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The Trouble With Treasure: Historic Shipwrecks Discovered In International Waters

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THE TROUBLE WITH TREASURE
HISTORIC SHIPWRECKS DISCOVERED IN INTERNATIONAL WATERS

*Cathryn Henn**

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I. INTRODUCTION

For many, images of ancient brutish pirates exploring the open sea with a bottle of rum in hand, a parrot on shoulder, and a treasure map where “X” marks the spot - all conjure up an air of excitement, mystery and romance. Despite these fanciful characters being long gone to the sands of time, sunken treasure and buried gold hold a magical spot in our imaginations. As mystic as these images seem, such treasures still exist today in an estimated three million undiscovered shipwrecks lying silent on the ocean floor.¹

Recent advances in technology, deep-water exploration, and salvage techniques have led to an unprecedented increase in the discovery and salvage of historic shipwrecks that were previously inaccessible and thought to be forever lost to the sea.² In the context of historic shipwrecks located in international waters, there are several competing interests: commercial salvors, preservation driven archaeologists, sovereign nations, and the public.³ Until recently, doctrines within the law of nations (specifically, the law of salvage and the law of finds) have been applied by the United States judiciary to allow salvors to profit from their discoveries.⁴ But commercial

¹ Cheng, *infra* note 13, at 697; Ulrike Guérin & Katrin Köller, *Of Shipwrecks, Lost Worlds and Grave Robbers*, A WORLD OF SCI., Apr.-June 2009, at 19, 22; Neil, *infra* note 3, at 896.

² Bederman, *Historic Salvage*, *infra* note 61, at 102; Bederman, *Maritime Preservation Law*, *infra* note 218, at 164; Cheng, *infra* note 13, at 698; Gibbins & Adams, *infra* note 17, at 284; Greene, et al, *infra* note 39, at 316; Neil, *infra* note 3, at 896; Richmond, *infra* note 11, at 109-10; Wright, *infra* note 4, at 287.

³ Jeremy Neil, *Sifting Through the Wreckage: An Analysis and Proposed Resolution Concerning the Disposition of Historic Shipwrecks Located in International Waters*, 55 N.Y. L. SCH. L. REV. 895 *passim* (2010/2011).

⁴ Brooke Wright, *Keepers, Weepers, or No Finders at All: The Effect of International Trends on the Exercise of U.S. Jurisdiction and Substantive Law in the Salvage of Historic Wrecks*, 33 TUL. MAR. L.J. 285, 299-303 (2008).

treasure hunters, who are focused on finding gold or other valuable commodities and motivated by financial gain, threaten to destroy important and rare contextual artifacts in their rush to beat their competitors.⁵

The location and status of a shipwreck are crucial in determining who has rights to a discovered ship. For example, a shipwreck found within a nation state is subject to that nation's domestic laws,⁶ whereas international conventions are applicable to those found in a sovereign state's territorial waters.⁷ However, the issue for ships in international waters is not so clear-cut: there are often competing legal claims between various salvors, possible original owners, insurers, states, and national governments.⁸ In addition, varying international laws may apply. Unfortunately, despite recent international conventions, there is no clear international consensus on salvor rights and protection of historic marine artifacts.⁹

⁵ Neil, *supra* note 3, at 904; Greene, et al, *infra* note 39, at 313-15.

⁶ For example, when a sunken vessel is located in U.S. water, U.S. courts apply U.S. domestic statutes, as well as the maritime law of salvage and finds. *See* Antiquities Act, 16 U.S.C. §§ 431-433 (2006); *see* LOUIS B. SOHN & JOHN E. NOYES, CASES AND MATERIALS ON THE LAW OF THE SEA 645 (Transnational Publishers, Inc. eds., 2004).

⁷ United Nations Convention on the Law of the Sea arts. 3, 33, 57, 76 & 236, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS] (establishing sovereign immunity for warships and other governmental ships, additionally this establishes zones where states can exert different laws and influence: territorial Sea is up to 12 nautical miles; the Contiguous Zone is up to 24 nautical miles; and the Exclusive Economic Zone and Continental Shelf is up to 200 nautical miles and beyond); United Nations Convention on the High Seas art. 2, Apr. 29, 1958, 450 U.N.T.S. 11 (establishing that the high seas are not subject to any single state sovereignty, and are therefore an area of international freedom); United Nations Convention on the Continental Shelf arts. 4 & 5, Apr. 29, 1958, 499 U.N.T.S. 311 (establishing that a coastal state maintained control over its continental shelf for purpose of exploration and exploitation of natural resources); *See* United Nations Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 516 U.N.T.S. 205 (establishing rights regarding some property found at sea).

⁸ Craig Forrest, *Historic Wreck Salvage: An International Perspective*, 33 TUL. MAR. L.J. 347, 348 (2009).

⁹ GEOFFREY BRICE, MARITIME LAW OF SALVAGE 256-57 (Stevens ed., 1983); Neil, *supra* note 3, at 896; Richmond, *infra* note 11, at 110-11; *see* Wright, *supra* note 4, at 310-11; Bederman, *Maritime Preservation law*, *infra* note 218, at 163-64.

The growing trend internationally and within the United States is a move from salvage principles toward preservation of ships for their cultural and archeological value.¹⁰ This trend, spurred by the sudden rise in technology and treasure hunting, has led to the development of legal principles, which were designed to give guidance for the protection of historic shipwrecks,¹¹ but were riddled with ambiguities and problems.¹² These ambiguous piecemeal laws fail to provide protection to archaeological and historic objects found at sea,¹³ fall short of preserving underwater cultural heritage, and lack sufficient support by international sovereign states to allow for a final determination of the appropriate principle of law.¹⁴ In light of these failures, a new policy is needed.

This article seeks to add clarity to the legal status of historic shipwrecks located in international waters. In Part II, this article discusses the unique aspects of historic shipwrecks as part of our archeological past and the competing party interests affected by the disposition of historic shipwrecks. Part III discusses the historic preservation movement within the United States, the extension of land-based historic preservation to marine archaeology, and how the United States has applied international law to cases heard in its court system. Part IV explores several important international conventions that add context to the legal environment surrounding the disposition of historic shipwrecks, and the deviation of international trends away from traditional salvage and finds law; this section discusses the 1982 Convention on the Law of the Sea, the 1989 Salvage Convention, and the 2001 Convention on the Protection of the Underwater Cultural Heritage. Part V examines two recently discovered historic shipwrecks, the *Black Swan* (or *Nuestra Senora de las Mercedes*) and the *HMS Sussex*, and by comparing these two cases, provides suggestions for the proper cooperative bi-lateral procedures

¹⁰ Wright, *supra* note 4, at 305-10.

¹¹ Brice, *supra* note 9; Neil, *supra* note 3, at 896; Allison Leigh Richmond, *Scrutinizing the Shipwreck Salvage Standard: Should A Salvor Be Rewarded For Locating Historic Treasure?*, 23 N.Y. INT'L L. REV. 109, 110-11 (2010).

¹² Bederman, *Maritime Preservation Law*, *infra* note 218, at 163-64; Neil, *supra* note 3, at 896.

¹³ Amber Crossman Cheng, *All In The Same Boat? Indigenous Property Rights in Underwater Cultural Heritage*, 32 Hous. J. INT'L L. 695, 709 (2010).

¹⁴ Wright, *supra* note 4, at 311.

that should be taken to protect all interests during the salvage of a historic shipwreck. This article argues that the problems associated with historic shipwrecks can be mitigated through a cooperative and collaborative approach that involves notice and participation of all the various stakeholders, and can be further alleviated by urging the archaeological community to play an active role in the protection of underwater cultural heritage through the establishment of best practices for salvage techniques. Furthermore, a cooperative model, instead of an approach based solely on *in situ* preservation¹⁵, ensures proper protection of underwater historic and cultural artifacts, achieves the objectives of all stakeholders, and serves the greatest benefit to the public and future generations.

II. MARINE ARCHAEOLOGY, SHIPWRECKS AND COMPETING INTERESTS

¹⁵ In situ preservation, while not defined by the United Nations 2001 Convention on Underwater Heritage, [UNESCO Convention on the Protection of the Underwater Cultural Heritage art. 2, Nov. 2, 2001, 41 I.L.M. 40] the phrase is understood to be a term referring to the preservation of an archeological item or site in its original place or location, and usually means preservation without disturbance. The following definitions may provide the reader with a better understanding of the term. In situ is defined by Merriam-Webster's Dictionary to mean, "in the natural or original position or place." Merriam-Webster, <http://www.merriam-webster.com> (last visited May 6, 2012). In situ preservation is defined by the National Oceanic and Atmospheric Administration to mean, "a precautionary management approach in which the first option for protection and management is to leave the site as it was found. It is a current professional practice for managing heritage resources in place when the disruption of the site could lead to its destruction. It is not intended to create any legal presumption to preclude recovery or salvage. To the contrary, the Annex Rules set forth the requirements for recording information about the site and the context of any artifacts before and during the recovery or salvage of such artifacts because otherwise the contextual information would be lost forever." National Oceanic and Atmospheric Administration Office of General Counsel, *Glossary*, http://www.gc.noaa.gov/gcil_glossary.html (last visited May 6, 2012). Note, in situ preservation should not be confused with the term in situ protection, used by the United Nations in different contexts. See, United Nations Educational, Scientific and Cultural Organization, *In Situ Protection*, <http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/protection/in-situ-protection/> (last visited, May 6, 2012).

Whenever a sunken vessel is discovered on the high seas, conflict can arise between various interests groups asserting policy and educational interest or parties bringing ownership claims.¹⁶ This section will discuss the distinctive importance of historic shipwrecks as an aspect of marine archaeology, as well as the competing interests that are at stake.

A. *Marine Archaeology & Shipwrecks*

It is inevitable that shipwrecks will play an exceptionally important role in marine archaeology, which is the study of material remains of human activities on the ocean, seas, and interconnected waterways.¹⁷ Even when compared to other archeological sites or important historical and cultural monuments, shipwrecks have the potential to offer an unparalleled glimpse into the past.¹⁸

Historically, bodies of waters acted as a means of connecting societies, thus reflecting on our collective past.¹⁹ The importance and prevalence of nautical travel has led to an enormous amount of ancient ships being lost to the sea.²⁰ Archeologists suggest that more undiscovered shipwrecks exist than any other archeological site of comparable significance.²¹ Further, shipwrecks consistently produce an unmatched variety and quality of intact artifacts, making such sites some of the most complex ever investigated.²² Undiscovered wrecks are now waiting to be tapped as a potential source of cultural education, offering unmatched reflections of society as a whole.²³

Shipwrecks have numerous characteristics that contribute to their importance. First, artifacts found in wet environments are generally significantly better preserved when compared to artifacts

¹⁶ David Curfman, *Thar Be Treasure Here: Rights to Ancient Shipwrecks in International Waters – A New Policy Regime*, 86 WASH. U. L. REV. 181, 183 (2008).

¹⁷ David Gibbins & Jonathan Adams, *Shipwrecks and Maritime Archaeology*, 32 WORLD ARCHAEOLOGY 279, 279 (2001).

¹⁸ Adams, *infra* note 19, at 292-293; Gibbins & Adams, *supra* note 17, at 280.

¹⁹ Jonathan Adams, *Ships and Boats as Archaeological Source Material*, 32 WORLD ARCHAEOLOGY 292, 292 (2001).

²⁰ Gibbins & Adams, *supra* note 17, at 280.

²¹ *Id.*

²² *Id.*

²³ *See Id.*

found in a dry environment.²⁴ Second, ships are generally lost by sudden accidents, providing for a well-preserved coherent freeze frame of that moment in time, called a "time-capsule" or "closed-find."²⁵ Closed-finds are highly prized archeological sites, due to the rich analysis that is deduced regarding the relationships between component objects, structure, assemblages and selection of objects aboard the ship.²⁶ Inferences can be made regarding these objects and their everyday use and meaning to a degree rarely achieved in other sites.²⁷ Third, items found onboard likely had a practical daily life purpose.²⁸ Since the space aboard a historic ship was extremely limited, such ships can be viewed as self-regulating systems that ensured each object had a purpose.²⁹ This provides for numerous inferential advantages over other types of archeological sites.³⁰ In sum, historic shipwrecks are invaluable glimpses into the past, which can provide us with a wealth of historic knowledge, as well as a literal wealth in gold, silver, and other valuable commodities.

B. Competing Interests

There is a delicate balance between public and private interests that must be considered in the processes of determining whether a salvor should be allowed to retain treasure from a historic shipwreck or receive a salvage award for finding such a wreck.³¹ An even deeper question is whether a salvor should even be allowed to disturb historic shipwrecks because of the risk of society losing the chance to learn from the underwater artifacts and the contextual

²⁴ Ole Varmer, *The Case Against the "Salvage" of the Cultural Heritage*, 30 J. MAR. L. & COM. 279, 280-81(1999); see also Adams, *supra* note 19, at 293.

²⁵ Adams, *supra* note 19, at 296.

²⁶ *Id.*; see also Gibbins & Adams, *supra* note 17, at 280; see also Greene et al., *infra* note 39, at 312.

²⁷ Adams, *supra* note 19, at 296.

²⁸ *Id.*

²⁹ Gibbins & Adams, *supra* note 17, at 280; see also Greene et al., *infra* note 39, at 312.

³⁰ Gibbins & Adams, *supra* note 17, at 280.

³¹ Richmond, *supra* note 11, at 117-18; Greene et al., *infra* note 39, at 314-15; see also Neil, *supra* note 3 *passim*.

information held by the site.³² Conversely, we must acknowledge that we will learn nothing of the past through pure *in situ* preservation, and ask ourselves what educational and cultural benefit we gain by leaving such items untouched. The competing interests to be addressed are the sovereign nations, the preservation driven archeological community, commercial salvage corporations, and the general public.

1. Archeological Interests

The interests held by sovereign nations and the archeological community are similarly aligned, and together, can be viewed as representing the “desire to implement and enforce archaeological standards when examining and salvaging a historic shipwreck.”³³

Sovereign nations are concerned with the treatment of shipwrecks by foreign salvors because historic shipwrecks are often culturally significant to nations:³⁴

countries who have lost significant amounts of vessels to the ocean stand to gain vast amounts of cultural and historic education from the examination of their shipwrecks. But these countries will gain nothing if their cultural heritage is snatched up by companies and auctioned off on the private market to the highest bidder.³⁵

This is particularly true for the European nations of France, Spain, Portugal, the United Kingdom and the Netherlands, and the Asian nations of China and Japan.³⁶

The views of archeologists vary widely, ranging from advocating for pure *in situ* preservation, to the belief that current salvage practices best protects underwater cultural heritage from

³² Richmond, *supra* note 11, at 117-18; Greene et al., *infra* note 39, at 315.

³³ Neil, *supra* note 3, at 903-05.

³⁴ Forrest, *supra* note 8, at 350; *see also* Wright, *supra* note 4, at 305; *see generally* Greene et al., *infra* note 39, at 311.

³⁵ Neil, *supra* note 3, at 904-05.

³⁶ Forrest, *supra* note 8, at 350.

human marine activity.³⁷ However, the archeological community is ultimately concerned with ethically gaining knowledge about our collective past.³⁸ They are “concerned foremost with research questions about the human past on the one hand and the responsibilities of national and international heritage management on the other.”³⁹

Sovereign nations and archeologists disfavor the current application of salvage laws in comparison to a new legal regime specifically designed to protect historic shipwrecks as cultural heritage.⁴⁰ The current legal regime applied by U.S. courts does not afford archeologists standing to argue on behalf of preservation interests.⁴¹ Switching from the current legal scheme to a new system would allow for the insertion of archeological standards in salvage, would shift away from profit-driven treasure hunting, and provide for education based on recovered artifacts.⁴²

These individuals argue that the world’s ocean pristinely preserves underwater artifacts; the lack of oxygen and the presence or absence of certain chemicals in the water contributes to the drastic slowing of deterioration of shipwrecks in marine environments.⁴³ Instead, salvage companies place shipwrecks in peril by disturbing

³⁷ See Greene et al, *infra* note 39, at 313 (discussing the role of archeologists in the exploration of historic shipwrecks is potentially in conflict with in situ preservation); See Neil, *supra* note 3, 903-05 (stating that archeologists generally disfavor the application of salvage laws, although a few archeologists argue that salvage law is necessary for the protection of shipwrecks that actually are in danger of being lost forever); see also UNESCO Convention on the Protection of the Underwater Cultural Heritage art. 2, Nov. 2, 2001, 41 I.L.M. 40 [hereinafter UCH Convention] (“The preservation in situ of underwater cultural heritage shall be considered as the first option before allowing or engaging any activities directed at this heritage.”).

³⁸ Greene et al., *infra* note 39, at 313; Cf. Delgado, *infra* note 47, at 21.

³⁹ Elizabeth S. Greene, Justin Leidwanger, Richard M. Leventhal & Brian I. Daniels, *Mare Nostrum? Ethics and Archaeology in Mediterranean Water*, 115 AM. J. OF ARCHAEOLOGY 311, 313 (April 2011).

⁴⁰ Neil, *supra* note 3, at 903; Varmer, *supra* note 24, at 280 (arguing archaeologists and their allies argue that the application of salvage law to the underwater cultural heritage must be stopped because salvage for commercial purposes destroys the underwater cultural heritage).

⁴¹ Curfman, *supra* note 16, at 183-84.

⁴² Neil, *supra* note 3, at 903-07.

⁴³ *Id.* at 903-04; Varmer, *supra* note 24, at 280.

and raising artifacts to the surface.⁴⁴ Archeological standards should be applied to the salvage of historic shipwrecks to combat the deteriorating effects of oxygen exposure and slow decomposition.⁴⁵ A new legal regime that applies preservation laws, instead of marine salvage laws, to historic shipwrecks could require archaeology industry standards in all excavations. It is further argued that the monetary and profit motives driving salvage companies should be removed, ensuring a focus on the potential educational information that can be gained from the site.⁴⁶

Unfortunately, abiding by archeological standards can be costly and time consuming.⁴⁷ Furthermore, many artifacts that are ripe with information, such as the trace elements on ceramics, hold no monetary value for salvors.⁴⁸ Current salvage laws, as applied by the courts, encourage salvage companies to loot shipwrecks for monetary gain, without employing archaeological standards.⁴⁹ A new legal regime applying preservation laws instead of marine salvage

⁴⁴ See *Cobb Coin Co. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 549 F. Supp. 540, 560-61 (S.D.Fla. 1982.) (“Archeologists for the State testified that in their opinion ancient shipwrecks buried under the sand are in no “peril” at all; they are undisturbed “time capsules” rich with archeological, anthropological and historical data. They felt that salvage on old wrecks actually created a “peril” for these artifacts by disturbing their tranquil existence.”); Neil, *supra* note 3, at 904; Varmer, *supra* note 24, at 280-81.

⁴⁵ Neil, *supra* note 3, at 905 (“Today, archaeologist are able to preserve many types of artifacts that might have been subject to increased deterioration years ago.”).

⁴⁶ Delgado, *infra* note 47 *passim*; See generally Greene et al., *supra* note 39 *passim*.

⁴⁷ James P. Delgado, *The Trouble with Treasure*, NAVAL HISTORY, Aug. 10, 2010, at 21 (explaining that by following the science of archaeology, “sites are carefully and systematically excavated, evidence and artifacts are recovered and subjected to laboratory analysis and preservation, and the findings are published for the review of other scientists and the public,” and that the sophistication of archeological labs rivals today’s crime labs.).

⁴⁸ See *Id.* at 22 (“Archaeologists have also decried the practices of treasure hunters who have focused on gold or other valuable commodities in a shipwreck and conducted hasty, shoddy excavations that in some cases amounted to ‘smash and grab’ operations. In some cases, the fragile evidence of the past that yields significant scientific information costs too much for a treasure hunter to carefully recover, preserve, and analyze.”).

⁴⁹ Neil, *supra* note 3, at 904.

laws could discourage commercial exploitation and make historic shipwrecks the property of sovereign states.⁵⁰

2. *Commercial Interests*

Commercial salvage companies hold practical profit motives, and can be viewed as most concerned with “the ability to or prohibition on making a profit by salvaging historic wrecks.”⁵¹ They argue that the public’s interest in the archeological study of underwater cultural heritage is addressed through current maritime law and *jus gentium* (which is the “law of nations”).⁵² Those with commercial interests are against a new legal regime focused solely on *in situ* preservation⁵³ and are opposed to preservation of a wreck simply for the sake of preservation. Instead, they argue salvage should be conducted under current laws so as to provide the public with access to the wreck.⁵⁴ If more needs to be done to protect historic shipwrecks, it should be done by addressing and modifying current salvage laws, and not by creating a new system of preservation laws.⁵⁵

Human marine activity, such as fishing trawlers, place wrecks in serious and immediate peril.⁵⁶ This is especially true for high-traffic waterways, such as the English Channel.⁵⁷ Commercial

⁵⁰ See UCH Convention, *supra* note 37 (this convention calls for the ban of commercial exploitation of historic shipwrecks and places an affirmative duty of states to find, recover, and regulate underwater cultural heritage themselves).

⁵¹ Neil, *supra* note 3, at 903, 906-07.

⁵² Bederman, *Historic Salvage*, *infra* note 61, at 103 (“Traditional rules of maritime law – observed by all seafaring nations in the world – provide the necessary legal security for those prepared to invest time and money in finding lost shipwrecks.”); Varmer, *supra* note 24, at 280.

⁵³ Neil, *supra* note 3, at 905-07.

⁵⁴ *Id.*; *Cf.*, Bederman, *Historic Salvage*, *infra* note 61, at 103-06 (“Despite its historic origins, the law of salvage has readily evolved to meet modern concerns regarding historic preservation of shipwrecks...At least as applied in admiralty court in the United States, historic preservation values have been merged with “traditional” salvage law.”).

⁵⁵ See generally, Bederman, *Historic Salvage*, *infra* note 61, at 103-06, 129; Ole Varmer, *supra* note 24, at 280.

⁵⁶ Neil, *supra* note 3, at 905

⁵⁷ *Id.*

salvage companies argue that current salvage law is necessary to protect shipwrecks that are currently in danger of being destroyed and lost forever.⁵⁸ These companies have the technology, ability, and motivation to locate these endangered ships before they are destroyed.

Salvage companies believe their entire profession has unfairly gained a negative reputation due to the bad acts of a few.⁵⁹ Some salvage companies assert their goals include locating ships to “satisfy archaeological curiosity and to promote cultural education.”⁶⁰ Other scholars explain that this is an “industry that combines sophisticated technology and concern for historic preservation values, all with an aim of returning long lost objects to public appreciation and to the stream of commerce.”⁶¹ For example, the Odyssey Marine Exploration is a salvage company that some have referred to as practicing in the field of “commercial archaeology.”⁶² Marine Odyssey Exploration distinguishes itself by focusing on proper scientific treatment of artifacts.⁶³ It aims to maintain high archeological standards in compliance with current industry practices, partner with academic institutions, governments and stakeholders, and ensure archeological recovered material is recorded, studied, and made available to the public through academic and other popular media.⁶⁴ Basically, for commercial salvors, embracing the values of historic preservation is “good for business.”⁶⁵

⁵⁸ *Id.* at 905; Greene et al, *supra* note 39, at 314.

⁵⁹ Neil, *supra* note 3, at 906.

⁶⁰ *Id.*

⁶¹ David J. Bederman, *Building New Regimes and Institutions for the Sea: Historic Salvage and the Law of the Sea*, 30 U. MIAMI INTER-AM. L. REV. 99, 102-03 (1998) [hereinafter Bederman, *Historic Salvage*] (this article went on to state that “Most treasure salvors recognize that certain objects they recover are not only priceless in a monetary sense, but also in an intangible way as part of national (or international) cultural patrimonies. Such items are routinely donated to museum or traveling cultural exhibitions.”).

⁶² Greene et al, *supra* note 39, at 314.

⁶³ See *A Commitment to Archaeology*, ODYSSEY MARINE EXPLORATION, <http://www.shipwreck.net/archaeology.php> (last visited Nov. 1, 2011).

⁶⁴ *Id.*

⁶⁵ Bederman, *Historic Salvage*, *supra* note 61 at 128.

Commercial salvage companies further argue the profit motives are essential since salvaging shipwrecks, especially historic shipwrecks, is prohibitively expensive.⁶⁶ Since companies often spend years of research and millions of dollars on high-tech instruments and manpower to locate a single wreck, economic incentives are essential to the survival of salvage companies.⁶⁷ These companies argue that commercial monetary motives are a benefit to the general public, because it provides industry competition and leads to increased discovery.⁶⁸ As Odyssey Marine Exploration demonstrates, this profit motive does not mean that aspects of the wreck, which have scientific or cultural value, but no economic value, must be destroyed in the process of excavation.⁶⁹ Instead, Odyssey Marine Exploration retains both in-house archeologists, as well as external archeologists, to collaborate on projects.⁷⁰ Those with commercial interests argue for-profit companies should be allowed and encouraged to salvage shipwrecks because the industry has the finances and experience to do so, while many governments and traditional academic archeologists do not.⁷¹ Putting the affirmative duty on states to locate and recover shipwrecks may lead to a freeze on recovery and the potential loss of many endangered ships.⁷²

⁶⁶ *Id.* at 102.

⁶⁷ Neil, *supra* note 3, at 906-07.

⁶⁸ E.g., Christopher R. Bryant, *The Archaeological Duty of Care: The Legal, Professional, and Cultural Struggle Over Salvaging Historic Shipwrecks*, 65 ALB. L. REV. 97, 106 (2001) ("The monetary value of many historic shipwrecks and the availability of new technology has drawn an increasing number of salvors into the salvage industry").

⁶⁹ See, e.g., *A Commitment to Archaeology*, Odyssey Marine Exploration, <http://www.shipwreck.net/archaeology.php> (last visited Nov. 1, 2011); see also Bederman, *Historic Salvage*, *supra* note 61, at 103-06, 128 ("The nautical archaeological community has, moreover, concluded that any commercial motive in recovering historic shipwrecks is antithetical to the protection and preservation of the underwater cultural heritage. The irony here is that most reputable historic salvors very much desire to collaborate with nautical archeologists. Conducting high quality archeological research and observing even the most stringent protocols for the recovery of artifacts are in the best interest of historic salvors.").

⁷⁰ *A Commitment to Archaeology*, Odyssey Marine Exploration, <http://www.shipwreck.net/archaeology.php> (last visited Nov. 10, 2011).

⁷¹ Greene et al, *supra* note 39, at 314.

⁷² See Neil, *supra* note 3, at 906-08.

Furthermore, those with commercial interests assert that they play a vital part of the continued educational development based on shipwreck artifacts.⁷³ Commercial interests, motivated by competition, caused a technological boom, leading to unprecedented rates of discovery.⁷⁴ It follows that without this profit motive there would be less competition among salvors, less technological development, and therefore, fewer wrecks would be found.⁷⁵

3. *Public Interests*

The interest held by the general public can be summarized as “the interest to educate and be educated about the historical and cultural implications that accompany historic wrecks.”⁷⁶ This interest has a tendency to get lost in the bitter feud between archeologists and salvage companies. For instance, when a historic shipwreck is discovered, archeologists may not want the artifacts to be moved or disturbed.⁷⁷ Archeologists have “a tendency to become singularly preoccupied with protecting artifacts and lose sight of why the protection is necessary in the first place...the education of the world public.”⁷⁸ Conversely, a salvor would naturally want to sell recovered artifacts to finance the salvage operation, and receive compensation for his or her time and effort.⁷⁹ Commercial salvage

⁷³ Cf., Neil, *supra* note 3, at 906; *A Commitment to Archaeology*, Odyssey Marine Exploration, <http://www.shipwreck.net/archaeology.php> (last visited May 6, 2012) (“The resulting information derived from Odyssey’s shipwreck projects is disseminated and made available to the public through a variety of media, including published books, archaeology and artifact reports, archaeology presentations, journal articles, educational curriculum and project plans - with the goal of inspiring public awareness, appreciation and knowledge of these fascinating historical, archaeological and cultural discoveries.” *Id.*).

⁷⁴ Cheng, *supra* note 13, at 698; Gibbins & Adams, *supra* note 17, at 284; Neil, *supra* note 3, at 907; Richmond, *supra* note 11, at 109-10; see, e.g., Wright, *supra* note 4, at 287.

⁷⁵ Neil, *supra* note 3, at 907; see, e.g., Bryant, *supra* note 68, at 106 (stating “the monetary value of many historic shipwrecks and the availability of new technology has drawn an increasing number of salvors into the salvage industry”).

⁷⁶ Neil, *supra* note 3, at 903 & 907-08.

⁷⁷ Richmond, *supra* note 11, at 118.

⁷⁸ Neil, *supra* note 3, at 907.

⁷⁹ Richmond, *supra* note 11, at 118.

companies are often single-mindedly focused on achieving a profit, and neglect the important responsibility companies have to document history for the public and future generations.⁸⁰

The needs of all three interests groups are not currently met under the salvage laws applied by U.S. courts.⁸¹ Confusion about the application of salvage laws often leads to litigation, which economically strains parties, slows the pace of wreck disposition, and negatively impacts all stakeholders.⁸² Ultimately, this fails to satisfy the public interest in learning about the cultural and historical aspects of shipwrecks. The current legal regime is thus ineffective at meeting the needs of all interest groups; instead a cooperative approach (as will be discussed in section V) should be used.

The next section will place these various interest groups into context by describing the development of the preservation movement in the United States, as well as the various laws that apply to international shipwrecks.

III. HISTORIC PRESERVATION IN THE UNITED STATES

This section will explain from a policy perspective why historic preservation is important in the U.S. Then, this section will discuss the extension of land-based preservation to marine archaeology and shipwreck preservation. Finally, this section will examine the legal principals from the U.S. Courts and the judiciary's difficulties in applying fragmented international jurisprudence to shipwrecks found and discovered in international waters.

A. *Why We Preserve*

Since the inception of the U.S., there has been a need to preserve our past and remember where we came from. Starting after the colonization of the U.S., Europeans preserved the names of

⁸⁰ Neil, *supra* note 3, at 907.

⁸¹ *Id.*; see Curfman, *supra* note 16, at 183-84.

⁸² Neil, *supra* note 3, at 908; see Curfman, *supra* note 16, at 183.

people and places from the Old World.⁸³ After the Revolutionary War, we preserved the places associated with our nation's founders.⁸⁴ Preserving the past gave our young nation a sense of stability, continuity, and belonging.⁸⁵ "Historic Preservation is an autobiographical undertaking. A person, a community, a society or a nation paints its own portrait by what it chooses to save."⁸⁶

As the movement for historic preservation in the U.S. matured, policy makers came to realize that preserving our past was not just about preserving old objects; it was also about preserving the total heritage of the nation.⁸⁷ In 1966, Congress incorporated the belief that our nation's historic and cultural resources should be a part of our daily lives in the enactment of the National Historic Preservation Act ("NHPA"), which states "the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people...."⁸⁸

Through the passage of the NHPA, the federal government developed a comprehensive national program to ensure a thorough and complete consideration of the effects of governmental actions on historic properties.⁸⁹ The NHPA is composed of three main parts. First, it created the National Register of Historic Places,⁹⁰ as the official federal listing of "districts, sites, buildings, structures, and objects of significance in American history, architecture, archaeology,

⁸³ W. Brown Morton III, *What Do We Preserve and Why?*, in *THE AMERICAN MOSAIC: PRESERVING A NATION'S HERITAGE* 145, 148 (Robert E. Stipe & Antoinette J. Lee eds., 1987).

⁸⁴ *Id.* at 150.

⁸⁵ *Id.* at 148.

⁸⁶ *Id.* at 146.

⁸⁷ *Id.* at 168-69 (this conclusion regarding historic preservation was stated in a report by the 1965 Special Committee on Historic Preservation organized by the U.S. Conference of Mayors).

⁸⁸ National Historic Preservation Act, 16 U.S.C. § 470(b)(2) (1966) (amended 2006).

⁸⁹ National Trust for Historic Preservation in the United States, *Editor's Note: An Overview Preservation Law Reporter Reference Material of Federal Historic Preservation Law & Related Legislation*, in *HISTORIC PRESERVATION: THE FEDERAL REGULATORY FRAMEWORK*, PRES. L. REP. 10,001(Ref.), at 10,003 (1994) [hereinafter *Preservation Law Reporter Reference Material*].

⁹⁰ National Historic Preservation Act, 16 U.S.C. § 470(f) (1966) (amended 2006).

engineering, and culture.”⁹¹ Second, it established a protective review process requiring federal agencies to consider the effects of a federal undertaking on listed properties or those eligible for listing.⁹² Third, it mandated that federal agencies minimize the harm to historic properties and work cooperatively with the Advisory Council by affording that body a reasonable opportunity to comment on proposed agency action.⁹³ This marked a strong change in federal legislation towards a protective nature, setting the path for future preservation laws.

B. Preservation of Historic Shipwrecks Located in the United States

Congress extended the protection for historic objects with the passage of the Abandoned Shipwreck Act of 1987 (“ASA”).⁹⁴ With the enactment of the ASA, Congress turned responsibility over to the States for the management of a “broad range of living and nonliving resources in States waters and submerged lands” that included certain abandoned ships.⁹⁵ The ASA asserts it is in the best interest of the public for the state to acquire and preserve historic shipwrecks as resources of recreational and educational benefit, and protect the wrecks historic value and environmental integrity.⁹⁶ Under the ASA, the U.S. claims title to any abandoned wreck “(1) embedded in submerged lands of a state; (2) embedded in coralline formations protected by a state on submerged lands of a state; or (3) on submerged lands of a state [when the wreck] is included in or determined eligible for inclusion in the National Register.”⁹⁷ Title to

⁹¹ *Preservation Law Reporter Reference Material*, *supra* note 89, at 10,007(Ref.).

⁹² *Id.*; *see generally* National Historic Preservation Act, 16 U.S.C. §§ 470(f), 470(h)r-2 (1966) (amended 2006).

⁹³ *Preservation Law Reporter Reference Materials*, *supra* note 89, at 10,007(Ref.); *Id.* at 10,003(Ref.) (the Advisory Council is an independent federal agency created under the National Historic Preservation Act).

⁹⁴ Abandoned Shipwreck Act of 1987, 43 U.S.C. § 2101 (2006).

⁹⁵ *Id.*

⁹⁶ *See* 43 U.S.C § 2103(a)(1) (2006).

⁹⁷ 43 U.S.C. § 2105(a) (2006); *see also* *Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel*, 221 F.3d 634, 640-41 (4th Cir. 2000) (for a more thorough discussion of the

any such abandoned⁹⁸ wreck or vessel is then automatically transferred from the U.S. to the state in which the shipwreck is located.⁹⁹ If the state consents, it can enter into a private agreement with a salvage company and permit that company to excavate the wreck.¹⁰⁰ However, the state would retain title to the ship and significant oversight authority.

The ASA is a deviation from traditional international maritime law, signaling a movement towards preservation and oversight over previously unbridled salvage.¹⁰¹ It explicitly prohibits the application of traditional maritime laws, stating “the law of salvage and the law of finds shall not apply to abandoned shipwrecks.”¹⁰² The drafters of the ASA were motivated by a desire to limit private commercial salvors, who are viewed as greedy treasure hunters and a threat to the archaeological and cultural integrity of historic shipwrecks.¹⁰³ Instead, state control was deemed the best way to allow for the salvage, exploration, and recovery of wrecks, all the while protecting the historic value and marine environment in which the wrecks lay rest.¹⁰⁴ The ASA has achieved this goal by removing many of the incentives for commercial salvors to risk their capital and time on wrecks located within the United States.¹⁰⁵

When litigation is brought regarding these types of historic wrecks, the power and authority of the courts to rule on domestic shipwrecks is easily justifiable. Under the U.S. Constitution, the judicial power of the federal courts extends “to all cases of admiralty

ASA and its application to two Spanish ships, *La Galga* and *Juno*, shipwrecked off the coast of Virginia).

⁹⁸ See 43 U.S.C. § 2101(b) (2006) (“Abandoned” is not specifically defined, however, the ASA states that “abandoned shipwrecks” are those “to which the owner has relinquished ownership rights with no retention”).

⁹⁹ 43 U.S.C. § 2105(c) (2006).

¹⁰⁰ Wright, *supra* note 4, at 308; see also *Sea Hunt v. Unidentified Shipwreck Vessel*, 221 F.3d 634 (4th Cir. 2000) (case provides an example of such an agreement and issuance of permit between Virginia and Sea Hunt, Inc.).

¹⁰¹ Forrest, *supra* note 8, at 363; Wright, *supra* note 4, at 307.

¹⁰² 43 U.S.C. § 2106(a) (2006).

¹⁰³ Forrest, *supra* note 8, at 363; Wright, *supra* note 4, at 307.

¹⁰⁴ Wright, *supra* note 4, at 307.

¹⁰⁵ *Id.*

and maritime jurisdiction.”¹⁰⁶ Maritime jurisdiction can be based on *in rem* and *in personam* jurisdiction.¹⁰⁷ Under *in rem* jurisdiction, the wreck in question is considered a “person” for the court’s jurisdictional purposes.¹⁰⁸ Thus, when a wreck is located in the territorial waters of a state, the court in that state can exercise its authority as though it was exercising personal jurisdiction over a person.¹⁰⁹

The ASA is not an international law, but instead a federal statute only applicable in U.S. waters when the wreck in question meets specific criteria. Federal admiralty salvage principles (the “law of salvage and finds”) are still the foundation or legal common law applied by U.S. federal admiralty courts.¹¹⁰ The law of salvage and finds is not applied to historic wrecks by many other nations.¹¹¹ This difference in law would not be an issue, but for the fact that the U.S. salvage industry is the strongest, largest, best funded, and most technologically advanced in the world.¹¹² Since U.S. flagged vessels are the most active salvors in international waters, the U.S. federal court’s practice of stretching constructive *in rem* jurisdiction to the far reaches of the globe makes the legal principles applied by U.S. courts to historic shipwrecks an international concern.¹¹³ Jurisdictional, political, as well as varied international legal principles, often make the disposition of internationally located historic shipwrecks a difficult exercise for U.S. courts.

¹⁰⁶ U.S. CONST. art. III, § 2, cl. 1.

¹⁰⁷ *Cobb Coin Co. v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 525 F. Supp. 186, 194 (S.D. Fla. 1981); *see R.M.S. Titanic v. Haver* 171 F.3d 943, 957 (4th Cir. 1999) (stating that “[w]hile actions based on both types of jurisdiction are grounded on the principle that ‘every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory,’ ‘actions in rem are prosecuted to enforce a right to things,’ whereas ‘actions in personam are those in which an individual is charged personally.’”).

¹⁰⁸ Neil, *supra* note 3, at 902.

¹⁰⁹ *Id.*

¹¹⁰ Forrest, *supra* note 8, at 350; *see also Cobb Coin*, 525 F. Supp. 186 (this case is an example of how a State’s regulations may not conflict with federal admiralty salvage principles).

¹¹¹ Forrest, *supra* note 8, at 350.

¹¹² *Id.* at 349; *see also Bederman, Historic Salvage, supra* note 61, at 102 (U.S. historic salvage firms are leading the way in the industry).

¹¹³ Forrest, *supra* note 8, at 349.

C. *International Shipwreck Litigation in the United States Courts*

When cases involving shipwrecks located in international waters are brought before U.S. courts, the question arises as to how such courts can exercise proper jurisdiction to make their rulings enforceable. Also, questions arise as to what legal principles would be enforceable against the rest of the international community. The courts have found the answers to these questions, allowing their ruling to be enforceable against the world, through *in rem* jurisdiction and historical maritime laws of salvage.¹¹⁴

1. *United States Jurisdiction over Shipwrecks in International Waters*

U.S. courts extend jurisdictional authority over shipwrecks located in international waters through the theory of *constructive in rem* jurisdiction.¹¹⁵ *In rem* jurisdiction is used when ships are located within the territorial waters of a certain court, and the “res” or property is located within the jurisdiction of that court.¹¹⁶ As such, *constructive in rem* jurisdiction is an extension of *in rem* jurisdiction, used when a ship lies outside the territorial boundaries of the United States.¹¹⁷ Under *constructive in rem* jurisdiction, a part of the ship must be brought into the geographical boundaries of a court’s jurisdiction.¹¹⁸ It is presumed the “res” is legally, an indivisible whole, and thus the doctrine allows for part of the ship to satisfy jurisdictional requirements for the entire shipwreck.¹¹⁹

¹¹⁴ Wright, *supra* note 4, at 297.

¹¹⁵ *Id.* at 297-98; Forrest, *supra* note 8, at 353-54; Neil, *supra* note 3, at 902; California v. Deep Sea Research, Inc., 523 U.S. 491, 499-500 (1998); *see also* R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943, 964 (4th Cir. 1999).

¹¹⁶ Neil, *supra* note 3, at 902; Wright, *supra* note 4, at 297; *see also* Haver, 171 F.3d at 964.

¹¹⁷ Neil, *supra* note 3, at 902; Wright, *supra* note 4, at 297-98; Forrest, *supra* note 8, at 354-55.

¹¹⁸ Neil, *supra* note 3, at 902.

¹¹⁹ *Id.*; *see also* Haver, 171 F.3d at 964; Deep Sea Research, 523 U.S. at 499-500.

2. Universal Applicability of Law and *Jus Gentium*

Since a vessel lying in international waters is beyond the exclusive power of any one nation's courts, the enforceability of such a decision requires, at the very least, the consent and acquiescence of the other nations, and basically, a decision based on law that other interested nations will respect.¹²⁰ The high seas are not without enforceable laws, since the law of salvage and finds is shared by part of maritime *jus gentium*.¹²¹ Thus, U.S. courts have adjudicated such cases under traditional maritime principles established as *jus gentium*.¹²²

In *R.M.S. Titanic, Inc. v. Haver*, the Fourth Circuit investigated the international body of maritime law from past to present. Honorable Judge Niemeyer explained that the principles of *jus gentium* have evolved from Roman law and are still active today.¹²³ In ancient Rome, *jus gentium* was created as the body of laws to be used as a common law applied to non-citizens.¹²⁴ It was based on fundamental, objective, universal principles that could be applied to all people irrespective of origin or citizenship.¹²⁵ It is a distinct, unwritten, and universal body of law applicable to all nations and people – based on “common sense” and “right reason.”¹²⁶ Included within this universal law of nations, or *jus gentium*, are the law of

¹²⁰ Wright, *supra* note 4, at 299.

¹²¹ *Haver*, 171 F.3d at 968.

¹²² Wright, *supra* note 4, at 299; *see also* Forrest, *supra* note 8, at 355.

¹²³ Paul V. Niemeyer, *Applying Jus Gentium to the Salvage of the R.M.S. Titanic in International Waters – The Nicholas J. Healy Lecture*, 36 J. MAR. L. & COM. 431, 437 (2005); *Haver*, 171 F.3d at 960 (Nations have applied this body of maritime law for 3,000 years or more. Although it would add little to recount the full history here, we note that codifications of the maritime law have been preserved from ancient Rhodes (900 B.C.E.), Rome (Justinian's *Corpus Juris Civilis*) (533 C.E.), City of Trani (Italy) (1063), England . . . And they all constitute a part of the continuing maritime tradition of the law of nations – the *jus gentium* . . . [F]ederal courts sitting in admiralty jurisdictions have steadfastly continued to acquiesce in the *jus gentium* governing maritime affairs.

¹²⁴ Wright, *supra* note 4, at 300; Niemeyer, *supra* note 123, at 438; *see also* Forrest, *supra* note 8, at 356.

¹²⁵ Wright, *supra* note 4, at 300.

¹²⁶ Niemeyer, *supra* note 123, at 439; *see* Wright, *supra* note 4, at 300; *see also* Forrest, *supra* note 8, at 355-56.

merchants and traditional maritime law.¹²⁷ This allows traditional maritime law to be a universal principle applicable to all persons as the time-honored common law of the seas.¹²⁸ Even further, the very nature of international maritime law necessitated the formation of *jus gentium* because:

[F]lag state' vessels and commerce are continually at the mercy of the vessels they encounter and the coastal nations through which they pass. Without an expectation and reciprocation of treatment according to the uniform application of traditional maritime customary law - *jus gentium* - the very nature of seafaring commerce would be threatened as individual nations sought to protect themselves and their commercial endeavors.¹²⁹

Courts have held that domestic salvage laws are derived from the law of salvage under *jus gentium*.¹³⁰ Therefore, when courts consider the applicable law for ships found in international waters, courts generally apply the U.S. laws of salvage and finds.¹³¹

3. *Substantive Law:
Laws of Salvage and Finds as Jus Gentium*

The traditional maritime law of nations applied by the U.S. courts includes the law of finds and law of salvage.¹³² When resolving claims to underwater property recovered by those who are not the property's owners, U.S. courts will look to the law of finds or the law of salvage, and apply one to the exclusion of the other.¹³³ The law of finds usually conveys legal title to the finder of a historic

¹²⁷ Niemeyer, *supra* note 123, at 439.

¹²⁸ *See id.* at 439-40.

¹²⁹ Wright, *supra* note 4, at 301.

¹³⁰ Niemeyer, *supra* note 123, at 439-40.

¹³¹ Wright, *supra* note 4, at 302.

¹³² R.M.S. Titanic Inc. v. Haver, 171 F.3d 943, 961 (4th Cir. 1999); *see, e.g.*, Wright, *supra* note 4, at 302-04; *see also* Richmond, *supra* note 11, at 137-50.

¹³³ *Haver*, 171 F.3d at 961; *see also* R.M.S. Titanic, Inc. v. Wrecked and Abandoned Vessel, 435 F.3d 521, 530-31 (4th Cir. 2006).

shipwreck, as compared to the law of salvage, which provides the salvor with compensation (but not title) for salvaging the wreck.¹³⁴ It is important to note, the existing legal structure in the U.S. does not provide standing to all potential stakeholders.¹³⁵ For example, the archeological community arguing on behalf of the educational interest of mankind would not be afforded a voice before the courts.¹³⁶

i. The Law of Finds

To establish a claim under the law of finds, a finder must prove: (1) intent to reduce the property to his possession, (2) actual or constructive possession, and (3) the property is either un-owned or abandoned.¹³⁷ If a finder satisfies these elements, he will have good title to the found property against all but the original owner.¹³⁸ In the context of historic shipwrecks, this law will only be applied in cases where the ship is considered abandoned, meaning no owners or successors-in-title have come forward to claim the property.¹³⁹ For a court to transfer title of a historic ship, the finder must prove by clear and convincing evidence that the original owner has abandoned the ship.¹⁴⁰ Admiralty courts reluctantly apply this law to maritime salvage because transferring title to the finder ultimately deprives the original owner of his or her rights in the property.¹⁴¹

¹³⁴ Neil, *supra* note 3, at 901.

¹³⁵ Curfman, *supra* note 16, at 183-84.

¹³⁶ *Id.* at 184.

¹³⁷ Cheng, *supra* note 13, at 710; *see also Wrecked & Abandoned Vessel*, 435 F.3d at 532.

¹³⁸ Wright, *supra* note 4, at 302; *see also Wrecked and Abandoned Vessel*, 435 F.3d at 532 (“Courts, however, have traditionally presumed that when property is lost as sea, title remains with the true owner, regardless of how much time has passed.” The court goes on to explain the two exceptions when abandonment of a ship can be presumed.).

¹³⁹ Richmond, *supra* note 11, at 149.

¹⁴⁰ Wright, *supra* note 4, at 302; *see* Richmond, *supra* note 11, at 149, *see also, e.g., Cheng, supra* note 13, at 711.

¹⁴¹ Wright, *supra* note 4, at 302; *see also Cheng, supra* note 13, at 711; *Wrecked and Abandoned Vessel*, 435 F.3d at 531 (“The law of salvage...has a favored, indeed a dignified, place within the law of nations or the *jus gentium*. The law of finds,

ii. Law of Salvage

To establish a claim under the law of salvage, a salvor must prove: (1) voluntary effort, rendered when not under an existing duty or contract; (2) marine peril or danger from which the vessel is salvaged; and (3) some degree of success in whole or part.¹⁴² If a salvor does not recover or rescue any property, even though he has exerted a substantial amount of time, effort, and financial expense, he is still not entitled to a salvage reward.¹⁴³ The law of salvage presumes that the owner desires the salvage service. For instance, "[w]hen providing the salvage service, a salvor acts on behalf of the owner in saving the owner's property even though the owner may have made no such request or had no knowledge of the need."¹⁴⁴ Under this law, the salvor is entitled to a reward from the owner in the form of a lien on the property saved.¹⁴⁵ The lien attaches to the property to the exclusion of all others, including the property's owner. This lien allows the salvor to enjoy a possessory interest in the property until compensated.¹⁴⁶ The monetary reward is measured as part of the value of the property saved, and is based on the time, skill, effort, zeal, and gallantry of the salvor, as well as the degree of danger in which the salvor placed himself.¹⁴⁷ This preserves the rights of the owner of the property, but effectively incentivizes potential salvors to take the risk of assisting distressed people and property at sea.¹⁴⁸

however, is a disfavored common-law doctrine rarely applied to wrecks and then only under limited circumstances.").

¹⁴² Cheng, *supra* note 13, at 709-10; Wright, *supra* note 4, at 303; Richmond, *supra* note 11, at 139.

¹⁴³ Richmond, *supra* note 11, at 139.

¹⁴⁴ R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943, 963 (4th Cir. 1999).

¹⁴⁵ Wright, *supra* note 4, at 303; *see also Wrecked and Abandoned Vessel*, 435 F.3d at 531; Bederman, *Historic Salvage*, *supra* note 61, at 104.

¹⁴⁶ *Haver*, 171 F.3d at 963; *see also Wrecked and Abandoned Vessel*, 435 F.3d at 531.

¹⁴⁷ Wright, *supra* note 4, at 303; Richmond, *supra* note 11, at 138-39; *see also, e.g., Cobb Coin Co. v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 525 F. Supp. 186, 198-208 (S.D. Fla. 1981) (discusses generally some of the rules regarding valuation of a salvage reward as well as the elements necessary to establish a claim based on salvage).

¹⁴⁸ Richmond, *supra* note 11, at 303.

Traditionally, the law of salvage was used to encourage people to render prompt and voluntary action to save lives and property from the perils of the sea.¹⁴⁹ It is important, however, to note several special circumstances surrounding the salvage of historic shipwrecks, which differ from those of current shipwrecks. First is the element of marine peril. Traditionally, this element was met when a ship was in danger of sinking (but not already sunk) either by running aground or due to some accident.¹⁵⁰ Many in the archeological community argue that given the pristine condition in which many ancient shipwrecks are preserved, commercial salvors are the culprits who put ancient ships in peril through their rush excavating and looting, which causes the loss of significant scientific and contextual information.¹⁵¹ Despite this, courts are fully willing to stretch this principle to hold historic wrecks lost to the ocean floor in peril of being lost to natural deterioration, or destruction by man-made fishing and marine activities, if left in place.¹⁵²

Second, the search for historic shipwrecks is far more expensive than the search for more modern wrecks, requiring salvage awards to be higher in order to justify the effort. In response to higher costs, courts have held that the additional time, skill, and effort required to salvage artifacts from historic shipwrecks should be taken into account when calculating a salvage award.¹⁵³

The third issue is the extent to which a salvor's preservation of the historical artifacts and contextual environment should be taken into consideration when calculating a salvage award.¹⁵⁴ Some have

¹⁴⁹ *Wrecked and Abandoned Vessel*, 435 F.3d at 531 (“Without some promise of remuneration, salvors might be understandably be reluctant to undertake the often dangerous and costly efforts necessary to provide others with assistance.”); *See Haver*, 171 F.3d at 962; *see also* Richmond, *supra* note 11, at 138.

¹⁵⁰ Neil, *supra* note 3, at 902-03.

¹⁵¹ Delgado, *supra* note 47, at 20-22; Greene et al., *supra* note 39, at 313-15.

¹⁵² Forrest, *supra* note 8, at 361; Neil, *supra* note 3, at 903; Wright, *supra* note 4, at 304.

¹⁵³ Richmond, *supra* note 11, at 141.

¹⁵⁴ Forrest, *supra* note 8, at 361; Wright, *supra* note 4, at 304; *See, e.g.,* Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co., 974 F.2d 450, 468 (4th Cir. 1992) (stating “salvors who seek to preserve and enhance the historical value of ancient shipwrecks should be justly rewarded.”); Cobb Coin Co. v. Unidentified, Wrecked & Abandoned Sailing Vessel, 549 F. Supp. 540, 559 (S.D. Fla. 1982).

argued that because a salvage award is already determined by weighing the factors, the application of the law of salvage to the new context of historic shipwreck recovery should prompt the inclusion of a new factor based on the need to take the preservation of historical value into account. It is further argued that an "archaeological duty of care" or "the potential salvor's fidelity to archaeological values" should be a new element in the weighting analysis.¹⁵⁵ In response to these arguments, some Courts have been willing to consider the protection of the archaeological value of historic shipwrecks when calculating salvage awards. These courts have not, however, required the archaeological value to be added as a new element in the law of salvage.¹⁵⁶

Even though U.S. courts apply *jus gentium*, there has been a growing trend away from the profit driven laws of salvage and finds, towards preserving the world's underwater cultural heritage for its historic, cultural and educational benefits. In the U.S., this trend is demonstrated in the Abandoned Shipwreck Act of 1987 ("ASA").¹⁵⁷ As previously discussed, the ASA, through a system based on State control and oversight, seeks to remove the incentives for profit-driven commercial salvors and promote the protection of archeologically important historic wrecks.¹⁵⁸ Internationally, the Convention on the Protection of the Underwater Cultural Heritage ("CUPUCH")¹⁵⁹ evidences a shifting in the international community away from the law of salvage and finds, towards the view that shipwrecks are cultural and archeological artifacts to be protected and preserved.¹⁶⁰

¹⁵⁵ Wright, *supra* note 4, at 304; see Bederman, *Historic Salvage*, *supra* note 61, at 106.

¹⁵⁶ Forrest, *supra* note 8, at 362; see, e.g., *Columbus-Am. Discovery Grp.*, 974 F.2d at 468; *Cobb Coin*, 549 F. Supp. at 559.

¹⁵⁷ Abandoned Shipwreck Act of 1987, 43 U.S.C. §§ 2101, 2103(a) (2006).

¹⁵⁸ Wright, *supra* note 4, at 307; see Forrest, *supra* note 8, at 379.

¹⁵⁹ See UCH Convention, *supra* note 37.

¹⁶⁰ Forrest, *supra* note 8, at 372-79; Greene et al., *supra* note 39 *passim*; Richmond, *supra* note 11, at 151-57; Wright, *supra* note 4, at 305-07.

IV. INTERNATIONAL TRENDS AND CONVENTIONS

The following section will discuss several important international conventions on maritime law. Recently a movement has arisen acknowledging ancient wrecks as “cultural heritage” belonging to either the country of origin or humanity as a whole.¹⁶¹ This trend deviates from the traditional *jus gentium* of salvage and finds law.

A. *The 1982 Convention on the Law of the Sea*

One source of international law that should be considered when determining a party’s rights with respect to a historic shipwreck located in international waters is the 1982 United Nations Convention on the Law of the Sea¹⁶² (“UNCLOS”).¹⁶³ Prior to the UNCLOS, no coastal nation claimed to exercise jurisdiction over historic shipwrecks, except for those located within three nautical miles surrounding a country’s coast, known as a nation’s “territorial sea.”¹⁶⁴ Historic shipwrecks were explicitly excluded from prior international conventions.¹⁶⁵

¹⁶¹ Curfman, *supra* note 16, at 181.

¹⁶² Cheng, *supra* note 13, at 707.

¹⁶³ It is of importance to note that article 311 states the UNCLOS does “not alter the rights and obligations of States Parties which arise from other agreements compatible with the Convention and which do not affect the enjoyment by other States Parties of their rights or the performances of their obligations under this Convention.” UNCLOS, *supra* note 7, art. 311. This leaves open the possibility for later conventions and agreements between nations that specifically elaborate in more detail on the protection of underwater cultural heritage. See Tommy T.B. Koh, President of the Third United Nations Conference on the Law of the Sea, Remarks at the final session of the Conference at Montego Bay (Dec. 6-8, 2012), http://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm; Richmond, *supra* note 11, at 123.

¹⁶⁴ Bederman, *Historic Salvage*, *supra* note 61, at 106 (the territorial sea was originally set at three nautical miles and later expanded to twelve).

¹⁶⁵ Bederman, *Historic Salvage*, *supra* note 61, at 107 n. 21 (“In deliberations of the International Law Commission, leading up to the drafting of the 1958 Convention, coastal State jurisdiction over shipwrecks located on the continental shelf was explicitly considered and rejected.”).

The creation of the UNCLOS was a historic event; "[t]he convention [was] the first global treaty of its kind."¹⁶⁶ More than 160 nation-states have ratified the UNCLOS.¹⁶⁷ Although the U.S. has not ratified it, they are a signatory and thus "obliged to refrain from acts which would defeat the object and purpose of the treaty."¹⁶⁸ Regardless, the UNCLOS is so widely accepted that it is considered customary law and has been referred to as the "comprehensive constitution for the ocean."¹⁶⁹

Articles 95 and 96 of the UNCLOS specifically confer sovereign immunity to warships and ships involved in government service. Article 95 asserts, "[w]arships on the high seas have complete immunity from the jurisdiction of any other State other than the flag State."¹⁷⁰ Article 96 declares that "[s]hips owned and operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State."¹⁷¹ This is important for historic shipwrecks that were involved in some type of government service, as it allows the nations of origin to claim ownership over these ships without being subject to the *jus gentium* laws of the sea.¹⁷²

Although the UNCLOS "'governs virtually all aspects of the law of the sea,'" it only vaguely addresses historic shipwrecks in two articles: 149 and 303.¹⁷³ The substantive provisions of these two

¹⁶⁶ SOHN & NOYES, *supra* note 6, at 13.

¹⁶⁷ There are 162 signatures as of June 3, 2011. See *Status of United Nations Convention on the Law of the Sea*, UN.ORG, http://www.un.org/depts/los/convention_agreements/convention_agreements.htm (last visited Nov. 11, 2011); see also *Table Recapitulating the Status of the Convention and of the Related Agreements*, UN.ORG, http://www.un.org/depts/los/reference_files/status2010.pdf (last visited Nov. 11, 2011).

¹⁶⁸ Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980); see also Cheng, *supra* note 13, at 707.

¹⁶⁹ Tommy T.B. Koh, *A Constitution for the Oceans*, in 1 CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 11 (Myron H. Nordquist ed., 1985); Cheng, *supra* note 13, at 707; Richmond, *supra* note 11, at 123.

¹⁷⁰ UNCLOS, *supra* note 7, art. 95; see also SOHN & NOYES, *supra* note 6, at 45; see also Richmond, *supra* note 11, at 129.

¹⁷¹ UNCLOS, *supra* note 7, art. 96.

¹⁷² Richmond, *supra* note 11, at 128-29.

¹⁷³ *Id.* at 126; see Bederman, *Historic Salvage*, *supra* note 61, at 106-09; see also Cheng, *supra* note 13, at 708-09;

articles are “vague and ambiguous,” providing no more than general guidance.¹⁷⁴ Despite this, articles 149 and 303 signal a movement away from *jus gentium* and toward the protection of historical shipwrecks as cultural heritage.

1. Section 149

Article 149 of the UNCLOS “governs archeological and historical objects found in the ‘Area.’”¹⁷⁵ It states:

All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.¹⁷⁶

One of the problems with article 149 is the scope to which it extends and applies beyond a nation’s shores. The “Area” is defined as “the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.”¹⁷⁷ The “Area” was intended to be restricted to twenty-four miles, thus restricting a nation’s claim to an object of “archeological or historical nature” to a distance of twenty-four miles from its coast.¹⁷⁸ Unfortunately, many states have not abided by this restriction and instead, have extended claims to historic wrecks beyond the intent of this article.¹⁷⁹ For instance, the U.S. and the United Kingdom view these rights to only extend twenty-four miles

¹⁷⁴ Richmond, *supra* note 11, at 130; see Bederman, *Historic Salvage*, *supra* note 61, at 106-09; see also Cheng, *supra* note 13, at 708-09.

¹⁷⁵ Richmond, *supra* note 11, at 131.

¹⁷⁶ UNCLOS, *supra* note 7, art. 149; see also SOHN & NOYES, *supra* note 6, at 563.

¹⁷⁷ UNCLOS, *supra* note 7, at art. 1 (defining “Area”); see also SOHN & NOYES, *supra* note 6, at 598; Richmond, *supra* note 11, at 131.

¹⁷⁸ Bederman, *Historic Salvage*, *supra* note 61, at 111-12; Richmond, *supra* note 11, at 131.

¹⁷⁹ Bederman, *Historic Salvage*, *supra* note 61, at 111-112; Richmond, *supra* note 11, at 131.

from a nation's baseline;¹⁸⁰ however, Spain has claimed rights to historic wrecks on its much larger continental shelf.¹⁸¹ Similarly, questions arose regarding the application of article 149 to "historic shipwrecks as part of underwater cultural heritage since it refers to protecting objects rather than wrecks specifically."¹⁸²

A second problem with article 149 is its ambiguous language. For instance, article 149 is unclear as to what constitutes the "benefit of mankind" and what objects are of "an archeological and historical nature."¹⁸³ Similarly, the treaty does not explain the manner in which objects are to be "preserved or disposed of,"¹⁸⁴ or provide funding for such preservation.¹⁸⁵ Preservation can be subject to multiple interpretations depending on the interest group involved. For instance, preservation could mean *in situ* preservation or excavation and placement in a museum.¹⁸⁶

A third problem with article 149 is its failure to explain the scope of the rights to be given, how to determine which states should be given such rights, or provide guidance when more than one state has preferential rights.¹⁸⁷ The treaty appears to create potential preferential rights in three alternative states: (1) the state of origin, (2) the state of cultural origin, and (3) the state of historic or archeological origin.¹⁸⁸ While the states listed in Article 149 were not

¹⁸⁰ Richmond, *supra* note 11, at 132.

¹⁸¹ *Id.* at 132.

¹⁸² *Id.*

¹⁸³ See UNCLOS, *supra* note 7, art. 149.

¹⁸⁴ See *Id.*

¹⁸⁵ Forrest, *supra* note 8, at 368.

¹⁸⁶ *Id.*; see Greene et al, *supra* note 39, at 313 (discussing the role of archeologists in the exploration of historic shipwrecks is potentially in conflict with *in situ* preservation); see also Neil, *supra* note 3, at 903-05 (stating that archeologists generally disfavor the application of salvage laws, although a few archeologists argue that salvage law is necessary for the protection of shipwrecks that actually are in danger of being lost forever).

¹⁸⁷ Cheng, *supra* note 13, at 708; Forrest, *supra* note 8, at 369; Richmond, *supra* note 11, at 133-34.

¹⁸⁸ See UNCLOS, *supra* note 7, art. 149 ("All object of an archaeological and shittroical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and

intended to be used as alternatives, the UNCLOS does not explain which of these three states does in fact get preferential rights if multiple states claim preferential rights.¹⁸⁹ These undefined terms have prevented the international community from reaching a consensus on the interpretation of this article, and have thus stalled preservation.¹⁹⁰

2. Section 303

Article 303 is another part of the UNCLOS that has some implications for historical shipwrecks. Article 303 declares:

1. States have the duty to protect objects of an archeological and historical nature found at sea and shall cooperate for this purpose.
2. In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the sea-bed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.
3. Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges.
4. This article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archeological and historical nature.¹⁹¹

archaeological origin.”); Richmond, *supra* note 11, at 133-134; Cf. Curfman, *supra* note 16, at 193; Cf. Cheng, *supra* note 13, at 708.

¹⁸⁹ Cheng, *supra* note 13, at 708; Richmond, *supra* note 11, at 134; Cf. Forrest, *supra* note 8, at 368-69.

¹⁹⁰ Forrest, *supra* note 8, at 368.

¹⁹¹ UNCLOS, *supra* note 7, art. 303; see also Forrest, *supra* note 8 at 369; Richmond, *supra* note 11, at 134-35.

Sections one and two of Article 303 work toward protection of cultural heritage. Article 303(2) specifically refers to article 33 (which sets the contiguous zone at a maximum of twenty-four miles),¹⁹² and thus only confers jurisdiction to coastal ships of shipwrecks and objects found up to twenty-four miles from its baseline.¹⁹³ However, as mentioned in the discussion on article 149, some states have tried to extend their jurisdiction beyond the intent of the UNCLOS adding to the confusion regarding interpretation of article 303.

Sections three and four of article 303 compound the confusion and ambiguity of the UNCLOS. Article 303(3) "maintains the status quo in terms of salvage laws,"¹⁹⁴ undercutting any progress made in early sections by preserving the law of salvage and finds.¹⁹⁵ However, in the very next section, article 303(4) allows for "other international agreements and rules in international law regarding the protection of objects of an archeological character."¹⁹⁶ Some scholars assert that this leaves the door open for future international conventions to protect archeological and historical objects, as well as specific agreements between states and private parties.¹⁹⁷ Others allege that article 303(4) fails to make it clear, "under the UNCLOS, whether salvage law or a new convention to preserve historic shipwrecks would prevail in determining how the shipwreck treasure should be protected."¹⁹⁸

The one thing clear is that the drafters of UNCLOS left open the question regarding historic shipwrecks for another day. UNCLOS left room for future international agreements that specifically elaborate on a more detailed protection of historic shipwrecks and underwater cultural heritage.¹⁹⁹ While ambiguity and confusion

¹⁹² UNCLOS, *supra* note 7, art. 33.

¹⁹³ Richmond, *supra* note 11, at 135.

¹⁹⁴ Forrest, *supra* note 8, at 370; UNCLOS, *supra* note 7, art. 303(3) (stating, "Nothing in this article affects... the law of salvage or other rules of admiralty...").

¹⁹⁵ Forrest, *supra* note 8, at 370; Cheng, *supra* note 13, at 709.

¹⁹⁶ UNCLOS, *supra* note 7, art. 303(4); *see also* Bederman, *Historic Salvage*, *supra* note 61, at 108.

¹⁹⁷ *See* Cheng, *supra* note 13, at 709; Forrest, *supra* note 8, at 370; Richmond, *supra* note 11, at 136.

¹⁹⁸ Richmond, *supra* note 11, at 136.

¹⁹⁹ *Id.* at 137; *Cf.* Forrest, *supra* note 8, at 370.

surround UNCLOS, it did start a discussion on the protection of underwater cultural heritage and laid the foundation for future laws.

B. The 1989 Salvage Convention

The International Maritime Organization promulgated the 1989 Salvage Convention ("Salvage Convention"),²⁰⁰ replacing the Brussels Convention on Salvage.²⁰¹ During the negotiations of the Salvage Convention, France and Spain tried to have historic shipwrecks excluded.²⁰² Although these attempts were not completely successful, the negotiations led to the inclusion of article 30(1)(d), which states: "Any State may, at the time of signature, ratification, acceptance, approval or accession, reserve the right not to apply the provisions of this Convention...when the property involved is maritime cultural property of prehistoric, archaeological or historic interest and is situated on the sea-bed."²⁰³ Article 30(1)(d) allows nation-states to make a reservation in order to exclude historic shipwrecks from the reach of the Salvage Convention.²⁰⁴ Conversely, this means that unless a nation specifically chooses to make a reservation, the Salvage Convention applies to the law of salvage of historic shipwrecks as the default rule.²⁰⁵

Spain contracted to enter into a reservation under article 30(1)(d), excluding its historic shipwrecks from the auspices of the Salvage Convention.²⁰⁶ The United Kingdom and the U.S. have not

²⁰⁰ International Convention on Salvage, 1989, Mar. 29, 1990, SEN. TREATY DOC. NO. 102-12 (1991), 1953 U.N.T.S. 165.

²⁰¹ The earlier Brussels Convention on Salvage did not contain any provisions on historic shipwrecks, but dealt instead with the duty to render assistance to persons in distress. It was an effort to uniform the application of salvage law from nation to nation. SOHN & NOYES, *supra* note 6, at 645 & 153; Forrest, *supra* note 8, at 371; Bederman, *Historic Salvage*, *supra* note 61, at 110.

²⁰² Forrest, *supra* note 8, at 371; Richmond, *supra* note 11, at 144.

²⁰³ 1989 Salvage Convention, *supra* note 200, at art. 30(1)(d); *see also* Richmond, *supra* note 11, at 145.

²⁰⁴ Richmond, *supra* note 11, at 145; Forrest, *supra* note 8, at 371; Bederman, *Historic Salvage*, *supra* note 61, at 110-11.

²⁰⁵ Bederman, *Historic Salvage*, *supra* note 61, at 111; Forrest, *supra* note 8, at 371.

²⁰⁶ *Status of Conventions*, INTERNATIONAL MARINE ORGANIZATION (Mar. 31, 2012), <http://www.imo.org/About/Conventions/StatusOfConventions/Documents/status-x.xls> (last visited Nov. 11, 2011); *see also* Richmond, *supra* note 11, at 145 (listing

entered into a reservation.²⁰⁷ However, the United Kingdom has “reserve[ed] the right to make a reservation in the future, meaning it does not necessarily exclude historic shipwrecks from the reach of the Salvage Convention as it has not yet made a reservation to that effect.”²⁰⁸

In sum, the Salvage Convention will apply to salvage operations of historic shipwrecks concerning the U.S. and the United Kingdom, but its application to operations concerning the U.S. and Spain is questionable, given Spain’s reservation under article 30(1)(d).²⁰⁹ The question arises that if the Salvage Convention is not applicable to operations between the U.S. and Spain, should U.S. courts adjudicating such a case fall back on the *jus gentium*? The addition of article 30(1)(d) into the Salvage Convention is further evidence of the international trend towards recognizing historic sunken vessels as part of our collective cultural heritage, but fails to provide a clear legal framework in which to adjudicate a dispute.

C. *The 2001 Convention on the Protection of the Underwater Cultural Heritage*

“In November 2001, the United Nations Educational, Scientific and Cultural Organization adopted the Convention on the Protection of the Underwater Cultural Heritage” (“UCH Convention”),²¹⁰ building upon the principles established in the UNCLOS,²¹¹ while trending away from salvage laws, towards protection of historical shipwrecks.²¹² Its main focus is on the obligation of party states to protect underwater cultural heritage

Spain as one of the nations that has made a reservation under Article 30(1)(d); Bederman, *Historic Salvage*, *supra* note 61, at 111 n.48 (listing Spain as one of the nations that have made the necessary reservation).

²⁰⁷ See *Status of Conventions*, *supra* note 206.

²⁰⁸ Richmond, *supra* note 11, at 146.

²⁰⁹ *Id.* at 145-46.

²¹⁰ Forrest, *supra* note 8, at 372; see also UCH Convention, *supra* note 37; Bederman, *Maritime Preservation Law*, *infra* note 218, at 192; Neil, *supra* note 3, at 908-909.

²¹¹ Forrest, *supra* note 8, at 372.

²¹² Wright, *supra* note 4, at 305.

through *in situ* preservation.²¹³ Despite its lofty goals, the UCH Convention creates several standards and rules that work against the ultimate goal of education for the general public.

First, the UCH acknowledges both the integral role cultural heritage plays in the history of people and nations, and the fact that it was created by an international community “[d]eeply concerned by the increasing commercial exploitation of underwater cultural heritage, and in particular by certain activities aimed at the sale, acquisition, or barter of underwater cultural heritage.”²¹⁴ The UCH Convention acknowledges, “growing *public interest* in and public appreciation of underwater cultural heritage,” and is “convinced of the importance of research, information, and *education* to the protection and preservation of underwater cultural heritage.”²¹⁵ Underwater cultural heritage is defined as:

All traces of human existence having a cultural, historical, or archeological character which have been partially or totally under water, periodically or continuously, for at least 100 years such as: (i) sites, structures, buildings, artifacts and human remains, together with their archeological and natural context; (ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and (iii) objects of prehistoric character.²¹⁶

Intriguingly, the majority of the drafters for the UCH Convention were archaeologists and academics, who are arguably biased towards the protection of historical artifacts.²¹⁷ The over inclusive definition of “underwater cultural heritage” encompasses absolutely everything from the human past; such over inclusion fails

²¹³ UCH Convention, *supra* note 37, at art. 2.

²¹⁴ Wright, *supra* note 4, at 305; *see* UCH Convention, *supra* note 37, art. 1; *see also* Cheng, *supra* note 13, at 711 (the UCH Convention is intended, in part, to prevent the exploitation of historic shipwrecks for profit).

²¹⁵ UCH Convention, *supra* note 37, at 1. (emphasis added).

²¹⁶ *Id.* art. 1, § 1(a); Cheng, *supra* note 13, at 711-12; Wright, *supra* note 4, at 305.

²¹⁷ Neil, *supra* note 3, at 914-15.

to recognize the necessity of a “significance” requirement for such objects.²¹⁸ Theoretically, splinters from surfboards, broken coke bottles and lobster traps could all fall within this definition, if such items are over one hundred years old. These items might not be “significant” to the history of humanity, but according to the UCH Convention, they should be preserved for the benefit of all mankind.²¹⁹ Additionally, this excessively broad definition inevitably makes the UCH Convention unmanageable and unworthy of the status of an international treaty.²²⁰ Only historical shipwrecks of cultural and historical significance should qualify for such burdensome regulation.²²¹ Further, this inclusive definition potentially cuts off the property rights of private individuals. For example, under traditional maritime law, if a vessel sinks, the owner’s interest in that vessel continues on through time until such rights are affirmatively waived.²²² However, under the UCH Convention, any vessel over 100 years of age that sinks would automatically revert to state ownership.²²³

Second, the UCH Convention places an affirmative burden on party-states to search for, commandeer and protect underwater cultural heritage in their jurisdiction, also requiring that “the

²¹⁸ David J. Bederman, *Maritime Preservation Law: Old Challenges, New Trends*, 8 WIDENER L. SYMP. J. 163, 194 (2002) [hereinafter Bederman, *Maritime Preservation Law*].

²¹⁹ *Id.* at 194-195; see, Neil, *supra* note 3, at 914-916.

²²⁰ See *Id.* (arguing that the definitions of UCH “are so expansive as to be outlandish”); see also Neil, *supra* note 3, at 914-15 (stating that the drafters eventually narrowed the definition, but even so, it was still extremely broad).

²²¹ Bederman, *Maritime Preservation Law*, *supra* note 218, at 194-95.

²²² For example, under the Abandoned Shipwreck Act of 1987 [102 Stat. 432, 43 U.S.C. §§ 2101-2106], the Federal government asserts and transfers title to a state any “abandoned shipwreck” that meets the statutory criteria. There is controversy today as to whether “abandonment” can be implied or it must be express. See, Bederman, *Maritime Preservation law*, *supra* note 218, at 166. See generally, *Sea Hunt, Inc. v. The Unidentified Shipwreck Vessel or Vessels*, 221 F.3d 634, 640-643 (4th Cir. 2000). Under salvage law, the owner retains an interest in property that is salvaged by another. The salvor generally receives a lien against the salvaged property, for his or her services rendered, similar to quantum meruit. See, *Cobb Coin Company, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 525 F.Supp. 186, 207-208 (S.D. Fla. 1981)(discussing salvor rewards).

²²³ See Neil, *supra* note 3, at 915-16.

preservation *in situ* of underwater cultural heritage shall be considered as the first option before allowing or engaging in any activities directed at this heritage.”²²⁴ Additionally, when a state discovers an object of “underwater cultural heritage,” it must: (1) notify potentially interested party states; (2) consider the other party-state’s interest; (3) cooperatively work with other states in the preservation of cultural heritage; and (4) provide all other nations with information regarding the discovery and location of new underwater cultural heritage sites.²²⁵ This affirmative duty on states is coupled with an explicit rejection of the laws of salvage and finds,²²⁶ and an unequivocal ban on commercial salvage.²²⁷

The duty to research, locate, and preserve underwater cultural heritage is unfairly placed on states, tying up important financial resources that can be dedicated to other areas of the state’s concerns. Conversely, the industry with the time, finances and desire to locate and explore historic shipwrecks are effectively prohibited from doing so.²²⁸ Not only does this rule take away the profit motive

²²⁴ UCH Convention, *supra* note 37, at art. 2; *see also* Cheng, *supra* note 13, at 713 (the UCH prefers *in situ* preservation); *see also* Neil, *supra* note 3, at 909.

²²⁵ UCH Convention, *supra* note 37, at arts. 9, 10, 11, 12, 18 & 19 (discussing the obligations each State Party has to other members, including the reporting and notification requirements, the protection afforded, and appropriate measures for disposal or seize, of any underwater cultural heritage); *see also* Wright, *supra* note 4, at 306 (discussing the UCH’s requirements of states with respect to finding underwater cultural heritage and its obligations to other party states).

²²⁶ *Id.*, at art. 4 (sets out the relationship to the law of salvage and law of finds and states the following: “Any activity relating to underwater cultural heritage to which this Convention applies shall not be subject to the law of salvage or land of finds, unless it: (a) is authorized by the competent authorities, and (b) is in full conformity with this Convention, and (c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection.”); Cheng, *supra* note 13, at 712; Wright, *supra* note 4, at 305; Richmond, *supra* note 11, at 154.

²²⁷ UCH Convention, *supra* note 37, art. 2, § (7) (“Underwater cultural heritage shall not be commercially exploited.”); Wright, *supra* note 4, at 306; Neil, *supra* note 3, at 910; Bederman, *Maritime Preservation law*, *supra* note 218, at 200; Richmond, *supra* note 11, at 153.

²²⁸ *See generally* Bederman, *Maritime Preservation Law*, *supra* note 218, at 197-200; *see, e.g.*, Forrest, *supra* note 8, at 374 (“In its structure, article 4 opens with a clear rule: salvage law and the preservation of historic wreck are incompatible. Such a draconian stance was, however, resisted by states such as the United States and United Kingdom, requiring complex and protracted negotiations...”).

of commercial salvage companies (and thus ensure their demise),²²⁹ but it also prohibits states from working cooperatively with the private salvage industry in an effort to locate historically and culturally significant artifacts. Given the huge investment of capital needed, it is unlikely that non-profit and government funded salvage enterprises would survive the profit ban.²³⁰ This freeze on salvage exploration would lead to a slowing in technological advancements and a moratorium on new discoveries. Wrecks currently deteriorating would be lost forever, and the public would ultimately lose its opportunity to receive cultural education.²³¹

The UCH Convention commendably aims to remedy the current inadequacies of international law, but is defective and unable to achieve its idealized goals.²³² It presents only the views of the archeological community, impermissibly putting the burden on states to find and finance exploration of shipwrecks, and is ambiguous and over inclusive in its definitions.²³³ In summary, the UCH Convention works to eliminate the profit motive of commercial salvage companies, but in doing so, eviscerates the ability of the world community "to locate, protect, preserve, and learn about historic [ship]wrecks."²³⁴

V. CONCLUSION: IMPROVING THE WAY WE PROTECT THE PAST THROUGH A COLLABORATIVE APPROACH

In this section, we will discuss two recently discovered historic shipwrecks, the *Black Swan* and the *HMS Sussex*. By comparing these two cases, this article will provide suggestions for the proper cooperative procedures that should be taken when a historic shipwreck is salvaged to best protect all competing interests. This problem with historic shipwrecks can be mitigated through a cooperative bi-lateral agreement that involves notice and participation of all the various stakeholders, and can be further

²²⁹ Neil, *supra* note 3, at 910.

²³⁰ *Id.* at 911.

²³¹ *Id.* at 912.

²³² *Id.* at 921.

²³³ *Id.* at 916.

²³⁴ *Id.* at 921.

mitigated by urging the archaeological community to play an active role in the protection of underwater cultural heritage through the establishment of best practices for salvage techniques ensuring the proper protection for these historic and cultural artifacts. This article argues that a cooperative model, instead of an approach based solely on *in situ* preservation, best achieves the objectives of all stakeholders and best benefits the public and future generations.

A. *Black Swan*

In March of 2007, an American shipwreck exploration company, Odyssey Marine Exploration, Inc. ("OME"), located a wreck site, the *Black Swan*, in international waters roughly 100 miles west of the Strait of Gibraltar.²³⁵ In the months and years to come, the *Black Swan* would become international news, widely being recognized as the "most valuable treasure find to date."²³⁶ Ultimately, OME recovered over 500,000 silver and gold coins from the *Black Swan*, weighing seventeen tons and estimated to be worth approximately \$500 million.²³⁷

²³⁵ Odyssey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel, 675 F.Supp.2d 1126, 1130 (M.D. Fla. 2009) [hereinafter OME I] (Magistrate Judge Mark Pizzo's Report and Recommended Order explains OME discovered the ship in international waters off the Straights of Gibraltar); Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel, 657 F.3d 1159, 1166 (11th Cir. 2011) [hereinafter OME II]; Cheng, *supra* note 13, at 698-99; Curfman, *supra* note 16, at 185-86; Richmond, *supra* note 11, at 112; Wright, *supra* note 4, at 295; Press Release, Odyssey Marine Exploration, Odyssey Will Object to Magistrate's Recommendation to Dismiss "Black Swan" Case (June 3, 2009), <http://www.shipwreck.net/pr180.php> [hereinafter Press Release I].

²³⁶ Curfman, *supra* note 16, at 185.

²³⁷ OME I, *supra* note 235, at 1134 (court discusses the Mercedes ship left port with 900,000 coins from El Callao and Montevideo, and Odyssey recovered 594,000 coins from the same nationality and mint); Cheng *supra* note 13, at 700; Forrest, *supra* note 8, at 352; Wright, *supra* note 4, at 295; *see also* Richmond, *supra* note 11, at 112-13; Press Release, Odyssey Marine Exploration, Odyssey to Request En Banc Hearing in "Black Swan" Case to Address Contradictions in Eleventh Circuit's Ruling (Sept. 21, 2011), <http://www.shipwreck.net/pr231.php> [hereinafter Press Release II].

The site was found 1,100 meters below the surface of the Atlantic Ocean, scattered on the seabed floor and absent of a vessel.²³⁸ After maintaining complete secrecy throughout the salvage operation, OME transported the recovered treasure to the U.S.²³⁹ However, OME has neither identified the wreck nor revealed its location, asserting that complete confidentiality is necessary to protect the find from other treasure hunters.²⁴⁰

Even though OME remained silent about the details of the wreck site, rumors arose that the sunken vessel is actually an old Spanish warship, named the "*Nuestra Senora de las Mercedes*" ("*Mercedes*") that was sunk by a British warship in 1804.²⁴¹ According to Spanish authorities, the *Mercedes* was built in Havana in 1788 as an addition to the Royal Spanish Navy.²⁴² During its lifetime, the ship performed both official governmental missions as well as commercial missions.²⁴³ For example, the ship participated in battle, transported troops, cargo and government officials.²⁴⁴ Conversely, *Mercedes* also undertook missions to transport mail, private passengers, and consignments of merchant goods and cargo.²⁴⁵ On February 27, 1803,

²³⁸ Curfman, *supra* note 16, at 186; Richmond, *supra* note 11, at 112.

²³⁹ Cheng, *supra* note 13, at 698 & 699-700; *see* Curfman, *supra* note 16, at 185; *see also* Wright, *supra* note 4, at 295 (discussing the claims that were brought in the United States District Court for the Middle District of Florida).

²⁴⁰ Wright, *supra* note 4, at 295; *see also* Curfman, *supra* note 16, at 185-86 (noting that "[a]ll that has been said is that the wreck lies at a depth of 1,100 meters in international waters, approximately 100 miles west of the Straits of Gibraltar.").

²⁴¹ Cheng, *supra* note 13, at 689-700; Curfman, *supra* note 16, at 185; Forrest, *supra* note 8, at 352; Richmond, *supra* note 11, at 112; Wright, *supra* note 4, at 295.

²⁴² OME I, *supra* note 235, at 1139; Cheng, *supra* note 13, at 698 (stating that "[t]he Spanish build the Mercedes in Havana in 1788).

²⁴³ Cheng, *supra* note 13, at 698-99; *see also* Press Release II, *supra* note 237 (discusses Odyssey's assertion that the majority of the coins aboard did not belong to Spain, and that even if the ship was Mercedes, it was on a commercial voyage at the time it sunk).

²⁴⁴ Cheng, *supra* note 13, at 699; *see* Press Release I, *supra* note 235 (stating that after the Magistrate's Recommendation to Dismiss, Odyssey Marine Exploration still believes there to be disputed material facts in the case, including whether the Mercedes was on a commercial mission, and whether the property recovered belonged to Spain); *see also* Press Release II, *supra* note 237 (discussing Odyssey's assertion that the majority of the coins aboard did not belong to Spain, and that even if the ship was Mercedes, it was on a commercial voyage at the time it sunk);.

²⁴⁵ Forrest, *supra* note 8, at 353.

the *Mercedes* embarked on her final mission from the Peruvian port of El Callao to Cadiz, Spain.²⁴⁶ The ship carried royal treasure from Peruvian mines²⁴⁷ and vast amounts of property for private Spanish citizens (seeking protection from the war between France and Great Britain).²⁴⁸ On the morning of October 5, 1804, the *Mercedes*, accompanied by three other Spanish frigates (the *Clara*, the *Medea*, and the *Fama*), were intercepted by the British Navy.²⁴⁹ The *Mercedes* and other frigates were only a day's sail from the Spanish coast.²⁵⁰ When the *Mercedes* refused to surrender, a battle ensued; in less than ten minutes, the *Mercedes* blew up.²⁵¹ The vessel sunk, taking the lives of the two hundred-fifty Spaniards aboard.²⁵² This attack prompted King Carlos IV of Spain to declare war on Great Britain and led to Spain becoming France's ally during the Napoleonic Wars.²⁵³ Given these dramatic events, it is clear that the *Mercedes* played a significant role in the history and is a part of the cultural heritage of both Spain and Peru.²⁵⁴

In the spring of 2007, OME filed an action in the U.S. District Court for the Middle District of Florida,²⁵⁵ invoking *constructive in*

²⁴⁶ Cheng, *supra* note 13, at 698.

²⁴⁷ *Id.* (Mercedes carried copper, tin ingot, and 900,000 coins minted in Lima, Peru. It is argued that the history of coins provides the nation of Peru a right to claim the cargo); *See Id.* at 697-98 ("The coins discovered by Odyssey were mined and minted in Peru when Peru was still a viceroyalty of the Spanish Empire. These precious metals were mined through the exploitation of indigenous people under terrible working conditions, and then transported to Spain with little benefit to themselves or their community. The fused relationship of the coins to the history of indigenous Peruvians is evidence that the coins represent their cultural heritage. Therefore, indigenous Peruvians should have standing to assert a claim to them.").

²⁴⁸ Cheng, *supra* note 13, at 699.

²⁴⁹ OME I, *supra* note 235, at 1133; Cheng, *supra* note 13, at 699; *see also* Richmond, *supra* note 11, at 112.

²⁵⁰ OME I, *supra* note 235, at 1133.

²⁵¹ *Id.*; *see also*, Cheng, *supra* note 13, at 699.

²⁵² Cheng, *supra* note 13, at 699; *see also* Richmond, *supra* note 11, at 112 (stating the Spanish ship, on its way back to Spain from Peru, sank in 1804 after being attacked by British ships);

²⁵³ OME I, *supra* note 235, at 1130, 1133 (explaining how the sinking of the Mercedes in 1804 was pivotal in the Spain's engagement in war with Britain.); Cheng, *supra* note 13, at 699; *see also* Richmond, *supra* note 11, at 112.

²⁵⁴ Cheng, *supra* note 13, at 699.

²⁵⁵ OME II, *supra* note 235, at 1166.

rem jurisdiction,²⁵⁶ and demanded “under the law of finds[,] possessory rights and ownerships over the items it has recovered and that remain at the salvage site; alternatively, under the law of salvage, the firm seeks a “liberal salvage award” for its services.”²⁵⁷ OME asserted the site was “beyond the territorial waters or contiguous zone of any country,”²⁵⁸ and that “the recovery is not subject to sovereign immunity by any nation pursuant to the Law of the Sea Convention.”²⁵⁹

In response, two sovereign nations, Spain and Peru, and twenty-five descendants of those who perished aboard the *Mercedes* filed claims with the District Court.²⁶⁰ The Kingdom of Spain intervened and claimed that: (1) the wrecked vessel is the “*Nuestra Senora de las Mercedes*”; (2) Spain has not abandoned its sovereignty of the vessel; (3) under applicable treaties (including the Treaty of Friends),²⁶¹ Spain’s warship should be afforded sovereign immunity; and (4) that it was the owner of the wreck and its contents.²⁶² Spain filed a motion to dismiss on the grounds that the District Court did not have subject matter jurisdiction to adjudicate claims against the naval property of Spain.²⁶³ Spain opposed the commercial salvage and sale of its historic shipwrecks, and asserted underwater cultural

²⁵⁶ OME I, *supra* note 235, at 1130; OME II, *supra* note 235, at 1166; Forrest, *supra* note 8, at 352; Press Release, Odyssey Marine Exploration, Spain’s Claim to One of Odyssey’s Shipwreck Cases Dismissed (Apr. 3, 2008), <http://shipwreck.net/pr162.php> [hereinafter Press Release III].

²⁵⁷ OME I, *supra* note 235, at 1131.

²⁵⁸ Forrest, *supra* note 8, at 352; *see also* OME I, *supra* note 235 at 1133; Curfman, *supra* note 16, at 186; Richmond, *supra* note 11, at 166.

²⁵⁹ Forrest, *supra* note 8, at 352 (quoting “Black Swan” *Project Overview*, ODYSSEY MARINE EXPLORATION, <http://shipwreck.net/blackswan.php>).

²⁶⁰ OME I, *supra* note 235, at 1131; OME II, *supra* note 235, at 1166.

²⁶¹ *See* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-11 (2006); FED.R.CIV.P. 12(b)(1); Treaty of Friendship and General Relations Between the United States of America and Spain, U.S.-Spain, Art. X, July 1902, 33 Stat. 2105 (“[i]n all cases of shipwrecks... each party shall afford to the vessel 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.”).

²⁶² OME I, *supra* note 235, at 1131; *see generally* OME II, *supra* note 235, at 1166-68.

²⁶³ OME I, *supra* note 235, at 1130; *see, OME II*, 657 F.3d at 1166 & 1167-68;

heritage is for the benefit of all mankind.²⁶⁴ Consequently, Spain denied OME permission to excavate and salvage the *Mercedes*.²⁶⁵

The Republic of Peru filed a conditional claim, suggesting that it may have an interest in the coins recovered from the *Mercedes*.²⁶⁶ Peru did not exist as a sovereign in 1804, but asserts a right to “all of its property and patrimony, namely that specie minted in or produced from ore extracted from Peruvian territory.”²⁶⁷

On June 3, 2009, Magistrate Judge Pizzo issued his Report and Recommended Order.²⁶⁸ Agreeing with Spain’s position and recommending dismissal, the court concluded the *res* at issue is the *Mercedes*, which qualifies for sovereign immunity; as such, the District Court is without subject matter jurisdiction to adjudicate the claims, and that the coins should be turned over to Spain.²⁶⁹ In response to this recommendation, OME, the Republic of Peru, and descendants of the merchants owning cargo aboard the *Mercedes* filed objections.²⁷⁰

The objecting parties asserted two main objections. First, they asserted there was not enough definitive proof to establish the *Black Swan* site was the *Mercedes*.²⁷¹ Second, even if the site was the

²⁶⁴ Cheng, *supra* note 13, at 700.

²⁶⁵ OME I, *supra* note 235, at 1130 (OME sought Spain’s permission to excavate the site in November 2006, but failed Spain to give Odyssey explicit approval) *Id.* at n.2 (additionally, the meeting put OME “on notice that Spain have not abandoned its sovereignty of the *Mercedes* nor given express approval of Odyssey’s commercial venture into Spanish shipwrecks”).

²⁶⁶ OME I, *supra* note 235, at 1131; *see also* “Black Swan” Project Overview, ODYSSEY MARINE EXPLORATION, <http://www.shipwreck.net/blackswan.php> (last visited Nov. 12, 2011).

²⁶⁷ OME I, *supra* note 235, at 1131.

²⁶⁸ *Id.* at 1130.

²⁶⁹ OME I, *supra* note 235, at 1126, 1148.

²⁷⁰ OME II, 657 F.3d at 1168; *accord* Plaintiff Odyssey Objections to Magistrate Judge’s June 3, 2009 Report and Recommendations, Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel, No. 8:07-cv-614-T-23MAP (oral argument requested July 21, 2009), http://www.shipwreck.net/pdf/dkt230OdysseyObjectionstoRandR_000.pdf (last visited Nov. 11, 2011); Press Release I, *supra* note 235; Richmond, *supra* note 11, at 113-14.

²⁷¹ Plaintiff Odyssey Marine Exploration, Inc.’s Objections to Magistrate Judge’s June 3, 2009 Report and Recommendation at 31, Odyssey Marine Exploration, Inc.

Mercedes, there is evidence that at the time of its demise, the ship was being used mainly for commercial purposes and carrying commercial cargo.²⁷² This, they argue, would preclude Spain from asserting that the warship has sovereign immunity.²⁷³

On December 22, 2009, Judge Merryday for the District Court adopted the Magistrate's Report and Recommendations, agreeing that the court lacked subject matter jurisdiction, granting Spain's Motion to Dismiss.²⁷⁴ However, Judge Merryday stayed the order returning the coins to Spain until the 11th Circuit Court of Appeals could hear the case.²⁷⁵ On May 24, 2011 the parties presented oral arguments and on September 21, 2011, a three-judge panel for the Court of Appeals affirmed the District Court's dismissal of the case for lack of jurisdiction.²⁷⁶ As of September 21, 2011, OME has stated it will request an *en banc* hearing before all the Court of Appeals judges, claiming the ruling by the panel to be contrary to "other Eleventh Circuit opinions and rulings by the United States Supreme Court."²⁷⁷

v. Unidentified, Shipwrecked Vessel, No. 8:07-CV-614-T-23MAP (oral argument requested July 21, 2009); Richmond, *supra* note 11, at 113-114; *see* Press Release I, *supra* note 235.

²⁷² Plaintiff Odyssey Marine Exploration, Inc.'s Objections to Magistrate Judge's June 3, 2009 Report and Recommendation at 14, Odyssey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel, No. 8:07-CV-614-T-23MAP (oral argument requested July 21, 2009); Richmond, *supra* note 11, at 113-114; *see* Press Release I, *supra* note 235.

²⁷³ Plaintiff Odyssey Marine Exploration, Inc.'s Objections to Magistrate Judge's June 3, 2009 Report and Recommendation at 30, Odyssey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel, No. 8:07-CV-614-T-23MAP (oral argument requested July 21, 2009); Richmond, *supra* note 11, at 113-114; *see* Press Release I, *supra* note 235.

²⁷⁴ OME I, *supra* note 235, at 1126, 1128-30; OME II, *supra* note 235, at 1168; Cheng *supra* note 13, at 701.

²⁷⁵ *See* OME II, *supra* note 235, at 1168; Cheng, *supra* note 13, at 701; Press Release, Odyssey Marine Exploration, "Black Swan" Case Moves to Federal Court: Judge Rules Recovered Coins to Remain in Odyssey Custody through Appeal (Dec. 23, 2009), <http://shipwreck.net/pr194.php>.

²⁷⁶ *See* OME II, *supra* note 235, at 1168; "Black Swan" Project Overview, *supra* note 266.

²⁷⁷ Press Release, Odyssey Marine Exploration, Odyssey to Request En Banc Hearing in "Black Swan" Case to Address Contradictions in Eleventh Circuit's Ruling (Sept. 21, 2011), <http://www.shipwreck.net/pr231.php>.

To this day, the status of the treasure recovered from the *Black Swan* site remains in limbo. While the U.S. courts may have ruled on the case, a resolution regarding the disposition of the treasure is far from settled. Spain, Peru, and the descendants of the merchants with cargo aboard the vessel still have competing claims yet to be resolved. This case highlights the heavy time and monetary investments needed when the rights to a historic shipwreck are litigated under the current legal regime in U.S. courts; uncertainties about the Black Swan's artifacts remain.

B. *HMS Sussex*

In 2001, OME located a wreck (believed to be the *HMS Sussex*) in international waters off the coast of Gibraltar.²⁷⁸ In the year that followed, OME would enter into the "Sussex Agreement," a cooperative archeological excavation agreement that was the first of its kind.²⁷⁹

The *HMS Sussex* was a 157 foot-long, 80-gun, and 500-man English warship that was lost in 1694 to a severe storm in the western Mediterranean.²⁸⁰ According to documentary research, the *HMS Sussex* was launched on April 11, 1693 from the Chatham Dockyard to become the seventh of a total of thirteen ships in a special naval fleet working against French expansionism under the aggressive Sun King, Louis XIV.²⁸¹

A pivotal figure in the strategy was Victor Amadeus,
the Duke of Savoy, and an ally of England, Holland,

²⁷⁸ Forrest, *supra* note 8, at 351; *HMS Sussex Project Overview*, ODYSSEY MARINE EXPLORATION, <http://www.shipwreck.net/hmssussex.php> (last visited Mar. 14, 2012).

²⁷⁹ Neil, *supra* note 3, at 917, *HMS Sussex Project Overview*, *supra* note 278.

²⁸⁰ *HMS Sussex Project Overview*, *supra* note 278; *HMS Sussex Historical Overview*, Odyssey Marine Exploration, <http://www.shipwreck.net/hmssussexhistoryoverview.php>; Broad, *infra* note 288, at 1 (the *Sussex* was British warship with 80 guns and 500 men); Forrest, *supra* note 8, at 351 (explaining that the *HMS Sussex* was an eighty-gun warship that sank in 1694 during a violent storm); Neil, *supra* note 3, at 917 (indicating that the *HMS Sussex* sank in 1694 due to a violent storm).

²⁸¹ *HMS Sussex Historical Overview*, *supra* note 280.

Spain and others in the War of the League of Augsburg. Savoy's entry in the war threatened France with the risk of attack through a poorly defended area. When France offered a generous payment to persuade the Duke of Savoy to switch sides – 3,000,000 “in money,” and six tons of gold – the English hurried to deliver a large fortune to counter France's bribe. Historical records suggest that a ship of money equal to a million pounds sterling was destined for Savoy, shipped aboard *HMS Sussex*.²⁸²

In December of 1693, the *HMS Sussex* and its fleet sailed for the Mediterranean, carrying a secret bribe for Savoy's loyalty.²⁸³ As the fleet cleared the Gibraltar bay, a vicious storm blew in off the coast of Africa.²⁸⁴ On February 19th, 1694, defenseless on the open sea, the *HMS Sussex* and twelve other ships relinquished to the storm's fury and sank.²⁸⁵ In total, 1200 men lost their lives, and all but two of the 600 men aboard the *HMS Sussex* perished.²⁸⁶ In addition, the secret bribe never made it to the Duke of Savoy.²⁸⁷ Some historians assert the loss of the *Sussex's* payment sent the Duke of Savoy into partnership with the French faction, “altering the war's outcome as well as a swath of European and American history.”²⁸⁸ Others have stressed that:

[t]he discovery could rank as one of the most important from the sea. If plans proceed for an excavation of the site, archival and field research by explorers suggests, the remains of the *Sussex* could

²⁸² *Id.*

²⁸³ *Id.*; Broad, *infra* note 288, at 1.

²⁸⁴ *HMS Sussex Historical Overview*, *supra* note 280.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ William J. Broad, ‘Eureka!’ Off Gibraltar: A Trove from 1694?, N.Y. TIMES, Feb. 24, 2002, <http://www.nytimes.com/2002/02/24/world/eureka-off-gibraltar-a-trove-from-1694.html>.

yield the richest treasure wreck of modern times and illuminate a lost chapter in world history.²⁸⁹

Since 1995, the OME had been actively searching for the *HMS Sussex*.²⁹⁰ The search began with a simple 1694 letter written by the French consul at Livorno, Italy describing the *HMS Sussex* tragedy and its valuable cargo.²⁹¹ Further historical records collaborated that the *HMS Sussex* was carrying a substantial amount of gold and silver coins when she sank; estimated to be worth as much as \$4 billion today.²⁹² Following the 1694 letter and the line of historical records that followed, OME conducted expeditions between 1998 and 2001, covering 400 square miles of seabed in the western Mediterranean.²⁹³ During the search phase, side-scan and bathymetric surveys were utilized by OME to chart the ocean floor and determine likely targets.²⁹⁴ In addition, aquatic robots were sent down to investigate the sites.²⁹⁵

The site believed to be the *HMS Sussex* was discovered 3000 feet below the Atlantic Ocean; east of the Straights of Gibraltar.²⁹⁶ Once it established the wreck to be the *HMS Sussex*, OME quickly began talks with United Kingdom; in September 2002, OME entered into the Sussex Agreement: a groundbreaking cooperative

²⁸⁹ *Id.*

²⁹⁰ Neil, *supra* note 3, at 917.

²⁹¹ *HMS Sussex Operational Overview*, MARINE ODYSSEY EXPLORATION, <http://www.shipwreck.net/hmssussexoperationaloverview.php> (last visited Mar. 5, 2012).

²⁹² Neil, *supra* note 3, at 917 (the gold and silver coins are estimated to be worth as much as \$4billion today); see Broad, *supra* note 288; see also *HMS Sussex Historical Overview*, *supra* note 280.

²⁹³ *HMS Sussex Operational Overview*, *supra* note 291.

²⁹⁴ *Id.*

²⁹⁵ Broad, *supra* note 288, at 1.

²⁹⁶ *HMS Sussex Operational Overview*, *supra* note 291 (“The distribution of clustered cannon suggests that the site is a coherent shipwreck lying in one continuous area. However, the site’s archaeological integrity has been disturbed by intrusive modern contamination. Bags of trash are scattered over some parts of the site and are partially buried alongside shipwreck materials. A long section of modern steel wire cable passes under and over one side of the visible wreck mound. Clothing, including a stray sock, has been found molded within the concretions on and around the cannon.”).

partnership agreement with the owner of the *HMS Sussex* and the government of the United Kingdom and Northern Ireland, known as Her Majesty's Government ("HMG").²⁹⁷ The Sussex Agreement was innovative in that it "could prove successful in balancing the interests of the commercial salvage industry, the concerns of the archaeological community, and the cultural interests of the world community."²⁹⁸ Although the exact details of the agreement are confidential, a Partnering Agreement Memorandum explains the key components.²⁹⁹

First, OME was required to submit an excavation "Project Plan" to HMG, which detailed "the equipment, personnel, and methodologies to be employed in the exploration [of the *HMS Sussex*]...and the conservation and documentation of any artefacts [sic] that may be retrieved."³⁰⁰ HMG then had forty-five days to comment on the Project Plan and one hundred to provide approval, or the Sussex Agreement would automatically terminate.³⁰¹ During this phase, OME was permitted and successfully completed a non-disturbance survey,³⁰² but agreed not to conduct any activities at the site until, and if, the Project Plan was approved.³⁰³

Currently, HMG has approved the Project Plan, and OME has completed a non-disturbance survey and is currently undertaking a trial excavation of the site.³⁰⁴ With the approval of the Project Plan provided, OME received security in the form of exclusive rights to excavation by HMG.³⁰⁵ The approval of the plan is important because

²⁹⁷ *HMS Sussex Project Overview*, *supra* note 278; Forrest, *supra* note 8, at 351; *see also* Neil, *supra* note 3, at 917;

²⁹⁸ Neil, *supra* note 3, at 917.

²⁹⁹ Partnering Agreement Memorandum Concerning the Shipwreck of the *HMS Sussex*, Between the Government of the United Kingdom of Great Britain & Northern Ireland & Odyssey Marine Exploration, Inc. (Sep. 27, 2002), <http://www.shipwreck.net/pam/> [hereinafter *Sussex Agreement*]; *see also* Neil, *supra* note 3, at 917.

³⁰⁰ *Sussex Agreement*, *supra* note 299.

³⁰¹ *Id.*; *see also* Neil, *supra* note 3, at 917 (stating that the Sussex Agreement would automatically terminate if the plan was not approved in the required time frame).

³⁰² *HMS Sussex Project Overview*, *supra* note 278; *Sussex Agreement*, *supra* note 299.

³⁰³ *Sussex Agreement*, *supra* note 299.

³⁰⁴ *HMS Sussex Project Overview*, *supra* note 278.

³⁰⁵ *Sussex Agreement*, *supra* note 299.

it ensures that the exploration and discovery of the *HMS Sussex* is done in a respectful manner for those sailors who lost their lives aboard the ship. In addition, it also ensures that objects of national cultural heritage are excavated in a manner that allows scientists to learn from them and properly preserve them. The Project Plan provides OME the benefit of security of its interest in the excavation of the site, against other potential treasure hunters.

The Sussex Agreement also provided a detailed outline of the financial obligations for both parties. OME was required to pay MHG: a non-refundable licensing fee; an expense deposit of £250,000 “in the event the exploration does not ‘provide sufficient revenue to pay the Government’s expenses relating to the [Sussex] Agreement;” and a conservation deposit of \$100,000 to “assure the Government that fund are available for the conservation and documentation of any artifacts retrieved from the site.”³⁰⁶ Additionally, OME took on responsibility for all expenses, including financing expenses, related to the project.³⁰⁷ Importantly, OME and HMG agreed to a profit sharing arrangement by which the parties would split the profits of recovered artifacts based on their selling price or appraised value.³⁰⁸ If the value of the artifacts recovered were worth \$45 million or less, MHG would receive 20% of the profits and OME 80%; if the value of the artifacts were worth between \$45 million and \$500 million, HMG and OME would each receive 50% of the profits; if the value of the artifacts were above \$500 million, HMG would receive 60% of the profits and OME 40%.³⁰⁹

The Sussex Agreement provides that at all times, HMG shall be considered the owner of the shipwreck and possess the power to appoint two representatives “to monitor and record the exploration to determine whether the activities are being carried out in compliance with the project plan.”³¹⁰ The project plan and the involvement of archeologists, HMG representatives, and adherence

³⁰⁶ Neil, *supra* note 3, at 917-18; *Sussex Agreement*, *supra* note 299.

³⁰⁷ *Sussex Agreement*, *supra* note 299.

³⁰⁸ *Id.*; see also Neil *supra* note 3, at 918 (“OMEX and the government agreed to split the profits of any artifacts recovered based on their appraised value or selling price.”).

³⁰⁹ *Sussex Agreement*, *supra* note 299.

³¹⁰ *Id.*

to a strict excavation ethic is very important given the unique attributes of the site that make excavation difficult:

“[a]lthough divers have gone deeper to retrieve lost artifacts, miles in the case of the Titanic, those explorations were relatively easy and superficial compared with the difficulty of teasing out material and historical information from disheveled piles of decaying ship remains. At a half mile down, the excavation would be the deepest attempted in the annals of archaeology.”³¹¹

HMG has publicly emphasized the importance of the archeological aspects of the project and ensured that government employed-archaeologists will supervise the excavation.³¹²

Reaction by the archeological community was instantaneous and reproachful. The Council for British Archaeology accused HMG of entering into the venture to “lin[e] its own pockets and those of a foreign company” and charged the project as having “doubtful archeological feasibility.”³¹³ Others have claimed that HMG was forced into the agreement. This argument asserts that the government was:

[L]argely powerless to prevent the salvage, given the wreck lies in international waters, that the salvage vessel and the salvors were foreign entities, and that, once the artefacts [sic] were recovered from the site and landed in the United States, its federal admiralty law would govern the application of salvage law. Whilst the U.S. federal admiralty courts would most likely recognise [sic] the ownership of the U.K. government, the court would apply U.S. salvage law

³¹¹ Broad, *supra* note 288, at 1.

³¹² Neil, *supra* note 3, at 918; *see also* Sarah Dromgoole, *Murky Waters for Government Policy: The Case of a 17th Century British Warship and 10 Tonnes of Gold Coins*, 28 MARINE POL’Y 189, 192 (2004) (stating that the project “would be subject to...archaeological observers appointed by the government”).

³¹³ Dromgoole, *supra* note 312, at 191; Forrest, *supra* note 8, at 351.

to the recovery and award the salvor a large percentage of the finds...Whilst the U.K. government...might oppose the recovery operation, its decision will not necessarily be recognized by the court.³¹⁴

Despite being immediately despised by the archeological community and the precarious position of HMG, the Sussex Agreement is important and innovative because “it established a model that acknowledges the importance of cultural education, allows for proper supervision of government-employed archeologists, and upholds the commercial incentive of commercial salvage companies.”³¹⁵ The Sussex Agreement meets the needs of all interests groups, while avoiding the cost and delay that litigation would entail. HMG has realized, given the current international framework, “that the only way it could secure artifacts of cultural value for the benefit of its citizens was to contract with [OME].”³¹⁶ OME has the technology, the financial ability, and motivation to locate and excavate the *HMS Sussex*, while HMG was physically and financially unable.³¹⁷ Given that fact that the *HMS Sussex* is located in international waters, HMG has no ability to stop OME or any other salvage company from pursuing the sunken vessel. Conversely, OME realized that involving and negotiating with HMG from the very start was the best way to reach its objectives of retrieving artifacts and earn a return on its time and effort.³¹⁸ Through working with HMG, OME was able to avoid the lengthy and costly litigation necessary to establish its salvage rights in the U.S. court system.³¹⁹ Additionally, the Sussex Agreement ensured the retrieval of historically and culturally important artifacts in a way that complied with archeological standards, so that society as a whole could learn from them.³²⁰

³¹⁴ Forrest, *supra* note 8, at 351.

³¹⁵ Neil, *supra* note 3, at 918.

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *See Id.*

³²⁰ *Id.* at 903.

C. Collaborative Approach

We must look at the competing interests affected by the disposition of a historic shipwreck and its archeological artifacts in order to fashion an optional resolution that best meets the needs of everyone. As discussed above, the potential interests involved when dealing with a wrecked vessel include those from sovereign nations (or individual owners, if any), the archeological community, commercial salvage corporations, and the public at large. The solution to this quandary lies in “properly marrying commercial incentives to invest vast amounts of money, time, and technology in the search for and the recovery of the sunken past, with a commitment to quality nautical archaeology.”³²¹ A collaborative model, based on cooperation and bilateral agreements (such as the Sussex Agreement), between the locator of historic shipwrecks and the wreck’s country of origin, best serves all interests and resolves many of the flaws in the current legal framework.³²² Such a model would promote a working partnership between private commercial salvage companies, the archeological community, government regulators, and managers of cultural heritage.³²³ A bilateral agreement would have several advantages over the current structure.

First, such an agreement would avoid the woes of the judicial system and allow the parties to control the outcome. Litigation entails heavy investments of time, money, and energy, while providing parties little-to-no certainty of the outcome.³²⁴ The process of preparing and going to court to resolve the disposition of a sunken vessel is likely to take years before the case is heard and appeals are decided; this is evidenced by the ongoing *Black Swan* saga.

³²¹ Bederman, *Historic Salvage*, *supra* note 61, at 129.

³²² Neil, *supra* note 3, at 921.

³²³ *Id.*, at 919; *see* Bederman, *Historic Salvage*, *supra* note 61, at 205 (noting that “what remains to be done is to create a working partnership between private commercial salvors, the nautical archaeology community, and government cultural heritage regulators and managers”); Greene et al., *supra* note 39, at 313 (“The active and responsible collaboration between scientists, archaeologists, and representatives from coastal states forms a positive model for approaches to deepwater wrecks beyond national boundaries.”).

³²⁴ Neil, *supra* note 3, at 919; Curfman, *supra* note 16, at 183.

Furthermore, protracted litigation is likely to cost parties a small fortune in legal fees.³²⁵ In addition, parties are often at the court's will as to what legal standards will be applied, or what legal fictions will be stretched to support the court's ultimate determination. It is a bad investment for commercial salvors to spend years searching for a sunken vessel without knowing the law to be applied by the court.³²⁶ Ultimately, whatever the outcome, the court's decision will be forced upon the parties. Uncertainty is likely to substantially increase the costs associated with litigation.

A collaborative agreement would avoid the ills associated with the judicial system. It would allow the parties to negotiate their demands and be the ultimate decider of the agreement.³²⁷ The parties would save time and money, since the negotiations in a collaborative agreement could be achieved much quicker than the vast length of time necessary for judicial deliberations.³²⁸ Importantly, the uncertainty that currently comes hand-in-hand with the judiciary would be eliminated – as the parties are empowered and become the ultimate decision makers.

Second, a collaborative agreement would evade the problems associated with the UCH Convention. The UCH Convention works to destroy the profit motives of commercial salvage companies, puts the burden on nations to invest the money necessary to research, locate, and explore historical vessels (without providing a funding source), and thereby eviscerates the ability of the world community to locate, protect, preserve, and learn about historic shipwrecks.³²⁹ As stated earlier, this profit motive is essential to the survival of the salvage industry and the continued search for sunken vessels: with less competition, there would be less of a demand for new technology,

³²⁵ See Curfman, *supra* note 16, at 183.

³²⁶ Neil, *supra* note 3, at 919.

³²⁷ See *Id.* (stating that a bilateral agreement allows both parties to negotiate for their respective desired results”).

³²⁸ See *Id.* (arguing that “the uncertainty of litigation leads to a substantial increase in legal fees that could be avoided by...bilateral negotiations...allow[ing] both parties to avoid the lengthy deliberation period required...”).

³²⁹ *Id.*

and fewer wrecks would be discovered.³³⁰ These undiscovered wrecks are in danger of being destroyed and lost forever.³³¹

A collaborative model between willing salvors and nations of origin would lead to an increased competition among salvors fighting for exclusive salvage agreements with governments, resulting in an increased number of salvors engaged in locating sunken vessels, an increase in the technological boom, and the necessity for salvors to engage in more efficient means of locating and recovering underwater cultural artifacts.³³² Additionally, increased competition among salvors would correlate to governments being able to demand a high financial return, as well as higher archeological standards in the recovery of artifacts. Once agreements are worked out, international regulators of underwater cultural heritage would no longer need to be involved, allowing the process to work without undue regulatory interference.³³³

Third, a collaborative agreement would escape the current problems associated with the lack of oversight, absence of uniform salvage techniques and standards, and the need for the participation of the archeological community. Currently, a ship found in international waters is not subject to any specific uniform standard of law or salvage standard. Under the salvage laws applied by the U.S. courts, no standard is required for the consideration of the archeological value of artifacts recovered.³³⁴ Nations do not have the

³³⁰ See *Id.* at 907 (stating that “profit incentive[] motivating these companies has caused a technological boom in the salvage industry and is responsible for locating more wrecks than ever before”); see Bryant, *supra* note 68, at 106 (stating that “the monetary value of many historic shipwrecks and the availability of new technology has drawn an increasing number of salvors into the salvage industry”); see Cheng, *supra* note 13, at 698 (noting that “recent development[] of advanced deep-sea sonar and magnetometer technology has made feasible the discovery of forgotten wrecks...”).

³³¹ See Neil, *supra* note 3, at 907 (noting that “[m]ore salvors searching for wrecks could mean more destruction of cultural artifacts”); see Bryant, *supra* note 68, at 106 (stating “the monetary value of many historic shipwrecks and the availability of new technology has drawn an increasing number of salvors into the salvage industry.”).

³³² Neil, *supra* note 3, at 919-20.

³³³ Bederman, *Historic Salvage*, *supra* note 61, at 205.

³³⁴ To establish a claim under the law of finds, a finder must prove: (1) intent to reduce the property to his possession, (2) actual or constructive possession, and (3) the property is either un-owned or abandoned, for a claim to be brought. See, Cheng,

power of oversight regarding exploration and recovery techniques. Additionally, the archeological community is only involved at the will of salvage companies, such as OME.

A collaborative agreement would work to solve these issues; such an agreement would provide adequate protection for ships because governments would have the power to approve the salvage techniques used and could require the collaboration of archeologists.³³⁵ A prime example of this is the Sussex Agreement. Additionally, through this oversight mechanism, governments could require peer-review between salvors, instilling a code-of-ethics³³⁶ among salvors and essentially, crafting industry standards.³³⁷ By evaluating such peer-reviewed reports of past salvage exploration, governments are better able to choose the more archeologically driven salvage companies in the future.

In conclusion, a collaborative model that provides for a bilateral agreement between potential salvors and nations of origin, taking all competing interest into account, best provides protection for our underwater cultural heritage. This model will provide a system that incentivizes private corporations to find and salvage artifacts for the benefit of all mankind. Instead of viewing profit motives as evil, it embraces the economic needs of the salvage industry, recognizing the difficulty in locating ships, and the financial and technological inability of nations to perform this task themselves.

supra note 13, at 710; *see also Wrecked & Abandoned Vessel*, 435 F.3d at 532. There is no requirement to consider archeological standards. Further, for the law of salvage, a salvor must prove: (1) voluntary effort, rendered when not under an existing duty or contract; (2) marine peril or danger from which the vessel is salvaged; and (3) some degree of success in whole or part, for a claim to be brought. *See*, Cheng, *supra* note 13, at 709-10; Wright, *supra* note 4, at 303; Richmond, *supra* note 11, at 139. There is no requirement that archeological standards be considered.

³³⁵ Neil, *supra* note 3, at 920.

³³⁶ *See* Bederman, *Maritime Preservation Law*, *supra* note 218, at 205 (arguing that a code of conduct for salvors could be created “using most, if not all, of the annexed Rules for the UNESCO-[Convention on the Protection of Underwater Cultural Heritage]”).

³³⁷ *See* Bederman, *Maritime Preservation Law*, *supra* note 218, at 205 (arguing that to achieve beneficial relationships between salvors and archeologists, “associations of professional archeologists [must] cease their illegal and discriminatory policy of excommunicating members who cooperate or work with commercial salvors”).

Additionally, it upholds the needs for active participation by the marine archeological community and seeks to maximize the cultural education of the general public. A collaborative model is far superior to the law of salvage and finds and the UCH Convention. This model, therefore, provides the best outcome by meeting the needs of each interest group in a practical way.