

DECLARATION OF AMBASSADOR DAVID A. BALTON

I, Ambassador David A. Balton, declare and say as follows:

1. I am the Deputy Assistant Secretary of State for Oceans and Fisheries, and have served in that position since September 2003. I make this declaration on the basis of personal knowledge or information made known to me in the course of my official duties.
2. In my capacity as Deputy Assistant Secretary of State for Oceans and Fisheries, I am responsible for United States policy pertaining to international maritime issues, including, but not limited to, the subjects of the law of the sea and underwater cultural heritage (shipwrecks). In my current position I have been accorded the rank of Ambassador. Prior to serving in this position, I also worked for 12 years as an attorney-adviser in the Office of the Legal Adviser of the Department of State, including six years in which I worked exclusively on matters relating to oceans and fisheries.
3. I make this declaration in connection with the litigation between Odyssey Marine Exploration Inc. and the Kingdom of Spain regarding a shipwrecked vessel that the Magistrate Judge in the case has found to be the Spanish warship *Nuestra Señora de las Mercedes*. In this declaration, I will focus on three major interests of the United States – (1) application of U.S. policy generally with respect to sunken state craft; (2) interpretation and application of the 1902 Treaty of Friendship and General Relations between Spain and the United States; and (3) the foreign policy interests of the United States in this matter.

U.S. Policy with respect to sunken state craft

4. United States policy with respect to “sunken state craft” – meaning warships and certain other government ships, along with aircraft and spacecraft - has been set forth in various statements of the President, Acts of Congress, and statements by the Department of State over the past few decades. Notably, the Presidential Statement on United States Policy for the

Protection of Sunken State Craft, issued on January 19, 2001 (Public Papers of the Presidents, William J. Clinton, January 19, 2001, Volume 3, p. 2956), declared that, “the United States retains title indefinitely to its sunken State craft unless title has been abandoned or transferred in the manner Congress authorized or directed. The United States recognizes the rule of international law that title to foreign sunken State craft may be transferred or abandoned only in accordance with the law of the foreign flag State.” The Presidential Statement further provided that “disturbance or recovery of [sunken State] craft should not occur without the express permission of the sovereign, and should only be conducted in accordance with professional scientific standards and with the utmost respect for any human remains.” The Presidential Statement concluded by declaring that “the United States will use its authority to protect and preserve sunken State craft of the United States and other nations, whether located in the waters of the United States, a foreign nation, or in international waters.” Thus, this policy applies to all sunken state craft, with no geographic limitation.

5. In particular, with respect to warships, it is the position of the United States that, under customary international law, warships and their associated contents are, unless captured prior to their sinking in armed conflict, entitled to recognition and protection as property of the flag state, unless the vessel has been expressly abandoned by the flag state. This position and policy is set forth in a 1980 Department of State letter reprinted in the Digest of United States Practice in International Law and attached as Exhibit A to this Declaration. The 1980 letter suggests that a different rule might apply to 17th or 18th century vessels, but as the Department of State has more recently confirmed in connection with litigation over two other Spanish vessels, and as reflected in the Presidential Statement, that is not current U.S. policy. Rather, the practice of the United States with regard to vessels sunk in the more distant past is now consistent with that related to those sunk more recently – title is not extinguished by passage of time.

6. This position is shared by other governments. On February 5, 2004, the United States published in the Federal Register its views regarding protection of sunken state crafts, including warships, as reflected in the 2001 Presidential Statement, and the views of other major maritime States - France, Germany, Japan, the Russian Federation, Spain, and the United Kingdom (69 Fed. Reg. 5647). There was unanimous agreement among these six States that the flag state retains title to sunken vessels, absent an express act of abandonment by the flag state and, as many of the States noted, this rule applies regardless of the passage of time since the vessel was sunk. These governments, including Spain, all also stated that no action may be taken regarding

a sunken state craft without the express permission of the sovereign. Spain concluded its statement by giving notice that “salvage or other disturbance of sunken vessels or their contents in which Spain has such interests is not authorized and may not be conducted without the express consent by an authorized representative of the Kingdom of Spain.” The 1980 Department of State letter also cites similar views of foreign governments, as well as examples of cases from foreign courts in which the same rules are applied. *See* Exhibit A at 1004-05.

7. U.S. policy on sunken warships was codified recently in the Sunken Military Craft Act (“the SMCA”). The SMCA, enacted in 2004, ensures protection of both sunken U.S. military craft, wherever located, and sunken foreign military craft located in U.S. waters. This statute codifies that sunken military craft of the United States remain U.S. property and that right, title, and interest of the United States are not extinguished except by express divestiture of title by the United States regardless of passage of time. The SMCA provides that the law of finds does not apply to any U.S. sunken military craft, wherever located, or to any sunken foreign military craft located in U.S. waters. The SMCA also protects all U.S. sunken military craft and sunken foreign military craft in U.S. waters from the application of the law of salvage by prohibiting the issuance of any salvage rights or awards for such craft unless expressly authorized by the flag state. Further, the SMCA prohibits unauthorized activity that disturbs, removes, or injures any sunken military craft.

8. Importantly, the SMCA specifically states, in section 1406(b), that it is to be “applied in accordance with generally recognized principles of international law and in accordance with the treaties, conventions, and other agreements to which the United States is a party.” Some of those principles of international law were described above, and an important and relevant treaty is described below.

9. I understand that a question has been raised – based on a 1989 Department of State memorandum - whether the policies I have described apply to foreign warships if they are “transporting any commercial cargo.” That memorandum, a copy of which is attached to this declaration as Exhibit B, addresses the U.S. perspective on whether the vessel *Presidente Rivera*, a state vessel of Uruguay, was entitled to sovereign immunity. As the memorandum makes clear, the *Presidente Rivera* was not a warship. *See* Exhibit B at 3. Therefore it could only be entitled to immunity if it was a government vessel operated for non-commercial purposes and

not engaged in commercial activity. *See id.* at 2. The memorandum reaches the conclusion that the *Presidente Rivera* was on commercial service and therefore was not entitled to sovereign immunity. This conclusion, however, has no relevance to the status of a warship, which under international law is treated differently than other government vessels.

10. In instances where sunken foreign *warships* have been located in waters of the United States, it has been the policy of the United States to recognize the claims by foreign governments of ownership to their warships, and to recognize that title to sunken warships is not lost absent express abandonment by the sovereign. For example, in 1997, the Government of France asserted title to the warship *La Belle*, which sank in 1686 and was discovered more than 300 years later off the coast of Texas. The Government of France provided evidence establishing that *La Belle* was a warship of King Louis XIV of France and that the ship was on an official mission for the King of France, title to which the Government of France had never abandoned. The United States Government recognized France's title to *La Belle* in an international agreement concluded between France and the United States in 2003. Similarly, in 1999, the United States filed amicus briefs recognizing Spain's claim to two sunken warships, the *Juno* and *La Galga*, located in U.S. waters off the coast of Virginia. The United States asserted that those vessels remained the property of the Kingdom of Spain and that a salvage award should be denied, positions that U.S. courts adopted.

11. It has also been the policy of the United States to assert title to U.S. warships sunken in the waters of other nations. For example, in 1987, the U.S. Department of State asserted to the Government of France that title to the warship *Alabama* of the former Confederate States of America, which sank in 1864 in a battle off the coast of France, was vested with the United States Government and that the United States had never abandoned that title. The Government of France rescinded its assertion of title to the *Alabama* and conceded that title rested with the United States.

1902 Treaty

12. I have examined the Treaty of Friendship and General Relations between the United States of America and Spain, signed at Madrid July 3, 1902 (33 Stat. 2105, Treaty Series 422, 11 Bevans 628) ("the 1902 Treaty"). The records of the Department's Treaty Office show that this treaty entered into force April 14, 1903, and remains in force between Spain and the United

States. This treaty covers a broad range of issues, but one provision in particular – Article X – is relevant to the issues in this litigation.

13. Article X of the 1902 Treaty provides: “In cases of shipwreck, damages at sea, or forced putting in, each party shall afford to the vessels of the other, whether belonging to the State or to individuals, the same assistance and protection and the same immunities which would have been granted to its own vessels in similar cases.” The United States reads this language to require the United States to extend to sunken Spanish vessels the same treatment that the United States would apply to U.S. vessels in similar circumstances.

14. The obligations of Article X apply to shipwrecked vessels of Spain and the United States wherever located. No language appears in Article X that would limit its coverage to the territorial waters of the United States and Spain. In this respect, the 1902 Treaty is unlike the 1795 Treaty between the same parties, known as the "Treaty of Friendship, Limits and Navigation," that the 1902 Treaty superseded. The text of the comparable provision (also Article X) of the 1795 Treaty is expressly limited in geographical scope to vessels or shipwrecks “on the coasts or within the dominion” of a treaty party. Further, the reference in the text of Article X to "cases of . . . damages at sea" contemplates its obligations were intended to apply beyond the territorial waters of the United States and Spain.

15. This interpretation is also supported by the exchange of diplomatic notes (attached as Exhibit C) between the United States and Spain arising from Spain's need for assurance from the United States that certain provisions in the treaty, namely Article IX, which provides for entry into port and discharge of cargo, would apply broadly to all territory under United States sovereignty and not only to territories of the Union. At the time, overseas U.S. territories with large Spanish populations such as Puerto Rico, Cuba, and the Philippines were of commercial interest to Spain and its citizens, and Spain wanted to ensure that the dispositions in Article IX and other aspects of the treaty would apply in those overseas territories as well. The assurance that Spain sought, and the United States was able to confirm through the notes, was expansion, not limitation, of the scope of this treaty.

16. It is also important to note that Article X of the 1902 Treaty applies equally to a vessel and the contents of that vessel. The purpose of Article X is to provide protection for shipwrecked vessels. A distinction between a shipwrecked vessel and its cargo would lend to an interpretation that dramatically weakens the intended purpose of protection. Such an

interpretation would permit salvors, at their discretion, to approach protected U.S. government vessels to search for potentially separable cargo or contents, negating the general rule protecting such vessels. Moreover, the interpretation that pairs the protection of vessel and contents and does not distinguish between the two is consistent with U.S. law on the subject, as reflected in both the Sunken Military Craft Act and the Abandoned Shipwreck Act of 1987.

Foreign Policy

17. As noted above, Spain has made clear to the United States that it considers its sunken vessels to be Spanish property and has not authorized salvage or other disturbance of such vessels. Moreover, Spain has specifically invoked the 1902 Treaty to request the United States to ensure that the same assistance, protection, and immunities that would be provided to U.S. vessels in similar cases be provided to the Spanish vessel at issue in this case.

18. It is in the foreign policy interests of the United States to honor the request of the Government of Spain. First, of course, the United States is obligated by the 1902 Treaty to afford Spanish vessels the same assistance, protection, and immunities which would be granted to sunken United States warships in a similar situation. The United States takes these and any treaty obligations seriously, and it is strongly in our interests to fulfill them. The parameters of the treatment that should be applied to sunken Spanish vessels are clearly articulated in the Sunken Military Craft Act, the 2001 Presidential Statement, and other declarations of U.S. policy.

19. Second, the United States has a foreign policy interest in obtaining reciprocal treatment from Spain and other countries for its own vessels. As a major maritime power with the world's largest Navy, adherence to the aforementioned principles of U.S. and international law regarding the protection of sunken state vessels is of significant importance to the United States. The United States has thousands of sunken warships located in waters across the globe – in U.S. waters, foreign waters, and international waters. The sites of these sunken warships may not only contain the vessels, but also cargo and equipment of importance to the United States, including that which is property of the United States Government and which may contain protected information, and serve as the final resting place for individuals lost in service to their country. The United States must uphold the principles that afford protection to these sunken vessels, not only to meet its obligations under international law, but also to ensure commensurate


reciprocal treatment by other States of our vessels. As technological and scientific advances continue to make the discovery of sunken vessels more and more possible, and thus increase the potential for actions to be taken by salvors upon U.S. warships, the number of instances in which the United States would seek the application of assistance, protection, and immunities as appropriate by other States increases. It is thus necessary for the United States to observe and apply these protections, so as to maximize the likelihood that other States will reciprocate.

Conclusion

20. U.S. policy and the bilateral U.S.-Spain treaty require that sunken Spanish warships that have not been abandoned, even if they are not in U.S. waters, must receive the same protection and immunity that would be provided to U.S. sunken warships, including protection against unauthorized salvage.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

August 26 2009



Ambassador David A. Balton