DISASTER, DECEIT, AND TREASURE: WHY THE UNCLOS RESOLUTION ON POSSESSION OF SALVAGED WRECKS IS DOING MORE HARM THAN GOOD

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ABSTRACT

The search for sunken treasure is a quest as old as time. That search, however, has led to animosity between neighbors, disputes between countries, and intercontinental naval battles. With the proliferation of undersea technology, what was once thought to be lost at sea is coming ever closer to the surface. Unfortunately, this new technology has only exacerbated existing disputes. The current state of international law, embodied in the United Nations Convention on the Law of the Sea (UNCLOS), inadequately solves treasure disputes over goods salvaged in international waters. Accordingly, UNCLOS must be amended to include a committee specifically designated and authorized to settle salvage disputes between member nations, states, and salvage companies. The United Nations, the United Nations Educational, Scientific and Cultural Organization, and the Institut de Droit International have attempted to remedy the disputes through resolutions. None of the resolutions have created a committee, and none of the resolutions have successfully solved the salvage disputes. Salvage disputes involve issues of maritime law, finders law, salvage law, and international law; therefore, they can only be solved when looked at through the historical lens in which they exist. This Note examines the history of maritime law and the development of salvage jurisprudence. It suggests a multi-factor framework that a salvage dispute committee can use to properly determine who owns what is found on the bottom of the sea.

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INTRODUCTION

June 8, 1708. Somewhere off the coast of Cartagena, Colombia. The air was thick with smoke.[1] Cannon fire echoed throughout the night sky, while blood and fire spewed from the deck of the *San José*.[2] The Spanish Galleon was in chaos. Its crew

1. Bill Chappel, *Wreck of Legendary Spanish Galleon is Finally Found, Colombia Says*, NPR (Dec. 5, 2015, 1:31 PM), http://www.npr.org/sections/thetwo-way/2015/12/05/458586878/wreck-of-legendary-spanish-galleon-is-found-colombia-says.

2. *Id.*

members loaded cannons with anything from chains to scrap iron, while others threw sand on the quickly pooling blood in an attempt to create sure footing.[3] Their efforts were futile. The *San José*'s twenty-four pound cannons were no match for its opponent's thirty-two pounders.[4] Admiral José Fernandez de Santillán feared the worst for his six hundred passengers.[5]

Less than one hundred feet away, Commodore Charles Wager watched as his ship, the *Expedition*, pummeled the ill prepared *San José*.[6] Wager had been chasing the *San José* for months.[7] Finally, in the spring of 1708, he received intelligence that Spanish treasure ships were carrying cargo from the Spanish Viceroyalty of Tierra Firma to France.[8] The cargo was needed to fund the efforts of Spain and France against Britain in the War of the Spanish Succession.[9] The *San José*, in particular, was a behemoth of a ship.[10] Nearly all of its 1066 tons were loaded with pearls from Panama, gold from the mines of Peru, and emeralds, amethysts, and diamonds from the Andes mountains.[11] Wager knew that the capture of the *San José* would make him an extremely wealthy man.[12]

As midnight approached, the two ships were completely enveloped in smoke. Finally, the cannon fire ceased and the

3. Christopher Klein, *Legendary Billion-Dollar Shipwreck Found Off Colombian Coast*, HIST. (Dec. 8, 2015), https://www.history.com/news/legendary-billion-dollar-shipwreck-found-off-colombian-coast.

4. Chappel, *supra* note 1.

5. Stephanie Pappas, *Sunken Treasure Ship Worth Billions Possibly Found After 300 Years*, LIVE SCI. (Dec. 8, 2015, 6:38 PM), https://www.livescience.com/53027-sunken-treasure-ship-found.html.

6. Chappel, *supra* note 1.

7. CHARLES JAMES FERET, FULHAM OLD AND NEW: BEING AN EXHAUSTIVE HISTORY OF THE ANCIENT PARISH OF FULHAM 95 (1900).

8. *Id.*; Willie Drye, *Battle Begins over World's Richest Shipwreck*, NAT'L GEOGRAPHIC (Dec. 18, 2015), http://news.nationalgeographic.com/2015/12/151218-san-jose-shipwreck-treasure-colombia-archaeology/.

9. *War of the Spanish Succession*, ENCYCLOPEDIA BRITANNICA (Dec. 13, 2015), https://www.britannica.com/event/War-of-the-Spanish-Succession.

10. Chappel, *supra* note 1.

11. Jonathan Watts & Stephen Burgen, *Holy Grail of Shipwrecks Caught in Three-Way Court Battle*, GUARDIAN (Dec. 6, 2015), https://www.theguardian.com/world/2015/dec/06/holy-grail-of-shipwrecks-in-three-way-court-battle.

12. *Id.*

battle was reduced to an eerie calm. Wager peered through the smoke, trying to catch a glimpse of his battered foe.[13] Suddenly, Wager heard a tremendous explosion and felt an intense heat from the direction of the *San José*.[14] Splinters and timbers burst across the deck of the *Expedition*, and a wall of water crashed down on Wager and his crew.[15] The gun powder on board the *San José* must have caused an explosion,[16] and the massive Spanish ship was now engulfed in flames. When Wager recovered from the blast, he watched as the *San José* and her crew disappeared into the dark water.[17] It was gone, forever lost to the Caribbean Sea, along with almost six hundred souls and an immense fortune.[18]

1981. Sixteen miles off the coast of Cartagena, Colombia. A commercial salvage company, Sea Search Armada (SSA), claims to have found the lost *San José*.[19]

Since its sinking in 1708, the *San José* has become the object of Colombian legend. Treasure hunters, adventurers, and novelists alike have fathomed the riches lost when the *San José* sank.[20] Gabriel Garcia Marquez described the legend of the ship in his novel, *Love in the Time of Cholera*. He wrote,

> Only eighteen meters down, there were so many old sailing ships lying among the coral reefs that it was impossible to even calculate the number . . . The easiest one to distinguish was the galleon *San José* . . . the ship most damaged by English artillery. [The diver] said he had seen an octopus inside, more than three centuries old, whose tentacles emerged through the openings in the cannon and who had grown to such a size in the

13. Klein, *supra* note 3.
14. *Id.*
15. *Id.*
16. Pappas, *supra* note 5.
17. Klein, *supra* note 3.
18. Pappas, *supra* note 5.
19. Watts & Burgen, *supra* note 11.
20. *Id.*

> dining room that one would have to destroy the ship to free him. He said he had seen the body of the commander, dressed for battle and floating sideways inside the aquarium of the forecastle.[21]

More than thirty years after SSA claimed to have found the *San José*, Colombia's President Juan Santos announced that Colombia, not SSA, found the sunken galleon.[22] That claim was immediately refuted by SSA.[23] In addition, Spain claimed ownership of the *San José*. Thus, a three-way legal battle ensued over the *San José* and its $17 billion treasure.[24]

The *San José* wreck may be the wealthiest found ship, but it is not the first to cause international discord, and it will not be the last. Scholars estimate that there are over 1200 wrecks off the coast of Colombia alone.[25] There are estimates that over three million shipwrecks remain on the ocean floor.[26] Even more appealing, over $60 billion in sunken treasure is waiting to be found among those wrecks.[27] James Delgado, the Director of Maritime Heritage at the National Oceanic and Atmospheric Administration, points out that the majority of wrecks are fairly close to shore.[28] Moreover, "With most shipwrecks so close to the shore, and multiple examples of wealthy patrons sponsoring exploration and research expeditions . . . many of these unexplored shipwrecks [could be] investigated in the coming years."[29]

21. GABRIEL GARCIA MARQUEZ, LOVE IN THE TIME OF CHOLERA 92–93 (Edith Grossman trans., 1988).

22. Watts & Burgen, *supra* note 11.

23. Drye, *supra* note 8.

24. Watts & Burgen, *supra* note 11.

25. *Id.*

26. Jay Bennett, *Less Than 1 Percent of the World's Shipwrecks Have Been Explored*, POPULAR MECHANICS (Jan. 18, 2016), http://www.popularmechanics.com/science/a19000/less-than-one-percent-worlds-shipwrecks-explored/.

27. *Id.*

28. *Id.*

29. *Id.;* William J. Broad, *Deepest Wrecks Now Visible to Undersea Cameras*, N.Y. TIMES (Feb. 2, 1993), http://www.nytimes.com/1993/02/02/science/deepest-wrecks-now-visible-to-undersea-cameras.html?pagewanted=all ("Now, however, deep-diving robots and manned submersibles equipped with advanced cameras, lights and lasers are going far beneath the waves, often miles

With the abundance of sunken vessels remaining to be discovered and the proliferation of deep-sea technology, ownership of what is found at the bottom of the sea is creating more discord than ever before between the finders and the countries claiming ownership of the wrecks. Because ownership of what is found at the bottom of the ocean has political, legal, and cultural ramifications, international law must provide a better remedy for determining who owns salvaged wrecks. Through an analysis of the ongoing legal battle over the $17 billion treasure found in the wreck of the *San José*, this Note argues that the United Nations Conference on the Law of the Sea should provide clearer instructions on how to determine possession of what is found at the bottom of the ocean. Further, the United Nations should create a committee responsible for settling every international salvage dispute through the application of a six-factor balancing test.

Part I of this Note introduces the ongoing battle for ownership of the *San José*. Second, it examines the history of maritime law from its inception in the ancient world to its current state. Third, it addresses the various international conventions and resolutions regarding salvaged shipwreck disputes. It concludes by examining different approaches taken by American courts facing salvaged shipwreck issues. Part II demonstrates the problems with the current international conventions and resolutions. It does this through an analysis of current and past litigation. It then proposes that a committee is the best solution to the current salvage disputes, and offers a six-factor test for resolving these cases. This Note concludes by applying the proposed six-factor test to the *San José* dispute.

down, to illuminate and photograph a rich new landscape of mankind's past. For the first time ever, virtually nothing is off limits.").

I. BACKGROUND

A. *Battle for the* San José

The legend of the *San José*, and the possibility of other monumental shipwrecks lying at the bottom of Colombian waters, led Colombian President Juan Santos to pass legislation in 2013.[30] The legislation declared that any culturally important manmade objects submerged in waters under Colombian jurisdiction were property of the Colombians.[31]

Only two years later, President Santos announced that Colombia, not SSA, discovered the *San José* wreck.[32] The Colombian claim was immediately refuted by SSA.[33] SSA claimed that it identified the site of the *San José* wreck in the early 1980s and registered its location in 1982.[34] According to President Santos, however, the Colombian government found the wreck independently of any previous research.[35] President Santos claimed that the key to locating the wreck was an academic, who he would not name, who "cornered him at a United Nations event in 2015."[36] The unnamed academic, who had studied the history of the *San José* wreck for over forty years, claimed he found a map in the U.S. Library of Congress.[37] The map was drawn by a Spanish spy working for the English.[38] According to President Santos, the map was completely new and enabled the Colombians to find the *San José* wreck.[39]

30. Christopher Mirasola, *Swimming Against the Tide: Colombia's Claim to a Shipwreck and Sunken Treasure*, HARV. INT'L L.J. (Jan. 26, 2016), http://www.harvardilj.org/2016/01/swimming-against-the-tide-colombias-claim-to-a-shipwreck-and-sunken-treasure/.

31. *Id.*

32. Jim Wyss, *Colombia Plans to Salvage Storied Shipwreck amid Legal Challenge*, MIAMI HERALD, http://www.miamiherald.com/news/nation-world/world/americas/colombia/article 159904439.html (last updated May 23, 2018, 1:17 PM).

33. Drye, *supra* note 8.

34. *Id.*

35. Wyss, *supra* note 32.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

Further complicating the dispute, Colombia offered to allow SSA to verify whether the *San José* was where the company claimed to have found it in 1981.[40] According to SSA officials, however, "the offer [was] a scheme, meant to provide Colombian officials an excuse to dismiss their longstanding claim to share the immense wealth of the *San Jos*[*é*]."[41] According to David Moore, Curator of Nautical Archeology at the North Carolina Maritime Museum, "landmarks plotted by modern GPS may be as much as one-eighth of a mile from where they were plotted with earlier technology . . . [and] other factors such as the depth of water and ocean currents can affect where an underwater landmark is plotted."[42] According to SSA, Moore's comments demonstrate how Colombia's offer was merely a false display of good faith.[43] SSA refused the offer and remained steadfast in its claim that it discovered the wreck in the 1980s with the "permission and participation of the Colombian government."[44]

After refusing the Colombian offer, SSA turned to the Colombian and U.S. legal systems to resolve the dispute.[45] At the time of this writing, however, no solution has been found. Adding fuel to the fire, "the Spanish government is considering whether to stake a claim."[46] Historically, Spain has maintained a "'clear position' in defen[s]e of its 'sunken wealth.'"[47] For

40. Watts & Burgen, *supra* note 11.

41. Drye, *supra* note 8. In a letter written to SSA attorney Danilo Devis Pereira, Colombian Minister of Culture Mariana Garces-Cordoba claimed that the *San José* was not where SSA argued it was. *Id.* The letter invited SSA to go to the 1982 coordinates and prove that the *San José* is there. *Id.* According to Cordoba's letter, if the ship is where SSA claims it is, Colombia will recognize SSA's claim. *Id.* If, however, the ship is not in the 1982 coordinates, "we will end this matter." *Id.*

42. *Id.*

43. *Id.*

44. Charles Penty, *A Shipwreck Possibly Containing $17 Billion Worth of Lost Gold Has Been Found off Colombia, and Everyone Wants a Piece*, GCAPTAIN (Dec. 10, 2015), http://gcaptain.com/a-shipwreck-possibly-containing-17-billion-worth-of-lost-gold-has-been-found-off-colombia-and-everyone-wants-a-piece/.

45. Watts & Burgen, *supra* note 11.

46. *Id.*; *see also* Penty, *supra* note 44 ("Spain does not need or have an interest in getting the treasure for its monetary value but it does have rights in the case.").

47. Watts & Burgen, *supra* note 11.

political reasons, Spain lays claim to all Spanish wrecks, regardless of where they are found.[48] It is also possible that the countries from whom the treasure was stolen may make a claim.[49] For example, in the case of the salvaged Spanish frigate *Nuestra Señora de las Mercedes*, there was a three-way dispute between the salvage company, Spain, and Peru, the latter claiming that the treasure was plundered from the Incas.[50] The outcome of this legal battle for the *San José* depends on application of maritime, finders, and salvage law.

B. *A Brief History of Maritime Law*

The sea has played, and continues to play, an integral role in human civilization.[51] Its implications reach into culture, economics, religion, and the law.[52] In ancient Egypt, for example, the sea was at the center of culture and commerce.[53] At the sacred site of Abydos, archeologists exposed the ruins of what was once a grand hall with walls entirely covered in depictions of boats and marine scenery.[54] The record is bare, however, as to any ancient Egyptian codification of laws regulating seafaring activity. Similarly, the ancient Phoenicians, famous for their mastery of navigation and shipbuilding, left no evidence of formal maritime laws.[55] The earliest codification of

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48. Penty, *supra* note 44 ("Spain scored a notable victory in defense of its sunken galleons in 2012 when it won the return of 594,000 silver coins after a U.S. Federal Court tussle with Odyssey Marine Exploration Inc.").

49. *Id.*; Al Goodman, *U.S. Court Backs Spain over $500M Sea Treasure*, CNN, https://edition.cnn.com/2012/02/01/world/europe/spain-u-s--treasure-dispute/index.html (last updated Feb. 4, 2012, 7:57 AM).

50. Goodman, *supra* note 49; Carla Salazar & Frank Bajak, *Peruvians Feel Robbed over Spain Getting Treasure*, SAN DIEGO UNION-TRIB. (Mar. 12, 2012, 11:45 PM), http://www.sandiegouniontribune.com/sdut-peruvians-feel-robbed-over-spain-getting-treasure-2012mar12-story.html.

51. Terence P. McQuown, *An Archaeological Argument for the Inapplicability of Admiralty Law in the Disposition of Historic Shipwrecks*, 26 WM. MITCHELL L. REV. 289, 289 (2000).

52. *See* Barry Bleichner, *Maritime Law*, MAR. ARCHEOLOGY, http://www.maritimearchaeology.com/information/law/ (last visited Dec. 18, 2018) (quoting Justice Mansfield as stating that "maritime law is not the law of a particular country, but the general law of nations").

53. *See* A.R. Williams, *Ancient Royal Boat Tomb Uncovered in Egypt*, NAT'L GEOGRAPHIC (Nov. 7, 2016), https://news.nationalgeographic.com/2016/11/royal-burial-boat-ancient-egypt-found/.

54. *Id.*

55. *Phoenician Ships*, MARINERS MUSEUM, http://exploration.marinersmuseum.org/watercraft/phoenician-ships/ (last visited Dec. 18, 2018).

maritime law comes from the Code of Hammurabi.[56] As civilizations developed, a greater need for regulation of maritime activities arose. Ultimately, legal jurists from the ancient Greek island of Rhodes codified maritime laws in the Code of Justinian, which became the basis for contemporary maritime law.[57]

Ancient Roman maritime law borrowed heavily from the Rhodesians.[58] Rome, as the dominant naval power, developed laws that greatly influenced the development of maritime law. As a result, "European maritime law evolved as a uniform, supranational, comprehensive body of law—a characteristic which, though sometimes threatened by the spread of nationalism, has never been lost completely."[59]

Ancient maritime law changed little into the medieval period.[60] In 1063, the first formal sea code pertaining to salvage appeared in the Maritime Ordinance of Trani.[61] This ordinance "rewarded the finder with half the goods found floating at sea if the owner appeared, '[a]nd if at the end of thirty days the owner [did] not appear, nor any lawful person on his behalf, the goods shall belong to him, who has found them.'"[62] The ordinance was the prevailing rule on salvage for over three

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56. STEVEN L. SNELL, COURTS OF ADMIRALTY AND THE COMMON LAW 50 (2d ed. 2007). *See generally The Code of Hammurabi*, AVALON PROJECT, http://avalon.law.yale.edu/ancient/hamframe.asp (last visited Dec. 18, 2018) (showing the translated text of the Code of Hammurabi, with one of the provisions stating that "[i]f a sailor wreck any one's [sic] ship, but saves it, he shall pay the half of its value in money").

57. Nicholas Joseph Healy, *Maritime Law*, ENCYCLOPEDIA BRITANNICA (July 21, 2014), https://www.britannica.com/topic/maritime-law#ref424613; *see also* SNELL, *supra* note 56, at 53 n.19 (noting that the Rhodesians created "a system of marine jurisprudence, to which even the Romans themselves paid the greatest deference and respect, and which they adopted as the guide of their conduct in naval affairs. These excellent laws not only served as a rule of conduct to the ancient maritime states; but as will appear from attentive comparison of them, have been the basis of all modern regulations respecting navigation and commerce.").

58. SNELL, *supra* note 56, at 53 n.19.

59. Healy, *supra* note 57.

60. Bleichner, *supra* note 52.

61. *See* Lawrence J. Lipka, *Abandoned Property at Sea: Who Owns the Salvage "Finds"?*, 12 WM. & MARY L. REV. 97, 98 (1970) (describing how Trani flourished in the 11th century when its port became one of the most important in the Adriatic Sea, and noting that Venice was the greatest maritime power of its time by 1400, having over three-thousand ships afloat).

62. Lipka, *supra* note 61, at 98 (quoting THE BLACK BOOK OF THE ADMIRALTY 523, 537 (Travers Twiss ed., 1876)).

hundred years. Then, in the thirteenth century, the Book of the Consulate of the Sea—a collection of Mediterranean maritime laws and ordinances—was compiled in Barcelona and followed by Spain, Provence, and several Italian cities.[63]

In addition to the Consulate of the Sea, one of the most significant developments in maritime law came with the Laws of Oleron. "[F]ormulated by Eleanor of Aquitane during the Second Crusade," the Laws of Oleron foreshadowed modern principles of finders law.[64] In it originated the proposition that valuable property found in the sea belonged to the first finder.[65] The Laws of Oleron were eventually adopted into English law and became the basis for maritime law in not only England but also in Scotland, France, Flanders, Prussia, and Castile.[66]

With the rise of nation-states, countries started to adopt their own maritime ordinances.[67] Maritime law came to embody principals of commercial law. Its development became fueled by the greed and competition that embodied the differences between European nations.[68] Uniformity was not completely lost, however. Several modern courts, such as the High Court of Admiralty in London, used the Laws of Oleron and the Consulate of the Sea as bases.[69]

Indeed, throughout the development of maritime law, several concepts remained uniform. In its simplest form, maritime law can be divided into four categories: the relationships among

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63. *Book of the Consulate of the Sea*, ENCYCLOPEDIA BRITANNICA (Feb. 22, 2016), https://www.britannica.com/topic/Book-of-the-Consulate-of-the-Sea.

64. Bleichner, *supra* note 52; *see also* Lipka, *supra* note 61, at 98 (noting that in the Laws of Oleron, "goods cast upon the sea to lighten the load by reason of tempestuous weather became the lawful possessions of the first occupant").

65. *The Rules of Oleron (circa 1266)*, ADMIRALTY & MAR. L. GUIDE, http://www.admiraltylaw guide.com/documents/oleron.html (last visited Dec. 18, 2018) ("[W]hen the master, merchant, and mariners have so ejected or cast out the said goods, as that they give over all hope or desire of ever recovering them again, and so leave them as things utterly lost and given over by them . . . only the first occupant becomes the lawful proprietor thereof.").

66. SNELL, *supra* note 56, at 63 ("It is from Oleron that the first body of substantive maritime law entered the English Legal System . . . [brought] by Richard the Lionhearted upon his return from the Crusades."); Bleichner, *supra* note 52.

67. *See, e.g.*, Healy, *supra* note 57 (giving examples of maritime ordinances adopted in Sweden, France, and Denmark during the seventeenth century).

68. *Id.*

69. Bleichner, *supra* note 52.

persons, the obligations toward persons and property, the rule for apportionment of losses for acts of nature, and salvage.[70] It is a body of law unlike any other. Therefore, salvage disputes can only be analyzed through the historical lens from which they were created.

C. *Relevant Legal Precedent*

Courts have analyzed international disputes over shipwrecks using the law of salvage and the law of finds. Both are relevant in determining ownership of shipwrecks like the *San José*.

1. *The law of salvage*

The law of salvage bears little resemblance to any other concept in Western law.[71] It originally emerged out of social policies favoring preservation of property destroyed at sea and discouraging embezzlement of salvaged property. [72] The rules of salvage, however, have changed greatly throughout history and vary from nation to nation.[73] Unlike the common law, which does not grant a volunteer a reward for his or her actions, salvage law permits a salvor[74] the right of compensation from the owner.[75] In treasure salvage cases, this unique complication has led to three way battles between the owner, salvor, and state of origin over the ships and their cargo.[76]

For a salvor to establish a valid claim he or she must meet three requirements: (1) there must be a marine peril that threatens to destroy the ship, (2) the salvage service must be rendered voluntarily, and (3) the salvage efforts must be at least

70. *See* SNELL, *supra* note 56, at 50–51.

71. *Id.* at 51.

72. *See* McQuown, *supra* note 51, at 295.

73. SNELL, *supra* note 56, at 51.

74. *See id.* at 51 n.26 ("[A] salvor is defined to be a person who, without any particular relation to the ship in distress, proffers useful service and gives it as a volunteer adventurer without any pre-existing contract that connected him with the duty of employing himself with the preservation of the vessel." (quoting The Clarita & The Clara, 90 U.S. (23 Wall.) 1, 16 (1874))).

75. THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 834 (3d ed. 2001).

76. *Id.* at 848.

partly successful.[77] The salvor might be entitled to a reward if the requirements are met.[78] To determine the salvor's reward, courts typically consider six factors: (1) the salvor's labor, (2) the salvor's skill in rendering the service, (3) the value of the property used by the salvors in rendering the service, (4) the risk incurred by the salvors, (5) the value of the property saved, and (6) the degree of danger from which the property was rescued.[79] Under traditional salvage law, the claim results in the salvor securing a maritime lien on the salvaged property.[80] This allows the salvor, as the plaintiff in the action, to bring an action against the ship itself and collect a reward.[81]

The property that is subject to salvage must be marine property. While U.S. courts have interpreted "marine property" broadly,[82] courts have limited salvage rewards in historic shipwreck cases.[83] In *Chance v. Certain Artifacts Found and Salvaged From the Nashville*, the District Court for the Southern District of Georgia denied a salvor's award because he placed the ship in greater danger than if it had been left undisturbed.[84] The Eleventh Circuit imposed an additional burden on salvors in *Klein v. Unidentified Wrecked & Abandoned Sailing Vessel*.[85] In *Klein*, the court held that a salvor must mark and identify historical artifacts removed from the salvage site in accordance with archeological standards.[86] *Chance* and *Klein* demonstrate courts' recognition of the historical importance of shipwrecks.

77. *Id.* at 836.

78. *See* McQuown, *supra* note 51, at 296–98.

79. *Id.*

80. Anne M. Cottrell, *The Law of the Sea and International Marine Archeology: Abandoning Admiralty Law to Protect Historic Shipwrecks*, 17 FORDHAM INT'L L.J. 667, 687 (1994).

81. *Id.*

82. *See, e.g.*, Lambros Sea Plane Base, Inc. v. Batory, 215 F.2d 228, 233 (2d Cir. 1954) (stating in dicta that floating logs are marine property); Broere v. Two Thousand One Hundred Thirty-Three Dollars, 72 F. Supp. 115, 117 (E.D.N.Y. 1947) (determining money on a floating corpse to be "marine property").

83. Cottrell, *supra* note 80, at 688.

84. 606 F. Supp. 801, 808 (S.D. Ga. 1984).

85. 758 F.2d 1511, 1515 (11th Cir. 1985).

86. *Id.*

But while a minority of courts have recognized historical or cultural significance in salvage cases, contemporary salvage law still falls short. For example, in the case of the *San José*, according to salvage law requirements Spain has absolutely no claim. Thus, although a majority of the passengers on board the *San José* were from Spain and the *San José* was a Spanish ship, salvage law would disregard any potential Spanish claim simply because Spain had no impact on the salvage of the ship.

2. *The law of finds*

Courts have also applied the law of finds to salvage claims. In contrast to salvage law, the law of finds treats the property as unowned.[87] Therefore, the finder of the property makes a claim for the property itself, instead of a claim for a reward from the property's value.[88] On its face, finders law is much more favorable to finders. Therefore, salvage companies and treasure hunters advocate for its application.

For a finder to make a successful claim, three elements must be met: (1) the finder must show intent to possess the found property, (2) the finder must actually possess the property, and (3) the finder must prove abandonment.[89] In most cases the first two elements are met easily.[90] The abandonment prong, however, has been a constant source of contention.

The abandonment prong has created difficulty for courts primarily because it combines several areas of the law: contracts, admiralty, insurance law, sovereign immunity, and property rights.[91] Additionally, the possibility for great financial gain from salvage of ancient wrecks can lead to an extensive list of parties claiming prior ownership under the law

87. *See* Hener v. United States, 525 F. Supp. 350, 354 (S.D.N.Y. 1981) ("The common law of finds treats property that is abandoned as returned to the state of nature and thus equivalent to property, such as fish or ocean plants, with no prior owner.").

88. *See* McQuown, *supra* note 51, at 299.

89. David Curfman, *Thar Be Treasure Here: Rights to Ancient Shipwrecks in International Waters—a New Policy Regime*, 86 WASH. U. L. REV. 181, 190 (2008).

90. *Id.*

91. SCHOENBAUM, *supra* note 75, at 852.

of finds.[92] Courts therefore tread lightly in determining whether the abandonment prong is satisfied. The prong is met by either an express statement of abandonment by an owner or a lack of intervention by anyone claiming ownership.[93] When ancient shipwrecks are involved, however, express statements are not so easy to come by. Moreover, courts are tentative to infer abandonment even where there has been a substantial lapse of time.[94] Thus, abandonment is not satisfied without clear and convincing evidence.[95]

The administrative difficulty in application of the law of finds, and its habit of creating vicious legal battles, has led to courts' resisting its application.[96] Several courts have hesitated to apply the law of finds because it can negatively influence the behavior of potential claimants.[97] In *Hener v. United States*, for example, the District Court for the Southern District of New York noted that "[w]ould-be finders are encouraged [by the law of finds] to act secretly, and to hide their recoveries, in order to avoid claims of prior owners or of other would-be finders that could entirely deprive them of the property."[98] Admiralty law favors application of salvage law over the law of finds because its "purposes, assumptions, and rules, directed toward the protection and preservation of maritime property, are more consonant with societal needs and interests."[99] But that does not mean the law of finds is irrelevant. Unlike the law of salvage, the law of finds incentivizes potential finders to seek out wrecks. There is a greater incentive to pursue wrecks under

92. *See* Columbus-Am. Discovery Grp. v. Atl. Mut. Ins., 974 F.2d 450, 454 (4th Cir. 1992) ("Without doubt the Dutch scholar . . . could not imagine legal brawls involving self-styled 'finders' from Ohio, British and American insurance underwriters, an heir to the Miller Brewing Fortune, a Texas Oil millionaire, an Ivy League university, and an Order of Catholic Monks. Yet that is what this case involves, with the prize being up to one billion dollars in gold.").

93. *See* Curfman, *supra* note 89, at 190.

94. *See* United States v. Steinmetz, 973 F.2d 212, 222 (2d Cir. 1992).

95. *See* Curfman, *supra* note 89, at 190.

96. *But see* Treasure Salvors, Inc. v. Unidentified Wreck & Abandoned Sailing Vessel, 569 F.2d 330, 337 (5th Cir. 1978) ("Disposition 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.").

97. *See* Curfman, *supra* note 89, at 191.

98. 525 F. Supp. 350, 356 (S.D.N.Y. 1981).

99. SCHOENBAUM, *supra* note 75, at 853.

finders law because finders are entitled to the found property, in contrast to salvage law, where salvors are only entitled to a reward from the property. Finders law, however, is inadequate in that, like salvage law, it does not account for the cultural or historical significance of found wrecks. For example, although the *San José* was carrying millions in plundered wealth from the *Peru*, the Peruvian government was prohibited from collecting any of the salvaged find because it did not find the ship.

D. *Attempts at Reform*

Several international bodies have tried to reconcile the differences between salvage law and finders law. The United Nations has attempted to remedy salvage disputes through multiple conventions. Additionally, the cultural and scientific arm of the United Nations has attempted to remedy salvage disputes. Finally, the Institut de Droit International has put forward a resolution in the hope of solving salvage disputes. Each of these attempted reforms fail, however, to adequately address salvage disputes.

1. *The United Nations Convention on the Law of the Sea*

Although the shortcomings are apparent, the inadequacies of salvage law and the law of finds have led to little codified reform. One modern effort to establish international rules regarding the recovery of ancient shipwrecks outside domestic territory was the United Nations Convention on the Law of the Sea (UNCLOS), an international agreement developed at the Third United Nations Conference on the Law of the Sea.[100] With UNCLOS, the United Nations attempted to address a plethora of ocean law issues, including ownership of ancient shipwrecks.[101] Nevertheless, ambiguous provisions,

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100. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS]; *see also Third United Nations Conference on the Law of the Sea*, DIPLOMATIC CONFS., http://legal.un.org/diplomaticconferences/1973_los/ (last visited Dec. 18, 2018).

101. UNCLOS, *supra* note 100, at arts. 149, 303.

inconsistent interpretations, and constant legal battles demonstrate that the United Nations was overly ambitious in its attempt to provide uniformity in oceanic law.

UNCLOS is the latest development in ongoing international resolutions involving the law of the sea. The first attempt was the 1958 Geneva Conference on the Law of the Sea. Four treaties came out of the Geneva Conference.[102] The United Nations reconvened for a second Conference on the Law of the Sea in 1960 to define the boundaries of the territorial sea.[103] The outdated and constricting traditional[104] three-mile boundary was eradicated to make way for a treaty allowing coastal nations greater control over a larger area of coastal waters. It failed, however, to clarify the legal regime governing the deep-sea bed.[105]

The inadequacies of these prior conferences compelled the United Nations to convene for the Third Conference in 1973.[106] Adopted and signed in 1982, UNCLOS states that the deep-sea bed constitutes the subsoil of the ocean and the ocean floor beyond the reaches of coastal nation jurisdiction.[107] It limits coastal nation jurisdiction to twelve nautical miles[108] and does not extend sovereign rights to the deep-sea bed, considering property found there to be "the common heritage of

102. *See* Convention of the Territorial Sea and Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205; Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 311; Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82; Convention on Fishing and Conservation of the Living Resources of the High Seas, Apr. 29, 1958, 17 U.S.T. 138, 559 U.N.T.S. 285.

103. UNCLOS, *supra* note 100, at art. 2 ("The sovereignty of a coastal [s]tate extends, beyond its land territory and internal waters and, in the case of an archipelagic [s]tate, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.").

104. *See* PHILIP C. JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION 5–6 (1927) (describing how Cornelius van Bynkershock suggested, in his 1703 treatise, that the distance a cannon shot traveled from shore—approximately three miles—was an appropriate measure of the coastal nation's jurisdiction over the sea).

105. *See* Cottrell, *supra* note 80, at 675.

106. *Id.* at 676.

107. UNCLOS, *supra* note 100, at art. 1.

108. *Id.* at art. 3.

mankind."[109] Moreover, UNCLOS established the International Seabed Authority, which ensures that activities carried out on the deep ocean floor are for the "benefit of mankind as a whole."[110]

UNCLOS attempts to establish parameters delineating a coastal nation's rights to regulate marine archeology.[111] Articles 149 and 303 address ancient shipwrecks found on the high seas.[112] More specifically, Article 303 advances the basic principle that all states must act to "protect objects of an archeological and historical nature found at sea."[113] Article 149 states a similar principal, providing that:

> All objects of an archeological and historical nature found in the [a]rea shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the [s]tate or country of origin, or the [s]tate of cultural origin, or the [s]tate of historical and archeological origin.[114]

Both Articles 149 and 303 are broad provisions that do not affect or inhibit traditional notions of admiralty law. Further, neither Article 149 nor 303 address the tension between the law of finds or the law of salvage. Article 303 circumvents possible resolutions between laws by stating that it is "without prejudice to other international agreements and laws that deal with archeological artifacts."[115]

As to dispute resolution, UNCLOS is similarly inconclusive. Part XV of the Convention contains Article 280, which provides

109. *Id.* ("Every [s]tate has the right to establish the breadth of its territorial sea up to a limit not exceeding [twelve] nautical miles, measured from baselines determined in accordance with this Convention.").

110. *Id.* at art. 140.

111. *See* Cottrell, *supra* note 80, at 679.

112. *Id.* at 680.

113. UNCLOS, *supra* note 100, at art. 303.

114. *Id.* at art. 149.

115. Cottrell, *supra* note 80, at 680–81.

that "nothing in this Part impairs the right of any [s]tates [p]arties 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."[116] This rather open-ended provision was intended to "ensure that one nation's unilateral interpretation of UNCLOS would not prevail over another nation's understanding of the Convention's text."[117] Articles 279 through 299 address dispute resolution generally, and do not provide a uniform procedure applicable to all parties, but rather allow disputing parties to resolve issues by any method they wish.[118]

Neither Article 303 nor 149 effectively secure the ownership or preservation of ancient shipwrecks.[119] Article 149 comes close; however, it fails to define "objects of an archeological and historical nature."[120] Similarly, Article 303 does not affect ownership rights and therefore cannot solve wreck ownership disputes.[121] Finally, another seemingly ineffective aspect of UNCLOS is its creation of the International Seabed Authority.[122] This body is powerless when it comes to wreck ownership because it addresses only issues of mining and exploration.[123] It does not empower anyone to declare ownership of salvaged or found shipwrecks.

2. *2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage*

Officially adopted in 2001, the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Protection of the Underwater Cultural Heritage was

116. UNCLOS, *supra* note 100, at art. 280.
117. Cottrell, *supra* note 80, at 681.
118. UNCLOS, *supra* note 100, at art. 279–99.
119. *Id.* at arts. 149, 303.
120. *Id.* at art 149.
121. *Id.* at art. 303.
122. *Id.* at arts. 279–99.
123. *Id.*

"intended to help states better protect their submerged cultural heritage."[124]

Recognizing the need to codify rules governing sunken archeological artifacts, the 2001 UNESCO Convention addressed some, but not all, of UNCLOS's shortcomings. Its main commitment was to improve preservation of underwater cultural heritage.[125] First, it tasked ratifying states with an obligation to perform scientific research according to the state's capabilities.[126] Second, it made *in situ* (i.e., in its original location on the sea floor) preservation the first option for ratifying states.[127] Third, it stipulated that there should be no commercial exploitation of underwater cultural heritage.[128] Finally, it encouraged states to trade and share information connected to sunken wrecks.[129] Its main improvement on UNCLOS was its definition of "underwater cultural heritage."[130] It defined "underwater cultural heritage" as "all traces of human existence having a cultural, historical, or archeological character which have been partially or totally underwater, periodically or continuously, for at least 100 years." Its definition included any vessel along with its cargo or other contents.[131]

But while it improved on some of UNCLOS's ambiguous provisions, the 2001 UNESCO Convention did not regulate the ownership of wrecks. That is problematic because it created obligations for states, such as *in situ* preservation, but did not describe an ownership mechanism. It proscribed idealistic rules without any form of implementation. Moreover, it only pertained to ratifying states; non-ratifying states were still free to commercially exploit sunken wrecks.

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124. United Nations Convention on the Protection of the Underwater Cultural Heritage, Nov. 2, 2001, 2562 U.N.T.S. 3 [hereinafter 2001 Convention].

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 51.

131. *Id.*

3. *Institut de Droit International Resolution: The Legal Regime of Wrecks of Warships and Other State-Owned Ships in International Law*

Following both UNCLOS and the 2001 UNESCO Convention, the Institut de Droit International (IDI)[132] adopted a resolution on "The Legal Regime of Wrecks of Warships and Other State-Owned Ships in International Law" to clarify the uncertainties surrounding ownership of sunken wrecks and warships.[133] Similar to previous treaties, the IDI Resolution made warships, or any type of naval vessel, immune from the jurisdiction of any state other than the flag state.[134] Article 4 of the Resolution gave preferential rights to sunken state ships to flag states, save for abandonment or transfer of title.[135] This included not only the ships themselves, but also the cargo found on the ships.[136] The cargo, as described by the Resolution, belongs to the flag state regardless of the ownership of those objects. While that is consistent with general principles of maritime law, it complicates ownership disputes.[137] This provision is problematic because it does not contemplate scenarios where the cargo on the sunken ship was pillaged from another state, such as in the case of the *San José*. Moreover, under the Resolution, wrecks found in internal waters are under the exclusive control of the coastal state.[138]

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132. The IDI is an organization "independent of any governmental influence . . . [that] contribute[s] to the development of international law and act[s] so that it might be implemented." *About the Institute*, INSTITUT DE DROIT INT'L, http://www.idi-iil.org/en/a-propos/ (last visited Dec. 18, 2018).

133. Institut de Droit Int'l [IDI], *The Legal Regime of Wrecks of Warships and Other State-Owned Ships in International Law* (Aug. 29, 2015) [hereinafter IDI Resolution], http://www.idi-iil.org/app/uploads/2017/06/2015_Tallinn_09_en-1.pdf.

134. *Id.* The flag state is the country where the vessel is registered. *Flag State Law and Legal Definition*, USLEGAL, https://definitions.uslegal.com/f/flag-state/ (last visited Dec. 18, 2018).

135. IDI Resolution, *supra* note 133.

136. *Id.*

137. *See* Sarah Dromgoole, *The Legal Regime of Wrecks of Warships and Other State-Owned Ships in International Law: The 2015 Resolution of the Institut de Droit International*, 25 ITALIAN Y.B. INT'L L. 179, 186 (2016).

138. IDI Resolution, *supra* note 133.

Another issue the Resolution contemplated, but did not address definitively, is ownership of the cargo found on board sunken ships.[139] Article 5 states that "cargo owned by the flag state remains the property of that [s]tate" and "[c]argo owned by other states remains the property of those [s]tates."[140] The Resolution does not contemplate scenarios where cargo is stolen or pillaged.

Article 2 explicitly provides that a wreck "is part of cultural heritage when it has been submerged for at least [one hundred] years."[141] Scholars have inferred that the one-hundred-year distinction was made for pragmatic reasons; one being that the law of salvage should be applied to anything under one-hundred-years old.[142] Applying the law of salvage to sunken ships or cargo less than one-hundred-years old, however, is problematic because it does not recognize that significance cannot be determined solely by age. Culturally significant sunken vessels might be under one-hundred-years old. Thus, if salvage law is applied to cargo with high cultural significance, that cargo might go to the salvor instead of to the culture to which it belongs. Further, the IDI Resolution did not provide any remedy for dispute resolution or a more detailed mechanism to determine ownership of salvaged wrecks.

E. *Applying Precedent in Treasure Salvage Cases*

To demonstrate the shortcomings of salvage law, finders law, and current international law, it is best to analyze their application in treasure disputes. This section analyzes salvage dispute cases where courts applied salvage law, finders law, and international law. It concludes by discussing the procedural history in the *San José* case.

139. *Id.*
140. *Id.*
141. *Id.*
142. *See* Dromgoole, *supra* note 137, at 187.

1. *Salvage and finds*

Article III, section 2 of the U.S. Constitution states that federal courts have exclusive jurisdiction over admiralty and maritime cases.[143] American courts often struggle in deciding whether to apply salvage law or the law of finds. In *Columbus-America Discovery Group, Inc. v. Atlantic Mutual Insurance Co.*, the Fourth Circuit considered whether insurance companies who had paid claims on the shipwreck had retained enough ownership interest for the law of finds to apply.[144] The court was hesitant to apply the law of finds because it believed that "[w]ould-be finders are encouraged . . . to act secretly, and to hide their recoveries, in order to avoid claims of prior owners or other would-be finders that could entirely deprive them of the property."[145] The court decided to apply the law of salvage, finding that its "aims, assumptions, and rules are more consonant with the needs of marine activity and [that] salvage law encourages less competitive and secretive forms of conduct than finds [sic] law."[146]

Whereas some courts have limited the application of the law of finds, other courts have limited salvage law's application. In *Klein v. Unidentified Wreck & Abandoned Sailing Vessel*, the Eleventh Circuit reasoned that salvage law could not apply because the ship was on lands controlled by the United States, and thus the sovereign had constructive possession of it.[147] Accordingly, as the sovereign in possession of the ship, the United States had the right to refuse a salvage request.[148]

Stirring up the already murky water, courts have reasoned that abandoned shipwrecks reach a state of "equilibrium," and thus salvage efforts can only increase the wreck's peril.[149] These

143. U.S. CONST. art. III, § 2.
144. 974 F.2d 450, 460 (4th Cir. 1992).
145. *Id.*
146. *Id.*
147. 758 F.2d 1511, 1514 (11th Cir. 1985).
148. *Id.* at 1515.
149. Chance v. Certain Artifacts Found & Salvaged from the Nashville, 606 F. Supp. 801, 808 (S.D. Ga. 1984).

courts refuse to apply salvage law in ownership disputes.[150] In contrast, other courts have found that abandoned shipwrecks are in a constant state of peril due to their exposure to the elements and other marine activity.[151] Those courts have refused to apply salvage law to abandoned shipwreck disputes.[152]

2. *Customary international law*

In addition to salvage and finds law, American courts have considered customary international law in determining ownership of salvaged wrecks. Customary international law can be defined as the "obligations created by a consistent pattern of [s]tate action that is followed due to a sense of legal obligation."[153] It is commonly comprised of treaties, contracts, and longstanding custom.

In *Sea Hunt v. Unidentified Shipwrecked Vessel*, the Fourth Circuit considered customary international law in determining ownership of the Spanish frigates *La Galga* and *Juno*.[154] The frigates both encountered storms and were wrecked off the coast of Virginia.[155] Pursuant to state permits, the salvage company Sea Hunt found and salvaged the wrecks.[156] Virginia claimed ownership of *La Galga* and *Juno* pursuant to the Abandoned Shipwreck Act of 1987 (ASA).[157] Under the ASA, coastal states retain ownership of ships that are abandoned and embedded in the state's submerged lands.[158] Although Virginia asserted its interest under the ASA, the court applied customary

150. *See id.*

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

152. *See id.* (refusing to apply salvage law to abandoned shipwrecks because there cannot be an existing owner).

153. Mirasola, *supra* note 30.

154. 221 F.3d 634, 638 (4th Cir. 2000).

155. *Id.* at 639.

156. *Id.*

157. *Id.*

158. 43 U.S.C. §§ 2101–06 (2018).

principles of international law.[159] The court was hesitant to infringe on the standard of international law, stating, "[i]t is simply not for us to impose a looser standard that would interfere with this long standing political judgment in sensitive matters of international law."[160] The court considered the Treaty of 1763 between Spain and Great Britain and determined that there was no express abandonment by Spain.[161] The court did not consider the law of salvage or the law of finds.

Another issue of international law was disputed in *Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*.[162] In 2007, the marine salvage company Odyssey Marine discovered a shipwreck one hundred miles west of the Strait of Gibraltar at a depth of over one-thousand meters.[163] After conducting research, the company learned that the wreck was the Spanish ship *Nuestra Señora de las Mercedes*.[164] A thirty-four-gun frigate, the *Mercedes* left Peru in 1804 and was attacked and sunk by the British fleet only miles away from Spain.[165] Odyssey Marine retrieved 594,000 coins and several other small artifacts from the wreck.[166] The treasure included the fabled "pirate coins known as 'pieces of eight,'"[167] and was valued at over $500 million.[168] Odyssey Marine immediately filed an in-rem action against the ship, which was countered by Spain's verified claim to the vessel and its cargo.[169] Spain then filed a motion to

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159. *Sea Hunt*, 221 F.3d at 642 ("[T]he State Department notes, 'U.S. domestic law is consistent with the customary international law rule that title to sunken warships may be abandoned only by an express act of abandonment.'" (quoting Abandoned Shipwreck Guidelines, 55. Fed. Reg. 50116, 50121 (1990))).

160. *Id.* at 643.

161. *Id.* at 644–45.

162. 657 F.3d 1159, 1159 (11th Cir. 2011).

163. *Id.* at 1166.

164. *Id.*

165. *Id.*; Goodman, *supra* note 49.

166. *Odyssey Marine Expl., Inc.*, 657 F.3d at 1166.

167. E. Lee Spence, *Pieces of Eight*, EXPLORERS RES. SOC'Y, http://www.exploresrs.org/blog/entry/5 (last visited Dec. 18, 2018) ("The legendary pirate coins known as 'pieces-of-eight' were actually silver 'dollars' made by native American craftsmen in Mexico, Peru, Colombia and other countries in Central and South America, who had been enslaved by the Spaniards.").

168. Goodman, *supra* note 49.

169. *Odyssey Marine Expl., Inc.*, 657 F.3d at 1166–67.

dismiss on grounds that the "*Mercedes* was a Spanish Royal Navy frigate . . . subject to sovereign immunity from all claims or arrest in the United States pursuant to the FSIA."[170]

Twenty-five more parties filed claims, each asserting an interest in the *Mercedes*. "Peru filed a claim contending it had sovereign rights to property aboard the *Mercedes* that originated in its territory or was produced by its people."[171] Peruvian ambassador Liliana Cino even said the "coins were taken from here, the fruit of the labour of various Peruvians. What we have requested of the judge is to define the ownership of the cargo which constitutes part of Peruvian cultural heritage."[172] The court, however, dismissed the Peruvian claim.[173] The court relied on principles of international law, including the 1902 Treaty of Friendship between the United States and Spain and general principles of comity, to determine that the ship and its cargo were Spain's property.[174] The court determined that customary international law governed, and it did not apply the laws of salvage or finds or assess the potential claim by Peru.[175]

3. *The legal battle for the* San José

Sea Search Armada found more than treasure when it located the coordinates to the sunken *San José*. It unlocked an arduous legal battle with Colombia, Spain, and Peru. First, the government of Colombia refused to honor the Colombian Supreme Court's ruling giving 50% of the salvage to SSA.[176] Next, in 2010, SSA filed suit in U.S. federal court against

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170. *Id.* at 1168; *see also* 28 U.S.C. § 1604 (2018) ("Subject to existing international agreements to which the United States is a party at the time of the enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States . . . .").

171. *Odyssey Marine Expl., Inc.*, 657 F.3d at 1168.

172. *A Tale of Colonial Ships and Peruvian Gold*, EN PERU (Jan. 15, 2010), http://enperublog.com/2010/01/15/a-tale-of-colonial-ships-and-peruvian-gold/.

173. *Odyssey Marine Expl., Inc.*, 657 F.3d at 1182.

174. *Id.* at 1183–84.

175. *Id.* at 1183.

176. Mac Margolis, *Colombia Treasure Ship Lures Lawyers, Guns and Money*, BLOOMBERG (June 21, 2017), https://www.bloomberg.com/view/articles/2017-06-21/colombia-treasure-ship-lures-lawyers-guns-and-money.

Colombia for breach of contract and conversion.[177] The District Court for the District of Columbia dismissed the complaint "for lack of subject matter jurisdiction, insufficient service of process, and failure to state a claim upon which relief may be granted."[178] That ruling was affirmed by the District of Columbia Circuit Court in 2013.[179] Adding insult to injury, Spain plans to file a claim for the treasure.[180]

Under current legal precedent, resolution of who owns the wrecked *San José* is unclear. Neither UNCLOS, the 2001 UNESCO Convention, or the IDI Resolution provide a clear mechanism for determining ownership of sunken vessels and their cargo. Depending on whether the law of finds or salvage law is applied, ownership of sunken vessels is similarly in doubt.

II. A PROPOSED SOLUTION

A. *Problems with Current International Conventions and Resolutions*

The 2001 UNESCO Convention, IDI Resolution, and UNCLOS do not provide an adequate mechanism to determine ownership of salvaged wrecks. The 2001 UNESCO Convention is inadequate because it is vague, does not provide detailed dispute resolution mechanisms, and has few signatories. While the Convention provided sanctions in Article 17, the parameters of those sanctions are vague and are left up to the state's decision.[181] Moreover, Article 7 allows states exclusive rights in the regulation of underwater activities in their internal waters, but does not mandate states to inform the flag state before

177. Sea Search Armada v. Republic of Colombia, 821 F. Supp. 2d 268, 270 (D.D.C. 2011), *aff'd*, 522 F. App'x 1 (D.C. Cir. 2013).

178. *Id.* at 275.

179. *Id.*; *see* Jillian Sequeira, *The Wreck of the San Jose: Legal Battles over Sunken Treasure*, L. STREET (Dec. 12, 2015), https://lawstreetmedia.com/issues/world/wreck-san-jose-legal-battles-sunken-treasure/.

180. Sequeira, *supra* note 179.

181. 2001 Convention, *supra* note 124, at art. 17.

excavating a wreck.[182] The failure of the Convention to include mandatory language opens up the possibility of ownership disputes and even possible deceitful behavior. The UNESCO Convention only provides for dispute resolution through "negotiations in good faith or other peaceful means of settlement of [states'] own choice."[183] Its most notable shortcoming, however, is the fact that it was not signed by several important maritime powers, such as the United States, United Kingdom, Russia, and Japan.[184]

The IDI Resolution is similarly inadequate, first because it has no provisions for dispute resolution. Although it provides some guidance on ownership of sunken wrecks, it does not put forth any mechanism for resolving the disputes that will undoubtedly arise. The Resolution is also problematic in how it addresses cargo found onboard sunken vessels.[185] It considers cargo found on board sunken vessels to be the flag state's property.[186] That is problematic because there are several scenarios, such as in the *San José* case, where the cargo found on sunken vessels was pillaged or stolen by the flag state. More often than not, the pillaged cargo is usually of great significance to the state of origin. Thus, the IDI Resolution's cargo provision ignores the potential cultural significance of cargo to states other than the flag state.[187] Furthermore, the IDI Resolution only regards sunken vessels over one-hundred-years old as "cultural heritage."[188] This is problematic because it is very likely that a ship under one-hundred-years old might be culturally significant. Under the IDI Resolution, a salvor might be entitled to a culturally significant vessel and its cargo simply because

182. *Id.* at art. 7 ("States [p]arties, with a view to cooperating on the best methods of protecting [s]tate vessels and aircraft, *should* inform the flag [s]tate [p]arty to this Convention and, if applicable, other [s]tates with a verifiable link, especially a cultural, historical or archeological link, with respect to the discovery of such identifiable [s]tate vessels and aircraft." (emphasis added)).

183. *Id.* at art. 25.

184. Mirasola, *supra* note 30.

185. *See* 2001 Convention, *supra* note 124, at art. 5.

186. *Id.*

187. *Id.* at art. 2

188. *Id.*

she met the salvage law elements and the vessel is under one-hundred-years old.

UNCLOS is similarly inadequate, with several ambiguous provisions. As the most widely accepted international convention concerning the law of the sea, UNCLOS should be amended. UNCLOS Articles 149 and 303 address the issue of shipwrecks found on the high seas. Article 149 gives "preferential rights" to "the [s]tate or country of origin, or the [s]tate of cultural origin, or the [s]tate of historical and archaeological origin."[189] This language is ambiguous. In several salvage cases, there are countries of origin, states of cultural origin, and states of historical and archeological origin all making claims for the wrecks. For example, in *Odyssey Marine Exploration, Inc.*, Spain, the United States, and Peru all made claims for the wreck.[190] Article 149 provides no remedy for such cases. If each state falls into a listed category, which has preference over the other?

Next, Article 303 does not clearly define "underwater cultural heritage."[191] This problem is remedied by the 2001 UNESCO Convention; however, the Convention has few signatories and is not as widely followed as UNCLOS.[192] Further, even the definition of "underwater cultural heritage" embodied in the 2001 UNESCO Convention is unsatisfactory. The Convention's definition is particularly vague considering UNESCO's understanding of "underwater cultural heritage." According to the UNESCO website:

> Underwater cultural heritage encompasses all traces of human existence that lie or have lain underwater and have a cultural or historical character. This includes three million shipwrecks such as *Titanic*, *Belitung* and the [4000] shipwrecks of the sunken fleet of Kublai Khan. There are also

189. UNCLOS, *supra* note 100, at art. 149.
190. 657 F.3d 1159, 1178–79 (11th Cir. 2011).
191. UNCLOS, *supra* note 100, at art. 303.
192. Mirasola, *supra* note 30.

> sunken ruins and cities, like the remains of the Pharos of Alexandria, Egypt . . . .[193]

In contrast, the 2001 Convention is far less specific.[194]

UNCLOS's vague definition of underwater cultural heritage has also received criticism from proponents of cultural property rights.[195] Cultural property has traditionally included art, artifacts, and antiquities.[196] Some modern anthropologists, however, argue that "an object of antiquity could include something that was made just yesterday if it related to long standing religious or social tradition."[197] Proponents of cultural property rights claim that under the current UNCLOS framework, preference is given to finders or governments. Those proponents argue that under the idea of cultural nationalism, preference should be given to the producers of the artifacts and artwork.[198] The importance of an artifact is based not on its monetary value, but rather on its importance to a particular culture.[199] According to the cultural nationalism point of view, artifacts belong to nations because of their symbolic value, which creates a common heritage and

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193. *The World's Underwater Cultural Heritage*, UNESCO, http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/underwater-cultural-heritage/ (last visited Dec. 18, 2018).

194. *See* 2001 Convention, *supra* note 124. Article 1 provides a definition for "underwater cultural heritage"; however, many other sections have vague definitions based on the location of the wreck. For example, Article 7 addresses "underwater cultural heritage in internal waters," and Article 8 addresses "underwater cultural heritage in the contiguous zone." *Id.*

195. Stephanie O. Forbes, *Securing the Future of Our Past: Current Efforts to Protect Cultural Property*, 9 PAC. MCGEORGE BUS. & DEV. L.J. 235, 239–40 (1996).

196. *Id.* at 239.

197. *Id.*

198. Robin A. Morris, *Legal and Ethical Issues in the Trade in Cultural Property*, 21 N.Z. L.J. 40, 40 (1990) ("Cultural property reflects a specific culture's unique understanding of natural forces as well as supernatural forces. Cultural property also reflects a culture's unique understanding of human relationships to each other and these forces. Objects of cultural property are invested with historical and theological information, exploring simultaneously the visible and the conceptual worlds. Such objects are often central to the understanding of a particular culture. Cultural property, therefore, uniquely represents the identity of a culture in terms of a people's concept of themselves, these forces and their relationships.").

199. M. June Harris, *Who Owns the Pot of Gold at the End of the Rainbow? A Review of the Impact of Cultural Property on Finders and Salvage Laws*, 14 ARIZ. J. INT'L & COMP. L. 223, 234 (1997).

identity.[200] The arguments made by cultural nationalists demonstrate that UNCLOS does not appreciate every possible claim to salvaged wrecks.

UNCLOS is also problematic because it does not abrogate finders or salvage law. While Article 149 does not explicitly state that the law of finds determines ownership of salvaged shipwrecks, "commentators have suggested that the law of finds is implied because there is no alternative ownership principle delineated in the provision."[201] The vague language in Article 149 only mandates that nations should dispose of salvaged wrecks for "the benefit of mankind as a whole."[202] Article 149 does not help to determine ownership. The absence of any mechanism to determine ownership demonstrates that the law of finds might have to be applied.

Article 303 does not abrogate finders or salvage law either. It states that, "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."[203] This open-ended language is similarly problematic because it neither chooses nor creates an applicable legal standard to apply to salvage disputes. For example, in the *San José* dispute Colombian President Santos enacted legislation granting ownership of any sunken ships to Colombia.[204] Under UNCLOS, there is nothing stopping coastal states from enacting similar legislation. State legislation granting ownership to coastal states undermines the purpose of UNCLOS and does not appreciate the rights of the parties involved.

Alternatively, if the owner is known and traditional salvage law is applied, companies like Odyssey Exploration or SSA, as salvors, might have valid claims to compensation from the owners of what they find.[205] Under this scenario, Article 303

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200. *Id.*
201. Cottrell, *supra* note 80, at 683.
202. UNCLOS, *supra* note 100, at art. 149.
203. *Id.* at art. 303.
204. Mirasola, *supra* note 30.
205. SCHOENBAUM, *supra* note 75, at 834; UNCLOS, *supra* note 100, at art. 303.

cannot apply.[206] Application of traditional salvage law is contrary to the argument advanced by cultural property advocates that property belongs to the state in which it has symbolic significance.[207]

Finally, UNCLOS does not address salvors' rights. While it is an international treaty, in actuality, states are rarely the only actors involved in salvage disputes. UNCLOS does not provide a mechanism for payment of salvors, many of whom invest millions in finding sunken wrecks. Whether the salvage companies' motives are altruistic or monetary, their rights cannot be ignored. UNCLOS's silence on salvors' or finders' rights of ownership and in dispute resolution is deeply problematic and needs to be revised.

B. *Proposal*

UNCLOS, the 2001 UNESCO Convention, and the IDI Resolution aimed to abrogate ownership disputes over salvaged wrecks and preserve preservation efforts for historic wrecks. Each falls short of achieving those goals. Ambiguous language, lack of a determinative legal standard, and failure to honor each party's rights have caused the current state of international law governing sunken wrecks to do more harm than good.

A better mechanism for determining ownership of salvaged wrecks is necessary, and should address the shortcomings of current laws. To alleviate the discord between states, preserve underwater heritage, and honor parties' rights, the United Nations should amend UNCLOS to include a multinational committee specially designated to solve any type of controversy involving submerged wrecks. The committee should consist of a group of representatives from U.N. member nations. The committee should have expertise in maritime law and the authority to resolve ownership disputes over sunken wrecks. A committee is the most viable solution, as (1) maritime law

206. UNCLOS, *supra* note 100, at art. 303.
207. Morris, *supra* note 198, at 40.

requires specific expertise, (2) a committee can interpret the ambiguities within UNCLOS, and (3) a multinational makeup will ensure that each member state's rights are being properly honored.

1. *Advantages of a committee*

The United Nations is essentially a conglomerate of committees acting together and separately.[208] Each member state assigns one person on each main committee and assigns several advisors to both the main committees and sub-committees.[209] The committees ensure that each member state is represented and each issue is deliberated and discussed. U.N. committees deal with issues concerning a particular topic.[210] After meeting as a committee, the U.N. sub-committees report their findings to the main committee.[211] As to oceanic law, UNCLOS did create a committee: the International Seabed Authority.[212] Its purpose is to "organize and control activities in the [international sea bed]."[213] The committee under UNCLOS, however, only addresses issues of mining and exploration.[214] The creation of the International Seabed Authority and the several other U.N. committees demonstrate that the U.N. General Assembly understands the advantages of decision-making through committee. The current disputes over salvage wrecks mandate the creation of a specific committee.

2. *How the committee should address each claim*

The problems created by UNCLOS demonstrate that a new mechanism for determining ownership of sunken wrecks is

208. *Main Committees*, GEN. ASSEMBLY UNITED NATIONS, http://www.un.org/en/ga/maincommittees/index.shtml (last visited Dec. 18, 2018).

209. *Id.*

210. *UN Documentation: General Assembly*, GEN. ASSEMBLY UNITED NATIONS, https://research.un.org/en/docs/ga/committees (last visited Dec. 18, 2018).

211. *Id.*

212. UNCLOS, *supra* note 100, at art. 156.

213. *Id.* at art. 157.

214. Curfman, *supra* note 89, at 194.

necessary. Each ownership claim on a salvaged wreck should be evaluated on a case-by-case basis. While principles of finders and salvage law are important, neither should be applied by the committee. The body of law for both principles has led to inconsistent results in ownership disputes. Additionally, neither properly acknowledges the rights of potential parties. In assessing each claim, the committee should consider six factors: (1) the amount of time the wreck was submerged, (2) the location of the wreck, (3) the individual party's salvage efforts, (4) the individual party's cultural connection to the wreck and/or its cargo, (5) preservation[215] of the wreck in respect to the individual party's claim, and (6) the party's proposed plan for the wreck and/or its cargo.

No individual factor should be determinative, and each party's claim should be balanced against the others. Ownership claims should not be limited to states. Salvage companies, such as Odyssey Marine Exploration, use state-of-the-art technology to search for sunken artifacts.[216] Thus, salvage companies should have their claims judged on the same scale as states. Under the proposed framework, finder's fees should also be granted to salvors based on consideration of the factors. As described above, salvage law does not consider the cultural significance of sunken vessels.[217] Finder's fees, however, are the only way to incentivize continued searching for wrecks and will discourage deceptive or dishonorable practices.[218]

Installation of the committee would allow all U.N. member states to assert their rights in a neutral setting. The multi-factor balancing test would hopefully garner support from proponents of preservation *in situ* and cultural property nationalists. Where finders and salvage law do not recognize the importance of *in situ* preservation or artifacts' cultural

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215. Proponents of preservation argue that salvaging a wreck can damage it. *See id.* at 205 (articulating that although some claim it would be preferable to study wrecks where they are found, no American court has agreed with that argument).

216. *A Passion for Exploration*, ODYSSEY MARINE EXPLORATION, https://www.odysseymarine.com/ (last visited Dec. 18, 2018).

217. *See supra* Section I.C.1.

218. *See supra* Section I.C.2.

significance, the proposed multi-factor test does.[219] The proposed balancing test considers cultural significance and finders and salvage law principles. Finders and salvage law principles are still relevant because there must be incentives for both states and private companies to search for sunken wrecks.[220] It is impossible to make every party happy; however, equitable remedies will best preserve history for humankind and allow states and salvors to continue to search for, and find, what was once thought to be lost.

3. *Diving back down to the* San José

If the United Nations implemented a multi-national committee that applied a multi-factor balancing test to claims for ownership of sunken wrecks, how would the *San José* dispute be resolved? First, it should be assumed that SSA, Colombia, Spain, and Peru will each make ownership claims. Each factor should be analyzed individually.

The first factor, the amount of time the wreck was submerged, does not weigh in favor of any party. In this particular case, there is a consensus that the ship sunk in 1708 and was untouched for over three hundred years.[221]

Next, the ship was discovered sixteen miles off the coast of Cartagena, Colombia.[222] The second factor, location of the wreck, favors Colombia. Depending on additional evidence, that is an area of possible contention. However, without anything more, after the first two factors are considered Colombia has the strongest claim.

The third factor, the individual party's salvage efforts, is almost entirely fact dependent. Based on the few facts available, this factor weighs in favor of SSA. According to SSA's brief to the Court of Appeals for the District of Colombia, SSA

219. *See supra* Section I.C.1.

220. *See supra* Section I.C.2.

221. Chappel, *supra* note 1.

222. Watts & Burgen, *supra* note 11.

performed extensive archival research.[223] SSA learned the *San José*'s cargo as well as its exact coordinates.[224] Colombia may also have an argument that it conducted salvage efforts. According to the Office of the Colombian President, Colombian archeologists located the wreck based on its cannons.[225] Moreover, Colombia finalized plans to bring up the wreck through a deal with an unnamed investor.[226] From the baseline facts, however, this factor slightly favors SSA.

The fourth factor, the individual party's cultural connection to the wreck, is also fact dependent. First, the factor does not favor SSA in any way. The *San José* was a Spanish ship flying a Spanish flag. It was crewed by Spaniards, who all lost their lives when it burst into flames and sunk to the bottom of the Caribbean Sea.[227] Historically, Spain has laid claim to all of its wrecks anywhere in the world.[228] Also weighing in favor of Spain is the fact that the galleon was not a private ship, but a warship, property of the Spanish nation.[229] Colombia, however, also has cultural ties to the ship.[230] Charles Beeker, Director of the Center for Underwater Science at Indiana University, argues that "wealth aboard the [*San José*] resulted from the conquest of the Americas," and that it should be returned to the indigenous people of South America.[231] Since its sinking, the *San José* has become the object of Colombian legend, even appearing in the work of Colombian author Gabriel Garcia Marquez.[232] President Santos has also claimed that shipwrecks

223. Brief for Appellant at 3–4, Sea Search Armada v. Republic of Colombia, No. 11-7144 (D.C. Cir. Apr. 20, 2012).

224. *Id.* at 4.

225. Pappas, *supra* note 5.

226. Wyss, *supra* note 32.

227. *Id.*

228. *See* Watts & Burgen, *supra* note 11; *see also* Penty, *supra* note 44.

229. Penty, *supra* note 44.

230. *See supra* Part I.

231. Willie Drye, *Treasure on Sunken Spanish Galleon Could Be Biggest Ever*, NAT'L GEOGRAPHIC (Dec. 9, 2015), https://news.nationalgeographic.com/2015/12/151209-spanish-shipwreck-billion-treasure-archaeology/.

232. *See* Watts & Burgen, *supra* note 11.

can bring Colombians together.[233] The *San José*'s cultural ties, however, also extend into Peru. Much of the $17 billion cargo was comprised of gold from the mines of Potosi, Peru, and emeralds, amethysts, and diamonds from the Andes Mountains.[234] Even more problematic, the extent of the cargo that sunk with the *San José* is unknown. Ship manifests and technology allow a glimpse into what art and artifacts were aboard the ship, but the entirety of its cargo and cultural significance remain a mystery. Thus, the fourth factor in this case weighs slightly in favor of Colombia.

The fifth factor, preservation of the wreck, is dependent on each party's plan for salvaging the *San José*. As no specific plans have been announced, this factor is neutral.

The sixth factor, the party's proposed plan for the salvaged wreck and cargo, is also challenging to consider without a plan from each party. At this stage, Colombia has stated that it will salvage all cargo from the wreck for study by archeologists, and will house the cargo in a museum for all people to see.[235] As the only party with a proposed plan, the final factor weighs in favor of the Colombians.

After each party makes a claim and the committee balances each claim with the factor test, ownership should go to the Colombians. SSA has no cultural ties to the ship. It has no plans to use the salvaged artifacts for historical research. Spain has made no effort to salvage the ship. Further, its cultural ties are based on its history of conquest and subjugation of indigenous peoples. Ultimately, Colombia should own the *San José*. But SSA should not go unrewarded. Based on consideration of the third factor, SSA made a substantial effort in salvaging the wreck. The committee should consider similar salvage cases in determining equitable compensation.

233. Wyss, *supra* note 32.

234. *See* Watts & Burgen, *supra* note 11.

235. *Id.*

CONCLUSION

Underwater archeology provides a window into past cultures. It provides insight into the art, architecture, and economics that created and destroyed civilizations. It also enhances contemporary culture through insight into possibly forgotten heritage.

The sea is one of the greatest museums known to humankind. Access to that museum, however, is limited. Modern technology is changing that, making thousands of wrecks and their cargo more accessible than ever. This in turn has led to the proliferation of disputes concerning the ownership of the wrecks and their cargo. In an attempt to resolve these disputes, the United Nations enacted UNCLOS. But after continued legal battles and international discord, UNCLOS has proven unsuccessful. The best way to preserve sunken wrecks, protect states' rights, and incentivize research and marine salvage is for the United Nations to amend UNCLOS to include a committee specially designated to solve any wreck ownership disputes. The committee should balance each claim based on a six-factor balancing test.

Author Douglas Preston wrote that "[p]eople need history in order to know themselves, to build a sense of identity and pride, continuity, community, and hope for the future."[236] Sunken wrecks allow humankind to learn history. Sunken wrecks should not be a source of contention and dispute, but a symbol of what humankind has achieved, and what it can hope for in the future.

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236. DOUGLAS PRESTON, THE LOST CITY OF THE MONKEY GOD: A TRUE STORY 286 (2017).