

INTERNATIONAL CENTER OF ARBITRATION

THE INTERNATIONAL FINALS

OF

THE 4TH LAWASIA MOOT COMPETITION 2009

BENEVOLENT HERITAGE, INC.

(CLAIMANT)

v.

THE GOVERNMENT OF ROLGA

(RESPONDENT)

MEMORIAL FOR THE CLAIMANT

2009

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<p style="text-align: center;">Agreement cannot be made on the basis of the principle of <i>Quantum Meruit</i>.</p> <p style="text-align: center;">ii. A calculation of profits under the 1995 Partnering Agreement cannot be made on the basis of the principle of <i>Pro Opere et Labore</i>.</p> <p>B. The parties intended the exclusive application of salvage legal principles in the distribution of artefacts under the 1995 Partnering Agreement Memorandum.</p> <p>a. The right to own and possess a relative share of artefacts recovered when its appraised values reaches \$45 million is an “Award in Specie” in favor of Claimant.</p> <p>b. The parties bound themselves to enter into a sale of artefacts through the formulation of a Joint Marketing Plan.</p> <p>c. The distribution of artefacts cannot be made on the basis of any other existing agreement or treaty.</p> <p>i. A distribution of artefacts cannot be made under the 2001 Guiding Principles for the Determination of the Disposition of Materials from the Shipwrecks of Astoria off the Coast of Rolga.</p> <p>ii. The artefacts cannot be distributed in accordance with the intention of the parties if they are to be subject to the restrictions under the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage.</p>	
<p>IV. Claimant suffered economic injury as a result of Respondent’s acts of interference.</p> <p>A. Respondent must make reparations by way of compensation.</p> <p>1. The 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage prohibits further acts of retrieval and commercial exploitation of retrieved artefacts.</p> <p>2. The Bilateral Agreement with Astoria deprives the Claimant of its right to conserve and its right to the stipulated distributive share.</p>	

<p>B. Respondent must compensate Claimant for the economic damages it suffered.</p> <ol style="list-style-type: none"> 1. The Claimant has incurred damages in deposits and fee paid. 2. The Claimant has incurred damages in lost profits (<i>lucrum cessans</i>). <ol style="list-style-type: none"> a. The profits are definite. b. The profits are quantifiable. 	
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STATEMENT OF JURISDICTION

The arbitral tribunal has the power to decide on matters regarding its jurisdiction.¹ The authority of an arbitral tribunal is limited to those disputes that the parties have agreed that it should determine.² The competence, therefore, of an arbitral tribunal comes from the mutual agreement of the parties.³

In the 1995 Partnering Agreement Memorandum, the Claimant and Respondent have mutually agreed to submit any difference, discrepancy, and dispute to arbitration.⁴ By virtue of the aforesaid arbitration clause, the Claimant respectfully submits this current dispute to arbitration. The arbitration tribunal is respectfully called to decide the matter in accordance with the relevant facts and the applicable law.

¹ UNCITRAL Model Law on International Commercial Arbitration, Article 16 (1).

² A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration*, 260 (1999)

³ A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration*, 260 (1999)

⁴ *Partnering Agreement Memorandum, Clause 10.*

QUESTIONS PRESENTED

I.

Whether or not the Respondent has interfered with the Claimant's salvage rights and performance under the 1995 Partnering Agreement Memorandum when it ratified the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, when it entered into a Bilateral Agreement with the state of Astoria in 2003, and when it issued a permit to Aquatic View to organize and make profits from visiting activities to the shipwreck Coeur de l' Ocean.

II.

Whether or not the Claimant has exclusive rights of photographing and documenting the shipwreck Coeur de l' Ocean.

III.

Whether or not the calculation of profits and/or distribution of artifacts between the Claimant and Respondent should be made solely on the basis of salvage legal principles.

IV.

Whether or not the Claimant suffered economic injury as a result of Respondent's acts of interference.

STATEMENT OF FACTS

COEUR DE L' OCEAN

Lying within 12 nautical miles off Rolga's coast, the Coeur de l' Ocean is an Astorian warship, laden with precious cargoes of commercial shipments and other war booty. In 1800, whilst enroute from Zamzala to another destination, the vessel sank due to the onslaught of a monsoon.

ROLGA GAINS INDEPENDENCE

On 7th November 1959, Rolga, which now has territorial jurisdiction over Zamzala, gained independence from Astoria and has henceforth prospered on agriculture and tourism. In addition to several of its islands being listed under the 1972 World Natural and Cultural Heritage Convention for their rich biodiversity and ecosystem values, remnants of World War II scattered in its maritime waters make it an extremely popular destination among wreck divers. Such wrecks however are facing peril from rampant lootings and illicit treasure hunting activities, trawl-net fishing and natural elements.

COEUR DE L' OCEAN IS DISCOVERED

In 1990, Mr. Bernard Bodd, an Astorian salvor and major shareholder of Benevolent Heritage, Inc. ('Heritage'), a Rolgan corporation with expertise in historic wrecks recovery, submitted a proposal to the Rolga Cultural Heritage Committee for the survey and recovery of certain wrecks belonging to the era of

Astorian expansion. Said proposal included the highly coveted Coeur de l' Ocean, thus, it was well-received by the Rolgan Government.

ENTRY INTO THE 1995 PARTNERING AGREEMENT MEMORANDUM

On 27th September 1995, the Government of Rolga and Heritage signed a "Partnering Agreement Memorandum," which recognized the latter's salvage rights to exclusively explore, document and conserve the artefacts.

SUCCESSFUL RETRIEVAL OF COEUR DE L' OCEAN ARTEFACTS

Upon approval of salvage project plan and compliance with the requisites laid down in Clause 3 of the 1995 Agreement, Heritage commenced its salvage operations and succeeded in recovering thousands of artefacts. Some of the artefacts have been auctioned off. Part of the profits generated from the auction was distributed among the parties, while the rest were used to partly finance the project expenses. Many artefacts were showcased in a maritime exhibit in the National Museum of Rolga. To date, thousands of artefacts await disposition.

NEW LAW TO PROTECT HISTORICAL AND CULTURAL WRECKS

In 2000, Rolga passed a new law to protect wrecks of historical and cultural significance to Rolga, on the basis of the developments leading to the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage, which Rolga subsequently ratified. This law authorizes the Minister of Rolga Cultural Heritage to designate a certain site as "restricted area", should he be satisfied that (1) it is, or it may be, the site of a shipwreck and (2) on account of

the historical, archaeological or artistic importance of that vessel, or of any objects contained or formerly contained in it, it should be protected from unauthorized interference.

ENTRY INTO A BILATERAL AGREEMENT WITH ASTORIA

In 2001, the Rolga entered into an agreement on the “Protection of Astorian Wrecks”, to protect historic wrecks, wherein both countries share genuine “historical and cultural” interest. Pursuant to this Agreement, Astoria ceded all its right, title and interest in and to Astorian shipwrecks lying on or off Rolga’s coast, while Rolga recognized the former’s “continuing interest” in articles retrieved from the said shipwrecks. Also, the “Guiding Principles for the Determination of the Disposition of Materials from the Shipwrecks off the Coast of Rolga” was signed to govern the manner of conserving pertinent artefacts in the National Museums of Rolga and of Astoria.

ROLGA LICENSES AQUATIC VIEW’S COMMERCIAL ACTIVITIES

In 2001, Rolga granted Aquatic View, a specialized tour operator, to organize and profit from exclusive underwater trips to view the wreck. Rolga also tolerated the latter’s subsequent conduct of (1) taking photographs and making video clips of the wrecks, (2) posting the images as promotional materials for the tours on their website, and (3) making and marketing CD souvenirs relating to the Coeur de l’ Ocean, thereby jeopardizing Heritage’s ongoing television documentary deal with an International Broadcasting Company.

SUBMISSION TO ARBITRATION

By 2003, Heritage realized that further investment in efforts, time and money into other Astorian wrecks would only be harmful to the company. Thereafter, Heritage and Rolga formalized the final distribution of artefacts recovered from the Coeur de l' Ocean. However, tension between the parties escalated, culminated in Heritage's referring the dispute to arbitration pursuant to Clause 10 of the 1995 Agreement.

SUMMARY OF PLEADINGS

The Respondent has interfered with the Claimant's salvage rights and performance under the 1995 Partnering Agreement Memorandum (1995 Agreement). In ratifying the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage (2001 UNESCO Convention), the Claimant was thereby legally prohibited from retrieving and selling artefacts. The Claimant was also legally prohibited from excluding others from the wreck site. Furthermore, the Claimant was legally required to divulge confidential information concerning its salvage operations.

The salvage rights and performance of the Claimant was also interfered with when the Respondent entered into a Bilateral Agreement with Astoria. The Bilateral Agreement recognizes Astoria's "continuing interest" over the artefacts, albeit that Astoria is not privy to the 1995 Agreement. The Bilateral Agreement, furthermore, reduces Claimant's distributive share in the recovered artefacts. In addition, the Bilateral Agreement deprives Claimant of its right to handle the conservation of retrieved artefacts.

The Respondent has also interfered with the salvage rights and performance when it issued a permit to Aquatic View for purposes of conducting commercial activities. The permit violates the Claimant's right to exclusively manage the salvage operations. It also prevents the Claimant from exclusively exploring the shipwreck and conserving and documenting any retrieved artefacts. Moreover, the issuance of the permit precludes the Claimant's realization of more profits through merchandising.

The Claimant suffered economic injury as a result of Respondent's acts of interference. The 2001 UNESCO Convention prohibits further acts of retrieval and commercial exploitation of

retrieved artefacts. Furthermore, the Bilateral Agreement with Astoria deprives the Claimant of its right to conserve and its right to the stipulated distributive share.

The Respondent must therefore make reparations by way of compensation. In this regard, the Claimant has incurred damages in deposits and fee paid. In addition, the Claimant has incurred damages in lost profits (*lucrum cessans*).

At this juncture, it should be stressed that, under the law of salvage, the Claimant has exclusive rights of photographing and documenting the shipwreck Coeur de l' Ocean.

It should also be underscored that the calculation of profits and/or distribution of artifacts should be made solely on the basis of salvage legal principles. The parties intended the exclusive application of salvage legal principles in the calculation of profits under the 1995 Agreement. The parties also intended the exclusive application of salvage legal principles in the distribution of artefacts under the 1995 Partnering Agreement Memorandum.

PLEADINGS

I. RESPONDENT INTERFERED WITH CLAIMANT’S SALVAGE RIGHTS AND PERFORMANCE UNDER THE 1995 PARTNERING AGREEMENT MEMORANDUM [1995 AGREEMENT]

The 1995 Partnering Agreement Memorandum is the law between the parties. In accordance with the principle of *pacta sunt servanda*⁵, each party must exercise his/her rights so as not to encroach on those of the other.

A. The Claimant has salvage rights under the 1995 Agreement.

The 1995 Agreement is a contract that contemplates the provision of salvage services and the grant of salvage rights, recognized under general maritime law, in order to conduct salvage operations on the Coeur de l’ Ocean.

1. The 1995 Agreement is a salvage contract between the Claimant and the Respondent.

Under general maritime law, there are three formal elements of a valid salvage claim: (1) marine peril; (2) service voluntarily rendered and (3) success in whole or in part, or that the service rendered contributed to such success.⁶ First, there was marine peril in the form of rampant lootings and illicit treasure hunting activities⁷, trawl-net fishing⁸ and the action of the elements.⁹ Second, the Claimant had no legal obligation prior to rendering salvage services to the

⁵ I. Brownlie, *Principles of Public International Law* (2003), pp.591-592.

⁶ *The Sabine*, 101 U.S. (11 Otto) 384, 25 L.Ed. 982 (1879); *Markakis vs. S/S Volendam*, 486 F.Supp. 1103 (S.D.N.Y. 1980); *United States vs. Ex-USS Cabot/Dedalo*, 297 F.3d 378 (2002), Schoenbaum, Thomas J., “Admiralty and Maritime Law” 1987, p. 502.

⁷ *Moot Problem (“Problem”)*, par.3.

⁸ *Problem*, par.3; “Disturbance of the Seabed by Mobile Fishing Gear: A Comparison to Forest Clearcutting” by Watling and Norse, 1998: 1190-92, in *Conservation Biology* 12.6 (1998), 1180-97; and *Shipwreck, Too, Threatened by Trawlers*, Oceana (<http://community.oceana.org/blog/2009/02/shipwreck-too-threatened-trawlers>).

⁹ *Treasure Salvors, Inc. vs. Unidentified Wrecked and Abandoned Sailing Vessel* (Treasure Salvors I), 569 F.2d 330, 337 (5th Cir.1978); *Platoro Ltd., Inc. vs. Unidentified Remains of a Vessel*, 695 F.2d 893, 901 n. 9, 1984 AMC 2288

respondent. Lastly, the Claimant has been successful, as in fact, it had already retrieved thousand of Coeur de l' Ocean artefacts, some of which were auctioned off, while the others were placed in a maritime exhibition within the National Museum.¹⁰

Furthermore, the 1995 Partnering Agreement Memorandum, exemplified the features of the standard salvage contract, Lloyd's Open Form (LOF) 1980, which provides for arbitration in case of dispute and which prescribes compensation on a "no cure, no pay" basis.¹¹

2. The 1995 Agreement gives exclusive rights to the Claimant as salvor.

There was compliance with the formal requisites of a valid salvage claim and conformity of the 1995 Agreement with the features of a standard salvage contract. Thus, the Claimant has exclusive rights to explore the shipwreck, to retrieve and possess the artifacts and to photograph the wreck and all artifacts therein.¹²

B. Respondent's subsequent conduct violates Claimant's rights under the 1995 Agreement.

The Respondent has breached its contractual obligations on more than one occasion, thereby rendering nugatory the 1995 Agreement.¹³

1. Respondent's ratification of the 2001 UNESCO Convention on the Protection of Underwater

(5th Cir.1983); *Cobb Coin Co., Inc. vs. Unidentified, Wrecked & Abandoned Sailing Vessel*, 549 F.Supp. 540, 557 (S.D.Fla.1982).

¹⁰ *Problem*, par.6.

¹¹ Schoenbaum, Thomas J., "Admiralty and Maritime Law" 1987, p.511; *Partnering Agreement Memorandum*, Clauses 5 and 10.

¹² *R.M.S. Titanic vs. Wrecked and Abandoned Vessel*, 1996 A.M.C. 2497.

¹³ I. Brownlie, *Principles of Public International Law* (2003), p.550.

The provisions of the Convention prescribing *in situ* preservation of the heritage and prohibiting its commercial exploitation¹⁴, encouraging responsible non-intrusive access to underwater cultural heritage¹⁵, and obliging State parties to share valuable information regarding underwater cultural heritage to other States¹⁶, prevent the Claimant from exercising its contractual rights and continuing its salvage operations.

a. The Claimant is legally prohibited from retrieving and selling shipwreck artefacts.

“Underwater cultural heritage” refers to “all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years, such as... vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context.”¹⁷ The Convention aims to preserve underwater cultural heritage for the benefit of humanity, so it prefers *in situ* preservation and prohibits commercial exploitation of the heritage¹⁸.

With the UNESCO Convention on the Protection of Underwater Cultural Heritage in full force and effect, the Claimant is prevented from further retrieving any artefact from the Coeur de l’ Ocean. At the same time, it is prohibited from selling any of the artefacts that it has already recovered from the wreck. As a consequence, the Claimant now cannot demand its rightful share according to Clause 5 of the 1995 Agreement.

¹⁴ UNESCO Convention on the Protection of Underwater Cultural Heritage (“UNESCO CPUCH”), Art.2, pars.3, 5 and 7.

¹⁵ UNESCO CPUCH, Art. 2, par.10.

¹⁶ UNESCO CPUCH, Art. 1 par.2 and 4.

¹⁷ UNESCO CPUCH, Art. 1 par.1.

¹⁸ UNESCO CPUCH, Art. 2 par.3, 5 and 7; “Rules Concerning Activities Directed at Underwater Cultural Heritage”, Rule 2.

b. The Claimant is legally prohibited from excluding others from the wreck site.

The Claimant, has conducted ongoing salvage operations with success and is deemed a salvor-in-possession, who is entitled to exclude others from exploring the shipwreck and to solely take images, photographs, videos and the like.¹⁹ The purpose of such rights is to compensate the salvor for its efforts and to encourage their continuation.²⁰ However, Claimant may no longer exercise this right because the Respondent is “encouraged” or otherwise, mandated to provide “responsible non-intrusive access to observe or document in situ underwater cultural heritage.”²¹ Consequently, any one may explore the Coeur de l’ Ocean to observe or document the heritage it embodies.

c. The Claimant is legally required to divulge confidential information concerning its salvage operations.

Under the 1995 Agreement, information regarding the Agreement and its execution are confidential.²² But, the Claimant can no longer enjoy the confidentiality accorded to its discovery and salvage operations, because the Convention enjoins the Respondent to share with other states any valuable information that it may have regarding underwater cultural heritage.²³

¹⁹ *R.M.S. Titanic vs. Wrecked and Abandoned Vessel*, A.M.C. 2497,1996.

²⁰ *Ibid.*

²¹ UNESCO CPUCH, Art.2 par.10.

²² *Partnering Agreement Memorandum*, Clause 11.

²³ UNESCO CPUCH, Art.19, par. 2 and 4.

The disclosure of such information exposes not only the Claimant’s discovery of the Coeur de l’ Ocean and its exact location, but more importantly, the source of the Claimant’s competitive advantages - expertise, human capital, technological implements or research sources.

2. Respondent’s concluding of Bilateral Agreement with Astoria impinges on Claimant’s salvage rights under the 1995 Agreement.

In entering into the Bilateral Agreement in 2003, the Respondent bound itself to recognize Astoria’s continuing interest in articles retrieved from any of the vessels referred to in their Agreement.²⁴ As such, the salvage services rendered with respect to the Coeur de l’ Ocean, an Astorian vessel²⁵, is restricted by the terms of the Bilateral Agreement.

a. The Bilateral Agreement recognizes Astoria’s “continuing interest” over the artefacts, albeit that Astoria is not privy to the 1995 Agreement.

Having recognized Astoria’s continuing interest in articles retrieved from its vessels²⁶, the Respondent now faces conflicting interests – the Claimant’s interest to profit from its salvage operations and Astoria’s interest to protect its cultural heritage.²⁷ Commercial exploitation of underwater cultural heritage is fundamentally incompatible with the protection and management of the heritage.²⁸ The Respondent has to choose and having chosen to recognize Astoria’s interest, it has abandoned its duty to protect the Claimant’s interest.

²⁴ *Problem*, par.9.

²⁵ *Problem*, par.1.

²⁶ *Problem*, par.9.

²⁷ *Problem*, par.9.

²⁸ *Charter on the Protection and Management of Underwater Cultural Heritage* (11th International Council for Monuments and Sites, General Assembly, Oct. 5-9, 1996); Dromgoole, S., forthcoming. Legal protection for the underwater cultural heritage: the immediate challenge and methods of response, in *Recent Developments in the Law of the Sea and China*, ed. M.H. Norquist, O’Keefe, P.J., 2002, *Shipwrecked Heritage: a Commentary on the UNESCO CPUCH*. Leicester: Institute of Art and Law.

b. The Bilateral Agreement reduces Claimant’s distributive share in the recovered artefacts.

The Bilateral Agreement requires the distribution of statistical samples of retrieved artefacts between the National Museums of the Respondent and of Astoria.²⁹ Astoria not only has a share in the retrieved artefacts, it can also impose on the division of the same depending on its requisite representative collection.³⁰ This Agreement contravenes the 1995 Agreement³¹ by reducing the latter’s share of the retrieved artefacts, without giving a reasonable payment for what should have gone to it.

c. The Bilateral Agreement deprives Claimant of its right to handle the conservation of retrieved artefacts.

Upon approval of the project plan and payment of the Conservation Deposit, the Claimant is accorded the right to handle the conservation of the retrieved artefacts.³² However, the exercise of that right is now infringed by Astoria’s conditions of representative sampling and of preventive treatment.³³ Astoria can now meddle with the Claimant’s choice of how best to conserve the artefacts.

3. Respondent’s licensing of Aquatic View’s commercial activities violates Claimant’s right to exclusively manage the salvage operations.

²⁹ *Guiding Principles for the Determination of the Disposition of Materials from the Shipwrecks of Astoria off the Coast of Rolga (2001)* (“*Guiding Principles*”), par.1 and 5.

³⁰ *Guiding Principles*, par.1.

³¹ *Partnering Agreement Memorandum*, Clause 5.

³² *Partnering Agreement Memorandum*, Clauses 2 and 3.

³³ *Guiding Principles*, pars.1-4.

The permit granted to Aquatic View, a tour operator, deprives the Claimant of its right to “salvage without interference”,³⁴ of its right to exclude others from exploring the shipwreck and from photographing the wreck.³⁵

a. The Respondent’s action prevents the Claimant from exclusively exploring the shipwreck and conserving and documenting any retrieved artefacts.

Claimant, as the first salvor, who has been operating continuously and has been successful in retrieving thousands of artefacts from the Coeur de l’ Ocean, has the right to “salvage without interference”³⁶ during the pendency of his salvage operations. It has the right to retain possession of the vessel and the artefacts until the salvage was completed, and no other person could interfere against it forcibly.³⁷ Allowing a “salvor” to take photographs of the wreck and wreck site is akin to allowing another salvor to physically invade the wreck and to take the artefacts therein themselves.³⁸

Respondent has granted Aquatic View, a tour operator, permit to organize tours of the Coeur de l’ Ocean. Furthermore, Respondent has allowed it to take photographs and video clips to post in their website.³⁹ Such acts interfere with the Claimant’s salvage operations and compel it to cease operations, considering the danger that having more than one submersible exploring the same shipwreck entails.⁴⁰ The respondent’s act also violates the Claimant’s contractual right

³⁴ *Hener vs. United States*, 525 F. Supp. 350, 357 (S.D.N.Y. 1981).

³⁵ *R.M.S. Titanic vs. Wrecked and Abandoned Vessel*, 9 F. Supp.2d 624.

³⁶ *Hener vs. United States*, 525 F.Supp. 350, 357 (S.D.N.Y. 1981); *The Hendry Ewbank*, 11 F. Cas. 1166, 1170-71 (C.C.D.Mass. 1833).

³⁷ *The John Gilpin*, 13 F. Cas. 675, 676 (S.D.N.Y. 1845).

³⁸ *R.M.S. Titanic vs. Wrecked and Abandoned Vessel*, 1996 A.M.C. 2497.

³⁹ *Problem*, par.11.

⁴⁰ *R.M.S. Titanic vs. Wrecked and Abandoned Vessel*, 9 F.Supp.2d 624.

to handle the conservation and documentation of the shipwreck Coeur de l' Ocean and the artefacts.

b. Respondent's action also prevents the Claimant from realizing more profits through merchandising.

Video sales, film documentaries and television broadcasts are inventive marketing ideas, which can be sold just like any physical artefact. But, the rights to images, photographs, videos and the like belong to the salvor.⁴¹ In this case, the Claimant, as a salvor, has the right to engage in such marketing strategies. At the same time, it has the right to market merchandise (exclusive of artefacts) related to the Coeur de l' Ocean.⁴²

II. The Claimant has exclusive rights of photographing and documenting the shipwreck Coeur de l' Ocean.

The 1995 Partnering Agreement Memorandum grants the Claimant the rights to photograph and document the shipwreck Coeur de l' Ocean.⁴³ Under the law on salvage, these rights are exclusive.⁴⁴

A. The Claimant has the rights to photograph and document the shipwreck Coeur de l' Ocean based on the 1995 Partnering Agreement.

Under the law on salvage, a successful salvage service accords the right to be compensated in the form of a salvage reward.⁴⁵ In the event that the salvor who rendered the

⁴¹ *Ibid.*

⁴² *Partnering Agreement Memorandum*, par.6.

⁴³ *1995 Partnering Agreement Memorandum*, Appendix 1, p.8, *Problem*.

⁴⁴ *Treasure Salvors, Inc. v. Wrecked & Abandoned Sailing Vessel* (1981) 640 F.2d 560 C.A.Fla.; *R.M.S. Titanic v. Wrecked and Abandoned Vessel* (1996) A.M.C. 249; *Hener v. United States*, 525 F.Supp. 350, 357 (S.D.N.Y.1981); *R.M.S. Titanic v. Wrecked and Abandoned Vessel* 9 F.Supp.2d 624 (1998).

successful salvage service has not been properly compensated and such salvor is in possession of the property subject of the salvage service, the salvor is granted the right to recoup its investment while in possession.⁴⁶ Given that the rights to photograph and document the subject property are means of realizing profits, the salvor necessarily possesses these rights to photograph and document.⁴⁷

The 1995 Partnering Agreement accorded salvage rights to the Claimant, particularly the right to retrieve artifacts from the shipwreck Coeur de l' Ocean.⁴⁸ Pursuant to this Agreement,⁴⁹ the Claimant has successfully rendered salvage service.⁵⁰ The Claimant, who is currently in possession of the shipwreck, has not been compensated for the successful salvage service.⁵¹ In this light, the Claimant has the right to recoup its investment, which necessarily includes the rights to photograph and document.⁵²

B. The Claimant's rights to photograph and document based on the Partnering Agreement are exclusive under the law of salvage.

Under the law of salvage, a salvor may acquire the right to take possession of the property for the purpose of saving it from peril and to retain it until proper compensation has been paid.⁵³ When the requisites of peril, voluntariness, and success, in whole or in part, of the

⁴⁵ *The Blaireau*, 6 U.S. (2 Cranch) 240, 266, 2 L.Ed. 266 (1804); *R.M.S. Titanic v. Wrecked and Abandoned Vessel* (1996) A.M.C. 2497; *Columbus America Discovery [Group] v. Atlantic Mut. Ins.*, 974 F.2d 450 (4th Cir.1992).

⁴⁶ *MDM Salvage, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 631F.Supp. 308 (S.D.Fla.1986); *R.M.S. Titanic v. Wrecked and Abandoned Vessel* (1996) A.M.C. 2497.

⁴⁷ *R.M.S. Titanic v. Wrecked and Abandoned Vessel* (1996) A.M.C. 2497.

⁴⁸ *Problem*, p.8, Clause 2.

⁴⁹ *Problem* p.8,.

⁵⁰ *Problem* p.2, par.6, *Problem*; p.5, par.12.

⁵¹ *Problem*, p.2, par.6 and p.5, par.12,.

⁵² *R.M.S. Titanic v. Wrecked and Abandoned Vessel* (1996) A.M.C. 2497.

⁵³ *Columbus-America Discovery Group v. Atlantic Mutual Insurance Company* 974 F.2d 450 (1992).

undertaking are complied with, the right to possess the property attaches.⁵⁴ The right of the Claimant to possess the wreck has therefore attached when the Claimant rendered salvage service.⁵⁵ This right to possess the shipwreck arose from the right of the salvor to be compensated for the services rendered.⁵⁶ This right to be compensated gives it the right to exclude third parties from photographing the shipwreck.⁵⁷ By virtue of this right, the Claimant is vested with the exclusive right to photograph and document the shipwreck Coeur de l' Ocean.

1. The Claimant has successfully rendered salvage service.

The essential characteristics of a salvage service are that it is performed on navigable waters and that it is voluntarily rendered by one under no existing duty to do so.⁵⁸ Claimant has successfully rendered salvage service to the Respondent.⁵⁹ After years of endless survey, it found the shipwreck Coeur de l' Ocean.⁶⁰ It was under no obligation to rescue the artefacts but it nevertheless concluded an Agreement with the Respondent to conduct the extensive recovery project of the artefacts.⁶¹ Pursuant to the approved Project Plan,⁶² the Claimant has retrieved many of the artefacts from the shipwreck Coeur de l' Ocean.⁶³ Some of these artefacts have been exhibited in the National Museum of the Respondent.⁶⁴ Claimant also undertook the conservation and documentation of the retrieved artefacts as stipulated in the Project Plan.⁶⁵

⁵⁴ *Id.*

⁵⁵ *Problem*, p.6, par.2.

⁵⁶ *The Blaireau*, 6 U.S. (2 Cranch) 240, 266, 2 L.Ed. 266 (1804); *R.M.S. Titanic v. Wrecked and Abandoned Vessel* (1996) A.M.C. 2497; *Columbus America Discovery [Group] v. Atlantic Mut. Ins.*, 974 F.2d 450 (4th Cir.1992).

⁵⁷ *R.M.S. Titanic v. Wrecked and Abandoned Vessel* (1998) 9 F.Supp.2d 624; *R.M.S. Titanic v. Wrecked and Abandoned Vessel* (1996) A.M.C. 2497.

⁵⁸ M. Norris, *The Law of Salvage* (1958), p. 2-3.

⁵⁹ Submission 1, A (i).

⁶⁰ *Problem*, p.2, par.5; *1995 Partnering Agreement Memorandum*.

⁶¹ *Problem*, p.2, par.5; *1995 Partnering Agreement Memorandum*.

⁶² *Problem*, p.8, Clause ;, par.1, *1995 Partnering Agreement Memorandum*.

⁶³ *Problem*, p.2, par.6.

⁶⁴ *Problem*, p.2, par.6.

⁶⁵ *Problem*, p.2, par.6.

Thus, the Claimant has successfully rendered salvage service. Salvage service success may be in whole or in part.⁶⁶

2. The Claimant has the right of possession for not having been properly compensated.

The Salvor's right of possession must be a lawful one.⁶⁷ This right to possess the shipwreck arose from the right of the salvor to be compensated for the services rendered.⁶⁸ The Claimant has not been properly compensated by the Respondent based on the Sharing Arrangement⁶⁹ in the Agreement. The Claimant has not received its rightful share in the profits, nor has it received its distributive share in the remaining artefacts. The estimated total value of the artefacts has already exceeded forty-five million dollars⁷⁰ but the Respondent has not ceded possession of some of these artefacts to the Claimant. This happened notwithstanding the fact that the Claimant has invested efforts, time, and money to recover the artefacts from the shipwreck.⁷¹ Not having been properly compensated, the Claimant therefore has the right to recoup its investment.⁷² Since the Claimant has the right to be compensated for the salvage service and it has not been properly compensated by the Respondent, it is therefore entitled to

⁶⁶ *Columbus-America Discovery Group v. Atlantic Mutual Ins'ce Company* 974 F.2d 450 (1992).

⁶⁷ *The Barke Cleone*, 6 F 517 (DC Cal 1881); *The Ann L. Lockwood*, 37 F 233 (DC Del 1888); *The Pinmore*, 121 F 425 (DC Wash 1903).

⁶⁸ *The Blaireau*, 6 U.S. (2 Cranch) 240, 266, 2 L.Ed. 266 (1804); *R.M.S. Titanic v. Wrecked and Abandoned Vessel* (1996) A.M.C. 2497; *Columbus America Discovery [Group] v. Atlantic Mut. Ins.*, 974 F.2d 450 (4th Cir.1992).

⁶⁹ *Problem*, p.9, Clause 5, Appendix 1.

⁷⁰ *Further Clarifications*, P.2, par.18; *see also the distribution of assets*.

⁷¹ *Problem*, p.5, par.12.

⁷² *The Blaireau*, 6 U.S. (2 Cranch) 240, 266, 2 L.Ed. 266 (1804), *R.M.S. Titanic v. Wrecked and Abandoned Vessel* (1996) A.M.C. 249.

recoup its investment by profiting from the shipwreck as salvor-in-possessor while it has still not finished its salvage operations.⁷³

3. By virtue of not having been fully compensated, the Claimant has the right to recoup its investment which includes the exclusive rights to photograph and document.

For not being fully compensated, the Claimant is a salvor-in-possession of the shipwreck for the duration of the salvage operations. No other person or persons, without his consent, can lawfully intrude upon the property.⁷⁴ Being a salvor-in-possession, the Claimant has the right to exclude others from visiting the wreck site to photograph the wreck.⁷⁵ This right arises from the right to be free from the interference of others and from the right of the salvor to recoup its investment.⁷⁶ The Salvage law recognizes the right of the salvor in possession to complete his salvage work free of interference from his rivals and such interference may be in the form of interference with the salvage operations or interference with the wreck.⁷⁷ It is a fundamental principle in the law of salvage that the salvor-in-possession has an exclusive right to complete his job unhindered by others.⁷⁸ When such interference happens, the salvor is entitled to exclude others from photographing the wreck.⁷⁹ This is to keep harm away from the shipwreck over which the salvor has the duty to protect.⁸⁰ The second reason for excluding third parties is to

⁷³ *MDM Salvage, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 631F.Supp. 308 (S.D.Fla.1986); *R.M.S. Titanic v. Wrecked and Abandoned Vessel* (1996) A.M.C. 2497

⁷⁴ *The Yucatan*, Fed Cas 18,194 (DC Fla 1847); *Lewis v. The Elizabeth and Jane*, Fed Case 8321 (DC Me 1823); *M. Norris*, *The Law of Salvage* (1958), p.248.

⁷⁵ *R.M.S. Titanic v. Wrecked and Abandoned Vessel* 9 F.Supp.2d 624 (1998).

⁷⁶ *Id.*

⁷⁷ *R.M.S. Titanic v. Wrecked and Abandoned Vessel* 9 F.Supp.2d 624 (1998).

⁷⁸ *Hener vs. United States*, 525 F. Supp. 350, 357 (S.D.N.Y. 1981); *The AMERICAN FARMER*, 80 Lloyd's Rep. 672; *The John Gilpin*, 13 F. Cas. at 676.

⁷⁹ *R.M.S. Titanic v. Wrecked and Abandoned Vessel* 9 F.Supp.2d 624 (1998)

⁸⁰ *Marex International v. Unidentified, Wrecked and Abandoned Vessel*, 952 F.Supp. 825, 829 (S.D.Ga.1997).

allow the salvor to recoup its investment in the salvage operations.⁸¹ The Claimant has invested efforts, time, and money into the shipwreck.⁸² It has, however, not been properly compensated.⁸³ Since the Claimant has the right to exclude others from photographing the shipwreck, the rights to photograph and document are therefore exclusive.

III. The calculation of profits and/or distribution of artifacts should be made solely on the basis of salvage legal principles.

The nature of the 1995 Agreement envisages a salvage service with a concomitant salvage reward. The parties, aware of the nature of the service and the reward, entered into the 1995 Partnering Agreement. And it is the intention of the parties to apply salvage legal principles in the calculation of profits and/or distribution of artefacts, as evidenced by the 1995 Agreement in general, and the sharing agreements in particular.

A. The parties intended the exclusive application of salvage legal principles in the calculation of profits under the 1995 Partnering Agreement Memorandum.

The calculation of profits provided for under the sharing arrangements of the 1995 Partnering Agreement reflect the intent of the parties to exclusively apply salvage principles. This intent can be seen from the calculation based on a relative percentage in the value of artefacts recovered, and the relatively high amount of such percentage.

1. The parties intended profits to be calculated based on a relative percentage of the aggregate value of artefacts recovered.

⁸¹ *The Blaireau*, 6 U.S. (2 Cranch) 240, 266, 2 L.Ed. 266 (1804).

⁸² *Problem*, p.5, par.12.

⁸³ *Problem*, p.9, Clause 5, Appendix 1.

The law of salvage rewards a salvor with a percentage of the value of property recovered, instead of providing for compensation in the form of a fixed monetary amount.⁸⁴ This principle is even more pronounced when the salvage service is yet to be completed and the determination of the exact amount and value of property is to be made upon its recovery.⁸⁵ Under the 1995 Partnering Agreement, the parties stipulated a calculation of profits through a percentage in the aggregate values of the artefacts to be recovered.⁸⁶

2. A relatively high percentage was contemplated in favor Claimant.

The law of salvage provides a generous and liberal compensation for salvage services rendered.⁸⁷ This generous award in favor of a salvor serves as reward given for perilous services, voluntarily rendered, and as an inducement to seamen and others to embark in such undertakings to save life and property.⁸⁸ Clause 6 of the Partnering Agreement provides for a relatively high percentage in the value of artefacts recovered.

3. A calculation of profits cannot be made on the basis of any other legal principle.

a. A calculation of profits under the 1995 Partnering Agreement cannot be made on the basis of the principle of *Quantum Meruit*.

⁸⁴ *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d at 962.

⁸⁵ *Colombus-America Discovery Group v. Atlantic Mutual Ins'ce Company* 974 F.2d 469.

⁸⁶ Clause 6, Partnering Agreement.

⁸⁷ Bordelon, Christopher Z., *Saving Salvage, Avoiding Misguided Changes to Salvage and Finds Law*, San Diego International Law Journal.

⁸⁸ Blackwall, 77 U.S. at 14.

Admiralty courts have consistently viewed the compensation awarded to a salvor for services rendered not as a pay on the basis of the principle of *quantum meruit*.⁸⁹ The principle of *quantum meruit*, which literally means ‘as much as he deserves’, refers to the payment of compensation based on the reasonable value of services rendered.⁹⁰ The sharing arrangements in the 1995 Partnering Agreement provides for a generous and liberal compensation. This clearly shows that the principle of *quantum meruit* was not intended to apply to the calculation of profits.

b. A calculation of profits under the 1995 Partnering Agreement cannot be made on the basis of the principle of *Pro Opere et Labore*.

A calculation of profits on the basis of the principle of *Pro Opere et Labore*, which means ‘for work and labor’, pertains to compensation based on the mere remuneration of the labor expended.⁹¹ This form of compensation is not determined on the basis of percentage of the value of the property subject of salvage service.⁹² A salvage reward is not a matter of compensation *Pro Opere et Labore* because it takes its source in a deeper policy.⁹³ Since the compensation contemplated under the sharing agreements is a salvage reward,

B. The parties intended the exclusive application of salvage legal principles in the distribution of artefacts under the 1995 Partnering Agreement Memorandum.

The intent of the parties to exclusively apply salvage legal principles is evident from the manner of the distribution of artefacts provided for under the sharing arrangements of the 1995

⁸⁹ Blackwall, 77 U.S. at 14.

⁹⁰ P. 21, Graham Virgo. *The Principles of the Law of Restitution*, Oxford University Press. (1999)

⁹¹ §3, Martin J. Norris. *The Law on Salvage*; Rhys Clift, Robert Gay. *The Shifting Nature of Salvage Law: A View from a Distance*. *Tulane Law Review*(June 2005)

⁹² *The Rendsberg*, Nyberg, 6 C. Rob.

⁹³ *R.M.S. Titanic v. The Wreck and Abandoned Vessel* 286 F3d 194

Partnering Agreement. This can be seen from the right granted to the Claimant to own and possess its share of artefacts and the manifest intent of the parties to engage in a sale of artefacts.

1. The right to own and possess a relative share of artefacts recovered when its appraised values reaches \$45 million is an “Award in Specie” in favor of Claimant.

When items salvaged are uniquely and intrinsically valuable beyond their monetary worth, an “award in specie” is deemed more appropriate.⁹⁴ The Le Coeur de l’ Ocean is well noted for its extremely high historical and cultural value. In fact, the National Geographic has described the initial items recovered from the shipwreck as the ‘most bedazzling underwater treasures found today.’⁹⁵ An “award in specie” was clearly stipulated in the sharing arrangements under the 1995 Partnering Agreement. Instead of compensation in money, a right to own and possess its relative share of artefacts once the items recovered exceed an aggregate amount of \$45 million is expressly provided for.⁹⁶

2. The parties bound themselves to enter into a sale of artefacts through the formulation of a Joint Marketing Plan.

A salvage award is usually paid from the proceeds of the sale of the property recovered.⁹⁷ The provisions of the sharing arrangements reflect the concomitant intent of the Respondent to engage in a sale of artefacts together with the Claimant. Mindful of the fact that more profits

⁹⁴ *Colombus-America Discovery Group v. Atlantic Mutual Insurance Company* 974 F.2d 469. 974 F.2d at 469

⁹⁵ *Problem*, par.4.

⁹⁶ *Partnering Agreement* Clause 6, 1995.

⁹⁷ Liza Bowman “Oceans Apart Over Sunken Ships: Is The Underwater Cultural Heritage Convention Really Wrecking Admiralty Law?” *Osgoode Hall Law Journal* (2001) p. 11.

would be gained if the artefacts recovered would be marketed as whole,⁹⁸ the parties endeavored to formulate a Joint Marketing Plan.

3. The distribution of artefacts cannot be made on the basis of any other existing agreement or treaty.

a. A distribution of artefacts cannot be made under the 2001 Guiding Principles for the Determination of the Disposition of Materials from the Shipwrecks of Astoria off the Coast of Rolga.

The distribution of artefacts provided for under the 2001 Guiding Principles provide for a mode of distribution of artefacts that is incompatible with the 1995 Partnering Agreement. The 2001 Guiding Principles considers only a distribution of artefacts between the institutions of Respondent and Astoria, contrary to what the parties contemplated under the sharing arrangements.⁹⁹ Furthermore, distribution under the 2001 Guiding Principles would be determined through proposals for distribution made by Director of the National Museum of the Respondent, as approved by a committee.¹⁰⁰ If the distribution provided for under the 2001 Guiding Principles, particularly Clauses 4 to 7, is to be given effect, it would be a violation of the form of distribution that the parties originally intended.

b. The artefacts cannot be distributed in accordance with the intention of the parties if they are to be subject to the restrictions under the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage.

⁹⁸ *Colombus-America Discovery Group v. Atlantic Mutual Ins'ce Company* 203 F.3d 291

⁹⁹ *Partnering Agreement*, Clause 6.

¹⁰⁰ *Guiding Principles*, Clause 4.

The 2001 UNESCO Convention forbids the commercial exploitation of shipwrecks, and artefacts recovered from it.¹⁰¹ If the principles of the 2001 UNESCO Convention are to be applied in the distribution of artefacts recovered from the wreck, a sale of the retrieved would be impossible, and the Claimant would not be able to own and possess its relative share of artefacts. The application of the 2001 UNESCO Convention in the distribution of artefacts would result in the Claimant not receiving proper contractual compensation.

IV. Claimant suffered economic injury as a result of Respondent's acts of interference.

An entity, whether natural or juridical, is entitled under international law and general principles of law to compensation for the value of the property of which such entity was deprived.¹⁰² A deprivation may occur under international law through interference by a state in the use of property or with the enjoyment of its benefits, even where the legal title to the property is not affected.¹⁰³ Correlatively, any breach of an international obligation involves the duty to make full reparation for the injury caused by its wrongful conduct.¹⁰⁴ Once causation is established, the wrongdoer is liable for all the harm that naturally flows from the wrongful act.¹⁰⁵

In this particular dispute, the Respondent has committed various acts of interference that effectively rendered the 1995 Agreement nugatory. The 2001 UNESCO Convention on the

¹⁰¹ UNESCO CPUCH, Rule 2.

¹⁰² A. LOWENFELD, INTERNATIONAL ECONOMIC LAW 466 (2002).

¹⁰³ *Id.*

¹⁰⁴ Articles of State Responsibility for Internationally Wrongful Acts ("ASR"), Art. 31(1), Report of the 53rd Sess., ILC (2001), G.A.O.R. 56th Sess., Supp. 10 [hereinafter ASR]; see also *Chorzow Factory Case*, Decision on Merits, 1928 P.C.I.J. (ser.A) No.17, at 29 [hereinafter *Chorzow Factory Case*]; BIN CHENG, GENERAL PRINCIPLES OF LAW 223 (1987).

¹⁰⁵ D. SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW, 231 (1999).

Protection of Underwater Cultural Heritage, which the Respondent has ratified, deprived the Claimant of its lawful exercise of its rights to retrieve and sell the artefacts, exclude others from the wreck site, and confidentiality of information concerning salvage operations. Moreover, the rights of the Claimant to its distributive share in the retrieved artefacts and to the conservation thereof are constrained by the terms of the Bilateral Agreement entered into by the Respondent and Astoria. Finally, the permit granted by the Respondent to Aquatic View impedes the right of the Claimant to explore, conserve, and document any retrieved artefacts. Such granting of permit also hinders the Claimant from realizing merchandising profits. Therefore, Respondent has the legal duty to make reparations.¹⁰⁶

A. Respondent must make reparations by way of compensation.

Reparation may take the form of restitution, compensation and satisfaction either singly or in combination.¹⁰⁷ In any event, reparation must be full, wherein the situation that would have existed had the wrong not occurred must necessarily be re-established,¹⁰⁸ so far as it is materially possible.¹⁰⁹ In this particular dispute, restitution is not the appropriate remedy, as the contractual rights of the Claimant in the 1995 Agreement can no longer be duly exercised under existing legislation.

1. The 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage prohibits further acts of retrieval and commercial exploitation of retrieved artefacts.

¹⁰⁶ ASR, Art.34, Report of the 53rd Sess., ILC (2001), G.A.O.R. 56th Sess., Supp. 10.

¹⁰⁷ Id., Art.34.

¹⁰⁸ *Chorzow Factory Case*, Decision on Merits, 1928 P.C.I.J. (ser.A) No.17, at 47; Roberts Claims (1926), R.I.A.A. iv. 77 at 80.

¹⁰⁹ ASR, Art. 35, Report of the 53rd Sess., ILC (2001), G.A.O.R. 56th Sess., Supp. 10; Commentaries on the Articles of State Responsibility, at 95. Article 35, par.2.

The provisions of the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage hinder the Claimant from exercising its contractual rights and continuing its salvage operations. Under the Convention, *in situ* preservation of the heritage is prescribed and commercial exploitation is proscribed,¹¹⁰ responsible non-intrusive access to underwater cultural heritage is encourage,¹¹¹ and State parties are obliged to share valuable information regarding underwater cultural heritage to other States.¹¹² Under this legal regime, it will be unlawful for the Claimant to further exercise its contractual rights to retrieve any remaining artefacts, sell the retrieved artefacts, and exclude others from the wreck site.

2. The Bilateral Agreement with Astoria deprives the Claimant of its right to conserve and its right to the stipulated distributive share.

The distribution of statistical samples of retrieved artefacts between the National Museums of the Respondent and of Astoria is an integral part of the Bilateral Agreement.¹¹³ Furthermore, under the Bilateral Agreement, Astoria is not only entitled to a share in the retrieved artefacts, but can also impose on the division of artefacts depending on its requisite representative collection.¹¹⁴ The Bilateral Agreement, therefore, effectively reduces the Claimant's share of the retrieved artefacts, without the appropriate compensation for such reduction.

Economic damage is clearly evident, as the contractual rights of the Claimant are effectively frustrated. Absent any other viable means of operating and earning profits under the 1995 Agreement, including the conduct of further exploration and retrieval or the sale of

¹¹⁰ UNESCO CPUCH, Art.2, pars 3, 5 and 7.

¹¹¹ UNESCO CPUCH, Art.2, par. 10.

¹¹² UNESCO CPUCH, Art.19 par. 2 and 4.

¹¹³ *Guiding Principles*, par.1 and 5.

¹¹⁴ *Guiding Principles*, par.1.

retrieved artefacts, restitution is no longer sufficient. Where restitution is inadequate to wipe out¹¹⁵ all the legal and material consequences caused by the wrongful act,¹¹⁶ the Respondent is under obligation to compensate any and all “financially assessable damage.”¹¹⁷

B. Respondent must compensate Claimant for the economic damages it suffered.

The Claimant has suffered remunerable harm to its contractual interest in the 1995 Agreement. The Claimant incurred economic damages (1) in deposits and fee paid, and (2) in lost profits (*lucrum cessans*).¹¹⁸ As such, the Respondent is duty bound to pay the sum corresponding to the value that a restitution in kind would bear.¹¹⁹

1. The Claimant has incurred damages in deposits and fee paid.

The 1995 Agreement required the payment of a license fee (USD \$30,000), an expense deposit (USD \$1,250,000), and a conservation deposit (USD \$100,000) prior to the commencement of salvage operations.¹²⁰ These have been duly paid by the Claimant to the Respondent.¹²¹

2. The Claimant has incurred damages in lost profits (*lucrum cessans*).

By virtue of the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage, the Claimant is prohibited from selling retrieved artifacts. Moreover, the Claimant’s distributive share under the sharing arrangements is reduced due to the Bilateral Agreement of Respondent with Astoria.

¹¹⁵ *Chorzow Factory Case*, Decision on Merits, 1928 P.C.I.J. (ser.A) No.17, at 47.

¹¹⁶ Commentaries on the Articles of State Responsibility, at 99. Art.36, par.3.

¹¹⁷ ASR, Art. 36(1) and (2), Report of the 53rd Sess., ILC (2001), G.A.O.R. 56th Sess., Supp. 10.

¹¹⁸ Art.36(1), Commentaries on the Articles of State Responsibility, p. 91. International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/56/10).

¹¹⁹ *Chorzow Factory Case*, Decision on Merits, 1928 P.C.I.J. (ser.A) No.17, at 47.

¹²⁰ *Partnering Agreement Memorandum*, Clause 3

¹²¹ *Further Clarifications*, Par.19.

In addition, the 25 tickets sold by the specialized tour operator Aquatic View resulted in unrealized profits on the part of the Claimant, such gain from marketing initiatives concerning the wreck belonging exclusively to the Claimant. There was also unrealized profits with respect to the CDs, which contained a song entitled “Cour de l’ Ocean’, commercially marketed as souvenirs by Aquatic View.

These would have clearly resulted in profit for the Claimant. Compensation is, therefore, warranted in this case as the *lucrum cessans* is well-founded¹²² and ascertainable,¹²³ the lost profits being both definite and quantifiable.¹²⁴

a. The profits are definite.

Losses, direct or indirect, that are reasonably certain¹²⁵ are compensable. In the particular dispute, a substantial number of artefacts have already been retrieved, therefore entitling the Claimant to its rightful share of the profits and the remaining artefacts, as stipulated in the sharing arrangements. In addition, the 25 tickets (USD \$20,000 each) have already been sold by Aquatic View, and the CDs containing the song entitled ‘Cour de l’ Ocean’ have already been commercially marketed.

b. The profits are quantifiable.

The computation of the economic damages incurred by the Claimant is straightforward. Loss of property is usually assessed by referring to specific heads of damage in the form of: (i) compensation for capital value, (ii) compensation for loss of profits, and (iii) incidental

¹²² Report and Recommendations Made by the Panel of Commissioners Concerning the Fourth Installment of “E3” Claims, 30 September 1999, (S/AC.26/1999/14), para. 126.

¹²³ *Chorzow Factory Case*, Decision on Merits, 1928 P.C.I.J. (ser.A) No.17, at 47.

¹²⁴ D. SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW, 221 (1999); A. Jorge and J. Salazar-Carrillo, *Lucrum Cessans, Damnum Emergens and the Market Place*, 4(1) J. OF FORENSIC ECONOMICS 117-118 (1990).

¹²⁵ D. SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW, 110 (1999).

expenses.¹²⁶ As such, to bring the parties to the situation which would have existed had the wrongful act not been committed,¹²⁷ Respondent must make reparations for: 1) the deposits and fee duly paid by the Claimant prior to the commencement of the salvage operations; 2) lost profits from prohibition to sell the retrieved artifacts, as may be computed according to the provisions of the sharing arrangements and the inventory and valuation of the retrieved artefacts; 3) lost profits from reduction of distributive share, as may be computed according to the provisions of the sharing arrangements and the inventory and valuation of the retrieved artefacts; 4) lost profits from the sale of Aquatic View of the 25 tour tickets (USD \$20,000 each); and 5) lost profits from the sale of Aquatic View of CDs containing a song entitled ‘Cour de l’ Ocean’.

¹²⁶ Commentaries on the Articles of State Responsibility, Article 36, par. 21.

¹²⁷ *Chorzow Factory Case*, Decision on Merits, 1928 P.C.I.J. (ser.A) No.17, at 47.

CONCLUSION AND PRAYER FOR RELIEF

Upon the foregoing facts and points of law, the Claimant respectfully requests this Arbitral Tribunal to declare and adjudge that:

- 1) The Respondent has interfered with the Claimant's salvage rights and performance under the 1995 Partnering Agreement Memorandum;
- 2) The Claimant has exclusive rights of photographing and documenting the shipwreck Coeur de l' Ocean;
- 3) The calculation of profits and/or distribution of artifacts should be made solely on the basis of salvage legal principles; and
- 4) The Respondent's interference caused the economic injury to Claimant, which it is duty bound to compensate.