

INTERNATIONAL CENTER OF ARBITRATION

2009

CASE CONCERNING THE SHIPWRECK COEUR DE L'OCEAN

BENEVOLENT HERITAGE INC

(CLAIMANT)

v.

THE GOVERNMENT OF ROLGA

(RESPONDENT)

MEMORIAL FOR THE RESPONDENT

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STATEMENT OF JURISDICTION

The claimant, Benevolent Heritage Inc. and the respondent, State of Rolga have agreed to bring any disputes regarding the 1995 Agreement before the International Center of Arbitration pursuant to Article 10 of the said agreement. Therefore the claimant and respondent have thus accepted the jurisdiction of the International Center of Arbitration pursuant to Rule 1 of the UNCITRAL Arbitration Rules

QUESTIONS PRESENTED

- I WHETHER the act of Rolga entering into an Agreement with Astoria, ratifying the 2001 UNESCO Convention and allowing other tour operator to make profits from visiting the wreck site has interfered with Benevolent Heritage Inc's rights and performance under the 1995 Agreement.

- II WHETHER Benevolent Heritage Inc. is granted with exclusive photography and documenting rights towards Coeur de l' Ocean, and that, in any event Benevolent Heritage is eligible towards those rights.

- III WHETHER the distribution of artefacts needs to be solely based on the salvage legal principles when it is already provided for under the 1995 Agreement.

STATEMENT OF FACTS

Astoria, a colonial empire of the West, recorded numerous military expeditions to the East in the 17th century. One of the most renowned adventures was the journey by Coeur de l' Ocean by Captain Van Cleef in 1800 to conquer the ancient trading city of Zamzala, now part of the State of Rolga. The battle was won and the Astoria's army robbed the riches of the Sultan's palace. However, the vessel sank with all the commercial shipments and other war booty whilst on route to another destination.

Rolga gained independence from Astoria on 7th November 1959. In the 1980s, many treasure hunters were lured into the waters surrounding Rolga due to technological advancement in underwater scientific research and existence of old archival records in Astoria. The Historical and Cultural Society of Zamzala, a non-governmental organization situated in Rolga, reported rampant lootings of historic wrecks in territorial waters of Rolga.

In 1990, Mr. Bernard Bodd, an Astorian salvor in Benevolent Heritage Inc with expertise in historic wrecks recovery submitted a proposal to the Rolga Cultural Heritage Committee for the survey and recovery of significant historical wrecks belonging to the era of Astoria. The Rolgan law at that time requires relevant authority to approve survey or recovery projects involving historical objects or sites.

On 1st June 1993, Benevolent identified the wreck, Coeur de l' Ocean to be located exactly 12 nautical miles from Rolga's baseline but beyond a 10 nautical miles limit. In order to convince the relevant authority to approve the recovery project, Benevolent had recovered silver coins, confirmed by archaeologists as 'rare items' and gold bars as well as gold bullions and ingots. These findings have been described by the National Geographic as the most 'bedazzling underwater treasures' ever found, estimated to be worth USD \$1 billion.

The Government approved the project and signed the Partnering Agreement Memorandum (Appendix 1) on 27th September 1995.

Today, many of the artefacts have been recovered and parts of the collection were auctioned off at overseas to partly finance the costs of the project. A maritime exhibition was set up within the National Museum by the Government in 2000 to showcase some of the recovered artefacts from Coeur de l' Ocean.

A new law was enacted in 2000 to protect wrecks of historical and cultural significance to Rolga due to the influence of the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage as Rolga participated during its negotiation process and voted in favour of its adoption in Paris on 2nd November 2001. The law provides, if a Minister is satisfied that any site in Rolga waters that proves to be, the site of a vessel and on account of historical, archaeological or artistic importance of the vessel, the site ought to be protected from unauthorized interference he may order to designate an area around the site as restricted area.

Following this, the Government of Rolga entered into an agreement on the "Protection of Astorian Wrecks" with the Government of Astoria in 2001. In the agreement, Astoria transfers to Rolga all its right, title and interest in the ancient wrecked vessels of the Astoria lying on or off the coast of Rolga.

The Government was questioned on the alleged involvement in the commercial exploitation of the artefacts recovered from the Coeur de l' Ocean. A government underwater archaeologist stationed on site confirmed that many of the artefacts were destroyed due to poor handling of objects. However, no such move to designate the site as restricted area under the new law has been made so far.

The Government has given a permit to Aquatic View, a tour operator to organize exclusive underwater trips to view the wreck, Coeur de l' Ocean. The company has sold 25 tickets, priced at USD \$20,0000, taken photographs and made video clips of the wrecks as promotional materials for the exclusive trips and commercially marketed CDs of a song entitled 'Coeur de l' Ocean' as souvenirs. The activities of the tour operator according to Heritage Inc. jeopardized the ongoing television documentary deal with an International Broadcasting Company.

Due to the development regarding protection of underwater cultural heritage, the parties took steps at finalizing the distribution of artefacts recovered from the Coeur de l' Ocean. Heritage Inc. accused the Government of Rolga of unfair distribution of artefacts contrary to the 1995 Agreement. The dispute is brought before the International Arbitration Centre pursuant to article 10 of the 1995 Agreement.

SUMMARY OF PLEADINGS

I. The agreement with Astoria, the ratification of the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage and allowing the tour operators to organize wreck divers to the wreck site including the taking of photographs has not interfered with Benevolent's right under the 1995 Agreement. Rolga was acting in part of its state duty to improve the state of its law by entering into an agreement with Astoria and ratifying the 2001 UNESCO Convention. The guiding principles in the Astorian Agreement has not interfered with Benevolent's rights on the artefacts under the 1995 Agreement as it only concerned Rolga's share of artefacts. The concept of in situ preservation under the 2001 UNESCO Convention does not prevent the ongoing salvage operation of the shipwreck and the 1995 Agreement does not constitute commercial exploitation as prohibited by the 2001 UNESCO Convention. Rolga has full sovereignty in its territorial water to permit tour operators, including Aquatic View to organize wreck divers. Benevolent's rights have not been interfered as the rights granted to them and Aquatic View is substantially different. Benevolent does not have the exclusive right to use the shipwreck name, Coeur de l' Ocean in association with sales and marketing merchandise.

II Benevolent does not enjoy the exclusive rights of photographing and documenting the shipwreck, Coeur de l' Ocean as the rights stated in the 1995 Agreement was not made exclusive only towards Benevolent. The law of salvage does not extend to the vesting of exclusive rights to visit, view and photograph the shipwreck and wreck site as the incentives of granting exclusive photography rights would run counter with the purpose of salvage. Photographing and documenting rights does not fall within the

ambit of a salvor's bundle of exclusive rights when rescuing a vessel in marine peril. Alternatively, even if the exclusive rights to photography and documenting falls within the ambit of a salvor's bundle of exclusive rights, the claimant has failed to fulfil the requisite elements before exercising those rights. The right that Benevolent possesses is only towards the still and video photographs taken by their party.

- III. The distributions of artefacts amongst the parties are to be made solely on the basis of the Partnering Agreement Memorandum 1995 as agreed upon by both parties. Benevolent and the State of Rolga are to be bound by the terms set forth in the agreement as it is proven to be an equitable agreement. Thus, the 1989 International Convention on Salvage shall not apply in accordance with Article 6 and 7 of the convention. The sharing arrangement set forth under the 1995 Partnering Agreement is applied by dividing the net value of the profits according to the 60%-40% and the artefacts are divided in a ratio of 3:2. In the alternative, if the law of salvage applies, the State of Rolga counterclaims that the award granted to Benevolent must be forfeited or diminished due to negligence in the handling of the artefacts recovered.

PLEADINGS

I. THE RESPONDENT HAS NOT INTERFERED WITH THE CLAIMANT'S RIGHTS AND PERFORMANCE UNDER THE 1995 AGREEMENT BY ENTERING INTO AGREEMENT WITH ASTORIA, BY RATIFYING THE 2001 UNESCO CONVENTION ON THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE AND BY ALLOWING THE TOUR OPERATORS TO ORGANISE WRECK DIVINGS TO THE WRECK SITE INCLUDING THE TAKING OF PHOTOGRAPHS.

A. The respondent was acting in part of its state duty by ratifying the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage¹ and by entering into an agreement with Astoria.²

1. The ratification of the 2001 UNESCO Convention strengthens the position of maritime areas in the respondent's state.

As a sovereign nation, the respondent has the right to enter into subsequent treaties and ratify any international conventions to improve the state of its laws. The respondent is a party to the United Nations Convention on the Law of the Sea 1982³ which provides that the states have the duty to protect objects of an archaeological and historical nature found at sea.⁴ Historic sunken vessels constitute the essence of underwater cultural heritage.⁵ The shipwreck, Coeur de l' Ocean was in danger due to

1(adopted 2 November 2001, entered into force 2 January 2009) [hereinafter the 2001 UNESCO Convention].

2Appendix II, Guiding Principles.

3(adopted 10 December 1982, entered into force 16 November 1994) [hereinafter UNCLOS].

4Ibid, Article 303(1).

5Honor Frost, Editorial, Museums from the Deaths, 35 MUSEUM 11, 11 (1983).

rampant lootings in the territorial waters of the respondent.⁶ The 2001 UNESCO Convention complements the UNCLOS by ensuring and strengthening the international protection of underwater cultural heritage.⁷ Since there was a lack of policing in the maritime areas,⁸ the respondent has adopted the 2001 UNESCO Convention to strengthen its position on the protection of underwater cultural heritage.⁹

2. The Astorian Agreement provides a better protection to historic wrecks in which Astoria and the respondent share genuine cultural and historical value.

The Astorian Agreement was subsequently entered following the successful adoption of the 2001 UNESCO Convention.¹⁰ As a state party to the 2001 UNESCO Convention, the respondent is encouraged to enter into bilateral, regional or other multilateral agreements for the preservation of UCH.¹¹ The respondent may invite states with a verifiable link, especially those with cultural and historical links to the UCH concerned which is Coeur de l' Ocean, to join such agreement.¹² In this present case, the respondent and Astoria share a historical link as the original owner of the shipwreck was Astoria.¹³ In the Astorian Agreement, Astoria has transferred to respondent the title of the shipwreck lying on or off the coast of the respondent.¹⁴ This includes the shipwreck concerned in dispute, Coeur de l' Ocean. Hence it will only be

⁶Moot problem, ¶3.

⁷Craig J.S. Forest, *Defining Underwater Cultural Heritage*, 31 Int'l J. Nautical Archaeological, 3, 10 (2002); Patrick J.O. Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on the Protection of Underwater Cultural Heritage*(Roberto Garabello & Tullio Sciovazzi, 2003); Janet Blake, *The Protection of the Underwater Cultural Heritage*, 45 Int'l & Comp. L.Q. 819 (1996).

⁸*Supra* (n.6).

⁹Hereinafter UCH.

¹⁰Moot problem, ¶9.

¹¹*Supra* (n.1), Article 6(1).

¹²*Supra* (n.1), Article 6(2).

¹³Moot problem, ¶1.

¹⁴*Supra* (n.10).

reasonable that guiding principles¹⁵ were set out on the disposition of the material recovered from the shipwreck in order to comply with its objective of providing a better protection to historic wrecks.¹⁶

B. The respondent has not interfered with the claimant's salvage rights and performance under the 1995 Agreement¹⁷ by entering into an agreement with Astoria in 2001.

The 1995 Agreement between the claimant and respondent reflects similar objectives with the Astorian Agreement which is to conserve the artefacts recovered. It was envisaged under the 1995 Agreement that arrangements shall be made for the conservation of artefacts recovered.¹⁸ In the Astorian agreement, it emphasized on the conservation and stabilization in the laboratory as soon as they are recovered.¹⁹

1. The respondent has not interfered with the claimant's rights in distributing, selling and possessing the artefacts recovered under the sharing arrangement.²⁰
 - a. The guiding principles under the Astorian Agreement only concerned the respondent's share of artefacts from the 1995 Agreement.

The Astorian Agreement provides guiding principles for the respondent to send representative collections to the Museums or Museums of Astoria and Rolga to ensure its long term preservation.²¹ The requirement here is in respect of representative collections and not the whole collections of the artefacts to be deposited to the museums. In addition, the disposition of artefacts to the museums

¹⁵*Supra* (n.2).

¹⁶*Supra* (n.10).

¹⁷Partnering Agreement Memorandum, Appendix I.

¹⁸*Ibid*, Article 2.

¹⁹*Supra* (n.2), Article 3.

²⁰*Supra* (n.17), Article 5.

²¹*Supra* (n.2), Article 1.

only takes into account the respondent's share of artefacts according to the sharing arrangement under the 1995 Agreement.²² Hence, it will not interfere with the claimant's share of artefacts.

- b. The regulations imposed on the partition of collections do not affect the claimant's rights to the artefacts under the 1995 Agreement.

The Guiding Principles in the Astorian Agreement provides two principles if the artefacts were to be apportioned between two or more institutions. Firstly, the total assemblage should be capable of reassembly to allow further statistical and scholarly analysis and secondly, for unique or rare objects that are split, perfect replicas must be made to complete the assemblage.²³ Such guidelines show that a need to split the artefacts is foreseeable and indicates the agreement does not strictly prohibit the distribution of artefacts into parts. Hence, in the event of distribution for rarer objects, it suffices that perfect replicas made to complete the assemblage. This duty lies entirely on the respondent to complete the assemblage on its share of artefacts in order to perform its obligations under the Astorian Agreement.

- c. The claimant's rights to the artefacts under the sharing arrangement²⁴ will be considered in distributing the artefacts.

The Director of the National Museum of Rolga is in charge of making proposals for the distribution of artefacts recovered.²⁵ The duty lies on the respondent. As such, the respondent will be considering the position of the claimant's rights under the sharing arrangement when preparing the proposals for the distribution of artefacts

²²*Supra* (n.20).

²³*Supra* (n.2), Article 2.

²⁴*Supra* (n.20).

²⁵*Supra* (n.2), Article 4.

to the museums. Thus, the claimant's right to the artefacts will not be interfered by the Astorian Agreement.

C. The respondent has not interfered with the claimant's salvage rights and performance under the 1995 Agreement by ratifying the 2001 UNESCO Convention.

1. The concept of *in situ* preservation has not interfered with the claimant's right to continue salvage operation towards the shipwreck.
 - a. *In situ* preservation is not the best option to be imposed on the shipwreck, Coeur de l' Ocean.

Rule 1 of the Annex, 2001 UNESCO Convention²⁶ provides that the protection of UCH through in situ preservation shall be considered as the first option. Indeed, in situ preservation shall be considered as the first option. Underwater sites should be excavated when a safety of a site is seriously threatened, whether by natural causes or by man-made ones such as oil drilling or other resource exploitation and looting.²⁷ In this case, in situ preservation is not the best option to protect the shipwreck as the shipwreck, Coeur de l' Ocean is in danger due to rampant lootings.²⁸ UCH is a non renewable stock of archaeological and cultural resources.²⁹ As such, salvage operations must be conducted so that the UCH will not simply be lost or deteriorated.

²⁶*Supra* (n.1).

²⁷ Marina Papa Sokal, *Accordia Research Institute, University of London*, "International Law for the protection of the underwater cultural heritage: Can our past be salvaged?" (2005).

²⁸*Supra* (n.6).

²⁹Cleere 'Approaches to the Archaeological Heritage' in Cleere, *New Directions in Archaeology*, Cambridge Uni Press, at 127.

b. The UCH has an educational value to the public.

The concept of in situ preservation will not prevent the salvage that is determined to be in the public interest or inhibit the public access to the wreck site or recovered artefacts for its educational value.³⁰ The 2001 UNESCO Convention further acknowledges that the public has the right of enjoyment and to be educated on the significance of the UCH.³¹ By recovering the artefacts from the shipwreck, it enables the public to enjoy the educational benefits from the UCH through maritime exhibition.³² As such the 2001 UNESCO Convention will not interfere with the ongoing salvage operation of the claimant.

2. The claimant's right under the sharing arrangements of the 1995 Agreement does not constitute the prohibition of commercial exploitation under the 2001 UNESCO Convention as it was justified by the act to refund the project.

Article 2(7) of the 2001 UNESCO Convention prohibits UCH from being commercially exploited.³³ However, this provision must not be interpreted strictly as the convention also provides that states parties shall take appropriate measures necessary to protect UCH.³⁴ The long delayed period of time and lack of funding from the archaeologist is detrimental to historic shipwrecks as they are subjected to the elements and other perils³⁵ such as the threat of pirates and recreational divers.³⁶

³⁰The Titanic Guidelines, Federal Register Vol. 66, no. 71, Notices, 18912, (Thursday, April 12, 2000).

³¹*Supra* (n.1), Article 2(10), Article 20, Annex Rule 7.

³²Moot problem, ¶6.

³³*Supra* (n.1).

³⁴*Supra* (n.1), Article 2(4).

³⁵Sabrina L. McLaughlin, *Roots, Relics and Recovery: What Went Wrong with the Abandoned Shipwreck Act of 1987*, 19 Colum.-VLA J.L. & Arts 149, 182 (1995); William Mullen, *Titanic Exhibition: History or Grave Robbing? Technology Offers The Chance To Salvage Sunken Ships From Almost Any Depth. Many Want Them Left In Peace.*, Chi. Trib., Dec. 12, 1999, at 1, 1999 WL 2940921; Lawrence J. Kahn, Comment, *Sunken Treasures: Conflicts Between Historic Preservation Law and the Maritime Law of Finds*, 7 Tul. Envtl. L.J. 595 (1994); Sean R. Nicholson, Comment, *Mutiny as to the Bounty: International Law's Failing Preservation Efforts Regarding Shipwrecks and Their Artifacts Located in International Waters*, 66 UMKC L. Rev., 162 (1997).

There are reports of rampant lootings of historic wrecks in territorial waters of the respondent made by the Historical and Cultural Society of Zamzala.³⁷ As such, the respondent has undertaken steps to salvage the shipwreck, Coeur de l' Ocean by entering into the 1995 Agreement with the claimant.

- a. The respondent has acted consistently with the 2001 UNESCO Convention by conducting a balance approach when entering into the 1995 Agreement with the claimant.

Salvaging historic shipwrecks is prohibitively expensive³⁸, that outside investors are often sought to fund salvage operations³⁹ and to enable projects relating to the conservation of artefacts to be carried out.⁴⁰ In return they are given some incentives for their efforts in the project. The 1995 Agreement provides arrangements to be made for the conservation of artefacts recovered from the shipwreck which would likely incur a high cost.⁴¹ When entering into a salvage agreement with commercial companies, the government has to adopt a balance approach⁴² which is by formulating commercial policy that ensures commercial group carry out excavation work to archaeological standards and full representative samples kept for public display.⁴³ In this case, the respondent has formulated a commercial policy under the

³⁶James A.R. Nafziger, *The Titanic Revisited*, Journal of Maritime Law & Commerce, Vol. 30 No 2, 327 (April 1999).

³⁷*Supra* (n.6).

³⁸Mary S. Timpany, Note, *Ownership Rights in the Titanic*, 37 Case W. Res. L. Rev., 40 (1986); Brendan I. Koerner, *The Race for Riches: Under the Sea, Treasure Hunters and Scientists Battle for History's Bounty*, U.S. News & World Rep., at 50 (Oct. 4, 1999); *The Camanche*, 75 U.S. 448, 450-51, 467-68, 8 Wall. 29-30 (1869); *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 333 (5th Circuit 1978).

³⁹Brendan I. Koerner, *Shipwrecked Savings: Better Stick with IPOs*, Instead, U.S. News & World Rep., at 50 (Oct. 4, 1999).

⁴⁰Neil Brodie, Kathryn Walker Tubb, *Illicit Antiquities, The Theft of Culture and the Extinction of Archaeology*, Routledge, 163 (2001).

⁴¹*Supra* (n.18).

⁴²M. Flecker, *The Ethics, Politics and Realities of Maritime Archaeology in Southeast Asia*, 31 IJNA, 14-15 (2002).

⁴³*Ibid.*

1995 Agreement to conserve the artefacts,⁴⁴ appoint representatives to monitor the salvage operation⁴⁵ and to provide relative share of profits under the sharing arrangement for the claimant to recover the expenses incurred.⁴⁶

- b. The respondent has no intention to commercially exploit the artefacts recovered from the shipwreck under the 1995 Agreement.

Under the 1995 Agreement the claimant was only given the right to market and sell merchandises related to the shipwreck and not the artefacts.⁴⁷ As such the respondent has no intention to commercially exploit the artefacts recovered when they entered into the 1995 Agreement. Commercial exploitation does not preclude the sale, transfer or trade of an entire collection to a museum provided that this commercial transaction does not result in dispersal of artefacts.⁴⁸ The respondent has set up a maritime exhibition to showcase some of the recovered artefacts from the shipwreck within the National Museum.⁴⁹ The collection of the artefacts that was auctioned off at overseas was also to finance the costs of the project.⁵⁰ The respondent formulated the agreement in such a way so that there is enough funds to recover and conserve the artefacts from the shipwreck.

3. The new law which was passed by the respondent in late 2000 due to the influence by the 2001 UNESCO Convention was not executed towards the claimant's salvage operation.

The new law provides that the Minister may order to designate an area around the site as a restricted area if it is proven to be a site of a vessel lying wrecked on

⁴⁴*Supra* (n.17), Article 1.

⁴⁵*Supra* (n.17), Article 4.

⁴⁶*Supra* (n.20).

⁴⁷*Supra* (n.17), Article 6.

⁴⁸Titanic Guideline explanatory note, para 180906-180907.

⁴⁹Moot Problem, ¶6.

⁵⁰*Ibid.*

account of the historical and archaeological importance.⁵¹ The 1995 Agreement is governed by Rolgan Law.⁵² The new Rolgan law was not applied retroactively to the 1995 Agreement as the law ceased to exist at the time of the execution of the 1995 Agreement. This can be seen when the respondent did not take any move despite the pressure from the Rolgan Cultural Society to designate the wreck site of Coeur de l' Ocean as restricted area.⁵³ The claimant still enjoys the right to continue the salvage operation. This indicates that there is no clear evidence that the 2001 UNESCO Convention would actually affect the claimant's rights under the 1995 Agreement.

D. The respondent has not interfered with the claimant's rights under the 1995 Agreement by permitting Aquatic View to organize exclusive underwater trips to the wreck site.

1. The respondent has full sovereignty to the shipwreck since it lies within its territorial sea and thus acquires the exclusive right to grant permit.

Jurisdiction of a nation within its own territory is necessarily exclusive and absolute.⁵⁴ Sovereignty provides a state to uphold its ultimate authority to exercise its controlling rights in its territory.⁵⁵ Inclusive within the general sovereign spheres of a nation is their territorial water,⁵⁶ defined as those navigable waters lying up to twelve nautical miles, measured from baselines.⁵⁷ This sovereignty extends over territorial

⁵¹Moot problem, ¶8.

⁵²*Supra* (n.17), Article 9.

⁵³Moot problem, ¶10.

⁵⁴*The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch), 116, 136 (Marshall, C. J.) (1812); Sorenson, Max., *Manual of Public International Law*, 253 (1968); James, Alan, *Sovereign Statehood*, 200 (1986), Oppenheim, *International Law* (1955).

⁵⁵*Corfu Channel (U.K. v Alb)*, 1949 ICJ Rep 4, 43; *Island of Palmas (U.S. v Neth)*, 11 RIAA 828 (1928).

⁵⁶(adopted 10 December 1982, entered into force 16 November 1994) Article 2(1) *United Nations Convention on the Law of the Sea 1982*[Hereinafter UNCLOS].

⁵⁷*Supra* (n.3), Article 3.

sea to its bed and subsoil.⁵⁸ The shipwreck, Coeur de l' Ocean which is found to be located exactly twelve nautical miles from the respondent's baseline is in the territorial waters.⁵⁹ Article 7 of the 2001 UNESCO Convention provides that a coastal state has exclusive rights to regulate and authorize activities directed at UCH in its territorial sea.⁶⁰ In addition, the respondent has obtained full rights and title to the shipwreck under the Astorian Agreement.⁶¹ The respondent thus acquires the exclusive right to permit anyone, including Aquatic View to organize activities related to UCH.

1. The right given to Aquatic View has not interfered with the claimant's right to continue the salvage operation.

The rights granted to the claimant and Aquatic View is substantially different. The claimant has the right to salvage the shipwreck⁶² where as the right granted to Aquatic View was the right to visit the wreck site, including photographing.⁶³ This right does not constitute any salvage effort and thus both parties will not result in a competitive manner against each other. The visits to the wreck site will not endanger the salvage operation or the shipwreck. This is because access is only permissible when it is non-intrusive and does not adversely affect the UCH.⁶⁴ The respondent therefore permitted Aquatic View as it is compatible with its protection and management of UCH.⁶⁵ In addition, the ticket is sold at USD \$20,000 each, as such it could be inferred that certain precautions and preparations have been taken to ensure the safety during the tour.

⁵⁸*Supra* (n.3), Article 2(2).

⁵⁹Further Clarifications, ¶1.

⁶⁰*Supra* (n.1), Article 7.

⁶¹*Supra* (n.10).

⁶²*Supra* (n.17).

⁶³Moot problem, ¶11.

⁶⁴*Supra* (n.1), Article 2(10), Annex Rule 7.

⁶⁵*Ibid.*

2. The claimant's documentary deal with the International Broadcasting Company was not granted by the respondent under the 1995 Agreement.

The 1995 Agreement only provides the arrangement for documentation of artefacts that may be retrieved from the shipwreck.⁶⁶ This right is limited for archaeological purpose and not for the purpose of gaining profits. The Annex Rule of the 2001 UNESCO Convention provides that documentation shall include a minimum comprehensive record of the site, including the provenance of underwater cultural heritage moved or removed in the course of activities.⁶⁷ As such, even if the claimant has the right for the documentary deal, the documentation would involve a more comprehensive record compared to the photographs and video clips taken by Aquatic View as promotional materials. Hence, the act of Aquatic View will not prejudice the claimant's right in documentation.

3. The respondent has not interfered with the claimant's right to use the name Coeur de l' Ocean in association with sales and marketing.⁶⁸

The claimant does not have the exclusive right to use the name Coeur de l' Ocean in association with sales and marketing merchandise. The exclusivity was not envisaged under the 1995 Agreement. Thus, the act of Aquatic View producing CDs with the song entitled 'Coeur de l' Ocean' does not interfere with the claimant's right.

⁶⁶*Supra* (n.18).

⁶⁷*Supra* (n.1), Annex Rule 27.

⁶⁸*Supra* (n.47).

II. THE CLAIMANT DOES NOT ENJOY THE EXCLUSIVE RIGHTS OF PHOTOGRAPHING AND DOCUMENTING THE COEUR DE L'OCEAN.

A. The claimant's rights in the 1995 Agreement is not exclusive.

The 1995 agreement provides for the exploration, conservation and the documentation of the shipwreck by the claimant.⁶⁹ By capturing still images and video photography, it was held by the court in *Andrea Doria* to be a method of documentation of the shipwreck.⁷⁰ Although the 1995 Agreement provides the claimant with the rights to photographs, the agreement however does not provide that these rights are to be exclusive in nature.⁷¹ Therefore, it cannot be contended by the claimant that it enjoys exclusive photographing and documenting rights towards the Coeur de l' Ocean.

B. The law of salvage does not extend to the vesting of exclusive rights to visit, view and photograph the wreck and the wreck site.⁷²

1. The incentives of granting exclusive photography rights would run counter with the purpose of salvage.

The maritime law of salvage developed to protect ships in peril and their cargo safe within the stream of commerce, discourage theft and to restore recovered property towards its owners.⁷³ The inducement for salvage services is limited to the court's award of compensation.⁷⁴ In *Haver*, it was held that if the court awarded exclusive

⁶⁹*Supra* (n.17), Article 1.

⁷⁰*Moyer v. Wrecked & Abandoned Vessel, Andrea Doria* 836 F. Supp. 1099, 1994, AMC 1021 (D.N.J. 1993).

⁷¹*Supra* (n.18).

⁷²Garabello and Scovazzi, *The Protection of Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention*, 68 (Volume 41 Ocean Development Publications, 2003).

⁷³Justin S. Stern, Smart Salvage: Extending Traditional Maritime Law To Include Intellectual Property Rights in Historic Shipwrecks. 68 *Fordham L. Rev* 2498, (2000).

⁷⁴*R.M.S Titanic Inc. v. Haver*, 528 U.S. 825 (1999).

photography rights to a salvor, it would convert a salvage operation on behalf of the owners to become a salvage service serving the salvors.⁷⁵ This would run counter with the purpose of salvage.⁷⁶ As such, the court held that the law of salvage does not extend to the vesting of rights to photograph the shipwreck.⁷⁷

In light of the above, the claimant is not granted with the exclusive photography and documenting rights.⁷⁸ If the claimant were granted exclusive photography rights towards the Coeur de l' Ocean, it would convert a salvage operation conducted by the claimant on behalf of the respondent, to become an operation merely serving the claimant. Clearly it would run counter with the purpose of salvage.⁷⁹

2. Photographing and documenting rights does not fall within a salvors rights.
 - a. Under the law of salvage, a photography right is not included in the salvor's bundle of exclusive rights when rescuing a vessel in marine peril.⁸⁰

In the case of *R.M.S Titanic v. Haver*, the grant of exclusive prerogative to take photographs to RMST due to its status as salvors-in-possession by the district court of Virginia was found to be erroneous when a further appeal was made in the Appeals Court.⁸¹ It was held that a property right would not prohibit the photographing and viewing of the property when it is still located in a public area. Furthermore, the 4th Circuit court in *Haver* held that exclusive rights to photography are not to be included

⁷⁵*Ibid.*

⁷⁶*Ibid*; Barbara T. Hoffman, *Sailing On Uncharted Waters: The US Law of Historic Wrecks, Sunken Treasure and the Protection of Underwater Cultural Heritage.*

⁷⁷*Supra* (n.70), *Andrea Doria.*

⁷⁸*Supra* (n.17).

⁷⁹*Supra* (n.70), *Andrea Doria*; *Supra* (n.74), *Haver.*

⁸⁰*Supra* (n.36), James A.R. Nafziger at 311.

⁸¹*Supra* (n.74) *Haver.*

as part of the salvage rights granted to a salvor-in-possession.⁸² The court came to this decision because the law does not include the notion that salvors can use the salvaged property for commercial use.⁸³

Similarly in this case, the claimant who possesses property right over the shipwreck Coeur de l' Ocean would not prohibit the photographing and viewing of the shipwreck by others as it is still located in a public area within the territorial seas of the claimant. Furthermore, the shipwreck cannot be used by the claimant to achieve their commercial gain. Therefore, the claimant does not have the exclusive prerogative to take photographs of the wreck.

- b. Alternatively, even if the salvors' rights include the exclusive rights of photographing the shipwreck, the requisite elements before one can exercise those rights are not fulfilled.
- i. The claimant failed to prove the elements necessary to prove the status salvors-in-possession.

Even if the exclusive right to photography falls under the exclusive salvage rights of a salvor given the status salvors-in-possession⁸⁴, the claimants have failed to gain that right as they do not possess the status "salvor-in-possession". All three elements necessary to be proven conjunctively for the claimant to qualify as a salvor-in-possession are due diligence, ongoing effort, and the prospect of success in recovering the artefacts.⁸⁵ The claimants salvage efforts towards the Coeur de l' Ocean was

⁸²*Supra* (n.74) *Haver*; Rachel J. Lin, *Salvage Rights & Intellectual Property : Are Copyright and Trademark Rights Included in the Salvage Rights to the R.M.S Titanic?* Tulane Maritime Law Journal [Vol.23 1999]; *Supra* (n.73) Justin S. Stern.

⁸³*Supra* (n.74) *Haver*, ¶33.

⁸⁴*R.M.S Titanic v. Haver* A.M.C 1330 (1999); *Supra* (n.74), *Haver*, at 971.

⁸⁵*R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel*, ("Titanic I"), 924 F. Supp. 714 (E.D. Va. 1996); *Bemis v. RMS Lusitania*, 884 F. Supp. 1042, 1051 (E.D. Va. 1995); *Supra* (n.70), *Moyer*, 1099, 1106; *The Edilo*, 246 F. 470 (E.D.N.C. 1917); *Hener*, 525 F. Supp. at 350 (S.D.N.Y.) 198; Martin Davis, *Whatever Happened to the Salvage Convention 1989*, 39 J. Mar. L. & Com. 463, October (2008).

ongoing with the prospect of success of recovering thousands of artefacts. Nonetheless the operation was not conducted diligently as confirmed by government underwater archaeologist stationed on site that many artefacts recovered from the shipwreck were destroyed due to poor handling of the object.⁸⁶ The claimant are alleged to possess the expertise in recovering the historical artefacts being professionals in their area, therefore their failure to act diligently cannot be accepted.⁸⁷

Furthermore, the court in *Cobb Coin* held that a salvor can lose his exclusive possessory rights to the wreck if he fails to exercise due diligence.⁸⁸ The granting of the status “salvor-in-possession” is not permanent and could be revoked if the salvor failed to fulfil any of the three elements.⁸⁹

In the present case, the claimant has failed to exercise due diligence in handling the recovered artefacts and thus does not qualify as a salvor-in-possession. Even if the claimant was primarily qualified and was awarded with the title “salvor-in-possession”, the status would be revoked when the claimant failed to exercise due diligence in salvaging the wreck. Therefore, the claimant does not enjoy exclusive salvage rights towards the shipwreck which consists of the exclusive rights to photography.

- ii. The claimant has failed to prove it has exclusive possession over the shipwreck Coeur de l’ Ocean.

⁸⁶*Supra* (n.53); Further Clarifications, ¶34.

⁸⁷*Anglo-Saxon Petroleum Co. v. The Admiralty*, 79 Lloyds List L.Rep. 611 (K.B. 1946) (*The Delphinula*); Geoffrey Brice Q.C., *International Maritime Law; Salvorial Negligence In English and American Law*, 22 Tul. Mar. L. J. 569, (1998).

⁸⁸*Cobb Coin Co. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 525 F. Supp. 186, 204 (S.D. Fla. 1981).

⁸⁹*R.M.S Titanic Inc. v. The Wrecked and Abandoned Vessel*, 286 F.3d 194, 202 (4th Circuit 2002); Christopher Z. Bordelon, *Saving Salvage: Avoiding Misguided Changes to Salvage and Finds Law*, 7 San Diego Int’l L.J. 173, (2005).

Exclusive viewing and photographing rights can only be achieved by exercising exclusive possession and removing the property to a private location where it cannot be viewed or photographed except under conditions controlled by the owner.⁹⁰ Exercising exclusive possession of the shipwreck is a requisite element to exercise the exclusive photographing rights.⁹¹

In the present case, exclusive possession was not exercised by the claimant as the shipwreck *Coeur de l' Ocean* was not removed to a private location where other parties cannot view the wreck except under the conditions controlled by the claimant.⁹² The claimant does not have a right to prohibit others from photographing the *Coeur de l' Ocean* while it still lies in public waters as the site of the wreck was not proclaimed a restricted area by the respondent.⁹³ Thus, the claimant does not enjoy the exclusive viewing and photographing rights.

c. The claimant's exclusive salvage rights does not restrict access of other parties to visit the shipwreck *Coeur de l' Ocean*

The law of salvage grants the salvors exclusive salvage rights which include the right to prevent other parties' access to the wreck site.⁹⁴ However, other parties are only restricted from diving into the wreck site for the purpose of taking photographs if

⁹⁰Garabello and Scovazzi, *The Protection of Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention*, 68 (Volume 41 Ocean Development Publications, 2003); *Supra* (n.73), Justin S. Stern.

⁹¹*Ibid*; *Supra* (n.85), *Titanic I* [Hereinafter 'RMST']; *Supra* (n.74) *Haver*; Sherry Hutt, Caroline M. Blanco, Ole Varmer, *Heritage Resources Law: Protecting the Archeological and Cultural Environment*, 401 (1999); CJ Shapreau, *The Brother Jonathan decision: Treasure Salvor's Actual Possession' of Shipwreck Gives Rise to Federal Jurisdiction for Title Claim*, *International Journal of Cultural Property* (1998), 7:2:475-495 Cambridge University Press.

⁹²*Supra* (n.53).

⁹³*Ibid*; *Supra* (n.74), *Haver*, at 970; *Supra* (n.73), Justin S. Stern.

⁹⁴*Platoro Ltd. V. The Unidentified Remains of a Vessel*, 518 F. Supp. 816, 820 (W.D Tex, 1981); *Platoro Ltd v. The Unidentified Remains of a Vessel*, 695 F.2d 893 (5th Circuit 1983); *The Sabine*, 101 U.S 384 (1879); *Legnos v. M/V Olga Jacob*, 498 F.2d 666, 672 (5th Circuit 1974); *Bemis v. R.M.S Lusitania*, 99 F.3d 1129, No 95-2057, 1996 WL 525417 at 3 (4th Circuit September 17, 1996); Christopher R. Bryant, *Article: The Archaeological Duty Of Care, The Legal Professional and Cultural Struggle Over Salvaging Historic Shipwrecks*, 65 Alb. L. Rev. 97 (2001).

it interferes with the salvors salvage operations.⁹⁵ Thus, a third party is not restricted from accessing the shipwreck for the purpose of taking photographs, as long as the divers do not disturb the wreck site and the act does not impede on the ongoing salvage operations by the salvors.

Furthermore the law of salvage does not exclude historic shipwrecks from public enjoyment as the commercial interest in historic shipwrecks is diverse.⁹⁶ Thus, the media, the museums, and in general the public all have a claim in these sites.⁹⁷ Therefore, it cannot be contended by the claimant that it has exclusive rights to photography as the act of Aquatic View in taking photographs of the Coeur De l' Ocean can be seen as fulfilling the claim of the publics' interest in the wreck site.

C. The claimant is not entitled to such exclusive rights as they do not rely entirely on the income generated from the photographing and documenting of Coeur de l' Ocean to finance the salvage operations.

In the case of *R.M.S. Titanic v Wrecked and Abandoned Vessel*, the U.S. District Court ruled that R.M.S. Titanic had exclusive rights to photograph the wreck and the wreck site on the basis that it did not sell the artefacts recovered from the wreck and therefore should be given the rights to obtain other means of income.⁹⁸ The court further held that allowing another party to take photographs of the wreck would cause serious harm to RMST as it would be unable to recoup its investment in the project.

The present case can be distinguished. The costs of the project concerning Coeur de l'

⁹⁵*Supra* (n.74), *Haver*:*Supra* (n.85), *Titanic I*, at 640.

⁹⁶Anne M. Cottrelli, *Comments: The Law of the Sea and Marine Archaeology: Abandoning Admiralty Law to Protect Historic Shipwrecks*, 17 *Fordham Int'l L.J.* 667; *Supra* (n.94), Christopher R. Bryant; Ole Varmer, *Second Newport Symposium: "Sunken Treasure Law, Technology and Ethics":Third Session:Non Salvor Interest: The Case Against the "Salvage" of the Cultural Heritage*, 30 *J. Mar. L. & Com.* 691, (1999).

⁹⁷Craig J.S Forrest, 34 *J. Mar. L & Com* 309 (2003); *Ibid*, Ole Varmer.

⁹⁸*Supra* (n.85) *Titanic I*.

Ocean carried out by the Claimant are partly financed by the auction of recovered artifacts from the wreck.⁹⁹ Thus, the Claimant does not solely rely on the income obtained from the photographing and documenting of Coeur de l' Ocean, and therefore would not be entitled to similar exclusive rights as conferred towards RMST.

D. The traditional law of salvage cannot be extended to include exclusive rights of photographing and documenting

1. Intellectual property rights are not inclusive of the exclusive salvage rights granted to salvors.

The court in *Haver* held that the range of rights granted towards a salvor does not include the integration of intellectual property rights.¹⁰⁰ Therefore, this excludes any notion of exclusive photographing and intellectual property rights granted to a salvor salvaging the wreck.¹⁰¹ Salvage law only relates to the protection of the wreck in its physical sense, namely the actual goods that can be physically restored to its owner.¹⁰²

In light of the above, as the imagery of the wreck is prospectively marketable and is not physical, it therefore is not protected under salvage law.¹⁰³ Thus, the exclusive salvage rights granted to the claimant does not include intellectual property rights.

⁹⁹Moot Problem, ¶6.

¹⁰⁰*Supra* (n.74), *Haver*.

¹⁰¹*Supra* (n.73), Justin S. Stern.

¹⁰²*Admiralty Law Institute: Admiralty Law at the Millenium, Tulane Law School Panel Discussion of Collision, Towage, Salvage and Limitation of Liability*, 24 Tul.Mar.L.J.405.(1999); *Supra* (n.74), *Haver*.

¹⁰³*Ibid*.

2. The intellectual property rights granted to the claimant are only towards the still and video photographs of the shipwreck.

Article 2(1) of the Berne Convention protects literary and artistic works which includes photographic works.¹⁰⁴ Copyright law provides for the protection of any photographs or likeness made of the shipwreck or archaeological site.¹⁰⁵ Copyright protection could also be obtained for movies or documentaries made about the salvaging operation of the shipwreck.¹⁰⁶ However the actual shipwreck itself cannot be copyrighted. Because the photographer did not create the wreck, he has no exclusive rights to the shipwreck, only exclusive rights towards the pictures he takes of it.¹⁰⁷ Thus, multiple parties would be permitted to photograph the wreck and generate any conceivable form of creative expression.¹⁰⁸

The granting of intellectual property rights on shipwrecks would potentially come into conflict with the right of nations who rightfully owns the shipwreck.¹⁰⁹ If the claimant were awarded with intellectual property rights over the Coeur de l' Ocean, it would be conflicting with the respondent who rightfully owns the shipwreck.¹¹⁰

The intellectual property rights the claimant possess are only towards the photographs of the shipwreck that the claimant has taken and not towards the shipwreck Coeur de l' Ocean itself. Therefore Aquatic View is not prohibited from

¹⁰⁴(adopted 9 September 1886, entered into 12 May 1887), Article 2(1) Berne Convention for the Protection of Artistic and Literary Works [Hereinafter Berne Convention].

¹⁰⁵*Supra* (n.82), Rachel Lin; *Gasperini v. Centre for Humanities*, 518 V.S 415, K19 (1996).

¹⁰⁶*Ibid*, Rachel Lin; *Monster Communication Inc. v. Turner Broad System*, 935 F.Supp 490.

¹⁰⁷*Supra* (n.104), Article 5.

¹⁰⁸*Ibid*; *Supra* (n.82), Rachel Lin.

¹⁰⁹Carol Ruppé, Jan Barstad, *International Handbook of Underwater Archaeology*, (*The Plenum Series in Underwater Archaeology No. 5*), Kluwer Academic/Plenum Publishers (2002).

¹¹⁰*Supra* (n.20).

taking photographs of the shipwreck as it is not against the intellectual property rights of the claimant.

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

A. The salvage legal principles are not envisaged in the 1995 agreement.

1. The sharing arrangement set forth in the 1995 agreement is applicable.

The agreement entered into by both parties is a pre-arrangement made before the actual salvage activity which is referred to as a contractual salvage.¹¹¹ Of such agreement, the payable fee is normally arranged in the contract and parties are to follow the provided sharing arrangement.¹¹² An agreement of this sort will be enforced by admiralty courts unless it is proved to be an inequitable agreement.¹¹³ In the case of *The Mulgrave*, the court dismissed a claim for salvage and enforced the agreement between both parties instead.¹¹⁴

In the 1995 Agreement between both parties, there is no such unfair distribution as the sharing arrangements set forth are equally just. The total appraised value of the amount of artefacts in the custody of the government is USD 616,298,000.¹¹⁵ According to the sharing arrangement, if the price range of the artefacts exceeds \$500 million, the claimant will receive 40% of the share while the government on the other hand, will receive 60%.¹¹⁶ Therefore, the distribution of the

¹¹¹D. Smith, Newell, “*The Law of Salvage*” (1994).

¹¹²*Ibid.*

¹¹³Brice, Geoffrey, *Maritime Law of Salvage*. London: Promenade Graphics of Cheltenham (1993).

¹¹⁴*The Mulgrave* (1827) 2 Hagg. 77.

¹¹⁵Moot problem, ¶12.

¹¹⁶*Supra* (n.20).

artefacts should be made solely on the arrangement agreed upon in the 1995 Agreement and the claimant has no right to claim for a reward based on the salvage legal principles.¹¹⁷

2. The International Convention on Salvage, 1989 is not applicable in determining the salvage award.

Article 6(1) of the 1989 Salvage Convention expressly provides that the convention shall apply save to the extent it is expressly or impliedly stated otherwise by the agreement.¹¹⁸ Therefore, the 1989 salvage conventions method of fixing the salvage reward does not apply to the extent that the parties contracted on a different basis.¹¹⁹ In the present case, through Article 6 of the 1989 Salvage Convention, the Conventions method of fixing a salvage award would not apply as the method for fixing the award is clearly expressed in the 1995 Agreement through the sharing arrangements.¹²⁰ The 1995 Agreement already sets forth the sharing arrangements in distributing the artefacts and also calculation of the profits.¹²¹ Thus, it can be seen that the parties agreed to be bound by that sharing arrangement and not depend on the criteria's of fixing a reward underlined in the 1989 Salvage Convention.

Article 7 of the 1989 Salvage Convention states that the contract may be annulled or modified if the payment provided for under the contract is a degree far too small for the services actually rendered.¹²² According to the sharing arrangements, the claimant would receive a total amount of USD 246,519,200 which is not an excessive degree small for the services that they have rendered in the salvage operation. The

¹¹⁷*Ibid.*

¹¹⁸(adopted 28 April 1989 in London, entered into force 14 July 1996), International Convention on Salvage [Hereinafter The 1989 Salvage Convention].

¹¹⁹*Ibid*; *Supra* (n.78), Martin Davis.

¹²⁰*Supra* (n.20).

¹²¹*Ibid.*

¹²²*Supra* (n.118) Article 7.

claimant has invested approximately USD 2.5 million prior to the initiation of the salvage operations and the return of profits of over USD 200 million in addition to the relative share of artefacts is not an amount “excessively too small”.

3. The distribution of artefacts and calculation of profits are to be made solely on the basis of the sharing arrangement set forth in the 1995 agreement.

A right to claim for a salvage award may only arise when a person voluntarily without any pre-existing agreement or legal duty preserves or contributes to preserving at sea any vessel, cargo, freight or other subject of salvage from danger.¹²³ This type of salvage is referred to as a pure salvage. In this instance however, it concerns a contractual salvage whereby the terms of the agreement are already agreed upon by both parties. Both parties have agreed to be bound by the agreement as clause 10 of the 1995 partnering agreement clearly states that should there be any disputes between the parties, the case shall be decided through arbitration.¹²⁴ The claimant is alleged to be professional salvors¹²⁵ and unlike non-professional salvors, a salvor with expertise in the area is presumed to know the business sufficiently well to be able to fix a price in the 1995 Agreement.¹²⁶ This clearly shows that the claimant and respondent have agreed to follow the terms set forth in the agreement.

¹²³Brice, Geoffrey, *Salvage and the Underwater Cultural Heritage, Marine Policy*, Vol 20, No. 4, pp. 337-342, 1996.

¹²⁴*Supra* (n.17), Article 10.

¹²⁵Moot Problem, ¶4.

¹²⁶Nicholas J. J. Gaskell, *The 1989 Salvage Convention and the Lloyd's Open Form (Lof) Salvage Agreement* 1990, 16 Tul. Mar. L. J. 1, (1991).

B. In the alternative, if the law of salvage applies, the respondent counterclaims that the claimant is forfeited or diminished from receiving awards due to negligence.

The 1989 Salvage Convention's method of remunerating the claimant through Article 13(1) shall not be applied as the 1995 Agreement has expressly stated the method of calculation. However, the Convention may be applied in other obligations.¹²⁷ Article 8(1) of the 1989 Salvage Convention, provides that a salvor should exercise a duty of care in carrying out a salvage operation. Therefore, by incorporating the 1989 salvage Convention into 1995 Agreement, the claimant has an obligation to exercise due care in salvaging the wreck. The degree of care to be portrayed during salvage operations is of which can reasonably be expected from persons in their positions.¹²⁸

In a leading English case, *Tojo Maru*¹²⁹, the court held that where the neglect is wilful, it entails an entire forfeit of the salvage remuneration or when it is mistake or misconduct; it would diminish the amount of salvage reward.¹³⁰ When persons undertake to perform a salvage service, they are bound to exercise ordinary skill and prudence in the execution of the duty which they place upon themselves to perform.¹³¹

The claimant has not exercised their due diligence in handling the artefacts recovered. This was confirmed itself by a government underwater archaeologist stationed on the site that many of the artefacts were damaged due to poor handling of the objects.¹³² The court in *Marex International, Inc. v. Unidentified, Wrecked &*

¹²⁷*Supra* (n.126) Nicholas J. J. Gaskell.

¹²⁸*Supra* (n.87) *Anglo-Saxon*; Geoffrey Brice.

¹²⁹*The Tojo Maru* AC 242 at 276 [1972].

¹³⁰*Ibid*, *The Atlas Lush* 54 (1862).

¹³¹Stephen Ninian, M.W.D. White, *Australian Maritime Law*, Federation Press (2nd edition 2000).

¹³²*Supra* (n.53).

*Abandoned Vessel*¹³³ followed the court in *Cobb Coin II*¹³⁴ and mandated that salvors demonstrate that they used an archaeological duty of care in salvaging historic shipwrecks before allowing them to recover the awards.¹³⁵

In the present case, the claimant is professional salvors who are more likely to be held liable for negligence as a heightened duty is imposed upon them.¹³⁶ The damaged caused by the claimant reduces the appraised value of the artefacts.¹³⁷ Hence under the law of salvage, the claimant should be forfeited or diminished of its claim for salvage awards.

The below items with its appraised value are to be distributed amongst the parties. According to the agreement, if the aggregate amount of the appraised value exceeds \$500 million, the respondent will be entitled to 60% of the share whilst the claimant will receive 40% of the total amount of the appraised value.¹³⁸

No	Item/ Articles/ Objects	Quantity	Appraised Value of each Item (USD)	Total
1	Gold Ingots and Bullions	360(216)	USD 50,000	USD 18,000,000
2	Gold Bars	100	USD 150,000	USD 15,000,000

¹³³*Marex International, Inc. v. Unidentified, Wrecked & Abandoned Vessel* 952 F. Supp. 825 (S.D. Ga. 1997) para 315.

¹³⁴*Cobb Coin Co., Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 549 F. Supp. 540, 557 (S.D. Fla. 1982).

¹³⁵*Supra* (n.53); Terence P. McQuown, *An Archaeological Argument for the Inapplicability of Admiralty Law in the Disposition of Historic Shipwrecks*, 26 Wm. Mitchell L. Rev. 289 (2000).

¹³⁶*Kentwood v. The United States*, 930 F. Supp. 227, 1997 AMC 231 (E.D Va. 1996)

¹³⁷Further Clarifications, ¶18.

¹³⁸*Supra* (n.20).

3	Silver Ingots	700	USD 20,000	USD 14,000,000
4	Silver Coins with Astorian marks	50,000	USD 10,000	USD 500,000,000
5	Copper planks	200	USD 5,000	USD 1,000,000
6	Indigo	200 chests	Not yet determined	-
7	Tobacco	10 tons	Not yet determined	-
8	Bronze Cannon with Astorian marks	2	Not yet determined	-
9	Silver Containers	1	USD 10,000	USD 10,000
10	Bronze forks	4	USD 2,000	USD 8,000
11	Silver pendant	1	USD 15,000	USD 15,000
12	Comb	2 pieces	Not yet determined	-
13	Olives and pickles	3 jars	Not yet determined	-
14	Unknown Liquid	1 bottle	Not yet determined	-
15	Ornaments	5 pieces	USD 5,000	USD 25,000
16	Elephant Tusks	50	USD 2,000	USD 100,000
17	Cannon balls	12	Not yet determined	-
18	Chinese porcelains	20,000 pieces	Those in mint condition (10,000 pieces) were appraised at USD	USD 60,000,000

			5,000 each. The remaining at USD 1000 each.	
19	Swords bearing some Arabic words	57 pieces	USD 20,000	USD 1,140,000
20	Silver daggers with precious stones.	2 pieces	USD 3.5 mil.	USD 7,000,000
21	Spices	70 bottles	Not yet determined.	-
				USD 616,298,000

In regards to the monetary value, the total amount of value of the items is USD 616,298,000. Therefore it will follow the 60%-40% sharing arrangement. Thus both claimant and respondent will receive the following shares;

Party	Percentage (%) According to the Agreed Range	Calculation	Entitlement of Each Party
Claimant; Benovelent Heritage Inc	40%	$\frac{40}{100} \times$ \$616,298,000	\$246,519,200
Respondent; Government of Rolga	60%	$\frac{60}{100} \times$ \$616,298,000	\$ 369,778,800

The artefacts with its appraised values are to be distributed amongst the two parties according to the sharing arrangement granting the respondent with 60% while the claimant would be entitled with 40%. This is equivalent to a ratio of 3:2.

No	Items/Articles/Objects	Quantity	3:2
1.	Gold Ingots and Bullions	360	216 : 144
2.	Gold Bars	100	60 : 40
3.	Silver Ingots	700	420 : 280
4.	Silver Coins With Astorian Marks	50,000	30,000 : 20,000
5.	Copper Planks	200	120 : 80
6.	Indigo	200 chests	120 chests : 80 chests
7.	Tobacco	10 tons	6 tons : 4 tons
8.	Ornaments	5 pieces	3 pieces : 2 pieces
9.	Elephant Tusks	50	30 : 20
10.	Chinese Porcelains	20,000 pieces	12,000 : 8,000
11.	Spices	70 bottles	42 : 28

Artefacts which are unable to be apportioned between the two parties due to the number of its quantity shall be given to the respondent as the number indicates that the items are unique and rare. Under Article 303 of the UNCLOS, it underlines the states duty to protect objects of an archaeological and historical nature. Due to the historical significance of the recovered artefacts, the respondent shall possess the remaining artefacts as it would contribute to the local, cultural and economic development.¹³⁹ It is to the public's interest that these resources have to be ensured

139 Yani Herreman, *The Role of Museums Today: Tourism and Cultural Heritage*, in *Art and Cultural Heritage: Law, Policy and Practice*, 419 (Barbara T. Hoffman, 2006); Keith Muckelroy, *Maritime Archaeology*, p. 120 (1978); Jerome Lynn Hall, *The Monte Christi "Pipe Wreck,"* in *Underwater Cultural Heritage at Risk: Managing Natural and Human Impacts* 35-37 (Robert Grenier, David Nutley & Ian Cochran, 2006); Valentina Sara Vadi, *Article: Investing In Culture: Underwater Cultural Heritage And International Investment Law*, 42 *Vand. J. Transnat'l L.* 853, (2009).

safe from being jeopardized,¹⁴⁰ considering the claimant's lack of due care in handling these artefacts. Such distribution is also consistent with the 1995 Agreement, which provides that the claimant is entitled to possess its relative share of artefacts when the aggregate amount of appraised value of the artefacts reaches USD 45 million.¹⁴¹

For the Chinese porcelains, out of the 20,000 pieces recovered, only 10,000 pieces were found to be in mint condition whilst the remaining were destroyed due to negligence of the claimant's personnel. The Chinese porcelains that were in mint condition were appraised at \$5000 each and those that were destroyed were appraised at \$1000 each. Therefore, the total amount of the Chinese porcelains that were destroyed should be deducted from the total appraised value that the claimant's shall receive.

Item/ Articles/ Objects	Calculations	Claimant's Entitlement
Chinese porcelains	(10,000 × \$5000)	\$246,519,200 –
	– (10,000 × \$1000) =	\$40,000,000 =
	\$40,000,000	\$206,519,200

¹⁴⁰*Supra* (n.70) Moyer; *Supra* (n. 96) Anne M. Cottrelli; Shallcross & Giesecke, *Recent Developments in Litigation Concerning the Recovery of Historic Shipwrecks*, 10 Syracuse J. Int'l L. & Com. 371, 402 (1983); Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978); Leonard D. DuBoff, *Introduction: Symposium Presented at the Annual Meeting of the Association of American Law Schools' Section on Art Law*, 12 Colum.-VLA J.L. & Arts 335 (1988); Melvin A. Fisher, *The Abandoned Shipwreck Act: The Role of Private Enterprise*, 12 Colum.-VLA J.L. & Arts 373, 376-77 (1988); John Carman, *Against Cultural Property: Archaeology, Heritage and Ownership*, 45 (2005)

¹⁴¹*Supra* (n.20)

Thus, after deducting the appraised value of the Chinese porcelains that were destroyed, the claimant is entitled to only \$206,519,200.

PRAYER FOR RELIEF

The State of Rolga prays to this tribunal to:

- a. *Declare* that the act of the Rolga entering into an agreement with Astoria in 2001, ratifying the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage and by allowing other tour operators to organize and make profits from visiting activities to the site including the taking of photographs has not interfered with Benevolent Heritage Inc. rights and performance under the 1995 Agreement.

- b. *Declare* that, in conducting the salvage services towards Coeur de l' Ocean, the law of salvage does not grant Benevolent Heritage Inc. the exclusive rights of photographing and documenting the wreck Coeur de l' Ocean.

- c. *Declare* that the distribution of artefacts solely based on the salvage legal principles are not envisaged in the 1995 Agreement and thus the distribution of the artefacts are to be in conformity with the 1995 Agreement.

Respectfully submitted,
Counsels for the Respondent.