

# High Seas Shipwreck Pits Treasure Hunters Against a Sovereign Nation: The *Black Swan* Case

by Kimberly L. Alderman



*Painting of the Mercedes Exploding*

## **Treasure Beneath the Sea**

“Odyssey set out to find the Mercedes and found it,” explained a US District Court in Florida, having sifted through substantial evidence in an effort to resolve a dispute between Odyssey Marine Exploration, a deep-sea treasure hunting operation, and the sovereign nation of Spain.

The dispute began in 2007 when Odyssey recovered 594,000 Spanish coins from the ocean floor, 3,600 feet below sea level and 100 miles west of Gibraltar. Odyssey took the bounty into possession and returned to the United States with it. In order to secure title to the coins, the company filed a claim in the US District Court in the Middle District of Florida, asking the clerk to issue a warrant of arrest over the recovered coins and any remaining items at the wreck site. Odyssey publicly referred to the site via the code-name Black Swan, and in court pleadings as “the unidentified shipwreck.”

Spain entered an appearance as an interested party, claiming that the site was the final resting place for one of its frigates – The Nuestra Senora de las Mercedes – which exploded in an 1804 confrontation with a British

squadron, resulting in the loss of 250 lives.

Interestingly, Peru then entered the action, claiming that the coins should be returned to the Peruvians, since they were minted in Lima, using local labor and precious metals, and never even made it to Spain. Even though Spain was a lawful colonial authority at the time the coins were minted, Peru made the unique argument that since the coins only left the country due to colonial exploitation, they should be repatriated. The resolution of that interesting question will have to wait, however, because the court declined to exercise jurisdiction over Spain, citing to the Foreign Sovereign Immunity Act (“FSIA”).

## **The Court’s Rationale: Sovereign Immunity**

The court explained that the FSIA provides the exclusive means to bring a foreign sovereign under the jurisdiction of US courts. The general rule of the FSIA is sovereign immunity, but the law delineates a number of exceptions. Odyssey argued first that the FSIA did not apply because they were not dealing with cargo owned by Spain and alternatively relied on an exception contained in §1605(b), which allows the court to resolve a maritime lien over a vessel or cargo of a foreign state “if that lien is based upon a

commercial activity of the foreign state.”

This exception is consistent with admiralty and international law, which hold that “a sovereign vessel that appears to have been abandoned remains the property of the nation to which it belonged at the time of sinking unless that nation has taken formal action to abandon it or to transfer title to another party.” *Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634, 643 (4th Cir. 2000) (quoting Dep’t of Interior, Advisory Guidelines on Abandoned Shipwreck Act, 55 Fed. Reg. 50,116, 50,121 (1990)). *Sea Hunt* also confirmed the international law that sunken warships may be abandoned only by an “express act of abandonment.”

In this case, Spain held tight to these firmly rooted laws, and filed a motion to dismiss Odyssey’s claim pursuant to them. The court ultimately granted Spain’s motion, but relied exclusively on the FSIA. Before this decision, the FSIA alone had never been applied to deny a US court jurisdiction over cargo recovered from the ocean floor.

The District Court resolved a myriad of legal issues posed by the parties by answering only one question – Is the wreck site in question the remains of the Mercedes? There is a wealth of evidence indicating it is, and Odyssey itself concedes that is the leading hypothesis of its own scholars. Hence, the court’s observation, “Odyssey set out to find the Mercedes and found it.”

## **A Sovereign Vessel, But Whose Cargo?**

The problem with the court’s methodology is this – assuming the site is the remains of the Mercedes: it wasn’t just government cargo aboard the frigate. In fact, twenty-five descendants of private persons who owned cargo about the ship filed claims to Odyssey’s booty. Spain has not contested that the Mercedes was carrying a significant load of civil cargo when she sank. The private owners argue that they never received compensation for the loss. Spain argues that they submitted the paperwork to receive compensation, but since it appears that compensation was never actually paid, it

## Treasure Hunters and Sovereign Immunity: The *Black Swan* Case (cont'd)

is unclear how this should prevent them from making a claim. These descendant owners moved the court to deny Spain's motion to dismiss, and to adjudicate their rights as owners, awarding Odyssey a salvage award under the law of salvage.

This aspect of the fact-intensive litigation was critical to Odyssey's argument because if the coins recovered were indeed privately owned (as it appears many, if not most all of them were), then the natural conclusion might be that Spain would have no interest in the coins, perhaps only in the remains of the ship. In this case, however, no vessel was ever located or recovered. Odyssey distinguished the Mercedes from the recovered coins, arguing that even if the ship itself conveyed sovereignty under the FSIA, said sovereignty would not attach to the private cargo.

The District Court, however, explained in their order granting Spain's motion to dismiss that the ship and the cargo are indistinguishable for the purposes of the Foreign Sovereign Immunities Act.

There are certain aspects of the ruling that are troubling, however. First, the court stated, "The ineffable truth of this case is that the Mercedes is a naval vessel of Spain and that the wreck of this naval vessel, the vessel's cargo, and any human remains are the natural and legal patrimony of Spain[.]" Even though the court considered substantial evidence in order to identify the ship as the Mercedes, there was no real factual inquiry into the contentions of Odyssey and the descendant owners that at least some portion of the cargo recovered was privately owned. Even Spain seemed to concede this point, but the reality was given little if any consideration in the 39-page magistrate recommendation and final order of dismissal.

The District Court instead declined to resolve the issue of private rights to the cargo, stating that to do so would implicate Spain's potential rights to it, making Spain an indispensable party. It followed that if Spain is immune under the FSIA, then they cannot be joined in the action, and Federal Rule of Civil Procedure 19(b) would apply, mandating a dismissal. The court explained that even if a dismissal under 19(b) would result in plaintiffs being left without a forum for a definitive resolution of their claims, the doctrine of sovereign immunity contemplates that possibility.

This logic is somewhat circular. If Spain has no interest in the cargo, then the FSIA should not apply. If the FSIA does apply, then Spain enjoys sovereign immunity and cannot be brought into the suit. Accordingly, if the cargo and ship are distinguishable, then the court cannot resolve whether the FSIA applies because Spain may have an interest in the cargo,

and if it did, then the FSIA would apply. In order to avoid this paradox, the court ruled the ship and the cargo indistinguishable, which resulted in an easy application of the FSIA.

However, the immunity provided for in the FSIA, specifically under §1609, requires that the property be that of the foreign state. The District Court made no evidentiary ruling as to whether the descendant owners continue to hold a property interest, and so applied the FSIA by way of an assumption in Spain's favor, that if the cargo was on the ship, then it belonged to Spain. This is not factually consistent with the assertion of any party to the action, however.

Odyssey argued that even if the FSIA were implicated, that an exception is provided for in §1605(b), which allows the court to resolve a maritime lien over a vessel or cargo of a foreign state "if that lien is based upon a commercial activity of the foreign state." This argument resulted in a significant factual dispute between Odyssey and Spain, where the former argued that historical documents show the ship was indeed on a commercial mission, and the latter argued to the contrary.

The court did not give much weight to this dispute, or to Odyssey's argument that the §1605(b) exception to immunity should apply. Rather than resolve the factual issue as to whether the Mercedes was on a commercial mission, the

***Professor Moore also makes the argument that Peru has preferential rights to the coins. The Spanish domination of what was the New World was brutal and horrific, he explained. During the first century, the Indian population apparently declined by nearly 80 percent due to overwork, malnutrition, and the introduction of diseases. It took over 300 years to replace that loss in population, and the coins are argued to constitute a natural resource that is protected under international law.***

court concluded that the §1605(b) exception "contemplates an arrest to enforce a judgment, not to create a legal right." In a footnote, the court explained, "Notably, salvage gives rise to a lien, but a find of maritime property does not."

This is the most troubling aspect of the District Court's order of dismissal. For the purposes of determining general applicability of the FSIA, the court concludes that the ship and the cargo are indistinguishable, thereby extending sovereignty to the recovered cargo. Some twenty pages later, however, the court says a certain exception to the FSIA does not apply because Odyssey recovered cargo rather than a ship!

### ***Rights of Salvage and the Law of the Sea***

Under maritime and international law, a salvage award is in-





## Treasure Hunters and Sovereign Immunity: The *Black Swan* Case (cont'd)

deed a maritime lien, and therefore §1605(b) could feasibly apply. The court's resolution of a claim for a salvage award would not be "creating a legal right," but instead would be recognizing one that already exists pursuant to the law of the sea.

Further, law of the sea expert Professor John Norton Moore filed an affidavit in support of Peru. In his affidavit, he points out that Spain asks for the court to both dismiss the action per immunity, and to order the coins "returned" to Spain (even though the coins have never actually been to Spain). For Spain to make such a request, it is invoking the jurisdiction of the court, potentially waiving its immunity. For the court to grant such a ruling, it would be making a de facto adjudication of the merits of all the parties claims: Spain, Odyssey, Peru, and the 25 descendant owners included. Yet this is exactly what the court did – dismissed the action and ordered that Odyssey return the coins to Spain. Accordingly, Spain availed itself of the benefit of the court, supposedly without yielding to its jurisdiction.

### **Colonialism Revisited**

Professor Moore also makes the expected argument that Peru has preferential rights to the coins. The way he makes it, however, was unexpected: convincingly. The Spanish domination of what was the New World was brutal and horrific, he explained. During the first century, the Indian population apparently declined by nearly 80 percent due to overwork, malnutrition, and the introduction of diseases. It took over 300 years to replace that loss in population, and the coins are argued to constitute a natural resource that is protected under international law. Even though Spain was acting pursuant to "lawful authority" at the time, so were the Germans when they appropriated artwork and artifacts during World War II, and it is now widely expected that those objects will be returned on laws that evolved from sheer principle. Accordingly, even though Peru did not get a chance for their argument to be heard on the merits, it would be a mistake to discount the position altogether. It remains to be seen whether the argument will be addressed in this particular case or if it will have to wait for another.



*Odyssey Handout of a Coin from the Black Swan*

### **The Hunt Continues**

This litigation continues by way of the appellate process, and there will be some interesting issues for the Court of Appeals to resolve. Without a finding of fact as to whether the 594,000 coins recovered were private cargo, it will be impossible for the appellate court to determine whether the FSIA is implicated, unless they want to affirm the District Court's implicit holding that sovereignty extends even to private cargo aboard a sovereign ship.

Further, even though the court did find that "[t]he Mercedes clearly was not engaged in any commercial activity at the time of its demise," no factual analysis to support the finding was provided, and there seemed to be a significant question of fact around this issue. Without a record of the factual analysis of the

evidence tending to show that the Mercedes was indeed engaging in commercial activity, it may prove difficult for the appellate court to determine the applicability of the §1605(b) exception to immunity that applies to vessels engaged in commercial activity.

Finally, the court's order of the return of cargo to Spain has been stayed pending the resolution of the appeal. If the Court of Appeals elects to uphold Spain's sovereignty, it may be hard pressed to justify what Professor Moore rightly called the de facto adjudication implicit in an order that the coins turned

over to Spain.

The Black Swan litigation is bound to get only more interesting as the appellate court must consider the competing claims and decide whether to affirm the District Court's expansion of the Foreign Sovereign Immunities Act, or to remand for proceedings to resolve some of the outstanding factual issues.

**Kimberly L. Alderman** is an attorney and cultural property law scholar who enjoys gardening, home brewing, and traveling. She maintains the Cultural Property & Archaeology Law Blog at <http://www.culturalpropertylaw.net>, where she has made the most essential Black Swan pleadings available for download.