the Middle District of Florida. Odyssey Marine filed the complaint *in rem*, using a small bronze block it secured from the wreckage.<sup>39</sup> Count One of the complaint listed a possessory and ownership claim based on the law of finds and Count Two sought a salvage award for Odyssey Marine.<sup>40</sup> This prayer asked the court for a declaratory judgment granting Odyssey Marine sole rights to salvage the valuables from the ocean floor and preventing any other individual, corporation, or government from interfering with the wreck.<sup>41</sup> On April 11, 2007, Odyssey Marine filed a motion seeking an *in rem* arrest warrant against the Unidentified Shipwrecked Vessel to continue recovering artifacts from the wreckage site.<sup>42</sup> According to the motion, Odyssey Marine would surrender all salvaged materials to the United States Marshal or an acceptable substitute custodian—a title Odyssey Marine sought for itself.<sup>43</sup> The Middle District granted the order and Odyssey Marine was appointed as substitute custodian until further notice.<sup>44</sup>

Spain fought Odyssey Marine’s complaint by filing a verified claim to the wreck.<sup>45</sup> Spain’s strongest objection to Odyssey Marine’s claim lay in a notice issued by the United States Department of State that publicized Spain’s objection to any salvage efforts conducted on its sunken warships.<sup>46</sup> Because Spain failed to grant Odyssey Marine the explicit right to disturb its fallen vessels, Spain contended that Odyssey Marine

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38. *Odyssey Marine*, 657 F.3d at 1166.

39. *Id.*

40. Verified Complaint in Admiralty *in Rem*, Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel, No. 8:07-cv-00614-SCB-MAP (M.D. Fla. Apr. 9, 2007).

41. *Id.*

42. *Odyssey Marine*, 657 F.3d at 1166.

43. *Id.* at 1167.

44. *Id.*

45. *Id.*

46. The Embassy of Spain presents its compliments to the Department of State and has the honor to address the matter of Spanish laws and policy regarding the remains of sunken vessels that were lost while in the service of the Kingdom of Spain and/or were transporting property of the Kingdom of Spain. In accordance with Spanish and international law, Spain has not abandoned or otherwise relinquished its ownership or other interests with respect to such vessels and/or its contents, except by specific action pertaining to particular vessels or property taken by Royal Decree or Act of Parliament in accordance with Spanish law. Many such vessels also are the resting place of military and/or civilian casualties.

Protection of Sunken Warships, Military Aircraft and Other Sunken Government Property, 69 Fed. Reg. 5,647, 5,647 (Feb. 5, 2004).



lacked the authority to seize the valuables that once lay on the ocean floor, but now were in the custodial possession of Odyssey Marine.

In response, Odyssey filed an Amended Complaint on August 7, 2007, seeking to add *in personam* claims against Spain to its initial complaint, including a claim for compensation for services rendered in discovering the wreck and recovering artifacts from the seabed.<sup>47</sup> The Amended Complaint also sought damages from Spain for an event that occurred on July 12, 2007: Odyssey Marine's ship, the *Ocean Alert*, was boarded, seized, and detained in the Spanish port of Algeciras after it departed Gibraltar.<sup>48</sup> Odyssey Marine sought damages because Spain paraded the *Ocean Alert* in the harbor as a publicity stunt, forced the ship's crew to sit in the sun for hours as Spanish authorities searched the vessel, and seized an Odyssey Marine attorney's computer and a hard drive.<sup>49</sup> While Odyssey Marine felt that Spain owed it restitution, this *in personam* claim provided Spain with the opportunity to invoke the Federal Sovereign Immunities Act to dismiss all counts against it.

#### F. *Two's a Party, Twenty-Eight's a Crowd*

Soon after Spain and Odyssey Marine began publicly warring over the title to the *res*, new parties quickly joined the legal fracas. Peru and twenty-five other claimants declared their interest in the vessel and its recovered cargo.<sup>50</sup> Peru contended that it retained an ownership interest in the ship's cargo because it originated in Peru and never reached Spain.<sup>51</sup> Though Peru was a colony of the Spanish Empire when the *Mercedes* was lost in 1804, Peru insisted that it maintained, as a sovereign nation, a possessory interest in the property.<sup>52</sup> Under this theory, the treasures contained in the cargo hold of the *Mercedes* never reached Spain's territory in Europe; therefore title to the treasures never transferred to Spain.<sup>53</sup> The twenty-five additional claimants filed claims arguing that they had an interest in the cargo aboard the vessel.<sup>54</sup> Twenty-four of the individuals alleged they were descendants of individuals with

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47. Amended Verified Complaint in Admiralty, Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel, No. 8:07-cv-00614-SCB-MAP (M.D. Fla. Aug. 6, 2007).

48. *Id.*

49. *Id.*

50. *Odyssey Marine*, 657 F.3d at 1168.

51. Brief of the Appellant the Republic of Peru at 7, Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel, 657 F.3d 1159 (11th Cir. 2011) (No. 10-10269).

52. *Id.* at 15 ("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.").

53. *Id.* at 26.

54. *Odyssey Marine*, 657 F.3d at 1166.

cargo aboard the *Mercedes*; the remaining individual claimed an ancestral interest in any of Spain's treasure in Florida.<sup>55</sup> Their claims only sought to recover a portion of the salvaged treasure proportionate to their relatives' original stake in the cargo.<sup>56</sup>

G. *WikiLeaks Joins the Party (But Sadly, Not as a Party)*

The court battle surrounding a Spanish frigate dating to the 1700s that fought sea battles in the Caribbean, was filled with Andean silver and gold, and sunk off the coast of Gibraltar became even more outrageous in late 2010. WikiLeaks released diplomatic cables written in "the careful language of international diplomacy" between the U.S. Ambassador to Spain and the Spanish Cultural Minister.<sup>57</sup> Odyssey Marine claimed that the ambassador offered to assist Spain in recouping the *Mercedes* treasure in exchange for help returning an 1897 Pissarro painting to a California family.<sup>58</sup> The painting, valued up to \$20 million, was allegedly seized in Germany by Nazis and is now located in a Madrid museum.<sup>59</sup> In response to this disclosure, Kathy Castor, the House Representative for Florida's Eleventh District, penned a letter to Secretary of State Hillary Clinton in support of Odyssey Marine's case, and requested an investigation into the allegations.<sup>60</sup> No further investigation into the matter has been publicized.

III. A DELUGE OF RELEVANT LAW

The Eleventh Circuit's holding in *Odyssey Marine Exploration, Inc. v. The Unidentified Shipwrecked Vessel* touches upon a variety of legal issues. The court invoked, discussed, and debated admiralty law (law of finds versus salvage law), international law (the Foreign Sovereign Immunities Act ("FSIA") and treaties between the United States and Spain), and United States common and statutory law (Abandoned Shipwreck Act ("ASA")<sup>61</sup> and the Sunken Military Craft Act (SMCA)<sup>62</sup>). When sitting in admiralty, federal courts apply "the *jus gentium*, or the customary law of the sea, the origins of which date back to

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55. *Id.* at 1168.

56. *Id.*

57. Kim Severson & Robbie Brown, *WikiLeaks Cables Make Appearance in a Tale of Sunken Treasure and Nazi Theft*, N.Y. TIMES, Jan. 6, 2011, at A10.

58. *Id.*

59. *Id.*

60. Letter from Kathy Castor, U.S. Representative, 11th Dist. of Fla., to Hon. Hillary R. Clinton, U.S. Secretary of State (Jan. 20, 2011), available at <http://www.shipwreck.net/pdf/Castor-StateOdysseyMarine.pdf>.

61. Abandoned Shipwreck Act, 43 U.S.C. §§ 2101–2106 (2006).

62. Sunken Military Craft Act, Pub. L. No. 108–375, §§ 1401–1408, 118 Stat. 1811, 2094–2098 (2004) (codified at 10 U.S.C. § 113 notes).

the ancients.”<sup>63</sup>

#### A. *The Law of Finds Versus the Law of Salvage*

Odyssey Marine’s initial and amended complaints included counts asking for a declaratory judgment based on either the law of finds or the law of salvage. Courts favor applying salvage law over the law of finds “when ships or their cargo have been recovered from the bottom of the sea by those other than the owners.”<sup>64</sup> This body of law allows the original owner of the vessel to retain ownership and possessory rights while awarding the salvors both a significant salvage award and the ability to claim true ownership of the find if the original owner fails to step forward.<sup>65</sup>

The law of finds is infrequently invoked by admiralty courts because it encourages dishonest behavior by rewarding those who fail to report the discovery of lost possessions.<sup>66</sup> While courts often choose to talk in eloquent and verbose terms when disseminating law, courts distill the law of finds to simply “finders, keepers.”<sup>67</sup> The law of finds is usually only applied to “previously owned sunken property only when that property has been abandoned by its previous owners.”<sup>68</sup> Because proving that a wreck is abandoned is an extremely arduous endeavor, only two categories of cases allow the application of the law of finds: cases where owners expressly and publicly abandoned their property and cases lacking claimants to items recovered from ancient shipwrecks.<sup>69</sup>

Due to the nature of the law of finds, a court likely would have applied salvage law had it needed to adjudicate Odyssey Marine’s claims. In this hypothetical scenario, Odyssey Marine would need to demonstrate three elements to win its salvage claim: (1) that the vessel

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63. *Odyssey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel*, 675 F. Supp. 2d 1126, 1136 (M.D. Fla. 2009), *aff’d* 657 F.3d 1159 (11th Cir. 2011); *see also* *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 960 (4th Cir. 1999) (noting that admiralty law does not “depend on any express or implied legislative action. Its existence, rather, preceded the adoption of the Constitution. It was the well-known and well-developed ‘venerable law of the sea’ which arose from the custom among ‘seafaring men . . . .’”).

64. *Columbus-Am. Discovery Group v. Atl. Mut. Ins. Co.*, 974 F.2d 450, 459 (4th Cir. 1992).

65. *Id.*

66. *See Hener v. United States*, 525 F. Supp. 350, 356 (S.D.N.Y. 1981) (“Would-be finders are encouraged by these rules to act secretly, and to hide their recoveries, in order to avoid claims of prior owners or of other would-be finders that could entirely deprive them of the property.”).

67. *See Columbus-Am. Discovery Group*, 974 F.2d at 459 (“A related legal doctrine is the common law of finds, which expresses ‘the ancient and honorable principle of “finders, keepers.”’”); *see also* *Martha’s Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked & Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1987) (holding that the principle of “finders, keepers” is analogous to the law of finds).

68. *Columbus-Am. Discovery Group*, 974 F.2d at 461.

69. *Id.*

be exposed to a marine peril; (2) that the salvage service be voluntary; and (3) that the salvage operation be successful.<sup>70</sup> In this case, salvage law is a more favorable alternative to finds law because

salvage law's aims, assumptions, and rules are more consonant with the needs of marine activity and because salvage law encourages less competitive and secretive forms of conduct than finds law. The primary concern of salvage law is the preservation of property on oceans and waterways. Salvage law specifies the circumstances under which a party may be said to have acquired, not title, but the right to take possession of property (e.g., vessels, equipment, and cargo) for the purpose of saving it from destruction, damage, or loss, and to retain it until proper compensation has been paid.<sup>71</sup>

A court would reinforce the inherent differences between these two doctrines and demonstrate how salvage law encourages the endeavors undertaken by marine salvage firms by adjudicating this manner under salvage law.

### B. *Foreign Sovereign Immunities Act*

The principle holding of this case, that Spain is immune from suit, hinges on the application of the FSIA. The FSIA plainly limits what suits a foreign sovereign is liable for in the United States by stating

[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.<sup>72</sup>

Moreover, the FSIA utilizes a broad interpretation of a foreign state by extending immunity for "agents or instrumentalities of the state,"<sup>73</sup> ensuring that courts in the United States cannot impinge upon the activities of a foreign state.

Although the immunity of a foreign government from suit is presumed, limited exceptions to this presumption exist, most notably, the commercial exception.<sup>74</sup> Under the FSIA, property of a foreign state is

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70. Christine Nicole Burns, *Finders Weepers, Losers Keepers: The Eleventh Circuit Denies Salvage Company's Claims to a Sunken Military Vessel Found in International Waters in Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*, 36 TUL. MAR. L.J. 803, 805 (2012) (citing *The Sabine*, 101 U.S. 384, 384 (1879)).

71. *Hener*, 525 F. Supp. at 356.

72. 28 U.S.C. § 1609 (2006).

73. 28 U.S.C. § 1603(a) (2006).

74. 28 U.S.C. § 1610 (2006). *See also* S & Davis Int'l, Inc. v. Republic of Yemen, 218 F.3d 1292, 1300 (11th Cir. 2000) ("In order to overcome the presumption of immunity, a plaintiff must prove that the conduct which forms the basis of its complaint falls within one of the statutorily defined exceptions.").

not immune from attachment when used for “commercial activity,” defined as “either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.”<sup>75</sup> This definition leaves the term “commercial” largely undefined and open to a variety of interpretations.<sup>76</sup> Yet, courts generally hold themselves to a restrictive application of the exception that allows a court to waive immunity under the commercial exception when a sovereign acts as a “private player,” not as a “market regulator.”<sup>77</sup>

In its holding, the Eleventh Circuit explicitly points out that *Odyssey Marine* failed to invoke the commercial exception in its appeal.<sup>78</sup> *Odyssey Marine* instead sought to invalidate Spain’s invocation of the FSIA by citing to section 1605(b) of the statute,<sup>79</sup> which carves out an exception to sovereign immunity for a foreign state in suits in admiralty to enforce a maritime lien based upon a commercial activity of the foreign state.<sup>80</sup> Because this exception is predicated upon a commercial exception like the more prevalent section 1610 exception, the court held that neither statute applied in this case.<sup>81</sup>

### C. Domestic Statutes on Shipwrecks

When adjudicating cases in admiralty, U.S. federal courts consult domestic and foreign statutory and customary law. The Eleventh Circuit discussed at great length the application of United States statutory law to the *Black Swan* wreck to reach its holding.<sup>82</sup> Although the two statutes discussed at length in the holding—the *Sunken Military Craft Act* and the *Abandoned Shipwreck Act*—apply only to wrecks found in the territorial waters of the United States, the court studied the legislative intent of the two acts to justify its holding.

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75. 28 U.S.C. § 1603(d) (2006).

76. The U.S. Supreme Court has stated that the definition of “commercial activity” in the FSIA remains largely undefined. The FSIA “simply establishes that the commercial nature of an activity does not depend upon whether it is a single act or a regular course of conduct”; it “merely specifies what element of the conduct determines commerciality (i.e., nature rather than purpose), but still without saying what ‘commercial’ means.” *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 612 (1992).

77. *Id.* at 614.

78. *Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*, 657 F.3d 1159, 1175 (11th Cir. 2011).

79. *Id.* at 1178.

80. 28 U.S.C. § 1605(b) (2006).

81. *Odyssey Marine*, 657 F.3d at 1175, 1178.

82. *Odyssey Marine*, 657 F.3d at 1175–81.

## 1. THE SUNKEN MILITARY CRAFT ACT

Enacted in 2004, the Sunken Military Craft Act (“SMCA”) aims “to preserve the right, title, and interest to any sunken military craft for the dual purpose of protecting military intelligence and affording proper respect to lost servicemen.”<sup>83</sup> The SMCA outlaws “engag[ing] in any activity directed at a sunken military craft that disturbs, removes, or injures any sunken military craft” without the explicit authorization of the government.<sup>84</sup> The SMCA also proclaims that the passage of time shall not extinguish the United States’ rights, title, and interests in its sunken military craft without an express divestiture.<sup>85</sup> The SMCA defines “sunken military craft” as “all or any portion of (A) any sunken warship, naval auxiliary, or other vessel that was owned or operated by a government on military noncommercial service when it sank and (B) any sunken military aircraft or military spacecraft that was owned or operated by a government when it sank.”<sup>86</sup> Succinctly, the SMCA broadly interprets “sunken military vessel” to include all vessels owned and operated by the government. The SMCA fails to distinguish between the cargo and the vessel itself, meaning that the vessel and its cargo, for the purposes of this statute, are a single entity.

Although the SMCA is domestic law, section 1407 of the SMCA encourages bilateral and multilateral agreements between the United States and foreign nations in congruence with the intent and purpose of the Act.<sup>87</sup> Spain and the United States never entered into an agreement regarding the obligations and duties of the SMCA, but the plain language of the statute evidences a legislative intent to establish reciprocity in the relationship between nations.<sup>88</sup> The framework that defines a sunken military vessel and protects lost ships under the U.S. domestic laws provided a template for the Eleventh Circuit to extend protections to the *Mercedes*.

Members of Congress filed an amicus brief to clarify the legislative intent of the statute, particularly in regard to what vessels are protected by the SMCA. The brief concluded that

[p]roperly construed, the SMCA’s protections do not extend to vessels (whether denominated as “warships,” “naval auxiliaries” or

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83. Burns, *supra* note 70, at 808.

84. Sunken Military Craft Act, Pub. L. No. 108–375, § 1402(a), 118 Stat. 1811, 2094–2098 (2004) (codified at 10 U.S.C. § 113 notes).

85. Sunken Military Craft Act § 1401.

86. Sunken Military Craft Act § 1408(3).

87. “The Secretary of State, in consultation with the Secretary of Defense, is encouraged to negotiate and conclude bilateral and multilateral agreements with foreign countries with regard to sunken military craft consistent with this title.” Sunken Military Craft Act § 1407.

88. *See id.*

“other vessels”), which are engaged in substantial “commercial service” at the time of their sinking. Carrying private passengers and commercial cargo for freight, payable to the government, should not be construed as “military non-commercial service” such as to bring a vessel within the protections of the SMCA. Any other interpretation would be contrary to the clear language of the SMCA, the position of the United States Navy and Congress’s intent in legislating that statute.<sup>89</sup>

## 2. THE ABANDONED SHIPWRECK ACT

The compulsion to adopt the Abandoned Shipwreck Act (“ASA”) in 1987 stemmed from the advance in technology greatly augmenting both the discovery and the exploration of shipwrecks.<sup>90</sup> The purpose of the legislation was to protect abandoned vessels in the navigable waters of the individual states by granting their title to the United States.<sup>91</sup> Under the auspices of the ASA, the United States is obligated to protect “those wrecks which have historical significance, as well as to permit public access to them in the same way that historic sites on land are protected and monitored.”<sup>92</sup>

Because the ASA is domestic legislation and, like the SMCA, is applicable only in the territorial waters of the United States, the application and utility of the legislation for this case lies in its intent, not its binding authority. The ASA, like the SMCA, defines a shipwreck as “a vessel or wreck, its cargo, and other contents” without severing the cargo from the vessel itself.<sup>93</sup> Furthermore, the ASA, published by the Department of the Interior in 1990, extends the same protections for vessels originating in foreign countries as it does to American vessels.<sup>94</sup> Although the *Mercedes* was not abandoned by Spain, the ASA served as a focal point in the discussion and deliberation of *Odyssey Marine* because it illustrates how the United States yearns to protect fallen vessels and the treasures that lie within the wrecks.

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89. Brief Amicus Curiae of Members of Congress on the Proper Construction of the Sunken Military Craft Act in Support of Neither Party at 15–16, *Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*, 657 F.3d 1159 (11th Cir. 2011) [hereinafter Congress Amicus].

90. Rob Regan, *When Lost Liners Become Found*, 29 TUL. MAR. L.J. 313, 332 (2005)

91. Abandoned Shipwreck Act, 43 U.S.C. § 2105 (2006).

92. Regan, *supra* note 90, at 333.

93. 43 U.S.C. § 2102(d) (2006).

94. Although a sunken warship or other vessel entitled to sovereign immunity often appears to have been abandoned by the flag nation, regardless of its location, it remains the property of the nation to which it belonged at the time of sinking unless that nation has taken formal action to abandon it or to transfer title to another party.

Abandoned Shipwreck Act Guidelines, 55 Fed. Reg. 50116, 50121 (Dec. 4, 1990).

#### D. *A (Friendly) Treaty Between the United States and Spain*

While the discussed domestic law encourages treaties between the United States and foreign nations that incorporate the law into the diplomatic relationship between the countries, Spain and the United States have yet to do so. However, at the conclusion of the Spanish American War, Spain and the United States entered into the “Treaty Between the United States and Spain of Friendship and General Relations,” which already incorporated several of the underlying rationales of both the SMCA and the ASA. The treaty states that

[i]n cases of shipwreck, damages at sea, or forced putting in, 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.<sup>95</sup>

Despite the treaty’s age, its authority is still recognized when discussing the obligations owed to the parties to the treaty.<sup>96</sup>

#### IV. NAVIGATING THE FEDERAL COURT SYSTEM: A PROCEDURAL HISTORY OF THE CASE

After the *Mercedes* remained under a column of water 1,100 meters tall for over two hundred years, the ship spent less than five years winding its way through the federal courts. Any claim to the *res* contrary to Spain’s was effectively quashed when the United States Supreme Court denied the petitions for writ of certiorari submitted by Odyssey Marine on May 14, 2012.<sup>97</sup> The claimants filed these petitions after receiving unfavorable decisions in both the Eleventh Circuit and the Middle District. The Eleventh Circuit, affirming the Middle District’s holding and returning custody of the *res* to Spain, thus serves as the final word on this case. Following the Supreme Court’s denial of certiorari, the valuable artifacts salvaged by Odyssey Marine and kept under the custody of the U.S. Marshal returned to Spain aboard C-130 cargo planes, effectively ending a bizarre chapter in the history of the Spanish frigate.<sup>98</sup>

95. Treaty Between the United States and Spain of Friendship and General Relations art. X, July 3, 1902, 33 Stat. 2105.

96. *See, e.g.,* Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels, 221 F.3d 634, 638 (4th Cir. 2000) (holding that “[t]he reciprocal immunities established by this treaty are essential to protecting United States shipwrecks and military gravesites. Under the terms of this treaty, Spanish vessels, like those belonging to the United States, may only be abandoned by express acts.”).

97. *See* Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel, 132 S. Ct. 2379 (2012); Republic of Peru v. Unidentified Shipwrecked Vessel, 132 S. Ct. 2380 (2012); De Aliaga v. Kingdom of Spain, 132 S. Ct. 2380 (2012).

98. Berfield, *supra* note 29.



### A. *The Middle District of Florida's Holding*

On June 3, 2009, United States Magistrate Judge Mark Pizzo issued the Report and Recommendation supporting Spain's motion to dismiss the claims of Odyssey Marine, Peru, and the twenty-five additional claimants.<sup>99</sup> Following a *de novo* review of the Report and Recommendation and the available evidence, the Middle District of Florida issued an order on December 22, 2009, wholly adopting the Report and Recommendation.<sup>100</sup> The district court announced it empathically agreed

(1) with the Magistrate Judge's application of Rule 12(b)(1) as the proper standard for reviewing the facts pertinent to a determination of subject matter jurisdiction and (2) with the Magistrate Judge's conclusion that no genuine, plausible claim persists that the site at issue is anything other than the site of the wreck of the Spanish naval vessel *Nuestra Señora de las Mercedes*.<sup>101</sup>

Moreover, the district court emphasized the magistrate's conclusion that "[the] FSIA defines 'commercial activity in the United States' as 'commercial activity carried on by such state and having substantial contact with the United States.' It is undisputed that the *Mercedes* had nothing to do with the United States: 'the *res* lacks any nexus to our nation's sovereign boundaries.'"<sup>102</sup>

The Middle District's holding (1) overruled the objections of the claimants to the magistrate's report, (2) adopted the Report and Recommendation, (3) dismissed Odyssey Marine's amended complaint for lack of subject matter jurisdiction, (4) vacated the arrest warrant of the *res*, and (5) dismissed for lack of subject matter jurisdiction the claims against the *res*.<sup>103</sup> While the court ordered Odyssey Marine to return the *res* to Spain within ten days of the ruling, the Court stayed the order pending appeal to the Eleventh Circuit.<sup>104</sup> This afforded the claimants the opportunity to exhaust their appeals before ceding actual possession of the Black Swan treasure to Spain.

### B. *The Eleventh Circuit's Holding*

The Eleventh Circuit affirmed the Middle District's grant of Spain's motion to dismiss, delivering another holding in favor of Spain on all matters. This holding settled questions regarding (1) the standard of review for Spain's motion to dismiss for lack of subject matter juris-

99. Report and Recommendation, *supra* note 5, at 34.

100. *Odyssey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel*, 675 F. Supp. 2d 1126, 1128 (M.D. Fla. 2009), *aff'd* 657 F.3d 1159 (11th Cir. 2011).

101. *Id.*

102. *Id.* at 1129 (citation omitted).

103. *Id.* at 1129–30.

104. *Id.* at 1130.

diction, (2) the requirement for an evidentiary hearing based on Spain's motion to dismiss, (3) jurisdictional and factual questions surrounding the *res* (the *Mercedes/Black Swan*), (4) the severability of the cargo from the sunken vessel, and (5) the release of the *res* from the U.S. Marshal's custody directly to Spain.

1. THE DISTRICT COURT USED THE CORRECT STANDARD OF REVIEW FOR SPAIN'S MOTION TO DISMISS

The Middle District of Florida reviewed Spain's motion to dismiss due to lack of subject matter jurisdiction using the standard of review customarily applied to motions asserted on factual grounds.<sup>105</sup> Citing *Carmichael v. Kellogg, Brown & Root Services, Inc.*, the Middle District held that when reviewing the complaint, it did not have to assume the allegations in the complaint were true and weigh them in a light most favorable to the non-moving party.<sup>106</sup> Spain's motion was predicated upon a factual attack to the court's subject matter jurisdiction, not a facial challenge to the allegations set forth in the complaint. Following *Carmichael*, courts review the allegations and evidence presented by all parties equally.<sup>107</sup>

Odyssey Marine had requested for the court to instead adopt a standard of review commensurate with Federal Rule of Civil Procedure 56.<sup>108</sup> Odyssey Marine argued that because the jurisdictional basis for the claim was intertwined with the merits of the underlying claim, the court should have viewed the evidence in a light favorable to the non-moving party.<sup>109</sup> However, the court rejected this argument because the subject matter jurisdiction for the claim is based on the FSIA, while the underlying claims are based on the laws of finds and salvage.<sup>110</sup> Jurisdiction is intertwined with the merits of the cause of action only "when a

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105. *Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*, 657 F.3d 1159, 1169 (11th Cir. 2011).

106. Facial challenges to subject matter jurisdiction are based solely on the allegations in the complaint. When considering such challenges, the court must, as with a Rule 12(b)(6) motion, take the complaint's allegations as true. However, where a defendant raises a factual attack on subject matter jurisdiction, the district court may consider extrinsic evidence such as deposition testimony and affidavits. *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1279 (11th Cir. 2009) (citations omitted).

107. *Odyssey Marine*, 657 F.3d at 1170.

108. Under this [Rule 56] standard, Odyssey asserts, the court should have viewed the evidence in the light most favorable to Odyssey and drawn all justifiable inferences in its favor. Odyssey argues the Rule 56 standard is necessary because a motion to dismiss implicates the merits of the underlying claim in the case.

*Id.* at 1169.

109. *Id.*

110. *Id.* at 1170.

statute provides the basis for both the subject matter jurisdiction of the federal court and the plaintiff's substantive claim for relief."<sup>111</sup>

2. THE ELEVENTH CIRCUIT DID NOT HAVE TO HOLD AN EVIDENTIARY HEARING WHEN CONSIDERING SPAIN'S MOTION TO DISMISS

The Eleventh Circuit determined that the Middle District of Florida acted well within its discretion by making conclusions of fact without conducting an evidentiary hearing.<sup>112</sup> While Odyssey Marine argued that it should have been afforded a formal evidentiary hearing, statutory authority granting that right does not exist. Instead, the Middle District had "discretion to devise a method for making a determination with regard to the jurisdictional issue."<sup>113</sup> The district court had more than enough evidence to draw its own conclusions regarding the identity of the *res* based on the preponderance of evidence found in Spain's Motion to Dismiss, Odyssey's Response, and Spain's Reply, which included affidavits of multiple historians, counter-affidavits, copies of original Spanish documents from the nineteenth century with translations, photographs from the shipwreck site, and photographs of the artifacts recovered.<sup>114</sup>

3. THE *RES* IS THE *MERCEDES* AND IS IMMUNE FROM ARREST UNDER THE FSIA

Despite Odyssey Marine's assertion that the court could not conclusively identify the shipwreck, the Middle District, supported by the "encyclopedic" evidence provided by the parties, determined that the shipwreck was the *Mercedes*.<sup>115</sup> The Eleventh Circuit affirmed this finding of fact and then had to determine whether the district court had the jurisdiction, in light of the FSIA, to place the *res* under arrest. Although the ship remained on the ocean floor, courts may exercise constructive possession over a shipwreck when part of the shipwreck is presented to it.<sup>116</sup> Even though Odyssey Marine did just that by collecting pieces of the ship from the ocean floor and physically transporting them into the territorial jurisdiction of the court, it failed to also provide the legal means for the court to exercise subject matter jurisdiction over the

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111. *Morrison v. Amway Corp.*, 323 F.3d 920, 926 (11th Cir. 2003).

112. *Odyssey Marine*, 657 F.3d at 1170.

113. *Id.*

114. *Id.*

115. *Id.*

116. *See id.* at 1175 (holding that a court may have either actual or constructive possession over the *res*, even if the *res* is not located in the United States).

find.<sup>117</sup> A court could only authorize an arrest of the *res*, as the property of a foreign state, if the FSIA grants it the authority to do so.<sup>118</sup>

Under the FSIA, a claimant must overcome the presumption that the defendant-nation is immune from suit to successfully make a claim.<sup>119</sup> *Odyssey Marine* failed to prove that the *Mercedes* fell into an exception to the FSIA and thus overcome this presumption.<sup>120</sup> The Eleventh Circuit had previously adopted the position that a foreign state waives its sovereign immunity for an activity when it “is commercially engaged when it acts like an ordinary private person, not like a sovereign, in the market.”<sup>121</sup> While *Odyssey Marine* contended that the transport of civilians and their cargo for a fee represented a commercial activity, the Eleventh Circuit agreed with historians who claimed that this was a function of a sovereign nation at the time.<sup>122</sup> The Eleventh Circuit concluded that the *Mercedes* was immune from arrest because Spain acted “like a sovereign, not a private person in the marketplace.”<sup>123</sup>

#### 4. THE *MERCEDES* AND ITS CARGO ARE NOT SEVERABLE

*Odyssey Marine*, Peru, and the twenty-five additional claimants had argued in the alternative that even if the *Mercedes* was immune from arrest, the cargo could be treated separately from the remains of the *Mercedes*, thus subjecting the valuable cargo, but not the *Mercedes*, to suit. The Eleventh Circuit soundly rejected this theory with a holding grounded in federal statutes and the 1902 Treaty of Friendship and General Relationships between the United States of America and Spain. As described previously, the treaty obligated both nations to treat each other’s vessels with reciprocal respect. The Eleventh Circuit pointed to the non-severability of a sunken ship and its cargo under the ASA and the SMCA to reinforce its holding.<sup>124</sup> The Eleventh Circuit made the assertion that these statutes govern shipwrecks without diving into whether these statutes applied specifically to the *Mercedes*.<sup>125</sup>

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117. *Id.*

118. *See Beg v. Islamic Republic of Pakistan*, 353 F.3d 1323, 1324 (11th Cir. 2003) (“Federal courts have jurisdiction to hear claims against foreign governments only if authorized by the Foreign Sovereign Immunities Act.”).

119. *S & Davis Int’l, Inc. v. The Republic of Yemen*, 218 F.3d 1292, 1300 (11th Cir. 2000).

120. *See Odyssey Marine*, 657 F.3d at 1175–78 (noting that *Odyssey Marine* failed to claim a commercial exception under either section 1609 or 1610 of the FSIA).

121. *Honduras Aircraft Registry, Ltd. v. Gov’t of Honduras*, 129 F.3d 543, 548 (11th Cir. 1997).

122. *Odyssey Marine*, 657 F.3d at 1177.

123. *Id.* at 1178.

124. *Id.* at 1180.

125. *Id.*

By holding that the cargo is not severable from the wreck of the *Mercedes*, the Eleventh Circuit also protected the interests of Spain without undermining the tenets of a lawful treaty.<sup>126</sup> Had the Eleventh Circuit overruled the district court's finding of immunity for both the *Mercedes* and its cargo and allowed the arrest of the cargo, the court would have inflicted "an undeniable potential for injury to Spain's interest."<sup>127</sup> The Eleventh Circuit was obligated to promote the "comity interest" that underlies the doctrine of sovereign immunity by ensuring the *Mercedes* and her cargo were treated as a single legal entity.<sup>128</sup>

#### 5. THE ELEVENTH CIRCUIT ORDERS THE RETURN OF THE *RES* TO SPAIN

When the district court vacated the arrest warrant for the *res/Mercedes* and ordered its return to Spain, the court merely returned the artifacts in its possession.<sup>129</sup> When the court initially granted the arrest warrant, Odyssey Marine served as a substitute custodian of the property in lieu of the U.S. Marshal, not as the rightful possessor of the *res*.<sup>130</sup> Under the theory posited by Odyssey Marine, the court would detain the *res* indefinitely because jurisdictional limitations prevent it from executing any order related to the *res*, including the simple act of releasing it from its custody.<sup>131</sup> Contrary to Odyssey Marine's contention, the court did not transfer possession of the *Mercedes*; it instead relinquished "its control of the *res* and released it to the party that has a sovereign interest in it."<sup>132</sup>

### V. DISCUSSION

*Odyssey Marine Exploration, Inc. v. The Unidentified Shipwrecked Vessel* is a watershed moment for the deep-sea salvage industry. *Odyssey Marine* resolves two key issues regarding a salvage firm's interest in its finds. First, the Eleventh Circuit's holding determines the relevance of sovereign immunity to historical shipwrecks. Secondly, it weighs the

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126. See Burns, *supra* note 70, at 812 (claiming that the Eleventh Circuit "was also concerned that denying dismissal would fail to give full effect to international treaties, thus potentially undermining the nation's promotion of international comity").

127. *Odyssey Marine*, 657 F.3d at 1182.

128. See *Republic of Philippines v. Pimentel*, 553 U.S. 851, 866 (2008) ("Giving full effect to sovereign immunity promotes the comity interests that have contributed to the development of the immunity doctrine.").

129. *Odyssey Marine*, 657 F.3d at 1183.

130. *Id.* at 1182–83.

131. See *id.* at 1183 ("It necessarily follows that the court, after determining the *res* was immune from arrest, must have the ability to release the *res* from its custody. A contrary conclusion would lead inexorably to court custody in perpetuity.").

132. *Id.*

benefits of retrieving artifacts and treasures from lost ships against the destruction of shipwrecks and the final resting ground of those lost at sea. Although tantalizing riches are available on the ocean floor to those salvage firms that can find them, legal and moral restrictions limit the seizure of those goods. Technological limitations once severely hindered the industry, but modern advances in the industry's techniques and tools now grant access to vessels once lost to the depths of the ocean. Today, the industry is not constrained solely by physical impediments; rather, it is hampered by the sensitivities and sensibilities of those protecting the resting places of ships and sailors.

By finding for Spain on all issues in *Odyssey Marine*, the Eleventh Circuit serves as a harbinger of change for the marine salvage industry by curtailing the breadth of deep-sea exploration endeavors. First, this section demonstrates that Odyssey Marine, despite its for-profit business model, shares the same respect for sunken vessels and desire to preserve antiquities as academic deep-sea exploration ventures. Secondly, this analysis examines the impact of the court's holding on Odyssey Marine's modern approach to the salvage of sunken vessels.<sup>133</sup> This discussion will also illuminate the inconsistencies hidden within the Eleventh Circuit's holding, which protects diplomatic relations at the expense of the deep-sea salvage industry. Lastly, the discussion proposes an alternative to the Eleventh Circuit's holding that balances the interests of a burgeoning industry with the desire to conserve and preserve sunken vessels.

A. *Differing Business Models, but Similar Reverence  
for Sunken Vessels*

As the reach of salvage companies extends to greater depths, preserving historical wrecks and respecting the dignity of the souls lost aboard the sunken vessels have become key issues for those exploring the depths of the ocean. These sacrosanct tendencies must be balanced against the business of deep-sea exploration. As a publicly traded firm, Odyssey Marine relies on treasures salvaged from the sunken vessels it finds to turn a profit, please its stockholders, and remain a viable corporation. However, one of the company's founding beliefs is that "[g]ood business and sound archaeological practice can co-exist and thrive together."<sup>134</sup> To put his belief into practice, Odyssey Marine balances

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133. Odyssey Marine describes its business model as "commercial marine archaeology," which it defines "as the pursuit of deep-ocean archaeological research and exploration as a 'for profit' venture." *Archaeology*, SHIPWRECK.NET (Odyssey Marine Exploration's Corporate Website), <http://www.shipwreck.net/archaeology.php> (last visited Jan. 21, 2013).

134. *Our Approach*, SHIPWRECK.NET (Odyssey Marine Exploration's Corporate Website), <http://www.shipwreck.net/ourapproach.php> (last visited Apr. 10, 2013).

profitability with the preservation of historical shipwrecks and relics.

The riches available to Odyssey Marine and its competitors were scarce until recently; less than forty years ago, salvage firms could only search and salvage vessels in several hundred feet of water.<sup>135</sup> Today, Odyssey Marine wields impressive and expensive technology, including submersible robots (known as ROVs—remotely operated vehicles), side-scan sonar, and magnetometers, that it implements to scour the ocean bed twenty-four hours a day, seven days a week.<sup>136</sup> Odyssey Marine's viable recovery depth is now limited only by the capability of the firm's ROVs, which are currently rated to 8,500 feet.<sup>137</sup> These innovations have effectively unlocked a broad swath of the ocean bed for exploration, and, correspondingly, they unlocked opportunities for salvage firms to discover and reclaim lost shipwrecks.

Despite this falsely presumed propensity to chase treasure and profits, Odyssey Marine is neither a raider of sacred tombs nor a plunderer of sunken treasure. When surveying a find, Odyssey Marine maps every minute detail of an entire salvage site, including items as small as buttons.<sup>138</sup> Following its 2008 discovery of the *HMS Victory*, a British warship, Odyssey Marine planned to retrieve a cannon from the wreck, but in preparation for this extraction, the company discovered skeletal remains next to the cannon.<sup>139</sup> Despite searching “hundreds of wrecks” in the English Channel, the *Victory* was its first encounter with human remains in this condition.<sup>140</sup> Although Odyssey Marine wanted to recover the remains for anthropological purposes, the company allowed the remains to lay undisturbed, at behest of the Royal Navy and Britain's Ministry of Defense.<sup>141</sup> Though this exercise in restraint represents the firm's single encounter with human remains, it demonstrates that Odyssey Marine is not ruthlessly scouring the seabed for any and all treasure.

Odyssey Marine's treatment of the *Victory* follows the noble example set during discovery of one of the most, if not the most, famous shipwrecks of all time—the *Titanic*. Robert Ballard, leading a team of

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135. William Mullen, *Titanic Exhibition: History or Graverobbing?*, CHI. TRIB., Dec. 12, 1999, [http://articles.chicagotribune.com/1999-12-12/news/9912120236\\_1\\_titanic-artifacts-salvagers-titanic-exhibition](http://articles.chicagotribune.com/1999-12-12/news/9912120236_1_titanic-artifacts-salvagers-titanic-exhibition).

136. *Search*, SHIPWRECK.NET, <http://www.shipwreck.net/omesearch.php> (last visited Jan. 21, 2013).

137. *Recovery*, SHIPWRECK.NET, <http://www.shipwreck.net/recovery.php> (last visited Jan. 21, 2013).

138. *Recovery*, SHIPWRECK.NET, <http://www.shipwreck.net/recovery.php> (last visited Jan. 21, 2013).

139. Neil Cunningham Dobson & Hawk Tolson, *A Note on Human Remains from the Shipwreck of HMS Victory, 1744*, Odyssey Marine Exploration Papers, <http://www.shipwreck.net/pdf/OMEPaper11-HumanRemainsfoundonVictory.pdf> (2010).

140. *Id.*

141. *Id.*

deep sea explorers, discovered the *Titanic* in 1985.<sup>142</sup> Upon making this historic find, his first impulse was to loot the site for the valuable treasures that lay within. However, he suppressed his inclination to substantially profit from his fortuitous discovery and chose not to disturb the site.<sup>143</sup> Deep sea exploration and salvage firms, despite opinions to the contrary, do exhibit an ability to weigh the profits of the firm against intangible benefits, such as the benefit of preserving history.

The Eleventh Circuit's holding restricts Odyssey Marine's ability to synthesize the seemingly contradictory concepts of "good business" and "sound archaeological practice" by drastically reducing the sheer number of shipwrecks available for salvage. Rather than allowing exploration and salvage firms the leeway to explore wrecks and independently determine the identity and importance of a wreck, the Eleventh Circuit's holding effectively presumes that the salvage firm has malevolent intentions and creates an impenetrable protective scheme for the shipwreck. The court accomplished this by disallowing the severance of cargo from its ship and applying sovereign immunity to activities tenuously connected to a sovereign's duties.<sup>144</sup> This holding disincentivizes for-profit firms from searching the ocean bed for these shipwrecks as the template for a sovereign to seize a rediscovered wreck has been laid forth by the Eleventh Circuit.

#### B. *Odyssey Marine: A Microcosm of the Deep-Sea Salvage Industry*

On May 18, 2007, Odyssey Marine Exploration, Inc., a publicly traded company,<sup>145</sup> issued a press release announcing that the Black Swan wreck yielded over 500,000 silver and gold coins.<sup>146</sup> The date of the press release, not so coincidentally, is the date of Odyssey Marine's historic high stock price, a market close of \$8.32 per share.<sup>147</sup> Since the announcement of the Black Swan find, Odyssey Marine has suffered through the weakened global economy, as have all corporations and industries, but the lawsuits surrounding the Black Swan directly and distinctly impacted its share price. Odyssey Marine's stock lost half of its market value over two days following the magistrate judge issuing his

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142. Mullen, *supra* note 135.

143. *Id.*

144. Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel, 657 F.3d 1159, 1183 (11th Cir. 2011).

145. Odyssey Marine is traded under the ticker symbol OMEX on NASDAQ. See *Odyssey Marine Exploration, Inc. NASDAQ:OMEX quotes & news—Google Finance*, GOOGLE FINANCE, <http://www.google.com/finance> (enter OMEX into the stock ticker search box) (last visited Apr. 11, 2013) [hereinafter OMEX Stock Profile].

146. *Press Release Archive*, SHIPWRECK.NET, <http://www.shipwreck.net/pr134.php> (last visited Jan. 21, 2013).

147. OMEX Stock Profile, *supra* note 145.



Report and Recommendation on June 3, 2009.<sup>148</sup> Unsurprisingly, given the procedural history of this case, Odyssey Marine's share price has yet to recover; it had a fifty-two week share price range of \$2.41 to \$4.36 per share for April 11, 2012, to April 11, 2013.<sup>149</sup> While the decline and stagnation of Odyssey Marine's stock price cannot solely be tied to one lawsuit—the firm has operated at a loss for years—the courts' decisions impacted Odyssey Marine's future business model as a deep-sea salvage company.<sup>150</sup>

#### 1. THE EXPANSION OF SALVAGE FOR HIRE AND CONTRACT BIDDING

Odyssey Marine quickly took to heart the lessons impressed upon it by its extensive and lengthy court battles over the *Mercedes*. Rather than face the trouble of seeking permission to salvage a wreck after its discovery, Odyssey Marine entered into contracts with the British government prior to finding and salvaging three wrecks.<sup>151</sup> It entered into its first contract with the British government in 2010 to find the *SS Gairsoppa*, which it successfully located and salvaged.<sup>152</sup> Under the terms of the contract, the United Kingdom retained title to the wreck, but Odyssey Marine was entitled to eighty percent of the proceeds from the wreck, even after recovering its costs.<sup>153</sup> This business model allows Odyssey Marine to limit its exposure to the usurpation of its finds under the guise of sovereign immunity, thus saving the company the hassle of undergoing litigious battles in the future.

The contractual business of Odyssey Marine contrasts greatly with the exploratory efforts required by the Amsterdam Project. Without contractually guaranteed salvage awards and rights, a firm that innocently finds and salvages the treasures from a wreck may be left without even recovering its costs, as Odyssey Marine experienced with the *Mercedes*.<sup>154</sup> The business decision to embrace contract bidding reflects how

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148. Berfield, *supra* note 29. See also OMEX Stock Profile, *supra* note 145 (After closing at \$3.87 on June 3, 2009, Odyssey Marine's stock price opened at \$1.44 on June 4, 2009).

149. *Id.*

150. Odyssey Marine has operated in the red for years. In 2012, the COO and President of Odyssey Marine, Mark Gordon, stated, "This is the year we become a real company. I know it sounds crazy. We've lost money for all these years and now we're talking about billions." Berfield, *supra* note 29.

151. *Id.*

152. *UK Government Awards Exclusive Salvage Contract to Odyssey Marine Exploration for Recovery of SS Gairsoppa Silver Cargo*, SHIPWRECK.NET, <http://www.shipwreck.net/pr195.php> (last visited Jan. 21, 2013).

153. *Press Release: Odyssey Provides Operational Update*, SHIPWRECK.NET, <http://www.shipwreck.net/pr252.php> (last visited Jan. 21, 2013).

154. After spending \$2.6 million dollars on the recovery of the *Mercedes*, the only compensation Odyssey Marine ever received for its work was a reimbursement from Spain for \$20 for each bucket that held the 594,000 coins, valued at nearly \$500 million, that it was forced

diminished profits have been accepted in exchange for safe havens from lawsuits.

While this contract bidding process seems like safe alternative to the method used in the Amsterdam Project, contract bidding requires knowledge of the wreck that may be difficult, if not impossible, to obtain prior to finding a wreck.<sup>155</sup> Unfortunately, contract bidding is not a workable premise for each wreck. The Amsterdam Project began as an exploratory effort seeking thirty different shipwrecks.<sup>156</sup> Upon discovering the Black Swan site, Odyssey Marine had to dispel reports that the ship may have been two British ships, either the *HMS Sussex* or the *Merchant Royal*.<sup>157</sup> The Black Swan site consisted of artifacts, valuables, and debris scattered over an area the size of several football fields, which further complicate the identification process.<sup>158</sup> Lastly, because the ship had exploded prior to sinking, the presence of a wreck, not its identity, was confirmed only after three sets of eyes reviewed the feedback from the exploratory equipment.<sup>159</sup>

The difficulties surrounding the identification of the *Mercedes* evince how contract bidding—a viable business model that Odyssey Marine has embraced—was untenable for the Amsterdam Project. Instead, salvage firms seeking shipwrecks comparable to the *Mercedes* must identify the ship to determine if it still enjoys the protections of sovereign immunity before claiming proper title to it. To forsake entering into a contract prior to commencing a project manifests the financial and legal risks that a company is willing to assume for a project. For the Amsterdam Project, the risk did not outweigh the reward. Odyssey Marine gained notoriety due to the high-profile nature of its case against Spain, but heightened exposure cannot recoup \$500 million.

## 2. A DUPLICITOUS ALTERNATIVE

Watching two Spanish C-130 cargo planes laden with the 595,000 silver and golden coins salvaged by Odyssey Marine depart Florida for Spain prompted Melinda MacConnel, Vice President and General Coun-

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to hand over to Spain. The 551 buckets required to transport the coins entitled Odyssey Marine to \$11,020. Berfield, *supra* note 29.

155. Presumably, proper identification of a wreck would be required prior to bidding. Also, contract bidding likely requires foresight into the potential cost and reward for a given project, which would potentially require intimate knowledge of the shipwreck, its cargo, its condition on the ocean floor, and any number of other variables analyzed when bidding on a project.

156. Odyssey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel, 675 F. Supp. 2d 1126, 1130 (M.D. Fla. 2009), *aff'd* 657 F.3d 1159 (11th Cir. 2011).

157. *Press Release Archive*, SHIPWRECK.NET, <http://www.shipwreck.net/pr135.php> (last visited Jan. 21, 2013).

158. *Odyssey Marine Exploration*, 675 F. Supp. 2d at 1136.

159. Berfield, *supra* note 29.

sel of Odyssey Marine, to predict the rise of a new alternative to bidding on salvage contracts prior to locating a sunken vessel: “[I]n the future no one will be incentivized to report underwater finds. . . . [A]nything found with a potential Spanish interest will be hidden or even worse, melted down or sold on eBay.”<sup>160</sup> Though this sentiment likely was borne out of frustration and anger, a kernel of truth lay behind her bitter words. When contrasting the law of finds and law of salvage in *Hener v. United States*, the court specifically addressed how the law of finds encourages devious, secretive behavior while the law of salvages encourages transparency and cooperation between the salvor and the title holder of the ship.<sup>161</sup> As Odyssey Marine witnessed half a billion dollars in treasure it salvaged fly across the ocean without receiving even a salvage award, the company’s legal counsel verified the incentive to forego decent and customary activities for clandestine and devious ones.

### 3. DIVERSIFYING THE CORPORATE STRUCTURE

To expand its business opportunities and seize other growth opportunities, Odyssey Marine altered both its corporate structure and business model after the Eleventh Circuit issued its holding. Odyssey Marine diversified its holdings by investing in Neptune Minerals, Inc., a company that specializes in exploring for underwater mineral deposits employing similar technologies and techniques utilized to discover sunken vessels.<sup>162</sup> Instead of searching for shipwrecks valued at \$50 million, Neptune Minerals seeks mineral deposits valued at \$50 billion.<sup>163</sup> As an added incentive to this new corporate direction, Odyssey Marine avoids some of the legal complications encountered in the Amsterdam Project by making claims to minerals rather than sunken vessels by incorporating deep-sea exploration ventures within its corporate umbrella.

Odyssey Marine’s response to adversity—save for Ms. MacConnel’s advocacy for circumventing customary maritime law—represents only the fluctuations of a single market actor, not the industry as a whole. Odyssey Marine, as a publicly traded firm, transparently dis-

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160. Raphael Minder, *Spain Gains Access to Trove of Shipwreck Coins*, N.Y. TIMES (Feb. 21, 2012), <http://www.nytimes.com/2012/02/22/world/europe/spain-gains-access-to-trove-of-shipwreck-coins.html>.

161. *Hener v. United States*, 525 F. Supp. 350, 356 (S.D.N.Y. 1981) (“Admiralty favors the law of salvage over the law of finds because salvage law’s aims, assumptions, and rules are more consonant with the needs of marine activity and because salvage law encourages less competitive and secretive forms of conduct than finds law.”).

162. Berfield, *supra* note 29.

163. *Id.*

closes its investments, its projects, and its current condition. It cannot hide its activities and strategies, which make it a readily surmisable bellwether for the industry. While a single market participant is not a proxy for the health of an entire industry, it can indicate a shift in the ideal business model for deep-sea salvage firms.

C. *The Crossroads: Can Governments Promote Deep-Sea Salvage While Also Encouraging the Preservation of Deep-Sea Wrecks?*

Application of the commercial exceptions to the FSIA requires determining whether shipwrecks are vessels serving either a commercial or governmental purpose. Courts create incentives or disincentives that encourage and discourage the salvage of sunken vessels by broadening or narrowing the commercial exceptions. When the Eleventh Circuit concluded that the *Mercedes* operated as a military vessel when it sank during the Battle of Saint Vincent Bay, it held that customs contemporary to the lifetime of vessels determine whether the commercial exception to the FSIA applies to the vessel.<sup>164</sup> Although the Eleventh Circuit's holding was ultimately too late to shield the *Mercedes* from Odyssey Marine's Amsterdam Project, the holding paternalistically applies sovereign immunity to protect shipwrecks. In lieu of encouraging the exploration and discovery of shipwrecks, the Eleventh Circuit's holding uses sovereign immunity to cordon off these shipwrecks from disturbance where they will remain cloaked under the depths of the sea.

1. REJECTING MODERN LEGAL DOCTRINE IN FAVOR OF THE PAST, AND VICE-VERSA

Admiralty law prides itself on its ancient pedigree.<sup>165</sup> The Eleventh Circuit applied a modern statute—the FSIA—to the salvage of a two-hundred-year-old shipwreck using reasoning predicated on customs dating back two hundred years.<sup>166</sup> Invoking the custom of the early 1800s

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164. “According to Spanish naval historians, it was an accepted practice at this time for a country to provide military transport for private property when the transport would pass through areas patrolled by hostile nations’ warships.” *Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*, 657 F.3d 1159, 1172 (11th Cir. 2011).

165. Nations have applied this body of maritime law for 3,000 years or more. Although it would add little to recount the full history here, we note that codifications of the maritime law have been preserved from ancient Rhodes (900 B.C.E.), Rome (Justinian’s *Corpus Juris Civilis*) (533 C.E.), City of Trani (Italy) (1063), England (the Law of Oleron) (1189), the Hanse Towns or Hanseatic League (1597), and France (1681), all articulating similar principles. And they all constitute a part of the continuing maritime tradition of the law of nations—the *jus gentium*.

*R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 960 (4th Cir. 1999)

166. *Odyssey Marine*, 657 F.3d at 1177.

to determine that the *Mercedes* acted in the capacity of a sovereign at the time of its demise allowed the Eleventh Circuit, as a court sitting in admiralty, to implement the ancient “laws of the sea.”<sup>167</sup>

For *Odyssey Marine*, however, this was not an idiosyncrasy of courts sitting in admiralty; it was a restraint on the application of the FSIA’s commercial exception. *Odyssey Marine* also cited evidence dating to the *Mercedes*’ sea-faring existence to persuade the court to find that the *Mercedes* was not acting in the capacity of a sovereign. Even though the ship’s manifest demonstrated that the vessel served as a commercial vessel transporting people and goods for a price, this tactic did not persuade the court.<sup>168</sup> For *Odyssey Marine*, this holding sits in direct contrast to the holding adopted by the U.S. Supreme Court in *Republic of Argentina v. Weltover, Inc.*, which denies sovereign immunity to government actors behaving in the capacity of a “private player,” not a government regulator.<sup>169</sup> Rather than rely upon modern jurisprudence, the Eleventh Circuit deferred to the findings of historians in its application of the FSIA.

Unlike the historically inclined method the court used to apply sovereign immunity, the Eleventh Circuit decided the severability of the *Mercedes* from its cargo based on modern, domestic laws rather than the custom of Spain or the United States at the time the ship sank. The Eleventh Circuit held that the legislative intent of modern laws such as the ASA and the SMCA dictated that a vessel and its cargo are not severable.<sup>170</sup> But the Eleventh Circuit neglected to acknowledge alternative modern judicial influences on the issue of severability by failing to address the Congress Amicus. This amicus brief explicitly detailed how the SMCA was inapplicable to military ships used in the same manner as the *Mercedes* because “[c]arrying private passengers and commercial

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167. *Titanic*, 171 F.3d at 960.

168. The cargo manifest for The MERCEDES, which was produced by *Odyssey* but completely ignored by Spain and by the district court, as well as 173 extant receipts showing freight charges paid (issued by a civilian silver master under the auspices of the Customs authority), clearly indicate that at least 75% of the cargo (measured by value) was privately owned and commercially shipped. In both of her South American ports of call local officials advertised the sailing of the vessels in order to solicit commercial cargoes. Furthermore, private merchants, having placed cargo on The MERCEDES in Spanish American ports, were charged freight at the rate of 1% of the declared value of their consignments.

Brief of *Odyssey Marine*, *supra* note 25, at 29 (citations omitted).

169. *Compare Odyssey Marine*, 657 F.3d at 1177 (holding that the *Mercedes* acted as a sovereign by transporting private cargo of Spanish citizens for a fee because this was a function of the Spanish Navy at that point in time) *with Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992) (holding that “[a] foreign state engaging in ‘commercial’ activities ‘do[es] not exercise powers peculiar to sovereigns’; rather, it ‘exercise[s] only those powers that can also be exercised by private citizens.’”).

170. *Odyssey Marine*, 657 F.3d at 1180–81.

cargo for freight, payable to the government, should not be construed as ‘military non-commercial service’ such as to bring a vessel within the protections of the SMCA.”<sup>171</sup>

Had the court reviewed case law contemporaneous with the demise of the *Mercedes*, the court would have found case law elucidating the Supreme Court’s intent to sever the sovereign immunity of a vessel from its cargo. In 1822, the Supreme Court held in *The Santissima Trinidad* that “whatever may be the exemption of the public ship herself, and of her armament and munitions of war, the prize property which she brings into our ports is liable to the jurisdiction of our Courts . . . .”<sup>172</sup> Whereas the court relied upon a historic usage of military vessels to apply sovereign immunity to the *Mercedes*, it inconsistently looked to contemporary law to find for Spain on the issue of the severability of the cargo from the vessel.

#### D. *The Solution: Encourage the Exploration of the Ocean Floor and the Discovery of Lost Vessels*

Courts can encourage the exploration of the ocean floor and the discovery of lost vessels by restricting the application of sovereign immunity towards sunken vessels and severing the relationship between a vessel and its cargo. Technological advances spurring growth in the deep-sea exploration and salvage industry have already prompted Congress to enact legislation encouraging the discovery of these vessels,<sup>173</sup> and courts should follow suit with similar encouragement. The over-ager application of the doctrine of sovereign immunity discourages marine salvage firms from undertaking these expensive and arduous ventures.<sup>174</sup> Odyssey Marine has operated at a loss for years and has shifted its focus away from discovering shipwrecks and toward underwater mineral exploration.<sup>175</sup> Limiting proactive initiatives—like Odyssey Marine’s Amsterdam Project—by punishing those fortuitous companies that find vessels limits the opportunities to discover and explore sunken vessels.

#### 1. EXPAND THE APPLICATION OF THE FSIA’S COMMERCIAL EXCEPTION

Rolling back the broad application of sovereign immunity to vessels like the *Mercedes* not only promotes industrial activities like Odys-

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171. Congress Amicus, *supra* note 89, at 15–16.

172. *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 354 (1822).

173. *See, e.g.*, Abandoned Shipwreck Act, 43 U.S.C. §§ 2101–2106 (2006).

174. Berfield, *supra* note 29.

175. *Id.*

sey Marine's salvage business, but is also consistent with existing caselaw.<sup>176</sup> To accomplish this, courts do not need to adopt the following sterilization of the FSIA proposed by Odyssey Marine in its brief to the Eleventh Circuit: "[a]ny logical reading of SMCA and background principles of international law incorporated by the FSIA compel the same result: a vessel is not entitled to foreign sovereign immunity if it was engaged in commercial acts."<sup>177</sup> Instead, courts need to evaluate the role of a vessel vis-à-vis its flag nation under the test elucidated in *Weltover*: is the vessel a "private actor" or a "market regulator?"<sup>178</sup> By ultimately deferring to the opinions of historians and the customs of colonial kingdoms from a bygone era to grant sovereign immunity to the *Mercedes*, the court shrouds the vessel in an unwarranted protective veil.

Courts must balance the principle of comity against the commercial interests of salvage firms that desire to uncover sunken vessels and disturb their (at one time) final resting place, but comity cannot serve as the primary motivation when ruling on an issue. This over-adherence to the principle of comity is evidenced by the Eleventh Circuit justifying its application of the ASA and the SMCA to the *Mercedes* due to the obligations the United States owed to Spain as laid forth in the Treaty of Friendship from 1902.<sup>179</sup> Based on this Treaty, the United States owed Spain the duty to "the same assistance and protection and the same immunities which would have been granted to its own vessels in similar cases."<sup>180</sup> But this did not dictate that the courts of the United States should appease Spain by automatically grant the *Mercedes* immunity from arrest. The United States owed Spain the duty to review its case under the same standard as the one granted to American ships.

The Eleventh Circuit failed to uphold this duty and examine the *Mercedes* under the framework propounded by the Supreme Court in *Weltover*. Instead, the Eleventh Circuit went to painstaking lengths, as documented above, to demonstrate that only the release of the *Mercedes* from arrest would preserve the vessel's, and Spain's, sovereign immunity. Diplomacy, like any delicate legal issue, requires the balancing of interests. The salvage of foreign-flagged vessels in the high seas is no exception. The court extended far too much deference to Spanish author-

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176. See *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992) (holding that a sovereign's actions are commercial within the meaning of the FSIA when it acts in the manner of a private player, not a market regulator).

177. Brief of Odyssey Marine, *supra* note 25, at 17.

178. *Weltover*, 504 U.S. at 614.

179. *Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*, 657 F.3d 1159, 1180–81 (11th Cir. 2011).

180. Treaty Between the United States and Spain of Friendship and General Relations art. X, July 3, 1902, 33 Stat. 2105.

ity by holding that a frigate transporting civilians and their cargo, for a carriage fee, acted in the capacity of a sovereign. Had the court held that the *Mercedes* was not immune under the commercial exception by acting as a “private player,” not as a “market regulator,” the court would have demonstrated respect for the tenet of sovereign immunity without misconstruing it.

## 2. ALLOW THE SEVERANCE OF CARGO FROM ITS VESSEL UNDER CERTAIN SITUATIONS

Courts sitting in admiralty should recognize, under certain conditions, a distinction between a vessel and its cargo when defining the *res* and sever the two. The Eleventh Circuit primarily justified its strict adherence to the non-severability of a vessel from its cargo based upon two narrow statutes, the ASA and the SMCA.<sup>181</sup> These statutes are tailored to pertain specifically to abandoned vessels and sunken military craft—not any sunken vessel. By misapplying these statutes to the *Mercedes*, the court ignores the legislative intent of those statutes. The Congress Amicus specifically states that the SMCA does not apply to military vessels “[c]arrying private passengers and commercial cargo for freight, payable to the government.”<sup>182</sup> When the property of private citizens was placed in the cargo hold of the *Mercedes* in 1804, the property remained separate and severable from the property of the Kingdom of Spain. The title to the cargo transferred to Spain only when the Eleventh Circuit misconstrued the application of modern legislation enacted by the United States Congress. A vessel and its cargo are inseverable in specific instances, as the ASA and SMCA demonstrate, but the Eleventh Circuit should not have applied these restrictive pieces of legislation to this issue.

## VI. CONCLUSION

Two hundred years after igniting Spain’s entry into the Napoleonic Wars, the *Nuestra Señora de las Mercedes* once again was at the heart of international conflict—*Odyssey Marine Exploration, Inc. v. The Unidentified Shipwrecked Vessel*. By consenting to a broad interpretation of the doctrine of sovereign immunity, the Eleventh Circuit’s holding serves as

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181. While the SMCA and the ASA do not state cargo is part of the vessel for immunity purposes, they show the protections awarded to a sunken sovereign vessel also extend to the cargo aboard that vessel. As evidenced by the SMCA, those protections are heightened when the sunken vessel is a military vessel. We grant the cargo on a sunken Spanish military vessel the same sovereign immunity protection we grant the vessel.

*Odyssey Marine*, 657 F.3d at 1181.

182. Congress Amicus, *supra* note 89, at 15–16.



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a limitation to the search and discovery of vessels lost to the depths of the ocean. By drastically limiting the commercial exception to the FSIA's application of sovereign immunity, salvage firms are now in peril of losing any claim that can be nebulously tied to the activities of a sovereign. To embolden the salvage industry, a business that already operates at the margins of profitability, courts need to expand both the commercial exception in the FSIA and the severability of a vessel and its cargo.

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