

Valentín Bou Franch - Mariano J. Aznar-Gómez (*)

SPANISH PRACTICE ON ANCIENT SUNKEN WARSHIPS AND OTHER STATE VESSELS

SUMMARY: 1. The Spanish Imperial Fleet. — 2. Spain's claims on Spanish galleons sunken abroad. — 2.1. The initial Spanish practice. — 2.2. The case of Juno and La Galga de Andalucía. — 2.2.1. The history of Juno and La Galga. — 2.2.2. The legal claims on *Juno* and *La Galga*. — 2.2.3. The United States District Court for the Eastern District of Virginia (Norfolk Division). — 2.2.4. The Spanish decision to appeal. — 2.2.5. The United States Court of Appeals for the Fourth Circuit. — 2.3. The case of San Salvador. — 2.3.1. The history of San Salvador. — 2.3.2. Spain's attitude towards the San Salvador. — 3. Foreign ancient warships sunken in Spanish maritime zones. — 3.1. Spanish Legislation on Underwater Cultural Heritage: A « Puzzle »? — 3.2. Reading Spanish Legislation with « International Law Lenses ». — 3.3. The particular case of (the alleged) HMS *Sussex*. — 4. The conformity of Spanish practice with international law.

1. *The Spanish Imperial Fleet*

The important technical and scientific developments and improvements on the art of navigation that took place in Spain from the second half of the XV century onwards, navigating for the first time through the high seas without following the coastline, allowed Spain to build up an overseas Empire in a relatively short period of time (1). Between the

(*) Associate Professors on Public International Law at the University of Valencia, Spain. This work has been written in the framework of the research programme CTIDIB/2002/251. The authors wish to express their gratitude to the Spanish authorities for all the documentation that they kindly proportioned us for writing this paper.

(1) On these important technical and scientific developments and improvements on the art of navigation, see LÓPEZ PIÑERO, *El arte de navegar en la España del Renacimiento*, Barcelona, 1986. According to this author, the Spanish handbooks on the art of navigation were broadly spread away all over Europe. As an example, it can be quoted that the *Arte de navegar*, 1545, by Pedro de Molina reached fifteen editions translated into French between 1554 and 1635, five editions translated into Dutch from 1580 to 1598, three in Italian (1554, 1555 and 1609) and two in English. The *Breve*

raise and the collapse of the Spanish Empire, that is, between the first famous voyage of *Christoforus Columbus* towards the *Indias Orientales* (Eastern Indies) or America in 1492 and the lost of the last oceanic Spanish colonies in 1898, following the wars on the Philippines and Cuba against the United States of America, hundreds of Spanish vessels shipwrecked all over the world. This fact makes Spain one of the current States with one of the largest underwater archaeological and historical heritage.

One of the most detachable characteristics of this immense underwater heritage consists in that it is constituted mainly by wrecks of vessels that can be almost all of them considered as State vessels. The Spanish vessels engaged in the discovery and colonisation of the Spanish Empire were all of them strongly controlled and monopolised by the Spanish Crown. It must be remembered that for a number of years *Christoforus Columbus* tried to convince the Catholic Kings on the need of funding his first expedition to the Eastern Indies. On several occasions, his petition was rejected but, at the same time, the Spanish Kings forbade the *Duke of Medinaceli* on very strong mandatory terms to provide private funding to the *Columbus* project (2). Even the first discovery voyages to the new world were all of them authorised by a royal document, entitled *Capitulaciones*, which was an unilateral grant from the Spanish Kings to the discoverers, allowing their voyages and fixing the exclusive rights for the discoverers under the condition that they discover some land, but the *Capitulaciones* also established the rights reserved to the Kings over that lands, in which their public dominion was always expressly mentioned (3). After the third *Colum-*

compendio de la sphaera y de la arte de navegar, by MARTÍN CORTÉS, had ten editions translated into English between 1561 and 1630. See LÓPEZ PIÑERO, *Ciencia y técnica en la sociedad española de los siglos XVI y XVII*, Barcelona, 1979, p. 202.

(2) According to J. H. Elliott, this decision, among many other evidences, shows the desire of the Catholic Kings to affirm the power of the Crown over the privileges of the Aristocracy and, at the same time, reveals that the Spanish Kings refusal to the Aristocracy participation, through private funding for the *Columbus* project, was due to their fear to the establishment of overseas independent fiefs. See ELLIOTT, 1986, *La España Imperial 1469-1716*, 5th ed., Barcelona, 1986, p. 59.

(3) For instance, in the *Capitulaciones* that the Spanish Kings granted to *Magallanes* and *Falero* on the discovery of the Islands of the Species (*Capitulaciones y asiento que Sus Majestades mandaron tomar con Magallanes y Falero sobre el descubrimiento de las Islas de la Especiería*), dated 22 March 1518, it is read what follows: "Por quanto vos el bachiller *Rui Falero* é *Hernando de Magallanes*, [...] queriéndonos hacer señalado servicio, os obligais de descubrir en los dominios que nos pertenesces é son

bus voyage to America, and due to the increasing pressure of different private initiatives to set sail to the new world, in 1500 the Catholic Kings, by a Royal Decree, reminded everybody that a royal license was needed in order to be engaged in discovery voyages or otherwise “the vessel or vessels and goods, maintenances and arms and stores and any other thing that will be carried on board” (4) will be confiscated by the Crown. This monopolistic control exercised by the Crown was perfected in 1503 with the establishment in Sevilla of the *Casa de la Contratación* or *Casa de Indias*, an organ of the Kingdom of Spain with full powers on questions concerning the navigation and trade between Spain and its overseas Empire (5).

At least three different categories of wrecked vessels (6) from the

nuestros en el mar Oceano, dentro de los límites de nuestra demarcacion, islas y tierras firmes é ricas especerías, con otras cosas de que seremos muy servidos y estos nuestros reinos muy aprovechados, mandamos asentar para ello con vosotros la capitulación siguiente. Primeramente, que vosotros con la buena ventura hayais de ir é vayais á descubrir á la parte del mar Oceano, dentro de nuestros límites é demarcacion, é porque no sería razon que yendo vosotros á hacer lo susodicho se vos atravesasen otras personas á hacer lo mesmo, é habiendo consideracion á que vosotros tomais el trabajo de esta empresa, es mi merced y voluntad, é prometo que por término de diez años primeros siguientes, no daremos licencia á persona alguna que vaya á descubrir por el mismo camino é derrota que vosotros fueredes [...]”. Reproduced from the *Archivo de Indias* in Sevilla, Spain, *leg. 4^o de Relaciones y Descripciones*.

(4) We translate. The original Spanish text provided for that “el navío o navíos e marcaduras, mantenimientos e armas e pertrechos e otras cualquier cosas que llevaren”.

(5) On the functions carried out by the *Casa de la Contratación* concerning the navigation between Spain and its overseas Empire, see Pulido Rubio, *El Piloto Mayor de la Casa de la Contratación de Sevilla*, Sevilla, 1950. It must be highlighted that the *Casa de la Contratación de las Indias*, founded only twelve years after the first *Columbus* voyage to America, as an organ of the King’s power also controlled all the movements of men and goods to and from America. As a result, at the *Archivo de Indias* and at the *Archivo de Simancas* are registered all the vessels that sailed between Spain and its overseas Empire, indicating the name and description of the vessels, the name, sex and age of each individual passenger or member of the crew or troops on board, as well as the goods, belongings and arms of each particular vessel that during several centuries formed the Spanish Imperial Fleet.

(6) The chance that a vessel from the Spanish Imperial Fleet could be sunken was a real risk, very well known since the beginning of the Spanish Empire. It must be recalled that in the very first *Columbus* voyage to America, one of the three famous caravels, the *Santa María* (also known as *La Gallega*), was lost after shipwrecking in the Caribbean Sea on 25 December 1492. Her belongings and crew were transported into another caravel, *La Niña*, and then used for building a fortification on land, called *La*

Spanish Imperial Fleet deserve a special attention for the purposes of this work. Wrecks of Spanish warships represent the first category. In this category, the most known kind of vessels included, although not with an exclusive character, are the famous Spanish galleons (7), on which a legend has arisen about many sunken galleons transporting huge quantities of silver and gold from America to Spain (8). As far as the importation of precious metals from America increased, security reasons determined that, by 1560, Spain had already developed and perfected a navigation system based on convoys. Each year two convoys set sail from the south of Spain to America (9). The first convoy, which was called *La Flota* (The Fleet), initiated the route back to Spain from the Mexican Gulf during the month of April; the second convoy, which was escorted by six or eight warships, received the collective name *Galeones* (Galleons), and departed from Panama during the month of August, picking up the vessels coming back to Spain from the southern coasts of South America. Both The Fleet and the Galleons met at Havana, where escorted by an additional number of warships set sail together towards Spain, in a number that each year oscillated between 60 and 130 vessels (10).

Navidad, which was the first European inhabited establishment in America. During the voyage by *Vicente Yáñez Pinzón* (1499-1500), who crossed for the first time the equator line and was also the first expedition reaching the Brazilian coasts, two out of his four vessels shipwrecked. It must be also recalled the fourth and last *Columbus* voyage (1502-1504) to America, when the Great Admiral lost the four vessels that formed his last fleet. See Morales Padrón, *Historia del descubrimiento y conquista de América*, Madrid, 1963, p. 47. It is also worth noting that, in an early date, such as 1555, *Alvar Núñez Cabeza de Vaca* published a book entitled *Naufragio y comentarios* (Shipwreck and commentaries).

(7) The word *galeón* (galleon) has different meanings. Originally it designed a special kind of warship, which was the result of adapting the Mediterranean *galera* (galley) to the needs of transoceanic navigation. But the term “galleon” has a broader meaning, as it is also used to embrace all the warships belonging to the Spanish Imperial Fleet.

(8) It must be noted that the development of galleons was due to military reasons, because they were fast ships, easily handy and with a powerful artillery on both sides. Galleons were frequently used to ensure the safety of the maritime trade with America, while the transport of goods was normally carried out by other ships (mainly, the ships called “*carraca*”), which were slow and heavy ships but with a bigger capacity for the cargo.

(9) The main destination ports in America were Vera Cruz, Cartagena and Nombre de Dios.

(10) Although the system of convoys was very expensive, it revealed itself as the

Many Spanish galleons shipwrecked along the main Spanish maritime routes (to and from Cádiz and *La Española*, that is, Santo Domingo and Haiti, or even to and from Acapulco and Manila (11)), while they were sailing the Caribbean Sea (12), or exploring the eastern and western shores of America. Another long number of Spanish galleons shipwrecked in other non-habitual Spanish maritime routes, due to different causes. For instance, due to the naval battle of *Lepanto* in 1571 against the Ottoman Empire (13) or to the disaster of the *Armada Invencible* (Invincible Armada) in her attack to England in

safest system of maritime transport against pirates. In fact, the only occasions when the enemies captured the convoys transporting the imperial treasure were on 1628, when the Dutch *Piet Heyn* capture a full convoy except three vessels, and on 1656 and 1657, when the English *Blake* destroyed the Spanish convoys.

(11) It must be remembered, for instance, that during the first Spanish expeditions through the Pacific Ocean during the XVI century, the number of shipwrecks of Spanish vessels was extraordinarily high. During the first voyage through the Pacific Ocean (expedition *Magallanes-Elcano*, 1519-1522), the vessels *Concepción* and *Trinidad* were lost around the Philippines Islands. The second Spanish expedition through the Pacific Ocean was a fleet of seven vessels that set sail from the western shores of Panama under the command of *Andrés Niño* at the beginning of 1521. The seven vessels were lost and nothing is known about the fate of this expedition. The second expedition that circumnavigated the World was initiated at La Coruña (Spain), on 24 August 1525, composed of seven vessels (*Santa María de la Victoria*, *San Gabriel*, *Santiago*, *Santi Spiritus*, *Anunciada*, *Santa María del Parral* and *San Lesmes*) under the command of *Juan Sebastián de Elcano*. Only eight men, out of 400 returned alive to Spain in 1536, but all the vessels were lost, most of them in the Pacific. The expedition of *Andrés de Saavedra* (1527-1529) lost the three vessels, included the *Florida*, after two frustrated attempts to return from the Philippines to Mexico navigating westwards. The expedition of *Hernando de Grijalva* (1536-1537) lost the vessel *Santiago* in New Guinea. The expedition of *Rui López de Villalobos* (1542-1545) set sail from Jalisco, Mexico, to the Philippines. After the fourth frustrated Spanish attempt to return to Mexico crossing westwards the Pacific Ocean, the five vessels of his fleet were lost. See PRIETO, *El Océano Pacífico. Navegantes españoles del siglo XVI*, Madrid, 1972.

(12) In the Caribbean Sea, the Spanish fleet discovered for the first time a “new” meteorological phenomenon, the hurricanes, that cause the shipwreck of many Spanish vessels. The first reports of this “new” meteorological phenomenon are linked to the fourth and last *Columbus* voyage to America. When the Great Admiral reached *La Española*, he met a long Spanish fleet ready to return to Spain. He advised the Governor of *La Española*, Mr. *Ovando*, to postpone the departure of this fleet because a strong storm was forming nearby. The Governor did not take his notice into account and the following day all his fleet disappeared under a Caribbean hurricane.

(13) During this battle, 152 Ottoman warships were sunk, 117 Ottoman warships were captured and only 46 warships were able to escape.

1588 (14), many Spanish galleons were sunk in the eastern Mediterranean Sea or along the coasts of England and Ireland. Even in the wars that at the end of the XIX century Spain held against the United States, which ended with the lost of Cuba and the Philippines for the Spanish Empire, many wood Spanish warships shipwrecked fighting the iron United States warships. In other cases, the shipwrecks of Spanish galleons took place in other more unusual latitudes, such as it was the case with the Spanish fleet that, under the command of the Admiral *Gabriel de Castilla*, set sail from Peru to Antarctica, disappearing all the vessels of his fleet in the Antarctic Ocean in 1603, south of 64° South latitude (15).

Wrecked vessels owned or operated by the Spanish Empire and that were used only on government non-commercial services represent the second category. Among the vessels that may be included in this second category, it is worth mention, for instance, those devoted exclusively to carry out scientific expeditions. In 1570, the Emperor *Felipe II* (Philip the Second) ordered the organisation of a Royal Scientific Expedition devoted to the study of the *cosas naturales de las nuestras Indias* (natural things of our Indias) under the command of *Francisco Hernández*. This expedition lasted six years and it is considered as the first modern scientific expedition. This same Spanish King and his successors organised several royal scientific expeditions and during these scientific voyages some vessels shipwrecked. Some of these expeditions have been very famous, like the expedition of the *Captain D. Alejandro Malaspina* (1789-1794) on the corvettes *Descubierta* and *Atrevida* or the voyage of the corvette *María Pía*, which in 1803 circumnavigated the world carrying on board the smallpox vaccine.

Wrecks of vessels owned or operated by the Spanish Empire but that were used on government non-commercial service, although not with an exclusive character, compose the third and last category of sunken vessels. Among this last category of sunken Spanish vessels, it can be recalled that from 1564-1565 until 1815, date of the Mexican independence from Spain, a permanent and regular line of maritime

(14) It must be remembered that 130 warships composed the Invincible Armada. Although the enemy captured none of these warships, at least two thirds of them shipwrecked, being unable to return back to Spain after the disastrous voyage of the Invincible Armada.

(15) See COLACRAI DE TREVISAN, *El ingreso de la Antártida a la escena mundial*, in *Rivista di studi politici internazionali*, 1983, p. 386.

navigation between Acapulco (Mexico, America) and Manila (the Philippines, Asia) was established for the transport of men and the trade of goods (16). Many vessels that sailed this maritime route also shipwrecked during these voyages.

The numerous vessels from the Spanish Imperial Fleet that shipwrecked between 1492 and 1898, their cargo and the belongings of these vessels, represent a very important part of the Spanish underwater historical and archaeological heritage. In most of the cases, these wrecks raise the question whether Spain still retain State sovereign immunity on them. However, in all cases, the question of their protection as underwater cultural heritage must not be forgotten.

2. *Spain's claims on Spanish galleons sunken abroad*

2.1. *The initial Spanish practice*

Before the adoption of the Act 16/1985, of 25 June 1985, on the Spanish Historical Heritage (17), Spain, as many other States, lacked a clear State policy concerning the protection of its underwater historical and archaeological heritage, represented in part by its ancient sunken warships and other State vessels. Before that date, marine technology had not developed enough and the issue of recovering from the bottom of the seas wrecks and other historical objects from ancient sunken State vessels was considered as a strange possibility, highly improbable in practice.

However, as marine technology developed, the risks of historical wrecks and other objects coming from Spanish sunken galleons being

(16) In 1564 *Miguel López de Legazpi* set sail from Acapulco and began his expedition towards the Philippines Islands. The following year, in 1565, *Andrés de Urdaneta*, who took part in the expedition of *Miguel López de Legazpi*, turned back sailing through the parallel 42^o, reaching the Californian coasts and then Acapulco, establishing the fastest maritime route between Asia and America. The voyage of *Andrés de Urdaneta* was the fifth Spanish attempt to discover the “*tornaviaje*” (the return voyage) from Manila (the Philippines) to Acapulco (Mexico). *Urdaneta*'s success settled the maritime route that for the following 250 years sailed the *Nao de Acapulco* or the *Buque de Manila* (the Acapulco or Manila vessels). After the voyages of *López de Legazpi* and *Urdaneta*, and following the maritime route settled by them, the vessel *San Jerónimo* initiated this permanent and regular navigation line on 1 May 1566 and it was ended with the voyage of the vessel *Magallanes* in 1815.

(17) Published in the *Boletín Oficial del Estado* (State Official Bulletin), hereinafter quoted as *B.O.E.*, of 29 June 1985.

rescued and sold by private companies became evident. The phenomenon of private sea treasure hunters arose at a time when Spanish domestic law did not pay any legal attention to the protection of its underwater historical heritage. Thus, it was not strange at all that when the first trials on the property rights of ancient Spanish galleons sunken abroad and rescued by private companies took place, Spain neither attended to these trials nor filed any claim in those litigations, asserting a legal interest in these wrecks (18). As a result of this lack of State policy on the protection of wrecked vessels sunken abroad, Spain lost any chance it might enjoy for claiming its sovereign and property rights on the wrecks of its galleons that were adjudicated by foreign domestic tribunals during this period. That was what in fact happened with the wreck of the warship *Nuestra Señora de Atocha* in 1976 (19), as well as with the wrecks of the Spanish galleons *Santa Rosaela*, *San Lorenzo del Escorial* and *Santa Clara* in 1983 (20).

(18) As the Decision of 21 July 2000 by the United States 4th Circuit Court of Appeals (*Sea Hunt, Inc. and Commonwealth of Virginia v. the Unidentified Shipwrecked Vessel or Vessels*) noted, “In other cases where abandonment was found for Spanish wrecks, Spain made no claim of ownership. See *Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F. 2d 330, 337 (5th Cir. 1978) (noting that « (t)he modern day government of Spain has expressed no interest in filing a claim in this litigation as a successor owner »); *Lathrop v. Unidentified, Wrecked & Abandoned Vessel*, 817 F. Supp. 953, 956 (M. D. Fla. 1993) (finding that « no one... asserted an interest in the alleged vessel »)”.

(19) *Nuestra Señora de Atocha* was a Spanish galleon that, together with other seven vessels out of a fleet of twenty-eight vessels, sank on 5 September 1622 in the Strait of Florida. Together with the eight vessels, 550 people and a cargo of gold, silver and jewels worth more than one half a million ducats were lost. The wreck was located approximately 10 nautical miles off the coasts of Florida, that is, on the continental shelf of the United States at that time. This case was adjudicated by the Judgment, dated 28 April 1978, by the United States District Court of Florida in *Treasure Salvors, Inc. v. Abandoned Sailing Vessel*, in *Federal Supplement*, v. 408, p. 907 (South District of Florida, 1976). See STRATI, *The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea*, The Hague/London/Boston, 1995, p. 273.

(20) During the second half of the XVIII century, these three galleons sank after running into a hurricane in the Atlantic Ocean, carrying a king's ransom in gold altarplate and other valuable items. On 13 January 1981, two private American salvage companies (*Subaqueous Exploration & Archaeology, Ltd.* and *Atlantic Ship Historical Society, Inc.*) identified their wrecks within the territorial sea of the State of Maryland. This case was decided by the Judgment, dated 21 December 1983, by the United States District Court of Maryland, in *Subaqueous Exploration & Archaeology, Ltd. and Atlantic Ship Historical Society, Inc., v. The Unidentified, Wrecked and Abandoned Vessels, Etc.*

More over, it has been recorded that, at this time, Spain even pledged to a blackmail by a private company that nowadays would be considered as a plundered of the underwater heritage. This private company, operating under the cover of credibility provided for by some professional archaeologists, applied for and obtained a permit for “archaeological site excavation” from the Government of the Philippines and then sold the recovered “treasure” to the Spanish Government for exhibition in its public museums, under the imminent threat that, otherwise, the recovered objects would be immediately sell to an anonymous private buyer. A case of this type did in fact occur with the cargo recovered from the *San Diego*, a Spanish galleon that sank near the Philippines and whose “goods” were finally bought for the Naval Museum of Madrid (21).

After the adoption of the Act 16/1985, of 25 June 1985, on the Spanish Historical Heritage, this attitude changed completely. From then onwards, Spain has asserted at any occasion that has arisen its sovereign and property rights on whatever Spanish warship or other State vessel sunken abroad.

2.2. *The case of Juno and La Galga de Andalucía*

This change of attitude became evident with the action that Spain carried out in order to claim its sovereign and property rights on the wrecks of two ancient galleons, *Juno* and *La Galga de Andalucía* (22). At this time, Spain decided to make a strong claim on them and, for the first time, appeared on a trial before a United States domestic tribunal to defend its rights in law in order to claim and protect its own underwater historical heritage (23).

et al, in *Federal Supplement*, v. 577, p. 597. See McWILLIAMS, *Salvage of Ancient Treasure Ships*, in *Lloyd's Maritime and Commercial Law Journal*, 1986, p. 16; GARABELLO, *Will oysters and sand save the underwater cultural heritage? The Santa Rosa case*, in CAMARDA & SCOVAZZI (eds.), *The protection of the underwater cultural heritage*, Milano, 2002, p. 73.

(21) Quoted by NEGUERUELA, *Managing the maritime heritage: the National Maritime Archaeological Museum and National Centre for Underwater Research, Cartagena, Spain*, in *The International Journal of Nautical Archaeology*, 2000, p. 189. See AZNAR-GÓMEZ, *Legal Status of Sunken Warships 'Revisited'*, in *Spanish Yearbook of International Law*, 2001-2002 (in print).

(22) *La Galga de Andalucía* (The Greyhound from Andalusia) will be quoted hereinafter as *La Galga*.

(23) On this judicial adjudication, see AZNAR-GÓMEZ, *La reclamación española*

2.2.1. *The history of Juno and La Galga*

The fifty-gun frigate *La Galga* was commissioned into the Spanish Navy in 1732 (24). *La Galga* initially served as part of Spain's Imperial Mediterranean Fleet, but in 1736 she sailed for Buenos Aires to join squadrons patrolling the Atlantic and Caribbean. For the next fourteen years, *La Galga* served as a convoy escort, travelling mainly between Veracruz, Havana, and Spain's principal home naval base at Cádiz.

Under the command of *Don Daniel Houny*, an Irishman at the service of Spain, *La Galga* left Havana on her last voyage on 7 August 1750, charged with escorting a convoy of merchant ships across the Atlantic Ocean to Cádiz, and carried on board the Second Company of the Sixth Battalion of Spanish Marines, Spanish Royal Property, and English military prisoners. On 18 August 1750, the convoy run into a hurricane near Bermuda. The storm separated the vessels in the convoy and forced them westward towards the American coast. During the seven-day storm, *La Galga* lost three masts and began to take on water. Efforts to lighten the ship by pushing her cannons overboard were unsuccessful, and on 25 August 1750, *La Galga* sank off the coast of the Eastern Shore near the Maryland/Virginia border. Most of the crew and passengers were able to reach land safely.

Following the shipwreck, *Captain Houny* attempted to salvage items from the wreck, but was blindered in doing so by the pillaging and looting of the vessel by local residents. In November 1750, *Captain Houny* was able to procure the assistance of *Governor Ogle* of Maryland in protecting the wreck, but before further salvage could be made a second storm come and broke up what was left of the vessel, ending the salvage efforts. *La Galga* then lay undisturbed for almost 250 years,

sobre los galeones hundidos frente a las costas de los Estados Unidos de América: el caso de La Galga y La Juno, in *Revista Española de Derecho Internacional*, 2000, p. 247; VIERUCCI, *Le statut juridique des navires de guerre ayant coulé dans des eaux étrangères: le cas des fregates espagnoles Juno et La Galga retrouvées au large des côtes des États-Unis*, in *Revue Générale de Droit International Public*, 2001, p. 705; WHITE, *Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634 (2000), cert. denied, 121 S.Ct. 1079 (2001), in *American Journal of International Law*, 2001, p. 678.

(24) All the data concerning the history of *La Galga* and *Juno* have been obtained from the Affidavit by *David Beltrán Catalá*, Counsel for Judicial Affairs of the Embassy of Spain in Washington D.C., which was included in Spain's claim as presented to the Norfolk District Court. Documentation provided by Spanish authorities on file with the authors. This United States domestic tribunal considered these data as "non disputed facts".

until the recent salvage attempts by *Sea Hunt*, which is the United States private maritime salvage company that claimed to have discovered the wrecks of *La Galga* and *Juno*.

The *Juno* was built in 1789. A thirty-four-gun frigate, she entered the service of the Spanish Navy in 1790, and sailed with a squadron of ships across the Atlantic to Cartagena. *Juno* served Spain for the next ten years in the Atlantic and the Caribbean, travelling many of the same routes *La Galga* had travelled half a century earlier.

On 15 January 1802, *Juno* set sail from Veracruz under the command of *Don Juan Ignacio Bustillo*, bound for Cádiz (Spain). A severe storm caused damage to *Juno*, and forced her to put in at San Juan where she underwent repairs for seven months (25). On 1 October 1802, *Juno* left San Juan, together with the frigate *Anfiriza*, again bound for Cádiz. *Juno*'s mission was to transport the Third Battalion of the Regiment of Africa, along with the soldiers' families and several other civilian officials, back to Spain after a long period of service abroad.

On 19 October 1802, a storm arose which separated *Juno* and *Anfiriza*. The storm continued, and by 22 October 1802, *Juno* was taking on water. Her crew was forced to jettison her cannons in an attempt to lighten the vessel. On 25 October 1802, the battered *Juno* encountered the American schooner *La Favorita*. The two vessels sailed westward together in the hopes of reaching an American port in which to weather the rest of the storm before *Juno* succumbed to her leaks. *Juno* continued to take on water, however, and during a lull in the storm on 27 October 1802, *Captain Bustillo*, ordered the passengers and crew of *Juno* to begin transferring to *La Favorita*. Only seven persons were able to transfer before the storm picked up and forced the vessels apart, making further transfers impossible.

On the morning of 28 October 1802, *La Favorita* lost sight of *Juno* in a heavy fog. *La Favorita* could come close enough only to hear the anguished cries for help as *Juno* went under. When the fog cleared, *Juno* was gone, and would not be seen again. A total of 432 sailors, soldiers and civilians perished when *Juno* sank. Although Spanish

(25) *Juno* has at times been reputed to have sunk carrying a fabulous treasure. The Spanish Navy archives, however, show that, although *Juno* was carrying a substantial shipment of government funds when she left Vera Cruz, the money was offloaded at Puerto Rico when *Juno* entered the dockyard for extended repairs and was transferred to another vessel, *Asia*, which continued on to Spain.

authorities ordered an investigation into the loss of *Juno*, the location of the wreck was not discovered until *Sea Hunt*'s recent efforts.

2.2.2. *The legal claims on Juno and La Galga*

The matter was a legal dispute over the status of two shipwrecked vessels believed to be the remains of the Spanish vessels *Juno* and *La Galga*, which were lost off the shores of present-day Virginia in 1802 and 1750, respectively. Pursuant to the Abandoned Shipwrecked Act of 1987, that is, a United States domestic act (26), the Commonwealth of Virginia had asserted a claim of ownership over *La Galga* and *Juno*. The ASA gives States title to shipwrecks that are abandoned and are embedded in the submerged lands of a State (27). *Sea Hunt, Inc.* is a private maritime salvage company based in the Eastern Shore of Virginia. The Virginia Marine Resources Commission (28), an agency of the Commonwealth of Virginia, granted *Sea Hunt* permits to explore for the shipwrecks off the Virginia coast and conduct salvage operations, including the recover of artefacts from the wrecks (29). *Sea Hunt* began to explore for shipwrecks within the areas of its permits and it spent about a million dollars in conducting remote sensing, survey, and diving and identification operations. *Sea Hunt* claimed that its efforts had resulted in finding the remains of *La Galga* and *Juno*.

To avoid interference with its operations, *Sea Hunt* initiated an *in rem* admiralty action against the two wrecks on 11 March 1998. *Sea Hunt* sought a declaratory judgment that the shipwrecked vessels “(had) never been subject to the sovereign prerogative of the Kingdom of Spain and (were) subject to admiralty’s laws of abandonment and the law of finds”; that “the Commonwealth of Virginia be adjudged the true, sole and exclusive owner of the Shipwrecked Vessel(s)”; and that any items salvaged therefrom by *Sea Hunt* be distributed pursuant to the permits issued by Virginia. In the alternative, *Sea Hunt* sought a liberal salvage award for its efforts. On 12 March 1998, the United States District Court for the Eastern District of Virginia (Norfolk Division) (30) issued an Order directing the arrest of the shipwrecked

(26) Hereinafter quoted as ASA. See 43 U.S.C. §§ 2101-2106 (1994).

(27) See *Id.*.2105 (a) and (c)

(28) Hereinafter quoted as VMRC.

(29) Under these permits, *Sea Hunt*'s “fair share” was to be 75 percent of the objects recovered or their cash value.

(30) Hereinafter quoted as the Norfolk District Court.

vessels and granting *Sea Hunt* exclusive rights of salvage until further notice. The Norfolk District Court also directed *Sea Hunt* to publish a general notice of the claim and to send specific notice of the action to both the United States and to Spain. This last aspect of this Order must be highlighted, as it is very probably the best way to apply in a concrete case the general duties of States to protect and to co-operate in the protection of the historical and archaeological heritage, as enshrined in Article 303, paragraph 1, of the United Nations Convention on the Law of the Sea (31), despite the fact that the United States is not yet a State Party to UNCLOS.

In response to the execution of that judicial order, on 18 May 1998, the United States Government filed a Motion to intervene, and a claim on behalf of Spain asserting ownership of the vessels (32). In addition, the United States filed an answer asserting the United States' own interest in exerting regulatory authority over those wrecks (33). On 21 August 1998, the United States filed a Motion to Modify the Preliminary Injunction on 12 March 1998, in order to allow the National Park Service to regulate the salvage operations of *Juno* and *La Galga* as well as to protect the remains of the vessels and their crew and passengers from disruption or destruction by *Sea Hunt*. Also on 21 August 1998, *Sea Hunt* filed a Motion to Strike and Dismiss the United States'

(31) Hereinafter quoted as UNCLOS. It is highly regrettable that the domestic tribunals of other States have not always followed this practice. For instance, according to Stevens Birch and D. M. McElvogue, on 4 May 1985 the private company *Streedagh Strand Armada Group* discovered the wrecks of three Spanish galleons, *La Lavia*, *La Juliana* and the *Santa María de Visón*, belonging to the Levant Squadron of the Invincible Armada. After a huge gale, the three galleons shipwrecked on 21 September 1588 at Donegal Bay, only two miles off the Irish coasts. At the end of 1987, litigation began between the *Streedagh Armada Group* and the Irish Office of Public Works over the rights of ownership of the three wrecks. The adjudication revoked the group's rights as salvors in possession in favour of the Irish Government. Any notice either of the finding or of the trial was ever given to the Spanish Government. See BIRCH and McELVOGUE, *La Lavia, La Juliana and the Santa María de Visón: three Spanish Armada transports lost off Streedagh Strand, Co Sligo: an interim report*, in *The International Journal of Nautical Archaeology*, 1999, p. 265.

(32) The United States sought to represent Spain's interests in the wrecks according to what it believed to be its obligations under the Treaty of Friendship and General Relations Between the United States and Spain, signed on 3 July 1902. See 33 *Stat.* 2105.

(33) The Pleadings filed by the United States were initially filed on 13 May 1998 in the Alexandria Division of the Norfolk District Court. They were forwarded to this Court, where they were filed on 18 May 1998.

motion to intervene on its own behalf, a Motion in opposition to the United States' motion to intervene on behalf of Spain, and a Motion for Partial Judgment on the Pleadings dismissing the claim of Spain.

On 23 September 1998, the Norfolk District Court granted *Sea Hunt's* Motion to strike and dismiss the United States' motion to intervene on its own behalf (34). Two days later, on 25 September 1998, the Norfolk District Court also denied the Motion to intervene filed by the United States on behalf of Spain (35). In its Order dated 25 September 1998, this Court held that the United States did not have the authority to act as counsel to represent Spain's interests in this matter. The Norfolk District Court granted Spain 90 days to obtain counsel and to make an appearance on its own behalf, and advised the United States that if it wished to assert its interests in this action, it should do so through an *amicus curiae* brief or other statement of interest (36). Action on *Sea Hunt's* Motion for partial judgment on the pleadings was delayed to allow Spain time to obtain new counsel and to respond (37).

Spain responded through private counsel on 23 December 1998 (38), with a Motion to intervene, a verified claim and an answer

(34) See *Sea Hunt, Inc. v. Unidentified Vessel or Vessels*, 182 F. R. D. 206 (E.D. Va. 1998). The 23 September 1998 Order was later on modified by an Amended Opinion and Order on 29 October 1998. The modification was merely to clarify the Court's language, and did not affect the substance of the original Order.

(35) See *Sea Hunt, Inc. v. Unidentified Vessel or Vessels*, 22 F. Supp. 2d 521, 526 (E.D. Va. 1998). The Norfolk District Court never expressly ruled on the merits of the United States' Motion to modify the preliminary injunction, but the Court did secure *Sea Hunt's* agreement that *Sea Hunt* would not resume operations until there had been a final adjudication of Spain's rights on the vessels.

(36) The United States initially filed a notice of appeal of the 25 September Order, but withdrew the appeal on 10 February 1999, thus revealing the Norfolk District Court of any jurisdictional concerns it had during the pendency of the appeal. See *Sea Hunt, Inc. v. Unidentified, Shipwrecked Vessel or Vessels, etc.*, No. 2:98 cv 281 (E.D. Va. 5 March 1999) (Order asserting jurisdiction).

(37) In "an abundance of caution", *Sea Hunt* filed a Motion to renew its motion for partial judgment on the pleadings on 16 February 1999, after Spain had made an appearance through its own counsel. As the Norfolk District Court never dismissed *Sea Hunt's* original motion, the Motion to renew was considered as unnecessary.

(38) As a result of an agreement between the Spanish Ministry on Foreign Affairs and the Spanish Ministry on Education and Culture (in particular, the State Secretary on Culture), it was decided that Spain would appear on these proceedings. Accordingly the Embassy of Spain in Washington D.C. contracted the services, as private counsel of Spain in these legal proceedings, of *Convington & Burling*, which would be paid for their services by the State Secretary on Culture of the Spanish

on its own behalf. At the same time, Spain filed the instant Motion for Summary Judgment and a brief in opposition to *Sea Hunt's* motion for Partial Judgment on the Pleadings. Also on 23 December 1998, the United States filed a Motion for authorisation to file a statement of interest and an *amicus curiae* brief. On 24 February 1999, the Norfolk District Court entered an Order in which, among other things, allowed Spain until 15 March 1999, to file any remaining briefs (39). At a hearing on 5 March 1999, the Norfolk District Court granted the United States' Motion to file an *amicus curiae* brief and statements on interests.

Spain's verified claim stated that the Kingdom of Spain:

"[...] was and still is the true and *bona fide* owner of the vessels *Juno* and *La Galga*... and that title and ownership interest in said vessels has never been abandoned or relinquished or transferred by the Kingdom of Spain".

Spain put forth affidavits and exhibits showing that at the time of their sinking both vessels were serving as vessels of the Royal Navy, that both vessels are currently on the register of the Spanish Navy and have never ceased to be sovereign property of Spain (40), and that transfer

Ministry on Education and Culture. The firm of lawyers *Convington & Burling* was assisted by the Legal Service of the Spanish Ministry on Foreign Affairs and by the Counsel for Judicial Affairs of the Embassy of Spain in Washington D.C.

(39) In addition, the 24 February 1999 Order waived the page limitations for briefs contained in Local Rule 7.

(40) It is interesting to note that the authority in United States case law concerning the legal consequences of raising in a trial the jurisdictional question of sovereign immunity over a public vessel is represented by the Judgment of 31 January 1938 of the U.S. Supreme Court, in the case *Compañía Española de Navegación Marítima, S.A. v. The Navemar*, available at <http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=case&court=us&vol=303&invol=68>. In that case, the Spanish Ambassador filed a suggestion in the cause, challenging the jurisdiction of the United States Court on the ground that the *Navemar* was a public vessel of the Republic of Spain, not subject to judicial process of the Court, and asking that it directed delivery of the vessel to the Spanish Acting Consul General in New York. As the United States Supreme Court acknowledged: "Admittedly a vessel of a friendly Government in its possession and service is a public vessel, even though engaged in the carriage of merchandise for hire, and as such is immune from suit in the courts of admiralty in the United States. *Berizzi Bros. Co. v. S.S. Pesaro* 271 U.S. 562, 46 S.Ct. 611; compare *The Exchange v. M'Faddon*, 7 Cranch 116. And in a case such as the present it is open to a friendly Government to assert that such is the public status of the vessel and to claim her immunity from suit, either through diplomatic channels or, if it chooses, as a claimant in the Courts of the United States. If the claim is recognized and allowed by the

or abandonment of the vessels would require formal authorisation by the Government of Spain, which had not occurred.

The United States filed an *amicus curiae* brief in support of Spain and attached Statements of Interest of the United States Departments of Defense and State. The Defense Department's statement (41) sets forth the United States' military interest in honouring, as a matter of international comity and customary international law, the principle that a nation's sunken naval vessels are sovereign property that may not be disturbed without express authorisation. The Defense Department's declaration observes that, in view of the United States' strong desire to protect the remains of the 1,500 or more U.S. naval vessels sunk around the world in the waters of other nations, it is particularly important that "the United States and its constituent states (grant) reciprocal recognition of the sovereign title and ownership interests of other sovereign governments in their wrecks in United States waters".

The State Department's submission (42) likewise articulates the position of the United States that, as a matter of customary international law, naval vessels of all nations are entitled to recognition and protection as sovereign property unless captured prior to sinking under the customary rules of war or expressly abandoned by the flag State. The State Department further declared that it is "the policy of the United States Department of State to recognise claims by foreign governments — such as in this case by the Government of Spain regarding the warships *Juno* and *La Galga* — to ownership of foreign warships sunk in the waters of the United States..". Indeed, the State

Executive Branch of the Government, it is then the duty of the Courts to release the vessel upon appropriate suggestion by the Attorney General of the United States, or other officer acting under his direction. [...] The foreign Government is also entitled as of right, upon a proper showing, to appear in a pending suit, there to assert its claim to the vessel, and to raise the jurisdictional question in its own name or that of its accredited and recognized representative. [...]". In the case of *Juno* and *La Galga*, Spain also claimed that, as warships, their wrecks also enjoyed sovereign immunity. However, while expressly reserving and asserting its sovereign immunity, Spain intervened in the District Court because it recognized that the Supreme Court's recent decision in *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998), "indicated that the District Court had jurisdiction to adjudicate Spain's claims of ownership of the vessels because they are not physically in Spain's possession".

(41) Issued by Rear Admiral *John D. Hutson*, Judge Advocate General of the Navy and Defense Department Representative for Ocean Policy Affairs.

(42) Issued by *Mary Beth West*, then-Deputy Assistant Secretary of State for Oceans, Fisheries and Space.

Department concluded that, with respect to this case, “[i]t is in the foreign policy interest of the United States to honour the request of the Government of Spain”.

2.2.3. *The United States District Court for the Eastern District of Virginia (Norfolk Division)*

The Norfolk District Court adjudicated this case through its Judgment of 22 April 1999 (43). It must be noted that, at the very last minute, *Sea Hunt* submitted on 15 March 1999 a “Notice of Filing” and accompanying affidavits asserting for the first time in this litigation that *Juno* and *La Galga* were not warships at the time of their respective sinking and were therefore not entitled to the special status and protection that the law affords to warships (44). Although the Court showed its concerns about the reasons for waiting so long to bring this potential factual dispute to the Court’s attention, the Norfolk District Court found “[i]t unnecessary to the disposition of this case to decide whether *La Galga* and *Juno* were indeed warships at the time of their respective sinkings” (45). This criticable assertion of the Norfolk District Court was based on an erroneous interpretation on the rule of express abandonment, as it was settled down with authority in United States case law, in particular in the case *Columbus-America Discovery Group v. Atlantic Mut, Ins. Co.* (46).

Therefore, the Norfolk District Court based its reasoning not in the special character of the wrecks, as warships enjoying immunity

(43) U.S. District Court for the Eastern District of Virginia, Judgment of 22 April 1999, *Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 47 F. Supp. 2d 678 (E.D. Va. 1999). We have used a copy of the Judgment delivered to the parties on 27 April 1999, which is attached to the Official Letter, dated 3 May 1999, from the General Director on Scientific and Cultural Relationships of the Spanish Ministry on Foreign Affairs to the General Director on Cultural Communication and Cooperation of the Spanish Ministry on Education and Culture. Documentation provided by Spanish authorities on file with the authors.

(44) Spain immediately brought a Motion to strike them, asserting that the factual issue *Sea Hunt* wished to raise at this late stage of the litigation was not a “genuine” issue of material fact that would allow *Sea Hunt* to avoid summary judgment, but rather a “contrived” issue of fact created by *Sea Hunt* as a last minute attempt to avoid summary judgment. Spain further argued that *Sea Hunt*’s affidavits clearly contradict the factual position that *Sea Hunt* had taken since the inception of this litigation.

(45) *Ibid.*, p. 12-13.

(46) 974 F. 2d 450, 461 (4th Cir. 1992), *cert. denied*, 507 U.S. 1000 (1993).

pursuant to international law, but on the “universal rule of express abandonment” (47). Given this “rule of express abandonment” that prevails “when an owner of a shipwreck appears in court to make a claim”, the Norfolk District Court dismissed *Sea Hunt*’s effort to claim ownership of *La Galga* and *Juno* under a theory of implied abandonment. According to this Court:

“The crux of this case is the issue of abandonment. There is no doubt that at one point in time *Juno* and *La Galga* belonged to Spain. The current ownership of the shipwrecks depends on whether Spain has abandoned its claim to the two vessels. Virginia’ s, and by extension *Sea Hunt*’s, claim rests on the Abandoned Shipwreck Act of 1987 (“ASA”), a federal act. Under the ASA: “the United States asserts title to any abandoned shipwreck that is: (1) embedded in submerged lands of a State..”.. 43 U.S.C.A. §2105(a) (West Supp. 1998). Title over a shipwreck covered under the ASA is transferred to the State in whose waters the wreck is located. See 43 U.S.C. §2105(c). Thus, if this Court finds that *Juno* and *La Galga* have at any time been abandoned by Spain, then according to ASA, the wrecks belong to Virginia. If, on the other hand, the Court finds that Spain has never abandoned *Juno* and *La Galga*, then Spain retains ownership over them” (48).

The implications of the *Columbus-America* rule in this case, pursuant to the Norfolk District Court, were that, whether or not *Juno* and *La Galga* were considered as warships, “their owner, the Kingdom of Spain, had appeared to claim ownership to them”. Therefore, *Sea Hunt*, “in pressing its claim for possession of the vessels under the law of finds, must show by « strong and convincing evidence » that the shipwrecks have been expressly abandoned by Spain”. Unless “*Sea Hunt* can do so, the Court must apply the law of salvage, which operates under the premise that « the original owners still retain their ownership interests in such property »” (49). Hence, the Norfolk

(47) According to the Norfolk District Court: “The statement of the law of abandonment by the Court in the *Columbus-America* could not be clearer. Although the Court clearly allows for an inference of abandonment for shipwrecks which have been lost and undiscovered for some time, in a case where the original owner appears, abandonment may not be inferred, but must be proven, regardless of how long the ships have been lost, and regardless of the character of the vessel. The *Columbus-America* case makes no distinction between private vessels and public vessels such as warships. Because of the assertion of a universal rule of express abandonment, it is irrelevant in this case for the purpose of determining abandonment whether *Juno* and *La Galga* were warships in the service of Spain at the time of their sinking”. *Ibid.*, p. 18.

(48) *Ibid.*, p. 13-14.

(49) *Ibid.*, p. 19.

District Court went on analysing *Sea Hunt's* claim to the wrecked vessels based on three different legal grounds.

a) *The erred Norfolk District Court's ruling on La Galga*

The first legal ground presented by *Sea Hunt* in order to prove that Spain had expressly abandoned *La Galga* was the Definitive Treaty of Peace Between France, Great Britain and Spain (Paris, 10 February 1763) (50), a treaty that ended the Seven Years War and transferred several of Spain's territories in the new world to Great Britain. Its Article XX reads as follows:

"His Catholick majesty cedes and guaranties, in full right, to his Britannick Majesty, Florida with Fort St. Agustín, and the Bay of Pensacola, as well as all that Spain possesses on the continent of North America, to the East or to the South East of the river Mississippi. And, in general, everything that depends on the said countries and Land, with the sovereignty, property, possession, and all rights, acquired by treaties or otherwise, which the Catholick King and the Crown of Spain have had till now over the said countries, lands, places, and their inhabitants; so that the Catholick King cedes and makes over the whole to the said King and to the Crown of Great Britain, and that in the most ample manner and form [...] It is moreover stipulated, that his Catholick Majesty shall have power to cause all the effects that may belong to him, to be brought away, whether it be artillery or other things" (51).

After interpreting this provision, the Norfolk District Court concluded asserting that:

"The sweeping language of Spain's cession in Article XX, together with the background of the complete change of sovereignty in the North American colonies, makes it unlikely that Spain intended to, or would have been allowed

(50) Published in English, Spanish and French in PARRY, *Consolidated Treaty Series*, vol. 42, p. 320.

(51) The original Spanish text provides that: "Su Majestad Católica cede [...] toda propiedad a Su Majestad Británica, la Florida con el fuerte de San Agustín y la Bahía de Panzacola, como también todo lo que la España posee en el continente de la América setentrional al este ó al sudeste del río Misisipi; y generalmente de todo lo que depende de los dichos Países y Tierras con la soberanía, propiedad, posesion y todos los derechos adquiridos por tratados ó de otra manera, que el rei católico y la corona de España han tenido hasta ahora á los dichos Países, Tierras, Lugares y sus habitantes, así como el rei católico cede y transfiere el todo al dicho rei y á la corona de la Gran Bretaña; y esto de la manera y la forma más amplia [...] que Su Majestad Católica tendra la facultad de hacer transportar todos los efectos que puedan pertenecerle, ya sea artilleria ó ya otros".

by Great Britain to maintain a claim of ownership over the wreck of *La Galga* off the coast of Virginia. Spain had ceded its rights over everything it owned in North America east of the Mississippi, including its rights to sunken vessels” (52).

Hence, the Court legal finding was that Article XX of the 1763 Treaty constituted a “« strong and convincing evidence » under the *Columbus-America* standard of an express abandonment by Spain of its title to *La Galga*. *La Galga* is consequently an abandoned shipwreck, and belongs to Virginia under the terms” of the ASA. The Norfolk District Court so found notwithstanding the facts that the Treaty (1) does not refer to *La Galga* by name, (2) makes no mention of sunken shipwrecks, and (3) by its terms, does not affect rights to property located seaward of the shoreline (53). Obviously, nothing of this first ground presented by *Sea Hunt* affected *Juno*, shipwrecked in 1802, that is, long after the 1763 Treaty.

b) *The correct Norfolk District Court’s ruling on Juno*

The second legal ground presented by *Sea Hunt* in order to prove that Spain had expressly abandoned *Juno* was the Treaty of Amity, Settlement and Limits Between the United States of America and His Catholic Majesty (the Kingdom of Spain), signed on 22 February 1819, a treaty that ended the conflict between Spain and the United States arising out of the War of 1812. The purpose of the 1819 Treaty was to “designate with precision the limits of their respective bordering territories in North America” (54). The key provision of the 1819 Treaty is its Article 2, which provided for the transfer of territory from Spain to the United States in the following terms:

“His Catholic Majesty cedes to the United States, in full property and sovereignty, all the territories which belong to him, situated to the Eastward of

(52) Judgment of 22 April 1999, p. 21.

(53) This Court acknowledged the final proviso of Article XX expressly preserving the King of Spain’s rights to “all the effects that may belong to him”, but hypothesised that the parties had probably intended for there to be some termination date governing the King’s rights, notwithstanding the fact that they had not provided for a termination date in the text of the Treaty.

(54) It was the second time that Spain ceded Florida. Spain initially ceded Florida to Great Britain in the Treaty of 1763. During the American Revolution, however, Spain recaptured Pensacola, and all of Florida was given back to Spain by treaty in 1784. In 1819, Spain again ceded Florida, this time to the United States.

the Mississippi, known by the name of East and West Florida. The adjacent Islands dependant on said Provinces, all public lots and squares, vacant Lands, public Edifices, Fortifications, Barracks and other Buildings, which are not private property...”.

In this case, the Norfolk District Court considered this provision “much narrower than Article XX of the 1763 Treaty. “[I]n the 1819 Treaty provision, Spain specifically ceded only « territories », namely Florida, and not « all that Spain possesses » as in the 1763 Treaty. Nothing in Article 2 implies that Spain has ceded anything other than territory and the structures erected on that territory [...] « Eastward of the Mississippi » [...] which is « known by the name of East and West Florida »”. As far as the wrecks of both *Juno* and *La Galga* are located in Virginia and not in Florida, this 1819 Treaty did not affect them. Thus, the legal finding of the Norfolk District Court was that “Spain did not expressly abandon *Juno* (and *La Galga*) through the 1819 Treaty” (55).

As a third and last legal ground, *Sea Hunt* argued that the declaration of war between Spain and the United States in 1898 operated as an express abandonment of Spain’s property in the United States, because “the existence of a state of war with Spain gave the United States the right to confiscate Spanish vessels in United States waters”.

Although the Norfolk District Court declared that it is clear that it is within the bounds of the law to confiscate a warship or a merchant vessel belonging to the enemy during time of war, this Court also held that “[w]hat is equally clear to the Court is that such confiscations are not automatic; and that an enemy vessel must actually be seized in order to be forfeited” (56). Taking into account that there was no allegation by *Sea Hunt* that the United States had actual control over the wrecks at any time during the hostilities of 1898, or thereafter, the

(55) *Ibid.*, p. 23.

(56) *Ibid.*, p. 25. The Norfolk District Court based this assertion in previous United States case law: “It has long been the law in the United States that a declaration of war alone does not work to seize enemy property. In *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814), *Chief Justice Marshall* articulated that rule as follows: « It may be considered as the opinion of all who have written on the *jus belli*, that war gives the right to confiscate, but does not itself confiscate the property of the enemy... ». *Id.*, at 125. Moreover: « The proposition that a declaration of war does not, in itself, enact a confiscation of the property of the enemy within the territory of the belligerent, is believed to be entirely free from doubt ». *Id.*, at 127”.

legal finding of the Court was that “[W]ithout such actual possession by the United States, *Juno* was not abandoned by Spain during the Spanish-American War of 1898. Thus, Spain retains ownership over *Juno*” (57).

Therefore, the Norfolk District Court reached a Solomonic conclusion concerning the wrecks of *Juno* and *La Galga*:

“*Sea Hunt* has succeeded in showing by «strong and convincing» evidence that, through the 1763 Treaty, Spain has expressly abandoned title to *La Galga*. Therefore, title to *La Galga* now lies with Virginia under the ASA, and *Sea Hunt* may continue with its salvage efforts according to the terms of the VMRC permits. There has been no such evidence of abandonment, however, as to *Juno*. Neither the 1819 Treaty nor the declaration of war in 1819 contain any evidence of an abandonment of *Juno* by Spain. Therefore Spain retains title to *Juno*’s wreck, and Virginia has no claim to *Juno* under the ASA. *Sea Hunt* may not, without Spain’s permission, continue salvage operations on the remains of *Juno*”.

c) *The Norfolk District Court correctly denied Sea Hunt a salvage award*

After these rulings, the question remains as to whether *Sea Hunt* was entitled to a salvage award for *Juno* under the traditional law of salvage. Although the Norfolk District Court’s Judgment expressly took note that Spain had “[s]pecifically indicated that it wishes to treat *Juno* as a maritime grave and does not want the wreck to be salvaged”, the legal finding of this Court was that:

“As this issue has not been fully argued by the parties, the question of whether *Sea Hunt* is entitled to an award under salvage law for salvage work performed on *Juno* is expressly RESERVED, pending supplemental briefing by the parties. Each party to the case is ORDERED to submit a supplemental brief on the issue of whether *Sea Hunt* is entitled to a salvage award for *Juno* within 30 days of the entry of this Order. [...] *Amicus* United States is also granted leave to submit a brief on this issue if it so chooses” (58).

Accordingly, Spain, *Sea Hunt* and the United States submitted their supplemental briefs and finally, on 25 June 1999, the Norfolk District Court ordered the denial of any salvage award for *Juno* to *Sea Hunt*. The Norfolk District Court correctly denied a salvage award to *Sea Hunt* for work carried out with respect to *Juno* and the reasons for

(57) *Ibid.*, p. 26

(58) *Ibid.*, p. 26-27.

this should have been equally applicable to *La Galga*. As the Norfolk District Court observed, “Spain had specifically indicated that it wished to treat *Juno* as a maritime grave, and does not want the wreck to be salvaged”. Spain’s denial of salvage was therefore reasonable: Spain wished the *Juno*, which is the grave of over 425 of its citizens, to remain inviolate.

Spain’s intention to deny salvage was promptly communicated to *Sea Hunt*. The Norfolk District Court found that “[a]s early as September 24, 1997, more than five months before the filing of the current *in rem* action, *Sea Hunt* was informed during negotiations with the National Park Service that Spain might claim ownership of the wreck”. In its complaint, *Sea Hunt* stated that “[u]pon information and belief, one of the defendant Shipwrecked Vessel is that of *Juno*, a Spanish frigate that disappeared in the vicinity of the salvage sites in 1802”. Spain’s answer to the complaint affirmed ownership of *Juno* and included a Verbal Note from the Embassy of Spain indicating that the site of *Juno* should remain a maritime grave and that salvage should not be permitted. What is more, *Sea Hunt* had requested the United States National Park Service to contact Spain “to determine the ownership status of the subject shipwrecks”. On 12 March 1998, the United States National Park Service informed *Sea Hunt*’s president that Spain regarded the two wrecked vessels as the sovereign property of the Government of Spain, and that the vessels “may not be salvaged or disturbed without authorisation”. The same National Park Service advised that “any activity that would disturb the shipwrecks, including dredging or removal of artefacts, would be inconsistent with the instructions of the Government of Spain”.

In light of this, the District Court’s legal conclusion denying salvage was beyond challenge. Quoting settled authority, this Court observed that “potential salvors do not have an inherent right to save distressed vessels”. Rather, the Norfolk District Court held, an owner retains a right to refuse unwanted salvage services. This “doctrine of rejection”, it explained, “is an ancient one, and has been recognised by many courts”. As the Norfolk District Court concluded:

“because *Sea Hunt* had prior knowledge of Spain’s ownership interests and had reason to expect Spain’s ownership claim and refusal to agree to salvage activity on *Juno*, *Sea Hunt* cannot be entitled to any salvage award. See generally, *Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511, 1515 (11th Cir. 1985) (denying salvage where the owner of the vessel “may not even have desired for the property to be rescued”); *Bonifay v.*

Paraporti, 145 F. Supp. 879 (E.D. Va. 1956) (salvor not entitled to an award where salvage rendered without consent)".

d) *The Norfolk District Court's Order denying Spain's Motion to alter or amend the Judgment*

In response to the Norfolk District Court Judgment of 27 April 1999, in which this Court had speculated about the intent of Great Britain in entering into Article XX of the 1763 Treaty and had held that Spain had ceded *La Galga* to Great Britain, the British Embassy in Washington D.C. issued a formal Diplomatic Note to the U.S. State Department declaring the official views of Her Majesty's Government with respect to Article XX and requesting that those views be transmitted to the Norfolk District Court. The Embassy of Spain responded with its own Diplomatic Note, reconfirming the view of the Kingdom of Spain regarding the District Court's erroneous interpretation of the 1763 Treaty. Both Notes were filed with the Norfolk District Court as exhibits to Spain's Motion, dated 9 July 1999, to alter or amend the judgment in light of the concerns of the two nations that the Norfolk District Court had misinterpreted the terms of their treaty (59).

The British Note declares the United Kingdom's "view that Article XX of the 1763 Treaty cannot be interpreted as involving an express abandonment by Spain of its rights to the wreck of *La Galga*". Rather, the Note continues, "in Her Majesty's Government's view, the intention behind Article XX was to transfer sovereignty over the territories mentioned in that Article, and not to deal with, or otherwise affect, the quite separate issues of the ownership of shipwrecks on the waters adjacent to these or other territories in North America". The Note goes on to point out that "[t]his view is supported by the last sentence of Article XX which distinguishes movable, from immovable property".

The Spanish Note confirms Spain's agreement with the British Note and further affirms the importance of "the principle of sovereignty and non-interference with state vessels (that) was specifically recognised in the 1667 Treaty of Madrid between Spain and Great

(59) British Diplomatic Note 41, Attachment A to Spain's Memorandum in Support of its Motion to Alter or Amend the Judgment (8 July 1999); Spanish Diplomatic Note 60/99, Attachment B to the same Spain's Memorandum. Later on, Spain submitted, on 23 July 1999, a Reply Memorandum in support of the Motion of the Kingdom of Spain to alter or amend the Court's Opinion and Order of 27 April 1999. Documentation provided by Spanish authorities on file with the authors.

Britain and was reaffirmed to the fullest extent in Article II of the 1763 Treaty". With this wording the Embassy of Spain was referring to the fact, not commented by the Norfolk District Court, that Article II of the 1763 Definitive Treaty of Peace incorporates "word for word" the provisions of an earlier treaty between Spain and Great Britain, the 1667 Treaty of Peace and Friendship. This 1667 Treaty had instituted an agreed regime of understandings governing diplomatic, military, and trade relations between the two nations, and it had established rights of safe conduct and freedom of navigation for merchant and military vessels. Of particular importance to this case is Article XVII of the 1667 Treaty, under which it was agreed:

"that neither the said King of Great Britain, nor the King of Spain, by any mandate general, nor particular, nor for any cause whatsoever, shall embark or detain, hinder, or take for his respective service, any merchant, master of a ship, pilot, or mariner, their ships, merchandize, cloths or other goods belonging unto the one or the other, in their ports or waters, if it be not that either of the said Kings, or the persons to whom the ships belong, be first advertised thereof, and do agree thereunto" (emphasis added).

In Article XVII, each King pledged that he would not take possession of the other's ships, whether private or state-owned, without specific notice and express "agree[ment]". According to Spain's Note, by incorporating the terms of Article XVII "word for word", the 1763 Treaty therefore recognised the sovereign rights of each nation on its vessels and established an all-encompassing rule of non-abandonment absent express consent (60).

However, on 29 July 1999, the Norfolk District Court entered an Order denying Spain's Motion to alter or amend its Judgment of 27 April 1999.

2.2.4. *The Spanish decision to appeal*

Following the delivery of the Norfolk District Court's Judgment of 27 April 1999, immediately the Embassy of Spain in Washington D.C. made public that:

"Sin perjuicio de que en estos momentos se está estudiando la posibilidad

(60) The 1667 Treaty of Peace and Friendship was renewed in a series of subsequent treaties entered into by Spain and Great Britain in 1670, 1680, 1713, 1729, 1748, 1763, and 1814, and thus remained in effect throughout the period involved in this case.

de apelar contra la decisión en lo que se refiere a los restos de *La Galga*, la Embajada de España quiere hacer pública su satisfacción por el hecho de que por primera vez se haya reconocido por vía judicial la propiedad española sobre los restos del *Juno* así como la exclusiva capacidad de España para decidir sobre el futuro de los mismos” (61).

In a more detailed Report (62), the same Embassy strongly recommended the Spanish Ministry on Foreign Affairs to appeal against this Judgment on three different grounds. First, this Judgment was interpreted as ratifying Spain’s ownership on all Spanish vessels shipwrecked from 1763 onwards, but left Spain in the worst legal situation concerning the Spanish vessels shipwrecked before that date. Therefore this Report expressed the need to question the legal interpretation of the 1763 Treaty made by the Norfolk District Court (63). Second, it stated that the Norfolk’s Judgment seemed to be a Solomonic decision, trying to give satisfaction to both parties and not answering the legal grounds put forward by Spain. As the arguments used by Spain had been previously endorsed by several United States Federal Courts of Appeals, the need to appeal was underlined in order “to counter-balance the pro-salvage attitude of this Judge, *as well as his long age*”. Third and last, this Report considered that:

“*Esta resolución judicial no resuelve la cuestión principal que planteábamos, es decir la absoluta inmunidad de los barcos de guerra sea cual sea la fecha de hundimiento y el lugar en que se encuentren.* El Juez utiliza un subterfugio jurídico para no entrar en esta cuestión señalando que, fuere cual fuere la naturaleza de barco de guerra o no de ambos pecios, la doctrina aplicable sería siempre la del « abandono expreso ». Este argumento contiene una falacia en sí mismo, dado que la jurisprudencia de las Cortes de Apelación ha admitido reiteradamente que para los barcos privados cabe el abandono tácito. De hecho da la impresión de que la idea de la inmunidad de los barcos de guerra

(61) Press Communicate from the Embassy of Spain in Washington, D.C., dated 29 April 1999. Documentation provided by Spanish authorities on file with the authors.

(62) Report concerning the Spanish wrecks *Juno* and *La Galga*, attached to the facsimile dated 29 April 1999 from the Embassy of Spain in Washington D.C. to the Legal Office of the Spanish Ministry on Foreign Affairs. Documentation provided by Spanish authorities on file with the authors.

(63) It is interesting to note that this Report put forward for the first time the idea that, at least the Spanish vessels that shipwrecked off Florida before 1763, could be legally claimed by Spain, as this Judgment expressly recognised that Pensacola and Florida were reconquered by Spain and the subsequent treaties with the United States, including the declaration of war of 1898, do not contain an express abandonment act of Spain.

resultaba incompatible con el reconocimiento de derechos en favor de la compañía *Sea Hunt* sobre *La Galga* y que en consecuencia el Juez ha optado por « obviar » el problema mediante una afirmación de principios jurídicos inconsistente con la jurisprudencia de las Cortes Federales” (emphasis added).

Following the recommendations of this Report, the Spanish Ministries on Foreign Affairs and on Education and Culture agreed to proceed with the appeal (64). Accordingly, on 23 July 1999 Spain filed a provisional Notice of Appeal and, on 4 August 1999, an amended Notice of Appeal. But in this case it was not only Spain who appealed the lower Judgment concerning *La Galga*. Both the Commonwealth of Virginia and *Sea Hunt* also noted a cross-appeal with regard to *Juno* and the denial of a salvage award.

In its Opening Brief on Appeal before the United States Court of Appeals for the Fourth Circuit (65), Spain submitted two main lines of legal argument. First, that *Sea Hunt* had not made an “extraordinarily strong” argument showing that the 1763 Definitive Treaty of Peace contains “clear and convincing evidence” that the Kingdom of Spain “expressly” abandoned the vessel *La Galga* to Great Britain. Spain held that *Sea Hunt* faced an extraordinary burden in this case because, under the law of the Fourth Circuit, *Sea Hunt* had to prove by “clear and convincing” evidence that Spain “expressly” abandoned *La Galga* in the 1763 Treaty. Beyond that, because *Sea Hunt*’s abandonment argument turned upon a reading of a treaty that contradicted the interpretation embraced by the treaty parties, *Sea Hunt* had to, under clear Supreme Court precedent, present “extraordinarily strong” evidence that its interpretation was the correct one. The convergence of these principles in this case required that *Sea Hunt* make an “extraordinarily strong” showing that the 1763 Treaty contains “clear and convincing” evidence of an express abandonment by Spain. According

(64) See the Informative Note attached to the Official Letter, dated 14 May 1999, from the General Director on Scientific and Cultural Relationships of the Spanish Ministry on Foreign Affairs to the General Director on Fine Arts and Archives of the Spanish Ministry on Education and Culture. See also the Official Letter, dated 21 May 1999, from the General Subdirector on the Protection of Historical Heritage of the Spanish Ministry on Education and Culture to the General Director on Scientific and Cultural Relationships of the Spanish Ministry on Foreign Affairs. Documentation provided by Spanish authorities on file with the authors.

(65) Documentation provided by Spanish authorities on file with the authors.

to Spain, this was simply impossible because “*Sea Hunt* can make no such showing” (66).

And second, that the Norfolk District Court erred in denying Spain’s Motion to alter or amend its Judgment. Contrary to this District Court’s decision, Spain held that:

— The first clause of Article XX is expressly limited to property located on land, and does not reach property, like *La Galga*, that is situated on the seabed. Clear Supreme Court precedent confirms that generic transfers of territory included in eighteenth century treaties, such as the one contained in Article XX, do not cede or otherwise affect rights to the seabed or property situated thereon.

— The second clause of Article XX does not extinguish or otherwise affect rights to movable state property; rather, according to the Supreme Court’s interpretation, the second clause merely transfers control of the territorial “dependencies” of the principal lands ceded by Spain to Great Britain.

— There is nothing in the third clause of Article XX that expressly forfeits Spanish rights to state property; to the contrary, the third clause of Article XX expressly preserves the right of the Spanish King to “br(ing) away” all “the effects that may belong to him”.

Spain’s conclusion was that:

“The language of the 1763 Treaty thus does not contain « clear and convincing » evidence of an express abandonment of *La Galga* by Spain. To the extent that the treaty-construction issue is even debatable, this Court should, pursuant to Supreme Court precedent, defer to the interpretation of the contracting parties, Spain and Great Britain. Both countries have issued formal Diplomatic Notes — which are subject to judicial notice — confirming that they did not intend to forfeit Spain’s right to *La Galga* in the 1763 Treaty” (67).

The United States also submitted a new *Amicus curiae* brief in support of Spain. This document, once again, began asserting the

(66) Spain founded this assertion reaffirming the grounds advanced in its Motion to alter or amend the Judgment: “The language of Article XX of the 1763 Treaty upon which *Sea Hunt* relies nowhere mentions *La Galga* by name. Nor, unlike other provisions of the Treaty, does the text of Article XX even refer generally to “ships” or “vessels”. Finally, none of the generic provisions of Article XX can reasonably be understood to constitute « clear and convincing » evidence of an express abandonment of *La Galga*”. *Ibid.*, p. 24.

(67) *Ibid.*, p. 25.

interest of the United States in this case, supporting the official Spanish attitude (68). The United States position, explained at length, was that:

“Article X of the 1902 Treaty of Friendship and General Relations, 33 Stat. 2105, *Treaty Series* 422, 11 *Bevans* 628, provides that “[i]n cases of shipwreck” each sovereign “shall afford to the vessels of the other” not only “the same assistance and protection” but “the same immunities which would have been granted to its own vessels in similar cases” (69). The question then, in interpreting this 1902 Treaty, is what immunities would have been granted to the vessels of the United States “in similar cases”. Both Spain and the United States agree that this language requires that Spanish ships be treated in the same manner as American ships lost in our own waters. [...]

(68) The first paragraph of this *Amicus curiae* brief reads as follows: “The United States has a substantial interest in the scope of admiralty law, and in particular in the interpretation of ASA, the federal statute which the district court found applicable here. The United States also has a substantial interest in the proper interpretation and implementation of the 1902 Treaty of Friendship and General Relations with Spain, which is currently in force. This treaty requires that these two nations afford shipwrecks of the other sovereign the very same immunities and privileges that would apply if the lost vessel had been a domestic ship that had gone down in local waters. The United States is the owner of military vessels, thousands of which have been lost at sea, along with their crews. In supporting Spain, the United States seeks to insure that its sunken vessels and lost crews are treated as sovereign ships and honoured graves, and are not subject to exploration, or exploitation, by private parties seeking treasures of the sea”. We have used a copy of the *Amicus brief* document that is attached to the Official Letter, dated 18 November 1999, from the General Director on Scientific and Cultural Relationships of the Spanish Ministry on Foreign Affairs to the General Director on Cultural Communication and Cooperation of the Spanish Ministry on Education and Culture. Documentation provided by Spanish authorities on file with the authors.

(69) This international treaty was officially published in Spain in the *Gaceta de Madrid* No. 110, of 20 April 1903. The Spanish official wording of its Article X is the following: “en los casos de naufragio, averías en el mar ó arribada forzosa, cada Parte deberá conceder á los buques de la otra, ya pertenezcan al Estado ó á particulares, la misma asistencia y protección é iguales inmunidades que los concedidos á sus propios buques en casos análogos”. The relevant language of Article X of the Treaty of Friendship of 1902 has its origin in a 1795 treaty between Spain and the United States, known as the “Treaty of Friendship, Limits and Navigation”. 8 Stat. 138, 11 *Bevans* 516. There it was specified by these same parties, that “When any Vessel of either Party shall be wrecked, foundered, or otherwise damaged on the coasts or within the dominion of the other, their respective Subjects or Citizens shall receive as well for themselves as for their vessels and effects the same assistance which would be due to the inhabitants of the Country where the damages happens”. 8 Stat. 143-144, 11 *Bevans* 519-520. This treaty was reaffirmed in 1819, see 8 Stat. 252, 11 *Bevans* 528, and continued in force until it was superseded by the Treaty of Friendship and General Relations of 1902.

Vessels of Spain, like those of the United States, can be abandoned only by an express renunciation; this is the “immunity” which, under the 1902 Treaty of Friendship and General Relations must be afforded Spain. Article IV of the United States Constitution provides that “Congress shall have power to dispose of and make all needful Rules and regulations respecting the Territory or other Property belonging to the United States”. Relying in part on the special responsibility of Congress in this area, the Supreme Court, in *United States v. California*, 332 U.S. 19, 40 (1947), held that the Federal Government may not be deprived of property interests by rules designed to resolve private disputes, and that “officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act”. See *United States v. Steinmetz*, 973 F.2d 212, 222-223 (3rd Cir. 1992), *cert. denied*, 507 U.S. 984 (1993) (holding that unless abandonment occurs by a formal act, Article IV, 3, cl. 2 of the Constitution forbids a finding of implied abandonment); *Hatteras, Inc. v. The U.S.S. Hatteras*, 2 A.M.C. 1094, 1098 (S.D. Tex. 1981), *aff’d without opinion*, 698 F.2d 1215 (5th Cir. 1983), *cert. denied*, 464 U.S. 815 (1983) (neither negligence, laches, delay, mistake or unauthorised actions can divest the United States of its property). See also, Gerald J. Mangone, *United States Admiralty Law* 225 (Kluwer, 1997) (“U.S. warships... sunk and untouched for more than a century, will not be considered as abandoned”). Since the language of the Treaty of Friendship and General Relations provides that in cases of shipwreck each sovereign shall afford to the vessel of the other not only “the same assistance and protection”, but “the same immunities which would have been granted to its own vessels in similar cases”, Spanish vessels shipwrecked off the coast of America are not to be deemed abandoned, absent an express renunciation of ownership” (70).

2.2.5. *The United States Court of Appeals for the Fourth Circuit*

The Decision, dated 21 July 2000, of the United States Court of Appeals for the Fourth Circuit (71) was, from its very beginning, fully in favour of Spanish legal thesis. In fact, in its very first paragraph, the US 4th C. Court of Appeals asserted that:

“As sovereign vessels of Spain, *La Galga* and *Juno* are covered by the 1902 Treaty of Friendship and General Relations between the United States and Spain. The 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. *Sea Hunt* cannot show by clear and

(70) *Ibid.*, p. 8-11.

(71) Hereinafter quoted as US 4th C. Court of Appeals. This Decision (*Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 221, F.3d 634) is also available at <http://laws.lp.findlaw.com/4th/992035p.html>.

convincing evidence that the Kingdom of Spain has expressly abandoned these ships in either the 1763 Treaty or the 1819 Treaty of Amity, Settlement and Limits, which ended the War of 1812. We therefore reverse the judgment of the Norfolk District Court with regard to *La Galga*, and affirm the judgment of the Norfolk District Court concerning *Juno* and the denial of a salvage award”.

This legal assertion of the US 4th C. Court of Appeals was explained on two different legal grounds. First, interpreting the legal meaning of the term “abandonment”. Second, analyzing whether *La Galga* and *Juno* were or were not abandoned by Spain.

a) *The applicable law: implied versus express abandonment*

As the US 4th C. Court of Appeals held, in order for the Commonwealth of Virginia to acquire title to the shipwrecks and to issue salvage permits to *Sea Hunt*, these vessels must have been abandoned by Spain. *Sea Hunt* and the Commonwealth of Virginia argued that the ASA requires application of an implied abandonment standard for shipwrecks in coastal waters, and that Spain had abandoned both *La Galga* and *Juno*. But the US 4th C. Court of Appeals held the opposite, stating that “because Spain has asserted an ownership claim to the shipwrecks, however, express abandonment is the governing standard” (72).

The US 4th C. Court of Appeals reached this finding after analyzing both the domestic law of the United States and the international law in force for the United States.

Pursuant to the domestic law of the United States, under the ASA, for a State, like the Commonwealth of Virginia, to acquire title to a shipwreck, it must be (1) abandoned and (2) on or embedded in the submerged lands of a State (73). Only if these two conditions are fulfilled, the title to the shipwrecks is automatically transferred to the States, who are then able to grant permits to explore and to conduct salvage operations on them. In this case, it was undisputed that *La Galga* and *Juno* are within Virginia’s submerged lands (74), but Spain argued that both frigates were never abandoned.

(72) The US 4th C. Court of Appeals held this assertion quoting the *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co.*, 974 F.2d 450, 464-465 (4th Cir. 1992).

(73) See 43 U.S.C. §2105 (a) & (c).

(74) “Submerged lands” for the purposes of the ASA includes coastal waters three miles from shore. *Id.* §2102(f)(1), §1301(a)(2).

The problem is complicated because the ASA does not define the critical term “abandoned”. Interpreting this Act, the US 4th C. Court of Appeals held that:

“Nothing in the Act indicates, however, that implied abandonment should be the standard in a case such as this where a sovereign asserts ownership to its vessels. The Act states in its findings that « abandoned shipwrecks » are those « to which the owner has relinquished ownership rights with no retention ». 43 U.S.C. 2101(b). The statute thus provides that a shipwreck is abandoned only where the owner has relinquished ownership rights. When an owner comes before the court to assert his rights, relinquishment would be hard, if not impossible, to show. Requiring express abandonment where an owner makes a claim thus accords with the statutory text. (...) An owner who comes forward has definitively indicated his claim of possession, and in such a case abandonment cannot be implied” (75).

Moreover, the US 4th C. Court of Appeals held that this very same legal finding was in conformity with admiralty law:

“Under admiralty law, where an owner comes forward to assert ownership in a shipwreck, abandonment must be shown by express acts. See *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co.*, 974 F.2d 450 (4th Cir. 1992). « [S]hould an owner appear in court and there be no evidence of an express abandonment », title to the shipwreck remains with the owner. *Id.*, at 461. This principle reflects the long-standing admiralty rule that when « articles are lost at sea the title of the owner in them remains ». The *AKABA*, 54 F. 197, 200 (4th Cir. 1893). When « a previous owner claims long lost property that was involuntarily taken from his control, the law is hesitant to find an abandonment », *Columbus-America*, 974 F.2d at 467-68; see also *Fairport*, 177 F.3d at 498; *Hener v. United States*, 525 F. Supp. 350, 356-57 (S.D.N.Y. 1981). An inference of abandonment is permitted, but only when no owner appears. See *Columbus-America*, 974 F.2d at 464-65 (« Should the

(75) The same legal finding was confirmed by the legislative history of the ASA. According to the US 4th C. Court of Appeals: “The legislative history of the ASA suggests that sovereign vessels must be treated differently from privately owned ones. The House Report incorporates a State Department letter, which states, « the U.S. only abandons its sovereignty over, and title to, sunken U.S. warships by affirmative act; mere passage of time or lack of positive assertions of right are insufficient to establish such abandonment ». H.R. Rep. No. 100-514(II), at 13 (1988), reprinted in 1988 U.S.C.C.A.N. at 381. The implications of this for other sovereign vessels is also underscored: « [T]he same presumption against abandonment will be accorded vessels within the U.S. territorial sea that, at the time of their sinking, were on the non-commercial service of another State ». *Id.* Under the ASA, then, an implied abandonment standard would seem least defensible where, as here, a nation has stepped forward to assert ownership over its sovereign shipwrecks”.

property encompass an ancient and long lost shipwreck, a court may infer an abandonment. Such an inference would be improper, though, should a previous owner appear and assert his ownership interest ... »”.

From the point of view of the international law in force for the United States, the US 4th C. Court of Appeals assumed the interpretation, almost word by word, of Article X of the 1902 Treaty of Friendship and General Relations with Spain, as made by the new *Amicus curiae* brief presented by the United States in support of Spain. After concluding that, pursuant to United States domestic law, “one of the immunities granted to United States vessels is that they will not be considered abandoned without a clear and affirmative act by the Government”, the US 4th C. Court of Appeals added that:

“Under the terms of the 1902 Treaty, Spanish vessels can likewise be abandoned only by express renunciation. Both Spain and the United States agree that this treaty provision requires that in our territorial waters Spanish ships are to be accorded the same immunity as United States ships. They also agree that such immunity requires application of the express abandonment standard. « When the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, we must, absent extraordinarily strong contrary evidence, defer to that interpretation ». See *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 (1982). We cannot therefore adopt an implied abandonment standard in the face of treaties and mutual understandings requiring express abandonment. Such a standard would supplant the textual framework of negotiated treaties with an unpredictable judicial exercise in weighing equities”.

It seems that for reaching this legal finding, the US 4th C. Court of Appeals took into account not only the unique peculiarities of this case (76), but also the foreign policy of the United States Government in general (77).

(76) Referring to Article X of the 1902 Treaty of Friendships and General Relations with Spain, the US 4th C. Court of Appeals underlined that: “According to the United States Department of State, « this provision is unique » in that no other « friendship, commerce and navigation treaty of the United States contains such a broadly worded provision applying to State ships entitled to sovereign immunity ». Statement of Interest, U.S. Dep’t of State, para. 13 (Dec. 18, 1998). This treaty requires that imperiled Spanish vessels shall receive the same immunities conferred upon similarly situated vessels of the United States”.

(77) “In a case such as this, it is « not for the courts to deny an immunity which our Government has seen fit to allow ». *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945) (involving an in rem admiralty action against foreign owned merchant vessel).

b) *The non-abandonment of La Galga*

On the analysis whether *La Galga* and *Juno* were or were not abandoned by Spain, the US 4th C. Court of Appeals settled down very quickly the question of the ownership of *Juno* (78), and devoted its attention to decide whether *La Galga* was or was not abandoned by Spain.

Interpreting Article XX of the 1763 Definitive Treaty of Peace Between France, Great Britain and Spain, which ended the Seven Years War and transferred several Spanish's territories in the new world to Great Britain (79), the Norfolk District Court found that "the sweeping language of Spain's cession in Article XX" implied that "Spain had ceded its rights over everything it owned in North America east of the Mississippi, including its rights to sunken vessels". However, the US 4th C. Court of Appeals disagreed with this interpretation, finding that "the plain language of this treaty provision contains no evidence of an express abandonment. [...] Such general treaty language does not come close to an « express declaration abandoning title », Columbus-America, 974 F.2d at 464, and therefore cannot amount to clear and convincing evidence of an express abandonment".

Four reasons supported this legal finding. First, the US 4th C. Court of Appeals accepted the literal interpretation suggested by Spain. This Court held that Article XX does not include any of the common nouns that could refer to *La Galga*. Notably absent are the terms

Our Constitution charges the political branches with the conduct of foreign affairs. See *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 109-10 (1948). The express abandonment standard is regularly applied by the executive branch in dealing with foreign vessels. It is simply not for us to impose a looser standard that would interfere with this long standing political judgment in sensitive matters of international law".

(78) The question of *Juno* was only dealt with by the US 4th C. Court of Appeals in footnote number one of its Decision. This footnote reads as follows: "We affirm the [Norfolk] District Court's holding that *Juno* was not expressly abandoned in the 1819 Treaty. Article II of that treaty transferred territory from Spain to the United States. But, as the [Norfolk] District Court noted, « Nothing in Article 2 implies that Spain has ceded anything other than territory and the structures erected on that territory ». *Sea Hunt*, 47 F. Supp. 2d at 690. We agree that Spain did not expressly abandon *Juno* in the 1819 Treaty for the reasons stated by the district court. See *id.* at 690-91". Hence, the cross-appeal made by the Commonwealth of Virginia and *Sea Hunt* with regard to *Juno* was rejected without further discussion by the US 4th C. Court of Appeals.

(79) See *supra*.

“shipwreck”, “vessels”, “frigates”, or “warships”. Other provisions of the treaty mention these terms explicitly. Further, the treaty also specifically catalogues items other than territory intended to be conveyed. Hence, the US 4th C. Court of Appeals concluded that:

“When the parties to the 1763 Treaty intended to cede non-territorial state property, they did so with great particularity. Yet nowhere does the treaty specifically mention the cession of « shipwrecks » [...] Without any mention of shipwrecks or any seagoing vessels it is hard to read Article XX as an express abandonment of *La Galga*”.

Second, the US 4th C. Court of Appeals argued that the cession of State property in Article XX is limited to all that Spain possesses “on the continent of North America”. The “plain meaning” of this is that Spain ceded to Great Britain only what was located on land, and did not cede possessions in the sea or seabed. According to the US 4th C. Court of Appeals, “the Norfolk District Court focused on the fact that the « clause is a sweeping grant of territory and property », yet overlooked the « on the continent » limitation. This limitation excludes wrecks like *La Galga* that were located not on the continent, but in the seabed” (80).

Third, Article XX provides that Spain ceded “every thing that depends on the said countries and lands”. The Norfolk District Court found that this included the wreck of *La Galga* (81). The US 4th C. Court of Appeals disagreed with this interpretation. Lying on previous

(80) The US 4th C. Court of Appeals even rejected the claim of *Sea Hunt* and the Commonwealth of Virginia that this language included the territorial sea. “Moreover, in light of eighteenth century understandings, this « on the continent » language would hardly amount to clear and convincing evidence of an express abandonment of property in coastal waters. In fact, the three-mile coastal belt, well-recognized today, had no clear counterpart in eighteenth century international law. Ownership of the three-mile belt in the eighteenth century was but a « nebulous suggestion ». United States v. California, 332 U.S. at 32. When « in 1776 the American colonies achieved independence and when in 1783 the Treaty of Paris was concluded, neither the British crown nor the colonies individually had any right of ownership of the seabed of the sea adjacent to the American coast ». Report of Special Master Maris, O.T. 1973, No. 35 Orig. at 47, adopted by United States v. Maine, 420 U.S. 515 (1975). Sovereign rights to the territorial sea were not established in international law until some time in the nineteenth century. See California, 322 U.S. at 33; accord Maine, 420 U.S. at 524. Nineteenth century and present-day views of territorial cession are hardly dispositive of what mid-eighteenth century treaty signatories intended. See *Shively v. Bowlby*, 152 U.S. 1, 57 (1894); *United States v. Angog*, 190 F. Supp. 696, 698 (D. Guam 1961)”.

(81) See *Sea Hunt*, 47 F. Supp. 2d at 689.

case law (82), the US 4th C. Court of Appeals concluded that: “under the Supreme Court’s relatively contemporaneous interpretation, « every thing that depends » does not include Spanish property such as the shipwrecks, but rather refers to « dependencies » such as nearby islands”.

Fourth, the US 4th C. Court of Appeals also received the Spanish argument on the final provision of Article XX, which established that: “his Catholick Majesty shall have power to cause all the effects that may belong to him, to be brought away, whether it be artillery or other things”. Spain argued that there is no deadline for the right to take this property away. Rather, the right is guaranteed irrespective of the time elapsed. By contrast, other provisions of the Treaty specifically set time limits for certain actions. Hence, the US 4th C. Court of Appeals took into account these arguments and held that:

“In treaty interpretation as in statutory interpretation, particular provisions may not be divorced from the document as a whole. See *Kolovrat v. Oregon*, 366 U.S. 187, 195-96 (1961) (refusing to interpret a treaty provision in isolation). Where such specific time limits were included for a variety of different actions but not included for the clause at issue here, there is a strong presumption that no time limit applies”.

After reaching this final finding based on these four arguments, it is surprising that the US 4th C. Court of Appeals still tried to confirm and ratify it on a different ground. Hence, the US 4th C. Court of Appeals referred to the attitude of the United Kingdom and the Kingdom of Spain. Both parties to Article XX of the 1763 Treaty agreed that the Kingdom of Spain did not abandon *La Galga*, and the US 4th C. Court of Appeals considered this agreement as “significant”.

(82) “It is anything but clear, however, given eighteenth century understandings, that « every thing that depends » can be interpreted to include this shipwreck. When interpreting this same clause of Article XX, Chief Justice Marshall noted, « By the 20th article of the [1763] treaty, Spain ceded Florida, with its dependencies, and all the country she claimed east or south-east of the Mississippi, to Great Britain ». *Johnson and Graham’s Lessee v. McIntosh*, 21 U.S. (8 Wheat.) 543, 584 (1823) (emphasis added). At the time, « dependencies » meant other territories that were dependent upon the sovereign country. A dependency was « a territory distinct from the country in which the supreme sovereign power resides, but belonging rightfully to it, and subject to the laws and regulations which the sovereign may think proper to prescribe ». *United States v. THE NANCY*, 27 F. Cas. 69, 71 (C.C.D. Pa. 1814) (No. 15,854); see also Webster’s II 303 (defining « dependency » as a « territory or state under the jurisdiction of another country from which it is separated geographically »)”.

The US 4th C. Court of Appeals took into account that, after the Norfolk District Court issued its Judgment, the United Kingdom issued a formal Diplomatic Note clarifying that Article XX of the 1763 Treaty “cannot be interpreted as involving an express abandonment by Spain of its rights to the shipwreck of *La Galga* [...] [T]he intention behind Article XX was to transfer sovereignty over the territories mentioned in that Article, and not to deal with, or otherwise affect, the quite separate issue of the ownership of shipwrecks on the waters adjacent to these or other territories in North America”. Spain also issued a Diplomatic Note reaffirming its view that the 1763 Treaty “was not a cession or abandonment of H.M. Frigate *La Galga* or other shipwrecked vessels of Spain”. Acknowledging this, the US 4th C. Court of Appeals held that:

“« While courts interpret treaties for themselves, the meaning given them by the Departments of Government particularly charged with their negotiation and enforcement is given great weight ». Kolovrat, 366 U.S. at 194. We decline to disregard the position of the relevant treaty signatories that Article XX was not intended to include movable property located in coastal waters. Given that their view accords with the language and structure of the Treaty itself, it can hardly be contended that *Sea Hunt* has put forward « extraordinarily strong contrary evidence », to rebut the parties’ interpretation”.

But even then, the US 4th C. Court of Appeals showed its radicalism on this point. After so a long legal reasoning distinguishing between implied and express abandonment, and finding many arguments for concluding that *La Galga* was not expressly abandoned by Spain, the US 4th C. Court of Appeals held that:

“Although we believe the standard of express abandonment controls in the circumstances of this case, it would be difficult under any test to conclude that *La Galga* was abandoned [...] In light of these circumstances (83), even a finding of implied abandonment would be improper”.

(83) These circumstances were described as: “The mere passage of time since a shipwreck is not enough to constitute abandonment. See *Columbus-America*, 974 F.2d at 461; *Fairport*, 177 F.3d at 499 (length of time « one factor among several relevant to whether a court may infer abandonment »). Spain attempted salvage after *La Galga* sank, maintained *La Galga* on its naval registry, and asserted a claim after *Sea Hunt* brought its admiralty action. Moreover, the shipwreck lies scattered and buried in the sand beneath the water, and technology has only recently become available for its salvage. See *Yukon Recovery, L.L.C. v. Certain Abandoned Property*, 205 F.3d 1189, 1194 (9th Cir. 2000) (« [L]ack of technology is one factor to consider in determining whether inaction constitutes abandonment »). In other cases where abandonment was

Hence, the final conclusion of the Decision of the US 4th C. Court of Appeals was to reverse the Judgment of the Norfolk District Court that the Kingdom of Spain abandoned the vessel *La Galga*, while affirming that Judgment as to *Juno*. Therefore, both vessels remain the property of Spain. Under these circumstances, it was not strange at all that the US 4th C. Court of Appeals confirmed the denial of a salvage award to *Sea Hunt* without any additional consideration (84).

c) *Subsequent developments*

Both the Commonwealth of Virginia and *Sea Hunt* appealed this Decision to the United States Supreme Court. On 20 February 2001, and without entering to discuss this case, the US Supreme Court denied this petition for *certiorari* (85), thus confirming the Decision of the US 4th C. Court of Appeals, dated 21 July 2000.

At the same time, the Kingdom of Spain and the United States entered into negotiations of a Memorandum of understanding concerning the wrecks of *Juno* and *La Galga*. The main underlying ideas in these negotiations were that Spain will retain the title of sovereign ownership to both wrecks; that the wrecks will remain in their current places, as maritime graves for their Spanish crews; that the United States will afford, pursuant to its domestic law, some kind of legal protection to these historical sites; and that the objects from these wrecks already recovered by *Sea Hunt* will be deposited at the nearest

found for Spanish wrecks, Spain made no claim of ownership. See *Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th Cir. 1978) (noting that « [t]he modern day government of Spain has expressed no interest in filing a claim in this litigation as a successor »); *Lathrop v. Unidentified, Wrecked & Abandoned Vessel*, 817 F. Supp. 953, 956 (M.D. Fla. 1993) (finding that « no one... asserted an interest in the alleged vessel »). By contrast, Spain has vigorously asserted its interest in the wreck of *La Galga* and wishes to maintain it as a sacred military gravesite”.

(84) The only reference in this Decision to this cross-appeal of *Sea Hunt* is found in its footnote number two, which reads as follows: “We affirm the district court’s denial of a salvage award to *Sea Hunt*. The district court found, « It is the right of the owner of any vessel to refuse unwanted salvage. *Sea Hunt* knew before bringing this action that the *Juno* was a Spanish ship and that Spain might make a claim of ownership and decline salvage.... Because *Sea Hunt* had prior knowledge of Spain’s ownership interests and had reason to expect Spain’s ownership claim and refusal to agree to salvage activity on *Juno*, *Sea Hunt* can not be entitled to any salvage award »”.

(85) 121 S. Ct. 1079 (2001).

public museum in the United States, that is, at the Museum of Assateague Island.

2.3. *The case of San Salvador*

2.3.1. *The history of San Salvador*

The Spanish vessel *San Salvador* shipwrecked on 31 August 1812 in Maldonado Bay, near the port of Punta del Este, Uruguay. The *San Salvador* was a 50 meters-long warship, that was used for troop transport from Cádiz (Spain) and she was originally destined for the port of El Callao, in Lima, Peru (86). After the revolution in the Oriental Band of the River Plate (nowadays Uruguay) against Spanish colonial power, the vessel deviated from her course to reinforce the Spanish city of Montevideo (87), from the attacks carried out by the rebels. On board the *San Salvador* were 520 soldiers belonging to the Second Battalion of the Regiment of *Albuera* in Extremadura (Spain), along with crew and passengers.

The *San Salvador* was taken by surprise by a strong southeast wind, known locally as *Pampero*, and ran aground on sandbanks. According to documents lodged in the *Archivo de la Marina* (88), the strong wind and lack of manoeuvrability caused the vessel to heel over on one side. The vessel was broken and the upper deck was dragged away from the hull. Due to the storm, the two sections of the vessel (the hull and the upper deck), were deposited 50 meters apart from each other with contents spread over the sea floor. After the shipwreck of the *San Salvador*, only 130 people on board survived, while almost 500 people died.

(86) Most of the data concerning the *San Salvador* are taken from a very useful and accurate document, which is the Letter dated on 29 June 1999, from the *Prefecto Nacional Naval* (Naval National Prefect) of the Republic of Uruguay, *Contra Almirante Sr. Oscar L. Otero Izzi*, to the Head of the Embassy of Spain in Montevideo, containing the Note No. 95/29/VI/99. Documentation provided by Spanish authorities on file with the authors. See also NASTI, *Recovery and conservation of navigational instruments from the Spanish troopship Salvador which sank in 1812 in Maldonado Bay, Punta del Este, Uruguay*, in *The International Journal of Nautical Archaeology*, 2001, p. 279.

(87) Maldonado Bay is situated about 250 kilometres north-east of Montevideo city. Uruguay became an independent State on 18 July 1830, that is, 18 years after the *San Salvador* had shipwrecked.

(88) Campo Muñoz, *Archivo General de la Marina "Don Alvaro de Bazán"*, Madrid, 1991, quoted by NASTI, *supra*, 86, p. 279.

The wreck of the *San Salvador* remained undisturbed from 1812 to 1993, when two private professional divers, Mr. Héctor Bado and Mr. Sergio Pronczuk, found it. Both divers were searching for the wrecked vessel of the *San Salvador* duly authorised by Uruguayan officials, in concrete, by the Uruguay's *Autoridad Marítima* (Maritime Authority) and by the *Comisión del Patrimonio Cultural de la Nación* (National Cultural Heritage Commission).

During 1997, these private divers contracted the archaeologist *Dr. Mensun Bound*, Director of the Oxford University Institute on Maritime Archaeological Research (MARE), who provided them with archaeological and technical support, in concrete, with the elaboration of an Underwater Archaeological Research Project for the Maldonado Bay area, that was again approved by the Uruguayan officials at the end of 1998. Implementing this Project, the two private divers, under the direction of *Dr. Mensun Bound*, began at the beginning of 1999 to recover different objects and artefacts from the surface of the seabed, until they discovered some human remains, presumably belonging to the crew and troops transported by the *San Salvador*. Such a new circumstance determined that the Director of the Underwater Archaeological Research Project for the Maldonado Bay area, *Dr. Mensun Bound*, renounced from the direction of this Project, as he decided not to alter in any way the location of the human remains; to inform on this point to the *Prefectura de Maldonado* (Prefecture of Maldonado); and not to continue the research operations. These decisions automatically caused the suspension of the research and rescue operations under the norms in force required by the Uruguayan National Cultural Heritage Commission.

2.3.2. *Spain's attitude towards the San Salvador*

It seems that it was at this time when, through an unofficial way (89), Spain knew for the first time about the discover of the wreck of the *San Salvador*. As a result of this unofficial information, the Embassy of Spain in Montevideo contracted the services of a Uruguayan lawyer, *Dr. José María Gamio*, who immediately carried out

(89) It seems that the unofficial way by which Spain knew about the finding of this wreck was the new published on local newspapers in Uruguay informing on a dissertation made at the end of 1998 by *Mr. Alfredo Koncke* at the Uruguayan Academy of Maritime and Fluvial History.

different actions on this case. On 2 June 1999, this lawyer submitted to the Registry of the *Prefectura Nacional Naval* (Naval National Prefecture), a Note dated 31 May 1999, directed to the Head of this Office, the *Contra Almirante Oscar L. Otero Izzi*, applying for the pertinent authorisation of access to the administrative dossier concerning the wreck of the *San Salvador* and asking to hold a meeting with him. The meeting was held on 9 June 1999 and was attended by the *Capitán de Navío José E. Aguiñaga*, under the instructions of the *Contra Almirante Oscar L. Otero Izzi*, who was unable to attend this meeting. At this meeting, the lawyer, *Dr. José María Gamio*, was informed of two points. First, on the denial of his application for access to the administrative dossier on the *San Salvador* (90), and second, that the research and rescue operations on this wreck were temporarily suspended after being reported on the finding of human remains.

A very important difference between the case concerning the Spanish shipwrecked vessels *Juno* and *La Galga* off the coasts of the United States and the case concerning the wreck of the Spanish galleon *San Salvador* is represented by the fact that, in this last case, the official authorisation given to a private enterprise for carrying out research work on a Spanish galleon and the permit to implement rescue operations on it, both of them granted without any official notification to the Embassy of Spain in Montevideo, are activities that cannot be qualified within the legal duty of all States to co-operate in the protection of the historical and archaeological heritage, as enshrined in Article 303, paragraph 1, of UNCLOS (91). It must be noted that this provision considers this duty to co-operate, worded in mandatory terms, as an absolute duty, with no exception and being not limited to

(90) In his first written Report to the Embassy of Spain in Montevideo, dated 14 June 1999, the Uruguayan lawyer, *Dr. José María Gamio*, explained the reasons for this denial as follows: "La audiencia con el mencionado oficial la tuve el 9 de junio pasado, y en la misma se me hizo saber que sería imposible acceder a mi solicitud, según nota de 2 de junio, en virtud de que las gestiones relativas a extracción de buques antiguos revestían el carácter de reservadas a juicio de la Autoridad Marítima. En consecuencia, sólo me restó pedir que tal resolución se me comunicara por escrito, a la mayor brevedad y con expresión de sus fundamentos. A la fecha no he recibido aún tal comunicación". Documentation provided by Spanish authorities on file with the authors.

(91) Uruguay ratified this international convention on 10 December 1992 and Spain did the same on 20 December 1996 (*B.O.E.* of 14 February 1997). Therefore, at this date UNCLOS was in force both for Uruguay and for Spain.

any maritime zone. Therefore, Article 303, paragraph 1, of UNCLOS also applies when the wreck is found even in the territorial sea of another State, as it was the case with the wreck of the *San Salvador*. *A fortiori*, the express denial of the authorisation of access to the administrative dossier concerning the wreck of the *San Salvador*, requested by the legal representant of a foreign State, which is the flag State of this wreck, is, without any doubt, a behaviour highly incompatible with the contents of this legal provision. It must be pointed out that in a recent Order, the International Tribunal for the Law of the Sea considered the duty to co-operate as:

“a fundamental principle [...] under the United Nations Convention on the Law of the Sea and general international law and that rights arise therefrom which the Tribunal may consider appropriate to preserve” (92),

prescribing unanimously in that occasion that State Parties in that controversy “shall cooperate and shall, for this purpose, enter into consultations forthwith in order to exchange further information” (93).

Afterwards, the Uruguayan lawyer wrote two reports, dated 14 June 1999 and 5 July 1999, respectively, for the Embassy of Spain in Montevideo, giving notice of the actions carried out and containing an analysis on the legal status of the wreck of the *San Salvador* and on the Spanish property rights on this wrecked vessel (94). His reports counseled to press the question on the immunity of jurisdiction on warship wrecks, not only because it could be controversial in theory, but mainly because there was no domestic trial in which to invoke the immunity of jurisdiction on this wreck (95). On the contrary, the written reports by the Uruguayan lawyer, *Dr. José María Gamio*, encouraged Spain to claim its property rights on the shipwrecked vessel

(92) Order of 3 December 2001, International Tribunal for the Law of the Sea, *The Mox Plant Case (Ireland v. United Kingdom)*. *Request for provisional measures*, paragraph 82.

(93) *Ibid.*, paragraph 89.

(94) Documentation provided by Spanish authorities on file with the authors.

(95) In his second Report dated 5 July 1999, p. 3, the Uruguayan lawyer, *Dr. José María Gamio*, held that “la inmunidad de jurisdicción es un instituto de derecho procesal y no de derecho sustantivo. Se limita a amparar al Estado al cual se pretende llevar a juicio ante tribunales de otro Estado. En el caso del buque *San Salvador*, que esté en nuestro conocimiento, nadie ha pretendido llevar a juicio al Estado español ante los tribunales de otro Estado para dilucidar aspecto alguno de la situación del navío o de sus restos. Entonces, ¿qué sentido tiene invocar la inmunidad de jurisdicción?”.

San Salvador, a claim that, in his opinion, was even in conformity with the domestic Uruguayan law (96).

This assertion was reached after a very thorough analysis of Uruguayan domestic law. According to it, the Uruguayan Decree-Act 14.343, of 21 March 1975, establishes the legal regime applicable to national or foreign vessels that are sunken, semi-sunken or aground. Its Article 15 states that:

“Las embarcaciones, objetos o restos, de cualquier naturaleza, tanto nacionales o extranjeras, así como las cargas y enseres pertenecientes a los mismos que se hubieren hundido [...] en aguas de jurisdicción nacional [...] con anterioridad al 31 de diciembre de 1973 y cuya extracción [...] no fuere comenzada antes de cuatro meses o después de publicada esta Ley, serán consideradas automáticamente abandonados a favor del Estado, cesando de hecho en su bandera, si fuese extranjera, todo lo que se documentará, a medida que se formen los expedientes respectivos, de acuerdo al artículo 8 *in fine*”.

Article 8 *in fine* stipulates that, as a consequence of its abandonment in favour of the State, “se documentará la correspondiente traslación de dominio (de dichos buques) en un certificado notarial con las resultancias del expediente del caso”. These provisions are complemented with Article 16, which provides for that “cuando se pueda comprobar que se trata de embarcaciones de bandera extranjera, deberá darse aviso a la Oficina Consular que corresponda”.

Article 17 of this Uruguayan Decree-Act states that “los procedimientos relacionados con el abandono de embarcaciones al Estado, son de competencia de la Prefectura Nacional Naval”. Concerning the sunken, semisunken or aground vessels and the objects included in this regime, belonging to the Uruguayan State, and obtained through abandonment, the Naval National Prefecture, acting in the name of the Uruguayan State, can:

A) Efectuar por sí misma o por medio de otros la extracción de la embarcación, restos u objetos en cuyo caso podrán ser utilizados por dicha Prefectura o enajenados libremente por la misma.

B) Enajenar gratuita u onerosamente la embarcación, restos u objetos a quien se obligue, bajo condición resolutoria expresa, a extraerla totalmente a su costa, en las condiciones y plazos que se le fijen” (Article 20).

(96) In his first Report, dated 14 June 1999, the Uruguayan lawyer, *Dr. José María Gamio*, concluded it with the assertion that: “Por las razones antes mencionadas, el navío *San Salvador* y sus restos siguen siendo propiedad del Reino de España”.

Analysing these provisions, the Uruguayan lawyer, *Dr. José María Gamio*, concluded his report suggesting two lines of legal action. First, to claim the unconstitutionality of Article 15 of the above mentioned Uruguayan Decree-Act because, in clear contradiction with Article 32 of the Constitution of the Eastern Republic of Uruguay, that provision qualifies as an “abandonment” what in reality shall give rise to an expropriation procedure. Second, to claim the ownership of the vessel *San Salvador*, as the Uruguayan Naval National Prefecture had not yet communicated to any Spanish Consular Agency the finding of this vessel, in contradiction with what Article 16 of the just mentioned Uruguayan Decree-Act stipulates; and therefore the vessel *San Salvador* could not be considered as “abandoned” by the Kingdom of Spain pursuant to Uruguayan domestic law.

At least the second line of legal action suggested by this lawyer seemed to be very well founded. On 29 June 1999, that is, 15 days after the first report of the Uruguayan lawyer, *Dr. José María Gamio*, directed to the Embassy of Spain in Montevideo, and 20 days after holding the Meeting in which the *Capitán de Navío José E. Aguiñaga*, acting under the instructions of the *Contra Almirante Oscar L. Otero Izzi*, informed the lawyer contracted by Spain, *Dr. José María Gamio*, on the denial of his application for access to the administrative dossier on the *San Salvador*, the Naval National Prefect, *Contra Almirante Oscar L. Otero Izzi* in person paid a visit to the Embassy of Spain in Montevideo. During his visit, he delivered to the Spanish Ambassador a Letter (97) and the administrative dossier on this wreck, including the domestic legislation and a summary of the minutes of extraction operations carried out from the shipwrecked vessel *San Salvador*. At the end of that Letter, the Embassy of Spain was also informed that, despite the suspension of the research and rescue operations due to the renunciation of the former Director of the Underwater Archaeological Research Project for the Maldonado Bay area, *Dr. Mensun Bound*,

“Los señores *Héctor Bado* y *Sergio Pronczuk* debieron contratar un nuevo arqueólogo, el *Dr. Atilio Nasti*, para poder continuar con las operaciones, pero

(97) Letter dated 29 June 1999, from the *Prefecto Nacional Naval* (Naval National Prefect) of the Republic of Uruguay, *Contra Almirante Sr. Oscar L. Otero Izzi*, to the Head of the Embassy of Spain in Montevideo, containing the Note No. 95/29/VI/99. Documentation provided by Spanish authorities on file with the authors. Its first paragraph expressly recognised that this Letter was in response to the application made by the Uruguayan lawyer contracted by Spain, *Dr. José María Gamio*.

hasta tanto el profesional no sea autorizado oficialmente, las actividades de rescate en el Navío *San Salvador* están suspendidas.

“Una vez que la Comisión del Patrimonio Cultural de la Nación, informe la aceptación del nuevo profesional a esta Autoridad Marítima, los trabajos serán habilitados nuevamente, ya que los interesados están en condiciones de continuar los mismos en forma inmediata”.

This Letter caused the immediate reaction of Spain. A Spanish official domestic legal report on this Letter (98) interpreted it in two different ways. First, it considered that the deliver to the Embassy of Spain in Montevideo of the administrative dossier on the extraction of the wreck of the *San Salvador* meant that the Uruguayan authorities were implementing the provision contained in Article 16 of the above mentioned Uruguayan Decree-Act 14.343 of 21 March 1975, thus opening the deadline of four months in order to consider the wreck of the *San Salvador* as legally abandoned by Spain. Second, it asserted that the existence of human osseous remains belonging to the embarked crew and troop, converted this site in a cemetery, “in conformity with the criteria which are becoming established at the international level”, and made unrecoverable this wreck. The suspension of the works and the abandonment of the operations by the archaeologists were interpreted as ratifying this assertion. However, it also took note that, pursuant to the Letter from the Uruguayan Naval National Prefect, the private Uruguayan divers, *Mr. Héctor Bado* and *Sergio Pronczuk*, were trying to overcome this obstacle. As a conclusion, this domestic legal report recommended that:

“Desde un punto de vista jurídico, procedería indicar a la Prefectura Nacional Naval (de Uruguay) que no se abandona voluntariamente el *San Salvador*, solicitando la paralización de los trabajos de extracción y que no se remuevan los restos de la tripulación y tropa de su tumba marina”.

After this domestic legal report was written, it seems that between September 1999 and April 2000, several meetings required by Spain took place between the Spanish Ambassador in Uruguay and the

(98) The domestic legal report was asked for through an official Letter dated 2 July 1999, from the General Director on Cultural and Scientific Relationships of the Spanish Ministry on Foreign Affairs to the General, Legal Council of the Institute on Naval History and Culture and of the Naval Museum from the Spanish Ministry on Defence, *Mr. José A. Jáudenes*. That domestic legal report was included in the response official Letter, dated 11 October 1999, signed by the *General Mr. José A. Jáudenes*. Documentation provided by Spanish authorities on file with the authors.

Minister on Foreign Affairs of Uruguay. During these meetings, the Spanish Ambassador communicated the Uruguayan Minister on Foreign Affairs the Spanish policy concerning wrecks from Spanish vessels in Uruguay, as enshrined in the conclusion of the domestic legal report just mentioned. At the same time, during these meetings the Spanish Ambassador proposed the Uruguayan Minister on Foreign Affairs to enter into bilateral negotiations on this question, handing him a first proposed draft of a bilateral convention for the protection of wrecks between the two countries.

While these negotiations were on, two important facts took place. First, at the end of 1999, the Embassy of Spain in Montevideo was informed on the discovery of another wreck of a Spanish galleon in Uruguay. In the diplomatic Verbal Note No. 7, dated 6 January 2000, the Spanish Ambassador took note of that notice and thanked the Uruguayan Ministry on Foreign Affairs. In a second official letter, the Spanish official policy towards Spanish galleons sunken in Uruguayan maritime zones was reaffirmed at length. Therefore, in the diplomatic Verbal Note No. 31, dated 8 February 2000, from the Embassy of Spain in Montevideo to the Uruguayan Ministry on Foreign Affairs, and after reporting that the new wreck in question could be the Spanish warship *Nuestra Señora del Pilar*, a vessel from the *Riquelme* fleet shipwrecked in 1548, the diplomatic Verbal Note went on saying that:

“La Embajada de España tiene el honor de poner en conocimiento de ese Ministerio de Relaciones Exteriores que no ha abandonado el pecio de *Nuestra Señora del Pilar*, lo cual sólo podría haber sido hecho mediante comunicación expresa a las autoridades competentes y mediante aplicación de sus normas internas de dominio público, por lo que (España) se reconoce como única titular de todos los derechos que se deriven de dicho pecio.

Del mismo modo España considera que, dada la condición del pecio como buque de guerra, éste es objeto de inmunidad soberana de conformidad con el Derecho Internacional, por lo que no le es oponible la legislación de la República Oriental del Uruguay.

Por todo lo anterior España reclama por la presente la suspensión del permiso de cateo y, salvo Acuerdo bilateral para la protección del patrimonio subacuático que le sean entregadas las piezas que ya hayan podido ser extraídas del buque y, hasta que tenga lugar esta entrega, no queden depositadas, en ningún caso, en poder del extractor o de particulares ni se autorice su exportación.

La Embajada de España ruega a ese Ministerio de Relaciones Exteriores tenga a bien dar traslado del contenido de esta Nota Verbal a la Prefectura Nacional Naval de Montevideo” (99).

(99) Verbal Note No. 31, dated 8 February 2000, from the Embassy of Spain in

It must be noted that this Verbal Note from the Embassy of Spain in Montevideo was communicated to the Uruguayan Ministry on Foreign Affairs once again within the deadline of four months, as provided for in Article 15 of the Uruguayan Decree-Act 14.343, of 21 March 1975 mentioned above.

The second relevant fact that took place at this time was that the *Contra Almirante Oscar L. Otero Izzi*, Naval National Prefect of Montevideo, directed an official Note to the Spanish Ambassador in Montevideo, dated on 4 April 2000, reporting on the situation of the wreck of the Spanish galleon *San Salvador*. In this Note, the Naval National Prefect of Montevideo stated that:

“De acuerdo a Resolución del Ministerio (uruguayo) de Educación y Cultura, fue autorizado el arqueólogo *Dr. Atilio Nasti* a dirigir y supervisar los trabajos de búsqueda y rescate del pecio *San Salvador*.

Notificados los permisarios, reiniciaron las actividades de prospección, identificación y señalización subacuática de los restos del mencionado navío.

Quando la situación lo amerite, comenzarán las tareas de rescate y extracción de elementos materiales y restos óseos hallados en el lugar del siniestro” (100).

The new that, against what Spain had claimed on several occasions at diplomatic bilateral level, the Uruguayan authorities had already granted a second permit for prospecting, allowing the recovery of human osseous remains from the crew and troop of the *San Salvador*, was confirmed in practice by the new Director of this archaeologist project. Since 1999, and with the financial support of the *Innerspace Exploration Team*, the archaeologist *Dr. Atilio Nasti* has directed the second phase of the Maldonado Bay Underwater Project, with MARE acting as the consultant institution. According to the new Director of this Project, who resulted less scrupulous than his predecessor in this charge, during this second phase of the Maldonado Bay Underwater Project, more than 4.000 items from the *San Salvador* were recov-

Montevideo to the Uruguayan Ministry on Foreign Affairs. Documentation provided by Spanish authorities on file with the authors.

(100) Note No. 47/04/IV/00, dated 4 April 2000, from the *Contra Almirante Oscar L. Otero Izzi*, Naval National Prefect of Montevideo, to the Spanish Ambassador in Montevideo. Documentation provided by Spanish authorities on file with the authors.

ered (101), and it was scheduled that in 2000 some complete human skeletal remains will be recovered from this area.

The knowledge of these news by the Spanish authorities determined an intensification of Spain's diplomatic activities. In a facsimile, dated 26 April 2000, from the General Director on Cultural and Scientific Relationships of the Spanish Ministry on Foreign Affairs to the General Subdirector for the Protection of Historical Heritage of the Spanish Ministry on Education and Culture, the official Spanish reaction was drawn as follows:

“A la vista de la actitud uruguaya habrá que prepararse para una defensa judicial de nuestros intereses en este asunto, si no prospera nuestra oferta de cooperación con Uruguay en el asunto.

En todo caso, se instruirá a nuestro Embajador a hacer entrega de la última versión del Convenio sobre Patrimonio Cultural Subacuático Común (sobre el modelo del acordado con República Dominicana) a las autoridades de Uruguay para intentar canalizar el asunto por esta vía” (102).

This text reveals three things. First, that Spain had already held consultations with some Uruguayan authorities, proposing them some bilateral forms of co-operation for the protection of wrecks. Although it is not expressly mentioned in this facsimile, it seems that it only can be the meetings that the Spanish Ambassador in Montevideo previously held with the Uruguayan Minister on Foreign Affairs, when the first made the proposal to enter into bilateral negotiations on this question, handling the second a first proposed draft of a bilateral convention for the protection of wrecks between the two countries. These bilateral negotiating efforts have been intensified since then.

Second, that the Spanish foreign policy on the protection of wrecks of Spanish warships or other State vessels sunken abroad prefers to deal with this problem through diplomatic channels, assuming the initiative for seeking a bilateral agreement of co-operation between Spain, as the flag State of the wrecked vessels, and the coastal States in whose maritime zones these wrecks are or maybe found. As far as these

(101) According to NASTI, *supra*, footnote 86, p. 279, numerous objects were found in this area, such as chinaware, bottles, wine glasses, silver coins and medical instruments, plus military artefacts, such as bronze cannon, cannonballs, swords, guns, and other artefacts of wood and leather. Among these finds, three navigational instruments: one sextant and two octants were recovered.

(102) Documentation provided by Spanish authorities on file with the authors.

authors know, no bilateral agreement of this kind has already been adopted, although Spain is currently celebrating bilateral diplomatic negotiations towards this aim with at least four Latin-American and Caribbean countries: Dominican Republic, Cuba, Nicaragua and Uruguay.

Third and last, that just in case of failure in reaching such a bilateral agreement of co-operation, at least in this particular case concerning the wreck of the *San Salvador* but very probably with a general scope anywhere else, Spain will opt for defending through the judiciary its legal interests on the protection of wrecks of Spanish warships or other State vessels sunken abroad. Indeed, Spain already acted this way in the case of *Juno* and *La Galga*, shipwrecked off the coasts of the United States. It must be highlighted that, in no way, the judicial defence of Spanish legal interests in this matter will have to be limited only to the domestic tribunals of the coastal State in whose maritime zones the wreck could be found. As far as there can be an infringement of Article 303, paragraph 1, of UNCLOS, the mandatory system for the peaceful settlement of disputes provided for in this international convention also remains open to Spain.

In the particular case of the wreck of the vessel *San Salvador*, it has not yet been necessary to go into the judiciary for the defence of the Spanish legal interests on it. After the adoption of this policy, the Spanish Ambassador in Montevideo increased his activities and held several meetings, both with the Uruguayan Minister on Foreign Affairs and even with the Uruguayan *Chancellor, Mr. Operti*. During these meetings, the question of the bilateral co-operation between both countries on Spanish warships and other State vessels sunken in Uruguay is being dealt with on a global perspective and not for single cases of wrecked vessels, like those of the *San Salvador* or *Nuestra Señora del Pilar*. Although these negotiations are still going on, the Uruguayan *Chancellor, Mr. Operti* has already given to Spain his personal and formal warranty that any rescue or recovery activity from Spanish wrecked vessels in Uruguay is suspended until the end of these negotiations. Hence, in a facsimile dated 21 June 2001, from the Director Admiral of the Naval Museum in Madrid (Spain), to the General Subdirector on International Cultural Relationships of the Spanish Ministry on Foreign Affairs, it is stated that:

“[...] la última noticia que se tiene es que el *Canciller Operti* había dado instrucciones, como primera medida precautoria, al Ministerio de Defensa

uruguayo para que las autoridades navales detuvieran las operaciones de rescate de pecios y no concedieran nuevos permisos de cateo” (103).

3. *Foreign ancient warships sunken in Spanish maritime zones*

As we have seen, Spain maintains a clear legal position over its sunken warships. As expressed in the diplomatic verbal note of 8 February 2000 quoted above, Spain asserted that abandonment of State vessels could only be done through an express communication to the competent authorities and through the application of Spanish domestic law relating to public domain.

Spain recently had the opportunity to apply its own doctrine to a foreign sunken warship embedded in Spanish waters which publicly arise in February 2002 (104): the alleged discovery by an US company — *Odyssey Marine Exploration Inc.* of Tampa, Florida — of what it is suppose to be HMS *Sussex*, a British flagship sunk in 19 February 1694 when sailing with ten tons of gold with which Britain tried to retain the Duke of Savoy as an ally against France during the Hapsburg Wars in Europe.

In order to deal with this case, some questions must be previously elucidated: first, the applicable Spanish domestic legislation; second, the incidence of international law on that legislation; and, finally, the *mise en oeuvre* of all these questions in the case of HMS *Sussex*.

3.1. *Spanish Legislation on Underwater Cultural Heritage: A « Puzzle »?*

As frequently happens in most States, Spain does not have domestic legislation expressly devoted to regulate its underwater cultural heritage. The quest of a logic legal canvas force us to find, relate and interpret several national legislation troubled by the fact that Spain constitutional system affords competences — particularly on cultural heritage — both to the State and the different autonomous communities (105). Speaking on sunken warships, we do limit our quest to the

(103) Documentation provided by Spanish authorities on file with the authors.

(104) See *El País*, 25 February 2002; *The New York Times*, 24 February 2002.

(105) The Spanish Constitution of 1978 establishes a complex “State of autonomías” (*Estado de las autonomías*). Since then, 17 different communities enjoy autonomy which grants each of them more competences than, for example, some federal States in Germany, Switzerland or the United States. See its Arts. 148.1.16 and

normal places where these wrecks are embedded: the coastal areas (106). Spanish domestic legislation may be therefore enumerated regarding, first, the “geographical” legislation and, second, the “material” legislation.

Spanish territorial sea was declared by the Act 10/1977, of Jan. 4, 1977, on the Territorial Sea (107). Given the fact that Articles 303 and 33 of UNCLOS extend partially coastal State rights on underwater cultural heritage to the contiguous zone (108), it must be also recalled the Act 27/1992, of Nov. 24, 1992, on the State’s Harbours and the Merchant Navy (109), particularly its Article 7, which declares and delimitates the Spanish contiguous zone, and its Additional Disposition 2, which echoes the coastal rights addressed in Article 33 of UNCLOS. Under both laws Spain thus enjoys its sovereignty and/or jurisdiction over both maritime zones to a limit not exceeding 24 nautical miles, measured from baselines determined in accordance with UNCLOS.

Under Article 132.2 of the Spanish Constitution, territorial sea is the *public domain* of the State. This core principle has been developed

149.1.28. These articles have been the legal basis for the adoption of generic competences on the protection of cultural heritage located in the different territories of the autonomous communities through their respective Statutes of Autonomy. See all these statutes and the particular reference to cultural competences at <http://www.mcu.es/bbaa/index.html>.

(106) Therefore we will not address, unless necessary, the particular questions related to cultural heritage lying on internal waters. The latter, however, represent a huge number of remains, including the wrecks of sunken warships, for example, in the Cádiz Bay, Algeciras Bay, Cartagena sound, Vigo estuary, etc.

(107) *B.O.E.* of 8 January 1977.

(108) By implication, Art. 33 of UNCLOS also should apply to the regime of wrecks embedded on the contiguous zone. Paragraph 2 of Art. 303 of UNCLOS states: “In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article”. Hence, only *removal*, not disruption or destruction should result an infringement of the coastal State laws.

In the Spanish case should be applicable the Organic Act 10/1995, of 23 November 1995, on the Penal Code (*B.O.E.* of 24 November 1995 and *B.O.E.* of 2 March 1996) particularly Arts. 235.1; 241.1; 250.5; 253, 319.1 and 3; 320; 321; 322; 323; 324; 339; 340; 613.1(a); 613.2; 614; 615; 616; 625 and 626; and the Organic Act 12/1995, of 12 December 1995, on the suppression of smuggling (*B.O.E.* of 13 December 1995).

(109) *B.O.E.* of 25 November 1992 and 12 December 1992.

by the Act 22/1988, of Jul. 28, 1988, on the Coasts (110), particularly in its Articles 3 and 5; and, incidentally, by the Act 27/1992 cited above. This legislation has a twofold implication: internationally, it establishes the Spanish sovereignty and jurisdiction over both marine areas in line with UNCLOS. Domestically, it must be underlined that the public domain of the State also refers to the conflict of competencies between the State and the autonomous communities.

This is relevant to the HMS *Sussex* case because the regional government of Andalusia (the autonomous community surrounding Gibraltar) was tempted to submit a claim before the Constitutional Court on the so called « conflict of competencies » (*conflicto de competencias*) against the central government on the constitutional competencies to deal with the wreck (111). It must be kept in mind that, under Article 13.27 of the Statute of Autonomy of Andalusia (112) and Article 149.1.28 of the Spanish Constitution, Andalusia has exclusive competence on the *management* of the historical heritage lying on its territory; and that Art. 17.11 of the Statute of Autonomy of Andalusia gives also this Community the exclusive power of execution of marine salvage in the Andalusian coasts (113). However, the exercise of both competences seems to be more complicated in this very case, although it finally gave the opportunity to both governments — national and

(110) B.O.E. of 29 July 1998.

(111) See ABC, 28 February 2002.

(112) Organic Act 6/1981, of 30 December 1981, B.O.E. of 11 January 1982.

(113) However, to this case was not applicable the Spanish law of finds or the law of salvage (and therefore its possible *execution* or *management* by Andalusia) since, under Spanish legislation, the underwater cultural heritage is *out of the stream of commerce*, contrarily to the principles of the law of salvage. Art. 22.3 of the Act 60/1962, of 24 December 1962, on Maritime Salvage (B.O.E. of 27 December 1962), expressly excludes the application of this law (and the law of finds) “to the objects that, by its nature or by legal rules, are exempted of the free commerce and which shall be governed by special dispositions on the subject”, *i.e.* the Spanish domestic legislation on cultural heritage.

In addition, Art. 44 of the Act 16/1985, of 25 June 1985, on the Spanish Historical Heritage (B.O.E., of 29 June 1985), expressly makes inapplicable the general rule of the law of finds under Art. 351 of the *Código Civil*: “All objects and material remains possessing the values of the Spanish Historical Heritage that are discovered as a result of excavations, earth moving or works of any type or by chance are considered of the public domain. The discoverer shall notify the appropriate Administration of the discovery within a maximum period of thirty days and immediately in the case of casual finds. *Under no circumstances shall the provisions of article 351 of the Civil Code be applicable to such finds.*” (emphasis added).

regional — to search for a solution that has been currently adopted as the general legal policy-making framework (114).

This legal canvas departs from the idea already seen that, under Article 132.2 of the Spanish Constitution, the maritime zones do not fall under the “territory” of the autonomous communities: they (and all the objects floating in, lying on or embedded on them) are the public domain of the State; but, under the Constitution, although the latter has exclusive competence on the “defence of the Spanish cultural, artistic and monumental heritage against export and plunder [...]” this should be “notwithstanding the possible management by the autonomous communities” (115). As expressed in several cases by the Spanish Constitutional Court, the title of territory as a public domain does not exclude the exercise of regional competencies *ratione materiae* (116). Hence, Article 2 of the particular Act on Cultural Heritage of Andalusia (117), although it refers to the Andalusian Historical Heritage lying *in* Andalusia, must be interpreted including the maritime zones surrounding that autonomous community.

The Act 16/1985 on the Spanish Historical Heritage, in its Article 6(a) expressly gives the Regional Government Agencies the executive competence to deal with the management of the heritage in their territories or under their competencies and it must be supposed that this includes the underwater cultural heritage embedded in the Spanish territorial waters. The early practice of the Spanish Central Govern-

(114) Compare this situation with, for example, the system established in the United States under the 1987 Abandonment Shipwreck Act (ASA), 43 U.S.C. 2101-06 (1994). The ASA provides that the United States has title to all abandoned shipwrecks found in U. S. waters within the 3-mile limit; however, the U. S. Government then passed title to the state in whose waters the shipwreck was located.

(115) Article 149.1.28. It must be also recalled the Act 7/1985, of 2 April 1985, on the Basis of Local Regime (*B.O.E.* of 3 April 1985), in which Arts. 2 and 25 recognise limited rights on the management of cultural heritage to local entities.

(116) See, for example, its rulings in cases 77/1984, of 3 July 1984 (*B.O.E.* of 30 July 1984), 227/1988, of 29 November 1988 (*B.O.E.* of 23 December 1988) and 149/1991, of 4 July 1991 (*B.O.E.* of 29 July 1991).

(117) Act 1/1991, of 3 July 1991 (*B.O.E.*, of 26 September 1991). The text in Spanish of Art. 2 reads as follow: “El Patrimonio Histórico Andaluz se compone de todos los bienes de la cultura, en cualquiera de sus manifestaciones, *en cuanto se encuentran en Andalucía* y revelen un interés artístico, histórico, paleontológico, arqueológico, etnológico, documental, bibliográfico, científico o técnico para la Comunidad Autónoma” (emphassis added).

ment shows that pattern (118), but it also shows that, given the mandatory cooperation between central and regional agencies over cases of protection against the plundering of the heritage (119), both Governments must look for a cooperative approach for the protection of underwater cultural heritage. In the *Sussex* affair, after different conversations between Madrid and Seville, both Governments arrived to a solution, blending legal and political considerations, that could serve for future analogous cases: although the territorial waters are public domain of the State, the legal competence to manage the protection of the underwater cultural heritage lying on these waters are exercised by each and every regional government, notwithstanding the subsidiary competence the central Government might exercise in cases surrounded by special circumstances like the *Sussex*: an alleged foreign State vessel, sunk in disputed waters (120).

3.2. *Reading Spanish Legislation with «International Law Lenses»*

In the *Sussex* affair, still under discussion not only in Spain but even among archaeologists in Britain (121), the wreck was embedded in

(118) A decision of the Government of 15 December 1989 over some heritage lying off the *Punta del Nao* in Cádiz adopted a similar solution, recognising the Andalusian Regional Government the competence to authorise the different decision over some archaeological pieces found in the Spanish territorial sea.

(119) It must be recalled that, in its Decision 17/1991, of 31 January 1991, the Spanish Constitutional Court interpreted very broadly the term “plundering” included in Art. 149.1.28, giving the central Government a “subsidiary” competence over the management of the historical heritage.

(120) Disputed only for the British Government which still maintains that Gibraltar has a three mile territorial waters. For the Spanish Government it is absolutely clear, as stated in its Declaration when ratifying UNCLOS on 15 January 1997, that it does not recognise “any rights or status regarding the maritime space of Gibraltar that are not included in article 10 of the Treaty of Utrecht of 13 July 1713 concluded between the Crowns of Spain and Great Britain. Furthermore, Spain does not consider that Resolution III of the Third United Nations Conference on the Law of the Sea is applicable to the colony of Gibraltar, which is subject to a process of decolonization in which only relevant resolutions adopted by the United Nations General Assembly are applicable” (see the text in the DOALOS Website at «http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm»).

(121) See SARAH DROMGOOLE, *Murky waters for government policy: the case of a seventeenth century British warship and ten tonnes of gold coins*, in *Marine Policy* 2004 (in print).

Spanish territorial waters which ease some of the decisions adopted. Some other problems could create the Act 16/1985 cited above when it establishes in its Art. 40.1 that

“According to the terms of article 1 of this Act, movable or immovable property of a historical nature that can be studied using archaeological methodology forms part of the Spanish Historical Heritage, whether or not it has been extracted and whether it is to be found on the surface or under ground, *in territorial seas or on the continental shelf*. Geological and palaeontological elements relating to the history of man and his origins and background also form part of this heritage” (emphasis added).

It has been properly said that the rule expressed in Article 40.1 of the Act 16/1985 just mentioned is « a maximalist thesis of jurisdiction » because it does not harmonize both with international law *de lege lata* (UNCLOS) and *de lege ferenda* (the UNESCO Convention) (122). Moreover, « ...although this provision may at some point be enforced by administrative authorities, it would be declared invalid by judicial courts in a case. The reason is simple: according to the Spanish legal system, international law has primacy over domestic law, and the quoted provision could be interpreted as a violation of UNCLOS. The latter argument will be compelling after the entry into force of the UNESCO Convention ».

In general, awaiting the final ratification of the UNESCO Convention, Spain is bound by general principles of international law (particularly regarding the rule of immunity of sunken warships), by the law of the sea codified in UNCLOS (particularly the rules relating to the rights of the coastal State) and by Spanish longstanding position in several cases of adjudication before domestic courts (particularly the recent cases on the *Juno* and *La Galga* in the United States), other cases before foreign authorities (the case of the *San Salvador* before the Uruguayan authorities) and during the drafting of the UNESCO Convention (123). Spain is thus bound by obligations imposed either by general customary and conventional law and unilateral acts.

According to the Spanish legal system (and particularly under

(122) See CARLOS ESPÓSITO & CRISTINA FRAILE, *The UNESCO Convention on the Underwater Cultural Heritage*, paper presented to the Conference “Bringing New Law for the Oceans”, University of California, Berkeley, School of Law, April 5-7, 2002 (on file with the author), at note 22.

(123) For a general survey of all these questions, see AZNAR-GÓMEZ, *supra*, note 21-bis.

Article 96.1 of the Constitution), international law has primacy over domestic law and, therefore, the obligations cited above force us to interpret all the enacted domestic rules under the *lenses* of international law. Hence, Spain shall exercise its sovereignty or jurisdiction over its maritime zone as limited by international law. Particularly, Spain has exclusive rights over any object, artifact or wreck lying on its territorial sea and its subsoil with the general limit of the sovereign immunity of a foreign States over its sunken warships, irrespective of the time of sinking unless a given act of express abandonment, either unilateral or conventional or capture or surrender under the laws of war. Special circumstances may give the wreck a particular status when it is either considered: (a) a human grave; or/and (b) a historical or cultural site.

As we will see, this has been the clear pattern of conduct of Spanish authorities regarding the remains lying on the Spanish territorial sea and allegedly belonging to HMS *Sussex*, a British sunken warship.

3.3. *The particular case of (the alleged) HMS Sussex*

During four expeditions off Gibraltar in Spanish territorial waters from 1998 to 2001, *Odyssey* developed submarine operation covered under the nick-name “Project Cambridge”, under the authorisation of Spanish authorities but also under severe conditions. This permission was given to the Spanish Law firm representing *Odyssey* by the Spanish Government through the Foreign Affairs Ministry — as we have seen, the one authorized to issue the permission since competence on territorial waters is a State competence not ceded to the autonomous regions — after consultations with the Ministry of Culture and Education.

The conditions were imposed by the Ministry of Culture and Education on 20 April 1999, and repeated to the U.S. Embassy in Madrid by a *Note verbale* issued by the Foreign Affairs Ministry of 5 October 1999. Personnel of the *Museo Nacional de Arqueología Marítima* and of the Spanish Navy were onboard during some expeditions to the wreck (124). But once these conditions were manifestly violated by the Company, Spanish authorities withdrew the permission to carry out further exploration within its sovereign waters. It is important, however, to underline that Spain never claimed title over the (alleged) British flagship.

(124) Documentation provided by Spanish authorities on file with the authors.

Doubts have arisen, however, regarding whether the *Odyssey Company* actually discovered the rests of a British ship since that company were given permission to raise only diagnostic artefacts to the extent necessary to determine if it might be the *Sussex*. Furthermore, the one cannon they raised with Spanish permission — currently under archaeological analysis in the *Museo Nacional de Arqueología Marítima y Centro Nacional de Investigaciones Arqueológicas Submarinas* of Cartagena, Spain — were not British but Dutch (125).

In any case, as far as *Odyssey* were convinced that the remains belonged to the *Sussex*, it signed an agreement with the British Government — as owner of HMS *Sussex* — made effective the 27 September 2002 to manage the exploration, conservation and the recovery of the rests and artefacts from the alleged *Sussex* (126). This agreement has been kept secret by both parties. Only a “Partnering Agreement Memorandum” has been made public in the *Odyssey Marine Exploration*’s webpage (127). Paragraph 12 of the Memorandum explicitly says that “[t]he Agreement contains a confidentiality clause governing the release of information concerning the Agreement and all documents relating to its execution”.

Until now there has been no legal precedent for a private company to join with a government to raise its treasure. The partnership is to split the profits or appraised values of the recovered coins on a sliding scale that favors *Odyssey* at first and then the government. *Odyssey* is to get 80 percent of the proceeds up to \$45 million, 50 percent from \$45 million to \$500 million and 40 percent above \$500 million. The British government gets the rest. No provision for the archaeological exploration of the wreck has been made. On the other hand — and for our tranquillity — it is very doubtful whether the depth of water would allow such exploration to proceed, at least with existing technology.

It must be said, however, that this Agreement has been bitterly criticized, particularly by the Council for British Archaeology (128) which denounced, among other reasons, the non compliance by the

(125) Though other sources state that *Odyssey* might have salvaged 19 cannons and an anchor from the sunken vessel without Spanish full permission.

(126) Agreement Concerning the Shipwreck HMS *Sussex*, of 27 September 2002.

(127) At <http://www.shipwreck.net/pam>.

(128) See its Press Release of 8 October 2002, Council for British Archaeology Slams Government Treasure Hunt, at <http://www.britarch.ac.uk/conservesussex.html>.

British Government of Article 3 of the revised European Convention on the Protection of the Archaeological Heritage, in force for the United Kingdom since 23 January 2001 (129). Actually, in the Explanatory Report to this Convention made by the Council of Europe it is plainly said that “[e]xcavations made solely for the purpose of finding precious metals or objects with a market value should never be allowed” (130). This principle was also held by the Group of Experts which helped the drafting of the UNESCO Convention: it plainly concluded that “the recovery of archaeological material should not be governed by its commercial value” (131).

The British branch of ICOMOS has also expressed its concerns on the Agreement. As stated in its Press Release of 5 November 2002:

“The current deal appears to be contrary to that best practice as set out in the *ICOMOS Charter on the Protection and Management of Underwater Cultural Heritage, 1996*, and the *UNESCO Convention on Underwater Heritage, 1998* [sic]. These documents stress that project funds for exploring underwater heritage must not require the sale of that heritage, that excavations should not be undertaken solely to find objects with a market value, and that underwater cultural heritage should not be traded or sold as commercial goods” (132).

Finally, in the UK, a motion has been put down in Parliament on 12 December 2002 noting the several positive steps recently taken by the British Government in respect of archaeology (133) but deploring

(129) European Convention of the Protection of the Archaeological Heritage (Revised), of 16 January 1992, EUROPEAN TREATY SERIES No. 143.

(130) Council of Europe Doc. MPC (91) 8, available at <http://conventions.coe.int/treaty/EN/cadreprincipal.htm>.

(131) Report of the Meeting of Experts for the Protection of Underwater Cultural Heritage, UNESCO Doc. CLT-96/CONF. 605/6, at 11.45.

(132) See the text at http://www.icomos.org/uk/news/bms_sussex_press.doc.

(133) Particularly, as it is exposed in the motion, it is applauded the UK Government’s recent actions «to protect the wreck of the American warship *Bonhomme Richard* and to return treasure illicitly taken from the wreck in Italian waters; welcomes recent improvements to the Treasure Act and its Code of Practice strengthening archaeological reporting of portable antiquities; notes the generally successful arrangement for archaeological investigations in public private partnerships for major infrastructure projects, including deposition of all finds in public museums; further notes the Government has ratified the Valetta Convention on the Protection of the Archaeological Heritage and has explicitly endorsed the UNESCO Convention for the Protection of the Underwater Cultural Heritage, both of which proscribe excavations carried out principally to recover precious metals and cultural objects for sale and

the approach taken towards the wreck of the *Sussex* (134). The motion further urgently asks the British Government « to reconsider its decision not to sign the UNESCO Convention on the Underwater Cultural Heritage, and to work closely with national and international experts and governments to develop and adopt effective means of protecting and managing the underwater cultural heritage in the public interest » (135).

All of these movements might be forcing the British authorities to “rethink” its *joint venture* with Odyssey and turning to the Spanish authorities in order to publicly cooperate in the preservation of the shipwreck, avoiding any interference of private operators.

To sum up, Spain has: (1) applied its national legislation as authorised by international law of the sea; (2) respected the sovereign immunity, by principle, of what it is supposed (though not confirmed) to be a foreign sunken warship; (3) exercised its authority *de lege ferenda* given by Article 7.1 of the UNESCO Convention; and (4) conditioned salvors activities to the nautical archaeology protocols.

4. *The conformity of Spanish practice with international law*

As we have seen, the Kingdom of Spain has strongly asserted its rights of sovereign property and immunity on ancient Spanish warships and other State vessels sunken abroad in order to protect its underwater cultural heritage. At the same time, Spain has also respected the same rights to which other States are entitled concerning their vessels sunken in Spanish maritime zones. This raises the problem of the legal status of wrecked vessels in international law.

Neither the four 1958 Geneva Conventions on the Law of the Sea, nor UNCLOS or general international law contain any particular,

dispersal ». See the full text of the motion at <http://edm.ais.co.uk/weblink/html/printable.html/ref=250> visited 14 February 2003.

(134) The motion quoted *supra* however regrets that « the Ministry of Defence has signed a treasure-hunting contract with Odyssey Marine Inc. based on the sale of cultural materials from the warship, *Sussex* which sank off Gibraltar in 1694; doubts whether the project’s principal purpose is recovery and disposal of UK cultural assets, conservation of the wreck, or archaeological research for public benefit; questions the technical feasibility of undertaking proper archaeological research at a depth of 2,500 feet; further notes significant domestic and international concern about precedents that this case may set ».

(135) *Ibid.*

express provision on the legal status of sunken warships (136). In some cases, a more general — global (137), regional (138) or bilateral (139) — regime could affect wrecks. Their capture or sinking during an armed conflict may also change its legal status. If considered “war graves”, wrecks would deserve the special protection given by the laws of war (140).

That warships enjoy sovereign immunity in international law is accepted without discussion. The 1926 Brussels Convention for the Unification of Certain Rules concerning the Immunity of State-owned Ships (141) provides for immunity for arrest and seizure to the government-owned vessels in public service. Articles 32, 95 and 236 of UNCLOS also grant immunity to warships (142). As a evidence of the current status of international customary law, Article 16 of the 1991 International Law Commission Draft Articles on Jurisdictional Immu-

(136) On these questions, we follow the more extensive legal analysis made by AZNAR-GÓMEZ, *supra* note 21-*bis*.

(137) For instance, the Convention for the protection of Cultural Property in the Event of an Armed Conflict, 14 May 1954, 249 *UNTS* 240; or the Convention for the Protection of the World Cultural and Natural Heritage, 16 November 1972, 1037 *UNTS* 152.

(138) Such as the Inter American Convention on the Archaeological, Historical and Artistic Heritage of the American Nations, 16 June 1976, 15 *ILM* 1350 (1976); or the European Convention on the Protection of the Archaeological Heritage (Revised), 16 January 1992, *European Treaty Series* No. 143.

(139) For instance, the Treaty of Friendship and General Relations between the United States of America and Spain, of 3 July 1902, quoted above. Its Article X provides that “In cases of shipwreck, damages at sea, or forced putting in, each party shall afford the vessels of the other [...] the same immunities which would have been granted to its own vessels in similar cases”.

(140) War graves must be cared for and preserved consistently with customary international humanitarian law and, particularly, with the four 1949 Geneva Conventions for the Protection of War Victims, 12 August 1949, all in 75 *UNTS*. Article 2 (9) and Rule 5 of the UNESCO Convention on the protection of the underwater cultural heritage (Paris, 2 November 2001) try to ensure, respectively, that “proper respect is given to all human remains located in maritime waters” and that “[a]ctivities directed at underwater cultural heritage shall avoid the unnecessary disturbance of human remains or venerated sites”.

(141) 10 April 1926, 176 *League of Nations Treaty Series* 199.

(142) Even some regional conventions have also similar provisions. Article 30 of the 1972 European Convention on State Immunity excludes “claims relating to the operation of seagoing vessels owned or operated by a Contracting State”. 16 May 1972, *European Treaty Series* No. 74.

nities of States and Their Property (143) confirms that warships and naval auxiliaries and other ships owned or operated by a State and used exclusively on government non-commercial service also grants immunity. The consequence is that warships and other State vessels enjoy immunity with regard to any action brought against them before the domestic courts of other nations.

The problem arises when dealing with sunken warships and other State vessels. As a principle, nothing in the legal texts suggests that warships lose their immunity by the simple fact of their sinking. As we have already seen, this has been the practice followed by Spain in the cases commented above. However, a functional approach has nonetheless been defended by some scholars and other States. According to this approach, the wreck of a warship is no longer a ship. Therefore, it is held that as soon as the sunken warship is not a "ship", it loses its functional condition and, therefore, does not deserve immunity. An important number of States do not share this view (144). Due to the different opinions on this question, the 2001 UNESCO Convention on the protection of the underwater cultural heritage has failed to settle down the question concerning the sovereign immunities of shipwrecked vessels. Its Article 2 (8) contains a disclaimer provision that reads as follows:

"Consistent with State practice and international law, including the United Nations Convention on the Law of the Sea, nothing in this Convention shall be interpreted as modifying the rules of international law and State practice pertaining to sovereign immunities, nor any State's right with respect to its State's rights with respect to its State vessels and aircraft".

(143) UN Doc. A/46/10, *Yearbook of the International Law Commission*, vol. II/2, 1991.

(144) At least for merchant vessels, it is relatively easy to find some evidence to the contrary in international practice. For instance, the cases of two oil tankers, the *Erika* and the *Prestige* can be quoted. These two oil tankers caused an oil spill while they were sailing. Afterwards both of them broke into two pieces and went down, causing a second oil spill from their wrecks embedded on the bottom floor of the sea. The two oil spills, the first one caused while they were sailing and the second one from their wrecks, have been both of them treated and considered as cases of accidental oil pollution resulting from vessels. In both cases, all the States concerned, and even the IMO Oil Pollution Fund, considered the oil spill from their wrecks as cases of oil pollution resulting from vessels, giving rise to a civil compensation from the Oil Pollution Fund. In these cases, the shipwreck did not alter the legal nature of the wrecks as vessels. There is no legal reason for thinking that what is accepted for wrecks of merchant vessels is not valid for wrecks of warships and other State vessels.

But at the same time the contents of these sovereign immunities are cleared away as far as the UNESCO Convention provides for that *coastal States Parties*, in the exercise of their sovereignty, *have the exclusive right to regulate and authorize activities* directed at underwater cultural heritage in their internal waters, archipelagic waters and territorial sea (Article 7 (1)) (emphasis added).

Notwithstanding this, it must be noted that the UNESCO Convention expressly applies to wrecks of State vessels and aircraft (145) “which have been partially or totally under water, periodically or continuously, for at least one hundred years, such as [...] vessels [...] or any part thereof, their cargo or other contents” (Article 1 (1) (a) (ii)). Hence, the UNESCO Convention expressly qualifies this kind of wrecks as “underwater cultural heritage”. This legal qualification is important, because the 1991 ILC Draft Articles on Jurisdictional Immunities of States and Their Property also qualifies as a special kind of State goods, deserving sovereign immunity, those goods forming part of the “cultural heritage of a State” (Article 19 (1) (d)), a provision that until now no State has questioned. Hence, Spain’s claims asserting its rights of sovereign property and immunity on ancient warships and other State vessels sunken abroad in order to protect its underwater cultural heritage must be considered in conformity with general international law, although they will be strongly limited in practice by the UNESCO Convention, if this Convention ever enters into force.

Another important feature of Spanish practice on Spanish ancient warships and other State vessels sunken abroad consists in that it reveals that Spain has only claimed its immunity privileges on these wrecks with the express intent to keep private salvors away from its underwater cultural heritage, in order to protect it, and not for entering into litigation against the coastal State where its wrecks may be found. This practice is in conformity not only with Spanish domestic law (146), but also with international customary and treaty law. The law of salvage *in genere*

(145) According to its Article 1 (8): “«State vessels and aircraft» means warships, and other vessels and aircraft that were owned or operated by a State and used, at the time of sinking, only for government non-commercial purposes, that are identified as such and that meet the definition of underwater cultural heritage”.

(146) Article 22 of the Act 60/1962 on Maritime Salvage and Article 44 of the Act 16/1985, of 25 June 1985, on the Spanish Historical Heritage which. As we have seen *supra*, this provision expressly makes inapplicable the general rule of the law of finds under Article 351 of the Civil Code.

hardly applies to vessels already sank and not simply in peril (147), as for underwater cultural heritage the danger has already passed: either a vessel has sunk or an object has been lost overboard.

In treaty law, Article 14 of the 1910 Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea stated that “this Convention does not apply to ships of war or to Government ships appropriated exclusively to a public service” (148). When the 1910 Convention was revised, the non-applicability of salvage to State vessels was again introduced, except in conformity with an express abandonment act. According to Article 4 (1) of the 1989 International Convention on Salvage, “this Convention shall not apply to warships or other non-commercial vessels owned or operated by a State and entitled, at the time of salvage operations, to sovereign immunity under generally recognised principles of international law unless that State decides otherwise” (149).

Along with this treaty law provisions, a general customary rule excluding the application of the law of salvage to warships and other State vessels, unless otherwise expressly decided by the flag State also exists. Even the recent UNESCO Convention recognises this rule, adding two additional requisites (150). Taking into account that the 2001 UNESCO Convention establishes that underwater cultural heritage shall not be commercially exploited (Article 2 (7)), it is rather impossible that the law of salvage could apply to underwater cultural heritage. Even confirming Spanish argument, the US 4th C. Court of Appeals Decision underlined that:

(147) The requisite to be in peril has been established in State practice. In the case of Spain, the Judgment of the Spanish Supreme Court, dated 15 February 1988 (*RAJ* 1988/1137), also requires it, confirming former authorities in the same sense.

(148) 23 September 1910. *USTS* 576. In force since 1 March 1913. When this Convention was modified by a Protocol done in Brussels on 27 May 1967, it expressly provided for that “a claim against a State for assistance or salvage services rendered to a ship of war or other ship which is, either at the time of the event or when the claim is brought, appropriated exclusively to public non commercial service, shall be brought only before the Courts of such State”. In force since 15 August 1977.

(149) 28 April 1989, 1953 *UNTS* 165. In force since 14 July 1996.

(150) Pursuant to its Article 4, “Any activity relating to underwater cultural heritage to which this Convention applies shall not be subject to the law of salvage or law of finds, unless it: (a) is authorised by the competent authorities, and; (b) is in full conformity with this Convention, and; (c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection”.

“matters as sensitive as these implicate important interests of the executive branch. Courts cannot just turn over the sovereign shipwrecks of other nations to commercial salvors where negotiated treaties show no sign of an abandonment, and where the nations involved all agree that title to the shipwrecks remains with the original owner. Far from abandoning these shipwrecks, Spain has vigorously asserted its ownership rights in this proceeding. Nothing in the law of admiralty suggests that Spain has abandoned its dead by respecting their final resting place at sea” (151).

As the case of the *San Salvador* has shown, when a State like Spain takes the decision to honour its undertakings to protect and to cooperate in the protection of its underwater cultural heritage, as required by Article 303 (1) of UNCLOS, it is fully necessary that the flag State of the wrecked vessel be informed as soon as possible on the finding of its wreck by the coastal State. Only when this premise is implemented, then the flag State will be able to enter into negotiations with the coastal State in order to decide, on a cooperative basis, the best measures for the protection of the wreck. In this case, the interests of Spain are guaranteed by Article 303 (1) of UNCLOS and by the interpretation given by the International Tribunal on the Law of the Sea to the duty to cooperate. As we have already seen, this International Tribunal has considered the duty to cooperate as a fundamental principle under UNCLOS and general international law, prescribing that States “shall cooperate and shall, for this purpose, enter into consultations forthwith in order to exchange further information”.

After the adoption of the 2001 UNESCO Convention, important problems have arisen with wrecks of warships and other State vessels sunken within the internal waters, archipelagic waters and territorial sea of third States. In these cases, its Article 7 reinforces the legal position of coastal States against flag States, providing for an exclusive right of coastal States to regulate and authorise activities on wrecks and, with a very hortatory language (“should inform”), not mandatory (“shall consult”), it establishes a very general duty to cooperate with the flag State of the wrecked vessel. According to Article 7 (3):

“Within their archipelagic waters and territorial sea, in the exercise of their sovereignty and in recognition of general practice among States, States Parties, with a view to cooperating on the best methods of protecting State vessels and aircraft, should inform the flag State Party to this Convention and,

(151) *Sea Hunt*, 221 F.3d 634, at 647.

if applicable, other States with a verifiable link, with respect to the discovery of such identifiable State vessels and aircraft”.

It is well known that these provisions were not considered acceptable to those States that believe that the flag State retains title indefinitely to its sunken State craft unless title has been expressly abandoned or transferred by them (152). Accordingly, Russia and United Kingdom, sponsored by the United States, submitted an amendment to Article 7 (3), trying to counter-balance the wording of this provision in favour of the flag State, which reads as follows:

“Within their *internal waters*, archipelagic waters and territorial sea, in the exercise of their sovereignty and in recognition of general practice among States, States Parties, with a view to cooperating on the best methods of protecting State vessels and aircraft, *shall consult* the flag State Party to this Convention and, if applicable, other States with a verifiable link, with respect to the discovery of such identifiable State vessels and aircraft. *Such State vessels and aircraft shall not be recovered without the collaboration of the flag State, unless the vessels and aircraft have been expressly abandoned in accordance with the laws of that State*” (153).

Although this proposed amendment was more in conformity with the practice already followed by Spain and other important number of States, and without any doubt would have resulted very useful in the protection of the Spanish underwater cultural heritage, this amendment, after being voted, was not accepted by the UNESCO General Conference. This question made that the UNESCO Convention resulted adopted by vote and not by consensus, and that some States, mainly United Kingdom and United States, announced that they will not become State Parties to it, due to the final situation of wrecks of State vessels in the territorial sea of a third State (154).

(152) SCOVAZZI, *The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage*, in CAMARDA & SCOVAZZI, *supra*, footnote 20, p. 128.

(153) Doc. UNESCO 31 C/COM.IV/DR.5, of 26 October 2001, reproduced in CAMARDA & SCOVAZZI, *supra*, footnote 20, p. 418.

(154) For instance, the United Kingdom delegation stated that: “The discussions about warships and State vessels and aircraft used for non-commercial service have proved contentious. There have been exhaustive attempts to reach consensus between the competing claims or the Sovereign Immunity enjoyed by Flag States on the one hand and jurisdictional claims of Coastal States on the other. Unfortunately the differences have not been resolved. The United Kingdom considers that the current text erodes the fundamental principles of customary international law, codified in

Spain did not follow such a radical attitude. In fact, Spain voted in favour of the adoption of the Convention and has already signed but not ratified it. It seems that following a more moderate attitude, Spain believes that it can get the same results through friendly cooperation with the coastal States where Spanish wrecks are or may be found. The adoption of a Memorandum of understanding between Spain and the United States on the wrecks of *Juno* and *La Galga* after being adjudicated to Spain, and the current ongoing diplomatic negotiations with Uruguay and other South American and Caribbean countries, seems to ratify this conclusion, as all these wrecks were found within the territorial sea of a third State.

However, it is clear that problems with some coastal States may arise in the future. In this regard, it must be remembered that, currently, Article 303 (1) of UNCLOS is a provision of treaty-law in force, while Article 7 of the 2001 UNESCO Convention is not. If this Convention enters into force, only then there will be a legal conflict between two treaty provisions. But even this case has been already dealt with by international law. According to the law of treaties, in particular, Article 30 (2) of the Vienna Convention on the Law of the Treaties, Article 311 of UNCLOS and Article 2 (8) and Article 3 of the 2001 UNESCO Convention, Article 303 (1) of UNCLOS must prevail over Article 7 of the UNESCO Convention. Therefore, it seems that it is still possible in the opinion of Spain to harmonise the claim to sovereign and ownership rights on wrecked State vessels and the duty to cooperate with coastal States in the protection of the underwater cultural heritage. At least, until now Spain is succeeding in doing so, but a cloudy and stormy future is coming.

UNCLOS, of Sovereign immunity which is retained by a State's warships and vessels and aircraft used for non commercial service limit expressly abandoned by that State. The text purports to alter the fine balance between the equal, but conflicting, rights of Coastal and Flag States, carefully negotiated in UNCLOS, in a way that is unacceptable to the United Kingdom". The United States' delegation declared that: "Nonetheless, we regret that we cannot accept this text because of objections to several key provisions relating to jurisdiction, the reporting scheme, warships and the relationship of the Convention to UNCLOS". Other delegations, like the French delegation, despite expressing its disagreement with the situation of State vessels and jurisdictional rights, voted in favour of the adoption of the Convention and signed it. See Statement on vote during debates in Commission IV on Culture, 29 October 2001, 31st Session of the General Conference, UNESCO, reproduced in reproduced in CAMARDA & SCOVAZZI, *supra*, footnote 20, p. 426.