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THE KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION

HO CHI MINH CITY, VIETNAM

THE 2009 LAWASIA INTERNATIONAL MOOT COMPETITION

BENEVOLENT HERITAGE INC.

(CLAIMANT)

V.

THE GOVERNMENT OF ROLGA

(RESPONDENT)

MEMORIAL FOR THE RESPONDENT

2009

Table of Contents

INDEX OF AUTHORITIES	5
STATEMENT OF JURISDICTION.....	15
QUESTIONS PRESENTED	16
STATEMENT OF FACTS.....	17
SUMMARY OF PLEADINGS	21
A. THE RESPONDENT HAS NOT INTERFERED WITH THE CLAIMANT’S RIGHTS AND PERFORMANCE UNDER THE 1995 AGREEMENT.	24
I. The Claimant’s recovery of <i>Coeur de l’Ocean</i> does not amount to salvage.	25
1. <i>Coeur de l’Ocean</i> is not in marine peril.	26
II. SALVAGE LAW IS EXCLUDED BECAUSE THE <i>COEUR DE L’OCEAN</i> IS A WARSHIP.....	28
III. THE RESPONDENT HAS NOT INTERFERED WITH THE CLAIMANT’S RIGHTS AND PERFORMANCE UNDER THE 1995 AGREEMENT.	30
1. The 2001 Agreement with Astoria does not constitute interference with the <i>1995 Agreement</i>	30
a. The sharing arrangements under the <i>1995 Agreement</i> does not provide specific entitlement of archaeological objects.	30
b. The <i>Guiding Principles</i> have no impact on the sharing arrangements between the Claimant and the Respondent.....	32
2. Ratification of the <i>2001 UNESCO Convention</i> does not constitute interference with the <i>1995 Agreement</i>	34
a. The Claimant can still perform the recovery work of <i>Coeur de l’Ocean</i> after the ratification of the <i>2001 UNESCO Convention</i>	34
b. The <i>2001 UNESCO Convention’s</i> ban of commercial exploitation of the artifacts does not interfere with the Claimant’s right under the sharing arrangements provision.	35
c. The Respondent had a duty to protect underwater cultural heritage even prior to the conclusion of the <i>1995 Agreement</i>	37
d. The ratification of the <i>2001 UNESCO Convention</i> does not interfere with the	

Claimant’s rights even in case of salvage.	39
3. Allowing tour operation and photographing does not constitute interference to the <i>1995 Agreement</i>	41
a. There is no breach of Confidentiality clause under the <i>1995 Agreement</i>	41
b. There is no interference even if salvage law applies as the Claimant failed to obtain exclusive possessory rights over the shipwreck.	44
B. THE CLAIMANT IS NOT ENTITLED TO ENJOY EXCLUSIVE RIGHTS OF PHOTOGRAPHING AND DOCUMENTING OF COEUR DE L’OCEAN ...	46
I. The <i>1995 Agreement</i> does not impliedly provide the Claimant with the exclusive rights to photograph and document <i>Coeur de l’Ocean</i>	46
II. Copyright law does not grant the Claimant the exclusive right of photographing and documenting of <i>Coeur de l’Ocean</i>	47
1. Copyright does not subsist in the shipwreck.	47
2. The Claimant is only entitled to the copyright in the photos it has taken but not the object it photographed.	48
3. Copyright does not extend to viewing and photographing of the property in public areas.....	49
III. Assuming this is salvage, salvage law does not allow exclusive photographic rights of the salvaged property.	50
1. Photographing and documenting the wreck is against the purpose of salvage law. 50	
2. The exclusive photographic right of <i>Coeur de l’Ocean</i> would violate the salvage principle for salvor’s reward.	51
3. Hindrance to the free use of <i>Coeur de l’Ocean</i> for the purpose of research and study	52
IV. THE DISTRIBUTION OF ARTEFACTS SOLELY ON THE BASIS OF SALVAGE LEGAL PRINCIPLES WAS NOT ENVISAGED BY THE 1995 AGREEMENT MEMORANDUM.....	53
1. The distribution of artefacts should base on the interpretation of contractual provision of the <i>1995 Agreement</i>	53
2. The <i>Sharing Arrangement</i> stipulated in the <i>1995 Agreement</i> is not in excessive degree too large or too small for the services actually rendered.....	54
3. The Claimant failed to exercise a duty of care in the recovery operation and there shall be a reduction of rewards due to poor handling of the artifacts.	56

V. DISTRIBUTION OF ARTEFACTS.....57
VI. CONCLUSION AND PRAYER FOR RELIEF61

INDEX OF AUTHORITIES

INTERNATIONAL TREATIES

1. *1886 Berne Convention* **45, 46,47, 50**
2. *1982 United Nations on the Law of the Sea* **23,29,37, 39**
3. *2001 UNESCO Convention on Protection of Underwater Cultural Heritage*
21,26,32,33,35,37,40,41, 50
4. *1989 Salvage Convention* **22, 27, 52**
5. *1968 Copyright act 1968* **47**
6. *1987 Law of Malaysia copyright act* **50**

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CASES

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3. *Bureau Wijsmuller v Owners of the Tojo Maru* (No.2) **55**

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37

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AGREEMENTS

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STATEMENT OF JURISDICTION

Benevolent Heritage Inc. and The Government of Rolga have submitted the present dispute to this court, the International Arbitration Center in accordance with the Rules of Arbitration of the Kuala Lumpur Regional Centre for Arbitration, and have accepted the compulsory jurisdiction of this tribunal with special agreement reference to clause 10 of the *1995 Partnering Agreement Memorandum*. The parties shall accept the judgment of this court as final and binding, and shall execute it in good faith and in entirety.

QUESTIONS PRESENTED

- I. Whether there has been an interference with the rights and performance of the 1995 Partnering Agreement Memorandum by the (1) entering into 2001 Agreement with Astoria, (2) the ratification of the 2001 UNESCO Convention on the protection of the underwater cultural heritage and (3) allowing tour operator to make profit by organizing wreck diving into the wreck site of *Coeur de l'Ocean* including photographing.
- II. Whether exclusive rights of photography and documentation of the *Coeur de l'Ocean* are granted.
- III. Whether the distribution of artefacts is solely on the basis of salvage legal principles.

STATEMENT OF FACTS

The State of Rolga, an independent State since 1959, was originally part of the colonial empire of Astoria. The historic city of Zamzala, the Sultan's palace in particular, symbolizes the riches and culture of the exotic region of the New World in the time of the 17th century.

In 1800 the Astorian warship *Coeur de l'Ocean* made its most prominent journey for the conquest to the ancient trading city of Zamzala, which is currently part of the territory of Rolga. The Astoria army won the battle but *Coeur de l'Ocean* was defeated by the monsoon. The warship sunk with large amount of goods, trunks of royal jewelry, and other riches that were robbed from the Palace of Zamzala. Under the technological advancement in underwater scientific research and recovery, there is a rise of treasure hunting at sea in the 1980s. The coveted *Coeur de l'Ocean* and other historic wrecks have attracted large amount of treasure hunters to the Rolgan waters. The Government of Rolga was alarmed by the rampant lootings of historic wrecks in territorial sea of Rolga.

In 1990 Benevolent Heritage Inc ("Heritage Inc."), company with expertise in historic wrecks recovery, submitted a proposal to the Rolga Cultural Heritage Committee for the survey and recovery of significant historical wrecks in the Rolgan territorial water. The Government of Rolga, the license granting authority, approved

the project plan submitted by Benevolent Heritage Inc in accordance to the then existing national heritage legislation. Later it also signed the *Partnering Agreement Memorandum* (“the *1995 Agreement*”) on 27 September 1995. It was a heritage recovery service contract with regards to survey, recovery and excavation of the *Coeur de l’Ocean* located within the Rolgan territorial waters.

In response to the development of the international legal regime of the protection of underwater cultural heritage, Rolga had signed and later ratified the *UNESCO Convention in the Protection of the Underwater Cultural Heritage* on 9 January 2005. The Minister of Rolga Cultural, Heritage Riska Benti, said that the State is well aware of its obligation to preserve cultural heritage by understanding the past through scientific means and scholarly manners.

In pursuant of the goal in providing better protection to historic wrecks in the Rolgan waters, Rolga entered into an Agreement with Astoria in 2001 on the “Protection of Astorian Wrecks”. Under the Agreement, Rolga received from Astoria all the rights, interests and titles of the Astorian ancient wrecks, including their contents, lying on or off the coast of Rolga. Rolga recognized Astoria had a continuing interest in articles recovered from any wrecks referred to under the Agreement. In fulfillment of the Agreement, the *Guiding Principles for Determination of the Disposition of Materials from the Shipwrecks of Astoria off the coast of Rolga*

(2001) was drafted.

In the light of progressive development in the protection of underwater cultural heritage, public awareness concerning the threat of commercial exploitation of the artefacts recovered from *Coeur de l'Ocean* rapidly rose. Various social quarters and forums had raised their concern and support towards the prohibition of commercial exploitation of historical artefacts retrieved from the sea. It was commented in a scholar article that the disposal of cultural objects divorced from its historical and cultural context is a great loss to humankind. Further, the government underwater archaeologist stationed on site of *Coeur de l'Ocean* confirmed that many artefacts were destroyed due to poor handling during the recovery service by Heritage Inc.

In fulfilling its obligation under the *2001 UNESCO Convention* and to protect its symbol of nationhood, Rolga had granted license to Aquatic View, a specialized tour operator to organize underwater trips for the public to view the *Coeur de l'Ocean*. Unfortunately, the progressive development in protection of underwater cultural heritage prompted Heritage Inc to withdraw from the heritage recovery project in 2003. Heritage Inc considered further investment in recovery work of Astoria wrecks would no longer be profitable to the company. Therefore, the parties proceeded to the final steps in executing the *1995 Agreement*. Yet, apart from prematurely terminating

the contract, Heritage Inc. accused the Rolgan Government of unfair distribution of artefacts contrary to the *1995 Agreement*.

SUMMARY OF PLEADINGS

- I.** The Respondent, the Government of Rolga, entered into a contract for heritage recovery service of *Coeur de l’Ocean* with the Claimant, Benevolent Heritage Inc., in 1995. The work of conservation and documentation of artefacts retrieved from *Coeur de l’Ocean* was the performance of the contract. It did not qualify as a salvage as the shipwreck was not in marine peril and salvage service was not required. The Claimant should not be entitled to any salvage rights in the present case.
- II.** Salvage law is inapplicable since the dispute arises from the *1995 Agreement* and the subject matter of the dispute did not amount to salvage. The *1989 Salvage Convention* cannot be applied because *Coeur de l’Ocean* is a warship and entitled to state immunity.
- III.** The conclusion of the Agreement with Astoria in 2001 does not constitute interference to the *1995 Agreement*. The disposition of artefacts should be strictly undertaken in accordance with the contractual provisions. The *1995 Agreement* does not provide specific entitlement to archaeological objects. The *Guiding Principles* under the Agreement with Astoria have no impact on the sharing arrangements between the parties.
- IV.** Ratification of the *2001 UNESCO Convention* does not prevent the performance

of the contract. The recovery work of *Coeur de l'Ocean* can still be legally carried out in conformity with the ratification. The ban of commercial exploitation under the Convention does not prohibit disposal of artefacts to retrievable sources and therefore does not deprive the Claimant's right under the sharing arrangements. Furthermore, that the ratification of *2001 UNESCO Convention* does not bring interference to the Claimant's rights as the Respondent has an existing duty to protect underwater cultural heritage from *1982 UNCLOS*.

- V. Allowing Aquatic View to organize wreck tours, including the taking of photographs, constitutes no breach of confidentiality under the *1995 Agreement*. Information concerning *Coeur de l'Ocean* is public information and its disclosure does not render interference to the contract. It is of public interest to disclose the discovery of *Coeur de l'Ocean* and the recovery work done to preserve it. There is no interference even if salvage law applied as the Claimant failed to obtain exclusive possessory rights over the shipwreck.
- VI. The Claimant does not enjoy exclusive rights of photographing and documentation of *Coeur de l'Ocean*. The contract does not provide exclusive rights to photograph and document, nor is the Claimant entitled to any copyright protection that supports exclusive rights. Even salvage law is applicable, salvage

rights do not include exclusive photographic rights of the salvaged property. Such exclusive rights should not be granted for it creates hindrance to research and study of underwater cultural heritage.

VII. The distribution of artefacts recovered solely on the basis of salvage legal principles was not envisaged by the *1995 Agreement*. The sharing arrangements shall be carried out in accordance with the contractual terms. The sharing arrangements were agreed by both parties and there is no unfair distribution of artefacts. In any event, the Claimant should not be entitled to salvage reward for it failed to preserve the archaeological value of the artefacts due to poor handling causing damages and destruction to artefacts recovered from *Coeur de l'Ocean*.

A. THE RESPONDENT HAS NOT INTERFERED WITH THE CLAIMANT'S RIGHTS AND PERFORMANCE UNDER THE 1995 AGREEMENT.

The *1995 Agreement* was a service contract for the recovery of *Coeur de l'Ocean*. It stipulated that the Claimant had the contractual obligation of conservation and documentation of artefacts retrievable from the *Coeur de l'Ocean*.¹ Under the then existing heritage legislation in 1995, government approval was required for all survey, recovery or excavation projects involving historical objects or sites.² Permit for recovery work was granted by the Respondent as an exercise of sovereign rights and jurisdictional power over shipwrecks within its territorial sea.³

The archaeological recovery of *Coeur de l'Ocean* is to be distinguished from a salvage operation. The Claimant's salvage claim should be defeated because long sunken wreck of *Coeur de l'Ocean* cannot be considered as being in marine peril. In any event, *Coeur de l'Ocean* is a warship and therefore it should be immuned from the jurisdiction of an admiralty court. Salvage legal principles under common law as well as the *International Convention on Salvage 1989* ("1989 Salvage Convention") are inapplicable. The present case should strictly be determined on the basis of

¹ Moot Problem Appendix (1) ¶1, 2

² Moot Problem ¶4,5; Moot Problem Appendix (1) ¶2

³ 1982 *UNCLOS* Article 2 & 3

contractual rights provided for by the *1995 Agreement*.

The Claimant is well aware of the obligation to protect cultural heritage because the recovery of *Coeur de l’Ocean* was subject to the scrutiny of the Rolga Cultural Heritage Committee.⁴ The 2001 Agreement with Astoria, the ratification of the 2001 *UNESCO Convention* and the tour operations in the wreck site, including photographing, did not interfere with the Claimant’s rights under the *1995 Agreement*. They are consistent with the Respondent’s continuous endeavour in preserving its national cultural heritage and promoting public awareness.

I. The Claimant’s recovery of *Coeur de l’Ocean* does not amount to salvage.

Article 1(a) of the *1989 Salvage Convention* defines a salvage operation as “any act or activity undertaken to assist a vessel or other property in danger in navigable waters or in any other waters whatsoever”. The right to salvage arises when a person is acting as a volunteer, i.e. in the absence of any pre-existing duty, preserves at sea any vessels, cargo or any other subject of salvage from danger.⁵ The Claimant has failed to establish that *Coeur de l’Ocean* and its contents were in need of salvage

⁴ Moot Problem ¶4

⁵ David J. Bederman & Brian D. Spielman, ‘Refusing Salvage’, 6 *Loy. Mar. L.J.* 33 2008; Geoffrey Brice, *Maritime Law of Salvage*, 3rd edition, Sweet & Maxwell, London, 1999. P.1; *The Sabine*, 101 US. 384 (1879)

service as it is not in marine peril⁶ and the Respondent can exercise its rights not to apply the *1989 Salvage Convention* in the case of *Coeur de l’Ocean*.

1. *Coeur de l’Ocean* is not in marine peril.

The essence of a salvage service “is that it is a service rendered to property or life in danger”.⁷ A salvage claim cannot be established if the Claimant fails to prove the existence of danger.⁸ Danger brought upon by an operative marine peril must be a real and sensible one, instead of fanciful, only vaguely possible or have passed by the time the service is rendered.⁹ Such danger that entitles salvors to claim remuneration must be direct and immediate.¹⁰

Long sunken wrecks are considered to be in a safe underwater environment rather than subject to marine peril.¹¹ In *Her Majesty v Mar. Dive* per Lissaman J., a sunken ship was held to have encountered no real danger but have come to achieve equilibrium with its environment.¹² In *Subaqueous Exploration & Archaeology Ltd v*

⁶ *The Blackwall*, 77 U.S. (10 Wall.) 870, 2002 AMC 1789 (1870); *The Sabine*, 101 U.S. 384 (1879); E. Boesten, *Archaeological and/or Historic Valuable Shipwrecks in International Waters Public International Law and What it Offers*, Hague, 2002. 102; Article 24(1) of UNCITRAL Model Rules provides that “each party shall have the burden of proving the facts relied on to support his claim or defence.”; M. Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals*, Kluwer Law International, 1996. 85

⁷ *Simon v Taylor* [1975] 2 Lloyd’s L.R. 338. 344

⁸ *The Wilhelmine* (1842) 1 N.o.C. 376, 378; *The Ranger* (1845) 3 N.o.C. 589, 590

⁹ F.D. Rose, *Kennedy & Rose Law of Salvage*, Sweet & Maxwell, 6th edition, 2002, ¶333; *Fort Myers Shell & Dredging Co. v. Barge NBC 512*, 404 F.2d 137, 139 (5th Cir. 1968)

¹⁰ *The Vandyck* (1882) 5 Asp. M.L.C. 17

¹¹ M. K. Aznar-Gomez, ‘Legal Status of Sunken Warships’, *Spanish Yearbook of International Law (SYIL)*, vol. VIII, 2001-2002, 7

¹² UNESCO Executive Board, ‘Feasibility Study for the Drafting of a new instrument for the protection of the underwater cultural heritage’, Hundred & forty-sixth Session, 146 EX/27, Paris, 23 March 1995

The Unidentified, Wrecked and Abandoned Vessel,¹³ the court held that marine antiquities that have been undisturbed for centuries are not proper subjects of salvage because they are not in marine peril. In the case where a shipwreck is situated in the seabed, the rate of deterioration becomes very slow due to the lack of oxygen. Instead of being subjected to marine peril, it is preserved under a protective and undisturbed environment.¹⁴ In *Klein v Unidentified, Wrecked and Sailing Vessel*,¹⁵ the court held that the unscientific removal of the artefacts did more to create a marine peril than to prevent one.¹⁶

The direct and immediate danger¹⁷ arose at the time when the *Coeur de l'Ocean* sank because of the monsoon in 1800.¹⁸ The danger however no longer existed in 1995.¹⁹ It has sunken and settled on the seabed for more than 200 years. The long settlement in the seabed has allowed the *Coeur de l'Ocean* to assimilate with the underwater environment and achieve the state of equilibrium with the marine environment.²⁰ Therefore the marine peril is no longer operative and the immobility

¹³ 577 F. Supp. 597, 611, 1983 AMC 913, 932 (D. Md 1983)

¹⁴ S. Dromgoole, "UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001: implications for commercial treasure salvors", *Lloyd's Maritime and Commercial Law Quarterly* 317, 325

¹⁵ 758 F.2d 1515 (11th Cir. 1985)

¹⁶ D. P. Larsen, 'Ownership of Historic Shipwreck in US Law', 9 Int'l J. Marine & Coastal L. 49 1994

¹⁷ *The Vandyck* (1882) 5 Asp. M.L.C. 17

¹⁸ Moot Problem, ¶1.

¹⁹ E. Boesten, *Archaeological and/or Historic Valuable Shipwrecks in International Waters Public International Law and What it Offers*, Hague, 2002; *The Vandyck* (1882) 5 Asp. M.L.C. 17

²⁰ UNESCO Executive Board, 'Feasibility Study for the Drafting of a new instrument for the protection of the underwater cultural heritage', Hundred & forty-sixth Session, 146 EX/27, Paris, 23 March 1995

of a sunken shipwreck does not render the *Coeur de l'Ocean* subject to marine peril.²¹

Unnecessary disturbance of a shipwreck being in equilibrium with the environment, and the unscientific removal of artefacts would create a marine peril than to prevent one.²² The poor handling causing physical damages to many artefacts including Chinese porcelains is in fact imposing threat instead of attempting to rescue the *Coeur de l'Ocean* and its contents. In any event, under the absence of marine peril and creating possible threat to the shipwreck and its contents instead, no salvage claim can be established for the service rendered for *Coeur de l'Ocean*.²³

II. SALVAGE LAW IS EXCLUDED BECAUSE THE *COEUR DE L'OCEAN* IS A WARSHIP.

The original purpose of a sunken vessel can be reflected by its physical structure, fittings and equipments. The armaments found in a shipwreck can be evident to show that it is a warship.²⁴ It has been argued that that a sunken warship is not qualified as a ship because it loses its functional condition. However, this approach has been

²¹ *The Troilus* [1951] AC 820 (HL)

²² *Klein v Unidentified, Wrecked and Sailing Vessel*, 758 F.2d 1515 (11th Cir. 1985); *ibid* (n12)

²³ D. P. Larsen, 'Ownership of Historic Shipwreck in US Law', 9 Int'l J. Marine & Coastal L. 31 1994. 47-48; Marian Leigh Miller, 'Underwater Cultural Heritage: Is the Titanic still in peril as Courts battle over the future of the historical vessel?', 20 Emory Int'l L. Rev. 345. P. 347-348; *Platoro Ltd. v. Unidentified Remains of a Vessel*, 614 F.2d 1051, 1055(5th Cir.1980)

²⁴ A. Strati, *The Protection of the underwater cultural heritage: An emerging objective of the contemporary law of the sea*, Kluwer Law International, 1995. 15

rejected by State practices.²⁵

Article 32, 95 and 236 of the 1982 *UNCLOS* recognize that warships enjoy state immunity.²⁶ Article 4 of the 1989 *Salvage Convention* provides that the Convention shall not be applicable to warships or other non-commercial vessels owned or operated by a State. Reflecting the current position of the customary law in relation to sunken warship, Article 16 of 1991 *ILC Draft Articles on Jurisdictional Immunities of States and Their Property*²⁷ contains similar provision with regards to warships and other state-owned vessels used on government non-commercial service.²⁸ Long sunken warships still entitle to sovereign immunity.²⁹ As a general principle in dealing with sunken warships, the state immunity would not be lost due to the fact that they are sunken into the sea. The legal status of a warship pertains and cannot be altered by deterioration.³⁰

Coeur de l'Ocean was a warship³¹ and therefore should be exempted from the scope of application of the 1989 *Salvage Convention*. The historical records have

²⁵ J. Ashley Roach, 'Sunken Warships and Military Aircraft', Department of the Navy – Naval Historical Centre, Washington DC. 1; Mariano K, 6.

²⁶ J. R. Harris, 'Protecting Sunken Warships As Objects Entitled To Sovereign Immunity', 33 U. Miami Inter-Am L. Rev. 101; Mariano K, 5.

²⁷ *Yearbook of the International Law Commission*, vol.II/2 (1991), Chapter II, UN Doc. A/46/10(1991).

²⁸ Mariano K, 6

²⁹ Migliorino, 'The Recovery of Sunken Warships in International Law', *ESSAYS ON THE NEW LAW OF THE SEA*, 250, 251; A. Strati, *The protection of the Underwater Cultural Heritage: An emerging Objective of the Contemporary Law of the Sea*, 1995. 221

³⁰ A. Strati, *The Protection of the underwater cultural heritage: An emerging objective of the contemporary law of the sea*, Kluwer Law International, 1995. 221

³¹ Moot Problem ¶1; Further Clarification on Moot Problem ¶5

shown that *Coeur de l’Ocean* was used for military purposes prior to its sinking.³² It is evident that the Claimant had recovered two bronze cannon with Astorian marks as well as cannon balls, which were part of the physical characteristics of a warship with ‘distinguishing markings as to nationality’.³³ In any event, the *Coeur de l’Ocean* was a State-owned non-commercial vessel performing public function since it was used for military purpose.³⁴ Therefore, pursuant to Article 4 of the *1989 Salvage Convention*, the Convention is inapplicable in the present case.

III. THE RESPONDENT HAS NOT INTERFERED WITH THE CLAIMANT’S RIGHTS AND PERFORMANCE UNDER THE 1995 AGREEMENT.

1. The 2001 Agreement with Astoria does not constitute interference with the 1995 Agreement.

a. The sharing arrangements under the 1995 Agreement does not provide specific entitlement of archaeological objects.

The sharing arrangement in the *1995 Agreement* provides that the Claimant shall be entitled to own and possess a relative share of the remaining artefacts under the

³² Moot Problem ¶1; Further Clarification on Moot Problem ¶5

³³ Moot Problem ¶12; Article 29 of *1982 UNCLOS*

³⁴ Article 29 of *1982 UNCLOS*

percentage agreed. The aggregate appraised value of the artefacts to be distributed amounts to USD\$63,789,000. It falls within the range ii. \$45 million to \$500 million and the parties shall be sharing on 50%-50% basis. Both Parties will be entitled to half of the remaining artefacts amounting to USD\$31,894,500 and will engage in a joint marketing plan for placement and sales of these artefacts.³⁵

The sharing arrangement does not provide that the disposition of the remaining artefacts would be subject to any preference in relation to quantity, quality or rarity. Nor does it contain specific provision setting down any preference in assigning particular items to either party. There is no requirement of the recovered objects to be sold in a forum where the best price can be obtained. The provision merely specifies the agreed arrangement in determining the proportion of unsold objects the Claimant is entitled to share. The Claimant's entitlement to the rare items was not envisaged in the *1995 Agreement* and hence the absence of rare items in its relative share of artefacts does not constitute any interference of its contractual rights.

The joint marketing plan allows the Respondent to exercise control over the means and channels for the disposal of the artefacts. It does not provide the Claimant with any right to freely dispose the artefacts to any sources without consent and authorization of the Respondent. The right to own and possess relative share of

³⁵ Moot Problem Appendix (1) ¶5

artefacts can only be exercise in conjunction with the joint marketing plan. Unless the joint marketing plan can be concluded and executed, the Claimant would not be entitled to dispose its relative share of artefacts. There is no ground for the Claimant to make allegation on unfair distribution and interference of contractual rights and performance.

b. The *Guiding Principles* have no impact on the sharing arrangements between the Claimant and the Respondent.

The *Guiding Principles for the Determination of the Disposition of Materials from the Shipwrecks of Astoria off the Coast of Rolga (2001)* (“*Guiding Principles*”) provides guidelines for disposition of any artefacts recovered from *Coeur de l’Ocean* between Astoria and Rolga.³⁶ Under the Article 26 of the *1969 Vienna Convention on the Law of Treaties* (“*1969 VCLT*”), the Respondent must preserve the artefacts following the *Guiding Principles* in good faith. Yet it does not constitute interferences rendering the sharing arrangements in the *1995 Agreement* defective or impossible to be executed.

The requirement for keeping rare objects or similar artefacts to form a set or a complete series for statistical treatment does not render a huge proportion of artefacts unavailable for fair distribution under the *Sharing Arrangement*. An illustrative

³⁶ Moot Problem Appendix (2)

example of sample set of artefacts is provided by the case of ‘two hoards of Roman coins discovered in East Yorkshire in 2000’. Out of 1900 coins recovered, the British Museum acquired a selection of 20 coins.³⁷ The number of artefacts required for archaeological research and for statistical sample does not necessarily take up a huge portion of the artefacts recovered. In the case of British warship *HMS Sussex*, the UK Government suggested that museums might not wish to acquire a large quantity of coins. The duplicate nature of many of the coins, considerable storage and preservation, security and insurance matters, would arise from the acquisition.³⁸ There are abundant quantity of artefacts, including 50,000 Silver coins with Astorian marks and 20,000 Chinese porcelains etc, which would enables similar pieces to be grouped to form a complete series or at least a set for archaeological research. At the same time the duplicated pieces available is sufficient for fulfilling the sharing arrangement.

As abundant as hundreds of gold ingots and bullions, gold bars silver ingots and copper planks were recovered from the *Coeur de l’Ocean*.³⁹ Even more abundant is the silver coin where 50000 pieces were recovered.⁴⁰ After retaining a statistical sample of the above items for display purposes and scientific research, the Claimant

³⁷ Sarah Dromgoole, ‘Murky waters for government policy: the case of a 17th century British warship and 10 tonnes of gold coins’, *Marine Policy* vol.28 Issue3, 24 May 2004, 189-198

³⁸ Sarah Dromgoole, ‘Murky waters for government policy: the case of a 17th century British warship and 10 tonnes of gold coins’, *Marine Policy* vol.28 Issue3, 24 May 2004, 189-198

³⁹ Further Clarifications of Moot Problem ¶18.

⁴⁰ Further Clarifications of Moot Problem ¶18.

could share most if not all of these abundant items. Many of the cannon balls are available for the Claimant because many duplicates are available for display purpose.⁴¹ The aggregated value of abovementioned items and some porcelains could amount to USD\$ 3 millions which satisfies the requirement under the *1995 Agreement* sharing arrangement. Therefore the disposition of artefacts under the *Guiding Principles* does not create any interference to the Claimant's rights under the agreement.

2. Ratification of the 2001 UNESCO Convention does not constitute interference with the 1995 Agreement.

a. The Claimant can still perform the recovery work of *Coeur de l'Ocean* after the ratification of the 2001 UNESCO Convention.

The Claimant's recovery work in the *Coeur de l'Ocean* is not barred by the 2001 UNESCO Convention. Despite the 2001 UNESCO Convention's preference for *in situ* preservation⁴², the recovery of artifacts is permissible because the *Rules concerning activities directed at underwater cultural heritage* ("Annexed Rule") annexed to the 2001 UNESCO Convention allows recovery of artifacts so long as it is conducted in a non-destructive manner.⁴³

⁴¹ Moot Problem Appendix (2) ¶3

⁴² Article 2(5) of the 2001 UNESCO Convention.

⁴³ Rule 4 of 2001 UNESCO Convention; Lowell B. Bautista, "Gaps, Issues, and Prospects: International

The methodology, equipment and personnel in the recovery of the *Coeur de l'Océan* were approved by the Rolga Cultural Heritage Committee.⁴⁴ The Claimant's recovery activities were under the Respondent's underwater archaeologists' close scrutiny.⁴⁵ The recovery activities in strict compliance with the *1995 Agreement* would also be in line with the *2001 UNESCO Convention*.

b. The 2001 UNESCO Convention's ban of commercial exploitation of the artifacts does not interfere with the Claimant's right under the sharing arrangements provision.

Article 2(7) and Annexed Rule 2 of the *2001 UNESCO Convention* prohibits any commercial exploitation of underwater cultural heritage. It states that underwater cultural heritage shall not be transferred as commercial goods. However, these articles should not be interpreted as a ban on disposition of cultural artifacts because Annexed Rule 2 of the *2001 UNESCO Convention* provides an exception. The exception allows the deposition of underwater cultural heritage recovered in the course of a project in conformity of the *2001 UNESCO Convention* which does not prejudice the scientific or cultural interest or integrity of the recovered materials or result in its irretrievable

Law and the Protection of Underwater Cultural Heritage", 14 Dalhousie Journal of Legal Studies 58 (2005), p. 68.

⁴⁴ Moot Problem ¶4.

⁴⁵ Moot Problem, Appendix (1) ¶4

dispersal. The sale of cultural artifacts recovered from the *HMS Sussex* was not considered as commercial exploitation because the artifacts remain retrievable and available for future scientific or archaeological study.⁴⁶

Annexed Rule 10 of the *2001 UNESCO Convention* lists out the content of a project design for the activities to be conducted upon underwater cultural heritage. Item (h) concerns a conservation program for artefacts and the site in close cooperation with the competent authorities. Item (m) relates to the arrangements for collaboration with museums and other institutions. Item (o) refers to the depositions of archives including underwater cultural heritage removed from the seabed. These elements can be identified under the *1995 Agreement*.

The 1995 Agreement The requirement of disposal of artifacts to a retrievable source available for future scientific or archaeological study is not an interference with the sharing arrangements provision under the *1995 Agreement*. Since the sharing arrangements stipulates that both Parties will pursue a joint marketing plan for the disposal of the artifacts,⁴⁷ the Claimant is not entitled to absolute autonomy in the deposition of the recovered objects. Similar to the case of *HMS Sussex*, the sale of cultural artefacts does not necessarily constitute commercial exploitation, as long as they remain retrievable and available for future scientific or archaeological study. The

⁴⁶ Sarah Dromgoole, 'Murky waters for government policy: the case of a 17th century British warship and 10 tonnes of gold coins', *Marine Policy* vol.28 Issue3, 24 May 2004, 189-198

⁴⁷ Moot Problem, Appendix (1) ¶5

Respondent as a party in the joint marketing plan and the relevant authority in regulating the execution of the project plan under the *1995 Agreement* shall initiate the disposal of artefacts through sale to museums or similar institution for preservation or protection of cultural heritage.⁴⁸ The execution of the sharing arrangements is not adversely affected under the ratification of the *2001 UNESCO Convention*.

The Claimant shall not be entitled to sell artefacts to irretrievable sources for commercial gain under the *2001 UNESCO Convention*, as it contravenes the intent of the *1995 Agreement* to conduct an archaeological recovery service. Nevertheless, it shall continue to enjoy its contractual rights under the permit of the Respondent to dispose of the artefacts in conformity to the sharing arrangement under the *1995 Agreement*, the joint marketing plan between the Claimant and the Respondent, as well as the provisions of the *2001 UNESCO Convention*.

c. The Respondent had a duty to protect underwater cultural heritage even prior to the conclusion of the *1995 Agreement*.

The duty to protect historic objects at sea is provided by Article 303(1) of the

⁴⁸ Sarah Dromgoole, 'Murky waters for government policy: the case of a 17th century British warship and 10 tonnes of gold coins', *Marine Policy* vol.28 Issue3, 24 May 2004, 189-198

1982 *UNCLOS* which was ratified by the Respondent in 1993.⁴⁹ The 2001 *UNESCO Convention* is based on Article 303(4) of the 1982 *UNCLOS* which anticipated the “progressive development of the law through “other international agreements [...] regarding the protection of objects of an archaeological and historical nature”.⁵⁰ The Preamble of the 2001 *UNESCO Convention*⁵¹ echoes that the Convention comes from progressive development of existing International instruments including the 1982 *UNCLOS*.⁵²

Prior to the conclusion of the 1995 *Agreement*, the Claimant was bound by Rolgan law to protect underwater cultural heritage. Since Rolga is a Monist State,⁵³ the duty to protect archaeological objects at sea has automatically become domestic law upon the ratification of the 1982 *UNCLOS*.⁵⁴ As early as 1990, Rolgan legislation has been prohibiting unauthorized excavation of historic objects or sites.⁵⁵ The subsequent ratification of 2001 *UNESCO* is a continuation of existing duty under 1982 *UNCLOS*.⁵⁶ The Respondent’s position and existing duty towards protection of

⁴⁹ Moot Problem, ¶16.

⁵⁰ Article 4 of the *UNCLOS*; Michael White, ‘International Decision: Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels, 221 F.3d 634 (2000), cert. denied, 121 S. Ct. 1079 (2001). U.S. Court of Appeals for the Fourth Circuit, July 21, 2000’, 95 A.J.I.L. 688-689

⁵¹ “Realizing the need to codify and progressively develop rules relating to the protection and preservation of underwater cultural heritage in conformity with international law and practice, including ... the United Nations Convention on the Law of the Sea of 10 December 1982”

⁵² Tullio Scovazzi, *The Protection of the Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention*, 2003, 10

⁵³ Further Clarifications of Moot Problem, ¶7.

⁵⁴ Malcolm Shaw, *International Law*, 6th edition, Cambridge University Press, 2008. 29, 51

⁵⁵ Moot Problem, ¶4.

⁵⁶ Ana Filipa Vrdoljak & Francesco Francioni, ‘The Illicit Traffic of Cultural Objects in the Mediterranean’, *EUI Working Papers*, AEL 2009/9, Academy of European Law Cultural Heritage Project. 10

historic objects was not altered by the act of ratification.

Under the allegation of interference, the Claimant has failed to identify any specific harm done cannot argue that the ratification of the *2001 UNSECO Convention* amounts to change of circumstances causing interference to its rights and performance under the *1995 Agreement*.

d. The ratification of the 2001 UNESCO Convention does not interfere with the Claimant's rights even in case of salvage.

Salvage law is not rejected by the *2001 UNESCO Convention*, given that its application is in conformity with the Convention.⁵⁷ Article 4 of the *2001 UNESCO Convention* allows salvage of underwater cultural heritage if the three criteria are satisfied: (i) it is authorized by the relevant authorities; (ii) it is in conformity with UCH; and (iii) ensures that any recovery of underwater cultural heritage achieves maximum protection. Rather than unrealistically reject salvage of underwater cultural heritage, the criteria in Article 4 of the *2001 UNESCO Convention* are to ensure responsible salvage for the benefit of preservation.⁵⁸

⁵⁷ Sarah Dromgoole, "2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage", *18 Int'l J. of Marine and Coastal Law* 60 (2003), 71.

⁵⁸ Liza Bowman, 'Ocean Apart Over Sunken Ships: Is the Underwater Cultural Heritage Convention Really Wrecking Admiralty Law?' *42 Osgoode Hall Law Journal* 1 (2004), 30.

Similarly under 1982 UNCLOS, Article 303(3) cannot be interpreted as to override the general duty of protection of underwater cultural heritage by Article 303(1) of the Convention.⁵⁹ Article 303(3) simply emphasizes that the protection of archaeological and historical objects at sea will not abolish salvage law which is still applicable to recent objects.⁶⁰ The use of the fixed period of 100 years underwater as a qualifying criterion of protection provided by the Convention, is considered as a reasonable time limit both for the determination of the scope of salvage law as well as the interpretation of ‘archaeological’ and ‘historical’. The reservation on salvage law does not in any event discharge the duty to protect them under Article 303(1).⁶¹

Such approach would result in dangerous incentive for treasure hunters and is exactly the opposite of the purpose of this Convention.⁶² Article 26 and Article 31(1) of the 1969 *VCLT* provides that treaty should be interpreted in accordance with its ordinary meaning in context and in the light of its object and purpose. The Claimant’s incorrect interpretation would defeat the purpose of Article 303 because its main purpose is to offer protection upon archaeological and historical objects found at sea against exploitation by salvors or treasure hunters who disregard the importance to

⁵⁹ Anastasia Strati, *The protection of the underwater cultural heritage: An emerging objective of the contemporary law of the sea*, Kluwer Law International, The Netherlands, 1995. 124

⁶⁰ Anastasia Strati, “Draft Convention on the Protection of Underwater Cultural Heritage A Commentary”, CLT-99/WS/8,.27.

⁶¹ Anastasia Strati, *The protection of the underwater cultural heritage: An emerging objective of the contemporary law of the sea*, Kluwer Law International, The Netherlands, 1995. 124

⁶² Roberta Garabello and Tullio Scovazzi, *The Protection of the Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention*, The Netherlands, 2003. 184

preserve underwater cultural heritage.

3. Allowing tour operation and photographing does not constitute interference to the 1995 Agreement.

a. There is no breach of Confidentiality clause under the 1995 Agreement.

In relation to breach of confidentiality, the subject of protection exists as information under the obligation of confidence is assumed.⁶³ There exists no breach of confidentiality if the information has been made freely and entirely public and therefore nothing protectable will remain.⁶⁴

The 1995 Agreement does not provide information of the exact location of the *Coeur de l'Ocean*. The confidentiality clause applies only to the release of information concerning the Agreement and all documents relating to its execution

Information concerning *Coeur de l'Ocean* and its disclosure does not render interference to the 1995 Agreement because it is public information and it is for public interest to disclose it to the public.

The identification and recovery project of the *Coeur de l'Ocean* is public

⁶³ William Cornish & David Llewelyn, *Intellectual Property: Patents, Copyright, Trade marks and Allied Rights*, 6th edition, London Sweet & Maxwell, 2007, 314

⁶⁴ *Saltman v Campbell* (1948) 65 R.P.C. 203, p.215; *John v Lloyds Bank* [1975] R.P.C. 385 at p.389; *Harrison v Project & Design* [1978] F.S.R. 81

information and not subject to protection. The fact that shipwreck *Coeur de l’Ocean* was identified and recovery work had been conducted was made known to the public prior to and during the execution of the *1995 Agreement* by both parties. The report by National Geographic prior to the signing of the *1995 Agreement*,⁶⁵ the maritime exhibition at National Museum in 2000,⁶⁶ and the Claimant’s ongoing television documentary deal with an International Broadcasting Company⁶⁷ have revealed information concerning *Coeur de l’Ocean* freely and entirely to the public.

Rule 35 of the *2001 UNESCO Convention* stipulates that the projects to be taken upon underwater cultural heritage shall provide for public education and popular presentation of their results where appropriate. Rules 36 of the Convention further provides that the final synthesis of a project shall be made public as soon as possible, having regard its complexity and confidentiality.

The Respondent as a party to the *2001 UNESCO Convention* recognizes the growing public interest in and public appreciation of underwater cultural heritage.⁶⁸

The objective of the *2001 UNESCO Convention* is to protect the underwater cultural heritage from destruction and to ensure public access to the value of the heritage.⁶⁹

Article 20 of the *2001 UNESCO Convention* provides that all States shall take

⁶⁵ Moot Problem ¶5

⁶⁶ Moot Problem ¶6

⁶⁷ Moot Problem ¶11

⁶⁸ Preamble of *2001 UNESCO Convention*

⁶⁹ E. Boesten, *Archaeological and/or Historic Valuable Shipwrecks in International Waters*, T.M.C. Asser Press, The Netherlands, 2002, 134-135

practicable measures to raise public awareness of the underwater cultural heritage. In pursuance to Rules 35 and 36 of the Convention, the Respondent shall exercise the duty and for the interest of the public, allows public access to the public information in relation to the recovery progress of the *Coeur de l'Ocean* in conformity of the Convention.

The Respondent pursues archaeological recovery and preservation work under the *1995 Agreement* is acting in an interest wider than its own national interest. It is also serving the interest of the international community in the protection of cultural heritage.⁷⁰ The identification and preservation of *Coeur de l'Ocean* is a step to strengthen the Rolgan cultural heritage appreciation as “symbol of nationhood”.⁷¹ Information sharing serves as a means to raise public awareness in the appreciation and protection of underwater cultural heritage.⁷² It is of public interest to disclose such discovery through maritime exhibition and other means such as underwater tour to wreck site *in situ* in pursuance of Rules 7 of the *2001 UNESCO Convention* and that does not constitute a breach of confidentiality.⁷³

⁷⁰ Anastasia Strati, *The protection of the underwater cultural heritage: An emerging objective of the contemporary law of the sea*, Kluwer Law International, The Netherlands, 1995. 124.

⁷¹ Valentina S. Vadi, ‘The Protection of Underwater Cultural Heritage in International Law: Challenges and Perspectives’, *EUI Working Papers*, AEL 2009/9, *Academy of European Law Cultural Heritage Project*.91; Moot Problem ¶7

⁷² E. Boesten, *Archaeological and/or historic valuable shipwrecks in international waters: Public International Law and What it offers*, TMC Asser Press, The Netherlands, 2002. 136; Preamble and Article 2(5) of *2001 UNESCO Convention*

b. There is no interference even if salvage law applies as the Claimant failed to obtain exclusive possessory rights over the shipwreck.

In *Morris v Lyonesse Salvage Co. Ltd.*,⁷⁴ the salvor must show that first, he has *animus possidendi*, and, secondly, that such use and occupation is reasonably practicable having regard to the subject matter, its location, and the practice of salvors.

In *Klein v Unidentified, Wrecked and Sailing Vessel*,⁷⁵ the court held that the exclusive salvage rights were denied because the archaeological provenience of the retrieved artefacts was not preserved in the recovery operation.⁷⁶ In *MDM Salvage*,⁷⁷ the Court denied applications from two commercial salvors to recover properties from a Spanish galleon, due to the fact that both had failed to make any attempt in preserving the “archaeological integrity” of the wreck.⁷⁸ The Court expressed that, “Archaeological preservation, onsite photography, and the marking of sites are particularly important ... as the public interest is compelling in circumstances in which a treasure ship, constituting a window in time [,] provides a unique opportunity to create a historical record of an earlier era. These factors constitute a significant element of entitlement to be considered when exclusive salvage rights are sought.”⁷⁹ Therefore the physical conditions as well as the archaeological value of the

⁷⁴ (1970) 2 Lloyd’s L.R. 59, 61

⁷⁵ 758 F.2d 1515 (11th Cir. 1985)

⁷⁶ E. Boesten, *Archaeological and/or historic valuable shipwrecks in international waters: Public International Law and What it offers*, TMC Asser Press, The Netherlands, 2002. 107

⁷⁷ 631 F. Supp. 308, 310-11 (S.D.Fla.1986)

⁷⁸ D. J. Bederman, *Historic Salvage and the Law of the Sea*, 30 *U. Miami Inter-Am. L. Rev.* 105-106 1998-1999

⁷⁹ 631 F. Supp. 308, 310 (S.D.Fla.1986)

artefacts retrieved are both important elements to show whether the salvor had been successful in its operation.⁸⁰

The present case is not of salvage and hence there is no obligation for the Respondent to protect the interest of first salvor over the shipwreck.⁸¹ Even if Arbitral Tribunal finds it a salvage, the tour operation does not constitute interference to the Claimant's rights and performance unless the Claimant can prove that it is entitled to maritime lien over the wreck site to prohibit the tour operations.

The Claimant cannot show that it has obtained *animus possidendi* and exercise it with due diligent.⁸² The poor handling of artefacts resulting in many of them being destroyed constituted an actual peril to the artefacts that should be well protected and preserved.⁸³ The archaeological value of those retrieved artefacts is lost as a result. This is particularly significant because the salvors are assumed to have the expertise in retrieving and handling such historical artifacts. The recovery of artifacts in such a poor manner cannot secure the Claimant exclusive possessory rights.

Even if the Claimant establishes that there is exclusive possessory right to the wreck site and/or the artefacts, such rights should not be exercised against the owner

⁸⁰ E. Boesten, *Archaeological and/or historic valuable shipwrecks in international waters: Public International Law and What it offers*, TMC Asser Press, The Netherlands, 2002. 100-101

⁸¹ S. Dromgoole & N. Gaskell, 'Who has a Right to Historic Wrecks and Wreckage?', 2 Int'l J. Cultural Prop. 217, 247 (1993)

⁸² P.J. O'Keefe & L.V. Prott, *Law and the Culture Heritage Volume 1 Discovery & Excavation*, Professional Books Limited, (1984) 120

⁸³ Moot Problem ¶10; Further Clarifications to the Moot Problem ¶34

of the wreck and any licensees of the owner, i.e. Aquatic View the tour operator. Such right can only be exercised against any competing salvors, in order to secure the rights of the first salvor.⁸⁴

B. THE CLAIMANT IS NOT ENTITLED TO ENJOY EXCLUSIVE RIGHTS OF PHOTOGRAPHING AND DOCUMENTING OF COEUR DE L'OCEAN

The *1995 Agreement* does not expressly provide the Claimant with exclusive photographing and documenting of *Coeur de l'Ocean*. The Claimant cannot assert that it has such exclusive right because (I) it was not impliedly provided by the *1995 Agreement*; (II) the Claimant is not entitled to any copyright protection which gives rise to such exclusive right; (III) assuming this is a salvage, salvage rights do not include exclusive photographic rights of the salvaged property; and (IV) there would be hindrance to research and study of underwater cultural heritage if such rights are granted to the salvor.

I. The *1995 Agreement* does not impliedly provide the Claimant with the exclusive rights to photograph and document *Coeur de l'Ocean*

The *1995 Agreement* does not contain any implied terms that grant the Claimant

⁸⁴ S. Dromgoole & N. Gaskell, 'Who has a Right to Historic Wrecks and Wreckage?', 2 Int'l J. Cultural Prop. 217, 246

the exclusive right of photography and documentary of *Coeur de l’Ocean*. Terms will only be implied when such term is necessary to give business efficacy to the contract and that any reasonable men would have agreed without hesitation to its insertion.⁸⁵

The Claimant’s exclusive right to image-taking of *Coeur de l’Ocean* cannot be implied in the *1995 Agreement*. Such right would not improve the efficiency of the Claimant’s recovery work because filming and photographing the wreck would be interrupt the recovery work⁸⁶ and drag down the work progress. The exclusive right to image-taking of *Coeur de l’Ocean* is incredibly profitable because such right can be sold to International *Broadcasting Company*.⁸⁷ No reasonable person would grant such profitable right without hesitation. The British Government requires 10% of any net income derived from the image-taking of *Sussex*.⁸⁸

II. Copyright law does not grant the Claimant the exclusive right of photographing and documenting of *Coeur de l’Ocean*

1. Copyright does not subsist in the shipwreck.

Article 2 of the *1886 Berne Convention for the Protection of Literary and*

⁸⁵ *Liverpool City Council v Irwin* [1976] 2 All ER 39, per Lord Cross; *Finchbourne Ltd v Rodrigues* [1976] 3 All ER 581; *Gardner Coutts & Co.* [1967] 3 All ER 1064.

⁸⁶ *R.M.S. Titanic, Inc. v. Wrecked and Abandoned Vessel*, 9 F. Supp. 2d 624 (E.D. Va. 1998), 637; *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943 (4th Cir. 1999), 970.

⁸⁷ Moot Problem, ¶11.

⁸⁸ The Partnering Agreement Memorandum between Britain and Northern Ireland and Odyssey Marine Exploration, Inc., available at <http://www.shipwreck.net/pam/>, last visited on 30 August 2009.

Artistic Works (“*Berne Convention*”) states that copyright protection is afforded to literary and artistic works. Article 2(1) of the *Berne Convention* defines an artistic work as works such as painting, sculpture, artistic craftsmanship in which, works of artistic craftsmanship. *Burge v Swarbrick* held that the object must show clear aesthetic notions and not focused on functional concerns in order to qualify as an artistic work.⁸⁹

Coeur de l’Ocean is not an artistic work due to the lack of “aesthetic notion” to be categorized as a work of artistic craftsmanship as it is made for the functional purpose of navigation rather than as a piece of art. Therefore, *Coeur de l’Ocean* is not copyrightable.

2. The Claimant is only entitled to the copyright in the photos it has taken but not the object it photographed.

Authors of the original work are entitled to have copyright protection of their work⁹⁰. One cannot exclude the others from producing their work based on the same object, as long as they can prove that there is no copying⁹¹ and there is originality⁹². Copying includes the act of direct reproduction or production of a derivative of the

⁸⁹ [2007] HCA 17.

⁹⁰ *Berne Convention*, Article 1

⁹¹ *Harman Pictures NV v Osborne* [1967] 1 WLR 723, *Baigent v The Random House Group Limited* [2007] EWCA Civ 247

⁹² Per Somervell LJ, *Bauman v Fussell* [1978] RPC 485, 486

work⁹³. Originality is defined as the input of skill and labour⁹⁴. In addition, copyright protects the expression of ideas but not the idea itself⁹⁵.

The Respondent submits that there is no evidence of any copying or production of derivatives based on Claimant's work when photographs and documentations are made directly from the *Coeur de l'Ocean*. As the photographing and documenting of *Coeur de l'Ocean* requires the author's own skill and labour instead of relying on Claimant's photos and documentaries, therefore, they are entitled to own copyright protection of their own work. Furthermore, the photographing and documenting of *Coeur de l'Ocean* is merely an idea which is not copyrightable.

3. Copyright does not extend to viewing and photographing of the property in public areas.

Assuming *Coeur de l'Ocean* is protected by copyright, the law only grants exclusive rights to image-recording of property situated in a "private or controllable location"⁹⁶ where it cannot be viewed or photographed without the owner's consent.

⁹³ *Copyright Act 1968*, s32(1) and (2)

⁹⁴ *Bauman v Fussell* [1978] RPC 485

⁹⁵ *Kenrick v Lawrence*(1890) 25 *QB* 99; *Cuisenaire v Reed* [1962] VR 719

⁹⁶ R. Garabello and T. Scovazzi, 'The Protection of The Underwater Cultural Heritage Before and After The 2001 UNESCO Convention', *Martinus Nijhoff Publishers Leiden/Boston*, 2003, 68; J. S. Stern, 'Smart Salvage: Extending Traditional Maritime Law to Include intellectual Property Rights in Historic Shipwrecks', 68 *Fordham Law Review*, May 2000, 2526; *R.M.S. Titanic, Inc. v Haver*, 171 F.3d 943, 969-970.

The Court in *R.M.S. Titanic, Inc. v Haver*⁹⁷ stated that an architect's copyright in the design of a building should not extend to prevent the viewing and photographing of such a building if it is located at a public site or is visible from a public place.⁹⁸

Coeur de l'Ocean is located in a public area because it lies on the seabed in Rolgan waters and its site has not been designated as a restricted area. Copyright would not affect the passerby's right to photographing *Coeur de l'Ocean* situating in a public site.

III. Assuming this is salvage, salvage law does not allow exclusive photographic rights of the salvaged property.

1. Photographing and documenting the wreck is against the purpose of salvage law.

The traditional salvage law does not encompass copyright claims by the salvor because salvage law merely protects the actual commodity, the vessel, rather than the intangible potentially marketable imagery of the historic wreck.⁹⁹ The granting of exclusive rights of photographing and documenting would be contrary to the purpose of salvage law, which is to return the vessel safely to the owner.¹⁰⁰ The

⁹⁷ 171 F.3d 943, p. 970 (4th Cir. 1999).

⁹⁸ 17 U.S.C. 120(a); see also *R.M.S. Titanic, Inc. v Haver*, 171 F.3d 943, 970.

⁹⁹ *R.M.S. Titanic, Inc. v Haver*, 171 F.3d 943, pp. 969-970.

¹⁰⁰ R. Garaballo and T. Scovazzi, 'The Protection of The Underwater Cultural Heritage Before and After

photographing and documenting of the wreck will detain the wreck in a dangerous environment. Thus the wreck in danger would be exposed to increasing risk.

Assuming *Coeur de l'Ocean* is in marine peril, the grant of exclusive right to photographing and documenting *Coeur de l'Ocean* to the Claimant would lengthen the duration of its exposure to marine peril. *Coeur de l'Ocean* would be kept in the dangerous site so as to allow the television broadcast company to film it for the documentary.

2. The exclusive photographic right of *Coeur de l'Ocean* would violate the salvage principle for salvor's reward.

Salvage law shall not reward the salvor any amount that exceed the value of the salvaged property.¹⁰¹ The court held that the salvor would be unjustly enriched if his remuneration surpassed the value of the salvaged property.¹⁰² The exclusive imaging-taking right could generate significant commercial gain which far exceeds the reward the salvor originally entitled to. The grant of such right has been rejected by the court because it was considered to be an unprecedented expansion of salvage principle which should not be permitted.¹⁰³

The 2001 UNESCO Convention', Martinus Nijhoff Publishers Leiden/Boston, 2003, p. 68; also see *R.M.S. Titanic, Inc. v Haver*, 171 F.3d 943, 969-970.

¹⁰¹ *Falcke v Scottish Imperial Insurance Co.* [1886] 34 Ch.D. 234, 248-249; also see Francis D. Rose, Kennedy & Rose Law of Salvage, London Sweet & Maxwell, 6th edn., 2002, 18-19.

¹⁰² *Falcke v Scottish Imperial Insurance Co.* [1886] 34 Ch.D. 234, 248-249; also see Francis D. Rose, Kennedy & Rose Law of Salvage, London Sweet & Maxwell, 6th edn., 2002, 18-19.

¹⁰³ J. S., Stern, 'Smart Salvage: Extending Traditional Maritime Law to Include Intellectual Property in Historic Shipwrecks', 68 *Fordham Law Review*, May 2000, 2525-2526.

3. Hindrance to the free use of *Coeur de l'Ocean* for the purpose of research and study

The Respondent submits that even if copyright subsists and is owned by the Claimant, the photographing and documenting of the *Coeur de l'Ocean* is still allowed to be used for purpose of teaching¹⁰⁴. Such has been further legislated by many countries of the Union of the Convention, such as Malaysia¹⁰⁵ and Australia¹⁰⁶, as to include the purpose of research and study. This is even contrary to the purpose of *2001 UNESCO Convention*, as in the preamble, it was written that the convention has been convinced of the importance of research and education to the protection and preservation of underwater cultural heritage. Therefore, by excluding others from photographing and documenting of the *Coeur de l'Ocean*, the free use of the wreck will be barred and archaeological and scientific research will be hindered.

¹⁰⁴ *Berne Convention*, Article 10

¹⁰⁵ Laws of Malaysia, Act 332, Copyright Act 1987, s13(2)(a)

¹⁰⁶ Copyright Act 1968, s. 40

**IV. THE DISTRIBUTION OF ARTEFACTS SOLELY ON THE BASIS OF
SALVAGE LEGAL PRINCIPLES WAS NOT ENVISAGED BY THE
1995 AGREEMENT MEMORANDUM.**

The *1995 Agreement* is a service contract which the sharing arrangements provide the distribution of artefacts between the parties. The execution of the sharing arrangements should base on the interpretation of the contractual terms, instead of relying solely on the basis of salvage legal principles under a salvage claim.

**1. The distribution of artefacts should base on the interpretation of
contractual provision of the *1995 Agreement*.**

The *1995 Agreement* set down the sharing arrangement for distribution of retrieved artefacts by a specific calculation and agreed percentage to decide the relative share among the parties.¹⁰⁷ According to the contractual term, the distribution depends on the aggregate appraised value plus net profits obtained from the sale of artefacts.¹⁰⁸ There are three factors in deciding the sharing of artefacts between the parties: number of artefacts retrieved, the appraised value of the artefacts and net profits from sale of artefacts.¹⁰⁹ It does not reflect any salvage legal principles to be

¹⁰⁷ Moot Problem Appendix (1) ¶ 5

¹⁰⁸ Moot Problem Appendix (1) ¶ 5

¹⁰⁹ Moot Problem Appendix (1) ¶ 5

relied upon in the calculation under the Sharing Arrangement clause.

In any event, salvage legal principle would not be applicable to determine the distribution of the artefacts even if the present case qualifies as a salvage operation. *1989 Salvage Convention* Article 6(1) states that the existence of a contract would prevail over the application of salvage law in any salvage operations. The application of salvage law is not mandatory in determining the salvage reward.¹¹⁰ If the Arbitral Tribunal finds this case a salvage and the *1995 Agreement* a salvage agreement, the contractual provisions in the distribution of artefacts should prevail over the salvage legal principles. Hence, whether or not the performance of the *1995 Agreement* is a salvage operation, the sharing arrangements under the *1995 Agreement* would determine the distribution of artefacts instead of application of salvage legal principles.

2. The *Sharing Arrangement* stipulated in the *1995 Agreement* is not in excessive degree too large or too small for the services actually rendered.

Article 6(1) of *1989 Salvage Convention* provides that the sole exception of distributing artifacts under existing contract are the situations listed under Article 7 of

¹¹⁰ N.J.J. Gaskell, 'The International Convention on Salvage 1989', *4 Int'l J. Estuarine & Coastal L.* 270 1989

the Convention. Past admiralty cases suggest that unless the remuneration is too large or too small in “excessive degree”, would the court consider to interfere with the salvage contract as the intention of the parties is amount of the salvage operation.¹¹¹

The Respondent submits that the ratification of *2001 UNESCO Convention* and Agreement with Astoria in 2001 did not render the remuneration given to the Claimant too small in an excessive degree. First, items that would be kept as statistical samples in compliance to the Agreement with Astoria in 2001 are of a small portion out of the all artefacts retrieved. Second, the poor handling of artefacts rendering many of them destroyed reflected the negligence of the Claimant and hence shall be construed with the calculation of profit. Third, the present case concerns an archaeological recovery project but not a salvage; and even if it is salvage, it has not been completed for work by Claimant was suspended since 2003 and the contract does not expire till 2015.

¹¹¹ *The Phantom* (1866) L.R. 1 A&E. 58, *The Westbourne* (1889) L.R.14 P.D.132, *The Theodore* (1858) 166 E.R.1163

3. The Claimant failed to exercise a duty of care in the recovery operation and there shall be a reduction of rewards due to poor handling of the artifacts.

In the case of *Tojo Maru*¹¹², the owners of Tojo Maru denied that the salvors were entitled to any remunerations under the contractual salvage and counterclaimed for damages sustained by the vessel through the negligence of the salvors. The Arbitral Tribunal found the salvors owed a duty of care in carrying out the operations, for the resulting damages were foreseeable.¹¹³ It was decided that the compensation for such negligence will be construed with the overall performance of the salvage.

The respondent submits that the poor handling of Chinese porcelains by Claimant personnel amount to negligence under the performance of the contract.¹¹⁴ Whether or not such operation rendered by the Claimant amounts to salvage, its performance of contractual obligation should be carried out with due diligent. Since the Claimant by its performance breached the duty of care and caused foreseeable damage to the artefacts,¹¹⁵ it should bear the costs of the destroyed Chinese porcelains and any other artifacts. Hence the distribution of artefacts would be affected by the Claimant's performance of the contract, as artefacts available for

¹¹² *Bureau Wijsmuller NV v Owners of the Tojo Maru* (No. 2) [1972] A.C. 242

¹¹³ *Caparo Industries plc v Dickman* [1990] 2 AC 605, 617-618

¹¹⁴ *Lochgelly Iron & Coal Co v M'Mullan* [1934] AC 1

¹¹⁵ *Bureau Wijsmuller NV v Owners of the Tojo Maru* (No. 2) [1972] A.C. 242, p.248

distribution is reduced by its poor handling of artefacts and its entitlement to relative share should be forfeited for not acting as a responsible salvor.

V. DISTRIBUTION OF ARTEFACTS

Since the Respondent has not caused any interference to the Claimant's rights and performance under the 1995 Agreement, it is submitted that both parties should honour the contractual provisions and the sharing arrangement under the 1995 Agreement should be executed according to its strict compliance.

The following table shows the distribution of artefacts according to the calculation based on the aggregate appraised value of the artefacts and the net proceeds from sales of artefacts.

No	Item/Articles /Objects	Quantity	Specific requirements	Appraised Value of each item (in US Dollar)	Claimant's share	Worth of Share (C) in USD	Respondent's share	Worth of Share (R) in USD
1	Gold Ingots and Bullions	360	Small quantity for purpose of archaeological research	USD 50,000 total, USD 138.88 each	320	444,416	40	5555.2
2	Gold Bars	100	Small quantity for purpose of archaeological research	USD 150,000, USD 1500 each	90	135,000	10	15,000
3	Silver Ingots	700	Small quantity for purpose of archaeological research	USD 20,000, USD 28.57 each	660	18,856.2	40	1,142.80
4	Silver Coins with Astorian Marks	50,000	Bears Astorian Marks, prioritised for Government	USD 10,000, USD 0.2 each	49960	9,992	40	8
5	Copper Planks	200	Small quantity for purpose of archaeological research	USD 5,000, USD 25 each	198	4,950	2	50
6	Indigo	200 chests	Unknown value, not valuable	Not yet determined	100	Not yet determined	100	Not yet determined
7	Tobacco	10 tons	Unknown value, not valuable	Not yet determined	5	Not yet determined	5	Not yet determined
8	Bronze cannon with Astorian marks	2	Rare Archaeological items, subject to Rolgan Museums, Clause 6 of Guiding Principles	Not yet determined	0	Not yet determined	2	Not yet determined

9	Silver container	1	Rare Archaeological items, subject to Rolgan Museums, Clause 6 of Guiding Principles	USD 10,000	0	0	1	10,000
10	Bronze forks	4	Rare Archaeological items, subject to Rolgan Museums, Clause 6 of Guiding Principles	USD 2,000, USD 500 each	0	0	4	2,000
11	Silver pendant	1	Rare Archaeological items, subject to Rolgan Museums, Clause 6 of Guiding Principles	USD 15,000	0	0	1	15,000
12	Comb	2 pieces	Rare Archaeological items, subject to Rolgan Museums, Clause 6 of Guiding Principles	Not yet determined	0	0	2	Not yet determined
13	Olives and pickles	3 jars	Unknown value, not valuable	Not yet determined	0	0	3	Not yet determined
14	Unknown liquid	1 bottle	Scientific analysis required	Not yet determined	0	0	1	Not yet determined

15	Ornaments	5 pieces	Rare Archaeological items, subject to Rolgan Museums, Clause 6 of Guiding Principles	USD 5,000, USD 1000 each	0	0	5	5,000
16	Elephant Tusks	50	Small quantity for purpose of archaeological research	USD 2,000, USD 40 each	48	1920	2	80
17	Cannon Balls	12	Unknown value, archaeological research	Not yet determined	6	Not yet determined	6	Not yet determined
18a	Chinese Porcelains (Mint)	10,000 pieces	Rare Archaeological items, subject to Rolgan Museums, yet in abundance	USD 5000 each	5253	26,265,000	4747	23,735,000
18b	Chinese Porcelains (Non-mint)	10,000 pieces	Rare Archaeological items, subject to Rolgan Museums, yet in abundance	USD 1000 each	5253	5,253,000	4747	4,747,000
19	Sword bearing some Arabic words	57 pieces	Small quantity for purpose of archaeological research	USD 20,000, USD 350.88 each	43	15,087.84	14	4,912.32
20	Silver daggers with precious stones	2 pieces	Rare Archaeological items, subject to Rolgan Museums, Clause 6 of Guiding	USD 3,500,000, USD 1,750,000 each	0	0	2	3,500,000

			Principles					
21	Spices	70 bottles	Unknown value, not valuable	Not yet determined	35	Not yet determine d	35	Not yet determined

VI. CONCLUSION AND PRAYER FOR RELIEF

The Respondent requests the Arbitration Tribunal to rule and declare that:

- i. The Respondent, by ratifying the *2001 UNESCO Convention*, entering the Agreement with Astoria in 2001 and by allowing tour operator to organize visiting activities to the site including taking of photographs has not interfered the rights of the Claimant's under the *1995 Agreement*
- ii. The Claimant is not entitled to enjoy the exclusive rights of photography and documentation of the *Coeur de l'Ocean*
- iii. The calculation of profit and/or distribution of artifacts will not be based solely on salvage principles.
- iv. The tribunal shall distribute the artifacts according to the sharing arrangements in *1995 agreement*.