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Anne M. Cottrell*

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Abstract

This Comment assesses the marine archaeology provisions of UNCLOS III and argues that the principles embodied in U.S. abandoned shipwreck law may significantly contribute to cooperative efforts that determine the future of shipwrecks found in international waters. Part I compares the existing legal framework of international marine archaeology established by UNCLOS III with U.S. law on abandoned historic shipwrecks. Part II presents commentators' interpretations of the Convention's marine archaeology provisions. Part II emphasizes these commentators' views on the ability of a nation to obtain jurisdiction over shipwreck recovery operations in international waters and whether nations should apply principles of salvage and finds to these efforts. Part III argues that UNCLOS III should be broadly interpreted to better reflect the U.S. view that salvage and finds law is inappropriate for historic shipwrecks. Finally, Part III proposes a legal structure for the treatment of historic shipwrecks found beyond domestic jurisdiction.

COMMENTS

THE LAW OF THE SEA AND INTERNATIONAL MARINE ARCHAEOLOGY: ABANDONING ADMIRALTY LAW TO PROTECT HISTORIC SHIPWRECKS

INTRODUCTION

Current international law does not adequately deal with marine archaeology.[1] Specifically, international law does not ensure for public benefit the preservation of historically significant shipwrecks, which are a major component of marine archaeological finds.[2] Because historic shipwrecks have educational, recreational, and cultural value and contribute to our understanding of history, it is in the public's interest to make certain that these resources are not jeopardized.[3] Preservation of historic shipwrecks found in international waters requires a legal regime

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1. James A.R. Nafziger, *Finding the Titanic: Beginning an International Salvage of Derelict Law at Sea*, 12 COLUM.-VLA J.L. & ARTS 339, 339 (1988); Douglas B. Shallcross & Anne G. Giesecke, *Recent Developments in Litigation Concerning the Recovery of Historic Shipwrecks*, 10 SYRACUSE J. INT'L L. & COM. 371, 402 (1983); Susan J. Lindbloom, Note, *Historic Shipwreck Legislation: Rescuing the Titanic from the Law of the Sea*, 13 J. LEGIS. 92, 92 (1986).

There are two sources for international law, treaties and custom. SHABTAI ROSENNE, PRACTICE AND METHODS OF INTERNATIONAL LAW 14 (1984). Treaties establish conventional international law. *Id.* Customary international law, in contrast, does not rest on a treaty basis. *Id.* Customary international law is derived from the generally accepted conduct of nations acting with the belief that the law required them to behave in that way. *Id.* at 55. The International Court of Justice considers customary international law to be "international custom, [and] evidence of a general practice accepted as law." Statute of the International Court of Justice, June 26, 1945, art. 38, § 1(b), 59 Stat. 1055, 1060, 3 Bevans 1179, 1187.

Marine archaeology is defined as the scientific study of the material remains of past human life and activities relating to the sea and navigation of the sea. Leonard D. DuBoff, *Introduction: Symposium Presented at the Annual Meeting of the Association of American Law Schools' Section on Art Law*, 12 COLUM.-VLA J.L. & ARTS 335, 335 n.1 (1988) (citation omitted). The study of shipwrecks with historic or archaeological significance with the aim of preserving them is considered a part of the broader discipline of marine archaeology. *Id.* at 335.

2. *See* DuBoff, *supra* note 1, at 335 ("In the simplest sense . . . marine archaeology refers to the study of shipwrecks.").

3. *See* Shallcross & Giesecke, *supra* note 1, at 371-73. Preserving historic shipwrecks is in the public interest. *See id.* The U.S. Supreme Court upheld the constitutionality of New York City's local historic preservation law partly because historic preservation has an important public purpose. *See* Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978). The Court stated that the destruction of historic properties has occurred without considering their important values. *Id.* at 108. The Court also found that pres-

that combines regulation of recovery operations with incentives to search for and locate shipwrecks.[4]

Several countries independently have passed statutes that regulate abandoned shipwrecks of historic or archaeological value found within their jurisdiction.[5] The United States has done so through the Abandoned Shipwreck Act of 1987 (the "ASA").[6] The ASA treats historic abandoned shipwrecks in the broader context of the U.S. national historic preservation program.[7] While the passage of these laws reflects domestic con-

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ervation of objects with special historic, cultural, or architectural significance enhances the quality of life for all citizens. *Id.*

While there is a public benefit in historic preservation generally, there are also groups that take special interest in shipwrecks. *See* Shallcross & Giesecke, *supra* note 1, at 371-73. Sport divers value historic shipwrecks' recreational attributes. *Id.* at 371; Moyer v. The Wrecked & Abandoned Vessel, Known As The Andrea Doria, 836 F. Supp. 1099 (D.N.J. 1993). For the sport diver, exploring sunken wrecks enhances a diving experience. Shallcross & Giesecke, *supra* note 1, at 371. While sport divers use shipwrecks for their recreational value, archaeologists use shipwrecks to reconstruct the past. *Id.* at 371-73. The information gained by the archaeologist may be disseminated to augment the public's understanding of former societies. *Id.* As of 1983, there were about two million sport divers and thousands of individual members of historic preservation and archaeology organizations. *Id.* at 371 n.1.

In comparison to the sport diver's and archaeologist's interest in shipwrecks, the professional treasure salvor's motivation is primarily economic. *Id.* at 371. The treasure salvor's goal is to spend the least amount of money to recover valuable artifacts from sunken wrecks such as gold, silver, and other precious metals. *Id.* The number of professional treasure salvage companies is relatively much smaller than the number of sport divers and preservation constituents. *Id.* at 371 n.1. Approximately twenty professional salvage companies existed in the United States in 1983. *Id.* As a result of ignoring the archaeological value of shipwrecks, professional treasure salvors may destroy the information archaeologists appreciate. *Id.* at 372. *But see*, Melvin A. Fisher, *The Abandoned Shipwreck Act: The Role of Private Enterprise*, 12 COLUM.-VLA J.L. & ARTS 373, 376-77 (1988) (stating that at least one professional treasure salvage company has established non-profit organization to operate shipwreck museum and to publish and disseminate archaeological information to interested persons).

4. *See* H. Peter Del Bianco, Note, *Underwater Recovery Operations in Offshore Waters: Vying for Rights to Treasure*, 5 B.U. INT'L L.J. 153, 172 (1987) (stating that two guiding policies for international marine archaeology should be to provide favorable incentives to locate and recover lost shipwrecks and to maximize protection for archaeologically significant objects resting on ocean floor).

5. *See* Alexander Korthals Altes, *Submarine Antiquities: A Legal Labyrinth*, 4 SYRACUSE J. INT'L L. & COM. 77, 84-93 (1976) (surveying relevant shipwreck laws in United Kingdom, Australia, France, Italy, Spain, Netherlands, Denmark and Norway); Timothy J. Runyan, *Shipwreck Legislation and the Preservation of Submerged Artifacts*, 22 CASE W. RES. J. INT'L L. 31, 40-41 (1990) (discussing Canadian abandoned shipwreck law).

6. Abandoned Shipwreck Act of 1987 ("ASA"), 43 U.S.C. §§ 2101-2106 (1988).

7. *See* Abandoned Shipwreck Act Guidelines, 55 Fed. Reg. 50,116 (Dec. 4, 1990) [hereinafter Guidelines]. The Secretary of the Interior published the Guidelines pursuant to § 2104 of the ASA. *Id.*; *see also* Anne Giesecke, *The Abandoned Shipwreck Act: Af-*

cern with safeguarding shipwrecks, shipwrecks found in international waters continue to be unprotected.[8]

This discrepancy is problematic because the increased sophistication of undersea technology has allowed professional treasure salvors to extend salvage operations beyond a country's jurisdiction to the deeper and less accessible portions of the oceans.[9] As more shipwrecks are found in international waters, unregulated salvage attempts could threaten an increasing number of historic shipwrecks.[10] Com-

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firming the Role of the States in Historic Preservation, 12 COLUM.-VLA J.L. & ARTS 379, 382-83 (1988) (explaining that one purpose of ASA was to coordinate states' historic preservation duties).

8. *See* Bernard H. Oxman, *Marine Archaeology and the International Law of the Sea*, 12 COLUM.-VLA J.L. & ARTS 353, 357 (1988) (regime of high seas includes marine archaeology as high seas freedom); Anthony Clark Arend, Note, *Archaeological and Historical Objects: The International Legal Implications of UNCLOS III*, 22 VA. J. INT'L L. 777, 786 (1982) (interpretation of high seas freedoms includes archaeological exploration); *see also* Anastasia Strati, *Deep Seabed Cultural Property and the Common Heritage of Mankind*, 40 INT'L & COMP. L.Q. 859, 870 (1991) (flag state jurisdiction is inadequate for protecting underwater cultural heritage).

A nation has jurisdiction over vessels flying its flag. THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 40 (1987). Flag state jurisdiction enables the flag state to carry out its responsibility to ensure that ships comply with international duties concerning safety of navigation, protection of life at sea, protection of the marine environment, and other administrative, technical, and social matters. *Id.* While flag state jurisdiction could allow a state to apply its own laws to a historic shipwreck, it may not resolve complex issues of ownership like the problem surrounding the *Titanic*. *See* Nafziger, *supra* note 1, at 339-41 (1988). Even though the ship was flying the British flag, U.S. and French explorers led the expedition to find the wreck and its passengers were from many different nations. *Id.*

9. *See* William J. Broad, *Deepest Wrecks Now Visible to Undersea Cameras*, N.Y. TIMES, Feb. 2, 1993, at C1. The new technologies include deep-diving robots and unmanned submersibles equipped with advanced cameras, lights, and lasers. *Id.* Because these technologies aid salvage operations and also archaeological documentation, they provide an alternative to the destruction of shipwrecks by salvage and treasure hunting. *Id.* The new technologies also divide salvage companies and preservationists because the photographs could help treasure hunters determine where to cut apart a shipwreck. *Id.* Alternatively, the photographs could be used to sensitively dismember a wreck while simultaneously documenting it. *Id. See generally* Drew F.T. Horrell, *Telepossession is Nine-Tenths of the Law: The Emerging Industry of Deep Ocean Discovery*, 3 PACE Y.B. INT'L L. 309 (1991) (discussing new technologies used to retrieve sunken wrecks).

Salvage operations include efforts to recover objects lost at sea, including shipwrecks. *See* Del Bianco, *supra* note 4, at 153 n.1. In ancient times, nets, grappling hooks, and skin divers were used to recover sunken items. *Id.* Twentieth century inventions such as the self-contained underwater breathing apparatus ("SCUBA") has made underwater exploration possible. *Id.* Also, the proton magnometer and metal detector have assisted in the location of wrecks. *Id.* Similarly, the invention of sonar has enabled the discovery of shipwrecks located under water. *Id.*

10. *See, e.g.*, Columbus-America Discovery Group, Inc. v. Atlantic Mut. Ins. Co., 974

mentators[11] are divided on whether the law of salvage[12] and finds[13] adequately protect the public's interest in preserving historic shipwrecks for their value as cultural property.[14]

F.2d 450, 455 (4th Cir. 1992) (stating that *S.S. Central America* located at distance of 160 miles off shore), *cert. denied*, __ U.S. __, 113 S. Ct. 1625 (1993); Marshall King, *Admiralty Law: Evolving Legal Treatment of Property Claims to Shipwrecks in International Waters*, 31 HARV. INT'L L.J. 313, 317 n.35 (1990) (explaining that salvors located *S.S. Central America* 160 miles of the coast of South Carolina); Cynthia Furrer Newton, *Finders Keepers? The Titanic and the 1982 Law of the Sea Convention*, 10 HASTINGS INT'L & COMP. L. REV. 159, 159-60 (1986) (discussing discovery of *Titanic* in international waters in early 1980's as example of impact of new technology on salvage operations on high seas); William J. Broad, *1784 Spanish Ship is Found in Gulf*, N.Y. TIMES, Dec. 19, 1993, at 38 (reporting that ship *El Cazador* discovered by fishing vessel 50 miles off Louisiana coast and recovered by use of sonar and underwater robot).

11. This Comment includes professional and student commentators' views on international marine archaeology law. The professional commentators include: Bruce E. Alexander (Semmes, Bowen & Semmes, Baltimore, Md.; Adjunct Professor of Law, University of Baltimore; member, Committee on Law of the Sea, Maritime Law Association of the United States); James A.R. Nafziger (Professor of Law, Willamette University College of Law); Bernard H. Oxman (Professor of Law, University of Miami School of Law; U.S. Representative and Vice-Chairman of the U.S. Delegation to the Third United Nations Conference on the Law of the Sea; Chairman of the English Language Group of the Conference Drafting Committee); Anastasia Strati (Research Officer, Institute of Hellenic Studies, Athens). The student note writers include: Anthony Clark Arend (University of Virginia School of Law); H. Peter Del Bianco (Boston University School of Law); Susan J. Lindbloom (Notre Dame Law School); Cynthia Furrer Newton (Hastings Law School).

12. *See Columbus-America Discovery Group*, 974 F.2d at 460-61. The admiralty principle of salvage law allows a plaintiff salvor to recover a reward from the owner of the shipwreck. *Id.* The law of salvage developed out of the policy to encourage efforts to save property from destruction and to discourage embezzlement. SCHOENBAUM, *supra* note 8, at 500. A salvor may be any person, including a corporation or a governmental agency, that performs an act of salvage. *Id.* at 506. A salvor must not have a preexisting duty to carry out salvage, however. *Id.* An example of a preexisting duty is a duty from a person's employment on a ship. *Id.* Firemen, pilots, and other public employees may receive a salvage reward only where services are provided outside their official duties. *Id.*

13. *See* David R. Owen, *The Abandoned Shipwreck Act of 1987: Good-bye to Salvage in the Territorial Sea*, 19 J. MAR. L. & COM. 499, 510 (1988). The law of finds is a common law doctrine that has been applied in the maritime context since 1861. *Id.* Since 1960, finds law appeared in admiralty cases as an "adjunct" to salvage law. *See id.* The application of finds law to historic abandoned shipwrecks is a recent trend in the law. *See Columbus-America Discovery Group*, 974 F.2d at 459-60. Under the law of finds, a court may grant title to the salvor under the principle of "finders, keepers." *Id.* (quoting Martha's Vineyard Scuba Headquarters v. The Unidentified, Wrecked & Abandoned Steam Vessel, 833 F.2d 1059, 1065 (1st Cir. 1987)).

14. *Compare* Strati, *supra* note 8, at 872 n.37 (arguing that salvage law should not be used for claims to shipwrecks by pointing out that salvor is profit-motivated and that salvage operations may destroy archaeological site) *with* Bruce E. Alexander, *Treasure Salvage Beyond the Territorial Sea: An Assessment and Recommendations*, 20 J. MAR. L. &

There has been one effort to establish conventional[15] international rules regarding the recovery of historic shipwrecks outside domestic territory.[16] The United Nations Third Convention on the Law of the Sea[17] ("UNCLOS III" or the "Convention") addressed abandoned shipwrecks in international waters.[18] Its provisions on marine archaeology, however, are ambiguous and therefore have been subject to different interpreta-

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COM. 1, 1 (1989) (arguing that courts should apply salvage law to claims to discovered shipwrecks in order to protect priority of first salvor).

Commercial treasure salvors support the application of salvage and finds to abandoned historic shipwrecks because a salvage reward or title to the wreck provides a valuable incentive to search for them. *See Columbus-America Discovery Group*, 974 F.2d at 454; Fisher, *supra* note 3, at 373 (arguing that Congress should not pass Abandoned Shipwreck Act of 1987 because title to shipwrecks will be granted to individual states); *see also* Douglas S. Cohen, Note, *Should Noli Fofendi Apply to Sunken Ships?*, 73 B.U. L. REV. 193, 193 (1993) (arguing that law of finds best encourages salvage efforts). The wreck in *Columbus-America Discovery Group* contained over U.S.$1 billion of gold, and a court awarded 90% of it to the plaintiff salvors. *See Salvagers Receive 90% of Treasure; Insurers, 10%*, N.Y. TIMES, Nov. 19, 1993, at A22.

The view that salvage and finds do not protect historic shipwrecks notes that under salvage and finds principles, title may vest in the finder of the shipwreck, precluding public ownership and control of the wrecked vessel. *See, e.g., Treasure Salvors*, 569 F.2d at 336-37 (explaining that under both salvage law and law of finds court may grant title of vessel to salvor). Also, a salvor is not required to use recovery techniques that consider the archaeological integrity of the shipwreck under traditional admiralty law. *See* SCHOENBAUM, *supra* note 8, at 502 (stating that elements required for salvage law cause of action include (1) marine peril; (2) services voluntarily rendered; and (3) success in whole or in part). Because of the potential negative impact of these principles on historic abandoned shipwrecks, U.S. law explicitly excludes historic shipwrecks from the law of salvage and finds. ASA, 43 U.S.C. § 2106(a) (1988); *cf.* Leeanna Izuel, Comment, *Property Owners' Constructive Possession of Treasure Trove: Rethinking Finders Keepers Rule*, 38 UCLA L. REV. 1659 (1991) (arguing for modification of finds law in order to avoid inconsistent results in award of title).

Historic shipwrecks may be considered within the broader context of cultural property. *See* Strati, *supra* note 8, at 860. Under international law, cultural property is defined as "property which . . . is specifically designated by each [nation] as being of importance for archaeology, prehistory, history, literature, art or science . . . . " United Nations Educational, Scientific and Cultural Organization Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, art. 1, Nov. 4, 1970, 823 U.N.T.S. 231, 234-36, *reprinted in* 10 I.L.M. 289, 289-90 (1971). For a discussion of the protection of cultural property, see generally Roger W. Mastalir, *A Proposal for Protecting the "Cultural" and "Property" Aspects of Cultural Property Under International Law*, 16 FORDHAM INT'L L.J. 1033 (1992-93).

15. *See supra* note 1 (explaining that conventional international law rests on treaty basis).

16. United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/CONF.62/122 (1982), *reprinted in* 21 I.L.M. 1261 (1982), *to enter into force* Nov. 16, 1994 [hereinafter UNCLOS III].

17. *Id.*

18. *See* UNCLOS III, *supra* note 16, arts. 149 & 303, 21 I.L.M. at 1295 & 1326.

tions.[19] While the Convention viewed marine archaeology as an important ocean law matter, it did not supply straightforward rules for international marine archaeology.[20] Although the United States has not ratified UNCLOS III, the Convention will achieve treaty status in late 1994.[21]

This Comment assesses the marine archaeology provisions of UNCLOS III and argues that the principles embodied in U.S. abandoned shipwreck law may significantly contribute to cooperative efforts that determine the future of shipwrecks found in international waters. Part I compares the existing legal framework of international marine archaeology established by UNCLOS III with U.S. law on abandoned historic shipwrecks. Part II presents commentators' interpretations of the Convention's marine archaeology provisions. Part II emphasizes these commentators' views on the ability of a nation to obtain jurisdiction over shipwreck recovery operations in international waters and whether nations should apply principles of salvage and finds to these efforts. Part III argues that UNCLOS III should be broadly interpreted to better reflect the U.S. view that salvage and finds law is inappropriate for historic shipwrecks. Finally, Part III pro-

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19. Nafziger, *supra* note 1, at 346.

20. *Id.*

21. *See* James L. Malone, *Freedom & Opportunities: Foundation for a Dynamic Oceans Policy*, DEP'T ST. BULL., Dec. 1984, at 76. The United States treats UNCLOS III as a restatement of customary international law except for the provisions on deep seabed mining. *Id.*; *see supra* note 17 (discussing U.S. rejection of UNCLOS III based on its deep seabed mining provisions). It is likely that the United States will sign UNCLOS III in the summer of 1994. Steven Greenhouse, *U.S. Aides Report Compromise on Sea Mining*, N.Y. TIMES, Mar. 10, 1994, at A10. Because the United States has been able to modify the provisions on seabed mining to make it less onerous for mining companies, the United States no longer objects to the treaty. *Id.*

UNCLOS III required 60 ratifying votes to come into force. SCHOENBAUM, *supra* note 8, at 22. On November 16, 1993, Guyana provided the sixtieth ratifying vote giving UNCLOS III treaty status as of November 16, 1994. Telephone interview with Marc LaBelle, United Nations Treaties Section (Feb. 28, 1994). The United States rejected UNCLOS III over a decade ago for reasons unrelated to abandoned shipwrecks. *See* United States Oceans Policy, Statement by President Reagan, 19 WKLY. COMPILATION PRES. DOC. 383 (Mar. 10, 1983) (rejecting UNCLOS III because United States did not agree with deep seabed mining provisions). Other nations such as Britain, Germany, and Italy also rejected UNCLOS III for the same reason. David E. Pitt, *U.S. Seeks to 'Fix' Mining Provisions of Sea Treaty*, N.Y. TIMES, Aug. 28, 1993, at 3. Due to the disagreement over deep seabed regime, sixty countries have joined in an effort in renegotiating the deep seabed mining provisions to allow developing countries to share the wealth that miners may recover. *Id.* Until it achieves treaty status, UNCLOS III is only recognized as customary international law. *Id.*

poses a legal structure for the treatment of historic shipwrecks found beyond domestic jurisdiction.

I. *MARINE ARCHAEOLOGY UNDER UNCLOS III COMPARED WITH U.S. ABANDONED SHIPWRECK LAW*

UNCLOS III and U.S. law differ as to marine archaeology.[22] UNCLOS III dealt with a plethora of ocean law issues, including marine archaeology.[23] The Convention allocated varying degrees of national[24] sovereignty to different maritime zones in international waters.[25] Additionally, the Convention included two marine archaeology provisions[26] that provide guidance for developing substantive aspects of historic abandoned shipwreck law.[27] Finally, UNCLOS III included compulsory dispute settlement provisions.[28] These dispute settlement provisions aim to provide a peaceful method of settling disputes that may arise with respect to the interpretation and application of the Convention.[29] U.S. abandoned shipwreck law, as compared with UNCLOS III's international scope, applies only to shipwrecks located within domestic jurisdiction of the United States.[30]

A. *UNCLOS III: Background and Maritime Zones*

UNCLOS III is the last of a series of international negotia-

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22. *Compare* ASA, 43 U.S.C. §§ 2101-2106 (1988) *with* UNCLOS III, *supra* note 16, arts. 149 & 303, 21 I.L.M. 1295 & 1326 (demonstrating differences between ASA and UNCLOS III).

23. *See* Arend, *supra* note 8, at 777 n.1. UNCLOS III convened 160 nations to develop a convention on numerous ocean law matters. *Id.*

24. *See* UNCLOS III, *supra* note 16, art. 1, ¶ 2, 21 I.L.M. at 1271 (referring to nations as "States Parties"). UNCLOS III uses the term "State" to refer to nations that have ratified the Convention. *See id.* As a result, the Convention uses the term "coastal State" to refer to nations with a boundary on international waters. *See, e.g., id.*, art. 2, ¶ 1, 21 I.L.M. at 1272.

25. *Id.* art. 2, 21 I.L.M. at 1271.

26. *See id.* arts. 149 & 303, 21 I.L.M. at 1295 & 1326.

27. *See* Oxman, *supra* note 8, at 355 (stating that law of sea supplies framework pursuant to which states may collectively develop substantive law of marine archaeology).

28. *See* UNCLOS III, *supra* note 16, arts. 186-191 & 279-299, 21 I.L.M. at 1306-08 & 1322-26.

29. *See* Louis B. Sohn, *Peaceful Settlement of Disputes in Ocean Conflicts: Does UNCLOS III Point the Way?*, 46 LAW & CONTEMP. PROBS. 195, 195 (1983).

30. *See supra* note 22 (comparing U.S. abandoned shipwreck law with UNCLOS III marine archaeology provisions).

tions dealing with the law of the sea.[31] The first stage of negotiations was the 1958 Geneva Conference on the Law of the Sea ("UNCLOS I").[32] UNCLOS I created four treaties: the Convention on the Territorial Sea and the Contiguous Zone,[33] the Convention on the Continental Shelf,[34] the Convention on the High Seas,[35] and the Convention on Fishing and Conservation of the Living Resources of the High Seas.[36] The United States ratified these treaties in 1961.

In 1960, the United Nations ("U.N.") convened UNCLOS II specifically to reach an international understanding regarding the boundaries for the Territorial Sea.[37] The Territorial Sea represents the territory over which a coastal nation may exercise exclusive jurisdiction.[38] The traditional three mile boundary for the Territorial Sea[39] limited coastal nations' jurisdiction. UN-

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31. *See* SCHOENBAUM, *supra* note 8, at 22 (explaining that since World War II there have been three international conferences on the law of the sea in 1958, 1960, and 1973-82).

32. *See id.* (explaining that first international discussions regarding ocean law matters was UNCLOS I).

33. Convention of the Territorial Sea and Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205.

34. Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311 [hereinafter the Continental Shelf Convention]. The Continental Shelf Convention became effective law in the United States by passage of the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356 (1988) ("OCSLA"). Treasure Salvors, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel, 569 F.2d 330, 340 (5th Cir. 1978). Article 2 of the Continental Shelf Convention gives the coastal nation sovereign rights for the purpose of exploring it and exploiting its natural resources. *Id.* at 339. According to comments of the International Law Commission, however, shipwrecks are not considered "natural resources" pursuant to the Continental Shelf Convention or the OCSLA. *Id.* at 340 (citing U.N. GAOR, 11th Sess., Supp. No. 9, at 42, U.N. Doc. A/3159 (1956)).

35. Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82.

36. Convention on Fishing and Conservation of the Living Resources of the High Seas, Apr. 29, 1958, 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285.

37. U.N. Conference on the Territorial Sea and Contiguous Zone, U.N. Doc. A/CONF.13/C.1/SR.1 to SR.66, A/CONF.13/C.1/L.1 to L.168 (1960); *see* D.W. Bowett, *The Second United Nations Conference on the Law of the Sea*, 9 INT'L & COMP. L.Q. 415, 421 (1960) (stating that UNCLOS II discussions involved increasing traditional three mile limit of Territorial Sea to either six or twelve miles).

38. *See* UNCLOS III, *supra* note 16, art. 2, 21 I.L.M. at 1272.

39. *See* PHILIP C. JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION 5-6 (1927). Cornelius van Bynkershock, in his 1703 treatise, *De Domino Maris Disertatio*, suggested that the distance a cannon shot would travel from shore was an appropriate measure of the coastal nation's jurisdiction over the sea. *Id.* The cannon-shot measure, calculated at a marine league, the equivalent to three geographical miles from

CLOS II represented national efforts to gain control over a larger area of coastal waters.[40] UNCLOS II, however, was adjourned without coming to an agreement on the breadth of the Territorial Sea.[41] While the Territorial Sea was of high priority to the international legal community during UNCLOS I and UNCLOS II, in UNCLOS III there was greater concern regarding the legal regime over the area the previous conferences failed to address, the deep seabed.[42] The deep seabed repre-

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shore by the Italian jurist Galiani in 1782, gained support until it was universally accepted as the maximum distance over which a coastal nation could claim sovereignty. *Id.* Since 1793, the Territorial Sea of the United States has been delineated at three miles. Letter from Secretary of State Thomas Jefferson to British Minister Mr. Hammond (Nov. 8, 1793), *reprinted in* 1 J. MOORE, DIGEST OF INTERNATIONAL LAW 702-03 (1906). Mr. Jefferson reported that

> [t]he President of the United States, thinking that, before it shall be finally decided to what distance from our seashores the territorial protection of the United States shall be exercised . . . finds it necessary in the meantime to fix provisionally on some distance for the present government of these questions. . . . Reserving, however, the ultimate extent of this for future deliberation, the President gives instructions to the officers acting under his authority to consider those heretofore given them as restrained for the present to the distance of one sea league or three geographical miles from the sea-shores.

Id.

40. *See* LUC CUYVERS, OCEAN USES AND THEIR REGULATIONS 154 (1984). A U.S.-Canada proposal to create a six-mile territorial sea combined with a fishery zone of an additional six miles failed to obtain enough votes to pass at UNCLOS II. *Id.* at 150.

41. *See* SCHOENBAUM, *supra* note 8, at 22.

42. *See* Jon Van Dyke & Christopher Yuen, *"Common Heritage" v. "Freedom of the High Seas": Which Governs the Seabed?*, 19 SAN DIEGO L. REV. 493, 506 (1982) (stating that UNCLOS I did not address deep seabed); *see* Bowett, *supra* note 37 (explaining that essential purpose of UNCLOS II was to decide whether to extend Territorial Sea).

The deep seabed is technically called "The Area" and defined in UNCLOS III as the "seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction." UNCLOS III, *supra* note 16, art. 1, ¶ 1, 21 I.L.M. at 1271. The deep seabed is the center of a controversy over how resources found there should be distributed. *See* Pitt, *supra* note 17, at 3 (discussing efforts to renegotiate deep seabed mining provisions of UNCLOS III).

The Convention was primarily concerned with the regime governing the mining of manganese nodules in the deep seabed. *See* Van Dyke & Yuen, *supra*, at 496. Manganese nodules are rocks that have a high mineral content and are valuable because they contain nickel, copper, manganese, and cobalt. *See id.* at n.7. A position in favor of international control over the ocean bed as the "common heritage of mankind" gained support amount the developing nations. *See* SHIGERU ODA, INTERNATIONAL CONTROL OF SEA RESOURCES xxvi (1989). Developing nations favored this approach because if manganese nodules were the "common heritage," profits from the resources must be shared with the rest of the world according to international standards. *See* Van Dyke & Yuen, *supra*, at 497. Critics of this view, including the United States, argued that international control and the concept of "common heritage of mankind" was founded on wishful thinking, Third World avarice, and a serious philosophical misunderstanding of prop-

sents the area of international waters beyond national jurisdiction.[43]

In order to confer on the deep seabed, the U.N. General Assembly created the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction (the "Seabed Committee") in 1968.[44] UNCLOS III continued the Seabed Committee's work when it convened in 1973.[45] The Convention addressed specifically the regime of the deep seabed, yet also provided a comprehensive set of rules on navigation, fishing rights, environmental protection, and scientific research.[46] In addition, UNCLOS III resolved the breadth of the Territorial Sea.[47]

UNCLOS III apportioned the oceans into maritime zones.[48] The Convention divided international waters into the Territorial Sea,[49] the Contiguous Zone,[50] the Exclusive Economic Zone,[51]

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erty rights and of the true common heritage of humanity. *See* BERNARD H. OXMAN, LAW OF THE SEA: U.S. POLICY AND DILEMMA 6 (1983). These critics believed that there was a 'ploy' to permit Third World countries to reap the profits from industrialized countries' efforts at deep seabed exploration. *See id.* In particular, production limitation, mandatory transfer of some technologies, and a built-in preference for public over private enterprise of deep seabed mining went against U.S. and industrialized countries' economic interests. *See id.*

43. *See* UNCLOS III, *supra* note 16, art. 1, ¶ 1, 21 I.L.M. at 1261.

44. G.A. Res. 2467, U.N. GAOR, 23rd Sess., Supp. No. 18, at 15, U.N. Doc. A/7218 (1968).

45. *See* Arend, *supra* note 8, at 788.

46. *See* Pitt, *supra* note 17 (explaining scope of UNCLOS III provisions).

47. UNCLOS III, *supra* note 16, arts. 2-4, 21 I.L.M. at 1272. The Territorial Sea is the ocean area extending from the shore of a coastal nation to a maximum of 12 nautical miles under international law. *Id.* art. 3, 21 I.L.M. at 1272.

48. *See generally* SCHOENBAUM, *supra* note 8, at 31-42 (discussing UNCLOS III maritime zones).

49. UNCLOS III, *supra* note 16, arts. 2-4, 21 I.L.M. at 1272.

50. *Id.* art. 33, 21 I.L.M. at 1276. The coastal nation has limited powers in the Contiguous Zone. *Id.* Article 33 of the Convention states:

> In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to . . . prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; punish infringement of the above laws and regulations committed within its territory or territorial sea.

Id.

51. *Id.* art. 55, 21 I.L.M. at 1280. Nations have some sovereignty in their Exclusive Economic Zones. *Id.* The legal regime of the Exclusive Economic Zone, as defined in UNCLOS III, consists of "an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention. *Id.*

and the Area.[52] The Territorial Sea extends twelve nautical miles[53] from the baseline[54] of a coastal nation.[55] A coastal nation has sovereignty over this area including air space over the sea as well as its bed and subsoil.[56]

While a coastal nation has complete control in the Territorial Sea, there is a historical notion that a country needed to protect itself through jurisdiction over an area that came to be known as the Contiguous Zone.[57] The Contiguous Zone is next to and seaward of the Territorial Sea out to a maximum of 24 nautical miles from the baseline.[58] A coastal nation may regulate customs and impose fiscal regulations in this area.[59] Thus, a coastal nation has a certain level of sovereignty in the Contiguous Zone.

The Exclusive Economic Zone, a concept originally introduced in UNCLOS III,[60] is also adjacent to the Territorial

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52. *Id.* art. 1, ¶ 1, 21 I.L.M. at 1272. The Area is defined as "the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction." *Id.*

53. *See* D.C. KAPOOR & ADAM J. KERR, A GUIDE TO MARITIME BOUNDARY DELIMITATION 21 (1986). UNCLOS III uses the nautical mile as the unit of distance and length measurement without defining this expression in linear terms. *Id.* The International Hydrographic Conference of 1929 approved the value of 1852 meters for the "international nautical mile," which has been adopted by most maritime nations and the International Bureau of Weights and Measures. *Id.*

54. *See* SCHOENBAUM, *supra* note 8, at 26-31 (explaining methods of determining baselines). A baseline is the starting point from which all measurements of the outer limits of maritime zones may be made. KAPOOR & KERR, *supra* note 53, at 29. The baseline is both the starting point for the outer limits of maritime zones and the limiting line for internal waters. *Id.*

55. UNCLOS III, *supra* note 16, art. 3, 21 I.L.M. at 1272. The extension of the Territorial Sea from its traditional breadth of three miles has left uncertain whether the states or the federal government will assume jurisdiction over the additional area. *See* Carol Elizabeth Remy, Note, *U.S. Territorial Sea Extension: Jurisdiction and International Environmental Protection*, 16 FORDHAM INT'L L.J. 1208 (1992-93) (arguing that for purposes of protecting environment through uniform laws, federal government, rather than individual states, should acquire jurisdiction over Territorial Sea from three miles out to twelve mile extension).

56. UNCLOS III, *supra* note 16, art. 2, 21 I.L.M. at 1272.

57. *See* Remy, *supra* note 55, at 1221 n.79 (explaining that coastal nation's interest was particularly to prevent smuggling from its territory). Smuggling was an early concern of eighteenth century countries with powerful navies. ARND BERNAERTS, BERNAERTS' GUIDE TO THE LAW OF THE SEA 112 (1988). The modern need for the Contiguous Zone is for national security reasons. *Id.*

58. UNCLOS III, *supra* note 16, art. 33, 21 I.L.M. at 1276.

59. *Id.* ¶ 1(a).

60. *See* Remy, *supra* note 55, at 1223 n.88. Both UNCLOS I and UNCLOS II did not include an Exclusive Economic Zone. *Id.* For a discussion on how the Exclusive

Sea.[61] A coastal nation by proclamation may establish an Exclusive Economic Zone that overlaps the Contiguous Zone and extends seaward to a maximum of 200 nautical miles.[62] The coastal nation has sovereign rights over activities affecting natural resources existing in the waters or seabed within the Exclusive Economic Zone's boundaries.[63] A coastal nation also has powers related to artificial installations, marine scientific research, and protection of the marine environment in the Exclusive Economic Zone.[64]

The Area, otherwise known as the deep seabed, constitutes the subsoil of the ocean and the ocean floor beyond the reaches of coastal nation jurisdiction.[65] There are no sovereign rights in the Area because property is considered to be "the common heritage of mankind."[66] According to UNCLOS III, the International Seabed Authority[67] (the "Authority") ensures that activities in the Area are carried out for the "benefit of mankind as a whole."[68]

Economic Zone developed out of coastal nation's desire to expand a fisheries zone, see ODA, *supra* note 43, at xiii-xx.

61. UNCLOS III, *supra* note 16, art. 55, 21 I.L.M. at 1280.

62. *Id.* art. 57, 21 I.L.M. at 1280. Article 57 states, "[t]he exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured." *Id.* In 1983, President Reagan issued a proclamation creating a 200-mile Exclusive Economic Zone for the United States. Proclamation No. 5030, 48 Fed. Reg. 10,605 (1983). Over 60 nations have proclaimed an Exclusive Economic Zone. KAPOOR & KERR, *supra* note 53, at 8.

63. UNCLOS III, *supra* note 16, art. 56, 21 I.L.M. at 1280. Article 56 states that coastal nations have

> sovereign rights for the purposes of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters . . . and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds . . . .

Id.

64. *Id.* art. 56, ¶ 1(b), 21 I.L.M. at 1279. Article 56, ¶ 1(b) states, "In the exclusive economic zone, the coastal State has . . . jurisdiction as provided for in the relevant provisions of this Convention with regard to . . . the establishment and use of artificial islands, installations and structures . . . ." *Id.*

65. *Id.* art. 1, ¶ 1, 21 I.L.M. at 1271.

66. *Id.*, art. 136, 21 I.L.M. at 1293; *see supra* note 42 (discussing "common heritage" implications).

67. UNCLOS III, *supra* note 16, art. 156, 21 I.L.M. at 1298. The Convention establishes the Authority through Article 156 which states, "[t]here is hereby established the International Seabed Authority, which shall function in accordance with [Part 4 of the Convention]." *Id.*

68. UNCLOS III, *supra* note 16, art. 140, ¶ 1, 21 I.L.M. at 1293.

In addition to creating these zones with various levels of national sovereignty, the Convention also includes a provision for the Continental Shelf, a geologically defined area of the ocean floor.[69] The Continental Shelf is a natural prolongation of a coastal nation's land.[70] It may extend over 200 nautical miles from the baseline.[71] The coastal nation has sovereign rights to control exploration and exploitation of natural resources on the Continental Shelf.[72] According to Article 81 of the Convention, a coastal nation has the power to regulate drilling on its Continental Shelf for "all purposes."[73]

B. *UNCLOS III Marine Archaeology Provisions*

The maritime zones included in the Convention establish parameters for a coastal nation's ability to regulate marine ar-

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69. *Id.* art. 76, 21 I.L.M. at 1285.

70. *Id.* Article 76 states that the Continental Shelf is "the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the *natural prolongation* of its land territory. . . . " *Id.* (emphasis added). *See generally* D.N. Hutchinson, *The Concept of Natural Prolongation in the Jurisprudence Concerning Delimitation of Continental Shelf Areas*, 55 BRIT. Y.B. INT'L L. 415 (1986) (discussing concept of natural prolongation of Continental Shelf). The full text of Article 76, ¶ 1 of UNCLOS III states:

> The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

UNCLOS III, *supra* note 16, art. 76, ¶ 1, 21 I.L.M. at 1285.

71. *See* UNCLOS III, *supra* note 16, art. 76, ¶ 1, 21 I.L.M. at 1285. The extension of the Continental Shelf depends on the location of the continental margin. *Id.* The continental margin is defined in Article 76, paragraph 3. *Id.*, art. 76, ¶ 3. This provision states that "[t]he continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the sea-bed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof." *Id.* If the continental margin is located beyond 200 nautical miles, the Continental Shelf ends where at the continental margin. *Id.*, art. 76, ¶ 1. If the continental margin is located closer to the baseline than 200 nautical miles, the Continental Shelf ends at 200 nautical miles from the baseline. *Id.*

72. *See id.* art. 77, 21 I.L.M. at 1285. The Convention's provision of the rights of the coastal nation is explicit. *Id.* Paragraph one of Article 77 states, "[t]he coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources." *Id.*; *see supra* note 34 (discussing definition of natural resources under Continental Shelf Convention).

73. *Id.* art. 81, 21 I.L.M. at 1286. Article 81 states, "[t]he coastal State shall have the exclusive right to authorize and regulate drilling on the continental shelf for all purposes." *Id.*

chaeology in general.[74] In addition, articles 149[75] and 303[76] of UNCLOS III specifically deal with archaeological resources found at sea. The four treaties comprising UNCLOS I did not include archaeological provisions.[77] Thus, the inclusion of these provisions in UNCLOS III means that the Convention, if ratified, will change the international law governing marine archaeology left by UNCLOS I.[78]

Article 149 states the broad proposition that nations should preserve historic shipwrecks found in the Area for the "benefit of mankind as a whole."[79] Article 303 is a "General Provision" of UNCLOS III.[80] This article provides that a nation has a duty to protect historic shipwrecks and that a nation may presume that removal of artifacts from its Contiguous Zone violates its customs laws.[81] Article 303 also provides that nothing in the provision

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74. *See* Oxman, *supra* note 8, at 355 (stating that law of sea provides jurisdictional framework for regulation of marine archaeology).

75. UNCLOS III, *supra* note 16, art. 149, 21 I.L.M. at 1295.

76. *Id.* art. 303, 21 I.L.M. at 1326.

77. *See* Arend, *supra* note 8, at 782.

78. *Id.* (stating that UNCLOS III will effect international marine archaeology law left unaddressed by UNCLOS I).

79. UNCLOS III, *supra* note 16, art. 149, 21 I.L.M. at 1295. Article 149 provides:

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

Id.

80. UNCLOS III, *supra* note 16, art. 303, 21 I.L.M. at 1326. Article 303 provides:

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

Id.

81. *Id.* ¶ 2. Paragraph two of Article 303 of the Convention essentially allows a coastal nation to presume that the removal of shipwrecks constitutes smuggling. *See* Oxman, *supra* note 8, at 264 (stating that Article 303, paragraph 2 does nothing to expand coastal nation's jurisdiction in Contiguous Zone except to provide presumption

will affect established ownership principles under admiralty law[82] and is "without prejudice" to other international agreements and laws that deal with archaeological artifacts.[83]

C. *UNCLOS III Dispute Settlement Provisions*

The dispute settlement provisions of UNCLOS III were included in the Convention to ensure that one nation's unilateral interpretation of UNCLOS III would not prevail over another nation's understanding of the Convention's text.[84] According to UNCLOS III, parties to a dispute may agree to settle a dispute by any method they wish.[85] The Convention provides different procedures for different categories of disputes.[86] While articles 279 through 299, included in Part XV of UNCLOS III, address dispute settlements generally, articles 186 through 191 deal with disputes over seabed mining in the Area.[87]

D. *U.S. Abandoned Shipwreck Law*

Current U.S. abandoned shipwreck law is represented by the Abandoned Shipwreck Act of 1987 (the "ASA").[88] The ASA was designed to resolve the legal problems with state regulation of historically significant shipwrecks on submerged lands within the territorial limits.[89] Senator Bill Bradley [D-NJ], who origi-

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of smuggling); *supra* note 50 (setting forth text of Article 33. which provides a coastal nation with jurisdiction to apply its own customs laws in its Territorial Sea).

82. *Id.* ¶ 3.

83. *Id.* ¶ 4. In effect, "without prejudice" means that the drafters wanted to protect other international agreements and laws concerning historic and archaeological artifacts. *See* Newton, *supra* note 10, at 190.

84. *See* Sohn, *supra* note 29, at 195.

85. *Id.* at 196; *see* UNCLOS III, *supra* note 16, art. 280, 21 I.L.M. at 1322. Article 280 is included in Part XV of the Convention which provides general provisions relating to the settlement of disputes. *See id.* Article 280 states, "[n]othing in this Part impairs the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice." *Id.*

86. *See* Sohn, *supra* note 29, at 197.

87. *Id.*

88. 43 U.S.C. §§ 2101-2106 (1988).

89. H.R. REP. NO. 514, 100th Cong., 2d Sess., pt. 1, at 1 (1988) *reprinted in* 1988 U.S.C.C.A.N. 365 [hereinafter House Report]. Shipwrecks of historic significance are the target of the legislation. *Id.* Of the 50,000 abandoned shipwrecks located in the navigable waters of the United States, approximately five to ten percent are estimated to be of historic significance. *Id.*; *see also* Henry M. Arruda, Comment, *The Extension of the United States Territorial Sea: Reasons and Effects*, 4 CONN. J. INT'L L. 697, 724-25 (1989) (discussing how extension of Territorial Sea may affect state statutes).

nally proposed the bill in the Senate, expressed particular concern about the admiralty court's jurisdiction over historic shipwrecks.[90] Congress enacted the ASA on April 28, 1988.[91]

Prior to the ASA's enactment, U.S. abandoned shipwreck law was unsettled.[92] Congress intended to provide clear rules regarding historic abandoned shipwrecks and to remedy the confusion created by the courts.[93] The abandoned shipwreck case law, known as the "treasure salvage" cases,[94] applied maritime law of salvage and the law of finds to determine ownership of resources lost at sea.[95] The ASA attempts to protect historic abandoned shipwrecks by removing abandoned historic shipwrecks from salvage and finds and by allowing state regulation of

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90. 113 CONG. REC. S3989 (daily ed. Mar. 26, 1987) (statement of Sen. Bradley). Senator Bradley said, "[u]nder the current system, Federal courts — sitting in admiralty — have substantial policymaking power, which has resulted in uneven judgments about the historical value of shipwrecks." *Id.*

91. *See* ASA, 43 U.S.C. §§ 2101-2106 (1988).

92. *See* House Report, *supra* note 89, at 366. The House Report states that, "[t]here is currently confusion over the ownership and authority to manage abandoned shipwrecks. States have claimed title to, and regulatory authority over, abandoned historic shipwrecks located on submerged lands under their jurisdiction. The Federal Admiralty Courts have also claimed jurisdiction over the salvage of these resources." *Id.*

93. *Id.*

94. *See, e.g.*, SCHOENBAUM, *supra* note 8, at 513 (referring to cases deciding claims to abandoned shipwrecks as "treasure salvage" cases).

95. Florida Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670 (1982), *on remand* 689 F.2d 1254 (5th Cir. 1982); Klein v. The Unidentified Wrecked & Abandoned Sailing Vessel, 758 F.2d 1511 (11th Cir. 1985); Maritime Underwater Surveys, Inc. v. The Unidentified, Wrecked & Abandoned Sailing Vessel, 717 F.2d 6 (1st Cir. 1983); Treasure Salvors, Inc. v. The Unidentified Wrecked & Abandoned Sailing Vessel, 640 F.2d 560 (5th Cir. 1981); Platoro Ltd. v. The Unidentified Remains Of A Vessel, 614 F.2d 1051 (5th Cir.), *cert. denied*, 449 U.S. 901 (1980); Treasure Salvors, Inc. v. The Unidentified Wrecked & Abandoned Sailing Vessel, 569 F.2d 330 (5th Cir. 1978); Jupiter Wreck, Inc. v. The Unidentified, Wrecked & Abandoned Sailing Vessel, 691 F. Supp. 1377 (S.D. Fla. 1988); Maritime Sys. Int'l, Inc. v. The Unidentified, Wrecked & Abandoned Vessel, CIV.A.85-611CMW to 85-646CMW and 85-646CMW to 85-648CMW, 1986 WL 7512 (D. Del. June 10, 1986); Indian River Recovery Co. v. The China, 645 F. Supp. 141 (D. Del. 1986); Chance v. Certain Artifacts Found & Salvaged From The Nashville, 606 F. Supp. 801 (S.D. Ga. 1984), *aff'd*, 775 F.2d 302 (11th Cir. 1985); Subaqueous Exploration & Archaeology, Ltd. v. The Unidentified, Wrecked & Abandoned Vessel, 577 F. Supp. 597 (D. Md. 1983); Treasure Salvors, Inc. v. The Unidentified, Wrecked & Abandoned Sailing Vessel, 556 F. Supp. 1319 (S.D. Fla. 1983); Cobb Coin Co. v. The Unidentified, Wrecked & Abandoned Sailing Vessel, 549 F. Supp. 540 (S.D. Fla. 1982); Metropolitan Dade County v. One Bronze Cannon, 537 F. Supp. 923 (S.D. Fla. 1982); Hener v. United States, 525 F. Supp. 350 (S.D.N.Y. 1981); Cobb Coin Co. v. The Unidentified, Wrecked & Abandoned Sailing Vessel, 525 F. Supp. 186 (S.D. Fla. 1981); Weber Marine, Inc. v. One Large Cast Steel Stockless Anchor, 478 F. Supp. 973 (E.D. La. 1979).

historic resources.[96] The ASA also delineates ownership rules, standards for determining which shipwrecks are worthy of preservation, and incentives to locate shipwrecks.[97]

1. The Law of Finds

Prior to the ASA, U.S. courts decided who owned abandoned shipwrecks by applying the common law notion of finds law.[98] The law of finds embodies the idea that a finder of derelict property is entitled to ownership of that property.[99] While U.S. courts adopted the law of finds to determine title to lost property, at one time the courts considered applying the doctrine of sovereign prerogative to do so.[100]

Sovereign prerogative is an English common law rule stating that where property is found derelict at sea, the sovereign acquires it rather than the finder.[101] In *Treasure Salvors v. The Unidentified Wrecked & Abandoned Sailing Vessel*, the U.S. Court of Appeals for the Fifth Circuit rejected the federal government's argument that they had expressly asserted title to a shipwreck under sovereign prerogative.[102] In *Treasure Salvors*, the plaintiff, a professional salvage company called Treasure Salvors, Inc., found a vessel in international waters off the coast of the Florida Keys.[103] The plaintiffs asserted title to the vessel pursuant to the

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96. ASA, 43 U.S.C. §§ 2106(a) & 2101 (1988).

97. *See generally* Guidelines, *supra* note 7 (including detailed recommendations for these substantive issues).

98. *See, e.g., Klein*, 758 F.2d 1511; *Chance*, 606 F. Supp. 801; *Indian River Recovery Co.*, 645 F. Supp. 141.

99. *Martha's Vineyard Scuba Headquarters*, 833 F.2d at 1065. The doctrine of finds expresses "the ancient and honorable principle of 'finders, keepers'." *Id.*

100. *See* Treasure Salvors, Inc. v. The Unidentified Wrecked & Abandoned Sailing Vessel, 569 F.2d 330, 342 (5th Cir. 1978).

101. *See* John J. Kenny & Ronald R. Hrusoff, *The Ownership of the Treasures of the Sea*, 9 WM. & MARY L. REV. 383, 383-85 (1967). The rule of sovereign prerogative is still in force in England and has been adopted in Canada. Canada Shipping Act, R.S.C., ch. 5-9, § 422 (1985) (Can.); *see* Runyan, *supra* note 5, at 40-41 (discussing Canadian approach to regulating historic wreck sites).

102. *Treasure Salvors*, 569 F.2d at 342.

103. Treasure Salvors, Inc. v. The Unidentified Wrecked & Abandoned Sailing Vessel, 408 F. Supp. 907, 908 (S.D. Fla. 1976). Under the mistaken assumption that the ship was in waters controlled by the state of Florida, the state required the salvor to enter into a series of contracts with the state pursuant to the Florida Archives and History Act. *Id.* The Florida Archives and History Act provided that Florida claimed ownership of all historic shipwrecks found in state waters. *Id.* A salvor who wished to search for historic shipwrecks must have obtained a license from the Florida Department of State, Division of Archives. *Id.* Subsequently, upon discovery of a wreck, the salvor

law of finds.[104] The U.S. government intervened and claimed title to the ship based on sovereign prerogative.[105]

The government's claim led the Fifth Circuit to decide whether sovereign prerogative or the law of finds would prevail in a U.S. admiralty court.[106] In support of the plaintiffs, the court held that the U.S. government had not expressly asserted title to the wreck through sovereign prerogative.[107] As a result of *Treasure Salvors*, U.S. courts have adopted the law of finds for the

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must have contracted with the state for recovery of any artifacts. *Id.* Such a contract gave salvors exclusive salvage rights over the wreck. *Id.* Based on the contract, the first salvors would be the only parties able to contract with the state. *Id.* After the salvors entered into these contracts with Florida, the Supreme Court in an unrelated case held that the area in which the wreck was found was federal waters, not state territorial waters. United States v. Florida, 420 U.S. 531 (1975). As a result of this decision, Treasure Salvors repudiated their contract with Florida and brought an *in rem* action in federal court to claim title to the ship. Shallcross & Giesecke, *supra* note 1, at 374.

104. *Treasure Salvors*, 408 F. Supp. at 907. The court stated that such a claim was properly within the scope of a salvage action. *Id.* at 909.

105. Treasure Salvors, Inc. v. The Unidentified Wrecked & Abandoned Sailing Vessel, 569 F.2d. 330, 340-41 (5th Cir. 1978). The United States contended that sovereign prerogative had been asserted legislatively because it was incorporated in American law and Congress specifically asserted jurisdiction. *Id.* at 337. The government argued that the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356 (1988 & Supp. III 1991) ("OCSLA") extended jurisdiction of the United States beyond the three-mile limit. *Id.* at 338. OCSLA extends jurisdiction and control to the United States to the Outer Continental Shelf. *Id.*

The government claimed that two federal statutes, the Abandoned Property Act (40 U.S.C. § 310 (1988)) and the Antiquities Act (16 U.S.C. §§ 431-458(a) (1988)) gave the federal government control of property located there. *Id.* at 337. The Abandoned Property Act authorizes the administrator of General Services to protect the interest of the government in wrecked, abandoned, or derelict property lying within the jurisdiction of the United States and which ought to come to the United States. 40 U.S.C. § 310 (1988). The Antiquities Act authorizes executive designation of historic landmarks situated upon lands owned or controlled by the United States as national monuments. 16 U.S.C. §§ 431-458(a) (1988).

The district court rejected this argument. *Treasure Salvors*, 408 F. Supp. at 909. First, the court found that the Abandoned Property Act applied only to property abandoned as a consequence of the Civil War. *Id.* Second, according to the court, OCSLA only gives the United States jurisdiction over mineral resources and does not apply to shipwrecks and artifacts. *Id.* at 910. Therefore, the Antiquities Act did not apply. *Id.* On appeal, the Fifth Circuit upheld the district court's holding. *Treasure Salvors*, 569 F.2d at 342.

106. *See Treasure Salvors*, 569 F.2d 330 (deciding whether sovereign prerogative or law of finds would be applied by United States courts to abandoned shipwrecks).

107. *Id.* at 343. The court stated, "[t]he 'American rule' vesting title in the finder has been widely recognized by courts and writers." *Id. But see* William J. Pallas, Note, *The Doctrine of State Succession and the Law of Historic Shipwrecks, The Bell of the Alabama:* United States v. Steinmetz, 17 TUL. MAR. L.J. 343 (1993) (discussing failure of U.S. courts to apply law of finds to Civil War property).

historic shipwrecks found at sea.[108]

Under the doctrine of finds, a finder gains title to property if the property has never been owned by anyone[109] or if it has been abandoned.[110] The finder must also demonstrate intent to obtain the property and that the finder exercised possession or at least a high degree of control over the property.[111] Abandonment must be more than merely leaving the property.[112] Neither the lapse of time[113] nor the inability to locate an owner[114] necessarily divests an owner of title to property. Rather, a finder must meet a high degree of proof that the owner intended to abandon the property.[115] Often times, this entails an owner's affirmative act indicating a repudiation of ownership.[116] If the owner fails to appear in court to claim the property, however, a court may infer that the owner intended to abandon the property.[117] Because of the likelihood that a his-

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108. *See supra* note 95 (listing treasure salvage cases).

109. *See, e.g.*, Columbus-America Discovery Group, Inc. v. Atlantic Mut. Ins. Co., 974 F.2d 450, 459-60 (4th Cir. 1992) (stating that historically, courts applied finds law only to maritime property such as ambergris, whales, and fish that never belonged to anyone (citing 3A BENEDICT ON ADMIRALTY § 158 (Martin J. Norris et al. eds., 7th ed. 1993)), *cert. denied*, __ U.S. __, 113 S. Ct. 1625 (1993).

110. *See id.* at 460 (explaining that law of finds applies to abandoned property).

111. *Id.* (quoting Hener v. United States, 525 F. Supp. 350, 356 (S.D.N.Y. 1981)). The court stated that in order to show intent,

> [a] would-be finder should be expected to act acquisitively, to express a will to own by acts designed to establish the high degree of control required for a finding of possession. The would-be finder's longing to acquire is exacerbated by the prospect of being found to have failed to establish title. If either intent or possession is found lacking, the would-be finder receives nothing; neither effort alone nor acquisition unaccompanied by the required intent is rewarded . . . Furthermore, success as a finder is measured solely in terms of obtaining possession of specific property; possession of specific property can seldom be shared, and mere contribution by one party to another's successful efforts to obtain possession earns no compensation.

Id.

112. *Id.* at 461. The court stated, "[t]oday, finds law is applied to previously owned sunken property only when that property has been abandoned by its previous owners. Abandonment in this sense means much more than merely leaving the property . . . . " *Id.*

113. *Id.*

114. *Id.*

115. *Id.* The proof must be "strong . . . such as the owner's express declaration abandoning title." SCHOENBAUM, *supra* note 8, at 512.

116. The Port Hunter, 6 F. Supp. 1009, 1011 (D. Mass. 1934).

117. *See* Columbus-America Discovery Group, Inc. v. Atlantic Mut. Ins. Co., 974 F.2d 450, 462 (4th Cir. 1992) (stating that there is only one case that has applied law of

toric shipwreck would be abandoned,[118] U.S. courts logically applied this common law notion to decide ownership claims to historic shipwrecks before the ASA's passage.[119]

2. Salvage Law

U.S. courts also applied the traditional admiralty law of salvage to historic shipwrecks before the ASA's passage rather than the law of finds, when an owner had not abandoned the property.[120] Unlike the law of finds, salvage law does not grant title of a shipwreck to a salvor.[121] Rather, salvage law guarantees a right to a reward from the owners of the vessel to compensate salvors for their service in saving foundering ships at sea.[122]

In order to protect the initial salvor's interest in recovering the property, customary admiralty law recognizes the right of first salvor.[123] An admiralty court will enjoin other salvors from interfering with the first salvor's recovery operations.[124] Pursu-

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finds where previous owner showed up in court), *cert. denied*, __ U.S. __, 113 S. Ct. 1625 (1993).

118. *See, e.g.*, Treasure Salvors, Inc. v. The Unidentified Wrecked & Abandoned Sailing Vessel, 569 F.2d 330, 337 (5th Cir. 1978) (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."); *see also* Arend, *supra* note 8, at 779 n.8 (stating that there may be no person, legal or natural, who might be able to claim title to shipwrecks that are too old to have a surviving owner).

119. *See supra* note 95 (listing treasure salvage cases).

120. *See Columbus-America Discovery Group*, 974 F.2d at 459. The Fourth Circuit stated that, "[h]istorically, courts have applied the maritime law of salvage when ships or their cargo have been recovered from the bottom of the sea by those other than their owners. Under this law, the original owners still retain their ownership interests in such property, although the salvors are entitled to a very liberal salvage award." *Id.*

A convention provides rules for international salvage law. *See* William L. Neilson, *The 1989 International Convention of Salvage*, 24 CONN. L. REV. 1203, 1203 (1992). On March 27, 1992, the United States ratified the 1989 salvage convention. *See id.* This convention, if it comes into force, will replace the 1910 Brussels Convention on Salvage. *Id.*; *see also* Nicholas J.J. Gaskell, *The 1989 Salvage Convention and the Lloyd's Open Form (LOF) Salvage Agreement 1990*, 16 TUL. MAR. L.J. 1 (1991).

121. *Columbus-America Discovery Group*, 974 F.2d at 460-61.

122. *Id.*

123. *See* John P. Fry, Note, *The Treasure Below: Jurisdiction Over Salving Operations in International Waters*, 88 COLUM. L. REV. 863, 876 (1988) (stating that admiralty courts historically have protected right of first salvor); 3A BENEDICT, *supra* note 109, § 227.

124. 3A BENEDICT, *supra* note 109, at § 227 (stating that admiralty courts will protect rights of first salvors legally in possession).

ant to such an injunction, a first salvor continues with an *in rem*[125] action to receive the reward.[126]

A salvage claim results in the salvor securing a maritime lien on the salved property, allowing the salvor, as plaintiff, to bring an *in rem* action against the ship and collect the reward.[127] In order for the salvor to bring the *in rem* action against the ship and receive the monetary award, the salvor must show a "marine peril,"[128] service voluntarily rendered when not required as an existing duty or from a special contract,[129] and success in whole or in part.[130]

These three elements, which are required to establish a salvage cause of action, are distinct from the factors courts consider

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125. *See* NICHOLAS J. HEALY & DAVID J. SHARPE, CASES AND MATERIALS ON ADMIRALTY 118 (2d ed. 1986). An action *in rem* connotes that a ship can be named as sole defendant in a complaint. *Id.* In essence, the vessel is personified. *Id.* Thus, the ship is arrested by a U.S. marshal, defaulted, tried, found at fault, and sold at auction to cover damages all without the active participation of the shipowner *in personam*. *Id.*

126. *See* GILMORE & BLACK, THE LAW OF ADMIRALTY § 8-13 (2d ed. 1975). An *in rem* action in admiralty generally requires the presence of the vessel within the court's territory. Treasure Salvors, Inc. v. The Unidentified Wrecked & Abandoned Sailing Vessel, 569 F.2d 330, 333 (5th Cir. 1978). This requirement is based on admiralty law's fiction of convenience that personifies a ship and allows a plaintiff salvor to recover from the ship itself when the court may not assert jurisdiction over the owner. *Id.* at 333-34. However, some courts, including the U.S. Supreme Court, have conferred *in rem* jurisdiction when the *res* is not located within the court's territory. Continental Grain Co. v. Barge FBL-585, 364 U.S. 19 (1960). In *Treasure Salvors*, the court held that the United States, by intervening in an *in rem* action, waived the usual requirement that the *res* be before the court. *Treasure Salvors*, 569 F.2d at 335. Because the United States consented to the court's jurisdiction, the United States could not claim that the court could not determine property interests in the subject of the litigation. *Id.* The court also stated that it had *in personam* jurisdiction over the parties. *Id.* As a result, arrest of the vessel was not essential to resolving the dispute. *Id.*

By not requiring the presence of the vessel within the court's territory, U.S. courts may obtain jurisdiction over shipwrecks located in international waters. *See* Moyer v. The Wrecked & Abandoned Vessel, Known As The Andrea Doria, 836 F. Supp. 1099 (D.N.J. 1993). Even though vessels may lay outside the Territorial Sea, nevertheless "[c]laims arising out of salvage operations at sea beyond the territorial limits of the United States are within the admiralty jurisdiction of the federal courts." MDM Salvage, Inc. v. The Unidentified, Wrecked & Abandoned Sailing Vessel, 631 F. Supp. 308, 311 (S.D. Fla. 1986).

127. 3A BENEDICT, *supra* note 109, § 288.

128. *Id.* § 63. A "peril" is considered to be a situation that requires some action to remove a vessel or its cargo from danger of being damaged. *See id.*; *see also*, Flagship Marine Services, Inc. v. Belcher Towing Co., 761 F. Supp. 792 (S.D. Fla. 1991).

129. 3A BENEDICT, *supra* note 109, § 68; B.V. Bureau Wijsmuller v. United States, 702 F.2d 333, 338 (2d Cir. 1983).

130. The Blackwall, 77 U.S. 1, 12 (1870).

when fashioning a salvage award.[131] The factors courts assess in determining the size of a salvage reward include the labor expended by the salvors in rendering the salvage service[132] and the promptitude, skill, and energy displayed in rendering the service in saving the property.[133] Courts may consider other issues as well, such as the value of the property employed by the salvors in rendering the service[134] and the danger to which such property was exposed.[135] Finally, courts appraise the risk incurred by the salvors in securing the property from the impending peril, the value of the property saved, and the degree of danger from which the property was rescued.[136]

In recognition of the potential historic value of abandoned shipwrecks, some courts have limited a salvage reward if salvage operations did not take into consideration the historic and archaeological value of the wreck.[137] For example, in *Chance v. Certain Artifacts Found & Salvaged From The Nashville,*[138] the court held that a salvage award should be denied because a salvor had placed the shipwreck in a greater danger than if the wreck were safely lying on the ocean bottom.[139] In *Klein v. Unidentified, Wrecked & Abandoned Sailing Vessel,*[140] the court went one step further by mandating that a plaintiff mark and identify artifacts removed from the shipwreck site to meet archaeological standards in salvaging.[141]

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131. *Compare* 3A BENEDICT, *supra* note 109, § 63 *with* § 237.

132. 3A BENEDICT, *supra* note 109, § 237.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *See* Chance v. Certain Artifacts Found & Salvaged From The Nashville, 606 F. Supp. 801 (S.D. Ga. 1984), *aff'd,* 775 F2d 302 (11th Cir. 1985); Klein v. The Unidentified Wrecked & Abandoned Sailing Vessel, 758 F.2d 1511 (11th Cir. 1985).

138. 606 F. Supp. 801 (S.D. Ga. 1984).

139. *Chance,* 606 F. Supp. at 809. The court noted that the plaintiff claiming a salvage award had not taken proper precautions to preserve the artifacts pulled from the shipwreck. *Id.* The plaintiff had stored artifacts in holding bins but did not change the water in the bins. *Id.* Additionally, the plaintiff piled the artifacts in plaintiff's backyard, which exposed the artifacts to harmful exposure to the elements. *Id.*

140. 758 F.2d 1511 (11th Cir. 1985).

141. Klein v. The Unidentified Wrecked & Abandoned Sailing Vessel, 758 F.2d 1511, 1515 (11th Cir. 1985). The court quoted the district court stating, "the plaintiff's unauthorized disturbance of one of the oldest shipwrecks in the [Biscayne National] Park and his unscientific removal of the artifacts did more to create a marine peril than to prevent one." *Id.* (quoting Klein v. The Unidentified Wrecked & Abandoned Vessel, 568 F. Supp. 1562, 1568 (S.D. Fla. 1984)).

Only maritime property may be the subject of salvage.[142] Courts, however, construe the term "maritime property" broadly so that maritime property may encompass a variety of items.[143] Pursuant to this flexible definition, courts have considered both money on a floating corpse[144] and floating logs[145] to be maritime property subject to a salvage claim. In the United States, courts have not questioned whether historic shipwrecks are maritime property.[146] Rather, U.S. courts have questioned whether historic shipwrecks are a part of maritime commerce for purposes of admiralty jurisdiction.[147]

3. The Use of Salvage and Finds for Claims in Treasure Salvage Cases

U.S. courts have considered both the doctrines of finds and salvage law in claims to abandoned shipwrecks.[148] In addition to deciding that the law of finds should apply rather than sovereign prerogative, in *Treasure Salvors* the Fifth Circuit also referred to the law of finds as an "adjunct" to the law of marine salvage,[149] holding that the two legal principles were consistent because a salvage award could amount to the entire vessel.[150] Thus, the

142. Cope v. Vallette Dry-Dock Co., 119 U.S. 625 (1887) (dry-dock moored in same position for twenty years is not maritime property).

143. *See* SCHOENBAUM, *supra* note 8, at 505.

144. Broere v. Two Thousand One Hundred Thirty-Three Dollars, 72 F. Supp. 115 (E.D.N.Y. 1947).

145. Tidewater Salvage, Inc. v. Weyerhaeuser Co., 633 F.2d 1304 (9th Cir. 1980).

146. *See, e.g., supra* note 95 (listing treasure salvage cases).

147. *See* Florida Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670 (1982) (Supreme Court implicitly accepted admiralty jurisdiction over abandoned historic shipwrecks); Zych v. Unidentified, Wrecked & Abandoned Vessel, Believed To Be The "Seabird," 941 F.2d 525, 532 (7th Cir. 1991) (stating that federal courts did not question admiralty jurisdiction over shipwrecks before passage of Abandoned Shipwreck Act of 1987), *modifying* 746 F. Supp. 1334 (N.D. Ill. 1990), *on remand*, 811 F. Supp. 1300 (N.D. Ill. 1992), *aff'd*, No. 93-1426, 1993 WL 88377 (7th Cir. (Ill.) Mar. 21, 1994). The U.S. Court of Appeals for the Seventh Circuit in *Zych* also expressed the opposing view that abandoned shipwrecks are not firmly within admiralty jurisdiction because they are not related to maritime commerce. *Id.* at 531.

148. *See, e.g.*, Treasure Salvors, Inc. v. The Unidentified Wrecked & Abandoned Sailing Vessel, 569 F.2d 330, 336-37 (5th Cir. 1978) (discussing application of salvage law or law of finds to abandoned shipwrecks).

149. *Id.* at 336. The Fifth Circuit stated, "[w]hether salvage law or the adjunct law of finds should be applied to property abandoned at sea is a matter of some dispute." *Id.* (citation omitted).

150. *Id.* at 337. The Fifth Circuit noted that under salvage law, "awards may include the entire derelict property." *Id.* (citation omitted).

remedies available for a finds or a salvage claim could be the same.[151]

Procedurally, pursuant to the combined principle of the laws of salvage and finds, a salvor may bring an *in rem* action when seeking either a salvage reward or title under the law of finds.[152] The combination of the two legal principles is also significant because it provides federal courts with exclusive subject matter jurisdiction[153] over such cases.[154] Federal courts have exclusive jurisdiction over salvage because no common law remedy permits concurrent jurisdiction in state courts.[155]

Federal courts would not, however, have exclusive jurisdiction over a simple claim to title under the law of finds because it is a common law cause of action.[156] As a result of merging the two principles, federal courts have exclusive subject matter jurisdiction over both salvage actions and claims to title under the law of finds.[157] Due to the alternative pleading in a treasure sal-

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151. *See id.* (explaining that under both salvage and finds law, court may award whole shipwreck to plaintiff).

152. *See, e.g.*, Zych v. The Unidentified, Wrecked & Abandoned Vessel, Believed To Be The SB "Lady Elgin," 746 F. Supp. 1334, 1336 (N.D. Ill. 1990) (plaintiff salvor claimed ownership of wreck or, alternatively, salvage award), *modified*, 941 F.2d 525 (7th Cir. 1991), *on remand*, 811 F. Supp. 1300 (N.D. Ill. 1992), *aff'd*, No. 93-1426, 1993 WL 88377 (7th Cir. (Ill.), Mar. 21, 1994).

153. U.S. CONST. art. III, § 2; 28 U.S.C. § 1333 (1988) (stating that federal courts have exclusive jurisdiction over admiralty and maritime cases). In addition to admiralty jurisdiction, a U.S. federal court may obtain jurisdiction over cases or controversies in two other ways. *See* 28 U.S.C. §§ 1331-1332 (1988). Under 28 U.S.C. § 1331, a federal court has jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the United States. *Id.* § 1331. Also, a federal court in the United States has jurisdiction over actions involving parties of diverse citizenship. *See id.* § 1332.

154. SCHOENBAUM, *supra* note 8, at 513 (explaining that admiralty subject matter jurisdiction is present whether the claim involves salvage or finds).

155. 28 U.S.C. § 1333. 28 U.S.C. § 1333, the "savings to suitors clause," provides in pertinent part that, "[t]he district courts shall have original jurisdiction, exclusive of the courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333 (1988).

156. *See* Columbus-America Discovery Group, Inc. v. Atlantic Mut. Ins. Co., 974 F.2d 450, 461 (4th Cir. 1992), *cert. denied*, __ U.S. __, 113 S. Ct. 1625 (1993).

157. Treasure Salvors, Inc. v. The Unidentified Wrecked & Abandoned Sailing Vessel, 569 F.2d 330 (5th Cir. 1978). In *Treasure Salvors*, the plaintiffs proceeded solely on the basis of a finds claim, not a salvage claim. *Id.* Nevertheless, the court treated the case as admiralty jurisdiction. *Id.*; *see* Zych v. The Unidentified, Wrecked & Abandoned Vessel, Believed To Be The SB "Lady Elgin," 746 F. Supp. 1334, 1338-39 (N.D. Ill. 1990) (stating that plaintiff's primary goal was recovery of property, but that salvage reward was requested in alternative), *modified*, 941 F.2d 525 (7th Cir. 1991), *on remand*, 811 F.

vage case, an admiralty court must decide which claim is more appropriate.[158] Some courts have refused to apply the law of finds.[159]

For example, in *Columbus-America Discovery Group, Inc. v. Atlantic Mutual Insurance Co.*,[160] the U.S. Court of Appeals for the Fourth Circuit addressed the issue of whether to apply the law of salvage or finds to an abandoned shipwreck.[161] In *Columbus-America Discovery Group*, the plaintiffs discovered an 1857 shipwreck, the *S.S. Central America*, 160 miles off the coast of South Carolina in international waters.[162] The plaintiffs claimed that they were either finder or salvor and were therefore entitled to title to the vessel and its cargo or a salvage reward.[163]

In deciding whether the law of finds or salvage should apply to the shipwreck, the Fourth Circuit considered whether insurance companies who had paid claims on the shipwreck had retained ownership interests.[164] The Fourth Circuit held that there was enough evidence to support the finding that the insurance underwriters had not abandoned the property and therefore determined that the law of finds did not apply.[165] The court applied salvage law to the case and remanded the action to the district court to determine the salvage reward.[166]

While the Fourth Circuit was concerned with whether the shipwreck had been abandoned by the underwriters, the court was also interested in the effect finds law or salvage law might

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Supp. 1300 (N.D. Ill. 1992), *aff'd*, No. 93-1426, 1993 WL 88377 (7th Cir. (Ill.) Mar. 21, 1994).

158. *See, e.g., Columbus-America Discovery Group*, 974 F.2d 450, 459-64 (discussing whether courts should apply salvage or finds law to abandoned shipwrecks).

159. *See id.* at 467 (holding that district court erred in applying law of finds and requiring district court to apply salvage law on remand).

160. 974 F.2d 450.

161. *Id.* at 462; *see also* Craig N. McLean, Comment, *Law of Salvage Reclaimed:* Columbus-America Discovery Group v. Atlantic Mutual, 13 BRIDGEPORT L. REV. 477 (1993) (discussing Fourth Circuit's decision); Todd B. Siegler, Note, *"Finders, Keepers" Revised for the High Seas:* Columbus-America Discovery Group v. Atlantic Mutual Insurance, 17 TUL. MAR. L.J. 353 (1993) (discussing Fourth Circuit's decision).

162. 974 F.2d at 455; *see also* King, *supra* note 10, at 316-19 (explaining how U.S. court had jurisdiction over vessel located outside court's territory).

163. Columbus-America Discovery Group, Inc. v. Atlantic Mut. Ins. Co., 974 F.2d 450, 458 (4th Cir. 1992), *cert. denied*, __ U.S. __, 113 S. Ct. 1625 (1993).

164. *Id.* at 450. British and American insurers paid over U.S.$1 million in claims upon the disaster. *Id.*

165. *Id.* at 461.

166. *Id.* at 470.

have on salvors' conduct.[167] The court noted, for example, that would-be finders would be encouraged to act secretively to avoid claims of previous owners or interference by other potential finders.[168] In contrast, the law of salvage would encourage less competitive and secretive conduct.[169] Because of the availability of the injunction to protect the right of first salvor, the first salvor would not fear the interference by other salvors and would engage in its salvage activity openly.[170]

In addition to applying the *Columbus-America Discovery Group* considerations, a court may also limit the use of the law of finds if the facts of the case fall within an exception to the general doctrine.[171] A common law exception to the law of finds exists if the property is found "embedded" in the soil.[172] In this situation, states have brought claims to shipwrecks under the Submerged Lands Act ("SLA"), which give states ownership of the Territorial Sea.[173] Accordingly, a shipwreck embedded in the bottom of the territorial sea is owned by the state in who's territory it is located.[174]

While some courts have limited the application of the law of finds, other courts have limited the application of salvage law to shipwrecks even when they are not completely abandoned, reasoning that abandoned shipwrecks are not in a marine peril, a necessary element of salvage.[175] In one case, expert testimony

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167. *Id.* at 460.

168. *Id.*

169. *Id.*

170. *See supra* note 123 and accompanying text (explaining right of first salvor under salvage law).

171. *See* Klein v. The Unidentified Wrecked & Abandoned Sailing Vessel, 758 F.2d 1511 (11th Cir. 1985); Chance v. Certain Artifacts Found & Salvaged From The Nashville, 606 F. Supp. 801, 807 (S.D. Ga. 1984), *aff'd*, 775 F.2d 302 (11th Cir. 1985) (law of finds did not apply because "vessel [was] firmly attached to the river bottom" and therefore belonged to state). In *Klein*, the court dismissed the plaintiff's claims for title under the law of finds and a salvage award. *Klein*, 758 F.2d 1511. The court held that the ship was located on lands controlled by the United States and thus the sovereign had constructive possession of it. *Id.* at 1514. As to the salvage request, the court decided that the United States had the right to refuse salvage efforts. *Id.* at 1515.

172. *Id.* at 1514.

173. 43 U.S.C. §§ 1301-1315 (1988); *see* Zych v. The Unidentified, Wrecked & Abandoned Vessel Believed To Be The SB "Lady Elgin," 746 F. Supp. 1334, 1343 (N.D. Ill. 1990), *modified*, 941 F.2d 525 (7th Cir. 1991), *on remand*, 811 F. Supp. 1300 (N.D. Ill. 1992), *aff'd*, No. 93-1426, 1993 WL 88377 (7th Cir. (Ill.) Mar. 21, 1994).

174. *See Zych*, 746 F. Supp. at 1343.

175. *See Klein*, 758 F.2d 1511 (abandoned shipwrecks are not in marine peril); Subaqueous Exploration & Archaeology, Ltd. v. The Unidentified, Wrecked & Abandoned

established that an abandoned shipwreck reached a stage of "equilibrium" once it was no longer in any danger of destruction.[176] Thus, salvage operations increased the peril of the wreck due to the disturbance caused by such activities.[177] Other courts have found nevertheless that shipwrecks are constantly in a marine peril due to the exposure to the elements and the potential for further damage.[178]

4. The Abandoned Shipwreck Act of 1987

By passing the Abandoned Shipwreck Act ("ASA"), the U.S. Congress significantly altered the existing law established by the treasure salvage cases.[179] The statute removed historic shipwreck law from admiralty principles, under which U.S. courts previously dealt with treasure salvage, by excluding historic shipwrecks found in the territorial waters of the United States from the law of salvage and finds.[180] The ASA also provides standards for determining historic significance[181] and incentives for

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Vessel, 577 F. Supp. 597 (D.Md. 1983) (abandoned shipwrecks are not in marine peril); Chance v. Certain Artifacts Found & Salvaged From The Nashville, 606 F. Supp. 801 (S.D. Ga. 1984) (abandoned shipwrecks are not in marine peril); *see supra* note 128 (defining marine peril).

In spite of these views, there are some courts that have held that abandoned shipwrecks are in a marine peril and therefore subject to a salvage claim. *See* Platoro Ltd. v. The Unidentified Remains Of A Vessel, 695 F.2d 893 (5th Cir.), *cert. denied*, 449 U.S. 901 (1980) (stating that abandoned shipwrecks are in marine peril); Treasure Salvors, Inc. v. The Unidentified Wrecked & Abandoned Sailing Vessel, 569 F.2d 330 (5th Cir. 1978) (finding that abandoned shipwrecks are in a marine peril); Jupiter Wreck, Inc. v. The Unidentified, Wrecked & Abandoned Sailing Vessel, 691 F. Supp. 1377 (S.D. Fla. 1988) (explaining that abandoned shipwrecks are in marine peril).

176. *See Chance*, 606 F. Supp. at 808. The court quoted an expert witness who appeared at trial. *Id.* Dr. Wright, the expert, stated that, "[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, until it is once again disturbed." *Id.* (citation omitted).

177. *Id.* at 808-09.

178. *Treasure Salvors*, 569 F.2d at 337 (explaining that vessel remains in marine peril after discovery due to exposure to elements).

179. *See supra* note 95 (listing treasure salvage cases involving law of salvage and finds); 43 U.S.C. § 2106(a) (1988) (stating that Abandoned Shipwreck Act excludes historic shipwrecks from law of salvage and finds).

180. *Id.*

181. *See* Guidelines, *supra* note 7, at 50,121 (providing definition of historic shipwreck according to ASA).

searching for historic shipwrecks.[182] Despite a challenge to its constitutionality, a federal court has upheld the ASA as conforming to the U.S. Constitution.[183]

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182. *Id.* at 50,132-35 (recommending ways to provide for public and private sector recovery of shipwrecks).

183. Zych v. The Unidentified, Wrecked, & Abandoned Vessel, Believed To Be The SB "Seabird," No. 93-1426, 1993 WL 88377 (7th Cir. (Ill.) Mar. 21, 1994), aff'g 811 F. Supp. 1300 (N.D. Ill. 1992). *Zych* represents a current constitutional challenge to the ASA in the U.S. courts. *Id.* The first opinion of the District Court for the Northern District of Illinois in *Zych* states the facts of the case. Zych v. The Unidentified, Wrecked & Abandoned Vessel, Believed To Be The SB "Lady Elgin," 746 F. Supp. 1334, 1336 (N.D. Ill. 1990), *modified*, 941 F.2d 525 (7th Cir. 1991), *on remand*, 811 F. Supp. 1300 (N.D. Ill. 1992), *aff'd*, No. 93-1426, 1993 WL 88377 (7th Cir. (Ill.) Mar. 21, 1994). In 1989 Harry Zych found the *Lady Elgin*, an 1851 sidewheel steamer, in Lake Michigan after sixteen years of searching for her. *Id.* The ship perished on a trip from Chicago to Milwaukee, carrying approximately four hundred passengers from a campaign rally for presidential candidate Stephen Douglas. *Id.* After a collision during a storm, the *Lady Elgin* sank in what has been coined the most famous shipwreck in the history of the Great Lakes. *Id.* Over three hundred lives were lost in the calamity. *Id.*

Zych found the *Seabird* soon after his location of the *Lady Elgin*. *Id.* at 1337. The *Seabird* also sank in Lake Michigan in 1868. *Id.* Originally, the court consolidated Zych's claim to both of the ships. *Id.* Plaintiff formed the Lady Elgin Foundation which entered into an agreement with CIGNA Property & Casualty Company ("CIGNA"), which insured the ship and had a claim of ownership in the vessel, giving the Foundation complete title to the wreck in exchange for twenty percent of the proceeds. *Id.* Because the issues raised by the *Lady Elgin* now differed due to CIGNA's property interest, the court vacated its consolidation order. *Id.* at 1338. The district court dismissed the plaintiff's claim for a declaration of title for lack of jurisdiction. *Id.*

In *Zych*, the plaintiffs argued that the ASA impermissibly changed federal admiralty jurisdiction. *Id.* at 1344. The court held, however, that the ASA was constitutional. *Id.* at 1344-45. The district court upheld the constitutionality of the ASA for two reasons. *Id.* First, the ASA did not abrogate federal jurisdiction over admiralty because it only alters substantive law and does not take away the power of the federal courts to "resolve questions concerning application of that law." *Id.* at 1345 (footnote omitted). Second, the court held that the ASA does not violate uniformity principles of maritime law. *Id.* at 1348. On appeal, the Seventh Circuit Court of Appeals held that the district court had applied an improper standard for determining the ASA's constitutionality. Zych v. Unidentified, Wrecked & Abandoned Vessel, Believed To Be The "Seabird," 941 F.2d 525, 528 (7th Cir. 1991), *modifying* 746 F. Supp. 1334 (N.D. Ill. 1990), *on remand*, 811 F. Supp. 1300 (N.D. Ill. 1992), *aff'd*, No. 93-1426, 1993 WL 88377 (7th Cir. (Ill.) Mar. 21, 1994). The Court of Appeals saw the two pertinent issues to be whether the ASA applied to the shipwreck and whether it was constitutional. *Id.* at 530. In order for the ASA to apply to the wreck, the court held that it was necessary for the district court to make a finding that the wreck was indeed "embedded" pursuant to § 5(a). *Id.* The appellate court found that the district court's description of the ship as "likely embedded" was not enough to trigger the ASA. *Id.* The Court of Appeals ordered the district court to hold an evidentiary hearing to determine whether the Seabird was "firmly affixed." *Id.*

As to the constitutionality of the ASA, the court stated that the district court must determine whether cases involving abandoned shipwrecks "[were] properly, firmly within the scope of admiralty jurisdiction prior to the ASA." *Id.* at 531. The court

a. Purpose and Overview of the ASA Provisions

The ASA's purpose is to establish the state's supremacy in

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rejected the district court's understanding of the ASA that federal courts would still hear abandoned shipwreck cases. *Id.* Instead, the court determined that the purpose of the ASA was to change the forum for abandoned shipwrecks from the federal to the state courts. *Id.* The court stated, "[d]epriving those who find embedded shipwrecks of causes of action based on the law of salvage and the law of finds divests federal courts of their admiralty jurisdiction over such claims, and concurrently vests state courts with jurisdiction over the same claims." *Id.*

The court determined that Congress' removal of historic shipwrecks from the federal courts' exclusive jurisdiction over admiralty and maritime matters would be permissible only if the district court could hold that the ASA did not remove "a thing falling clearly within" admiralty law. *Id.* (citing Panama R.R. v. Johnson, 264 U.S. 375 (1924)). The court identified the two lines of reasoning that the district court could follow to determine the constitutionality of the ASA. *Id.* The first is that admiralty law is primarily concerned with maritime commerce. *Id.* at 531. The second is that the Supreme Court has implicitly accepted the existence of such jurisdiction. *Id.* at 532.

The district court, on remand, held that the ASA did not unconstitutionally alter the federal court's exclusive jurisdiction over admiralty claims because regulating historic shipwrecks is not a central concern of admiralty law. Zych v. The Unidentified, Wrecked, & Abandoned Vessel, Believed To Be The SB "Seabird," 811 F. Supp. 1300, 1306 (N.D. Ill. 1992), *aff'd*, No. 93-1426, 1993 WL 88377 (7th Cir. (Ill.) Mar. 21, 1994). The district court on remand held that the standard for determining constitutionality was whether the management of historic wreck sites is a central concern to admiralty. *Id.* The court held that regulating abandoned shipwrecks was not related to maritime commerce and laws developed to govern maritime commerce have been stretched to fit claims to historic shipwrecks. *Id.* at 1307. In terms of salvage law, the court held that its elimination passed constitutional muster because shipwrecks falling under the ASA must be abandoned. *Id.* at 1309. Because courts prefer finds over salvage, they would not apply salvage in an instance where a claim was brought for a shipwreck with no outstanding ownership claim. *Id.* If the shipwreck is not abandoned, then the ASA does not apply. *Id.* at 1311 n.9. Finds law, which the court admitted was an aspect of admiralty law, was not altered by the ASA. *Id.* at 1313. The court stated, however, that the "Act does not remove from federal jurisdiction any significant federal function that rested with the federal courts in abandoned shipwreck litigation prior to the Act." *Id.* at 1314. Because the ASA only applied to shipwrecks "embedded" in the territorial lands of the state, this exception from the law of finds necessarily meant that the state could obtain title to the wreck in spite of the ASA. *Id.*

The Seventh Circuit heard the case on appeal from the district court for the second time. Zych v. Unidentified, Wrecked & Abandoned Vessel, Believed To Be The "Seabird," No. 93-1426, 1994 WL 88377 (7th Cir. (Ill.) Mar. 21, 1994), *aff'g* 811 F. Supp. 1300 (N.D. Ill. 1992). The Seventh Circuit affirmed the district court's holding that the ASA was constitutional. *Id.* at *6. The court held that the ASA's removal of abandoned historic shipwrecks from the law of finds did not impermissible alter admiralty jurisdiction. *Id.* at *4. The court stated that because the ASA only applies to shipwrecks that are abandoned, it does not have any affect on the law of salvage. *Id.* The court also held that even though Zych wanted to bring a claim for a salvage reward against the State of Illinois, the owner of the shipwreck under the law of finds, the Eleventh Amendment would bar the suit. *Id.* at *5. Because the Eleventh Amendment bars suits against the states, absent their consent, Zych could not request a salvage reward from Illinois. *Id.*

regulating the excavation of state land in order to recover abandoned shipwrecks.[184] The ASA removes the responsibility to administer archaeological sites from federal courts and gives this duty to the individual states.[185] In enacting the ASA, Congress recognized that the states are in the best position to oversee and manage historic shipwrecks found in the Territorial Sea because the states have a large responsibility to administer the national historic preservation program[186] according to the National Historic Preservation Act of 1966[187] ("NHPA"). The NHPA set out the federal government's historic preservation policy and established measures that enable preservation of the nation's historic resources.[188]

The ASA furthers the states' preservation responsibility by

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184. *See* Giesecke, *supra* note 7, at 382. The author also notes that the ASA will decrease the cost of litigation that has accrued due to the current uncertainty in the federal courts over this issue. *Id.*

185. *Id.* at 388.

186. National Historic Preservation Act of 1966 ("NHPA"), 16 U.S.C. §§ 470-470x-6 (1988 & Supp. IV 1992) (establishing national historic preservation program). The NHPA provides the states' roles in § 470a(b)(3):

> It shall be the responsibility of the State Historic Preservation Officer to administer the State Historic Preservation Program and to —
>
> (A) in cooperation with Federal and State agencies, local governments, and private organizations and individuals, direct and conduct a comprehensive statewide survey of historic properties and maintain inventories of such properties;
>
> (B) identify and nominate eligible properties to the National Register and otherwise administer applications for listing historic properties on the National Register;
>
> (C) prepare and implement a comprehensive statewide historic preservation plan;
>
> (D) administer the State program of Federal assistance for historic preservation within the State;
>
> (E) advise and assist, as appropriate, Federal and State agencies and local governments in carrying out their historic preservation responsibilities;
>
> (F) cooperate with the Secretary, the Advisory Council on Historic Preservation, and other Federal and State agencies, local governments, and organizations and individuals to ensure that historic properties are taken into consideration at all levels of planning and development;
>
> (G) provide public information, education, and training and technical assistance relating to the Federal and State Historic Preservation Programs; and
>
> (H) cooperate with local governments in the development of local historic preservation programs and assist local governments in becoming certified pursuant to subsection (c) of this section.

Id. § 470a(b)(3).

187. *Id.*

188. *See id.* §§ 470-471.

directing the states to manage the recovery of historic shipwrecks. In Section 2101[189] of the ASA, Congress mandates that states are responsible for managing living and non-living resources found in state waters and in submerged lands. Section 2101 includes shipwrecks as part of these resources.[190] In addition, the ASA grants the United States title[191] to any shipwreck that is embedded[192] in the submerged lands of a state,[193] embedded in coralline formations protected by a state on submerged lands of a state,[194] or located on submerged lands of a state and is included in or determined eligible for inclusion on the National Register of Historic Places (the "National Register").[195] Section 2105(c) of the ASA transfers title of the shipwrecks specified in Section 2105(a) to the states in which they are located.[196]

Pursuant to Section 2104, the U.S. Secretary of the Interior must publish guidelines (the "Guidelines") to assist states in developing statutes to govern the rights between salvors and the states.[197] The Guidelines include an extensive list of recommendations on how states should manage historic shipwrecks.[198]

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189. 43 U.S.C. § 2101(a) (1988).

190. *Id.* § 2101(b).

191. *Id.* § 2105(a). *But see id.* § 2105(d) (granting title of any abandoned shipwreck in or on Indian lands to the Indian tribe owning such lands).

192. *See id.* § 2101(a). "Embedded" is defined in § 2102(a) of the ASA as "firmly affixed in the submerged lands or in coralline formations such that the use of tools of excavation is required in order to move the bottom sediments to gain access to the shipwreck, its cargo, and any part thereof." *Id.*

193. *Id.* § 2105(a)(1). Section 2105(a)(1) states, "The United States asserts title to any abandoned shipwreck that is . . . embedded in submerged lands of a State . . . . " *Id.*

194. *Id.* § 2105(a)(2). Section 2105(a)(2) states, "The United States asserts title to any abandoned shipwreck that is . . . embedded in coralline formations protected by a State on submerged lands of a State . . . . " *Id.*

195. *Id.* § 2105(a)(3). Section 2105(a)(3) states, "[t]he United States asserts title to any abandoned shipwreck that is . . . on submerged lands of a State and is included in or determined eligible for inclusion in the National Register . . . . " *Id.* The National Register of Historic Places is a comprehensive list of districts, sites, buildings, structures, and objects significant in American history, architecture, archaeology, engineering and culture. 36 C.F.R. § 60.1 (1993). The primary purpose of the National Register is to help plan for the protection of historic resources in the United States. *Id.* § 60.2.

196. 43 U.S.C. § 2105(c) (1988). Section 5(c) states, "[t]he title of the United States to any abandoned shipwreck asserted under subsection (a) of this section is transferred to the State in or on whose submerged lands the shipwreck is located." *Id.*

197. *Id.* § 2104(c); *see supra* note 7 (stating that Secretary of the Interior published Guidelines in Federal Register).

198. *See* Guidelines, *supra* note 7, at 50,122-25 (listing recommendations for state historic abandoned shipwreck programs). The Guidelines also include recommendations to assist the Federal government in managing shipwrecks located on federal pub-

These recommendations, for example, include what professional archaeology standards states should require of salvors[199] and creative ways of developing incentives for locating shipwrecks.[200]

Section 2106 of the ASA states that the law of salvage and finds does not apply to shipwrecks covered by the ASA.[201] The ASA's legislative history explains that the intention of Congress was to prevent admiralty courts from obtaining jurisdiction over abandoned historic shipwrecks.[202] Specifically, Congress stated that the laws of salvage could result in the loss of historical information and artifacts to the public.[203]

b. Determining Historic Significance of Shipwrecks

The ASA covers shipwrecks that are embedded in the submerged lands of a state, embedded in the coralline formations of a state, or that are eligible to be listed in the National Register.[204] As a result, the U.S. Court of Appeals for the Seventh Circuit in *Zych v. Unidentified, Wrecked & Abandoned Vessel, Believed to Be The SB "Seabird"* found that the ASA sets out two methods of determining historic significance of shipwrecks in territorial waters.[205] The court first held that "embeddedness" is an indicia of historic significance.[206] Second, the court held that if the shipwreck is eligible to be listed in the National Register, then it is historically significant under the ASA.[207]

The NHPA authorizes the Secretary of the Interior to ex-

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lic lands. *Id.* at 50,125-27. Finally, the Guidelines explain methods of funding shipwreck programs, surveying and identifying shipwrecks, documenting and evaluating shipwrecks, providing for public and private sector recovery of shipwrecks, providing public access to shipwrecks, interpreting shipwreck sites, establishing volunteer programs, and creating underwater parks. *Id.* at 50,128-38.

199. *Id.* at 50,124.

200. *Id.* at 50,128-29 (including Guideline 11 that implies that government may offer contracts to commercial salvors).

201. 43 U.S.C. § 2106(a) (1988).

202. *See* House Report, *supra* note 89, at 366.

203. *See id.* (stating that problem with salvage law is loss of historical material).

204. 43 U.S.C. § 2105(a) (1988).

205. Zych v. Unidentified, Wrecked & Abandoned Vessel, Believed To Be The SB "Seabird," 941 F.2d 525, 529 (7th Cir. 1991), *modifying* 746 F. Supp. 1334 (N.D. Ill. 1990), *on remand*, 811 F. Supp. 1300 (N.D. Ill. 1992), *aff'd*, No. 93-1426, 1993 WL 88377 (7th Cir. (Ill.) Mar. 21, 1994).

206. *Id.* The Seventh Circuit stated, "[i]n the ASA, the concept of "embeddedness" serves as a proxy for historic value." *Id.*

207. 43 U.S.C. § 2105(a)(3) (1988); *see supra* note 195 (explaining that shipwrecks listed in National Register are covered under ASA if on submerged lands of state).

pand and maintain a National Register of districts, sites, buildings, structures, and objects significant in American history, architecture, archaeology, engineering and culture.[208] The states are responsible for nominating properties to the National Register,[209] which is a planning tool that assists the government and citizens in the protection of properties worthy of preservation.[210] Federal agencies must consider the impact on properties eligible to or listed in the National Register when undertaking a project such as the construction of a highway or a dam.[211] In addition, when a property is listed in the National Register, it becomes eligible for Federal grants-in-aid for historic preservation and to receive tax credits for rehabilitation.[212] A resource is eligible to the National Register if it is more than 50 years old, has contributed to American history, is related to the lives of important individuals, is representative of a type or method of construction, or may provide information about history or prehistory.[213]

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208. National Register of Historic Places, 36 C.F.R. § 60.1 (1993).

209. 36 C.F.R. § 60.6 (1993).

210. *Id.* § 60.2.

211. *Id.* § 60.2(a).

212. *Id.* § 60.2(c).

213. *Id.* § 60.4. The Criteria for Evaluation are:

National Register Criteria for Evaluation. The quality of significance in American history, architecture, archaeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association and

(a) that are associated with events that have made a significant contribution to the broad patterns of our history; or

(b) that are associated with the lives of persons significant in our past; or

(c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or

(d) that have yielded, or may be likely to yield, information important in prehistory or history.

Criteria Considerations. Ordinarily cemeteries, birthplaces, or graves of historical figures, properties owned by religious institutions or used for religious purposes, structures that have been moved from their original locations, reconstructed historic buildings, properties primarily commemorative in nature, and properties that have achieved significance within the past 50 years shall not be considered eligible for the National Register. However, such properties will qualify if they are integral parts of districts that do meet the criteria or [sic] if they fall within the following categories:

(a) A religious property deriving primary significance from architectural or artistic distinction or historical importance; or

(b) A building or structure removed from its original location but which

c. Incentives Available for Recovering Historic Shipwrecks

The ASA removes historic shipwrecks from the maritime rules of salvage and finds, but does not preclude a salvor from being compensated for recovery efforts.[214] The states, through a contracting, licensing, or permitting process, may agree with salvors that they deserve compensation for locating, salvaging, and documenting a historic shipwreck.[215] As opposed to salvage law, a salvor under the ASA must meet professional standards in recovery methods in order to receive compensation.[216] Finally, an

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is significant primarily for architectural value, or which is the surviving structure most importantly associated with a historic person or event; or

(c) A birthplace or grave of a historical figure of outstanding importance if there is no appropriate site or building directly associated with his productive life.

(d) A cemetery which derives its primary significance from graves of persons of transcendent importance, from age, from distinctive design features, or from association with historic events; or

(e) A reconstructed building when accurately executed in a suitable environment and presented in a dignified manner as part of a restoration master plan, and when no other building or structure with the same association has survived; or

(f) A property primarily commemorative in intent if design, age, tradition, or symbolic value has invested it with its own exceptional significance; or

(g) A property achieving significance within the past 50 years if it is of exceptional importance.

Id.

214. *See* the Guidelines, *supra* note 7, at 50,132-35. The Guidelines recommend that states encourage both public and private sector recovery of shipwrecks. *Id.* In particular, the Guidelines state that a state may award title of artifacts to private salvors, if it is in the public interest. *Id.* at 50,134-35.

215. *Id.*

216. *See id.* at 50,134. The Guidelines state that a professional manner in the study and recovery of historic shipwrecks includes the following

(a) The permittee, licensee or contractor has secured any other necessary State or Federal permits;

(b) A professional underwater archaeologist is in charge of planning, conducting and supervising the field operations, laboratory analysis, and report preparation;

(c) A conservation laboratory is in place prior to commencement of filed operations and a professional nautical conservator is in charge of planning, conducting and supervising the conservation of any artifacts and other materials recovered from the site;

(d) Field operations, laboratory analyses, and conservation treatments use appropriate scientific methods and techniques and are as non-destructive and non-disturbing as possible to the site, the surrounding environment, and any artifacts and other materials recovered from the site;

(e) The shipwreck site is fully documented (i.e., an archaeological site map is prepared, measured drawings are made of significant features, and a photo-

individual who does not comply with shipwreck recovery standards could face civil or criminal penalties if a state implemented recommendations included in the Guidelines.[217]

II. *INTERPRETATIONS OF UNCLOS III MARINE ARCHAEOLOGY PROVISIONS*

Despite the fact that commentators have maintained that ar-

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graphic record is made of the wrecked vessel, significant features, and artifacts);

(f) A professional final report is prepared (and approved by the State) that describes the field operations, excavation methods, laboratory analyses, conservation treatments, scientific findings, and recommendations for any future work;

(g) Copies of all field notes, site maps, measured drawings, photographs, videos, final reports, and other data and records derived from the recovery and analysis are deposited, stored and maintained in the repository named in the permit, license or contract;

(h) Copies of final reports, site maps and other appropriate records are provided to the State's historic preservation office and the underwater archaeology office (or archaeology office, in the absence of an underwater archaeology office);

(i) When the State is maintaining ownership to any artifacts or other materials recovered from the site, those items are deposited, stored and maintained in the repository named in the permit, license or contract;

(j) When the State is transferring ownership to any artifacts or other materials recovered from the site to a commercial salvor or treasure hunter:

(1) The transfer is made only after field operations and laboratory analysis are completed, the recovered items are conserved, and the final report is approved by the State; and

(2) To the extent possible, the items transferred are preserved and maintained as an intact collection and are made available for future study, public interpretation and exhibition;

(k) When a commercial salvor or treasure hunter is undertaking the recovery, the salvor or treasure hunter posts a performance bond to cover costs associated with the recovery (this is to ensure that sufficient funds would be available to the State if the salvor or treasure hunter is unable to complete the recovery according to the terms and conditions of the permit, license or contract); and

(l) Information on the recovery activity and the archaeological findings are disseminated to the scientific community and to the public.

Id.

217. *Id.* at 50,124-25. The Guidelines call for prosecution of individuals who willfully damage or vandalize state-owned shipwrecks or otherwise violate the state's shipwreck management program according to state laws and regulations governing state-owned property. *Id.* at 50,124. The Guidelines also recommend criminal fines and civil penalties to be proportional to the nature of the violation, increase with subsequent convictions, and include community service in the management of shipwrecks. *Id.*

ticles 149[218] and 303[219] of UNCLOS III regarding marine archaeology are vague,[220] these commentators also contend that ratification of the Convention would still alter the existing law governing the discovery of historic shipwrecks.[221] By examining the preparatory documents, or *travaux preparatoires*,[222] of the Convention, commentators have interpreted how the marine archaeology articles will change the law.[223] Specifically, commentators have analyzed the legislative history of UNCLOS III to determine which shipwrecks qualify for special treatment, who has property rights to those shipwrecks, and what the incentives should be to locate them.

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218. *See supra* note 79 and accompanying text (explaining that Article 149 of UNCLOS III addresses archaeological and historical objects found in Area).

219. *See supra* notes 80-83 and accompanying text (explaining that Article 303 of UNCLOS III deals with marine archaeology in Contiguous Zone and Exclusive Economic Zone, and on Continental Shelf).

220. *See* Nafziger, *supra* note 1, at 346 (stating that, "[w]hat eventually emerged at UNCLOS III . . . is murky.").

221. *See* Arend, *supra* note 8, at 781-87 (discussing how UNCLOS I left marine archaeology unregulated, with exception of coastal nation's sovereignty in Territorial Sea). UNCLOS III is the first treaty with marine archaeology provisions. Newton, *supra* note 10, at 166. Because the law of salvage and finds ruled international marine archaeology prior to UNCLOS III by virtue of the notion of freedom of the high seas, UNCLOS III effected the international law of marine archaeology. *Id.*

222. *See* Arend, *supra* note 8, at 782 n.22 (explaining that 1969 Vienna Convention on the Law of Treaties specifically provides that *travaux preparatoires* provide clarification of ambiguous treaties); Vienna Convention of the Law of Treaties, *opened for signature* May 23, 1969, arts. 31-32, U.N. Doc. A/CONF.39/27 (1969), *reprinted in* 8 I.L.M. 679 (1969), *entered into force* Jan. 27, 1980.

223. *See, e.g.*, Oxman, *supra* note 8; Strati, *supra* note 8; Arend, *supra* note 8; Newton, *supra* note 10. For the best chronicle of the legislative history of Article 149, see Strati, *supra* note 8, at 874. The first step in the negotiation process that produced *travaux preparatoires* for Article 149 was the Sea-bed Committee in 1970. *Id.* at 874-77. During the years 1971-73, both Greece and Turkey submitted proposals to Subcommittee I of the Seabed Committee, however the Seabed Committee did not finalize Article 149. *Id.* UNCLOS III continued the debate on marine archaeology. *Id.* at 876-77. The 1975 Geneva session produced the Informal Single Negotiating Text ("ISNT"). *Id.* at 876. The 1976 New York session produced the Revised Single Negotiating Text ("RSNT"). *Id.* Finally, the Final Draft of the Convention came at the 1980 Geneva session. *Id.* at 877.

The legislative history for Article 303 was concentrated in the latter part of the 1970s. *See* Arend, *supra* note 8, at 793-99. During the eighth session of the Convention in 1979, there were various delegation proposals to modify Article 303. *Id.* at 793-94. Similarly, during the ninth session in 1980, there were further modifications to the provision. *Id.* at 794-97.

A. *Determination of Archaeological Significance Under Articles 149 and 303*

The Convention's marine archaeology provisions, articles 149 and 303, do not define "objects of archaeological and historical nature."[224] National laws typically include age as a qualification for an artifact to be considered worthy of preservation.[225] Although the initial proposal for Article 149 included a threshold of fifty years,[226] this provision was deleted later in the negotiation process[227] leaving the text of the Convention without any date guideline.[228] As a result, one commentator suggested that artifacts must be centuries old to qualify as archaeological and historical.[229] Another commentator suggested that the date

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224. UNCLOS III, *supra* note 16, art. 149 & 303, 21 I.L.M. at 1295 & 1326.

225. *See* Strati, *supra* note 8, at 873 n.39 (listing ages of artifacts that qualify under national heritage laws).

226. *See* Arend, *supra* note 8, at 790. A Sub-Committee of the Seabed Committee submitted a proposal stating, "[t]he recovery and disposal of wrecks and their contents more than [fifty] years old found in the area shall be subject to regulation by the Authority without prejudice to the rights of the owner thereof." *Id.*

227. *See* Arend, *supra* note 8, at 792. The RSNT simplified the article and stated

> [a]ll objects of an archaeological and historical nature found in the area shall be preserved or disposed of for the benefit of the international community as a whole, particular regard being paid to the preferential rights of the state or country of origin, or the state of cultural origin, or the state of historical and archaeological origin.

Id.

228. Strati, *supra* note 8, at 877. The Final Draft of the Convention, produced at the Geneva session in 1980, changed the RSNT by substituting the words "benefit of mankind as a whole" for "benefit of the international community as a whole" in Article 149, but did not insert a date guideline. *Id.*

229. Oxman, *supra* note 8, at 364-65 (quoting Bernard H. Oxman, *The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980)*, 75 AM. J. INT'L L. 211, 241 n.152 (1981). Oxman observed:

> The provision is not intended to apply to modern objects whatever their historical interest. Retention of the adjective "historical" was insisted upon by Tunisian delegates, who felt that it was necessary to cover Byzantine relics that might be excluded by some interpretations of the word "archaeological." Hence, the term "historical origin," lacking at best in elegance, when used with the term "archaeological objects" in an article that expressly does not affect the law of salvage, does at least suggest the idea of objects that are many hundreds of years old. [The word "origin" was subsequently deleted by the Conference Drafting Committee.]
>
> The article contains no express time limit. As time marches on, so does our sense of what is old, Nevertheless, given the purpose for using the term "historical," it may be that if a rule of thumb is useful for deciding what is unquestionably covered by this article, the most appropriate of the years conventionally chosen to represent the start of the modern era would be 1453: the

guideline should be a period of 100 to 200 years because most nations use this time period as a criteria for protection of underwater remains.[230] Others have recommended that an interpretation of the Convention should include the fifty year standard.[231]

B. *Property Rights to Shipwrecks Found in International Waters*

The Convention defines ownership of discovered artifacts according the area in which they are found.[232] Articles 149 and 303 of UNCLOS III address different geographic regions of the high seas.[233] Article 149 focuses on ownership rights within the Area.[234] Article 303 covers the Contiguous Zone, the Exclusive Economic Zone, and the Continental Shelf.[235]

1. Property Rights in the Area

While Article 149 does not explicitly state that the law of finds rules the discovery of historic shipwrecks in the Area,[236] commentators have suggested that the law of finds[237] is implied because there is no alternative ownership principle delineated in the provision.[238] These commentators argue that the only ap-

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> fall of Constantinople and the final collapse of the remnants of the Byzantine Empire. Everything older would clearly be regarded as archaeological or historical. A slight adjustment to 1492 for application of the article to objects indigenous to the Americas, extended perhaps to the fall of Tenochtitlán (1521) or Cuzco (1533) in those years, might have the merit of conforming to historical and cultural classifications in that part of the world.

Id.

230. Strati, *supra* note 8, at 873 n.39 (time limits provided by general heritage legislation in most countries is approximately 100 to 200 years). The author notes that these age standards aim to include artifacts that are of more recent history. *Id.* at 874 (stating that it would be unfortunate if UNCLOS III included "old-fashioned" understanding of marine archaeology by allowing preservation of only "very old" artifacts).

231. *See* Newton, *supra* note 10, at 177-78 (explaining that *Titanic* would qualify under Article 149 of UNCLOS III with a fifty year standard because drafters' original intent was to include this standard for objects of historical and archaeological nature); *see also* Del Bianco, *supra* note 4, at 174 (stating that specific time limit of fifty years could be used to avoid subjective determination of historic significance and be used also for time limit that terminated ownership rights).

232. *See* UNCLOS III, *supra* note 16, arts. 149 & 303, 21 I.L.M. at 1295 & 1326.

233. *Id.*

234. *Id.* art. 149, 21 I.L.M. at 1295.

235. *Id.* art. 303, 21 I.L.M. at 1326.

236. *See supra* notes 65-68 and accompanying text (explaining definition of Area according to UNCLOS III).

237. *See supra* notes 98-119 and accompanying text (explaining law of finds).

238. *See* Nafziger, *supra* note 1, at 348; *cf.* Newton, *supra* note 10, at 193 (stating

parent duty that Article 149 imposes on nations is to cooperate to preserve significant shipwrecks.[239] The law of finds, however, will determine ownership.[240] Although the law of finds provides one solution to ownership disputes in the Area, other commentators have noted that vesting title in the finder of property lost at sea is inconsistent with the primary concern of the Seabed Committee,[241] which was providing maximum international control over the area beyond a coastal nation's control.[242]

In order to achieve international control over the deep seabed, the Seabed Committee suggested the Authority[243] oversee activities in the Area.[244] One proposal included in the legislative history of the Convention suggested that the Authority have jurisdiction over marine archaeology,[245] however the drafters deleted this provision.[246] Although marine archaeology is admit-

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that under Article 149, law of finds governs discovery of historic shipwrecks but that owner must defer to state of origin).

239. *See* Nafziger, *supra* note 1, at 346 (arguing that because there is no agency included in Article 149, provision's purpose is to rely on goodwill of nations). The United States took this approach with the *Titanic*. *See generally* Lindbloom, *supra* note 1 (explaining U.S. law mandating creation of *R.M.S. Titanic* memorial). Congress enacted the R.M.S. Titanic Maritime Memorial Act of 1986 ("*Titanic* Act") in order to designate the wreck as an international maritime memorial. 16 U.S.C. §§ 450rr-450rr-6 (1988). The *Titanic* Act aims to protect the scientific, cultural, and historical significance of the shipwreck. *Id.* § 450rr(b)(2). However, salvors have removed artifacts from the shipwreck in violation of this U.S. legislation. William J. Broad, *Items on Titanic Brought to U.S.*, N.Y. TIMES, July 7, 1993, at A11. Additionally, the United States Court of Appeals for the Fourth Circuit has granted exclusive salvage rights over the *Titanic* to a professional salvage company. *See* Marex Titanic, Inc. v. The Wrecked & Abandoned Vessel, 2 F.3d 544 (4th Cir. 1993).

240. *See* Nafziger, *supra* note 1, at 348.

241. *See supra* note 44 and accompanying text (explaining that U.N. General Assembly created Seabed Committee to confer on deep seabed).

242. *See* Arend, *supra* note 8, at 788.

243. *See supra* note 67 and accompanying text (explaining role of International Seabed Authority).

244. *Study of International Machinery: Report of the Secretary-General*, U.N. Doc. A/AC.138/23 (1970), *reprinted in Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction*, U.N. GAOR, 25th Sess., Supp. No. 21, at 29, U.N. Doc. A/8021 (1970).

245. *See* Arend, *supra* note 8, at 788. Greece made the proposal that the Authority oversee marine archaeology in the Area. *Id.* (citing U.N. Doc. A/AC.138/SC/1/L.25 (1975)). If the Authority controlled marine archaeology in the Area, the Authority would decide preferential rights of state of origin and if state did not want to avail itself of those rights, the Authority would dispose of objects conforming with the principle that objects belong to the common heritage of mankind. *See* Altes, *supra* note 5, at 82.

246. *See* Arend, *supra* note 8, at 789-90 (stating that United States objected to Authority's control over marine archaeology).

tedly not within the Authority's control,[247] there was an effort to remove marine archaeology from the finds regime by providing jurisdiction to an independent agency.[248]

The absence of Authority jurisdiction over marine archaeology has prompted some commentators to suggest that in order to best carry out the directive of Article 149, a different agency should oversee the recovery of historic shipwrecks in the Area and decide who owns them.[249] Looking to the other terms used in Article 149, a commentator noted that the provision has no practical effect unless an agency is designated to implement it.[250] For example, Article 149 states that archaeological artifacts must be preserved for the "benefit of mankind as a whole."[251] Also, the drafters gave "preferential rights"[252] to the "state or country of origin, state of cultural origin, or state of historical or archaeological origin."[253]

According to some commentators, the principle that archaeological artifacts should be preserved for the "benefit of mankind as a whole" implies that there is a commonness of ownership and benefit of shipwrecks with archaeological significance.[254] Similarly, preferential rights suggest that one nation has a priority, but that there are simultaneous rights in other nations.[255] Pursuant to these principles, commentators suggest

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247. *See* Oxman, *supra* note 8, at 361 n.23. According to Article 136, which defines the Authority's powers, the Authority does have jurisdiction over the "common heritage of mankind," which does not include shipwrecks. *Id.*

248. *See* Arend, *supra* note 8, at 789.

249. *See* Strati, *supra* note 8, at 878 (stating that one option is to establish international body to deal with protection of archaeological remains located on deep seabed floor). One recommendation has been to appoint the United Nations Educational, Scientific, and Cultural Organization ("UNESCO") to oversee the international marine archaeology regime. *Id.* A commentator has pointed out that UNESCO has the legislative and operative powers to do so, and has expressed an interest in underwater archaeology. *Id.* UNESCO's role is to protect and restore the world's imperished treasures. *See Don't Rush Back to UNESCO*, N.Y. TIMES, Feb. 23, 1993, at A18.

250. *See* Strati, *supra* note 8, at 878.

251. UNCLOS III, *supra* note 16, art. 149, 21 I.L.M. at 1295; *see* Nafziger, *supra* note 1, at 346 (arguing that problem with Article 149 is absence of expert body to ensure disposal of objects for "benefit of mankind as whole").

252. *See* Strati, *supra* note 8, at 886 (defining preferential rights as giving preference to nation whose cultural heritage property in question is most closely linked).

253. UNCLOS III, *supra* note 16, art. 149, 21 I.L.M. at 1295.

254. *See* Strati, *supra* note 8, at 880-81.

255. *Id.* Fisheries Jurisdiction (U.K. v. Iceland), 1974 I.C.J. 3 (July 25) (explaining meaning of preferential rights); Fisheries Jurisdiction (F.R.G. v. Iceland), 1974 I.C.J. 175 (July 25) (explaining meaning of preferential rights).

that an international agency could be appointed as the "trustee" for humanity, overseeing negotiations concerning the extent of nations' rights to historic shipwrecks.[256] The agency would also carefully supervise recovery operations to guarantee that archaeological standards are satisfied.[257]

2. Property Rights in the Contiguous Zone, the Exclusive Economic Zone, and on the Continental Shelf

The legislative history of UNCLOS III reveals that negotiations regarding Article 303[258] included discussions of whether a coastal nation's sovereign rights should be extended to the Exclusive Economic Zone and the Continental Shelf because most archaeological exploration occurs in these areas.[259] The United States opposed this "creeping" jurisdiction.[260] As a result, the drafters ultimately altered the early proposals of Article 303.[261]

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256. *See, e.g.*, Strati, *supra* note 8, at 880-84 (suggesting that agency could be "trustee" for humanity).

257. *See* Nafziger, *supra* note 1, at 350; *see also*, Howard H. Shore, Note, *Marine Archaeology and International Law: Background and Some Suggestions*, 9 SAN DIEGO L. REV. 668, 681 (1972) (recommending establishment of International Marine Archaeological Commission).

258. *See supra* notes 80-83 and accompanying text (discussing Article 303 of UNCLOS III).

259. *See* Arend, *supra* note 8, at 793 (citing Informal Proposal by Cape Verde, Greece, Italy, Malta, Portugal, Tunisia and Yugoslavia, U.N. Doc. A/CONF.62/C.2/Informal Meeting/43 (Aug. 16, 1979)). For example, Cape Verde, Greece, Italy, Malta, Portugal, Tunisia and Yugoslavia sponsored a proposal during the eighth session of UNCLOS III that stated

> [t]he coastal State exercises sovereign rights over any object of purely archaeological and historical nature on or under its continental shelf for the purpose of research, salvaging, protection ad proper presentation. However, the State or country of origin, or the State of cultural origin, or the State of historical origin shall have preferential rights over such objects in case of sale or any other disposal.

Id.

260. *See id.* at 795 (citing U.S. Delegation Report, Ninth Session of the Third United Nations Conference on the Law of the Sea 34 (1980)). The United States reported

> [w]hile all nations recognize the importance of the need to protect objects of an archaeological and historical nature, a seven-nation proposal to this effect was not included in [an earlier draft] because it was perceived as having the potential for upsetting the delicate balance between coastal state rights and obligations and the rights and obligations of other States. The text was also vague and, if adopted, could have led to disputes between States with no guidelines as to how they might be resolved.

Id.

261. *See id.* at 793-99.

While one early suggestion gave a coastal nation the right to apply its own laws regarding marine archaeology in the Exclusive Economic Zone,[262] the final version removed coastal nation sovereignty from the language of the treaty.[263]

The final version demonstrates how resistance to the extension of a coastal nation's sovereignty led to a compromise. The compromise avoided the creation of an "archaeological zone" where a coastal nation would be permitted to apply its own laws to protect historic shipwrecks.[264] Paragraph 1 of Article 303 provides that in all areas of the high seas, nations have a duty to protect objects of archaeological and historical significance.[265] The United States was interested primarily in policing the area directly adjacent to the Territorial Sea rather than allowing coastal nation sovereignty throughout the Exclusive Economic Zone.[266] Accordingly, paragraph 2 allows coastal nation jurisdiction over attempted removals of archaeological objects from the Contiguous Zone by presuming that this action will violate customs, fiscal, immigration, and sanitary laws.[267]

The explicit referral to the Contiguous Zone in Article 303 leaves open whether a nation may obtain jurisdiction over marine archaeology in the Exclusive Economic Zone and on the Continental Shelf.[268] Commentators have analyzed whether a coastal nation could obtain jurisdiction over recovery of ship-

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262. *See id.* at 796-97 (citing Informal Proposal by Greece, U.N. Doc. A/CONF.62/GP/10 (Aug. 18, 1980)). During the ninth session of the UNCLOS III talks, the Greek delegation proposed a draft that said:

> 1. All States have the duty to protect, in a spirit of cooperation, objects of archaeological or historical value found in the marine environment.
> 2. Nothing in this Convention shall be deemed to prevent coastal States form enforcing, in an exclusive manner, their own laws and regulations concerning such objects up to a limit of 200 nautical miles form the baselines from which the breadth of the territorial sea is measured, while respecting the rights of identifiable owners.
> 3. The State or country of origin, or the State of cultural origin, or the State of historical or archaeological origin of the object shall enjoy preferential rights in case of sale or any other disposal resulting in its removal from the State where it is situated.

Id.

263. *See* UNCLOS III, *supra* note 16, art. 303, 21 I.L.M. at 1326.

264. *See* Arend, *supra* note 8, at 799.

265. UNCLOS III, *supra* note 16, art. 303, ¶ 1, 21 I.L.M. at 1326. *But see* Newton, *supra* note 10, at 192 (stating that Article 303 applies only in Contiguous Zone).

266. *See* Arend, *supra* note 8, at 798 n.98.

267. UNCLOS III, *supra* note 16, art. 303, ¶ 2, 21 I.L.M. at 1295.

268. *See id.*

wrecks by virtue of Article 60, which provides for control over artificial islands, installations, and structures in the Exclusive Economic Zone.[269] Similarly, a coastal nation has the exclusive right to regulate drilling on the Continental Shelf for "all purposes" according to article 81.[270]

If marine scientific research included marine archaeology, coastal nations would have exclusive jurisdiction over marine archaeology in the Exclusive Economic Zone.[271] Commentators, however, generally agree that attempts to search for and recover historic shipwrecks do not constitute marine scientific research as defined in the Convention.[272] These commentators justify their views on the grounds that the marine archaeology provisions were added after the development of the provisions that give a coastal nation the exclusive right to authorize and regulate marine scientific research in its Exclusive Economic Zone and on its Continental Shelf.[273] Second, commentators note that marine scientific research, as defined in UNCLOS III, refers to the search for knowledge about the natural marine environment.[274]

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269. *See* Oxman, *supra* note 8, at 369-70. Art. 60 allows control if the activity is for "other economic purposes" and "interferes with exercise of rights of coastal state." UNCLOS III, *supra* note 16, art. 60, 21 I.L.M. at 1279.

270. *See* Oxman, *supra* note 8, at 370.

271. *See* UNCLOS III, *supra* note 16, art. 246, 21 I.L.M. at 1317. Article 246 states in relevant part:

> 1. Coastal States, in the exercise of their jurisdiction, have the right to regulate, authorize and conduct marine scientific research in their exclusive economic zone and on their continental shelf in accordance with the relevant provisions of this Convention.
>
> 2. Marine scientific research in the exclusive economic zone and on the continental shelf shall be conducted with the consent of the coastal State.
>
> 3. Coastal States shall, in normal circumstances, grant their consent for marine scientific research projects by other States or competent international organizations in their exclusive economic zone or on their continental shelf to be carried out in accordance with this Convention exclusively for peaceful purposes and in order to increase scientific knowledge of the marine environment of the benefit of all mankind. To this end, coastal States shall establish rules and procedures ensuring that such consent will not be delayed or denied unreasonably. . . .

Id.

272. *See* Strati, *supra* note 8, at 883; Oxman, *supra* note 8, at 366; Arend, *supra* note 8, at 801 n.111.

273. *See* Oxman, *supra* note 8, at 366.

274. *Id.* at 367. Article 243 states that marine scientific research includes the study of "[p]henomena and processes occurring in the marine environment and the interrelations between them." UNCLOS III, *supra* note 16, art. 243, 21 I.L.M. at 1316; *see also*,

The legislative history is scant for the third paragraph of Article 303. This scarcity of legislative history adds to the ambiguity of paragraph 3, which addresses property rights, stating that nothing in Article 303 "affects" the law of salvage or other rules of admiralty.[275] There are two viewpoints on what the third paragraph means. According to some commentators, UNCLOS III, by virtue of this provision, embodies salvage law rules of title to shipwrecks.[276] If there are any outstanding ownership rights to a historic shipwreck, the salvor would be entitled to a salvage reward from the owner.[277] If there is no existing owner, then the law of finds applies and the salvor would obtain title to the wreck.[278]

In contrast, the other viewpoint argues that the third paragraph of Article 303 excludes salvage principles from the regulations dealing with marine archaeology.[279] This outlook takes into account that salvage law does not adequately protect shipwrecks with archaeological or historical value.[280] Recovery methods are not regulated by traditional salvage law.[281] A salvor is awarded compensation regardless of whether the shipwreck is sensitively dismantled or documented.[282] Under salvage law's adjunct, the law of finds, title vests in the finder precluding pub-

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Bernard H. Oxman, *The Regime of Warships Under the United Nations Convention on the Law of the Sea*, 24 VA. J. INT'L L. 809, 844-47 (1984).

275. UNCLOS III, *supra* note 16, art. 303, ¶ 3, 21 I.L.M. at 1326. Article 303, ¶ 3 also states that law regarding cultural exchanges and rights of identifiable owners are not affected by the provision. *Id.*

276. Oxman, *supra* note 8, at 362 ("[provision] expressly negates any effect on rules regarding title.").

277. *See supra* note 122 and accompanying text (stating that salvor is entitled to salvage reward under salvage law). Alexander recommends that the salvage reward be contingent on whether the salvor uses proper archaeological methods of recovery and that the matter of a marine peril be settled as a matter of law. Alexander, *supra* note 14, at 14-18.

278. *See supra* text accompanying note 99 (explaining rule of title for abandoned property under law of finds).

279. *See* Arend, *supra* note 8, at 779-80 n.8.

280. *See* House Report, *supra* note 89, at 366 (stating salvage law does not protect historic qualities of shipwrecks).

281. *See supra* notes 128-30 and accompanying text (discussing elements required to establish salvage cause of action).

282. *Id. But see supra* notes 137-41 and accompanying text (discussing that some courts have limited salvage reward when salvor did not take into account historical value of shipwreck).

lic ownership.[283] Commentators and courts have insisted, therefore, that salvage law does not protect historic shipwrecks for public enjoyment.[284]

In addition to this policy justification that salvage law should not be applied to historic shipwrecks because recovery methods are inconsistent with preservation values, commentators and U.S. case law have addressed the legal reasons to exclude historic shipwrecks from salvage law.[285] First, U.S. courts have questioned if historic wrecks are subjects of admiralty because they have an attenuated connection to maritime commerce.[286] Second, U.S. courts do not agree whether shipwrecks are in a marine peril.[287] Finally, although salvage law has been applied to objects other than active ships,[288] the subjects of salvage are generally items that could interfere with navigation.[289] Shipwrecks are usually buried deep beneath the ocean surface and therefore do not impede shipping ventures.[290] Finally, due to the length of time that historic shipwrecks have been lying at the bottom of the sea, some U.S. courts questioned if historic shipwrecks could be subjects of salvage law.[291] Because salvage law only applies when there is an existing owner of the artifact, historic shipwrecks may be too old for any person to claim title to them.[292]

Paragraph 4 was added to Article 303 later than the article's

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283. *See supra* text accompanying note 99 (stating that finder acquires title to property under law of finds).

284. *See supra* note 14 (explaining why salvage law does not protect historic abandoned shipwrecks).

285. *See* Zych v. Unidentified, Wrecked & Abandoned Vessel, Believed To Be The "Seabird," 941 F.2d 525 (7th Cir. 1991), *modifying* 746 F. Supp. 1334 (N.D. Ill. 1990), *on remand*, 811 F. Supp. 1300 (N.D. Ill. 1992), *aff'd*, No. 93-1426, 1993 WL 88377 (7th Cir. (Ill.) Mar. 21, 1994).

286. *Id.* at 531-32.

287. *See supra* notes 175-78 and accompanying text (setting forth two arguments for whether abandoned shipwrecks are in marine peril).

288. *See supra* notes 144-45 and accompanying text (noting that salvage law has been applied to floating logs and floating corpse).

289. *See id.*

290. *See* Broad, *supra* note 9 (stating that *S.S. Central America* was found over mile and a half below surface).

291. Treasure Salvors, Inc. v. The Unidentified Wrecked & Abandoned Sailing Vessel, 569 F.2d 330, 337 (5th Cir. 1978).

292. *See id.* (stating that salvage law should not be applied to abandoned shipwrecks because it is impossible for there to be existing owner).

preceding portions. Paragraph 4 of Article 303[293] states that UNCLOS III does not effect other international agreements concerning archaeological and historical artifacts.[294] Commentators have interpreted this paragraph to mean that the law of the sea should be consistent with the evolving law of international archaeology.[295] Existing international archaeology agreements apply only within the territories of member nations, are therefore not generally applicable to shipwrecks found at sea.[296] International agreements, however, may provide insight into how to treat archaeological artifacts found at sea, particularly with regard to the issue of ownership.[297]

Another commentator suggests that this provision allows a new agreement to be formed to fill gaps left by the marine archaeology provisions in UNCLOS III.[298] For example, if salvage law does not apply to historic shipwrecks located in the Contiguous Zone, the Exclusive Economic Zone, and on the Continental Shelf, another regime must be organized. This approach acknowledges the limited usefulness of Article 303 and encourages further refinement of the law of shipwrecks found beyond the Territorial Sea.

C. *Incentives to Search for Shipwrecks Beyond Domestic Jurisdiction*

In addition to deciding who owns historic shipwrecks, providing an incentive to search for and locate abandoned historic shipwrecks beyond the territorial sea also is an essential part of a

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293. *See supra* note 83 and accompanying text (explaining meaning of UNCLOS III's Article 303 paragraph four).

294. *See* UNCLOS III, *supra* note 16, art. 303, ¶ 4, 21 I.L.M. at 1326. Paragraph four states that UNCLOS III is "without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature." *Id.*

295. *See* Oxman, *supra* note 8, at 355 (stating that nations' duties to protect archaeological objects are derived from law of sea and law of cultural artifacts). UNESCO is responsible for several recommendations regarding cultural property and international archaeology. *See* UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 (1972), *reprinted in* 10 I.L.M. 289 (1971); UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37, *reprinted in* 11 I.L.M. 1358 (1972); UNESCO Recommendation Concerning the Protection, at a National Level, of the Cultural and Natural Heritage, Nov. 16, 1972, UNESCO Doc. 17 C/107 (1972), *reprinted in* 11 I.L.M. 1367 (1972).

296. *See* Strati, *supra* note 8, at 867-68.

297. *Id.*

298. *See* Arend, *supra* note 8, at 803.

substantive law of international marine archaeology.[299] Under traditional salvage law, the reward is an inducement to discover shipwrecks.[300] If salvage law applies, the reward entails monetary compensation, but may include the entire vessel.[301] If finds law applies, the reward consists of title to the wreck.[302] Therefore, when the treasure amounts to one billion dollars worth of gold, the incentive to recover a historic shipwreck clearly exists under traditional admiralty principles.[303]

From a professional salvage company's perspective, the economics of salvage operations would preclude any salvage efforts if no incentive were offered.[304] Similarly, from a preservationist's perspective, the lack of an incentive is equally problematic because of limited public resources to search for and recover wrecks.[305] Commentators therefore have suggested that a reward be made even if salvage law does not apply to historic shipwrecks.

For example, one commentator suggested that in the Area, the agency[306] appointed to oversee marine archaeology could distribute an appropriate reward.[307] For shipwrecks found in the Contiguous Zone, in the Exclusive Economic Zone, or on the Continental Shelf, the incentive is a more problematic matter because the issue of property rights is less settled than in the

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299. *See supra* note 4 and accompanying text (stating that to effectively regulate marine archaeology, incentives to locate shipwrecks must be offered).

300. *See supra* text accompanying note 122 (stating that reward is available to first salvor that saves marine property from marine peril).

301. *See supra* notes 148-51 and accompanying text (discussing U.S. courts' combination of law of salvage and finds because under both principles remedy may be vessel itself).

302. *Id.*

303. *See* Columbus-America Discovery Group, Inc. v. Atlantic Mut. Ins. Co., 974 F.2d 450 (4th Cir. 1992), *cert. denied*, __ U.S. __, 113 S. Ct. 1625 (1993). *But see Salvagers Receive 90% of Treasure; Insurers, 10%*, *supra* note 14 (stating that judge presiding over salvage award proceedings believed that gold on board *S.S. Central America* amounted only to U.S.$21 million).

304. *See Salvagers Receive 90% of Treasure; Insurers, 10%*, *supra* note 14 (stating that salvors of *S.S. Central America* have spent U.S.$30 million on salvage effort thus far).

305. *See* Guidelines, *supra* note 7, at 50,128. The Guidelines state that, "[a]dequate funding is the key to the successful operation of programs for the management of publicly-owned shipwrecks." *Id.*

306. *See supra* notes 249-50 and accompanying text (discussing commentators' views that international agency should be appointed to determine nations' rights to wrecks).

307. *See* Strati, *supra* note 8, at 880-84.

Area.[308] Incentives are connected to property rights because if salvage law or finds applies, either compensation or title is awarded to the salvor, respectively.[309]

III. *THE PRINCIPLES OF U.S. ABANDONED SHIPWRECK LAW SHOULD BE INCORPORATED INTO AN INTERPRETATION OF UNCLOS III*

International law differs from a coastal nation's domestic law.[310] International law is based on the idea of comity and negotiation, while a nation's law is grounded on sovereign powers.[311] Therefore, it is valid to question whether the use of domestic legal principles should be applied to the interpretation of an international treaty such as UNCLOS III.[312] In the case of the marine archaeology provisions of UNCLOS III, there is general agreement that the articles dealing with historically significant objects found at sea provide insufficient guidance for dealing with historic shipwrecks.[313] The ASA represents an approach to protecting historic shipwrecks that could be used to add detail and substance to the broader principles spelled out in articles 149 and 303 of UNCLOS III.[314] The finer points of an international historic shipwreck law may be resolved relying on the dispute resolution provisions of the Convention and by developing an international marine archaeology agreement consistent with the directives of UNCLOS III.[315]

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308. *See supra* notes 258-98 and accompanying text (discussing property rights in Contiguous Zone, in Exclusive Economic Zone, and on Continental Shelf).

309. *See supra* note 150 and accompanying text (discussing fact that title to vessel may be awarded under law of salvage and finds).

310. *See* Oxman, *supra* note 8, at 355. Oxman stated that, "[t]he difference is that the law of the sea may yield more options than, and pose problems different from, those that arise from a terrestrial system rooted almost exclusively in territorial sovereignty." *Id.*

311. *See id.*

312. *Cf. id.*

313. *See supra* note 1 (discussing inadequacy of international marine archaeology law).

314. *See supra* note 22 (comparing detail of ASA and UNCLOS III).

315. *See* Arend, *supra* note 8, at 803. Due to its imminent ratification and because UNCLOS III is an extensive treaty that deals with a plethora of ocean law matters, it is unlikely that the United Nations would halt the ratification process to amend the marine archaeology provisions of the Convention. *Id.* Article 303, paragraph 4 implies that a new agreement is what the treaty calls for by referring to "other international agreements." *Id.*

A. *Determining Historic Significance of Shipwrecks Found in International Waters Should Be Based on the More Encompassing Standard Included in the ASA*

An interpretation of UNCLOS III should define significant shipwrecks using a standard that recognizes recent history.[316] Failing to use a fifty year threshold, the more encompassing standard, would exclude the *Titanic* and other important aspects of U.S. history.[317] The legislative history of the Convention demonstrates that nations considered a broader standard, but left the language in the final draft open to interpretation.[318] The U.S. approach supports the use of a more inclusionary standard in interpreting UNCLOS III.[319]

During the UNCLOS III negotiations, the U.S. Delegation recommended that only shipwrecks centuries old be considered historically significant.[320] This recommendation contradicts the ASA, which incorporated the NHPA standard of requiring historically significant objects to be fifty years old.[321] In addition, even if the resource has not achieved significance in the past fifty years, the property is eligible to be listed in the National Register if it is exceptionally significant.[322]

The United States adopted a liberal standard for determining objects worthy of preservation in the NHPA.[323] To sanction

316. *See* Nafziger, *supra* note 1, at 348 (explaining that *Titanic* was 73 years old when it was discovered).

317. *Id.* A 50 year standard would ensure that World War II ships would be significant. *See* Guidelines, *supra* note 97, at 50,141 (listing shipwrecks included on National Register of Historic Places including *U.S.S. Arizona* and *U.S.S. Utah*, both of which sank during Pearl Harbor on December 7, 1941).

318. *See* notes 224-31 and accompanying text (discussing *travaux preparatoires* and commentators' views on appropriate age standard to be included in UNCLOS III).

319. *See supra* text accompanying note 213 (stating U.S. age standard for historic resources).

320. *See supra* note 229 and accompanying text (stating Oxman's observations regarding appropriate age for historic and archaeological resources under UNCLOS III).

321. 36 C.F.R. § 60.4 (1993).

322. *Id.* at *Criteria Considerations* (g).

323. *See supra* note 213 (stating Criteria for Evaluation for listing on National Register). It is notable that age is not the sole consideration under U.S. law. *Id.* International law should take into account an object's integrity, its contribution to broad patterns of history, any associations to the lives of significant persons the shipwreck may have, and whether the shipwreck embodies the distinctive characteristics of a type, period or method of construction. *See id.* Additionally, a criteria for consideration particularly relevant to historic shipwrecks would be whether the shipwreck has yielded or is likely to yield, information important in prehistory or history. *See id.*

any other standard would set an arbitrary line between a shipwreck found at twelve miles from the baseline, or within the Territorial Sea,[324] and one that was found just beyond this limit.[325] The express purpose of the UNCLOS III maritime zones is to organize the jurisdiction of coastal nations, not to define what the international community views as shipwrecks worthy of protection. Therefore, shipwrecks both inside and outside the Territorial Sea limits should be judged according to the same historic significance standard.[326]

B. *An International Agency Should Be Appointed to Implement Article 149*

The *travaux preparatoires* demonstrate that the Authority[327] does not have jurisdiction over marine archaeological finds discovered in the Area.[328] While the Authority has the power to distribute the "common heritage of mankind," which includes the living and non-living resources located in the deep seabed,[329] it does not have jurisdiction to resolve claims to archaeological resources in the deep seabed.[330] This result of the UNCLOS III negotiations is unfortunate because in order for Article 149[331] to have effect, an agency must implement it.[332] Therefore, the international community should appoint an alternative agency to be responsible for shipwrecks found in the Area.[333]

The best suggestion for the designation of an agency is that the United Nations Educational, Scientific, and Cultural Organization ("UNESCO") be in charge of marine archaeology in the

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324. *See supra* notes 53-55 and accompanying text (explaining that Territorial Sea is measured at distance of twelve miles from baseline of coastal nation).

325. *See, e.g., supra* note 57 and accompanying text (discussing historical purpose of Contiguous Zone).

326. *Id.*

327. *See supra* note 67-68 and accompanying text (explaining that International Seabed Authority controls activities taking place on deep seabed).

328. *See supra* text accompanying note 65 (discussing how UNCLOS III defines Area as deep seabed).

329. *See id.*

330. *See supra* notes 243-48 and accompanying text (explaining that marine archaeology is not within Authority's control).

331. *See supra* note 79 and accompanying text (discussing Article 149 of UNCLOS III).

332. *See supra* notes 243-57 and accompanying text (explaining why appointment of agency is necessary to implement Article 149).

333. *Id.*

Area.[334] UNESCO could take over these responsibilities easily because it already has an international presence, deals specifically with archaeological matters, and makes recommendations for international approaches to archaeology.[335] Moreover, UNESCO has the advantage of being a structured organization which could adapt to being accountable for resolving matters of marine archaeology.[336]

Pursuant to the dispute resolution provisions of the Convention, UNESCO would decide whether a shipwreck had historic significance. As the trustee for humanity, UNESCO would have the power to determine if a private individual would gain title to a shipwreck or if the shipwreck should be preserved for the public's benefit by being removed to a museum or cultural institution. All UNESCO determinations would be made in order to benefit the public interest.

Giving jurisdiction to UNESCO over marine archaeology would best serve the public interest by taking historic shipwrecks out of the realm of salvage and finds law. Title would not necessarily be granted to the individual who found the abandoned historic shipwreck.[337] Also, under a system where by statute shipwrecks became abandoned after a period of fifty years, it would be unlikely that salvage would apply at all to historic shipwrecks because only the law of finds applies to abandoned shipwrecks, not the law of salvage.[338]

The language of UNCLOS III, including the phrases "for the benefit of mankind as a whole" and "preferential rights" argues in favor of an independent organization making decisions regarding historic shipwrecks rather than allowing title to be

334. Strati, *supra* note 8, at 878. While the United States withdrew from UNESCO ten years ago, the State Department has recommended that the Clinton Administration rejoin the organization. *See* Steven Greenhouse, *Rejoining UNESCO Suggested to U.S.*, N.Y. TIMES, Feb. 19, 1993, at 5. The reasons given for rejoining is that it would help American scientists, educators and corporations to cooperate in science, education, culture, and communications. *Id.*

335. *Id.*; *see supra* note 295 (listing UNESCO recommendations on international archaeology and cultural property).

336. *See* Nafziger, *supra* note 1, at 351 (questioning need for another bureaucracy).

337. *See id.* at 350 (stating that there is increasing recognition that law of finds may be law of losses); *supra* note 14 and accompanying text (discussing why salvage law should not be applied to historic shipwrecks).

338. *See* Del Bianco, *supra* note 4, at 174 (discussing French shipwreck law that mandates that all wrecks left over period of five years are abandoned).

granted to the finder.[339] Without an agency to implement Article 149, the law of finds would probably govern.[340] The law of finds excludes input by the international community over the future of objects with historic significance. The designation of a public body, however, could balance competing interests thereby preserving objects of an archaeological and historical nature for the "benefit of mankind as a whole."[341]

U.S. law delegates to a government body the responsibility of determining the fate of historic shipwrecks.[342] The ASA requires the states to manage historic shipwrecks[343] and rejects the law of finds.[344] Therefore, U.S. law supports an interpretation of Article 149, which would mandate an autonomous organization to control marine archaeological matters in the Area.

C. *The Proper Interpretation of Article 303 Is to Give Coastal Nations Jurisdiction Over Marine Archaeology and to Exclude Historic Shipwrecks from Salvage Law*

In spite of the U.S. delegation efforts to avoid the creation of national jurisdiction over marine archaeology beyond the Territorial Sea, it is possible to interpret Article 303[345] to include marine archaeology within regimes that coastal nations already have jurisdiction to regulate.[346] A coastal nation's jurisdiction arguably exists for the regulation of customs laws violations in the Contiguous Zone, over drilling operations on the Continental Shelf, and over the installation of structures in the Exclusive Economic Zone, all of which may affect marine archaeology practices.[347] Once jurisdictional power is established, it is neces-

339. *See supra* notes 251-53 and accompanying text (discussing meaning of "benefit of mankind as a whole" and "preferential rights").

340. *See* Nafziger, *supra* note 1, at 348. The author stated, "the applicable law of the sea is itself at sea." *Id.*

341. *See supra* notes 243-57 and accompanying text (explaining role of agency that would oversee marine archaeology in international waters).

342. *See* ASA, 43 U.S.C. § 2106(a) (1988).

343. *Id.*

344. *Id.*

345. *See supra* notes 80-83 and accompanying text (explaining that Article 303 of UNCLOS III deals with marine archaeology in Contiguous Zone, in Exclusive Economic Zone, and on Continental Shelf).

346. *See supra* notes 269-70 and accompanying text (explaining that coastal nation may obtain jurisdiction over marine archaeology in Exclusive Economic Zone and on Continental Shelf by virtue of drilling provisions).

347. *Id.*

sary to determine the details of coastal nation regulation to provide the most protection for historic shipwrecks. Following the U.S. approach, the best method of protection is to define a regime that treats historic shipwrecks outside of admiralty rules of salvage and finds.[348]

1. In the Contiguous Zone, Art. 303, ¶ 2 Controls a Coastal Nation's Jurisdiction, While in the Exclusive Economic Zone the Drilling Provisions Establish Jurisdiction

With the exception of the ability to assume that removal of archaeological objects from a nation's Contiguous Zone constitutes smuggling for the purposes of enforcing customs regulations,[349] coastal nations do not have jurisdiction over marine archaeology by virtue of the facial language of the marine archaeology provisions of the Convention.[350] While it is arguable that marine archaeology is not marine scientific research as defined in the Convention,[351] the suggestions regarding articles 60[352] and 81[353] could provide jurisdiction in the Exclusive Economic Zone and on the Continental Shelf, respectively. Thus, a coastal nation could regulate marine archaeology by incorporating rules into its customs regulations, its laws regarding the installation of structures, and regulations related to drilling.

2. Coastal Nations Should Exclude Historic Shipwrecks from the Law of Salvage and Finds

Once it is established that a coastal nation may obtain jurisdiction over marine archaeology in the Contiguous Zone and the Exclusive Economic Zone, and on the Continental Shelf, it is

348. *See, e.g.*, House Report, *supra* note 89, at 366 (advocating that admiralty principles of salvage and finds are not appropriate for historic abandoned shipwrecks because of resulting loss of historical data and artifacts).

349. *See* UNCLOS III, *supra* note 16, art. 303, ¶ 2, 21 I.L.M. at 1326.

350. *See supra* notes 258-68 and accompanying text (discussing facial language of Article 303).

351. *See supra* notes 271-74 and accompanying text (discussing why marine archaeology does not come under marine scientific research provisions of UNCLOS III).

352. *See supra* note 269 and accompanying text (discussing how marine archaeology could fall under Article 60 which allows coastal nation control over artificial islands, installations, and structures in Exclusive Economic Zone).

353. *See supra* note 270 and accompanying text (discussing how marine archaeology could fall under Article 81, which allows coastal nation to control drilling on Continental Shelf for any purpose).

necessary to determine how these respective regulations could incorporate marine archaeology to afford protection to historic shipwrecks.[354] A prerequisite to effectively regulating marine archaeology through regulatory strategy is to exclude historic shipwrecks from the law of salvage and finds.[355] Freeing historic shipwrecks from these principles would allow a broader range of regulatory possibilities because coastal nations would not be constrained by the rules of title included in salvage and finds law.[356]

Pursuant to a viable interpretation of Article 303, paragraph 3,[357] because historic shipwrecks are subjects of admiralty and salvage law is based on the existence of an "identifiable owner," paragraph 3[358] reveals that it does not challenge the supposition that title to historic shipwrecks should be based on rules of admiralty.[359] This, however, is not the only possible interpretation.[360] The fact that historic shipwrecks have been treated as subjects of admiralty in the past does not preclude an alternative policy.[361]

It is possible to interpret paragraph 3 as excluding historic shipwrecks from the admiralty rules.[362] If the assumption is that historic shipwrecks are not subjects of admiralty rules of salvage and finds, creating new rules for title and recovery operations would not effect the rights of identifiable owners, salvage law, or other rules of admiralty. Rather, if the assumption is that archaeological finds in international waters belong to nobody and there is *a priori* right by the state of origin, there is a greater range of possible regulatory solutions to preserve historic ship-

354. *See supra* note 4 (stating that marine archaeology regulations should maximize protection of historic shipwrecks and provide incentives to locate them).

355. *See supra* notes 280-84 and accompanying text (discussing how salvage law from policy perspective does not protect historic shipwrecks).

356. *See supra* text accompanying notes 109-10 & 121-22 (discussing rules of title in law of finds and salvage).

357. *See supra* note 82 and accompanying text (discussing meaning of paragraph 3 of Article 303).

358. *See id.* (explaining that Article 303, paragraph 3 states that nothing in UNCLOS III affects admiralty principles).

359. *See, e.g.*, Newton, *supra* note 10, at 194.

360. *See* Arend, *supra* note 8, at 779-80 n.8 (explaining that Article 303 of UNCLOS III excludes marine archaeological finds from the law of salvage).

361. *See, e.g.*, ASA, 43 U.S.C. § 2106(a) (1988) (removing historic abandoned shipwrecks from the law of salvage and finds).

362. *See* Arend, *supra* note 8, at 779-80 n.8 (explaining that Article 303 of UNCLOS III excludes marine archaeological finds from law of salvage).

wrecks and to deal with them in a way that benefits the international community as a whole.

The United States has embraced this theory by excluding historic shipwrecks from salvage and finds in the ASA.[363] The U.S. Congress based this approach on the notion that historic shipwrecks are not a part of admiralty because abandoned historic shipwrecks are not related to maritime commerce.[364] From a policy perspective, the ASA recognizes that the value of preservation is not furthered by salvage and finds law.[365] This is true because title goes to the finder or someone who has an ownership interest in the wreck.[366] In addition, archaeological standards are not used in recovery methods.[367]

Viewing historic shipwrecks as something distinct from admiralty provides the opportunity to regulate in creative ways. For example, the penalty for smuggling parts of a historic shipwreck out of the Contiguous Zone could include reverting title of the object removed to the coastal nation. Because removal of the object is inevitable at some point in the retrieval process, unless a finder immediately informed the coastal nation's authorities of the existence of the wreck and surrendered title to them, that individual could be facing civil or criminal penalties.

In the Exclusive Economic Zone and on the Continental Shelf, a coastal nation could regulate respectively the installation of structures and drilling procedures by requiring a person wishing to drill into a coastal nation's Continental Shelf or somewhere within the Exclusive Economic Zone to acquire a permit from UNESCO in order to proceed. Failure to obtain a permit could result in penalties by the coastal nation. While enforcement would be the responsibility of the coastal nation through the permitting process, UNESCO would oversee the recovery operations and be the ultimate arbiter of title and a reward.

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363. *See* ASA, 43 U.S.C. § 2106(a) (1988).

364. *See* House Report, *supra* note 89, at 366. The House Report stated that admiralty law developed to encourage the salvage of commercial goods. *Id.* Also, the House Report explained that salvage operations result in the loss of historical information and artifacts. *Id.*

365. *See supra* notes 280-84 and accompanying text (describing policy behind excluding historic abandoned shipwrecks from law of salvage and finds).

366. *See supra* text accompanying notes 121-22 and accompanying text (discussing rule of title under salvage law).

367. *See supra* note 14 (explaining that salvage law is not favored by preservationists because it does not require archaeological standards to be met).

D. *Incentives Should Be Available to Encourage the Location of Historic Wrecks Yet Made Contingent on the Use of Archaeological Standards in Recovery Operations*

The primary argument set forth for the retention of salvage law to settle disputes regarding title to abandoned historic shipwrecks is that the salvage reward provides an incentive to locate shipwrecks.[368] Salvage law proponents also point out that the costs of salvage operations are generally exorbitant.[369] Accordingly, salvors are entitled to compensation either in the form of monetary compensation or title to the shipwreck.

Although some U.S. courts have required the use of archaeological expertise in salvage operations of historic shipwrecks,[370] generally a salvor may use recovery methods that destroy the historic value of the wreck.[371] The salvage reward is not made contingent on whether the shipwreck remains intact.[372] Instead, a salvor may destroy the site and the historical information it contains through the use of explosives, dredges or propeller wash deflectors.[373] Thus, an important aspect of historic preservation, the documentation of historic sites, is not achieved under salvage law.[374]

The issue is not whether a salvor is entitled to compensation. Preservationists agree that salvors should be compensated.[375] However, in the case of international marine archaeology, UNESCO should decide the proper reward. First, an incen-

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368. *See* Newton, *supra* note 10, at 195 (stating that "article 303 fails to provide salvage law's incentive of salvage reward."). Other commentators have noted the protection of priority, or the injunction stage, of salvage law that is critical to preserving archaeological integrity by allowing the first salvor to complete recovery operations without the interference by others. *See* Alexander, *supra* note 14, at 2-6 (explaining that right of first salvor is important aspect of salvage law).

369. *See supra* note 304 (explaining costs of salvage operations).

370. *See supra* notes 137-41 and accompanying text (discussing fact that some U.S. courts have required salvors to show that they have used sensitive recovery methods to receive salvage reward).

371. *See* SCHOENBAUM, *supra* note 8, at 502 (stating traditional requirements for salvage reward).

372. *Id.*

373. *See, e.g.*, Guidelines, *supra* note 7, at 50,132 (explaining potentially harmful salvage methods).

374. *See id.* at 50,131 (providing recommendations on documentation methods); Broad, *supra* note 9 (explaining that new technologies used for salvage operations may also be used to enhance documentation of historic shipwrecks).

375. *See* Guidelines, *supra* note 7, at 50,135 (providing system to assess when transfer of title of artifacts to salvors is in public interest).

tive should be available for providing notice of the location of a shipwreck.[376] Second, after recovery operations are finished, title or other compensation should be granted to the salvor when appropriate recovery methods are used and such a reward is in the public interest.[377]

E. *The United States Should Ratify UNCLOS III and Should Participate in Developing a New Agreement for International Marine Archaeology*

Because UNCLOS III has achieved its necessary sixty ratifying votes without a U.S. ratifying vote, the United States could be prohibited from participating in dispute resolution proceedings as provided in the Convention.[378] Therefore, it is in the U.S. interest to ratify UNCLOS III.[379] Because UNCLOS III has achieved treaty status, to address the marine archaeology deficiencies in the treaty, it is more difficult to amend the treaty rather than to develop a new international agreement pertaining to shipwrecks and other archaeological resources.[380]

Settling controversies over ownership rights to historic shipwrecks in international waters could be handled by the dispute resolution mechanisms already included in the treaty.[381] Compulsory dispute settlement is consistent with the concept of

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376. *See* Del Bianco, *supra* note 4, at 173 n.106. Under the Australian system, a salvor is entitled to a reward for reporting the wreck. *Id.*

377. *See, e.g.*, Guidelines, *supra* note 7, at 50,135. The Guidelines state that States should

> (a) Not transfer title to any items to another party until the authorized recovery activity is completed, the items are properly conserved and analyzed, and any required final report is competed and approved by the State;
> (b) Determine any archaeological and commercial values of recovered artifacts and other materials;
> (c) Determine what would constitute fair compensation to the private party (for his or her recovery efforts) in terms of a share of items recovered, a percentage (in cash) of the fair market value of the items, or a combination thereof; and
> (d) Retain title to items that are unique, exceptionally valuable historically or representative of the items recovered, or are recovered illegally after enactment of the State's shipwreck management statute.

Id.

378. *See* Oxman, *supra* note 8, at 371.

379. *See id.*

380. *See* Arend, *supra* note 8, at 803 (explaining that marine archaeology was not priority during UNCLOS III negotiations).

381. *See* UNCLOS III, *supra* note 16, art. 280, 21 I.L.M. at 1322. Although one commentator suggested that the Deep Seabed Dispute Chamber could settle these dis-

"preferential rights," implying that negotiations are necessary to settle questions of property rights.[382] Additionally, compulsory dispute settlement could assist in developing precise interpretations of the Convention's rules and defining the states' obligations to protect archaeological and historical objects.[383]

The development of a new agreement would be consistent with the language of UNCLOS III.[384] Paragraph 4 of Article 303[385] provides the opportunity to create a new agreement that better protects historic shipwrecks in international waters.[386] Negotiations could proceed on regional bases. Most importantly, experts in the field of marine archaeology including archaeologists and professional salvagers could negotiate to develop the best possible approach to preserving shipwrecks found in international waters for the public benefit.[387]

CONCLUSION

Technological advances in undersea gear have encouraged more extensive recovery of historic shipwrecks in international waters.[388] The existing international regime is currently inadequate to address preservation goals. Although UNCLOS III provides a framework for international marine archaeology, the Convention's ambiguous provisions should be interpreted to incorporate principles delineated in the U.S. comprehensive approach to protecting historic shipwrecks. Applying U.S. abandoned shipwreck standards to the development of a new international marine archaeology agreement will protect historic

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putes, articles included in Part XV should be used because marine archeology is not an "activity in the Area." Strati, *supra* note 8, at 885.

382. *See* Strati, *supra* note 8, at 884 (discussing Fisheries Jurisdiction Cases).

383. Oxman, *supra* note 8, at 371. The author also highlights the possibility that if a nation does not ratify the treaty, it may be excluded from the dispute settlement process. *Id.*

384. *See id.* (stating that dispute resolution provisions may be used to develop precise interpretations of marine archaeology provisions).

385. *See* UNCLOS III, *supra* note 16, art. 303, ¶ 4, 21 I.L.M. at 1326. Paragraph 4 states, "[t]his article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature." *Id.*

386. *See* Arend, *supra* note 8, at 803 (calling for new international agreement to address marine archaeology).

387. *See id.*

388. *See supra* note 9 (discussing technological progress in shipwreck recovery methods).

shipwrecks in international waters by fulfilling the general propositions regarding marine archaeology set out in UNCLOS III.

*Anne M. Cottrell**

* J.D. Candidate, 1994, Fordham University; M.S. Historic Preservation, 1989, Columbia University.