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## Sifting Through the Wreckage: An Analysis and Proposed Resolution Concerning the Disposition of Historic Shipwrecks Located in International Waters

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Sifting Through the Wreckage:  
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## I. INTRODUCTION

Far beneath the waves of the world's oceans is an expansive necropolis home to approximately three million shipwrecks.<sup>1</sup> Technological advancements in deep water exploration and salvage have allowed commercial salvage companies and underwater archaeologists alike to locate and salvage ships previously thought to be permanent residents of Davy Jones's locker. For the past thirty years this advent of technology has spurred the establishment of a legal regime designed to provide guidelines and procedures for the protection and salvage of these historic wrecks. However, ambiguity surrounding the legal status of historic wrecks, especially those discovered in international waters, has encumbered the efforts of all parties concerned with the disposition of both the wrecks themselves and their cargo. Consider the tale of the *Nau Chagas*, a sixteenth-century Portuguese merchant ship.

On June 22, 1594, the *Nau Chagas* was returning to Portugal from India when it encountered three British warships near the Faial Islands in the middle of the Atlantic Ocean.<sup>2</sup> The *Nau Chagas* was carrying trade goods from India and a large cargo of diamonds and other precious gems.<sup>3</sup> The British ships intercepted the outmanned and outgunned *Nau Chagas*, and a bloodstained battle ensued, lasting for over twenty-four hours.<sup>4</sup> According to the only eyewitness account available, written by Melchior do Estacio do Amaral in 1604, "[t]he sea was purple with blood dripping from the scuppers, the decks cluttered with the dead and the fire raging in some parts of the ships, and the air so filled with smoke that, not only we could sometimes not see each other but we could not recognize each other."<sup>5</sup> Eventually, the fire that broke out on the *Nau Chagas* found its way to the gunpowder room and the ship exploded in a tremendous ball of fire. The remains of the ship and its precious cargo of diamonds and gems sank into oblivion over one mile deep into the Atlantic ocean.<sup>6</sup>

Estimates of the ship's location suggest that it lies approximately 1000 miles off the coast of Portugal.<sup>7</sup> At the time of its demise, the *Nau Chagas* was privately owned by a Portuguese merchant company that has likely been defunct for hundreds of

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1. Ulrike Guérin & Katrin Köller, *Of Shipwrecks, Lost Worlds and Grave Robbers*, A WORLD OF SCI., Apr.–June 2009, at 19, 22.
  2. Paulo Monteiro, *The Nau Chagas*, CENTRO DE NACIONAL DE ARQUEOLOGIA SUBAQUÁTICA NOS AÇORES, [http://www.abc.se/~pa/publ/nau\\_chag.htm](http://www.abc.se/~pa/publ/nau_chag.htm) (last updated Dec. 1999) (summarizing and translating Melchior do Estacio do Amaral, *Tratado* (1604), available at <http://purl.pt/12295/2>) (last visited Jan. 9, 2011)).
  3. Monteiro, *supra* note 2.
  4. *Id.* It is reported that the *Nau Chagas* had 400 passengers and crewmembers on board, of which 230 were slaves. By the time the ship encountered the British, many had died and all had become weak due to a lack of food and outbreaks of scurvy and malaria. In the end, less than 70 Portuguese killed over 150 British soldiers. Only 13 Portuguese were saved from the wreck. *Id.*
  5. *Id.*
  6. *See id.*
  7. *Id.* The ship encountered the British near the Faial Islands, which are approximately 1000 miles off the coast of Portugal. *Id.*

years.<sup>8</sup> In the 400 years since its fateful voyage, memories of the ship and the lives lost have faded, but stories of the ship's bounty of diamonds and gems live on.<sup>9</sup> Numerous legal questions pervasively shroud the future of the ship in uncertainty: If the *Nau Chagas* were located today, who would be its rightful owner? Would the ship's discoverer be entitled to a finder's fee? Would the salvor of the ship's precious remains gain title to the remains or be able to legally dispose of them at will? Could Portugal, the ship's country of origin, claim title over the ship and its remains?

These questions cannot be answered easily. Presently, courts, international bodies, commercial salvage companies, and state governments apply a patchwork of legal principles to resolve disputes over the legal status of shipwrecks located in international waters. In the past thirty years, U.S. courts have presided over a number of disputes regarding shipwrecks located by commercial salvage companies worldwide.<sup>10</sup>

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8. The fact that the *Nau Chagas* was privately owned is of significant importance. The United States and many foreign nations consider state-owned vessels, such as warships, immune from the application of the law of finds, salvage law, or claims of any other nation. *See, e.g.*, Geneva Convention on the High Seas art. 8, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 11 ("Warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State."); Sunken Military Craft Act, Pub. L. No. 108-375, § 1406, 118 Stat. 2094 (2004) ("The law of finds shall not apply to . . . any foreign sunken military craft located in United States waters; and [n]o salvage rights or awards shall be granted with respect to . . . any foreign sunken military craft located in United States waters without the express permission of the relevant foreign state.").
  9. *See, e.g.*, K. M. MATHEW, HISTORY OF THE PORTUGUESE NAVIGATION IN INDIA, 1497-1600, at 272 (1988); C. R. BOXER, THE PORTUGUESE SEABORNE EMPIRE 1415-1825 (1st ed. 1969); JAMES DUFFY, SHIPWRECK & EMPIRE, BEING AN ACCOUNT OF PORTUGUESE MARITIME DISASTERS IN A CENTURY OF DECLINE (1955); Monteiro, *supra* note 2; *Treasure Shipwrecks Around the World*, TREASURELORE.COM, [http://www.treasurelore.com/florida/treasure\\_ships.htm](http://www.treasurelore.com/florida/treasure_ships.htm) (last visited Mar. 14, 2011).
  10. *See, e.g.*, California v. Deep Sea Research, 523 U.S. 491 (1998) (holding that the Eleventh Amendment does not bar federal jurisdiction to adjudicate claims pertaining to shipwrecked vessels in state territory that are no longer in the possession of foreign nations); R.M.S. Titanic, Inc. v. The Wrecked & Abandoned Vessel, 435 F.3d 521, 524 (4th Cir. 2006) ("In remanding this case to the district court, we also recognize explicitly the appropriateness of applying maritime salvage law to historic wrecks such as the *Titanic*."); Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels, 221 F.3d 634 (4th Cir. 2000) (awarding ownership rights of two Spanish warships located off the coast of Virginia to Spain through the Abandoned Shipwreck Act (ASA)); Int'l Aircraft Recover, L.L.C. v. The Unidentified, Wrecked & Abandoned Aircraft, 218 F.3d 1255 (11th Cir. 2000) (holding that the United States, as owner of the sunken aircraft located in international waters, could prohibit salvage efforts, and salvage company had no right to continue salvage operations over the express objections of the plane's owner); R.M.S. Titanic, Inc. v. The Wrecked & Abandoned Vessel, 171 F.3d 943 (4th Cir. 1999) (holding that the district court properly awarded salvage rights to a shipwreck located outside U. S. territorial waters); Treasure Salvors, Inc. v. The Unidentified Wrecked & Abandoned Sailing Vessel, 640 F.2d 560, 566 (5th Cir. 1981) ("[T]he absence of the res from the territorial jurisdiction of the court was not fatal to jurisdiction to adjudicate a controversy where the contending parties consented to the court's jurisdiction over their interest in the absent res . . . . The subject matter jurisdiction granted by this statute [28 U.S.C.A. § 1333] is not limited to causes of action arising from events or occurrences on the territorial waters of the United States."); Odyssey Marine Exploration, Inc. v. The Unidentified Shipwrecked Vessel, No. 8:07-CV-614-SDM-MAP, 2009 U.S. Dist. LEXIS 119088 (M.D. Fla. 2009) (recommending dismissal of an admiralty claim by Odyssey Marine Exploration (OMEX) over a ship believed to be a Spanish vessel afforded sovereign immunity); Martha's Vineyard Scuba Headquarters, Inc. v. The Wrecked & Abandoned Steam Vessel R.M.S. Republic, No. Civ.A. 00-11565-NG, 2005 WL 3783838, at \*4 (D. Mass. 2005) (applying salvage law allowed court to exercise in rem jurisdiction over a wreck

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Specifically, these courts have been asked to determine either who the rightful owner of a shipwreck is or whether the finder and/or salvor of a shipwreck is entitled to money for the effort expended in locating and salvaging the wreck. These questions are difficult enough to answer when the subject shipwreck is located domestically, within the sovereign territory of a state.<sup>11</sup> However, when the shipwreck is located in international waters, hundreds or thousands of miles away from the sovereign shores of any nation, the question of the legal status of the wreck requires the difficult task of applying numerous theories of domestic law intertwined with a fragmented series of international legal principles in order to solve.

This article seeks to add clarity to the confusion surrounding the legal status of historic wrecks located in international waters. This issue is particularly ripe for analysis and resolution based on a view of international law that considers more than just a body of rules when determining the legality of a specific action.<sup>12</sup> Alternate

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located roughly fifty miles south of Nantucket) (“[A] clear pattern over the past twenty years has emerged in which federal courts have exercised in rem jurisdiction over the remains of shipwrecks located outside their district’s geographic boundaries.”); *Marex Int’l, Inc. v. The Unidentified, Wrecked & Abandoned Vessel*, 952 F. Supp. 825, 828 (S.D. Ga. 1997) (“Claims . . . arising out of salvage operations in international waters . . . are within the admiralty jurisdiction of the federal courts by virtue of an exception to the traditional res requirement, which allows a court to assert *quasi in rem* jurisdiction over a shipwreck upon which salvage operations are being performed.”).

11. See, e.g., *Great Lakes Exploration Grp. v. Unidentified Wrecked & (for Salvage-Right Purposes), Abandoned Sailing Vessel*, 522 F.3d 682 (6th Cir. 2008) (admiralty action seeking to arrest ancient sailing vessel that sank in Lake Michigan during the 1600s); *Fairport Int’l. Exploration, Inc. v. The Shipwrecked Vessel, Known as “The Captain Lawrence,”* 245 F.3d 857 (6th Cir. 2001) (admiralty in rem action was brought to establish the right to salvage a shipwrecked vessel, which sank in Lake Michigan in 1933); *Yukon Recovery, L.L.C. v. Certain Abandoned Prop.*, 205 F.3d 1189 (9th Cir. 2000) (“[C]ontest for salvage rights to gold cargo in a shipwreck lying for a century on the bottom of the inland passage near Juneau.”); *Sindia Expedition, Inc. v. Wrecked & Abandoned Vessel, Known as “The Sindia,”* 895 F.2d 116 (3d Cir. 1990) (salvage claim brought with respect to a British ship that sank within eyesight of Ocean City, New Jersey); *Smith v. The Abandoned Vessel*, 610 F. Supp. 2d 739 (S.D. Tex. 2009) (claimant brought in rem action in admiralty, seeking title, under the law of finds, to a vessel allegedly lost near a small lake in Texas); *Fathom Exploration, L.L.C. v. The Unidentified Shipwrecked Vessel or Vessels*, 352 F. Supp. 2d 1218 (S.D. Ala. 2005) (salvage claim to a ship alleged to be located in the territorial waters of Alabama); *Ehorn v. The Abandoned Shipwreck known as the Rosinco*, 301 F. Supp. 2d 861 (E.D. Wis. 2002) (salvage claim to a ship located in Lake Michigan twelve miles off the coast of Wisconsin); *Sunken Treasure, Inc. v. Unidentified, Wrecked & Abandoned Vessel*, 857 F. Supp. 1129 (V.I. 1994) (salvage claim to a ship located in the territorial waters of the United States, three miles off the coast of St. Croix); *Lathrop v. Unidentified, Wrecked & Abandoned Vessel*, 817 F. Supp. 953 (M.D. Fla. 1993) (salvage claim brought with respect to a ship submerged in the Cape Canaveral National Seashore).
12. See W. Michael Reisman, *The View From the New Haven School of International Law*, 86 AM. SOC’Y INT’L L. PROC. 118, 121–22 (1992) [hereinafter Reisman, *New Haven Sch. of Int’l Law*] (“Conventional legal analyses and jurisprudences that conceive of law as a body of rules look only at a limited number of texts, characterized as legal, and those social events, ‘facts,’ to which the rules direct attention . . . . The New Haven School has adapted . . . a scheme of cultural anthropology, in which any social process is described systematically in terms of those who engage in it (the participants), the subjective dimensions that animate them (their perspectives), the situations in which they interact, the resources upon which they draw, the ways they manipulate those resources and the aggregate outcomes of the process of interaction, which are conceived in terms of a comprehensive set of values.”).

means of resolution outside the auspices of judicial institutions provide far more advantageous methods with which to resolve disputes in this area.

Part II of this article briefly explains how U.S. courts have struggled to apply long established legal principles in an attempt to define the legal status of historic wrecks.<sup>13</sup> Additionally, it identifies the core values that exist amongst decision makers involved in disputes over the disposition of historic wrecks.<sup>14</sup> Exposure of the pertinent values of decision makers helps to explain why past practices are not sufficient and can help fashion preferable alternate means of resolution.

Part III introduces the United Nations Educational, Scientific, and Cultural Organization's (UNESCO) 2001 Convention on the Protection of Underwater Cultural Heritage (the "Convention").<sup>15</sup> At its core, the Convention seeks to provide individual states with a better way to protect their underwater cultural heritage (UCH)<sup>16</sup> and clarify the ambiguity surrounding the legal status of historic wrecks, while advancing UNESCO's core value of educating the world public.<sup>17</sup> However, the Convention insufficiently accommodates the policies that its proponents advance and is both overinclusive and underinclusive; it is too broad in scope and too narrow in application to successfully accomplish its goals.

Part IV highlights an alternative resolution to this pressing dilemma. Commercial salvage companies and the ship's country of origin should follow a cooperative model similar to the 2002 Partnering Agreement Concerning the Shipwreck of the *HMS Sussex* (the "Sussex Agreement") between the government of Great Britain and the salvage company, Odyssey Marine Exploration, Inc. (OMEX).<sup>18</sup> This model lessens the affirmative duty the Convention places on states to locate and protect their own UCH than that which is required under the Convention. In the alternative, it allows

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13. This article does not seek to provide an exhaustive account of the history of admiralty law applied to historic wrecks. For a detailed historic analysis, see Robert D. Peltz, *Salvaging Historic Wrecks*, 25 TUL. MAR. L.J. 1 (2000).

14. Decision makers are defined in the broadest sense as official and unofficial entities concerned with the outcome of a particular dispute that take formal and informal actions that directly influence the outcome. See, e.g., W. Michael Reisman, *The Manley O. Hudson Lecture: Why Regime Change is (Almost Always) a Bad Idea*, 98 AM. J. INT'L L. 516, 520 (2004) [hereinafter Reisman, *The Manley O. Hudson Lecture*]; Reisman, *New Haven Sch. of Int'l Law*, *supra* note 12, at 119.

15. See *infra* Part III.

16. UCH is a term created by the drafters of the Convention. Generally, under the Convention, UCH "encompasses all traces of human existence that lie or were lying under water and have a cultural or historical character." *Safeguarding the Underwater Cultural Heritage*, UNESCO, <http://www.unesco.org/new/en/unesco/themes/underwater-cultural-heritage/> (last visited Feb. 25, 2011).

17. *About the Convention on the Protection of the Underwater Cultural Heritage*, UNESCO, <http://www.unesco.org/new/en/unesco/themes/underwater-cultural-heritage/the-2001-convention/about/> (last visited Jan. 9, 2011); see also *Text of the 2001 Convention*, UNESCO, <http://www.unesco.org/new/en/unesco/themes/underwater-cultural-heritage/the-2001-convention/official-text/> (last visited Jan. 9, 2011).

18. 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. (Sept. 27, 2002) [hereinafter Partnering Agreement], available at <http://shipwreck.net/pam> (last visited Jan. 9, 2011).

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states to regulate both salvaging activities and the disposition of their cultural heritage, all while maximizing the chance that imperiled wrecks will be located. Further, by not requiring judicial institutions to stretch legal rules in order to resolve disputes, this model allows the parties directly involved to determine the law to be applied and therefore an ability to predict a potential outcome of a dispute. Such bilateral and multilateral agreements between commercial salvage companies and individual states provide concerned parties with the maximum ability to achieve their individual goals.

### II. ANALYSIS OF U.S. LAW AND EXPOSURE OF VALUE PREFERENCES

An analysis of contemporary disputes over historic wrecks reveals the value preferences of decision makers involved in such disputes. Decision makers in this area include national governments, archaeologists, commercial salvage companies, attorneys, domestic and international jurists, the media, and the international public. It is axiomatic that each of these parties when involved in a dispute over a historic wreck seeks to have its values upheld. In theory, one would expect legal principles to develop over time that are based upon the most prevalent value preferences. However, as an examination of disputes over historic wrecks shows, the legal regime in this area does not reinforce the predominant values of the parties involved. Conversely, the ambiguity caused by a shifting jurisprudence undermines the professed values of both sides of the dispute. As a result, what remains is a fragmented legal regime too narrowly focused on judicial intervention as the means for resolving disputes.

While there has been a history of wreck litigation in the United States since the beginning of the 1800s,<sup>19</sup> disputes lodged in U.S. courts increased in the 1980s and 1990s as more wrecks were being located.<sup>20</sup> This time period marked the beginning of a technological and scientific age where shipwrecks, thought to be lost forever, were being sought out and discovered. The innovation of such technologies as the Self Contained Underwater Breathing Apparatus (SCUBA), Global Positioning Satellites (GPS), and Underwater Remote Operated Vehicles (ROVs) led to an increase of commercial salvage companies whose goal was to locate and salvage historic, and hopefully profitable, wrecks. This proliferation of salvage activities, made possible by the new underwater technological boom, created unique economic,

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19. *See, e.g., The Mulhouse*, 17 F. Cas. 962 (S.D. Fla. 1859).

20. Wreck litigation in the 1800s and early 1900s focused primarily on the salvage of ships that were still seaworthy but damaged. *See, e.g., Lewis v. The Elizabeth & Jane*, 15 F. Cas. 478, 479 (D. Maine 1823) (ship abandoned on a reef and hauled into shore by another boat). Wreck litigation in the late 1900s more often concerned wrecks that were underwater. *See, e.g., Marex Int'l, Inc. v. The Unidentified, Wrecked & Abandoned Vessel*, 952 F. Supp. 825, 828 (S.D. Ga. 1997) (wreck underwater since 1840). It is evident that with approximately three million shipwrecks located under the ocean, there will always be more shipwrecks underwater than damaged but seaworthy vessels above water. Therefore, it is easy to understand the increase in wreck litigation in the 1980s and 1990s as wrecks located underwater were becoming increasingly more accessible.

political, and legal confrontations on a global scale.<sup>21</sup> As a result, commercial salvage companies, state governments, and private and public corporations became parties to legal disputes over wrecks and began to seek protection of their value preferences through litigation in the federal courts of the United States.<sup>22</sup>

Federal courts regularly apply principles of salvage law and the law of finds to resolve disputes over historic wrecks.<sup>23</sup> The law of finds generally conveys legal title to the finder of a historic wreck, whereas salvage law provides compensation to the salvor for salvaging the wreck but does not convey title.<sup>24</sup> Despite the pleas of many salvage companies, “[c]ourts in admiralty favor applying salvage law rather than the law of finds.”<sup>25</sup> Application of salvage law involves resolution of two legal issues, which rely on the assumptions of two legal fictions: (1) the theory of constructive in rem jurisdiction;<sup>26</sup> and (2) the principle that a sunken ship is in “marine peril.”<sup>27</sup>

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21. This time period was the first time national governments were recognizing ownership claims for shipwrecks and artifacts that originated in their country. Driven by cultural and economical concerns, national governments and commercial salvage companies began to clash, prompting national legislation and international regime modification. *See, e.g.*, Abandoned Shipwreck Act, 43 U.S.C. §§ 2101–2106 (2006).
  22. *See* James A. R. Nafziger, *The Evolving Role of Admiralty Courts in Litigation Related to Historic Wreck*, 44 HARV. INT’L L.J. 251, 251 (2003) (“A focus on U.S. courts is especially significant because of the country’s dominant role in salvage of historic wreck around the world.”).
  23. *See, e.g.*, Fla. Dep’t of State v. Treasure Salvors, Inc., 458 U.S. 670 (1982) (applying the law of finds); *Sindia Expedition, Inc. v. Wrecked & Abandoned Vessel*, 895 F.2d 116 (3d Cir. 1990) (salvage claim brought with respect to a British ship that sank within eyesight of Ocean City, New Jersey); *Sunken Treasure, Inc. v. Unidentified, Wrecked & Abandoned Vessel*, 857 F. Supp. 1129 (V.I. 1994) (salvage claim to a ship located in the territorial waters of the United States, three miles off the coast of St. Croix); *Lathrop v. Unidentified, Wrecked & Abandoned Vessel*, 817 F. Supp. 953 (M.D. Fla. 1993) (salvage claim brought with respect to a ship submerged in the Cape Canaveral National Seashore).
  24. *See* 2 THOMAS J. SCHOENBAUM, ADMIRALTY & MARITIME LAW § 16-7 (4th ed. 2009) (“The clear major premise of the law of salvage is that the property that is the object of the salvage act is owned by persons other than the salvor. The purpose and rules of the laws of salvage are designed to accord the salvor a right to compensation, not title . . . . The primary concern of the law of finds is title to the property. The finder can acquire title against all the world (except an owner who shows non-abandonment) by demonstrating the intent to acquire the property and possession (or a high degree of control).”).
  25. *Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co.*, 974 F.2d 450, 460 (4th Cir. 1992) (“The law of finds is disfavored in admiralty because of its aims, its assumptions, and its rules. The primary concern of the law of finds is title. The law of finds defines the circumstances under which a party may be said to have acquired title to ownerless property. Its application necessarily assumes that the property involved either was never owned or was abandoned. . . . Admiralty favors the law of salvage over the law of finds because salvage law’s aims, assumptions, and rules are more consonant with the needs of marine activity and because salvage law encourages less competitive and secretive forms of conduct than finds law.”) (quoting *Hener v. United States*, 525 F. Supp. 350, 356–58 (S.D.N.Y. 1981)).
  26. *See, e.g.*, *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 969–70 (4th Cir. 1999).
  27. While numerous legal fictions exist in the law as analytical tools to solve complex problems, legal fictions are susceptible to being increased in scope beyond their original contemplation. It has been argued that the fiction of marine peril has been used to analyze problems that are not within its original ambit. *See, e.g.*, *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th Cir. 1978) (holding that the common law doctrine of marine peril was superseded by

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These theories have produced unnecessary obstacles and undesirable results for parties concerned with the salvage of historic wrecks.

Under a theory of in rem jurisdiction, the shipwreck in question (the res or the “thing” which is the subject of the dispute) is considered a “person” for jurisdictional purposes.<sup>28</sup> Therefore, if the shipwreck lies within the territorial waters of a certain district, the court in that district can exercise in rem jurisdiction over it just as it would exercise personal jurisdiction over a person in its jurisdiction.<sup>29</sup> However, if a ship lies outside of the territorial boundaries of a state or the United States, a court must adopt a theory of constructive in rem jurisdiction to establish its jurisdiction. For a court to have constructive in rem jurisdiction over a ship, part of the ship must be brought within the geographical boundaries of the court’s jurisdiction.<sup>30</sup> The doctrine effectively allows a single part of a ship to constitute the entire ship in order to satisfy jurisdictional requirements.<sup>31</sup>

Once a court’s jurisdiction has been established, the person making a claim to the ship under salvage law must prove that the property in question is in marine peril.<sup>32</sup> Traditionally, this status has been applied to ships that are in danger of

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statue, but still applicable to wrecks located in international waters, stating that “[d]isposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd lengths”).

28. See, e.g., *id.* at 333–34 (“In rem actions in admiralty generally require, as a prerequisite to a court’s jurisdiction, the presence of the vessel or other res within the territorial confines of the court. This rule is predicated upon admiralty’s fiction of convenience that a ship is a person against whom suits can be filed and judgments entered.”) (citation omitted).
29. *The Brig Ann*, 13 U.S. 289, 291 (1815) (“In order to institute and perfect proceedings in rem, it is necessary that the thing should be actually or constructively within the reach of the Court. It is actually within its possession when it is submitted to the process of the Court; it is constructively so, when, by a seizure, it is held to ascertain and enforce a right of forfeiture which can alone be decided by a judicial decree in rem.”). A court may also assert jurisdiction over the entire shipwreck if part of the ship or its cargo is brought within the district of the court. See, e.g., *R.M.S. Titanic*, 171 F.3d at 964 (“[T]he Supreme Court implicitly recognized the propriety of a district court’s exercise of in rem admiralty jurisdiction over a shipwreck in California’s territorial waters after a salvor presented ‘china, a full bottle of champagne, and a brass spike from the ship’s hull’ to the district court.”) (quoting *California v. Deep Sea Research (Deep Sea Research)*, 523 U.S. 491, 496 (1998)).
30. See, e.g., Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 94 AM. J. INT’L L. 102, 125 (2000) (“Rather than limiting this jurisdiction to shipwrecks occurring within U.S. territorial waters, U.S. courts have allowed the salvor of a shipwreck outside U.S. waters to obtain a maritime lien on it by bringing pieces of the vessel into the court’s jurisdiction.”).
31. *Id.* at 124. “In 1994 the District Court for the Eastern District of Virginia, exercising in rem jurisdiction over the wreck and the wreck site (based on the presence of a wine decanter and other artifacts brought into the court’s territorial jurisdiction), awarded salvor-in-possession status and exclusive salvage rights to R.M.S. Titanic, Inc. (RMST), a Florida corporation.” *Id.* at 125. However, “[a]ny power exercised in international waters through ‘constructive in rem’ jurisdiction [can] not be exclusive to the whole world. For example, a French court could presumably . . . [issue] a similar order at the same time with no less effect.” *Id.* at 126. For this reason, the doctrine of constructive in rem jurisdiction is considered by some to be “imperfect . . . [and] falls short of giving the court sovereignty over the wreck.” *Id.*; see also *R.M.S. Titanic*, 171 F.3d at 967; *Deep Sea Research*, 523 U.S. at 502.
32. See *The Sabine*, 101 U.S. 384 (1879). For a more in-depth discussion of salvage law, including the other elements necessary to plead a prima facie cause of action, see SCHÖENBAUM, *supra* note 24.

sinking either by running aground or due to an accident on deck and not to ships that have already sunk.<sup>33</sup> However, in the context of a shipwreck, courts have stretched the principle of marine peril to find that historic wrecks already long lost on the bottom of the sea are in peril of either being lost again or destroyed due to natural underwater elements, manmade wastes, or fishing activities.<sup>34</sup>

### A. Value Preferences of Decision Makers

The reaction of decision makers to the current legal regime described above reveals the pertinent values that need to be addressed in order to fashion an optimal alternative resolution. The pertinent values in this area include the desire to implement and enforce archaeological standards when examining and salvaging a historic wreck, the ability to or prohibition on making a profit by salvaging historic wrecks, and the interest to educate and be educated about the historical and cultural implications that accompany historic wrecks.

#### 1. Archaeological Standards

Most national governments and archaeologists expressly disfavor the application of salvage law to disputes over historic wrecks.<sup>35</sup> The application of salvage law results in the dissemination of shipwrecks and artifacts based in large part upon economic motivations with no consideration of appreciable archaeological standards. In the eyes of this community, the twisting and contorting of legal principles to make salvage law applicable to historic wrecks is disfavored in comparison with the creation of a new legal regime designed specifically to protect the most amount of wrecks possible. Archaeologists, governments, and judges alike assert that the legal fiction of marine peril is not supported by evidence that the wreck has survived for so many

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33. See, e.g., *Conolly v. S.S. Karina II*, 302 F. Supp. 675 (E.D.N.Y. 1969) (analyzing a salvage claim where a boat came to assist another boat that had lost power and was drifting dangerously close to a reef system).
  34. See, e.g., *Platoro Ltd. v. Unidentified Remains of a Vessel*, 695 F.2d 893, 901 n.9 (5th Cir. 1983) (“[T]he *Espiritu Santo* was still in peril after its location was discovered . . . it is far from clear that the sand would remain sufficient protection from the various perils of the Gulf of Mexico.”); *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th Cir. 1978) (“Marine peril includes more than the threat of storm, fire, or piracy to a vessel in navigation.”); *Cobb Coin Co. v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 549 F. Supp. 540, 557 (S.D. Fla. 1982) (“Because the defendant vessel was still in the peril of being lost through the action of the elements or of pirates and was not being successfully salvaged when the plaintiff undertook its salvage operation, it was subject to a ‘marine peril’ for purposes of the plaintiff’s salvage claim.”).
  35. See, e.g., *Abandoned Shipwrecks Act of 1987*, 43 U.S.C. §§ 2101–2106 (2006) (eliminating the law of finds and salvage from the purview of shipwrecks found to be embedded in the territory of a state); William J. Clinton, Statement on United States Policy for the Protection of Sunken Warships (Jan. 19, 2001), 37 WEEKLY COMP. PRES. DOC. 195 (Jan. 22, 2001) (“Because of recent advances in science and technology, many of these sunken government vessels, aircraft, and spacecraft have become accessible to salvors, treasure hunters, and others. . . . The United States recognizes the rule of international law that title to foreign sunken State craft may be transferred or abandoned only in accordance with the law of the foreign flag State. Further, the United States recognizes that title to a United States or foreign sunken State craft, wherever located, is not extinguished by passage of time, regardless of when such sunken State craft was lost at sea.”).

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years underwater in its present location.<sup>36</sup> These parties argue that the mere existence and survival of shipwrecks found after hundreds of years on the ocean floor proves that they are in fact *not* in any sort of marine peril.<sup>37</sup> Further, archaeologists posit that the lack of oxygen in the ocean environment retards the deterioration process evident in ancient artifacts found on land.<sup>38</sup> Interestingly, Ole Varmer, an attorney with the National Oceanic and Atmospheric Administration, argues that it is the commercial salvage companies who place the shipwreck in marine peril when they attempt to raise it, not the ocean environment itself.<sup>39</sup> Varmer explains that even if a shipwreck is removed from the seabed under the strictest of archaeological standards, it is still going to be exposed to water and oxygen that “threaten the stability of the site.”<sup>40</sup>

Many people on this side of the debate argue that by applying the law of salvage, courts encourage companies to salvage wrecks without employing any archaeological standards.<sup>41</sup> Indeed, commercial salvage companies have been called pirates, looters, and thieves for their history of pillaging shipwrecks primarily for their economic value and for not considering a wreck’s historical and cultural importance.<sup>42</sup> In addition, many governments argue that the cultural value of these shipwrecks cannot be stated purely in monetary terms. Countries who have lost significant amounts of

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36. See, e.g., *Subaqueous Exploration & Archaeology Ltd. v. Unidentified, Wrecked & Abandoned Vessel*, 577 F. Supp. 597, 611 (1983) (“[T]he Court finds that the defendant vessels are not reasonably in peril of being lost through the elements since they are ‘impervious to weather conditions above the surface of the sea,’ with the ‘sand prevent[ing] deterioration under water.’”) (quoting *Platoro*, 508 F.2d at 1114–15 n.1); *Ontario v. Mar-Dive Corp.*, 141 D.L.R. 4th 577, para. 64 (Can. Ont. 1996) (“It is submitted that the salvage as proposed by Mar-Dive and Atlantic Western will not save the Atlantic from any danger. The Crown alleges that, if the salvage scheme is carried out, the Atlantic is at greater risk and danger than if left undisturbed in its present resting place.”); Ole Varmer, *The Case Against the “Salvage” of Cultural Heritage*, 30 J. MAR. L. & COM. 279, 280 (1999) (arguing that “historic shipwrecks are in marine peril and need to be rescued . . . is in direct conflict with the numerous benefits to be gained through in situ preservation”).
  37. See, e.g., *Chance v. Certain Artifacts Found & Salvaged from The Nashville*, 606 F. Supp 801, 808 (S.D. Ga. 1984) (“Dr. Wright, Associate Professor of Anthropology at Valdosta State College, explained that when a vessel sinks, ‘[t]here is an initial state of rapid deterioration. It [the vessel] adjusts to the environment in which it is, and then it reaches a state of equilibrium. The deterioration continues at a much, much slower rate. It will remain in a state of equilibrium, or approximate equilibrium, until it is once again disturbed.’”) (citation omitted); *Cobb Coin*, 549 F. Supp. at 561 n.20 (“Dr. Wilburn Cockrell, the administrator of the Florida Division of Archives and Records Management . . . believes that an ancient shipwreck . . . is destroyed when it is ‘opened up’ for artifact or data extraction.”).
  38. Varmer, *supra* note 36, at 280. (“Once a shipwreck is covered by the seabed, the rate of deterioration becomes very slow due to the lack of oxygen. The shipwreck site is now in a preserved state and is by no means in marine peril.”).
  39. *Id.*
  40. *Id.* at 280–81.
  41. *Id.* at 280.
  42. See, e.g., David J. Bederman, *The UNESCO Draft Convention on Underwater Cultural Heritage: A Critique and Counter-Proposal*, 30 J. MAR. L. & COM. 331, 343 (noting that the International Law Association views salvors as “looters” and “destroyers of our past”).

vessels to the ocean stand to gain vast amounts of cultural and historical education from 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. By applying salvage law to resolve disputes in this area, U.S. courts are encouraging this specific behavior. It is this problem that motivated the campaign for the development of an international legal regime designed to protect wrecks, as pieces of cultural heritage, from the thievery of salvage companies.<sup>43</sup> Therefore, some argue that salvage law does not reinforce the values of the archaeological community and many governments, as most courts are unwilling to hold salvage companies responsible for the continued safety of the wreck.<sup>44</sup>

On the other side of the debate, commercial salvage corporations (and even a few archaeologists) argue that salvage law is necessary for the protection of shipwrecks that actually are in danger of being lost forever.<sup>45</sup> They posit that man-made intrusions into the ocean, such as fishing trawlers and waste, place wrecks in more serious and immediate peril than do salvage companies.<sup>46</sup> For example, wrecks located in certain high-traffic locations, such as the English Channel, appear to be at high risk of severe damage or entire loss.<sup>47</sup> In cases where wrecks are found to be in immediate peril, the risks of salvage must be balanced against the risk of entire loss. Many commercial salvage companies would likely concede Varmer's argument regarding a potential increase in deterioration once an artifact is exposed to oxygen. However, they would likely point out that Varmer fails to address the ability of the archaeological community to develop technology that counteracts the deteriorating qualities of oxygen. Today, archaeologists are able to preserve many types of artifacts that might have been subject to increased deterioration years ago.<sup>48</sup>

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43. See *infra* Part III.

44. See Varmer, *supra* note 36, at 283.

45. The recovery plan for the shipwreck *Queen Anne's Revenge* provides evidence of archaeologists supporting the salvage of the shipwreck due to "catastrophic scour and erosion caused by tropical storm events . . . . One significant hurricane could effectively destroy the archaeological context of the site and cause the loss of countless artifacts." CHRIS SOUTHERLY ET AL., N.C. OFFICE OF STATE ARCHAEOLOGY, FALL 2006 RECOVERY PLAN FOR NORTH CAROLINA ARCHAEOLOGICAL SHIPWRECK SITE 31CR314, 1 (2006), available at <http://www.qaronline.org/archaeology/FullRecoveryPlanFall2006Final.pdf> (last visited Jan. 9, 2011).

46. See Cahal Milmo, *Why is There a Storm Brewing Over the Right to Plunder Shipwrecks?*, THE INDEPENDENT (UK), June 9, 2009, <http://www.independent.co.uk/news/world/politics/why-is-there-a-storm-brewing-over-the-right-to-plunder-shipwrecks-1700207.html> ("Commercial archaeology companies say the image of the seabed as an undisturbed oasis of colonial galleons and corroding steamers is entirely wrong with fishing trawlers and plastic waste ruining countless archaeological sites.").

47. *Id.* ("Mr Stemm, of [OMEX], said last month: 'The English Channel is like a giant industrial wasteland. The devastation we have found flies in the face of policy which is to preserve wrecks in situ.'").

48. For example, when the *Mary Rose* was salvaged in the late 1980s and early 1990s, archaeologists used methods such as spraying the ship with a solution of polyethylene glycol, which gradually replaced the water inside the wooden frame of the ship. This solution prevented the wood from drying up, cracking, and becoming brittle due to exposure to oxygen. *The Mary Rose Ashore—Page 4 of 6*, THE MARY ROSE TRUST, <http://www.maryrose.org/project/ashore4.htm> (last visited Jan. 9, 2011).

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Further, many commercial salvage companies argue that the entire profession has gained a poor reputation because of a few irresponsible parties.<sup>49</sup> Certain salvage companies argue that one of their goals is to find and locate historic wrecks in order to satisfy archaeological curiosity and to promote cultural education about these wrecks.<sup>50</sup> OMEX, for example, employs a number of archaeologists on its salvage team to make sure that its operations are conducted under the most up-to-date archaeological standards.<sup>51</sup> As a counterparty to the issue of archaeological standards, the next pertinent value preference exhibited by decision makers is the ability of or prohibition on commercial salvage companies earning a profit from salvaging historic wrecks.

### 2. Profit Motives

The prospect of discovering a shipwreck containing chests full of gold and silver coins has driven a large number of companies and individuals to search for long-lost wrecks.<sup>52</sup> Archaeologists argue that this goal of many treasure hunters is to blame for the loss of countless historical artifacts. Archaeologists portray the typical treasure hunter as destroying anything blocking his path to a potential treasure, including artifacts that could be used to tell the story of how the ship found its way to the bottom of the ocean in the first place. For example, a clay pot could easily be thought of as valueless to a treasure hunter and destroyed, but that same pot could provide an archaeologist with information relating to where the ship began its journey, where it stopped along the way, and who and what may have been on board.

While the incentive of turning a profit motivates commercial salvage companies, the ability to make a profit should not mean that the cultural aspects of a wreck, which may be of little economic value, must be destroyed in the process. The economic motivation of salvage companies appears to be necessary for their survival

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49. See, e.g., *A Commitment to Archaeology*, ODYSSEY MARINE EXPLORATION, <http://www.shipwreck.net/archaeology.php> (last visited Jan. 9, 2011) [hereinafter *A Commitment to Archaeology*] (“Our shipwreck exploration is conducted under strict archaeological and scientific guidelines, supervised internally by our project archaeologists and sometimes externally by archaeologists and other accredited scientists whom we invite to collaborate on projects. Odyssey’s professional mission differs profoundly from marine salvage operations whose sole aim is to recover commercially valuable items from wrecks, typically disregarding their significant archaeological and historic value.”).

50. For example, Intersal, Inc., which located the ship *Queen Anne’s Revenge* off the coast of North Carolina, relinquished its rights to the ship to the Underwater Archaeology Branch of the North Carolina Division of Archives and History. Intersal relinquished its rights to the ship “[i]n a spirit of cooperation and the desire to see that what is believed to be the ‘Blackbeard Collection’ remains intact for scientific study and public display.” Intersal, Inc., *QUEEN ANNE’S REVENGE ONLINE*, <http://www.qaronline.org/project/intersal.htm> (last visited Jan. 9, 2011). Intersal retained the exclusive rights to make replicas of any artifacts found on the site. *Id.*

51. See *A Commitment to Archaeology*, *supra* note 49.

52. See, 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.”) (citation omitted).

as the process of searching for and salvaging a wreck is prohibitively expensive.<sup>53</sup> Companies spend years researching in order to pinpoint the location of a wreck. Once the location is identified, a company must employ an arsenal of ships and high-tech instruments just to find out where the wreck lies on the ocean floor. Companies can spend millions of dollars in simply attempting to locate a wreck, let alone actually finding and salvaging one.<sup>54</sup>

The profit incentive motivating these companies has caused a technological boom in the salvage industry and is responsible for locating more wrecks than ever before. If finding a wreck were not profitable, there would be less competition amongst salvors and less technological innovation. More salvors searching for wrecks could mean more destruction of cultural artifacts, but it could also mean more technological advancements and more wrecks being found. A balance of all competing value preferences, which does not currently exist under the regime of U.S. salvage law, needs to be achieved for the benefit of all parties concerned.

### 3. *Cultural Education of the Public*

Sometimes lost in the debate between archaeologists and commercial salvage companies are the interests of the public. Archaeologists have a tendency to become singularly preoccupied with protecting artifacts and lose sight of why the protection is necessary in the first place. The ultimate end for which wrecks should be protected and documented is the education of the world public. Similarly, commercial salvage companies often focus only on turning a profit and forget about the significant responsibility they have to document history.

Archaeological standards intended to protect wrecks and their artifacts are important so that the public can learn about and experience them.<sup>55</sup> Correspondingly, commercial salvage companies should be allowed to profit from a historic wreck only if they are also able to add to the historical record by providing artifacts and other cultural or historical information to the public.

The application of salvage law to shipwrecks has resulted in a fragmented legal regime that has both shrouded the industry in uncertainty and fostered a period of technological innovation that has increased our ability to locate and salvage wrecks. More shipwrecks than ever before are being located, but their cultural and historical

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53. *Id.* at 110 (citation omitted) (“The cost of locating and salvaging a vessel is so prohibitive that many archaeologists simply lack the resources to search for shipwrecks and salvage or recover them. For example, it was initially estimated that the cost of salvaging the Titanic could exceed \$1 billion. Moreover, one salvor spent \$1 million to locate two Spanish galleons; salvaging El Salvador will likely cost an additional \$5 to \$10 million; \$12.7 million has already been invested in salvaging the Central America; it cost \$2 million (1971 value) just to locate the Atocha; and in 1863, a failed attempt to salvage the Camanche cost \$38,000, followed by an attempt to recover the vessel at a cost of \$110,000.”).

54. *Id.*

55. Preservation of a wreck merely for the sake of preservation should not be heralded. Archaeological standards should be used in order to provide the public with access to and knowledge about a wreck.

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heritage is not being addressed appropriately.<sup>56</sup> More needs to be done to protect UCH and its potential to advance the cultural and historical education of the world population in general. Archaeological standards are currently being employed by some responsible salvage companies. However, the salvage community at large is not held to any sort of standard. In many cases, financial gain is indeed the sole motivation for the salvage of shipwrecks, leaving nations powerless to enforce whatever rights they may have over their cultural heritage. All of this behavior negatively impacts the interests of the public in learning about the historical and cultural aspects of the shipwrecks and thus is ineffective.

Additionally, the confusion surrounding the application of salvage law prohibits either side of the debate to predict the outcome of a dispute. This confusion puts a large economic strain on all parties, as most litigation proceeds at a less than desirable pace. The lengthiness results in a mountain of legal fees and, perhaps most importantly, stalls the recovery, exploration, and documentation of the wrecks. This reality is not satisfying to salvage companies seeking monetary reimbursement or to governments seeking an appraisal of the cultural value of the wreck itself. Thus, in order to inhibit opposition in court, salvage companies have been untruthful or vague regarding the documentation of wrecks and artifacts.<sup>57</sup> Some salvage companies are slow and/or untruthful when identifying a wreck they have found in order to delay or block a competing claim of ownership to the wreck. While untruthful statements cannot be supported, the application of salvage law requires salvage companies to be as vague as possible in their filings to protect their interests to the highest degree. It is this precise environment that sparked the international community's attempt to design a legal regime that could better protect the cultural aspects of historic wrecks.

### III. THE 2001 UNESCO CONVENTION ON THE PROTECTION OF UNDERWATER CULTURAL HERITAGE

In 2001, the General Conference of UNESCO adopted the Convention on the Protection of Underwater Cultural Heritage.<sup>58</sup> The Convention was the result of four years of debate within the UNESCO General Conference and many more years of

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56. See *supra* Part II (discussing new technological advancements that allow for more shipwrecks to be located); see also *infra* Part III.A.1 (discussing how archaeological standards are not being appropriately addressed).

57. See, e.g., John Ward Anderson, *Will Finders Be Keepers of Salvaged Treasure?: 17-Ton Haul of Silver and Gold From Atlantic Pits U.S. Firms Against Spain*, WASH. POST, Aug. 27, 2007, at A01 (“The papers, in which Odyssey asks to be named ‘custodian’ of the wrecks, do not name any of the ships and give only vague descriptions of their graves, but undersea archaeologists and other experts say there is little doubt what they refer to: the Nuestra Señora de las Mercedes; the Merchant Royal, a 36-gun British navy vessel that sank in 1641 in bad weather off southwestern England.”).

58. Convention on the Protection of Underwater Cultural Heritage, Nov. 6, 2001, 41 I.L.M. 40 [hereinafter UNESCO Convention].

deliberation prior to the formal negotiations.<sup>59</sup> On January 2, 2009, the Convention went into effect.<sup>60</sup> As of March 2011, thirty-three countries had ratified the Convention and four more countries had adopted it.<sup>61</sup>

On November 2, 2001, the General Conference passed a resolution adopting the Convention and set out its rationale for why the Convention was necessary.<sup>62</sup> The General Conference acknowledged “the importance of underwater cultural heritage as an integral part of the cultural heritage of humanity” and admitted to being “deeply 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.”<sup>63</sup> Further, “the public’s right to enjoy the educational and recreational benefits of responsible nonintrusive access to in situ underwater cultural heritage, [and the] value of public education to contribute to awareness, appreciation and protection of that heritage” were instrumental concerns.<sup>64</sup> The General Conference also acknowledged “the need to codify and progressively develop rules relating to the protection and preservation of underwater cultural heritage in conformity with international law and practice,”<sup>65</sup> thereby acknowledging that the current legal regime designed to resolve disputes surrounding historic wrecks was not adequate. Lastly, the General Conference stated that it was “committed to improving the effectiveness of measures at international, regional and national levels for the preservation *in situ* or, if necessary for scientific or protective purposes, the careful recovery of underwater cultural heritage.”<sup>66</sup>

In furtherance of the above goals and findings, the General Conference banned the commercial exploitation of historic wrecks, defined UCH broadly, and focused narrowly on state actors as the only empowered decision makers under the Convention. While the Convention is an admirable attempt at providing protection for UCH, it has failed in its goal to enhance the value of historical and cultural education to the world community. Instead, the Convention has confounded the legal status of

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59. Guido Carducci, *New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage*, 96 AM. J. INT’L L. 419, 419 (2002).

60. UNESCO Convention, *supra* note 58, art. 27 (“This Convention shall enter into force [on 2 January 2009] but solely with respect to the twenty States or territories that have so deposited their instruments [on or before 2 October 2008]. It shall enter into force for each other State or territory three months after the date on which that State or territory has deposited its instrument.”).

61. *Id.*

62. See Carducci, *supra* note 59, at 419.

63. UNESCO Convention, *supra* note 58.

64. *Id.*

65. *Id.*

66. *Id.* *In situ* is a Latin phrase meaning in the natural or original position or place. *In situ Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/insitu> (last visited Jan. 10, 2011). In the context of the Convention, it refers to leaving a shipwreck in its present resting place on the ocean floor.

shipwrecks and created a new regime that is destined to keep the lost treasures of the sea in exactly the same position they are in now—lost.

*A. The Convention's Ban on Commercial Exploitation*

The most intriguing and far-reaching aspect of the Convention is its prohibition on the commercial exploitation of UCH. One of the objectives of the Convention is that “[u]nderwater cultural heritage shall not be commercially exploited.”<sup>67</sup> Further, the Annex of the Convention, describing the rules to be followed, states:

The commercial exploitation of underwater cultural heritage for trade or speculation or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of underwater cultural heritage. Underwater cultural heritage shall not be traded, sold, bought or bartered as commercial goods.<sup>68</sup>

In an apparent attempt at compromise, the Convention allows for “deposition of underwater cultural heritage, recovered in the course of a research project.”<sup>69</sup> However, this deposition must not include the sale of any items deemed to be UCH.<sup>70</sup> Therefore, the result of the ban on commercial exploitation is an attempt to completely destroy a commercial entity’s profit motive in retrieving wrecks in the first place.

If the Convention becomes customary international law,<sup>71</sup> the consequence of the ban on commercial exploitation would be a near or complete annihilation of the historic wreck salvage industry. Without a profit motive, commercial salvage companies will likely not survive. Some for-profit companies, like OMEX, are publicly owned and thus owe a duty to their shareholders that they would be unable

67. UNESCO Convention, *supra* note 58, art. 2, para. 7.

68. *Id.* at Annex, r. 2.

69. *Id.* at Annex, r. 2(b). The deposition of UCH must be made in accordance with Article 2, paragraph 6: “Recovered underwater cultural heritage shall be deposited, conserved and managed in a manner that ensures its long-term preservation.” *Id.* art. 2, para. 6. The Convention’s focus on state parties as the primary actors on the international stage seems to suggest that any UCH recovered must be deposited with a national government.

70. *Id.* at Annex, r. 2.

71. Article 38 of the Statute of the International Court of Justice states that “international custom, as evidence of a general practice accepted as law” will be applied by the International Court of Justice to resolve disputes. Statute of the International Court of Justice, art. 38, sec. 1(b), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993. The application of law in the area of historic wreck salvage certainly cannot be codified as a general practice accepted as law. Prior to the creation of the Convention, courts around the world did not apply any one concept of law with regard to historic wrecks. Furthermore, the fact that only thirty-two countries have ratified the Convention further evidences that the Convention has yet to become customary international law. For more discussion about the Convention and its relation to customary international law, see Valentina Sara Vadi, *Investing in Culture: Underwater Cultural Heritage and International Investment Law*, 42 VAND. J. TRANSNAT’L L. 853, 891 (2009) (“In addition, given the controversial nature of its provisions, the [UCH Convention] is not likely to become part of customary international law.”).

to fulfill.<sup>72</sup> It appears that the only companies that would be able to survive in such an environment would be companies that have enormous amounts of private capital, not-for-profit organizations, and government-funded entities.<sup>73</sup> However, due to the immense costs associated with this business, it is unlikely that even those organizations would be able to survive for long, if at all.<sup>74</sup>

Even if all commercial salvage companies engage in a type of looting piracy that does not comply with any appreciable archaeological standard of care, the Convention's prohibition on commercial exploitation still has little merit. The Convention essentially places an affirmative duty on states to find, recover, and regulate UCH themselves. The Convention takes a view of international law that focuses primarily on states as the sole actors in international disputes. The Convention requires that state parties "cooperate in the protection of underwater cultural heritage,"<sup>75</sup> "preserve underwater cultural heritage for the benefit of humanity,"<sup>76</sup> and "take all appropriate measures in conformity with this Convention and with international law that are necessary to protect underwater cultural heritage."<sup>77</sup> It therefore creates a new regime under which states need to coordinate with each other and spend money on the discovery of wrecks and the resolution of disputes. It is wishful thinking to suggest that governments are going to spend the amount of money necessary to locate,

72. Generally, officers and directors of public for-profit corporations owe a fiduciary duty to the corporation's shareholders. This fiduciary duty includes a duty for the corporation to seek a profit for its shareholders. If a commercial salvage company did not seek a profit in recovering shipwrecks they would be unable to fulfill this fiduciary duty. See Henry T.C. Hu, *New Financial Products, the Modern Process of Financial Innovation, and the Puzzle of Shareholder Welfare*, 69 TEX. L. REV. 1273, 1278 (1991) ("The most basic principle of corporate law is that a corporation is to be primarily run for the pecuniary benefit of its shareholders.").

73. For example, companies with large amounts of private capital would be able to fund research and recovery efforts without the need to seek a profit to pay for their projects. Not-for-profits and government-funded entities would not violate the prohibition on profit seeking and thus would be able to exist under the Convention's new regime.

74. Unlike "dry" archaeology, underwater archaeology provides several unique challenges, which result in a corresponding increase in monetary expenditure compared to dry archaeology. John D. Broadwater explains a few of these challenges:

Theoretically, one can survey and excavate an archaeological site under water using essentially the same techniques as those employed on "dry" sites. In practice, however, most underwater sites present formidable obstacles, particularly turbidity, rough seas, strong currents, and cold temperatures . . . . A dry-land colleague, after his first underwater archaeology dive . . . described the experience as "like trying to excavate in a blizzard while wearing a blindfold, gas mask, heavy parka, mittens and snowshoes!"

John D. Broadwater, *Digging Deeper: Deepwater Archaeology and the Monitor National Maritime Sanctuary*, in INTERNATIONAL HANDBOOK OF UNDERWATER ARCHAEOLOGY 639, 641 (Carol V. Ruppe & Janet F. Barstad eds., 2002) (citation omitted).

75. UNESCO Convention, *supra* note 58, art. 2, para. 2.

76. *Id.*

77. *Id.*

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protect, and perhaps recover historic wrecks.<sup>78</sup> As a result, many, if not all, presently lost wrecks will not be located and the general public will not receive any gain in cultural education.

By attempting to protect historic wrecks from individuals and corporations who employ no archaeological standards, the Convention has succeeded in creating a sort of moratorium on location and recovery efforts. This moratorium seems incompatible with the stated “value of public education to contribute to awareness, appreciation and protection” of historic wrecks asserted by UNESCO.<sup>79</sup> In an attempt to protect the historic wrecks from potential damage or destruction, the Convention has put the onus on successive generations to find and locate these historic wrecks. This diminishes the awareness, education, and appreciation of the world public, as well as the likelihood of wrecks being found; without the competitive salvage industry, less money will be put into research and development of new technologies, extending the amount of time taken to locate the wrecks, if they can be located at all.

In addition, by eliminating the commercial incentive of salvage companies and thereby limiting the number of wrecks that can be found and located, many wrecks in peril of being damaged and destroyed will receive no protection at all. The drafters of the Convention seem to assume that because not all wrecks are considered to be in marine peril, all wrecks are perfectly safe in their present conditions. Realistically, this principle cannot be supported. Human intrusion into the ocean is a well-documented concern of marine scientists everywhere.<sup>80</sup> Waste and fishing activities in certain high-traffic locations like the English Channel place wrecks in serious and

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78. In the United States, for example, cultural institutions and programs are largely funded through private donations. In Florida, the entire 2010–2011 fiscal year state budget for the Division of Historical Resources was \$11,179,883, which includes money received from donations. *2010–2011 Operating Budget in Agency Format*, TRANSPARENCY FLA., <http://transparencyflorida.gov/Agency.aspx?FY=11&BE=45000000&M=N> (last visited Mar. 8, 2011). The Division of Historical Resources is responsible for planning, organizing, developing, directing, coordinating, and evaluating the statewide program of historical resource preservation and also is responsible for the state archaeology program. *About the Division*, FLORIDA DIVISION OF HIST. RESOURCES, <http://www.flheritage.com/about/index.cfm> (last visited Feb. 25, 2011). Florida likely has the largest collection of shipwrecks of any state in the entire United States and, with only an \$11 million annual budget that is used to fund both land-based and underwater preservation, very little money, if any, is left for location and salvage efforts. Compare Florida with OMEX, a company traded on NASDAQ, which already possesses significantly more amounts of machinery and technology than the state of Florida, and reports a \$5.1 million operation and research expense for 2010. *Odyssey Marine Exploration Reports Continued Improvements in Financial Performance for Second Quarter 2010*, ODYSSEY MARINE EXPLORATION (Aug. 9, 2010), <http://shipwreck.net/pr205.php>. In the area of deep water salvage, state-run outfits will likely never be as well funded or equipped as commercial operations.

79. UNESCO Convention, *supra* note 58.

80. See, e.g., Robin Kundis Craig, *Protecting International Marine Biodiversity: International Treaties and National Systems of Marine Protected Areas*, 20 J. LAND USE & ENV'T L. 333, 344–45 (2005) (footnote omitted) (“A number of human activities threaten marine biodiversity, including coastal development, destruction of marine habitats, introduction of invasive species, and overfishing. Traditionally, however, both scientists and policymakers have focused on marine pollution as the most important problem affecting marine biodiversity.”).

immediate peril.<sup>81</sup> Similarly, the ocean floor is subject to many dangerous natural disasters, such as underwater volcanoes and earthquakes. If money is not proactively being spent to locate these wrecks, they cannot be protected. The Convention can therefore be seen as underinclusive; while it seeks to protect UCH and to educate the world public, it simultaneously eviscerates the likelihood that many of the world's shipwrecks will be found in the first place and does not protect wrecks from natural disasters or man-made intrusions into the ocean.

Proponents of the Convention will likely point out that the Convention leaves open the possibility of salvaging wrecks if they are actually in danger.<sup>82</sup> Article 12 allows “[a]ll States Parties [to] take all practicable measures . . . to prevent any immediate danger to the underwater cultural heritage, whether arising from human activity or any other cause.”<sup>83</sup> Two problems with this belief undermine its assumption. First, the convoluted nature of the regime created by the Convention requires consultation and agreement between multiple state governments.<sup>84</sup> It is unrealistic to believe that governments will be able to come together quickly enough to save a ship in danger of being damaged or destroyed. The time-consuming nature of salvaging a wreck and the bureaucracy created by the Convention prevents parties from acting with anything resembling swiftness. Second, the reality of a wreck in danger being located is dramatically decreased due to the likely decline in the commercial salvage industry. Simply put, with fewer people looking for historic wrecks, it is likely that fewer wrecks will be located. In the end, it is more likely that a ship in peril of being damaged or destroyed will be damaged and destroyed unbeknownst to anyone than it is that the international community under the Convention will come together quickly enough to save a wreck from destruction. UNESCO's hypocrisy with regard to the Convention is epitomized by the recent discovery of a British ship.

The ship in question had been lost at the bottom of the ocean since 1744. OMEX would not have been able to justify spending the massive amounts of capital it needed

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81. See Dr. Sean A. Kingsley, *Deep-Sea Fishing Impacts on the Shipwrecks of the English Channel & Western Approaches*, ODYSSEY MARINE EXPLORATION (2009), [http://shipwreck.net/pdf/OMEPapers4Final\\_000.pdf](http://shipwreck.net/pdf/OMEPapers4Final_000.pdf) (last visited Jan. 10, 2011) (“A high density of the sites displays evidence of detrimental impacts from the deep-sea fishing industry, predominantly trawler, scallop dredge and gill net fishing activities.”). In 2007, a comparative analysis of the risks of pollution to the English Channel was conducted by French and English authorities. Espace Manche Dev. Initiative, *The Management of Maritime Pollution in the English Channel: A Comparative Analysis of Risks & Contingency Planning*, LITTORAL-COASTLINES, 23 (Aug. 2007), [http://www.littoral-coastlines.com/telechargement.php?id\\_page=0-10-55-118&file=EMDI\\_GB\\_2007.pdf](http://www.littoral-coastlines.com/telechargement.php?id_page=0-10-55-118&file=EMDI_GB_2007.pdf). The organization found that:

Unlike other maritime zones the [English] Channel is constricted between the two Anglo-French land-masses. This geographical framework can amplify the impact of a pollution at large scale . . . . Any increase of maritime activities in the English Channel will cause a parallel increase in pollution that is to be found in the Channel marine environment.

*Id.* at 23.

82. See UNESCO Convention, *supra* note 58, art. 12.

83. *Id.* art. 12, para. 3.

84. *Id.* art. 12, para. 4.

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to locate the ship without the potential for commercial gain. In response to the discovery, Koichiro Matsuura, then Director-General of UNESCO, carelessly stated, “I am delighted that such an exceptional example of underwater heritage has been located. The cultural and scientific value of this artefact is considerable . . . [and I trust that the recovery of the ship] is not used for commercial gain.”<sup>85</sup> This statement typifies UNESCO’s hypocrisy with regard to the Convention; they recognize that the discovery of sunken historic ships is desirable and provides the world community with considerable gains in cultural and scientific education, but gloss over the fact that it was only a for-profit entity that could have located the ship in the first place. If, as Matsuura would prefer, the ship found is not used for commercial gain, it likely would not have initially been found at all. The Convention, in its attempt to preserve and protect historic wrecks, essentially encourages the decline of the commercial salvage industry and thus severely limits the amount of entities searching for historic wrecks. The answer to the problem of protecting historic wrecks should not be to limit the amount of entities searching for wrecks, but to provide more adequate protection while maximizing the chance that wrecks will be found.

### *B. The Convention’s Definition of Underwater Cultural Heritage*

The negotiations leading up to the creation of the Convention were difficult, as several divergent views on the definition of UCH permeated through the drafters.<sup>86</sup> Interestingly, most of the drafters of the convention were academics and archaeologists concerned primarily with affording the utmost protection to UCH. Therefore, while the views on the definition of UCH were divergent, they were divergent within a community that viewed protecting UCH at all costs as the primary objective.<sup>87</sup> In fact, due to the composition of the drafters and the overall congruous nature of their views, one of the first drafts of the Convention defined underwater cultural heritage as “all underwater traces of human existence.”<sup>88</sup> This definition was attacked instantly

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85. *Preservation of Sunken British Warship Urged by UN Cultural Agency*, UN NEWS SERVICE (Feb. 5, 2009), <http://un.org/apps/news/story.asp?NewsID=29782&Cr=unesco&Cr1>.

86. See Carducci, *supra* note 59, at 420 (footnote omitted).

87. *Id.* Carducci notes that “protecting UCH more substantially and extensively than had been done under international law so far” was the overall goal of the drafters. *Id.* David Bederman notes that,

[t]he ILA [International Law Association who worked on drafting the Convention] is an international organization of academic international law specialists, acting in their individual capacities. The ILA worked on its product for several years, during which time no input was invited from any person or entity other than those concerned with historic preservation values.

Bederman, *supra* note 42, at 331. Craig Forrest has also observed the apparent inequity in influence exerted by the archaeological community. See Craig J. S. Forrest, *Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?*, 34 J. MAR. L. & COM. 309, 338 (2003) (“This very cohesion has often prevented the archaeological community from interacting with the treasure salvage community, but it seems to have allowed the former to exert disproportionate influence in the political arena.”).

88. CULTURAL HERITAGE LAW COMM., INT’L LAW ASS’N, BUENOS AIRES DRAFT CONVENTION ON THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE 432, 434 (1994); Bederman, *supra* note 42, at

as being extensively, and perhaps impermissibly, broad.<sup>89</sup> For example, David Bederman, Professor of Law at Emory University, rhetorically asked, “Does this mean that pieces of a splintered surfboard or even a soda can thrown overboard on a fishing outing should be countenanced by the UNESCO Draft?”<sup>90</sup> While this question may have been a bit tongue-in-cheek, it pointed out a pressing dilemma with the draft that the drafters needed to address; the definition of UCH would unavoidably include things that the drafters had not anticipated.

The drafters of the Convention ultimately narrowed the definition of UCH, but even the narrowed definition is still excessively broad and overinclusive. The Convention now defines underwater cultural heritage as “all traces of human existence having a cultural, historical or archaeological character which have been partially or totally underwater, periodically or continuously, for at least 100 years.”<sup>91</sup> The definition has been narrowed from previous drafts of the Convention by adding the requirement that UCH must have “a cultural, historical, or archaeological character.” However, in attempting to strengthen the definition, the drafters included several new phrases that are left undefined and are overly broad. What, for example, has cultural, historical, or archaeological character? In Professor Bederman’s hypothetical, it seems that a soda can would still fit the definition of UCH under the Convention and would therefore be subject to the Convention’s moratorium. For instance, it can be argued that Coca-Cola’s products carry a cultural significance because the company is one of two of the most successful soda manufacturers in the world, has existed since the late 1800s, and is recognized almost everywhere on earth.<sup>92</sup> Would a coke bottle from 1910 therefore be considered a trace of human existence with cultural significance?

The definition of UCH is limited, however, by the requirement that the subject UCH must be “periodically or continuously [underwater], for at least 100 years.”<sup>93</sup> This requirement is significant and responds directly to the concerns of present-day individuals and corporations who may be concerned about salvaging their own ships. The drafters accepted that if a ship sinks today, the Convention should not apply to it and the individual or company who owns the ship should be allowed to take all steps necessary to recover their sunken possessions. The Convention allows salvage of UCH to occur for 100 years before the moratorium period begins. Nevertheless, the definition of UCH in the Convention taken as a whole still applies in situations that the drafters did not anticipate and is defectively overinclusive.

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332.

89. Bederman, *supra* note 42, at 332. See also Carducci, *supra* note 59, at 422 (“After considering a number of proposals and counterproposals, the delegates adopted a broad definition of UCH . . .”).

90. Bederman, *supra* note 42, at 332.

91. UNESCO Convention, *supra* note 58, art. 1, para. 1(a).

92. See *The Chronicle of Coca-Cola*, THE COCA-COLA COMPANY, [http://www.thecoca-colacompany.com/heritage/chronicle\\_birth\\_refreshing\\_idea.html](http://www.thecoca-colacompany.com/heritage/chronicle_birth_refreshing_idea.html) (last visited Jan. 10, 2011).

93. UNESCO Convention, *supra* note 58, art. 1, para. 1(a).

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Consider the following hypothetical: A U.S. company makes small figurines out of highly precious metals. Their figurines have gained a global cult-like following, and both children and adults compulsively collect them. While shipping the figurines from the United States to another country, the ship containing the figurines sinks in international waters. Due to the remote location in which the ship sank, salvage efforts are impossible and the company is unable to recover its ship or its cargo. The company survives the disaster, but never gives up the hope of being able to locate and salvage their ship. One hundred and one years later, a new technology is developed that allows the company to gain access to its ship. By this time, the metals used in the figurines have quadrupled in value due to their increased scarcity. Upon examination of the remains of the ship, most of the figurines have been destroyed; however a few have survived in near-perfect condition. The company would like to salvage its ship and cargo primarily for the value of the precious metals that have survived intact. Will the company be able to salvage the ship or contract with a salvage company to retrieve and sell the metals in order to recover their value?

Under the Convention, the company would likely not be able to salvage and sell its own cargo. It can certainly be argued that the contents of the ship are “traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years.”<sup>94</sup> The figurines were and still are immensely popular around the world, they are undoubtedly traces of human existence, and have been on the bottom of the ocean for at least 100 years. The Convention’s ban on commercial exploitation will come into effect when the company attempts to salvage the remains of the ship for its commercial value. Thus, in order to retrieve its property, the company would have to expend enormous amounts of effort and capital to appeal to the state parties of the Convention and engage in the cumbersome negotiating procedure set up by it.<sup>95</sup> While it is the goal of the Convention to protect UCH from looters, in this particular situation, the Convention’s reliance on states as the only members of the international community that can protect UCH encumbers the ability of the company to recover its *own* ship.

The task that the drafters of the Convention were faced with was difficult, however, as it stands the Convention impermissibly acknowledges only one side of the debate (the archaeologists), focuses too narrowly on state actors, and is overly broad in its definitions. This particular situation can be more adequately resolved using a bilateral partnership model that acknowledges the values of both sides of the dispute and considers more than just states as actors on the international stage.

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94. *Id.*

95. For example, under Articles 11 and 12 of the Convention, the company will have to notify and report its search and salvage activities to the Director-General of UNESCO. At this time, any state may submit a claim to the ship or its contents, and all states parties to the convention shall “consult on how best to protect the underwater cultural heritage, and to appoint a State Party to coordinate consultations.” *Id.* arts. 11, 12.

#### IV. A BILATERAL PARTNERSHIP MODEL

The ultimate value that should be upheld in the course of crafting a measure to protect UCH is the education of the world public. By acknowledging the educational values of UCH, a compromise between a salvage company's economic motivation and the archaeological concerns of states and archaeologists can be achieved. The main reason UCH should be protected is not because it may be sold for millions of dollars, but because the world community is interested in learning about the history of UCH and culture through its personal interaction with it. In order to achieve this goal, the private sector, primarily commercial salvage companies, needs to be involved in the location and recovery of historic wrecks. To this end, a model of cooperation between the salvage company and the owner of a wreck or, if none exists, the country of the wreck's origin, provides an optimal way to resolve disputes over historic wrecks.

As perhaps the first agreement of its kind, OMEX and the government of Great Britain created a partnership model that 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: the Sussex Agreement. The Agreement concerns the *HMS Sussex*, which reportedly sank during a violent storm in 1694.<sup>96</sup> The ship was carrying gold and silver coins intended as a bribe for the Duke of Savoy, which are believed to be worth as much as \$4 billion today.<sup>97</sup>

OMEX had been actively searching for the *HMS Sussex* since 1995. In 2002, it entered into the Sussex Agreement with Great Britain.<sup>98</sup> Although the exact details of the Agreement are confidential, a published memorandum that highlights several of its key concepts is available.<sup>99</sup> The Agreement required OMEX to submit a "project plan" for the excavation of the site to the British government.<sup>100</sup> The project plan was to provide the government with "details of equipment, personnel, and methodologies to be employed, and of matters relating to the conservation and documentation of recovered artefacts."<sup>101</sup> The government then had between 45 and 100 days in which to approve the project plan and provide comments, or the Agreement would automatically terminate.<sup>102</sup> The Agreement also required OMEX to pay a licensing fee to the government and a deposit of £250,000 in the event that the exploration did not "provide sufficient revenue to pay the Government's expenses related to the

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96. 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, 190 (2004).

97. 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>. In addition to the coins, the ship also had onboard a crew of 500 men, who all likely perished when the ship sank. *Id.*

98. Partnering Agreement, *supra* note 18.

99. *Id.*

100. *Id.*

101. Dromgoole, *supra* note 96, at 190.

102. Partnering Agreement, *supra* note 18.

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Agreement.”<sup>103</sup> In addition, OMEX had to deposit \$100,000 with the government as proof that money was available for the conservation of any artifacts recovered from the site.<sup>104</sup> The government had the right to appoint two representatives to observe and monitor OMEX’s activities and make sure that the excavation conformed to the project plan.<sup>105</sup> Lastly, and perhaps most significantly, OMEX and the government agreed to split the profits of any artifacts recovered based on their appraised value or selling prices.<sup>106</sup> If the artifacts recovered were worth less than \$45 million, OMEX would retain 80% of the profits and the government 20%; if the artifacts recovered were worth between \$45 million and \$500 million, each party would receive 50%; and if the artifacts were worth more than \$500 million, the government would receive 60% of the profits and OMEX only 40%.<sup>107</sup> In the media, the government made a point of stressing that the archaeological aspects of the project were of utmost importance.<sup>108</sup> Although the available memorandum of the Agreement did not comment on it, the government also stated that the Agreement allowed it to retain recovered cultural artifacts and that the government had a right of first refusal with regard to the disposition of all recovered artifacts.<sup>109</sup>

Although the Agreement encountered immediate criticism from the archaeological community,<sup>110</sup> it established a model that acknowledges the importance of cultural education, allows for the proper supervision of government-employed archaeologists, and upholds the commercial incentive of commercial salvage companies. The British government realized that the only way it could secure artifacts of cultural value for the benefit of its citizens was to contract with OMEX.<sup>111</sup> OMEX had the technology and means to locate and excavate the ship and Great Britain did not. If anything of importance was to be recovered from the ship, OMEX or another salvage company would have to do it. OMEX realized that negotiating with the British government was the best way to ensure that its objectives of retrieving artifacts of cultural importance and receiving a profit could be achieved. If OMEX could successfully negotiate with the government, it could sidestep a lengthy and costly litigation process and still accomplish its goals.

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103. *Id.*

104. *Id.*

105. *Id.*

106. *See id.*

107. *Id.*

108. Dromgoole, *supra* note 96, at 192.

109. *Id.*

110. *Id.* at 191.

111. Interestingly, Dromgoole argues that the British government was obligated to act in their citizens’ best interest. The government had to consider not only the cultural impact of its decisions, but also the financial impact. If the rumors of the Sussex’s massive treasure reserves turned out to be true, the government would stand to gain a significant financial windfall. Conceivably, this money would be spent by the government on programs that directly benefit the population. *Id.* at 195.

A model such as the Sussex Agreement is the best chance that the parties have to achieve their expressed value preferences. It allows for the preservation of cultural artifacts, upholds archaeological standards, maintains the profit motive of salvage companies, and maximizes the chance that historic wrecks will be located and protected.

Significantly, a bilateral agreement such as this does not involve judicial institutions and allows each party to negotiate for its respective desired results. Unlike the judicial application of salvage law or the law of finds, a bilateral agreement offers both parties a chance to maximize their desired results. In addition, judicial institutions are not required to stretch legal fictions beyond their intended application in order to claim jurisdiction over a matter. Further, parties would not have to hazard a guess as to what law will apply or which way a court will rule on a matter. Commercial salvage companies spend millions of dollars and thousands of hours in research and locating tasks alone. It is inefficient to put forth that kind of effort without knowing which type of law a court will apply or how it might rule on the matter.

The uncertainty of litigation leads to a substantial increase in legal fees that could be avoided by engaging in bilateral negotiations. A bilateral agreement allows both parties to avoid the lengthy deliberation period required by judicial institutions. Litigation over a wreck could take many years and involve a number of appeals, whereas a negotiated instrument can be obtained in a significantly less amount of time.<sup>112</sup> More time, therefore, can be expended on location, recovery, and conservation efforts, which are of paramount importance.

Additionally, a bilateral agreement such as the Sussex Agreement provides vastly superior results than the Convention because it does not destroy the profit motives of commercial salvage companies.<sup>113</sup> In fact, a system of bilateral agreements will likely lead to an increase in competition amongst salvage companies vying for exclusive agreements with governments. This increased competition could prove to be beneficial in two ways. First, the increased competition will likely result in an increase in the number of entities engaged in location and recovery efforts. This is

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112. For example, litigation over the *Titanic* has been ongoing since 1996. Marian Leigh Miller, *Underwater Cultural Heritage: Is the Titanic Still in Peril as Courts Battle Over the Future of the Historic Vessel?*, 20 EMORY INT'L L. REV. 345, 347 (2006) ("At the forefront of this application of maritime law is the United States District Court for the Eastern District of Virginia, which has been occupied with the case *R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel* since 1996."); see also *R.M.S. Titanic, Inc. v. The Wrecked & Abandoned Vessel*, 435 F.3d 521 (4th Cir. 2006); *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel*, 286 F.3d 194 (4th Cir. 2002); *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943 (4th Cir. 1999); *R.M.S. Titanic, Inc. v. The Wrecked & Abandoned Vessel*, 531 F. Supp. 2d 691, 2007 (E.D. Va. 2007); *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel*, 323 F. Supp. 2d 724 (E.D. Va. 2004); *R.M.S. Titanic, Inc. v. Wrecked and Abandoned Vessel*, 920 F. Supp. 96 (E.D. Va. 1996). Contrast the litigation history of the *Titanic* with the lack of litigation over the wreck of the *H.M.S. Sussex*. OMEX spent three years exploring for the remains of the *Sussex* between 1998 and 2001. *HMS Sussex Project Overview*, ODYSSEY MARINE EXPLORATION, <http://www.shipwreck.net/hmssussex.php> (last visited Jan. 9, 2011). One year later, in 2002, OMEX and the government of Great Britain entered into a partnering agreement and no litigation has been instituted by either side. *Id.*

113. See *supra* Part III.A.

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preferable because, if regulated correctly by the negotiated instrument, it will increase the chance that historic wrecks will be located and/or saved from actual marine peril. Second, increased competition in the private sector could lead to an ever-increasing technological boom. As more entities vie for government contracts, more money will be injected into the commercial salvage industry and these entities will seek to develop more efficient means of location and recovery by spending a significant sum on the research and development of new technologies.

A system of bilateral agreements also provides adequate protection for shipwrecks. Governments can control the salvage process by approving techniques to be used and by employing archaeologists to oversee it. Further, the government would likely insist on a choice of law clause in the agreement, conferring jurisdiction over a potential dispute on a specific judicial institution. The judicial institution would then be able to render a decision based on the law of the parties' choosing, thereby eliminating substantial confusion as to which law would apply.

Despite the advantages of this new model, some wrecks may still be exposed to the risk of being looted by individuals or companies; but this risk is no greater than that which currently exists under the Convention and salvage law. The Convention places an affirmative duty on individual states to protect UCH from looters without defining specifically how a state should engage in that protection, other than notifying the Director-General of UNESCO of any activities that may be taking place in violation of the Convention.<sup>114</sup> Realistically, even without the Convention, a similar amount of protection would still exist. States are no more likely to be able to stop a rogue salvage outfit from "illegally" salvaging a wreck under the Convention than they are if the Convention were not in force.

Another advantage of a system of bilateral agreements is that it is not overinclusive like the Convention and thus will not negatively intrude into areas that it was not meant to affect. For example, the hypothetical mentioned in Part III involving a U.S. company that manufactures figurines would not occur under a system of bilateral agreements. The company would not be subject to the cumbersome approval system designed by the Convention and would likely be able to freely contract with a salvage company to recover its goods for a reasonable fee.

A model based on bilateral agreements embraces the economic aspirations of commercial salvage companies and does not view a profit motive as antithetical to the protection of UCH. This model recognizes the difficulties inherent in locating and recovering UCH and seeks to maximize the cultural education of the world community. The model therefore provides preferable outcomes when compared to salvage law, the law of finds, and the Convention.

## V. CONCLUSION

The present combination of litigation in U.S. courts and the application of the Convention does not allow for the most desirable results with respect to historic wrecks located in international waters. The litigation model has proven ineffective in

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114. UNESCO Convention, *supra* note 58, art. 11, para. 1.

protecting against looters and has failed in its inability to require salvage companies to adhere to archaeological standards. Similarly, the Convention, while an admirable attempt to rectify a pressing dilemma, is defective and unable to achieve its lofty objectives. The Convention seeks to eviscerate the profit motive of commercial salvage companies and, in doing so, undermines the ability of the world community to locate, protect, and learn about historic wrecks. In contrast, a model based on bilateral agreements between the locator of a historic wreck and the wreck's owner or the country of the wreck's origin can resolve many of the inequities present in the current regime.