

Odyssey, Peru, and all twenty-five individual claimants assert that even if the *Mercedes* is immune from arrest, the cargo aboard the *Mercedes*, and therefore the treasure that has been salvaged from the shipwreck, is not immune. The individual claimants argue they have a right to the cargo because they are descendants of those who had an interest in cargo on the *Mercedes*, and Peru claims it has a patrimonial interest in cargo that originated in its territory. Together, they argue the treasure is not immune because the cargo aboard the *Mercedes* is private property that is severable from the shipwreck. . . .

No party has pointed us to any case or statute that directly answers the question of whether cargo aboard a sunken military vessel is entitled to the same sovereign immunity as the sunken vessel. . . .

As we discuss below, we are persuaded that in the context of a sunken Spanish military vessel, the cargo and the shipwreck are interlinked for immunity purposes. Two reasons support this conclusion: first, other statutes governing shipwrecks, including the Sunken Military Craft Act (SMCA), Pub. L. No. 108-375, §§1401–08, 118 Stat. 1811, 2094–98 (2004), which would govern the salvage claims against the *Mercedes*, treat cargo as part of the shipwreck; and second, the principles of comity discussed in the Supreme Court's decision in *Republic of the Philippines v. Pimentel*, 553 U.S. 851, 128 S.Ct. 2180 (2008), lead us to consider the potential for injury to the interest of the sovereign.¹³

INTERNATIONAL ORGANIZATIONS

UNESCO Admits Palestine; United States Cuts UNESCO Funding

In late October 2011, the biennial General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) voted to admit Palestine as a member state of the organization.¹ Under the Article II(2) of the UNESCO Constitution,² “states not members of the United Nations Organization may be admitted to membership of the Organization, upon recommendation of the Executive Board, by a two-thirds majority vote of the General Conference.” The vote in the General Conference was 107 in favor, 14 opposed, with 52 abstentions. Under Article IV(C)(8)(a) of UNESCO's Constitution, abstentions do not count as votes, so the vote satisfied the requirement for admission.

The United States pays 22 percent of UNESCO's budget, which was projected at \$653 million for 2012–2013.³ However, provisions of U.S. law adopted in the 1990s prohibit paying appropriated funds to the United Nations or any UN specialized agency that admits Palestine to full membership. Under Public Law 103-236,

The United States shall not make any voluntary or assessed contribution—

(1) to any affiliated organization of the United Nations which grants full membership as a state to any organization or group that does not have the internationally recognized attributes of statehood, or

¹³ *Id.* at 1179–80.

¹ Scott Sayare & Steven Erlanger, *Palestinians Win a Vote on Bid to Join UNESCO*, N.Y. TIMES, Oct. 6, 2011, at A13; Steven Erlanger, *Palestinian Bid for Full UNESCO Membership Imperils American Financing*, N.Y. TIMES, Oct. 24, 2011, at A5; Steven Erlanger & Scott Sayare, *UNESCO Approves Full Membership for Palestinians*, N.Y. TIMES, Nov. 1, 2011, at A8.

² Available at <http://unesdoc.unesco.org/images/0012/001255/125590e.pdf>.

³ *UNESCO Approves*, *supra* note 1.

(2) to the United Nations, if the United Nations grants full membership as a state in the United Nations to any organization or group that does not have the internationally recognized attributes of statehood, during any period in which such membership is effective.⁴

Under Public Law 101-246,

(a) Prohibition.—No funds authorized to be appropriated by this Act or any other Act shall be available for the United Nations or any specialized agency thereof which accords the Palestine Liberation Organization the same standing as member states.⁵

The General Conference's action triggered an immediate suspension of U.S. payments to UNESCO. This suspension had a major impact on the organization's budget because the United States often pays a significant portion of its assessed contributions to international organizations late in a calendar year. Here, the result was an immediate suspension of U.S. payments variously reported as \$65 or \$80 million.⁶ The cutoff of U.S. funding is expected to result in significant reductions in staffing and programs, including literacy, judicial reform, and water resources development programs in Afghanistan, Iraq, and elsewhere, strongly supported by the United States.⁷

Victoria Nuland, the U.S. Department of State spokesperson, issued a statement regretting the UNESCO vote.

Today's vote by the member states of UNESCO to admit Palestine as a member is regrettable, premature, and undermines our shared goal of a comprehensive, just, and lasting peace in the Middle East. The United State remains steadfast in its support for the establishment of an independent and sovereign Palestinian state, but such a state can only be realized through direct negotiations between the Israelis and Palestinians.

The United States also remains strongly committed to robust multilateral engagement across the UN system. However, Palestinian membership as a state in UNESCO triggers longstanding legislative restrictions which will compel the United States to refrain from making contributions to UNESCO.

U.S. engagement with UNESCO serves a wide range of our national interests on education, science, culture, and communications issues. The United States will maintain its membership in and commitment to UNESCO and we will consult with Congress to ensure that U.S. interests and influence are preserved.⁸

UNESCO's director-general highlighted to the General Conference the potentially adverse implications of admitting Palestine for the organization. An excerpt from her statement follows:

Let me be frank. As Director-General, it is my responsibility to say that I am concerned by the potential challenges that may arise to the universality and financial stability of the Organization.

⁴ Pub. L. 103-236, Title IV, § 410, 108 Stat. 454 (1994) (codified as amended at 22 USC §287e note (2006)).

⁵ Pub. L. 101-246, Title IV, § 414, 104 Stat. 70 (1990) (codified as amended at 22 USC §287e note (2006)).

⁶ Steven Erlanger, UNESCO Trims Its Budget, N.Y. TIMES, Nov. 11, 2011, at A8; Steven Erlanger, *Cutting Off UNESCO, U.S. May Endanger Programs in Iraq and Afghanistan*, N.Y. TIMES, Nov. 17, 2011, at A10.

⁷ *Cutting Off UNESCO*, *supra* note 6.

⁸ U.S. Dep't of State Press Release No. 2011/1844, Palestinian Admission to UNESCO (Oct. 31, 2011), at <http://www.state.gov/r/pa/prs/ps/2011/10/176418.htm>.

I am worried we may confront a situation that could erode UNESCO as a universal platform for dialogue. I am worried for the stability of its budget.

It is well-known that funding from our largest contributor, the United States, may be jeopardized.

I believe it is the responsibility of all of us to make sure that UNESCO does not suffer unduly as a result.⁹

Implications for Other Specialized Agencies? The constitutions of some UN specialized agencies, including the World Intellectual Property Organization (WIPO), provide that a member of any other specialized agency is eligible for membership. U.S. officials registered concern at the risk of serious injury to U.S. interests should WIPO also admit Palestine as a member.

QUESTION: Did the State Department brief business representatives on UNESCO's decision to admit Palestine as a full member?

ANSWER: Today senior USG officials from State and the US Patent and Trademark Office briefed representatives from leading U.S. industries on today's vote at UNESCO and the implications that vote might have for Palestinian accession to the World Intellectual Property Organization (WIPO).

During the meeting, Assistant Secretary of State Esther Brimmer underscored U.S. concern that Palestinian membership in WIPO could have serious implications for U.S. leadership in this organization, which supports the global [intellectual property rights] infrastructure and helps U.S. companies protect their intellectual property around the world. The United States is a leading global voice on issues related to patent, copyright, and trademark matters, and should the U.S. be unable to provide its contributions to WIPO, the impact of that voice could be significantly diminished.

In attendance were representatives from a wide range of U.S. businesses and industries, including the U.S. Chamber of Commerce, the Business Software Alliance, and United States Council for International Business. The State Department will also brief a number of civil society groups, including NGO's with a particular interest in UNESCO.¹⁰

UN Secretary-General Ban Ki-moon also warned of the adverse implications for other UN agencies of losing U.S. financial support should Palestine gain full membership.¹¹

Less Success in Palestinian Effort to Gain UN Membership. Palestinian efforts to obtain full membership in the United Nations have met with less success. In September 2011, Palestinian President Mahmoud Abbas announced that Palestine would seek full UN membership by

⁹ Discours de la Directrice générale de l'UNESCO Irina Bokova, à l'occasion de l'examen du point relatif à l'admission de la Palestine comme Etat membre de l'UNESCO (Oct. 31, 2011), at <http://unesdoc.unesco.org/images/0021/002136/213660M.pdf>; see Irina Bokova, *Punishing UNESCO Would Be Unwise*, WASH. POST, Oct. 24, 2011, at A14.

¹⁰ U.S. Dep't of State Press Release No. 2011/1843, WIPO Briefing (Oct. 31, 2011), at <http://www.state.gov/r/pa/prs/ps/2011/10/176417.htm>.

¹¹ Neil MacFarquhar, *Palestinians Inch Closer to Rejection at U.N. Body*, N.Y. TIMES, Nov. 4, 2011, at A10.

means of an application to the Security Council.¹² The United States opposed the Palestinian effort and vowed that it would veto any application in the Security Council if necessary.¹³

As of this writing (late November 2011), the Palestinian initiative has been unsuccessful. Under Article 4(2) of the UN Charter, membership in the organization requires a decision by the General Assembly acting on a recommendation from the Security Council. Under Article 27(3), the Council's recommendation requires nine affirmative votes and no veto by a permanent member. Palestine reportedly has not been able to muster the nine votes necessary for an affirmative Security Council decision, even absent a U.S. veto. In mid-November, the Council's admissions committee (on which all fifteen members are represented) adopted a report saying that it was "unable to make a unanimous recommendation" to the full Council.¹⁴

INTERNATIONAL LAW AND NONSTATE ACTORS

United States Joins with Other Governments, Major Companies, and NGOs in Effort to Strengthen Voluntary Principles on Security and Human Rights

In September 2011, a U.S. delegation joined with representatives of six other governments,¹ nineteen major oil and mining companies,² and ten nongovernmental organizations (NGOs)³ at an Extraordinary Plenary Session in Ottawa of the participants in the Voluntary Principles on Security and Human Rights (Voluntary Principles).⁴ The Voluntary Principles were adopted in 2000 in an effort to minimize human rights abuses by security forces in conflict areas where large natural resources companies often operate.⁵

¹² Isabel Kershner, *Palestinian Says U.S. 'Too Late' on U.N. Bid*, N.Y. TIMES, Sept. 9, 2011, at A5; Ethan Bronner & Isabel Kershner, *Palestinians See U.N. Appeal as Most Viable Option*, N.Y. TIMES, Sept. 18, 2011, at A6.

¹³ Joby Warrick & Joel Greenberg, *Diplomatic Efforts Unable to Derail Palestinians' U.N. Gambit*, WASH. POST, Sept. 9, 2011, at A16; Ethan Bronner, *Palestinians Resist Appeals to Halt U.N. Statehood Bid*, N.Y. TIMES, Sept. 16, 2011, at A10; Joby Warrick & Scott Wilson, *U.N. Vote Could Test U.S. Role in Mideast*, WASH. POST, Sept. 16, 2011, at A1; Ethan Bronner & Isabel Kershner, *Palestinians Set Bid for U.N. Seat; A Clash with U.S.*, N.Y. TIMES, Sept. 17, 2011, at A1; Neil MacFarquhar & Steven Lee Myers, *Diplomats Scramble as Palestinians Plan to Apply for U.N. Membership on Friday*, N.Y. TIMES, Sept. 20, 2011, at A11.

¹⁴ *Committee Is Deadlocked over Palestinian Membership Bid*, N.Y. TIMES, Nov. 12, 2011, at A5; see also MacFarquhar, *supra* note 11.

¹ The participating countries are Canada, Colombia, the Netherlands, Norway, Switzerland, the United Kingdom, and the United States.

² The participating companies are Anglo American, AngloGold Ashanti, Barrick Gold Corporation, BG Group, BHP Billiton, BP, Chevron, ConocoPhillips, ExxonMobil, Freeport McMoRan Copper and Gold, Hess Corporation, Inmet Mining, Marathon Oil, Newmont Mining Corporation, Occidental Petroleum Corporation, Rio Tinto, Shell, Statoil, and Talisman Energy.

³ The attending NGOs were Amnesty International, The Fund for Peace, Human Rights First, Human Rights Watch, IKV Pax Christi, International Alert, Oxfam, Pact, Partnership Africa Canada, and Search for Common Ground. Attending as observers were the International Committee of the Red Cross, the International Council on Mining & Metals, and the International Petroleum Industry Environmental Conservation Association.

⁴ Summary of Proceedings—Voluntary Principles on Security and Human Rights—Extraordinary Plenary Session (Sept. 16, 2011), at http://www.voluntaryprinciples.org/files/FHE-DC-130591-v1-VPs_Summary_of_Proceedings_Extraordinary_Plenary_Meeting.pdf. For background information on the Voluntary Principles, see <http://www.icmm.com/library/voluntary-principles-on-security-and-human-rights>.

⁵ Voluntary Principles on Security and Human Rights, Statement by the Governments of the United States of America and the United Kingdom (Dec. 19, 2000), at http://www.unglobalcompact.org/Issues/conflict_prevention/meetings_and_workshops/volsupport.html. For discussion of a similar code of conduct among companies providing security services to international resources companies and others, see John R. Crook, *Contemporary Practice of the United States*, 105 AJIL 122, 156 (2011).