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National Treasure: a Survey of the Current International Law Regime for Underwater Cultural Heritage

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**NATIONAL TREASURE: A SURVEY OF
THE CURRENT INTERNATIONAL LAW
REGIME FOR UNDERWATER CULTURAL
HERITAGE**

Christian Hoefly

I. INTRODUCTION

The *SS Gairsoppa* was doomed when the vessel left Calcutta, India in December of 1940 and sailed in the treacherous Atlantic Seas during World War II.¹ Unknown to the sailors navigating the vessel on that day, the salvage of the sunken ship in 2011 would set precedent to navigate the equally unforgiving waters of maritime salvage law. Amongst a virtual sea of conflicting international common law principles, international conventions, and national laws, the salvage of the *SS Gairsoppa* provides a model for contracted historical salvage for other states to follow.

Odyssey Marine Exploration, Inc. (“Odyssey”), a Florida-based salvage firm well-experienced in salvage operations and salvage litigations, conducted the salvage of the *SS Gairsoppa*. Working cooperatively with the United Kingdom government, Odyssey entered into a contracted salvage of the *SS Gairsoppa* that ensured salvage of the vessel, and established clear ownership rights of the salvaged property. Contracting historical salvage not only promotes the exploration and recovery of sunken vessels and artifacts by providing clear economic incentives for governments and salvors alike, but

¹ *SS Gairsoppa Historical Overview*, ODYSSEY MARINE EXPLORATION, <http://www.shipwreck.net/ssgairsoppahistoricaloverview.php> (last visited Oct. 21, 2013) [hereinafter *SS Gairsoppa Historical Overview*].

equally serves to minimize the litigation risk associated with historical salvages.

This article surveys the current international salvage law regimes, and analyzes the economic incentives provided by the current laws. Part II traces the history of the *SS Gairsoppa* and chronicles the service of the vessel, its eventual sinking, and the contracted salvage agreement that led to the vessel's recovery. Part III details the applicable laws governing international historic salvages including traditional international law, and international treaties. Part III also analyzes the economic incentives of the current legal regime. Part IV discusses the alternative of contracted historical salvage operations and the advantages, both legal and economic, for states to enter into contracted salvage.

II. FROM BATTLE TO RESURRECTION

The *SS Gairsoppa* was one of many vessels sunk in the Atlantic during World War II, but it could reshape more than just the ocean floor. The vessel transported an extraordinary amount of silver on its final journey, and the vessel's salvage now provides a path for many states to follow in recovering their lost treasures. This section details the life of the *SS Gairsoppa* to provide insight into the ship's interaction with international law. The section also provides an overview of the contracted salvage that should serve as a model for other states with historic shipwrecks.

A. Life of the *SS Gairsoppa*

The *SS Gairsoppa* began its career for the British India Steam Navigation Company Ltd. in 1919 as a commercial vessel.² British India Steam Navigation Company finished construction of the

² *Id.*

vessel.³ The vessel sailed the commercial waters of China, Australia, India, and East Africa for the next twenty years.⁴

In the years leading up to the Second World War, the U.K. Director of Sea Transport of the Admiralty approached the British India Steam Navigation Company attempting to enlist passenger ships to join the British Fleet.⁵ The *SS Gairsoppa* was in war service by 1940, along with all 103 British India Company ships.⁶ By the end of the war, fifty-one of these 103 ships were destroyed.⁷

The *SS Gairsoppa's* final voyage started in Calcutta, India in December 1940, where the vessel was loaded with what was thought to be £500,000⁸(about \$1,980,200)⁹ of silver ingots along with tons of other general cargo.¹⁰ The *Gairsoppa* joined the merchant convoy SL 64 off the coast of West Africa, and headed to Liverpool.¹¹ The convoy slowed to 8 knots (9.2 mph)¹² due to the poor condition of the ships, and was unable to connect with escort warships as the convoy entered dangerous Atlantic waters off of the western coast of Africa.¹³ Matters became bleaker as the *Gairsoppa* reached northern

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Lloyd's of London Press, LLOYD'S WAR LOSSES: THE SECOND WORLD WAR, 190, (Sep. 3, 1939 - Aug. 14, 1945, vol. 1).

⁹ See *Tables of Historical Exchange Rates to the United States Dollar*, WIKIPEDIA, http://en.wikipedia.org/wiki/Tables_of_historical_exchange_rates_to_the_United_States_dollar (last visited Oct. 21, 2013) (which provides the historical exchange rate of the pound to dollar in 1940. \$1,980,200 1940 dollars would be worth approximately \$33,080,231.10 today based on an inflation estimate provided by the Bureau of Labor Statistics available at http://www.bls.gov/data/inflation_calculator.htm).

¹⁰ *SS Gairsoppa, CONVOY WEB*, http://www.convoyweb.org.uk/sl/mem/64_1.htm (last visited Oct. 21, 2013).

¹¹ *SS Gairsoppa Historical Overview*, *supra* note 1.

¹² See *Calculator and Unit Converter*, GOOGLE, https://www.google.com/search?q=8+knots+to+mph&rlz=1C1CHFX_enUS519US519&oq=8+knots+to+mph&aqs=chrome..69i57j0.6016j0j7&sourceid=chrome&espv=210&es_sm=93&ie=UTF-8 (last viewed Oct. 21, 2013).

¹³ *SS Gairsoppa Historical Overview*, *supra* note 1.

latitudes. The vessel lost touch with the convoy due to high wind speeds, ocean swells, and insufficient fuel.¹⁴

On February 17, 1941, German Captain Ernst Mengersen's U-boat, which was responsible for sinking over 70,000 tons of cargo during the war, torpedoed the *Gairsoppa*.¹⁵ The torpedo triggered an explosion which destroyed communications, and with no distress call sent, the *Gairsoppa* sank into the North Atlantic and became a grave for all the men on board except for one.¹⁶

B. Contract for Salvage

The British House of Commons originally tendered the salvage of the *Gairsoppa* in 1989 after adopting a policy of publically offering salvage contracts for government-owned wrecks and cargoes.¹⁷ The policy attempted to obtain the best return on investment for the taxpayers financing the salvages, but failed to receive adequate interest.¹⁸ The initial tendering only received one bid from Deepwater Recovery and Exploration, which was not pursued.¹⁹

The salvage was revisited in January of 2010, when the United Kingdom Government Department for Transport awarded the salvage contract to Odyssey.²⁰ The competitive process used blind bids received by the Government to establish how much of the known, insured silver would be retained by the salvage companies as

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Parliamentary Business – Publications & Records: Written Answers November 15, 1989 Column 257*, PARLIAMENT.UK, <http://www.publications.parliament.uk/pa/cm198889/cmhansrd/1989-11-15/Writtens-2.html> (last visited Oct. 22, 2013).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *UK Government Awards Exclusive Salvage Contract to Odyssey Marine Exploration for Recovery of SS Gairsoppa Silver Cargo*, ODYSSEY MARINE EXPLORATION, <http://shipwreck.net/pr195.php> (last visited Oct. 17, 2013) [hereinafter *Exclusive Salvage Contract*].

compensation.²¹ The Government received three bids, and accepted Odyssey's bid.²²

The contract for the salvage was based on "standard commercial practices," and called for:

Odyssey [to] assume the risk, expense, and responsibility for the search, cargo recovery, documentation, and marketing of the cargo. If the salvage is successful, Odyssey will be compensated with a salvage award which consists of a majority of the net value of the recovered cargo after deduction of expenses of search and salvage.²³

The contract allowed Odyssey to retain 80% of the salvaged silver's value after recouping exploration costs.²⁴ Simply put, the United Kingdom would subtract the exploration cost from the total value of the salvaged silver, and then retain only 20% of that figure. This contract was extremely lucrative for Odyssey; based on the estimated value of the insured silver, Odyssey stood to earn forty-five million dollars.

Odyssey expected the exploration to take ninety days,²⁵ but it proved more difficult when the *Gairsoppa* was not found within the original search location.²⁶ Odyssey located the *Gairsoppa* in 2011²⁷ approximately 4700 meters (approximately three miles) below sea level in international waters nearly 300 miles off the coast of

²¹ *Id.*

²² *Parliamentary Business – Publications & Records: Written Answers October 31, 2011 Column 419W*, PARLIAMENT.UK, <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm111031/text/111031w0002.htm> (last visited Oct. 22, 2013).

²³ *Exclusive Salvage Contract*, *supra* note 20.

²⁴ *SS Gairsoppa Operational Overview*, ODYSSEY MARINE EXPLORATION, <http://www.shipwreck.net/ssgairsoppaoperationaloverview.php> (last visited Oct. 17, 2013) [hereinafter *SS Gairsoppa Operational Overview*].

²⁵ *Exclusive Salvage Contract*, *supra* note 20.

²⁶ *SS Gairsoppa Operational Overview*, *supra* note 24.

²⁷ Kerry Sanders & Lauren Sullivan, *\$77M Sunken Treasure Found at Bottom of Atlantic*, TODAY NEWS, (July 23, 2013, 11:48 AM), <http://www.today.com/news/77m-sunken-treasure-found-bottom-atlantic-6C10714149>.

Ireland.²⁸ While finding the vessel was a major hurdle, it did not ensure that the precious silver cargo would be located.²⁹ In fact, Odyssey did not recover the first bar of silver until the following year, on July 18, 2012.³⁰ The summer 2012 operations yielded 1,218 bars of silver (approximately 48 tons); the summer 2013 operations yielded an additional 1,574 bars (approximately 61 tons).³¹ In total, the salvage operation recovered 99% of the insured silver aboard the *Gairsoppa*, which amounted to 110 tons of silver (approximately 3.2 million troy ounces).³²

Odyssey turned over the salvaged silver to JBR Recovery Limited, a leading European broker, for sale.³³ The estimated value was seventy-seven million dollars, and the cost of exploration was twenty million dollars.³⁴ Out of the fifty-seven million dollar net total, Odyssey will receive about 45.6 million dollars and the United Kingdom will receive the remaining 11.4 million dollars worth of silver.

III. COMPARISON OF CONTROLLING LAW

A. Traditional Maritime Law of Salvage and Finds

International common law tradition maintains two controlling doctrines that concern historic shipwreck salvage: salvage law and the law of finds. Salvaging a historic shipwreck, or any vessel in distress, requires technical expertise to conquer the high level of risk and danger involved.³⁵ Generally, the primary motivation of salvage operations is the compensation received for the task, which normally

²⁸ *SS Gairsoppa Operational Overview*, *supra* note 24.

²⁹ Sanders, *supra* note 27.

³⁰ *SS Gairsoppa Operational Overview*, *supra* note 24.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ Sanders, *supra* note 27.

³⁵ CRAIG FORREST, INTERNATIONAL LAW AND THE PROTECTION OF CULTURAL HERITAGE, 307-08 (2010) [hereinafter International Law].

is a percentage of the salvaged property's value.³⁶ The common law of salvage incentivizes individuals to assume the risk associated with the operations in order to rescue ships, their cargo, and their sailors.³⁷

Salvage law applies to ships that have been abandoned, derelict, or shipwrecked.³⁸ Salvage operations must demonstrate four conditions: (1) the property must be in marine peril;³⁹ (2) the salvor must attempt the operation voluntarily; (3) the operation must be in the interest of the owner; and (4) the salvor must be at least partially successful in recovering the property.⁴⁰ While the salvor may be completely or partially motivated by the salvage reward, the salvor may not be under any duty to rescue the salvage vessel.⁴¹

Under salvage law, it is presumed that the owner has not abandoned his interest in the vessel or its cargo.⁴² Without abandonment, the salvor cannot gain title over the recovered property and is only entitled to the salvage reward.⁴³ To receive the salvage reward, the salvor must file a motion with the controlling admiralty/maritime court.⁴⁴ Most often the reward is a percentage basis of the property recovered. The percentage awarded varies depending on the salvage operation's level of risk, cost, and skill.⁴⁵ If the owner refuses or is unable to pay the reward, the salvor can receive a maritime lien on the property.⁴⁶

On the other hand, if the vessel or property is abandoned, the law of finds controls.⁴⁷ A majority of historic shipwrecks are

³⁶ *Id.*

³⁷ *Id.* at 288.

³⁸ *Id.* at 300.

³⁹ The term "marine peril" is ordinarily understood to mean that a vessel is at risk of sinking, losing its cargo, or otherwise in danger from rough seas or other forces which might compromise its seaworthiness. International Law, *supra* note 35, at 300.

⁴⁰ *Id.*

⁴¹ *Id.* at 304.

⁴² *Id.* at 309.

⁴³ *Id.*

⁴⁴ International Law, *supra* note 35, at 307.

⁴⁵ *Id.* at 309.

⁴⁶ *Id.* at 311-12.

⁴⁷ *Id.* at 310.

presumed abandoned.⁴⁸ A key exception of sovereign immunity applies to vessels like warships.⁴⁹ The law of finds allows for the salvor to retain full title over the salvaged property.⁵⁰ The salvor is entitled to the property based on the assumption that “the property involved either was never owned or was abandoned.”⁵¹

Courts decide whether salvage law or the law of finds applies.⁵² The determination is fact specific, but courts tend to apply the law of finds to historic shipwrecks.⁵³ This tendency results from the fact that the majority of wrecks go unsalvaged for decades if not centuries, regardless of the owners actual intent to abandon the wreck.⁵⁴

B. International Salvage Law Conventions

1. *United Nations Convention on the Law of the Sea*. - The United Nations Convention on the Law of the Sea (“UNCLOS”)⁵⁵ aimed at addressing navigational rights, territorial sea limits, economic jurisdiction, legal status of resources on the seabed, passage of ships, conservation and management of living marine resources, protection of the marine environment, a marine research regime, and setting a binding procedure for dispute settlement between States.⁵⁶ UNCLOS addresses historical shipwrecks in articles 149 and 303.⁵⁷ It is not

⁴⁸ *Id.*

⁴⁹ *See, e.g.*, United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3, 397 (1982) [hereinafter UNCLOS] art. 42(5), 236 (recognizing that sovereign vessels like warships are entitled to immunity from the conventions laws, this is a traditional principle of international law).

⁵⁰ *Id.* at 310.

⁵¹ Valentina Sara Wadi, *Investing in Culture: Underwater Cultural Heritage and International Investment Law*, 42 VAND. J. TRANSNAT’L L. 853, 870 (2009) (citing *Hener v. United States*, 525 F. Supp. 350, 356 (S.D.N.Y. 1981)).

⁵² Wadi, *supra* note 51, at 870 - 71.

⁵³ *Id.* at 871.

⁵⁴ *Id.*

⁵⁵ UNCLOS, *supra* note 49.

⁵⁶ *The United Nations Convention on the Law of the Sea (A historical perspective)*, OCEANS & LAW OF THE SEA UNITED NATIONS, http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm (last visited Oct. 23, 2013) [hereinafter *UNCLOS Historical Perspective*].

⁵⁷ UNCLOS, *supra* note 49, at art. 149, 303.

surprising given the major concerns of UNCLOS that the Convention only tangentially addresses historical shipwrecks. However, these articles do represent substantive international law that has been applied to historical salvage sites.⁵⁸

Article 149 is included within Part XI of UNCLOS titled “The Area,”⁵⁹ and primarily addresses the deep-sea mining rights in customary international waters.⁶⁰ The article reads:

All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.⁶¹

The article encompasses historical shipwrecks without mentioning the term in its broad phrase “all objects of an archaeological and historical nature.” Many commenters have criticized the language as over-inclusive, and a “political tactic” by states that wished to advance the recognition of general cultural heritage rights.⁶² Regardless of the reason for the article’s inclusion, subsequent interpretations have yielded disparate meanings.

One of the main issues left unresolved by Article 149 is how to “preserve[] or dispose[] of” historical objects.⁶³ The ambiguity of the phrase and lack of clarification leaves salvors no clear guidance. Preserving an object has been interpreted as meaning both leaving

⁵⁸ Craig Forest, *Historic Wreck Salvage: An International Perspective*, 33 TUL. MAR. L. J. 347, 368 (2009).

⁵⁹ UNCLOS, *supra* note 49, at Part XI.

⁶⁰ *See generally id.* at Part XI (which details, through the multiple articles in the section, the duties owed to States concerning resources in the area. The convention defines “area” to mean “the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction” in article 1).

⁶¹ *Id.* at art. 149.

⁶² Anastasia Strati, THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: AN EMERGING OBJECTIVE OF THE CONTEMPORARY LAW OF THE SEA 310 (1995).

⁶³ Forest, *supra* note 58, at 369.

the item “*in situ*,”⁶⁴ and, conversely, placing the object in a museum for display.⁶⁵

Another issue with interpreting the article is what “preferential rights” should be given to which State.⁶⁶ UNCLOS refers to rights of “State or country of origin,” as well as, “State of cultural origin” and “State of historical and archaeological origin.”⁶⁷ While analogous in many situations, UNCLOS never explicitly defines the terms. Further, UNCLOS’s negotiations used the terms as synonyms, but all were left in the article, implying differing meanings to the terms.⁶⁸

Article 303 furthers the protections for underwater cultural heritage and is included in Part XVI of UNCLOS titled “General Provisions,”⁶⁹ and Part XVI addresses general rights applicable to all zones discussed in UNCLOS. Article 303 provides:

1. States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.
2. In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the seabed 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

⁶⁴ *In situ* is a Latin phrase meaning in the natural or original position or place. In situ Definition, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/insitu> (last visited Nov. 19, 2013). In the context of the Convention, it refers to leaving a shipwreck in its present resting place on the ocean floor.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ UNCLOS, *supra* note 49, at art. 149.

⁶⁸ Forest, *supra* note 58, at 369.

⁶⁹ UNCLOS, *supra* note 49, at art. 303, Part XVI.

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 archaeological and historical nature.⁷⁰

At first glance, Article 303 seems to restate the general duty of the State “to protect objects of an archaeological and historical nature found at sea.”⁷¹ Article 303, Sections 2 and 3 set the controlling law for historical salvage. Under Article 303(2), States with any historical wrecks found within the contiguous zone have full jurisdictional control over the salvage.⁷² In Article 303(3), UNCLOS seems to concede that traditional laws of salvage apply.⁷³ UNCLOS did not intend this to be the case, as demonstrated by the language of 303(4). The Article carves out a provision to “harmonize the rules of the law of the sea” with the “emerging law of archaeology and cultural heritage.”⁷⁴ This exception to Article 303’s applicability paved the way for both the International Maritime Organization (“IMO”), 1989 International Convention on Salvage Law, and the United Nations Educational, Scientific and Cultural Organization (“UNESCO”), Underwater Cultural Heritage Convention (“UCH”), which are comprehensive conventions on historical salvage law.⁷⁵

UNCLOS was never intended to be controlling law for historical salvages, and Articles 149 and 303 are unsurprisingly vague.⁷⁶ However, the treaty is substantive international law and created a clear carve out for controlling salvage law treaties.

2. *IMO 1989 International Convention on Salvage Law*. - The main purpose of general salvage law is to “encourag[e] the rescue of

⁷⁰ UNCLOS, *supra* note 49, at art. 303.

⁷¹ *Id.*

⁷² *Id.*; *see also* UNCLOS, *supra* note 49, at art. 33 (contiguous zone can extend twenty-four miles from the state’s coastal baselines that determine its territorial sea).

⁷³ UNCLOS, *supra* note 49, at art. 303.

⁷⁴ Forest, *supra* note 58, at 370.

⁷⁵ *Id.*

⁷⁶ *Id.*

endangered property at sea, and, importantly, protect[] the marine environment from pollution [of] ships.”⁷⁷ In 1989, the IMO passed a comprehensive convention to update international salvage law.⁷⁸ The IMO convention replaced the law of salvage adopted in Brussels 1910, which centered around the “no cure, no pay”⁷⁹ principle.⁸⁰ The IMO convention incentivizes environmental protection during salvage where the “no cure, no pay” regime did not, by providing a “special compensation” award for minimizing damage to the environment.⁸¹

The IMO convention does not define “vessel” to include or exclude historical shipwrecks, but historic shipwrecks and their cargo are included within its definition of “property.”⁸² The definition is broad and applies to “any property in danger” that is “not permanently and intentionally attached to the shoreline and includes freight at risk.”⁸³

While not apparent from the text’s plain meaning, the expansive definition of property was understood by the drafters to include historical salvage. During the negotiations surrounding the convention, the German diplomat attempted to introduce an amendment that would have directly addressed sunken ships.⁸⁴ Conversely, the Argentinean diplomat proposed an amendment that

⁷⁷ *Id.*

⁷⁸ International Convention on Salvage, Apr. 4, 1989, 1953 U.N.T.S. 165 (1989) [hereinafter IMO].

⁷⁹ “No cure, no pay” is a principle that requires a “useful result” for a salvage award; in the absence of a useful result, there is no payment. A “useful result” is when property of value is saved. Property includes the vessel, cargo, or life. See Nicholas J. Gaskell, *The 1989 Salvage Convention and the Lloyd’s Open Form (LOF) Salvage Agreement 1990*, 16 TUL. MAR. L.J. 1, 49-50 (1991).

⁸⁰ *International Convention on Salvage*, INT’L MAR. ORG., <http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-on-Salvage.aspx> (last visited Oct. 24, 2013).

⁸¹ *Id.*

⁸² IMO, *supra* note 78, at art. 1 (The convention defines vessel to mean: any ship or craft, or any structure capable of navigation; and defines property to mean: any property not permanently and intentionally attached to the shoreline and includes freight at risk).

⁸³ IMO, *supra* note 78, at art. 1.

⁸⁴ Gaskell, *supra* note 79, at 35 (1991).

would have excluded sunken vessels from the convention.⁸⁵ Without the adoption of either amendment, historical shipwrecks or any sunken vessel became property under Article 1(c).⁸⁶ Further, Article 30(1)(d) permits States to exempt “maritime cultural property of prehistoric, archaeological or historic interest” from the convention’s provisions.⁸⁷ The reservation’s implication is clear: if member States do not explicitly state the convention does not apply to its historical sunken shipwrecks, then the convention will apply to any salvage operations on these wrecks.⁸⁸

Before the IMO convention came into force, U.S. courts often held general maritime salvage law applied to historic shipwrecks.⁸⁹ The distinction between general maritime law and the IMO convention is important because general maritime law does not apply to abandoned shipwrecks.⁹⁰ Prior to the IMO convention, abandoned shipwrecks were controlled by the “harsh, primitive, and inflexible” common law of finds, which expressed “the ancient and honorable principle of ‘finders, keepers.’”⁹¹ The IMO convention makes no distinctions for “abandoned” property. Thus, the law of finds never applies in jurisdictions employing the IMO convention.⁹² Without the exclusion, the application of the IMO to historic shipwrecks falls well within the requirements of “any property in

⁸⁵ *Id.* at 35-36.

⁸⁶ *Id.* at 36-37.

⁸⁷ IMO, *supra* note 78, at art. 30; Martin Davies, *Whatever Happened to the Salvage Convention 1989?*, 39 J. MAR. L. & COM. 463, 483 (2008).

⁸⁸ Davies, *supra* note 87, at 483.

⁸⁹ See *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978); and *Cobb Coin Co., Inc. v. Unidentified, Wrecked and Abandoned Sailing vessel*, 549 F.Supp. 540 (S.D. Fla. 1982) (holding that historical vessels being salvaged are governed by the “general maritime law of salvage applied to the retrieval of property from shipwrecks”).

⁹⁰ Davies, *supra* note 87, at 483.

⁹¹ An abandoned shipwreck is any wreck that has not been salvaged within a certain common law period of time. The time period ranges depending on the jurisdiction of the wreck and any controlling national or international laws. See *Hener v. U.S.*, 525 F.Supp. 350, 356 (S.D.N.Y. 1981) (holding general maritime salvage law was “harsh, primitive and inflexible”); *Martha’s Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1987) (holding the basic operating values of common salvage law to be “finders, keepers”).

⁹² Davies, *supra* note 87, at 483.

danger” that is “not permanently and intentionally attached to the shoreline and includes freight at risk.”⁹³

Due to its language, the IMO convention includes historic salvage operations; the application of the IMO convention to historic vessels poses problems. Even if courts would favor the application of the IMO convention over the common law of finds, the purpose of the IMO convention is to provide the salvor with payment from the owner of the salvaged property.⁹⁴ Without knowledge of the owner of the historic shipwreck, the IMO convention does not provide clear authority on ownership of the property.⁹⁵ The IMO convention in Article 12(1) provides that a successful salvage operation “give[s] the right to reward,”⁹⁶ but the IMO convention does not detail the procedure to follow if the owner is unknown. The IMO convention does not state the reward must be monetary, and one could argue that payment could be the salvaged property, but there is no clear authority to establish that argument.⁹⁷

While the IMO convention does not provide clear international law for historic shipwrecks, it does provide differing incentives from UNCLOS. The IMO convention introduced major reform to international salvage law, especially considering the incentives for protection of the marine environment.⁹⁸ Due to the problematic language of the IMO convention regarding historic vessels, it has not seen widespread adoption by States as governing law for historic wrecks.⁹⁹

3. *UNESCO UCH Convention*. - The thirty-first United Nations Educational, Scientific, and Cultural Organization (“UNESCO”) adopted the Convention on the Protection of the Underwater Cultural Heritage¹⁰⁰ (“UCH Convention”) in November

⁹³ IMO, *supra* note 78, at art. 1.

⁹⁴ Davies, *supra* note 87, at 484.

⁹⁵ *Id.*

⁹⁶ IMO, *supra* note 78, at art. 12(1).

⁹⁷ Davies, *supra* note 87, at 484.

⁹⁸ Forest, *supra* note 58, at 371.

⁹⁹ *Id.*

¹⁰⁰ Convention on the Protection of the Underwater Cultural Heritage, Nov. 2, 2001, UNESCO Doc.31C/Resolution 24 (2002) [hereinafter “UCH Convention”].

2001.¹⁰¹ The UCH Convention attempts to provide protection to States with underwater cultural heritage (“UCH”)¹⁰² by clarifying the ambiguity surrounding the legal status of historic shipwrecks.¹⁰³ The protection, preservation, and proper display of UCH advance UNESCO’s core value of educating the world public.¹⁰⁴

The UCH Convention built upon UNCLOS to develop a comprehensive convention to govern historic shipwreck salvage and protection.¹⁰⁵ The UCH Convention began as an International Law Association’s (“ILA”)¹⁰⁶ draft convention in 1994.¹⁰⁷ The draft convention included an annex, which set out the benchmark standards for underwater archaeology, and prohibited the commercialization of historic shipwreck salvage operations.¹⁰⁸ The draft convention went as far as to prohibit the application of salvage law to historic shipwrecks.¹⁰⁹ The draft convention was submitted to UNESCO for adoption, where the inclusion of salvage law and non-commercialization clauses were heavily debated.¹¹⁰

The preamble of the UCH Convention explicitly acknowledges “the importance of underwater cultural heritage as an

¹⁰¹ *Protecting Underwater Heritage From Treasure Hunters*, UNESCO GENERAL CONFERENCE, http://www.unesco.org/confgen/press_rel/291001_subaqua.shtml (last visited Oct. 17, 2013) [hereinafter “*Protecting UCH*”].

¹⁰² UCH is a term created by the drafters of the Convention. Generally, under the Convention, UCH “encompasses all traces of human existence that lie or were lying under water and have a cultural or historical character.” *Safeguarding the Underwater Cultural Heritage*, UNESCO, <http://www.unesco.org/new/en/unesco/themes/underwater-cultural-heritage/> (last visited Oct. 17, 2012).

¹⁰³ *Protecting UCH*, *supra* note 101.

¹⁰⁴ *About the Convention on the Protection of the Underwater Cultural Heritage*, UNESCO, <http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/2001-convention/> (last visited Nov. 18, 2011) [hereinafter “*About UCH*”].

¹⁰⁵ Forest, *supra* note 58, at 372.

¹⁰⁶ Founded in 1873, the International Law Association is a private non-governmental organization of persons interested in international law. *About Us*, INTERNATIONAL LAW ASSOCIATION, http://www.ila-hq.org/en/about_us/index.cfm (last visited Nov. 17, 2013).

¹⁰⁷ Forest, *supra* note 58, at 372.

¹⁰⁸ *Id.* at 373.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

integral part of the cultural heritage of humanity” and admits the UCH is “deeply concerned by the increasing commercial exploitation of underwater cultural heritage, and in particular by certain activities aimed at the sale, acquisition or barter of underwater cultural heritage.”¹¹¹ Further, “the public’s right to enjoy the educational and recreational benefits of responsible nonintrusive access to *in situ* underwater cultural heritage” was a major factor.¹¹² Lastly, the UCH Convention expresses concern with the current legal framework of historic salvage by acknowledging “the need to codify and progressively develop rules relating to the protection and preservation of underwater cultural heritage in conformity with international law and practice.”¹¹³

Opposition to UCH convention’s application of salvage law to historic shipwrecks is best summarized by the commentary to the ILA draft convention¹¹⁴:

[T]he law of salvage relates solely to the recovery of items endangered by the sea; it has no application to saving relics on land. For underwater cultural heritage, the danger has passed; either a vessel has sunk or an object has been lost overboard. Indeed, the heritage may be in greater danger from salvage operations than from being allowed to remain where it is. . . The major problem is that salvage is motivated by economic considerations; the salvor is often seeking items of value as fast as possible rather than undertaking the painstaking excavation and treatment of all aspects of the site that is necessary to preserve its historic value.¹¹⁵

¹¹¹ UCH Convention, *supra* note 100, at 1.

¹¹² UCH Convention, *supra* note 100, at 1.

¹¹³ *Id.*

¹¹⁴ Forest, *supra* note 58, at 373.

¹¹⁵ *Id.*, citing Patrick J. O’Keefe & James A.R. Nafziger, *The Draft Convention on the Protection of the Underwater Cultural Heritage*, 25 OCEAN DEV. & INT’L L. 391, 404 (1994).

This argument is reiterated by many commenters¹¹⁶ and was stated multiple times in the negotiations of the convention.¹¹⁷ The UCH convention codifies this argument in “Article 4 – Relationship to law of salvage and law of finds”¹¹⁸ stating that “activity relating to [UCH] shall not be subject to the law of finds.”¹¹⁹

The broad prohibition against salvage law application is subject to an exception. The exception stems from developed States expressing concerns over the limiting of sovereign power of States to engage in commercial and cultural transactions.¹²⁰ Salvage law can be applied when “authorized by the competent authorities” to the extent salvage law conforms to the UCH Convention and “ensures [the] recovery of the [UCH] achieves its maximum protection.”¹²¹

¹¹⁶ See Forest, *supra* note 58, at 373; O’Keefe, *supra* note 116, at 404; Strati, *supra* note 63 at 300; Luigi Migliorino, *In Situ Protection of the Underwater Cultural Heritage Under International Treaties and National Legislation*, 10 INT’L J. MARINE & COASTAL L. 486 (1995); Janet Blake, *The Protection of the Underwater Cultural Heritage*, 45 INT’L & COMP. L.Q. 819-43 (1996); Bruce E. Alexander, *Treasure Salvage Beyond the Territorial Sea: An Assessment and Recommendations*, 20 J. MAR. L. & COM. 7-8 (1989).

¹¹⁷ Forest, *supra* note 58, at 373, *citing* Roberta Garabello, *The Negotiating History of the Convention on the Protection of the Underwater Cultural Heritage*, in *The Protection of the Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention*, 89, 123-3, (Roberta Garabello & Tullio Scovazzi eds., 2003).

¹¹⁸ Article 4 reads:

“Relationship to law of salvage and law of finds

Any activity relating to underwater cultural heritage to which this Convention applies

shall not be subject to the law of salvage or law of finds, unless it:

- (a) is authorized by the competent authorities, and
- (b) is in full conformity with this Convention, and
- (c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection.”

UCH Convention, *supra* note 100, at art. 4.

¹¹⁹ UCH Convention, *supra* note 100, at art. 4.

¹²⁰ Garabello, *supra* note 117, at 123-25.

¹²¹ UCH Convention, *supra* note 100, at art. 4.

The prohibition against applying salvage law to UCH supports the UCH Convention's main purpose of banning commercial exploitation of UCH.¹²² The Annex of the UCH Convention describes commercial exploitation as “fundamentally incompatible with the protection and proper management of underwater cultural heritage.”¹²³ The Annex allows for the recovery and deposition of UCH by “professional archaeological services” for the purpose of a “research project.”¹²⁴ Further, the UCH convention states that *in situ* preservation is the preferred option when a historical shipwreck is discovered.¹²⁵ *In situ* not only preserves archaeological investigation that can occur before the site is disturbed,¹²⁶ but also serves to freeze commercial incentives for salvage. Commercial salvors often seek items of value as fast as possible rather than undertaking the painstaking excavation and treatment of all aspects of the site that is necessary to preserve its historic value.¹²⁷

The scope and jurisdiction of the UCH Convention are quite broad. The definition of UCH, according to the convention, includes “all traces of human existence having a cultural, historical or archaeological character which have been partially or totally underwater, periodically or continuously, for at least 100 years.”¹²⁸ Hundred-year-old, historic shipwrecks are included in this definition.¹²⁹ The jurisdiction of the UCH convention is slightly more limited than UNCLOS or the IMO convention. The jurisdiction extends to all international waters, which are also controlled by UNCLOS or the IMO convention, but allows coastal States complete

¹²² *Id.* at art. 2(7).

¹²³ *Id.* at Annex, I. General Principles, R. 2.

¹²⁴ *Id.*

¹²⁵ *Id.* at art. 2 para. 5.

¹²⁶ Forest, *supra* note 58, at 368.

¹²⁷ Jeremy Neil, Note & Case Comment, *Sifting Through the Wreckage: An Analysis and Proposed Resolution Concerning the Disposition of Historic Shipwrecks Located in International Waters*, 55 N.Y.L. SCH. L. REV. 895, 911 (2010/2011).

¹²⁸ UCH Convention, *supra* note 100, at art. 1 para. 1(a).

¹²⁹ The definition continues to outline specific items intended to fall under the UCH Convention's protection: “vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context.” UCH Convention, *supra* note 100, at 1 para. 1(a)(ii).

sovereignty within territorial waters as outlined by UNCLOS or the IMO convention.¹³⁰

C. Economic Incentives

1. *United Nations Convention on the Law of the Sea*. - The main problem plaguing the development of salvage law is the struggle between providing economic incentives to motivate would-be salvors, and preserving the archeological value of historic shipwrecks.¹³¹ UNCLOS, in broad terms, imposes duties on would-be salvors to “protect objects of an archaeological and historical nature,”¹³² and gain the approval of the “coastal State” for removal of objects.¹³³ Even within the comprehensive framework of UNCLOS, salvors must remain cognizant of the interaction of traditional salvage law and the law of finds.¹³⁴ Due to the lack of treaty language regarding historic shipwrecks, UNCLOS’s economic incentives flow from traditional salvage law and, more importantly, the law of finds.¹³⁵ The law of finds allows for full possession of the wreck once the salvager makes an affirmative effort to take possession of the wreck.¹³⁶

While providing salvors with title to salvaged objects, the law of finds provides limited economic incentives.¹³⁷ The incentive to salvage historic shipwrecks under UNCLOS and the law of finds is limited to the estimated value of items aboard the vessels, but this fails to recognize any intrinsic value of the wrecks.¹³⁸ The majority of national governments and archaeologists expressly disfavor the application of the law of finds, and salvage law, generally, to historic shipwrecks.¹³⁹ The disfavor stems from the law’s nature to overlook

¹³⁰ UCH Convention, *supra* note 100, at art. 7, para. 1.

¹³¹ Paul Hallwood & Thomas J. Miceli, *Murky Waters: The Law and Economics of Salvaging Historic Shipwrecks*, 35 J. LEGAL STUD. 285, 295 (2006).

¹³² UNCLOS, *supra* note 49, at art. 303(1) (emphasis added).

¹³³ *Id.* at art. 303(2).

¹³⁴ *Id.* at art. 303(3).

¹³⁵ Hallwood, *supra* note 131, at 295, 293.

¹³⁶ *Id.* at 293.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Neil, *supra* note 127, at 904.

the archaeological value contained in the shipwreck and surrounding area.¹⁴⁰ It is not unusual for salvors of historic shipwrecks to be referred to as pirates, looters, and thieves for their role in removing artifacts from sites merely for profit without regard for their historic significance.¹⁴¹

The primary economic driver for the salvage of historic shipwrecks under UNCLOS is the value of items aboard the vessels due to the law of finds providing title.¹⁴² Salvors under UNCLOS must “protect” the items they salvage from historic shipwrecks.¹⁴³ However, many archaeologists would argue that removing items from their current location on the seafloor is not protecting them.¹⁴⁴ The fact that the items are submerged, and removed from the presence of oxygen slows the deterioration process.¹⁴⁵ Even the most careful salvages disturb the delicate ecosystems of historic shipwreck sites and threaten the site’s archaeological value.¹⁴⁶

On the other hand salvors argue that without the salvage of historic shipwrecks, sites offer little value and are in danger of complete destruction from other human activity and natural disasters.¹⁴⁷ Salvors defend their position by stating that human actions, like fishing trawlers and plastic waste,¹⁴⁸ combined with natural disasters, like hurricanes and earthquakes, effectively destroy the archaeological content of these sites and cause the loss of

¹⁴⁰ *Id.*

¹⁴¹ See, e.g., David J. Bederman, *The UNESCO Draft Convention on Underwater Cultural Heritage: A Critique and Counter-Proposal*, 30 J. MAR. L. & COM. 331, 343 (observing that the International Law Association views salvors as “looters” and “destroyers of our past”).

¹⁴² Hallwood, *supra* note 131, at 295, 293.

¹⁴³ UNCLOS, *supra* note 49, at art. 303(1).

¹⁴⁴ Ole Varmer, *The Case Against the “Salvage” of Cultural Heritage*, 30 J. MAR. L. & COM. 279, 280 (1999).

¹⁴⁵ Varmer, *supra* note 144, at 280.

¹⁴⁶ *Id.* at 280-81.

¹⁴⁷ Neil, *supra* note 127, at 905.

¹⁴⁸ Cahal Milmo, *Why is There a Storm Brewing Over the Right to Plunder Shipwrecks?*, THE INDEPENDENT (UK), June 9, 2009, <http://www.independent.co.uk/news/world/politics/why-is-there-a-storm-brewing-over-the-right-to-plunder-shipwrecks-1700207.html>.

countless artifacts.¹⁴⁹ Further, many commercial salvage companies employ a team of archaeologists to maintain high compliance standards during the salvage.¹⁵⁰ For example, Odyssey employs a team of archaeologists whose goals are to maintain compliance with community standards, preserve the history associated with recovered cultural relics, and fully document all artifacts that are recovered before they are passed on to museums and collectors.¹⁵¹

2. *IMO 1989 International Convention on Salvage Law.* - As discussed above, the IMO convention was not explicitly written to control the salvage of historic shipwrecks. However, the UCH convention excludes any sunken vessels less than one hundred years old.¹⁵² This carves out an area of historic vessels that have been on the seafloor for less than one hundred years. This means that the recovery of vessels from WWII is not controlled by the UCH convention, but instead by the IMO convention. The incentives to salvage these vessels, like the *SS Gairsoppa*, operate similar to restitution.¹⁵³

Restitution operates under the assumption that a person enriched by the actions of another should be liable to pay for the enrichment.¹⁵⁴ This restitutionary payment is the driver for the salvage reward recognized under the IMO convention, in that the salvage must have a “useful result”¹⁵⁵ to be entitled to the reward.¹⁵⁶ Additionally, the restitutionary value of the reward is enhanced by several other motivators. Courts routinely increase the salvage

¹⁴⁹ Chris Southerly et al., N.C. OFFICE OF STATE ARCHEOLOGY, FALL 2006 RECOVERY PLAN FOR NORTH CAROLINA ARCHAEOLOGY SHIPWRECK SITE 31CR314, 1 (2006).

¹⁵⁰ See, e.g., *A Commitment to Archaeology*, ODYSSEY MARINE EXPLORATION, <http://www.shipwreck.net/archaeology.php> (last visited Dec. 24, 2013) (provides the specific steps Odyssey undertakes to protect the artifacts it recovers).

¹⁵¹ *Id.*

¹⁵² UCH Convention, *supra* note 100, at art. 1 para. 1(a).

¹⁵³ See Catherine Swan, *The Restitutionary and Economic Analyses of Salvage Law*, 23 A & NZ MAR. L. J. 99, 104-06 (2008) (details the history of salvage law and its shared restitutionary goals).

¹⁵⁴ Swan, *supra* note 153, at 105-06.

¹⁵⁵ See *supra* note 79 (defines a “useful result” to be when property of value is saved. Property includes the vessel, cargo, or life.)

¹⁵⁶ Swan, *supra* note 153, at 106.

rewards for maintaining salvage vessels on standby,¹⁵⁷ and successfully protecting the environment.¹⁵⁸

The IMO convention's salvage rewards differ from a purely restitutionary reward for services rendered.¹⁵⁹ The reward serves three main purposes: compensation for the work done, reimbursement for the expenses incurred, and a reward to promote the public policy of salvage.¹⁶⁰ The reward's purpose does not align with a restitutionary model, and is quite often a purely discretionary amount determined by the court.¹⁶¹

The salvage reward can also be compared to a model of contingent payment.¹⁶² The contingent model, elaborated on by William Landes and Judge Richard Posner, predates the adoption of the IMO convention. The model states that as the probability for successful recovery increases, the ensuing reward should decrease.¹⁶³ This is reflected in the criteria used to determine the salvage rewards listed in Article 13 of the IMO convention.¹⁶⁴ As the degree of success rises in the salvage, the weight of the factors decreases, and so does the salvage reward. Thus, while the IMO convention's salvage reward is primarily a restitutionary payment on its face, the factors used to determine the reward align with a contingent payment model.

¹⁵⁷ *Id.*

¹⁵⁸ IMO, *supra* note 78.

¹⁵⁹ Swan, *supra* note 153, at 106.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² William M. Landes & Richard A. Posner, 'Salvors, Finders, Good Samaritans, and Other Rescuers', 7 J. L. STUD. 83, 100-103 (1978).

¹⁶³ Landes, *supra* note 162, at 101.

¹⁶⁴ IMO, *supra* note 78, at art. 13 (the criteria include the salvaged value of the vessel and other property, the skill and efforts of the salvors in preventing or minimizing damage to the environment, the measure of success obtained by the salvor, the nature and degree of the danger, the skill and efforts of the salvors in salvaging the vessel, other property and life, the time used and expenses and losses incurred by the salvors, the risk of liability and other risks run by the salvors or their equipment, the promptness of the services rendered, the availability and use of vessels or other equipment intended for salvage operations, and finally, the state of readiness and efficiency of the salvor's equipment and the value thereof).

The contingent payment model is reinforced by the “special compensation”¹⁶⁵ given to salvors that protect the environment in their salvage operations. The reward serves to promote environmental protection in salvage operations, measures that were routinely overlooked by previous regimes.¹⁶⁶ This type of payment does not fit into a restitutionary model, and instead serves to promote public policy, in accordance with a contingent fee model.¹⁶⁷ The payment reflects the balancing of proper economic incentives against the increased cost of preventing environment damage during salvage operations.¹⁶⁸

3. *UNESCO UCH Convention.* - The UCH convention features an almost complete lack of economic incentives. Unlike the salvage title gained under traditional maritime law and UNCLOS, or the salvage reward given under the IMO convention, the UCH convention’s main provisions serve to ban the “commercial exploitation”¹⁶⁹ of historic shipwrecks. According to the convention, the “commercial exploitation” of UCH is “deeply concerning” especially considering the sale, acquisition or barter of UCH.¹⁷⁰ By declining to provide economic incentives for historic salvage, the UCH seemingly abridges any reason to independently conduct these types of operations.

The adoption of the UCH convention did not stop the search for and salvage of historic vessels, but simply shifted the cost burden from commercial salvors to the States’ with UCH sites.¹⁷¹ The UCH convention requires that state parties “cooperate in the protection of underwater cultural heritage,”¹⁷² “preserve underwater cultural

¹⁶⁵ IMO, *supra* note 78, at art. 14 (“special compensation” is provided when a salvage is carried out in such a way to protect the environment. The compensation is equal 30% of the expenses incurred by the salvor).

¹⁶⁶ Forest, *supra* note 58, at 371.

¹⁶⁷ Swan, *supra* note 153, at 109.

¹⁶⁸ *Id.*

¹⁶⁹ UCH Convention, *supra* note 100, at art. 2(7).

¹⁷⁰ *Id.* at 1. (“Deeply concerned by the increasing commercial exploitation of underwater cultural heritage, and in particular by certain activities aimed at the sale, acquisition or barter of underwater cultural heritage.”)

¹⁷¹ Neil, *supra* note 127, at 911.

¹⁷² UCH Convention, *supra* note 100, at art. 2(2)

heritage for the benefit of humanity,”¹⁷³ and “take all appropriate measures in conformity with this Convention and with international law that are necessary to protect underwater cultural heritage.”¹⁷⁴ These requirements assume States will regulate and control the historic salvage market. Further, with the elimination of independent economic incentives, the States now face the burden of motivating commercial salvage companies to find and recover historic shipwrecks.

The State controlled salvage market has seen a number of such arrangements.¹⁷⁵ Interstate agreements have been reached over the *CSS Alabama* (France and United States), *HMS Birkenhead* (United Kingdom and South Africa), *HMS Erebus* (United Kingdom and Canada), *HMS Terror* (United Kingdom and Canada), *Estonia* (Estonia, Finland, and Sweden), and the most notable historic salvage, *Titanic* (United States, United Kingdom, Canada, and France).¹⁷⁶ Odyssey has entered into several salvage agreements with the United Kingdom which include the *SS Gairsoppa*, *SS Mantola*, *HMS Victory*, and *HMS Sussex*.¹⁷⁷ These agreements will undoubtedly continue to increase as the market for commercial salvage adjusts.

IV. RECOMMENDATION FOR COUNTRIES WITH HISTORICAL SALVAGE SITES

The contracted salvage of the *SS Gairsoppa* should serve as a model for states with historic shipwrecks. States with known sites or states aware of vessels lost at sea should seek to enter into contracted agreements for the exploration and salvage of these vessels. By contracting the salvage of these vessels, states maintain significant control over their cultural heritage while promoting the necessary economic incentives for salvage operations. As outlined in the UCH convention, these historic shipwrecks contain valuable insight into historically significant events, as well as extraordinarily valuable

¹⁷³ *Id.*

¹⁷⁴ *Id.*; Neil, *supra* note 127, at 911.

¹⁷⁵ Hallwood, *supra* note 131, at 296.

¹⁷⁶ *Id.*

¹⁷⁷ *Shipwrecks*, ODYSSEY MARINE EXPLORATION, <http://www.shipwreck.net/shipwrecks.php> (last visited Dec. 24, 2013).

metals and precious stones. The international legal regime shifted the burden of incentivizing historic salvage to the state. Demonstrated by the agreements between Odyssey and the United Kingdom, contracted salvage motivates commercial salvage companies to undertake these operations while protecting the archaeological value of the sites.

The terms of the agreement need to be carefully considered in order to properly protect the interests of both the country and the commercial salvage company.¹⁷⁸ The agreements should call for a project plan that details the complete operation. The plan should provide the government with detailed information of equipment, people, techniques, and conservation methods to be used. The agreement should detail the period for acceptance of the plan, and any needed termination terms. Following approval, the commercial salvage company should post a deposit sufficient to cover governmental expenses to serve as collateral in case of insufficient performance of the agreement. Additionally, the government may want to include a term detailing how monitoring of the operation will be accomplished, whether by government officials or company certified reports.

The most important terms of the agreement are the compensation parameters. As in the *SS Gairsoppa's* salvage, a profit sharing model should be employed. By sharing a percentage of overall profits, the government incentivizes the commercial salvage company to maximize gain during the operation. The agreement should detail the exact percentages, as well as the calculations to determine the profit.

Additionally, contracted salvage avoids the uncertainty that litigation involves. By having the state and salvage company negotiate for their interest, contracted salvage can find the optimal solution; whereas, litigation often falls short. Litigation involves uncertainty in

¹⁷⁸ My recommendation is modeled after the successful agreements utilized by the United Kingdom and Odyssey; *See* Partnering Agreement Memorandum Concerning the Shipwreck of the HMS Sussex, Between the Government of the United Kingdom of Great Britain & Northern Ireland & Odyssey Marine Exploration, Inc. (Sept. 27, 2002), available at <http://shipwreck.net/pam> (last visited Jan. 2, 2014).

the controlling law, substantial legal fees, delayed timing to reach a decision, and unforeseeable results. Contracted salvage streamlines the process by establishing a binding agreement for the interested parties, and mitigates the litigation uncertainty. Salvage contracts normally include dispute resolution terms. The terms often include arbitration clauses that completely remove litigation risk.

States employing contracted salvage recognize the need to provide adequate economic incentives for salvage operations while protecting their UCH. These agreements foster commercial salvage companies' participation, while safeguarding the archaeological interests in historic shipwrecks. Contracted historic salvage therefore provides states with preferable results when the current international regime obfuscates desired outcomes.