The UNESCO Draft Convention on Underwater Cultural Heritage: A Critique and Counter-Proposal

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I
INTRODUCTION

Others have ably praised and defended the UNESCO Draft Convention on the Protection of the Underwater Cultural Heritage ("UNESCO Draft"). I come now to bury it. And although I have written elsewhere about the background history and antecedent drafts of the UNESCO initiative, I intend to focus here on two points: (1) illustrating the most glaring deficiencies of the UNESCO Draft, and, (2) introducing an alternative approach to the problem of managing the resource of historic shipwrecks.

II
CRITIQUE OF THE UNESCO DRAFT

Truth be told, there was little in the April 1998 UNESCO Draft that was surprising or novel. Most of it is based on an earlier effort by the International Law Association ("ILA"). The ILA is an international organization of academic international law specialists, acting in their individual capacities. The ILA worked on its product for several years, during which time no input was invited from any person or entity other than those concerned with historic preservation values. The final product of the ILA's work was adopted at Buenos Aires in 1994 ("ILA Draft").

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In the interest of full disclosure, I note here that I have been a paid consultant to many historic salvors and have represented their interests in litigation involving rights and access to historic shipwrecks.


3For the purposes of the discussion here, the referenced version of the ILA Draft is the one that
The ILA Draft was explicitly intended to be submitted for consideration by the United Nations Educational, Scientific and Cultural Organization ("UNESCO"), and in 1995 it was. In a Report issued on March 23, 1995, UNESCO’s Executive Board considered the feasibility of “drafting a new instrument for the protection of the underwater cultural heritage.” Authorization to proceed on this drafting project was granted at the 1997 UNESCO General Conference. The stated objective was to have a draft convention ready in time for the next General Conference of UNESCO (in November 1999). The April 1998 Draft Convention has been tabled pursuant to this mandate.

As currently written, the UNESCO Draft suffers from a number of key defects, and I will attempt to briefly consider them here. They are: (1) a ridiculously over-inclusive definition of “cultural heritage,” (2) a seriously flawed definition of abandonment for historic shipwrecks, (3) an expansive grant of competence to coastal States, in violation of current international law, and, finally and most seriously, (4) an abortive attempt to abolish commercial incentives for historic shipwreck exploration and recovery.

A. An Over-Inclusive Definition of Cultural Heritage

The definitions set out in article 1 of the UNESCO Draft are overinclusive, ambiguous, and prone to misinterpretation or confusion. The term “underwater cultural heritage” itself is problematic. It is so broadly inclusive that it stretches to “all underwater traces of human existence.” Does this mean that pieces of a splintered surfboard or even a soda can thrown overboard on a fishing outing should be countenanced by the UNESCO Draft? Certainly not, but the definition would seem to cover such items. The term, which is defined to include “sites, structures, buildings, artefacts and human remains, together with their archaeological and natural contexts,” could easily be read also to include support beams of a pier, lobster traps, and oil rig platforms.

Article 1 further confuses matters with the definition of “wreck” in paragraph 1(b) as including “a vessel, aircraft, or other vehicle or any part thereof, its cargo or other contents, together with its archaeological and natural context.” Does this mean that the ship’s cargo is covered by the
UNESCO Draft even if it has drifted off or has washed ashore? The provision’s reference to “archaeological and natural context” is intended to emphasize that “[c]ontext is one of the most essential aspects of archaeological heritage in providing knowledge of life during a particular era,” but, despite the inclusion of the archaeological and natural contexts in the definition of “underwater cultural heritage,” there is no definition of the scope of such contexts.

Furthermore, the definitions of “underwater cultural heritage” are so expansive as to be outlandish. The commentary to the ILA Draft (the acknowledged source for the UNESCO Draft) states that “[t]his is likely to include all aspects of the underwater cultural heritage of significance to the history of humanity,” and this is precisely the problem. Such an overinclusive definition ignores the necessity for a requirement of significance, whether cultural or historical. In order to create both a manageable regime and one worthy of international treaty, only wrecks of significance should be included in the definition.

These definitions, in tandem with the commentary provided by the drafters, seem to falsely equate age with historical significance. Under the UNESCO Draft, if a cargo ship loaded with simple raw materials sank, its contents would be considered “underwater cultural heritage.” But, in this situation, the cargo has no independent historical significance and should not be considered “underwater cultural heritage.” The glaring absence in article 1 of an additional provision which would remedy the problem of the faulty assumption that age equals significance is a tremendous failing of the UNESCO Draft. A provision to the effect that the treaty shall apply to those articles which have historical significance and substantively add to historical understanding would be a start for focusing perhaps the most important definition of the treaty.

If UNESCO persists in embracing such an expansive and undiscriminating definition of “underwater cultural heritage,” it would need to adopt some sort of tentative list (albeit a list that is not exclusive) which would identify the types of historically significant items which would be granted the protection of the UNESCO Draft. A listing approach, such as the National Register system in the United States, might be a suitable vehicle

\[9\text{See O'Keefe & Nafziger, supra note 3, at 406 (glossing identical text of the ILA Draft).}\]

\[10\text{Id.}\]

\[11\text{An alternative, as presented in the Counter-Proposal, see art. 2, para. 2, would be to require that the underwater cultural heritage or historic shipwreck have “unique and outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.”}\]

\[12\text{As referenced in the Abandoned Shipwreck Act, 43 U.S.C. §§ 2102(b), 2105(a)(3). See also National Historic Preservation Act, 16 U.S.C. § 470a.}\]
for such identification. This process would enable each State Party to an international regime to create a list of “significant” wrecks, thereby giving full information to divers. This definition would also create a rebuttable presumption and allow for continued exploration of shipwrecks and the recovery of property lost at sea.

But, as matters stand now, the UNESCO Draft’s definition of “underwater cultural heritage” is simply extravagant and unworkable.

B. An Impermissible Definition of Abandonment

Article 2, paragraph 1 of the UNESCO Draft indicates that it only applies to underwater cultural heritage that has been “abandoned.” The definition of abandonment propounded in the previous article, however, is unacceptable due to confusing and unrealistic time constraints. This definition allows a period of 25 years from the discovery of technology sufficient to recover the heritage, or if no technology was available to permit recovery, 50 years from “the last assertion of interest by the owner” of the “underwater cultural heritage” before the heritage is deemed legally abandoned. This is too short a time span to assume that the owner or interested party has abandoned all hope of ever locating the item. The UNESCO Draft creates a new international standard for abandonment which is quite inconsistent with the longstanding general maritime law. In so doing, it works an expropriation of property in violation of international law, an act that would have to be accompanied by prompt, adequate, and effective compensation by the State which was asserting title or a regulatory interest in the affected historic shipwreck.

A few examples will suffice in illustrating that the standard of abandonment propounded in the UNESCO Draft is contrary to the general maritime law as observed in a number of maritime countries. In *Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*, the United States Court of Appeals for the Fourth Circuit held a group of insurance companies which had assumed title to the *Central America* (which sank in 1857 off the coast of South Carolina) and failed to recover the wreck in the intervening 135 years were still the proper owners. Similarly lengthy time frames were at issue in negotiations between Norway and the Netherlands over the

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13But see UNESCO Doc. 146 EX/27, at 8, ¶ 42 (Mar. 23, 1995) (doubting whether the 1972 UNESCO Convention on the Protection of the World Cultural and Natural Heritage could be applied to shipwreck sites offshore or the artifacts recovered therefrom).
14UNESCO Draft, art. 2, para. 1.
15See id., art. 1, para. 2.
ownership of wrecks of vessels which belonged to the Dutch East India Company.\textsuperscript{17}

The general maritime law, moreover, has consistently held that currently identifiable owners of property unwillingly lost at sea are presumed not to have abandoned their rights and interests.\textsuperscript{18} Indeed, the 1982 United Nations Convention on the Law of the Sea ("LOS\textsuperscript{C}") confirmed this result when it preserved "the rights of identifiable owners" of shipwrecks located in a coastal State's territorial sea or contiguous zone.\textsuperscript{19} That is why the legal test for abandonment (whether on land or at sea) has always required two elements: (1) an intent to abandon, and, (2) an act carrying that intent into effect.\textsuperscript{20} Indeed, some courts have required "strong and convincing evidence" for proof of abandonment.\textsuperscript{21} Presumptive periods for abandonment have thus been disfavored in the general maritime law.\textsuperscript{22}

In the United States, in federal legislation known as the Abandoned Shipwreck Act of 1987 ("ASA"),\textsuperscript{23} Congress presumably intended that courts apply the general maritime law's presumption against abandonment of property involuntarily lost at sea. Indeed, the ASA does not directly define the term abandonment. However, Congress desired that the Act apply to "certain abandoned shipwrecks, which have been deserted and to which the owner has relinquished ownership rights with no retention."\textsuperscript{24} Congress' use of the terms "deserted" and "relinquished" require, at a bare minimum,

\textsuperscript{17}See Robinson v. Western Australian Museum, 16 A.L.R. 623, 647–48, 654, 663, 671–74 (1977) (Austl.) (holding that the original owner of the \textit{Gilt Dragon} (sunk in 1656) retained title to the vessel).

\textsuperscript{18}The Akaba, 54 F. 197, 200 (4th Cir. 1893); Wilkie v. Two Hundred and Five Boxes of Sugar, 29 F. Cas. 1247 (D.S.C. 1796) (No. 17,662). See also Simon v. Taylor, [1975] 2 Lloyd's Rep. 338 (Sing. High Ct. 1974) (Federal Republic of Germany held to still be the owner of a U-Boat torpedoed and sunk during World War II).


\textsuperscript{20}See \textit{CADG}, 974 F.2d at 461; Friedman v. United States, 347 F.2d 697, 704 (8th Cir.), cert. denied, 382 U.S. 946 (1965) (abandonment is an ultimate fact or conclusion based upon a combination of act and intent); Morissette v. United States, 187 F.2d 427, 430 (6th Cir. 1951), rev'd on other grounds, 342 U.S. 246 (1952) (same).


\textsuperscript{22}But see Abandoned Wreck Law (Revised), Cayman Islands, §§ 2, 3, 12 (1977); Historic Shipwrecks Act, Australia, § 4A (1976), both abstracted in O'Keefe & Nafziger, supra note 3, at 395 (for a 50 year time limit).

\textsuperscript{23}43 U.S.C. §§ 2101–2106.

\textsuperscript{24}43 U.S.C. § 2101(b).
a strongly evinced intent to abandon. Indeed, they may even be regarded as terms-of-art, a congressional recognition that the maritime law applies a strong presumption against abandonment. Congress obviously had the opportunity to establish a statutory presumption of abandonment, and did not do so.

In cases of involuntary loss at sea, the consistent standard used by admiralty courts has been to ascertain whether the owner had the knowledge and means to recover the property. If the owner knew the location of the wreck and had the technical means to economically recover it, but failed to do so, that constitutes an abandonment. If not, then the wreck cannot be deemed to be abandoned by inference. This is utterly consistent with the intent of Congress as expressed in the ASA’s legislative history: “[T]he term abandoned does not require the original owner to actively disclaim title or ownership. The abandonment or relinquishment of ownership may be implied or otherwise inferred, as by an owner never asserting any control over or otherwise indicating his claim of possession of the shipwreck.” Rather, following from the suggestive language in the ASA legislative history, a court can infer abandonment, but only when the owner has failed to “assert control” or “otherwise indicat[e] [a] claim of possession.”

While the UNESCO Draft claims to “stabilize expectations” and to preserve the reasonable rights of owners, the 50 year limit does no such thing. The provisions regarding the availability of technology suitable to recovery of cultural heritage are convoluted and obtuse. It is unclear whether

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25 See Nunley v. M/V Dauntless Colocotronis, 863 F.2d 1190, 1198, 1993 AMC 1676 (5th Cir. 1989) (valid abandonment occurs through act of “deserting” property); Katsaris v. United States, 684 F.2d 758, 761 (11th Cir. 1982) (abandonment does not occur unless there is a “total desertion” by the owner); Everhart v. State Life Ins. Co., 154 F.2d 347, 356 (6th Cir. 1946) (abandonment is an “absolute relinquishment or renunciation” of a right).


27 See CADG, 874 F.2d at 461; Lady Elgin, 755 F. Supp. at 217.


29 According to well-established precedent, a cargo insurer which declares a total loss and pays the full policy limits takes title of the property via subrogation. This can be accomplished through a formal tender of abandonment or by simply paying all claims. See Great Western Ins. Co. v. Fogarty, 86 U.S. (19 Wall.) 640 (1873); Patapsco Ins. Co. v. Southgate, 30 U.S. (5 Pet.) 604, 622–23 (1831); CADG, 974 F.2d at 457 (“Under applicable law, then and now, once the underwriters paid the claims made upon them by the owners of the gold, the treasure became theirs.”); The Tashmoo, 1937 AMC 1536, 1540 (Arb. 1937) (“an underwriter who has fully reimbursed his assured in respect to a loss is entitled to any salvage that results in respect to such loss. . .”).

Insurers do not lightly declare total losses and pay full policy limits. When they do so, they expect to take title and to acquire the benefits of any subsequent salvage. Marine insurers have led in the recovery of valuable property from shipwrecks, and its return to the stream of commerce, precisely because they have invested in that property when they paid on the loss policies.

30 See O’Keefe & Nafziger, supra note 3, at 406, cmt. 2 (glossing text which the UNESCO Draft expressly relied upon).
the two clauses\textsuperscript{31} are contradictory or merely alternatives. Clause 2(a) leaves open the possibility of reading an indefinite time period into the UNESCO Draft as a 25 year span following the discovery of technology which would make recovery feasible. However, clause 2(b) allows only 50 years following an assertion of the owner's rights if no technology suitable to the task was available.

The ambiguity resulting from these definitions leaves much to be desired and will certainly cause the UNESCO Draft to falter. At a minimum, these provisions appear to shift the burden from a presumption of ownership to one of abandonment. Not only does this conflict with the general maritime law, it will necessitate a case-by-case analysis to determine whether an item was truly abandoned by the rightful owner.

Ironically, the UNESCO Draft does assume that one class of underwater cultural heritage is never abandoned: "any warship, military aircraft, naval auxiliary or other vessels or aircraft owned or operated by a State..."\textsuperscript{32} Although this is not the place to consider whether sovereign vessels or aircraft lost at sea can be abandoned,\textsuperscript{33} it is interesting to note that the UNESCO Draft resolves this issue in favor of States, thus removing a possible ground for objection to the Draft.\textsuperscript{34}

Regarding the general scope of the UNESCO Draft, article 1(a) provides that it only applies to "underwater cultural heritage" which has been abandoned and also has been submerged for at least 100 years (with the caveat that "[a]ny State Party may, however, protect underwater cultural

\textsuperscript{31}See UNESCO Draft, art. 1, paras. 2 (a) & (b).

\textsuperscript{32}UNESCO Draft, art. 2, para. 2.

\textsuperscript{33}I have previously advocated this position. See Steinmetz v. United States, 973 F.2d 212, 1992 AMC 2879 (3d Cir. 1992), cert. denied, 507 U.S. 984 (1993).

I believe the "custom" that sovereigns never abandon their vessels (save by an explicit act) is actually of very recent origin. The United States has admitted that until quite recently it was generally acknowledged that nations could be impliedly divested of title to their sunken warships under the admiralty law of finds. See 1980 Digest of United States Practice in International Law 999, 1003–05 (M. Leich ed.) (Opinion of State Dep't Legal Advisor, Dec. 30, 1980) (collecting authorities). Prior to the 1960's, the decisions of courts in this country clearly evinced the position that a State could impliedly abandon title in its sunken warships. See, e.g., Baltimore, Crisfield & Onancock Line, Inc. v. United States, 140 F.2d 230, 234, 1944 AMC 87 (4th Cir. 1944) (United States battleship sunk as target practice in 1911); State ex rel. Bruton v. Flying "W" Enters., Inc., 160 S.E.2d 482, 1968 AMC 2125 (N.C. 1968) (Confederate blockade runners and other vessels); State by Ervin v. Massachusetts Co., 95 So. 2d 902, 903, 1962 AMC 1061 (Fla. 1956), cert. denied, 355 U.S. 881 (1957) (United States battleship sunk as target practice in 1922, found in 1952); Deklyn v. Davis, 1 Hopk. Ch. 154 (N.Y. 1824) (British frigate sunk in 1781 or 1782, found 30 years later).

heritage which has been submerged underwater for less than 100 years”).

This provision leads to some interesting problems.

First, it creates an unusual effect under the laws of finds and salvage. Article 1(2) creates at least a 50 year window in which a wreck is deemed abandoned (it could be after 25 years under art. 1, paragraph 2 (a)), but it is not covered by the UNESCO Draft until it has been submerged for at least 100 years. This could result in circumstances in which a finder or a salvor of such a wreck would gain title to the item due to the true owner’s legal inability to maintain title after the 50 year period has lapsed.

Second, the caveat allowing a State Party to the UNESCO Draft to alter the requirements and, in effect, to apply the Convention to “underwater cultural heritage” that has been submerged for less than 100 years (presumably a State could do away with this provision entirely) could lead to inconsistent application of the Convention and conflicts with owners’ rights over their property. The intent of article 2 is simply unclear. By countenancing a patch-work of national regulations, the goal of uniformity sought by the UNESCO Draft will certainly be destroyed. But this uniformity concern aside, the real objection to these provisions is that, by concocting an expansive definition of abandonment of property lost at sea, they would effectuate an expropriation of private property in violation of international law.

It has been suggested that this problem with the UNESCO Draft can be simply cured by ensuring that the instrument speaks only to the regulatory authority that States can exercise over historic shipwrecks, and not to legislate as to title in those wrecks. But, as will be discussed presently, the UNESCO Draft commands that commercial recovery of a shipwreck and its contents—even by its owner—must be barred by signatory States. Operation of this rule would still effect a regulatory taking or “creeping expropriation” of property in violation of relevant international law principles. So it is essential that the UNESCO Draft properly define abandonment consistent with the general maritime law, and exclude from its application underwater cultural property that has not been abandoned.

C. An Over-Extension of Coastal State Jurisdiction

The drafters of the UNESCO instrument supposedly made one critical change from the earlier draft prepared by the ILA. The ILA Draft proposed the creation of a new form of coastal State competence in the law of the sea:


a cultural heritage zone. As defined in article 1, paragraph 3 of the ILA Draft, the "cultural heritage zone" means all the area beyond the territorial sea of the State up to the outer limit of its continental shelf as defined in accordance with relevant rules and principles of international law.\textsuperscript{37} Article 5 outlined the establishment of the "cultural heritage zone" in which "the State Party shall have jurisdiction over activities affecting the underwater cultural heritage."\textsuperscript{38}

The participants at the Third United Nations Law of the Sea Conference ("UNCLOS III") will immediately realize that such a novel maritime zone is not in accordance with the relevant rules and principles of international law. This expansion of coastal State jurisdiction is certainly beyond the scope of the Exclusive Economic Zone ("EEZ") and Continental Shelf regimes. The provisions establishing the "cultural heritage zone" seek to alter those compromises reached in article 303 of the LOSC.\textsuperscript{39}

While some States at UNCLOS III lobbied for complete coastal State control and authority over archaeological and historical objects found on their continental shelves, the United States and other nations resisted this proposal on account of a fear of upsetting the already delicate balance of interests on the continental shelf. The compromise arrived at allows coastal States to completely regulate the removal of "underwater cultural heritage" in their territorial seas and contiguous zones, but no farther.

The ILA Draft, then, sought to modify the LOSC in a few material respects. It allowed the creation of a "cultural heritage zone" which was coextensive with the entire breadth of coastal State authority out to 200 nautical miles (or beyond). However, within that zone, the coastal State must observe the international guidelines for the proper removal and recovery of archaeological and historical objects as outlined in the Charter for the Protection and Management of the Underwater Cultural Heritage ("the Charter") prepared by the International Council for Monuments and Sites ("ICOMOS").\textsuperscript{40}

This aspect of the ILA Draft was the subject of concerted attack by a

\textsuperscript{37}O'Keefe & Nafziger, supra note 3, at 405.
\textsuperscript{38}Id. at 409. See also A. Strati, The Protection of Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea 359 (1995).
\textsuperscript{39}The LOSC provided that the absolute limit of coastal State authority over "archaeological and historical objects found at sea" was 24 nautical miles, the outer limit of the contiguous zone, established under article 33 of the Convention. Article 303, paragraph 2, codifies this understanding:

In order to control traffic in such objects [archaeological and historic objects found at sea], the coastal State may, in applying article 33 [on Contiguous Zones], presume that their removal from the sea-bed in the zone referred to in that article without its approval would result in an infringement of its laws.

LOSCh, supra note 19, art. 303, para. 2.
\textsuperscript{40}See ILA Draft, supra note 3, art. 5, para. 2.
number of maritime powers. The governments of the United States and United Kingdom went on official record with their opposition to the ILA Draft and its provisions of a cultural heritage zone and enhanced coastal State authority over historic shipwreck, premises which "were expressly considered and rejected at the Third UN Conference on the Law of the Sea." These sentiments were echoed by other countries at UNESCO meetings leading up to the preparation of the UNESCO Draft.

Despite this opposition to the creation of a cultural heritage zone, and UNESCO's disavowal that it intended such an innovation, the UNESCO Draft achieves precisely that same result, although by means calculated to obscure that intent. But the language of article 5 of the UNESCO Draft seems clear enough: coastal States are given the power to regulate activities affecting underwater cultural heritage within their EEZs and on their continental shelves. Indeed, the UNESCO Draft requires that coastal States regulate historic shipwreck recovery in such a way as to comply with the operative provisions of the ICOMOS Charter, a number of which expressly prohibit the commercial exploration or recovery of those shipwrecks. States Parties are given the right to issue permits for activities affecting underwater cultural heritage in their EEZs and continental shelves, and are required to punish "all breaches of the terms" of those permits.

Lastly, article 5 allows that a coastal State "may deny authorization for the conduct of activities affecting underwater cultural heritage having the effect of unjustifiably interfering with the exploration or exploitation of their

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41 See J. Roach & R. Smith, United States Responses to Excessive Maritime Claims 477 (2d ed. 1996) (both authors are attorneys with the State Department, and the volume originally appeared as a publication of the Naval War College's International Law Studies series). See also Zander & Varmer, Closing the Gaps in Domestic and International Law: Achieving Comprehensive Protection of Submerged Resources, 1 Common Ground 60, 68 (Fall/Winter 1996).

42 See commentary to UNESCO Draft art. 1 (indicating that Greece, Germany, Italy, the Netherlands, the Republic of Korea, Tunisia, and the United Kingdom opposed the concept of a cultural heritage zone).


44 See UNESCO Draft, art. 5, para. 2 (“States Parties may regulate and authorize all activities affecting underwater cultural heritage in the exclusive economic zone and on the continental shelf, in accordance with this Convention and other rules of international law.”).

45 See id. art. 5, para. 3 (“In authorizing such activities [occurring within the States' EEZ or continental shelf], States Parties shall require compliance, at a minimum, with the operative provisions of the [ICOMOS] Charter, in particular taking into account the needs of conservation and research, including the need for re-assembly of a dispersed collection, as well as public access, exhibition and education.”). The ICOMOS Charter is incorporated into the UNESCO Draft by the terms of article 24.

46 See id. art. 5, para. 5. See also UNESCO Draft arts. 8 (Permits), 10 (Other Sanctions).
This is an amendment to article 246 of the LOSC, which governs the conditions in which the permission of a coastal State must be secured before nationals of another State may conduct marine scientific research ("MSR") in that coastal State's EEZ or continental shelf. Article 246 provides that a coastal State may only deny permission for MSR if the research has an application to the exploitation of natural resources, and, obviously, shipwrecks are not a natural resource of the EEZ or continental shelf. Article 5(4) of the UNESCO Draft would upset that accommodation by allowing coastal States to conclusively deny requests for historic shipwreck exploration as a corollary to their right to regulate MSR. Not only does that increase coastal State competences in the EEZ and continental shelf in a way that is contrary to the settled international law on this subject, it also would have the effect of allowing coastal States to veto many meritorious exploration projects.

In all events, the UNESCO drafters regarded article 5 as a "core provision" of their project. And although no cultural heritage zone is created, the drafters indicate that their provision "is the first time that a Convention specifies the right of coastal States to establish their jurisdiction over underwater cultural heritage on their continental shelf and exclusive economic zone." The UNESCO Draft simply creates a cultural heritage zone in another guise, one that just as effectively promotes the arrogation and expansion of coastal State claims to offshore areas.

D. Abolition of Commercial Salvage of Historic Shipwrecks

If the UNESCO Draft suffered merely from definitional missteps and a too-great willingness to alter established international law, I suppose it could be excused and amended in due course. But the fundamental failing of the Draft is its embrace, as a first principle, that historic shipwrecks as underwater cultural heritage should be managed in only one way (in situ preservation), exclusively by the standards of one epistemic community (nautical archaeologists), without regard for the interests of other, multiple

47Id. art. 5, para. 4.

48It should be noted that when the United States proclaimed its EEZ, it specifically disclaimed any interest in regulating any form of MSR. See Reagan Proclamation on the Establishment of an Exclusive Economic Zone, 48 Fed. Reg. 10,605 (Mar. 10, 1983).

In article 3(3) of the counter-proposal discussed later in this article, historic shipwrecks are disallowed as a "natural resource," for which article 246 of the LOSC would permit coastal States to have complete discretion in refusing a permit for MSR.

49UNESCO Draft, art. 5, commentary ¶ 1. The other "core provision" is article 7, which requires that States regulate the activities of their nationals and vessels so as to ensure compliance with the ICOMOS Charter.

50Id.
users of shipwrecks. The UNESCO Draft, like its ILA predecessor, has concluded that commercial incentives in the exploration and recovery of historic shipwrecks are evil and should be outlawed.

UNESCO has gone on record as being implacably hostile to the interests of private salvors. One recent official UNESCO document criticized the LOSC’s reservation of rights under “the law of salvage or other rules of admiralty” as “protect[ing] the commercial exploitation of historic shipwrecks, leading to the destruction of archaeological resources without their scientific examination.” A Group of Experts assembled by UNESCO to consider the contours of a Draft Convention categorically concluded that “the recovery of archaeological material should not be governed by its commercial value.” One expert at the meeting said that “the concept of being financially rewarded was fundamentally antithetical to archaeological and scientific research.” The experts ultimately agreed that “incentives to salvage should not be included in the new international provisions on the protection of underwater cultural heritage.” UNESCO has thus committed itself to the same anti-competitive, State-regulatory approach embraced by the ILA Draft, as well as largely endorsing the expansion of coastal State jurisdiction offshore. As just one example, a recent UNESCO publication characterizes historic salvors as “pillage[rs],” who are profiting from a less than watertight legal situation [as] they remove valuable artifacts and destroy evidence essential for the archaeologist to uncover history. . . . UNESCO has been called-upon by the archaeological and legal communities along with numerous Member States to help rectify this situation by preparing an international convention for the protection of this vast underwater treasure trove.

The abolition of commercial exploration and recovery of historic shipwrecks in the UNESCO Draft is accomplished in a devious and back-handed way. In contrast, Article 4 of the ILA Draft flatly directs that “[u]nderwater cultural heritage shall not be subject to the law of salvage.” The stated

51 LOSC, supra note 19, art. 303, para. 3.
52 UNESCO Doc. 146 EX/27, at 3, ¶ 17 (Mar. 23, 1995). The Feasibility Study concluded that article 303 of the LOSC was, “according to archaeologists and lawyers concerned with the preservation of the underwater cultural heritage, . . . insufficient for the protection of the cultural heritage.” Id. at 3, ¶ 14. The explicit reservation, in article 303(3) for the admiralty law governing salvage and finds, was characterized by UNESCO as a “serious problem.” Id. ¶ 15.
54 Id.
55 Id. at 13, ¶ 52.
56 Williams, Underwater Heritage, A Treasure Trove to Protect, UNESCO Sources 7 (Feb. 1997) (No. 87).
57 O’Keefe & Nafziger, supra note 3, at 408.
rationale for this provision is that historic shipwrecks are not in “marine peril.” But, more honestly, the ILA Draft makes express its assumptions about historic salvage. "The major problem," the ILA commentary notes, "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." Even more breath-taking is the ILA Draft’s ad hominem attack on the entire historic salvage community, as "looters" and "destroyers of our past." The UNESCO Draft’s abolition of commercial exploration and recovery of underwater cultural heritage can be seen in two different sets of provisions. The first set includes articles 5(3) and 7(1)—core provisions of the Draft—which, respectively, require coastal States to “require compliance, at a minimum, with the operative provisions of the [ICOMOS] Charter” and other States Parties to regulate the activities of their nationals if they are conducted “in a manner inconsistent with the principles of the Charter.” The ICOMOS Charter contains two explicit bars on commercial exploration and recovery of shipwrecks. The Charter provides categorically that “Underwater cultural heritage is not to be traded as items of commercial value.” Moreover, “[p]roject funding must not require the sale of underwater cultural heritage..." I think it is certainly safe to assume that these two clauses would be considered “operative provisions” or a “principle” of the Charter, and thus would be binding on States Parties.

The second provision in the UNESCO Draft which effects an abolition of commercial shipwreck recovery is article 12(2): “States Parties shall provide for the non-application of any internal law or regulation having the effect of providing commercial incentives for the excavation and removal of underwater cultural heritage.” The commentary to this article makes clear that it is intended as an alternative to the ILA Draft’s express abolition of the application of the international maritime law of salvage and finds to historic shipwrecks. Moreover, the intent of this provision is to void any provision

58See infra note 72 and accompanying text. See also UNESCO Doc. 146 EX/27, at 6, ¶ 29–30 (Mar. 23, 1995) (questioning whether shipwrecks are in marine peril).
59O’Keefe & Nafziger, supra note 3, at 409 (commentary to art. 4).
60Id. at 414 (commentary to art. 14).
61UNESCO Draft, art. 5, para. 3.
62Id. art. 7, para. 1.
63ICOMOS Charter, art. 13 (Curation), ¶ 2.
64Id. art. 3 (Funding), ¶ 2.
65UNESCO Draft, art. 12, para. 2.
66See id. commentary ¶ 2 ("Following the omission of article 4 of the ILA draft on the exclusion of salvage law, this paragraph has been drafted to avoid the application of a national law to material brought ashore from outside the national jurisdiction where this would provide monetary incentives to excavate.

\[\text{April 1999} \quad \text{Critique} \quad 343\]
of maritime law that provide monetary incentives to excavate or remove cultural property.67

The UNESCO Draft seeks to amend the LOSC's application of "the law of salvage or other rules of admiralty" to historic shipwreck recovery.68 It is also nothing less than a categoric prohibition—if not outlawry—of the practice of historic salvage. These provisions evince a strong, and perhaps even irrational, antipathy towards international maritime law and the admiralty courts that administer it. It is an enmity that is entirely undeserved. Despite its historic origins, the law of salvage has readily evolved to meet modern concerns regarding historic preservation of shipwrecks. Because the salvor essentially acts as an agent of the court in recovering the wreck and bringing it into the jurisdiction of the court, judges have broad discretion both in the initial selection and appointment of the salvor, and later, in deciding the amount of the salvor's award. The federal courts in the United States have exercised that discretion to ensure that the historical values of antiquated shipwrecks are preserved in the salvage process.

It has sometimes been suggested that ancient and modern salvage laws have developed over centuries without any regard for archaeology. The underlying policy thrust of the assertion is that the hoary admiralty law of salvage is totally unsuited to the "modern" problem of managing historic shipwrecks as a cultural resource. The policy alternative advocated by many historic preservationists is that salvage law be replaced by further governmental regulation of shipwrecks, regulation that will uniquely privilege decision-making by nautical archaeologists. The clear message is that shipwrecks should, under no circumstances, be considered an economic resource, as lost property to be restored to the "stream of commerce."

Indeed, it has been suggested that wreck salvage has never been part of admiralty jurisdiction. This is utterly fallacious. All salvage of property lost at sea implicates maritime commerce.69 And the power to regulate such activities was specifically reserved by Congress in the Submerged Lands Act.70 Courts have consistently held that salvage of wrecked vessels is

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67See id. ("[O]ther provisions of salvage law would need to be examined to ensure they are not inconsistent with the regime established by the Charter.").
68LOSC, supra note 19, art. 303, para. 3.
70See 43 U.S.C. § 1314(a) (expressly retaining for the United States "all its ... powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce [and] navigation... ").
within the scope of traditional admiralty jurisdiction.\textsuperscript{71} Wrecked vessels are still subject to marine peril, under the traditional rule of The Sabine.\textsuperscript{72}

It might be helpful to the debate to realize that the admiralty law of salvage is not as rigid or as single-focused as has been supposed. At least as applied in admiralty courts in the United States, historic preservation values have been merged with "traditional" salvage law. It has become the consistent practice of United States courts that before granting exclusive salvage rights over an historic shipwreck to a commercial recovery outfit, archaeological protocols be observed concerning the wreck site, in order to allow for future study and research about the wreck and its contents.

For example, in \textit{MDM Salvage, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel},\textsuperscript{73} the District Court denied the applications of two different sets of commercial salvors to recover property from a Spanish galleon, noting that neither firm had attempted to preserve the "archaeological integrity" of the wreck. The court noted that:

Archaeological preservation, on-site photography, and the marking of sites are particularly important . . . as the public interest is compelling in circumstances in which a treasure ship, constituting a window in time provides a unique opportunity to create a historical record of an earlier era. These factors constitute a significant element of entitlement to be considered when exclusive salvage rights are sought.\textsuperscript{74}

Indeed, United States courts have made express that the potential salvor's fidelity to archaeological values is among the elements to be considered in granting a salvage award.\textsuperscript{75} This is not to say, of course, that commercial salvors have been held to exactly the same technical standards as adopted by nautical archaeologists. Under special circumstances, United States courts have allowed for some modest deviations from these protocols.\textsuperscript{76}


\textsuperscript{74}Id. at 310. See also Cobb Coin Co. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 525 F. Supp. 186, 208, 1983 AMC 966 (S.D. Fla. 1981).


\textsuperscript{76}See \textit{Moyer}, 836 F. Supp. at 1107 (where the court noted that because the ocean liner was of "decidedly modern vintage, [t]here exist extensive photographs, deck plans, models, and other documentation"); Platoro Ltd. v. Unidentified Remains of a Vessel, 518 F. Supp. 816, 822 (W.D. Tex. 1981).
III
AN INCENTIVE REGIME FOR HISTORIC SHIPWRECKS: A MODEST COUNTER-PROPOSAL

So the UNESCO Draft’s abolition of commercial incentives for the exploration and recovery of historic shipwrecks is a totally illogical and extreme reaction to the problems presented in historic shipwreck management and the conservation of the underwater cultural heritage. But if the UNESCO initiative is misguided (for all of the reasons indicated above), what would be the contours of an appropriate regime? In collaboration with the Professional Shipwreck Explorers Association (“ProSEA”), I have drafted an International Convention on the Exploration and Protection of Submerged Historic Wrecks (“ProSEA Draft”). Although I hope most (if not all) of the provisions of this counter-draft are self-explanatory, I thought it useful to set forth here some of the more salient features of this proposal.

A. Scope of the ProSEA Draft

The counter-proposal applies to “historic wrecks,” and thus chooses not to confront the nettlesome definitional problems associated with the use of the term “underwater cultural heritage.” The reason this choice seemed sensible is that the ProSEA Draft, by its own terms, does not apply to “any historic wreck located within a Contracting State’s internal waters, archipelagic waters, territorial sea, or, if the relevant Contracting State has adopted regulations pursuant to articles 33 and 303(2) of the 1982 U.N. Convention on the Law of the Sea, its contiguous zone.” In short, the ProSEA Draft applies only to ocean areas beyond 24 nautical miles from shore, or, for those coastal States that have not enacted underwater cultural heritage areas for their contiguous zones, beyond that States’ territorial sea (usually 12 nautical miles). With that limitation, it was believed that the only cultural heritage to be regulated by a treaty instrument would be historic wrecks. The ProSEA Draft thus concentrates on the status of historic shipwrecks located in coastal States’ EEZs, continental shelves, and then beyond on the high seas.

The counter-proposal defines historic wrecks as “any vessel, ship, airplane or other man-made mode of transportation lost at sea no later than one hundred (100) years prior to the commencement of exploration or

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77 The text of the ProSEA Draft is available from the author (lawdjb@law.emory.edu).
78 ProSEA Draft, art. 3, para. 1.
79 One provision of the ProSEA Draft, article 19, clarifies that coastal States are obliged to promptly release any arrested or detained vessels engaged in the exploration or recovery of historic wrecks. Failure to do so would subject the coastal State to proceedings under article 292 of the LOSC before the International Tribunal for the Law of the Sea.
recovery operations." For the sake of clarity, a "wreck" is also defined as "any form of vessel or water-borne craft, aircraft, or other man-made mode of transportation that has been lost or sunk and is wholly or partially submerged under water." The ProSEA Draft makes continuous reference to "objects from (or associated with) historic wrecks," and these are defined to include "the hull or shell of the wreck, any part thereof, its cargo or contents, as well as its archaeological, historic, cultural and natural context." Finally, the ProSEA Draft attempts to regulate historic wrecks and wreck sites, and a wreck site is defined to include "areas in which objects from (or associated with) a wreck are found, including secondary archaeological deposits, including a safety zone not exceeding a distance of 200 meters as measured from the outermost archaeological deposit." This provision mirrors those in the LOSC which create 500 meter safety zones around offshore and marine scientific installations.

The ProSEA Draft makes one other exclusion from its scope, and it is a significant one. Article 4 creates a narrow and finely-wrought exception for "State-owned vessels." I have already noted that there is substantial controversy surrounding the question of whether warships (or, for that matter, all vessels owned and operated by a State) should be subject to a heightened standard of explicit abandonment. And although I doubt whether State vessels sunk before this century should be subject to this rule, it is probably necessary to confront this issue. The approach taken in article 4 is to precisely delimit the class of State-owned vessels which are covered by a rule of express abandonment. That was accomplished by requiring that, first, the vessel be a warship (as defined in article 29 of the LOSC) or a vessel owned and operated by a State which used it, at the time of its loss at sea, for exclusively non-commercial purposes. The second restriction is that such a vessel was entitled, at the time of its loss at sea, to sovereign immunity under then generally recognized principles of international law. This would require the relevant tribunal to determine the intertemporal law that applied to the ship at the time of its sinking; it would be insufficient

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80Id. art. 2, para. 6.
81Id. art. 2, para. 12.
82Id. art. 2, para. 9.
83Id. art. 2, para. 13.
84See LOSC, supra note 19, arts. 60, para. 5 & 260.
85See supra notes 32-33 and accompanying text.
86That provision requires that a warship (1) bear the external markings of such ships of its nationality, (2) be under the command of an officer duly commissioned by the government of that State and whose name appears on the appropriate service list or its equivalent, and, (3) be manned by a crew under regular armed forces discipline. See LOSC, supra note 19, art. 29.
87ProSEA Draft, art. 4, para. 1(b).
88For more on this concept, see Island of Palmas Case (U.S. v. Neth.), 2 Rep. Int'l Arb. Awards 829.
for a State to assert that under current theories of sovereign immunity, the vessel should be subject to a rule of express abandonment.

B. Application of the 1989 Salvage Convention

Article 1 of the ProSEA Draft contains the provision that the "Exploration of Historic Wrecks . . . and recovery of objects from (or associated with) such wrecks, shall be governed by the terms of the 1989 International Convention on Salvage, except to the extent that those terms are modified in this instrument."\(^8\) This reflects an important legal principle: that many of the general maritime law's rules of salvage are applicable to the exploration and recovery of historic shipwrecks. It appears to make more sense to use the 1989 Salvage Convention as the starting-point for the creation of a legal regime—particularly one that emphasizes incentive and responsibility—rather than cobbling together disparate rules drawn from other sources.

In 1989, the International Maritime Organization ("IMO"), the United Nations specialized agency charged with the regulation of shipping, concluded an International Convention on Salvage.\(^9\) The 1989 Salvage Convention replaced the 1910 Brussels Convention on Salvage, which did not contain any provisions on historic shipwrecks. It has been argued that the 1989 Salvage Convention impliedly excluded historic shipwrecks from its application.\(^9\) The Convention defines "salvage operations" as "any act or activity to assist a vessel or any other property in danger in navigable waters or in any waters whatsoever."\(^9\) The argument would run that because shipwrecks are not "in danger," they would not qualify for salvage. But, as already mentioned,\(^9\) shipwrecks are often characterized as being in marine peril under the general maritime law, and thus do qualify for salvage.\(^9\) So this purported exclusion of shipwreck salvage from the 1989 Salvage Convention appears doubtful, or, at best, ineffective.\(^9\)

\(^8\) ProSEA Draft, art. 1.
\(^9\) See supra note 72 and accompanying text.
\(^9\) This matter was discussed extensively in the IMO Legal Committee deliberation on the 1989 Salvage Convention. See IMO Docs. LEG/56/4/5; LEG 56/WP.14.
\(^9\) See also UNESCO Doc. 146 EX/27, at 3, ¶ 19 (Mar. 23, 1993) (incorrectly suggesting that French
More pertinently, the 1989 Salvage Convention allows a State, upon ratification, to make a reservation “not to apply the provisions of the Convention . . . when the property involved is maritime cultural property of prehistoric, archeological or historic interest and is situated on the seabed.” This obviously means that the 1989 Convention would, in the absence of a Contracting State making a reservation, apply to salvage of historic shipwrecks. Upon its ratification, the United States declined to reserve against the Convention’s application to historic shipwrecks. As of 1996, only eight States had made the necessary reservation regarding the non-applicability of the Convention to historic salvage. The Convention entered into force on July 14, 1996, and as of January 1998 has 25 parties representing over a quarter of the world’s ocean-going shipping tonnage.

As of this writing, it is uncertain whether the 1989 Salvage Convention would, on its own authority, have any impact on the recovery of artifacts from historic shipwrecks. Arguably the 1989 Convention has no bearing on the question of coastal State authority to regulate shipwreck recovery, that matter having been presumably settled in the LOSC. Nevertheless, the provisions of the 1989 Salvage Convention lend credence to the principle that historic salvage is not to be presumptively excluded from the ambit of salvage operations and that the general maritime law of salvage continues to extend to recovery of historic wrecks.

By incorporating the terms of the 1989 Salvage Convention, the counter-proposal attempts to clearly delineate that commercial incentives should apply to the exploration and recovery of historic shipwrecks. Indeed, it simply makes no sense (as the UNESCO Draft purports to do) to exclude the maritime law doctrines of salvage and finds from this sector. As will be discussed further below, the ProSEA Draft builds from the provisions of the 1989 Salvage Convention by affirmatively requiring that salvors or finders of historic shipwrecks observe certain archaeological and historic preserva-
tion protocols as a condition for a maritime tribunal to give a salvage award, to grant title in the wreck, or to enjoin others from interfering with that party’s operations.

C. Salvors v. Finders of Historic Wrecks: The Key Test of Abandonment

The ProSEA Draft grasps the nettle of distinguishing between wrecked vessels and cargoes that have been abandoned and those that have not. I simply do not believe that any useful or credible treaty instrument on this subject can avoid that subject. From the question of title comes the determination of ownership. While certain experts have suggested that the question of title can be divorced from a grant to coastal States of extensive regulatory competence over shipwrecks, I believe this is a grievous mistake. It will be a license to coastal States to regulate an owner’s access to its property, and thus effectuate a creeping expropriation or regulatory taking in violation of international law.

Article 11 of the ProSEA Draft provides a definition of abandonment. This provision recognizes that abandonment has to be determined not only for the vessel, but also for the cargo.\(^\text{100}\) Article 11 recognizes that property involuntarily lost at sea can be abandoned in two fashions: by express abandonment and by implied abandonment. Express abandonment is fairly straightforward, requiring that a “wreck’s original owner (and its successors in interest), or the original owner’s assignees or subrogees (and their successors in interest) have expressly renounced their rights and interests in the wreck.”\(^\text{101}\) This provision acknowledges that a wreck’s original owner may have successors in interest. Moreover, that original owner or successor may have assigned or subrogated (via an insurance policy) its rights to another party. This clause requires that a “chain of title” be constructed to establish whether a party has expressly renounced its rights in a wreck.

The far more difficult problem concerns implied abandonment. The ProSEA Draft would codify the general maritime law rule, mentioned above,\(^\text{102}\) that looks to whether an owner knew (or should have known) the location of a wreck and had the technology to explore or recover it, but yet did not do so within a reasonable time (10 years in the Draft article).\(^\text{103}\) I believe this strikes the right balance between owners of historic wrecks and other parties (including sovereigns) that would seek rights to explore and recover them. It does require that owners be vigilant in their rights, and to

\(^\text{100}\)See ProSEA Draft, art. 11, para. 2.
\(^\text{101}\)Id. art. 11, para. 1(a).
\(^\text{102}\)See supra notes 26–29 and accompanying text.
\(^\text{103}\)See ProSEA Draft, art. 11, para. 1(b).
act promptly when they learn the location of a wreck, or (in the more likely scenario) when the technical capacity to find, explore, and recover the wreck becomes available.

The distinction between abandoned and unabandoned historic wrecks is crucial to the ProSEA Draft. If an historic wreck is considered unabandoned, it will be governed by the provisions of Part II on Exploration of Historic Wrecks. Explorers of historic wrecks do not, obviously, have ownership rights in the wrecks. Instead, they can be granted salvage rewards by tribunals of competent jurisdiction applying maritime law, on conditions that will be discussed further below. An explorer of an historic wreck may enforce its salvage rights against owners through maritime liens.\textsuperscript{104}

In contrast, finders of historic wrecks which have been abandoned may seek “a declaration of title in objects recovered from a wreck.”\textsuperscript{105} In addition, there are a host of “other rights” or forms of relief that both explorers and finders may seek from “a maritime or admiralty court or any other tribunal of competent jurisdiction.”\textsuperscript{106} Among these are: (1) the sole right to engage in exploration of a wreck and to exclude all others from a wreck site, (2) the exclusive right to recover objects from a historic wreck without interference, and, (3) protection of intellectual property rights derived from the exploration of a wreck site and objects recovered therefrom.\textsuperscript{107} As will be discussed presently, a finders’ or explorers’ rights will often be conditioned on the nautical archaeological and historic preservation undertakings it is prepared to make.

Explorers and finders may seek these rights and relief in courts of competent jurisdiction. These are defined in article 13 of the ProSEA Draft. If the tribunal is located in a signatory State where the finder or explorer is a citizen, national, resident, domiciliary, or is incorporated or has its principal place of business, it will be deemed competent to issue the sorts of decrees just described.\textsuperscript{108} Likewise, if a finder or explorer “accepts the jurisdiction of the court or tribunal and agrees to place all objects recovered from the wreck site within that court’s or tribunal’s jurisdiction,” it will be deemed competent.\textsuperscript{109} This is a form of \textit{in rem} jurisdiction applied by many maritime tribunals around the world. If a decree granting ownership rights or other forms of relief is made by a court of competent jurisdiction, such decrees are fully enforceable in all other States Party to the Convention.\textsuperscript{110}

\textsuperscript{104}See id. art. 9, para. 1.
\textsuperscript{105}See id. art. 13, para. 1(c).
\textsuperscript{106}Id. art. 13, para. 1.
\textsuperscript{107}See id. art. 13, paras. 1(a), 1(b) & 1(d).
\textsuperscript{108}See id. art. 13, para. 3(a).
\textsuperscript{109}See id. art. 13, para. 3(b).
\textsuperscript{110}See id. art. 14.
In case of disputes arising under the Convention, they will be resolved by arbitration. If no arbitral tribunal has been constituted within six months of the initiation of the dispute, it may be referred either to the International Court of Justice or the new International Tribunal for the Law of the Sea.111

D. Duties of Historic Shipwreck Explorers and Finders

In exchange for receiving rights or remedies from courts applying the Convention, shipwreck explorers and finders have a number of duties. These are articulated in article 6 of the counter-proposal. The idea here is that courts will be in the best position to enforce these duties, as a condition for the explorer or finder to receive a decree binding and enforceable under the Convention. This is the essence of the incentive regime I have discussed.

The duties under article 6 are notable. In many respects they emulate the guidelines suggested in the ICOMOS Charter. In some regards, they go even further in promoting the archaeological integrity of the wreck and historic preservation values. But they do so in harmony with commercial incentives to explore historic wrecks and to recover items therefrom. As a general matter, shipwreck explorers and finders are “obliged to take all reasonable and practicable measures to encourage the protection and management of historic wreck sites and objects recovered therefrom.”112 This general obligation is supplemented by a host of specific duties, which are presented in article 6 in the rough chronological order that a shipwreck exploration and recovery operations would proceed.

In the first general phase of work, explorers and finders are under a duty to plan the exploration and recovery,113 and to engage the services of a qualified project archaeologist.114 One of the most important decisions to be made at this phase of the work is to determine whether in situ preservation of the wreck site is the most appropriate utilization.115 If this option is chosen, recovery of artifacts or objects from the site will be precluded.

In the next phase of the work, the emphasis of article 6 is on meticulous record-keeping of archaeologically significant data. This includes “mapping of the wreck site ... including recording the spatial relationships among objects, vessel parts and bottom features, whether recovered or left in place.”116 Moreover, the explorer or finder must “record[] descriptive and locational data on all objects and artifacts associated with the wreck which

111 See id. art. 18.
112 See id. art. 6.
113 See id. art. 6, para. 2.
114 See id. art. 6, paras. 3 & 4. For a definition of this term, see id. art. 1, para. 10.
115 See id. art. 6, para. 1.
116 See id. art. 6, para. 5.
are recovered from, or observed on, the wreck site and its debris field, in accordance with accepted contemporary archaeological recording standards."  

The next phase of the work concerns the objects recovered from a wreck site. Article 6 imposes duties to "stabiliz[e] and conserv[e]... all objects recovered from a wreck site, so as to minimize the loss of significant scientific, archaeological and historical data," and to "preserv[e], publi[sh] and disseminat[e]... field notes, maps, photographs, other primary recorded data and archival information about the wreck site and objects recovered therefrom, consistent with contemporary archaeological reporting standards."  

The last phase—and undoubtedly the most controversial— involves the disposition of the objects and artifacts recovered from historic wrecks. The key here is to require explorers and finders to take steps to ensure that important information about archaeologically significant artifacts is assembled prior to the dispersal of a collection, and to make possible later reference to that information. But for certain artifacts—those of irreplaceable archaeological value—explorers and finders are under a special duty to offer preferential rights of purchase to interested States. Such a purchase would be based on a fair market value appraisal.

I believe these provisions impose substantial duties on finders and explorers of shipwrecks. Combined with the possibility of receiving awards of title to objects recovered from historic wrecks, or other rights or relief, I think this will be a powerful form of incentive for archaeologically appropriate conduct. Just as important, though, these duties ensure that data on archaeologically significant objects is preserved, and that collections of truly unique artifacts will not be dispersed.

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117See id. art. 6, para. 6.
118See id. art. 6, para. 7.
119See id. art. 6, para. 8.
120This phrase is elsewhere defined as those artifacts “having unique and outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.” See id. art. 2, para. 2.
121See id. arts. 6, paras. 9(b), 9(c), 9(d) & 9(e).
122Defined at art. 2, para. 7, as “an artifact that provides archaeologically significant data or knowledge which cannot be obtained from any other source or through documentation, photography, molding, replication or other means of producing a facsimile of the artifact.”
123See id. art. 6, para. 9(a).
124This is “an estimate of the current Fair Market Value of the artifact or artifacts by a professional appraiser with experience appropriate to the specific type and age of the subject artifacts. Comparable sales, previous legitimate offers for the artifact(s) and any other information which can be readily relied upon for developing an accurate representation of the price which might be expected in an open market transaction between a willing buyer and willing seller should be considered by the appraiser.” See id. art. 2, para. 5.
IV
CONCLUSION: THE VOYAGE FROM HERE

The process of drafting any treaty instrument on managing historic wrecks will be a long and arduous one—assuming that UNESCO is sincere in its desire to fashion a treaty that will garner wide international acceptance. Regrettably, the first UNESCO Draft is a notable failure, for the reasons I have enunciated above. Unfortunately, there is so much wrong with the UNESCO Draft it is hard to imagine that selective revisions will cure these ailments. The UNESCO Draft’s failings are, at bottom, systemic and philosophical. To the extent that the UNESCO Draft panders to overweaning State regulation of historic shipwrecks, and, consequently, eschews an incentive regime for private salvors and finders, it is doomed to irrelevance.

Indeed, I would go further and say that the UNESCO Draft is totally antithetical to a pragmatic, multiple-use management of historic shipwrecks. The Draft ignores the interests of all but one community that might have a stake in this resource—professional nautical archaeologists under the sponsorship of coastal States. The UNESCO Draft ignores the rights of the fishing industry that has traditionally been the largest user (and destroyer) of wrecks as artificial reefs. It disregards the interests of sports and recreational divers and even the larger, but non-professional, archaeological community.

Such a treaty—like the original deep seabed mining regime of Part XI of the LOSC—will simply be unable to provide a reason for individuals to mobilize vast amounts of time, capital, and technology to locate, study, and recover underwater cultural heritage. And if there is no incentive given to individuals, it is highly doubtful whether governmental, educational, or charitable institutions will be able to mobilize those resources. The only real alternative, I think, is adopting some form of the ProSEA Draft counter-proposal.

Only time will tell if a draft project on historic shipwrecks will be a voyage that will find a safe harbor, or, like the subject it purports to govern, will be lost at sea.