

**HISTORIC SALVORS, MARINE ARCHAEOLOGISTS,
AND THE UNESCO DRAFT CONVENTION
ON UNDERWATER CULTURAL HERITAGE**

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I. INTRODUCTION

The last 25 to 30 years have seen a dramatic increase in the discovery of sunken shipwrecks and the recovery of related artifacts. Historic wrecks from Phoenician Galleys to the SS Titanic have been located and explored. Recovery of artifacts has ranged from the mundane (lumps of coal and chamber pots)¹ to the exotic (millions in gold coins² and gold bullion).³ This has occurred as a result of the development of ever-more sophisticated location and recovery techniques and tools. Locating such wrecks is now facilitated by the use of more sophisticated magnetometers, acoustic remote sensing instruments, such as side scan sonar and sub bottom profilers, and the amazingly accurate satellite Global Positioning System. When utilized with computers which control and monitor them and record their data, and incorporated into submersible vessels specifically designed for deep sea use, the devices have enabled scientists, archaeologists and salvors to locate wrecks like the Titanic, the Bismarck, the

¹ Susan Wels, *Titanic; Legacy of the World's Greatest Ocean Liner* 6,183 (1997).

² *Deep Sea Research v. California*, 883 F. supp. 1343 (N.D. Cal. 1995), *aff'd* 102 F. Supp. 379 (9th Cir.), *aff'd in part and vacated and remanded*, 118 S. Ct. 1464 (1998) (the *Brother Jonathan* case).

³ *Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 1978 AMC 1404, 1406 (5th Cir. 1978) (the *Atocha* case); *Columbus America Discovery Group v. Atlantic Mutual Ins. Co.*, 974 F.2d 450, 458, 1992 AMC 2705 (4th Cir. 1992), *cert. denied*, 507 U.S. 1000 (1993) (the *Central America* case).

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Yorktown (sunk in the Pacific during the Battle of Midway) and wrecks from antiquity in the Mediterranean.⁴ In addition, the ability to recover artifacts from wrecks at extreme depths is enhanced by the use of sophisticated remote operated vehicles (ROV's), manned submersibles and autonomous underwater vehicles (AUV's).⁵ For instance, the Institute Francais de Recherche pour l'Exploitation les Mers (IFREMER) has developed a manned deep diving submersible, the Nautille, capable of working at depths of up to 20,000 feet. It has been with the use of this submersible, and its two robotic arms equipped with scooping, grasping, and vacuum suction devices, that recovery of such small, fragile artifacts as teacups, documents, and glassware have been accomplished from the wreck of the Titanic. And all this at a depth of some 2 ½ miles below the surface on the bottom of the Atlantic Ocean, working at pressures that "are comparable to those beneath the space shuttle's engine at blastoff" and which would crush a human's bones to dust.⁶ In all, some 5,000 artifacts have been carefully recovered from the Titanic.⁷ Further, advanced video and photographic equipment have produced amazingly clear

⁴ See Roderick Mather, Technology and the Search for Shipwrecks, 30 J.Mar.L.&Com. 175 (1999).

⁵ Id. at 183.

⁶ Wels, supra note 1, at 110, 162.

⁷ Id. at 132.

images of the wreck and the debris field.

This advance in technology means that more and more shipwrecks, both in shallow coastal water and in the deep sea, will be located and explored, and that attempts to salvage those wrecks will be more frequent. This development has heightened the interest of two separate groups. On the one hand salvors have now a far greater ability than ever before in history to recover artifacts from sunken vessels and profit thereby, either by selling them or exhibiting the artifacts as a collection to a fee-paying to the public. These entrepreneurs often invest large amounts of time, money and personal sacrifice in locating shipwrecks and recovering the treasures or artifacts they often hold.⁸ They rely on the maritime law of salvage and finds for their reward. Simplistically stated, if the wreck and its contents have been abandoned by former owners (and subrogated insurers), an admiralty court applying the law of finds can award title to the property to the party who recovered it. If the wreck and its contents have not been abandoned an admiralty court can award the salvor a maritime lien on property recovered under the maritime law of salvage.⁹ In either circumstance the salvor has the potential to profit from his efforts

⁸ It took years to locate the Atocha, at a cost of \$2 million and the loss of 4 lives, including the son and daughter-in-law of the expedition leader. The Atocha, supra note 3 at 1978 AMC 1406; Lawrence D. Bradley, Jr., U.S. Treasure Trove Law, Spring 2000, ABA Senior Lawyers Magazine 24. The location of the Central America took 2 years and an expenditure of \$10 million. Bradley, op. cit. supra at 26. Merely acquiring the equipment necessary to conduct operations at the Titanic wreck site this past August has cost nearly \$3.5 million. Comments of R.M.S. Titanic, Inc. on NOAA's Proposed Guidelines for Research, Exploration and Salvage of R.M.S. Titanic 5.

⁹ 2 Thomas J. Schoenbaum, Admiralty and Maritime Law 338 (2nd 1994). Different rules apply with respect to abandoned shipwrecks that are embedded in submerged lands, in coral formations, or listed on the National Registry of Historic Places and that are located within state territorial waters. In such cases the laws of salvage and of finds do not apply. Title is deemed to be

either by a monetary reward granted in pure salvage cases, by selling the property recovered, or, if the property is of sufficient public interest, exhibiting it to the public for a fee and profiting from books, videos or TV shows concerning the discovery.

held by the United States and transferred to the state in whose territorial water the shipwreck is located. Abandoned Shipwreck Act, 1987, 43 USC §§2101-2106. 2 Schoenbaum, *op. cit. supra* at 344-345. Any recovery activity in connection with such wrecks can only be accomplished under permit or license from the state involved.

On the other hand the archaeological community regards historic shipwrecks as individual time capsules that have both scientific and cultural importance in that they document part of mankind's common heritage. Archaeologists are not so interested in collecting artifacts per se as they are in conducting research that lead to the answers to historical questions that cannot be answered by documents or other sources. They are concerned that artifacts be properly conserved, kept together for future study, and decline to disturb sites if there is the risk of destroying the historical context, or if the future may lead to more sophisticated methods of excavation. The profit nature is regarded as irrelevant to the archaeologists. Research in the public and scientific interest is their goal. Indeed, the profit motive is deemed antithetical, as they feel it may drive out scientific methodology and believe the sale of artifacts precludes future study. Even the creation of books and movies is viewed by them with suspicion since they feel the need to attract public attention will lead to exalting the romantic explorer and trivializing the more important increase in knowledge.¹⁰ Their concern is that without some type of control on historic salvors, the scuba diving public, fishing interests, and others whose activities might disturb wreck sites, important archeological findings will be lost. Their training leads them to believe that the preferred method of preservation of historic or culturally significant wrecks is to prohibit recovery and to leave the wreck, and any artifacts, on the sea bottom (in situ preservation).¹¹

¹⁰ See D. K. Abbass, A Marine Archaeologist Looks at Treasure Salvage, 30 J.Mar.L.&Com. 261, 262-263 (1999).

¹¹ Ole Varmer, The Case Against the "Salvage" of the Cultural Heritage, 30 J. Mar. L. & Com 279, 288-289 (1999).

This feeling is so strong among this relatively small group¹² that any member of the “club” who lends his assistance to treasure salvors who they believe act from profit motives and “savage” sites, runs substantial career risks. One archaeologist has written:

There are sanctions against those who do not support professional archaeological values. Punishments against unethical behavior may be overt, such as the loss of listing as an acceptable consultant for contract work. More subtle, and perhaps more devastating, is the loss of professional reputation and the labeling of the transgressor as an outcast. To my knowledge, the most damaging mistake an archaeologist can make is to be involved with dreaded treasure hunters who savage sites for profit. This admittedly incendiary language represents the reality of the archaeological attitude.¹³

These differences in point of view, attitude and approach have, not surprisingly, led to a certain amount of distrust and enmity between various members of these two groups. Many archaeologists tend to regard treasure salvors as pirates and looters of cultural artifacts, whose only goal is the satisfaction of their own greed. They would say that the commercial salvors are people who know the price of everything and the value of nothing. By the same token many commercial historic salvors regard the archaeologists as impractical intellectuals, who know the value of everything and the cost of nothing. The salvors point out that without the time, energy, and great sums of money advanced by historic salvors in order to locate and recover wrecks, much of what archaeologists regard as important

¹² There are approximately 90 full-time underwater archeologists in the United States. Abbass, supra note 10, at 263.

¹³ Id. at 265.

artifacts would never be found at all.

Interestingly, a potential middle ground has been developing in the way the admiralty courts have been approaching the law of salvage and finds as it applies to historic shipwrecks. Admiralty courts have increasingly imposed on salvors the requirement that they proceed with the recovery of artifacts by using archeological standards of documentation and recovery. The requirements have been imposed as a condition of the granting of a salvage lien and recovery of a salvage award. An example of such a case is found in the salvage of the Titanic. Exclusive salvage rights to the Titanic have been granted by the admiralty court in Norfolk, Virginia, to a group of entrepreneurs who formed a corporation, RMS Titanic Inc. (RMST). But that grant was not without conditions. RMST is required to perform its recovery of artifacts in a manner that is consistent with archeological standards, has agreed not to sell such artifacts (except lumps of coal used by the vessel as fuel) and must report periodically to the court on its activities.¹⁴ In the case involving the wreck of the SS CENTRAL AMERICA which sunk on the high seas 160 miles east of Charleston, South Carolina, the United States court of Appeals for the Fourth Circuit took into account the immense skill of the salvor in protecting the historical and archaeological value of the wreck in considering the salvage award.¹⁵ These developments have not satisfied the

¹⁴ RMS Titanic Inc. v. The Wrecked and Abandoned Vessel Titanic, 924 F. Supp. 714, 1996 AMC 2481 (E.D. Va. 1996).

¹⁵ Columbus American Discovery Group v. Atlantic Mutual Ins. Co., *supra* note 3 at 468. See also Moyer v. Andrea Doria, 836 F.Supp. 1099, 1107, 1994 AMC 1021 (D.N.J. 1993); and The Brother Jonathan, *supra* note 2, at 883 F.Supp.1363, where the skill and commitment of the salvor were important factors in the granting of an injunction protecting the salvor's right to explore and recover artifacts. See also MDM Salvage Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 631 F. Supp. 308, 310-11, 1987 AMC 537 (S.D. Fla. 1986).

majority of the marine archeological community in the U.S. In addition , this community believes that a better solution would be an international one since many wrecks lie in international waters. It is against this background that a proposed draft convention on Underwater Cultural Heritage has been under discussion since 1998 by a group of governmental experts convened under the auspices of the United Nations Educational, Scientific and Cultural Organization (UNESCO) at its headquarters in Paris. The purpose of this group, who are mostly from the cultural missions of their governments, as opposed to the commercial or maritime side, is to draft a convention that would be embraced by all of the major nations of the world and would control the preservation of what is termed Underwater Cultural Heritage (UCH). The initial UNESCO Draft Convention (April 1998) was essentially based on a draft proposed by the International Law Association (ILA) at Buenos Aires in 1994. Interestingly, over the years that the ILA worked on its Draft, no input was sought from commercial or salvor interests but only from those concerned with historic preservation interests.¹⁶

It is the purpose of this paper to give a very brief summary of the current draft convention under consideration by UNESCO,¹⁷ and to consider the effect that such a draft convention would have on

¹⁶ David J. Bederman, The UNESCO Draft Convention on Underwater Cultural Heritage: A Critique and Counter-Proposal, 30 J. Mar. L.& Com. 331 (1999).

¹⁷ The draft discussed herein is the July 1999 Draft which is attached as an Appendix to this Article. This is the most recently published version of the Draft Convention as of August 1999 when this paper was prepared.

private and commercial property interests if adopted as a convention by this country.

II. BRIEF OUTLINE OF UNESCO DRAFT CONVENTION

The scope of the draft UNESCO Convention is broad. By its terms it would apply to all UCH (or, alternatively, UCH found at sea) as defined by the Convention, except for warships.¹⁸ The Convention defines UCH as all traces of human existence underwater for at least 100 years including, of course, wrecked vessels, but also including “sites, structures, buildings, artifacts, and human remains, aircraft and cargo, or any part thereof.”¹⁹ In addition, the definition provides that a State Party²⁰ could designate as UCH certain traces of human existence within its jurisdiction that is even less than 100 years old.²¹

¹⁸ UNESCO Draft Convention on the Protection of the Underwater Cultural Heritage, UNESCO Doc. CLT-96 CONF. 202/5 Rev. 2, Paris, July 1999 (hereafter “Draft Convention”), Art. 2.

¹⁹ Id. Art. 1, para. 1(a).

²⁰ A “State Party” means a State consenting to be bound by the UCH Convention and for which the Convention is in force. Id. Art. 1, para. 2.

²¹ Id. Art. 1, para. 1(b).

The general principal of the Draft Convention is stated to be the preservation of UCH for the benefit of mankind.²² This is accomplished by establishing Rules Concerning Activities Directed at Underwater Cultural Heritage which are attached as an annex to the Draft Convention.²³ The Convention gives State Parties the right, and duty, to impose these Annex Rules, and to control and/or exercise jurisdiction over UCH, in a number of ways depending upon where the UCH is located. First, it gives the State Parties the exclusive right to regulate and authorize activities directed at UCH and enforce the Annex Rules in “their internal waters, archipelagic waters and territorial sea.”²⁴ Second, it gives State Parties authority over UCH and the right to enforce the Annex Rules within their contiguous zone²⁵ as defined under the United Nations Convention on the Law of the Sea (UNCLOS).²⁶ Third, it gives State Parties rights with respect to UCH in their exclusive economic zone (EEZ)²⁷ and on their continental shelf. There are actually three alternatives for the jurisdictional provisions relating to the EEZ and continental shelf currently contained in the Draft Convention. Option 1 flatly gives State Parties the authority over UCH in their EEZ and on their continental shelf, and directs State Parties to require, at a

²² Id. Art. 3.

²³ Id. Annex Rules.

²⁴ Id. Art. 4.

²⁵ Id. Art. 4 bis.

²⁶ The contiguous zone is that zone contiguous to a coastal nation’s territorial sea out to 24 nautical miles from the base line from which the territorial sea is measured. United Nations convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/CONF. 62/122 (1982) reprinted in 21 I.L.M. 1261 (1982) (hereafter UNCLOS) Art. 33.

²⁷ The EEZ extends out to no more than 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. Id. Art. 57.

minimum, compliance with the Annex Rules.²⁸ Option 2 directs State Parties to exercise their sovereign power as conferred by UNCLOS in those areas to protect UCH in accordance with the Draft Convention.²⁹ Option 3 gives State Parties the right to prohibit any UCH activity in those areas that does not comply with the Annex Rules.³⁰ Finally, it gives State Parties the right to regulate UCH even beyond these waters by declaring that State Parties should take all reasonable measures to ensure that their nationals and vessels flying their flags refrain from engaging in any activity aimed at UCH in a manner inconsistent with the Annex Rules.³¹ The Draft Convention further directs that State Parties shall take measures to prohibit use of their territory, including their ports and offshore terminals, by anyone, even foreign nationals, engaging in UCH activity inconsistent with the Annex Rules.³² State Parties are given the right to seize UCH items that come into their countries that have been recovered without following the Annex Rules.³³ The Draft Convention contemplates that State Parties would have some sort of permit process.³⁴ Specifics of this authorization or permitting scheme are not set out in the Convention and presumably would be left to implementing legislation by State Parties. Notably, one proposed provision requires that State Parties shall provide for the non-application of any internal law or regulation that

²⁸ Draft Convention, Option 1, Art. 5.

²⁹ Id. Option 2, Art. 5.

³⁰ Id. Option 3, Art. 5.

³¹ Id. Option 1, Art. 7; Option 2, Art. 7; Option 3, Art. 6.

³² Id. Option 1, Art. 6; Option 2, Art. 6; Option 3, Art. 5, para 5(b).

³³ Id. Art. 9.

³⁴ Id. Art.8.

would have the effect of providing commercial incentives, or any other reward, for the excavation and removal of UCH.³⁵

³⁵ Id. Art. 12(2). The Chairman's note to this proposal is that it should be deleted as the gist of the provision is part of the Annex Rules and/or the statement of General Principles. Either way the intent and effect is to remove any commercial incentive from UCH activity.

As can be seen from the above it is the Annex Rules attached to the Convention that contain the most pertinent operative provisions. The Annex Rules are derived from the Charter for the Protection and Management of the Underwater Cultural heritage prepared by the International Council for Monuments and Sites (ICOMOS Charter).³⁶ Earlier drafts of the UNESCO convention specifically incorporated the terms of the ICOMOS Charter.³⁷ The current Annex Rules are based on, and in large measure replicate, the ICOMOS Charter.

Like the ICOMOS charter the Annex Rules effectively prohibit commercial activity or reward in connection with UCH. The Rules General Principle states that

“The commercial exploitation of underwater cultural heritage for trade or speculation or its irretrievable disposal is fundamentally incompatible with the protection and proper management of underwater cultural heritage. Underwater cultural heritage shall not be traded, sold, bought or

³⁶ ICOMOS is an international nonprofit organization that promotes conservation of the world’s historic and archaeologic sites. One historic salvor, RMS Titanic Inc., has described the ICOMOS Charter as a “purist archaeologists’ wish list” that only takes into account the archaeological community. It notes that interest groups such as salvors and sports divers were excluded from the development process of the Charter and that their interests were not taken into account by ICOMOS. Comments of R.M.S. Titanic, Inc., on NOAA’s Proposed Guidelines for Research, Exploitation and Salvage of R.M.S. Titanic.

³⁷ Bederman, supra note 16 at 339-340.

bartered as items of commercial value.’³⁸

³⁸ Draft Convention, Annex, para. 2.

The general principles further assert that UCH is best protected “through in situ preservation, which should be considered as the first option.”³⁹ In other words the presumption dictated by the Rules is that UCH should be left undisturbed on the ocean floor. The Rules also state that, to the extent possible, all artifacts should be curated and kept together and intact as a collection to provide for scientific and public access.⁴⁰ The Rules then go on to outline the necessary elements of any project design, funding requirements and archaeological standards to be used and followed in connection with any expedition, and the required documentation and reporting requirements associated therewith.

III. CONTROVERSIAL PROVISIONS OF DRAFT CONVENTION

From this very brief description of the basic provisions of the Draft Convention a number of controversial points can be identified. Basically the main controversial points fall into five separate categories: (1) the breadth of the definition of UCH; (2) the in situ presumption; (3) the abrogation of the law of salvage and finds; (4) the provisions granting jurisdiction and authority to State Parties which conflict with UNCLOS; and (5) the prohibition of commercial activity related to UCH.⁴¹

(1) **Definition**

³⁹ Id. Annex, para. 1.

⁴⁰ Id. Annex, para. 31.

⁴¹ This is not to suggest that there are not additional points of controversy, such as the exclusion of warships from the Convention. See Bederman, supra note 16 at 357, 347.

The definition of UCH contained in the Draft Convention is too broad. It makes no distinction between significant wrecks, such as a Greek trireme or a ship from the Spanish Armada on the one hand, and, on the other, a tin can, coke bottle, or lump of coal that have been on the bottom for 100 years. In addition, it gives State Parties the authority to declare objects that are even less than 100 years old to be UCH. Given the fact that serious controls are placed on UCH by the Draft Convention that affect commercial interests and property rights, the designation of UCH should be limited to wrecks or items that are of special or outstandingly significant scientific or archaeological interest. Not all wrecks are or will be archaeologically “significant.”⁴² This is particularly true going forward. While the documentation of mankind’s culture and existence prior to the 19th century may be limited, the same cannot be said for the last 100 years or so. Indeed in more modern times it seems that every detail of human existence and culture is written about, photographed, recorded or videotaped, and even curated in some form or other. It is hard to conceive that one hundred years from now the documentation of our daily life will be such a mystery that we would need to protect wrecks of modern vintage and mundane items of underwater debris.

(2) **In Situ Preservation**

The very first sentence of the Annex Rules concerning UCH activities states as follows:

⁴² See Moyer v. Andrea Doria, supra note 15, at 1994 AMC 1031, noting that the archaeological preservation aspect was less important in that case because, inter alia, there existed “extensive photographs, deck plans, models and other documentation” of the wreck.

“The protection of Underwater Cultural Heritage is best achieved through in situ preservation, which should be considered as the first option.”⁴³

⁴³ Draft Convention, Annex para. (I)(1).

This sentence establishes a presumption that the protection of UCH is best achieved by leaving it where it is, at the bottom of the ocean, and not recovering it from the ocean floor. The trouble with the quoted Rule, and the presumption that it creates, is that in some cases it is demonstrably false. For instance, scientists and others involved with the Titanic project have stated that the wreck of the Titanic and its artifacts are slowly disintegrating as a result of its underwater setting.⁴⁴ These scientists predict that in due course there will be nothing left of the wreck but a spot of rust colored sand.⁴⁵ The same is apparently true with respect to the Union warship U.S.S. Monitor, and the government has instituted efforts to recover that vessel. Very recently the news media have reported on the successful recovery of the Confederate submarine Hunley.

The point is not that leaving a wreck underwater will always lead to destruction of that wreck. What is happening to the Titanic is not necessarily true for all wrecks. Indeed, there is evidence that some wrecks are better preserved by leaving them in situ. What is wrong with the Rule contained in the Annex is the presumption that in situ preservation is always correct. That simply is not the case. Rather

⁴⁴ Canadian microbial ecologist D. Roy Cullimore, an expert on “rusticles”, has stated:
The ship is disintegrating because rusticles are sucking
more and more iron out of the steel.”

He predicts “the integrity, the structure of the ship will one day collapse.” Wels, supra note 1, at 152. In short the Titanic will one day be a pile of dust on the ocean floor, and the artifacts from it, if not recovered, will be “consumed by bacteria, corroded by salt and acids, and abraded by sediments....” Id. at 157.

⁴⁵ Similar comments were made by those who have photographed and dived on the wreck over a period of years at a public hearing held by the National Oceanic and Atmospheric Administration (NOAA) to consider the proposed Guidelines for Research, Exploration and Salvage of RMS Titanic on June 15, 2000. Recent dives on the wreck in August of this year confirm this. Telephone conference with Mark S. Davis, Esq., attorney for RMST on August 18, 2000.

than dictate a presumption in this regard, the Convention should leave the determination of the best method of preservation of UCH to a case-by-case analysis without any presumption that UCH is best protected by in situ preservation.

Of course there is one other aspect of in situ preservation which is puzzling to laymen. Presumably the protection of UCH is done not just to preserve objects for study by archaeologists, but also to make them available to access by the public for educational and instructional purposes. Leaving a wreck and its artifacts on the bottom of the ocean does not, of course, give access to that wreck or any of its artifacts to the general public unless the wreck is in reasonably shallow water. Even then the mass of the public are not accomplished scuba divers. That there is widespread interest among the public in these wrecks is evidenced by the significant public interest in the Titanic, and the exhibition of recovered Titanic artifacts that is drawing huge crowds as it travels throughout the nation. Finally, where real treasure artifacts are concerned, such as gold coins or gold bars, leaving them on the bottom of the ocean when recovery would not harm them seems to be pointless.

(3) **Abrogation of the Law of Salvage and Finds**

Another controversial aspect with respect to the proposed Draft Convention is the fact that it abrogates the law of salvage and finds. It does so not in direct terms, but indirectly. One of the proposed provisions is Article 12(2) which states:

“State parties shall provide for the non-application of any internal law or regulation having the effect of providing commercial incentives or any other reward for the excavation or removal of underwater cultural heritage.”

Even if this provision were not included, other provisions of the Convention and Annex Rules would be

inconsistent with the law of salvage and finds.

By displacing the law of salvage in the context of UCH the Draft Convention does away with a distinction between abandoned property and non-abandoned property. Under the Draft Convention it matters not whether or not the owner, or his subrogated insurer,⁴⁶ has abandoned a wreck or its contents. Either way the ownership interest is effectively divested for anything that is designated UCH. A country which exercises sovereignty over the location of a wreck has control and constructive possession over it, so that it will have de facto, if not de jure, ownership. The owner is no longer free to do as he chooses with his property. Presumably any intellectual property rights of an owner from which he might seek to profit would also be lost.⁴⁷ By ousting the law of salvage and finds, the Draft Convention also abrogates any salvage rights that an entrepreneur who locates the wreck might have obtained. A salvor would have no maritime lien, no property right in the wreck, and no intellectual property rights that could be utilized to defray costs or obtain a profit. The Draft Convention has no provision for remuneration of loss of property rights. In short the owner's and/or salvor's only right

⁴⁶ Cargo and hull underwriters who pay claims for total loss take title to the property insured by subrogation. See, Great Western Ins. Co. v. Fogarty, 86 U.S. 640 (1873), The TASHMOO, 1937 AMC 1536, 1539-1541 (Arb. 1937). One writer has noted:

“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.”

David J. Bederman, Historic Salvage and the Law of the Sea, 30 U. Miami Inter-Am. L.R. 99, 118 (1998).

⁴⁷ See pp. 21-22 infra.

would be the right to seek permission from the appropriate State Party to deal with such property under very restrictive guidelines and rules. This may be appropriate when dealing with significant wrecks from antiquity where there is no identifiable owner, but the Draft Convention's scope would also cover wrecks of more modern vintage whose owners, or subrogated insurers, can be identified.

The archaeologists and their supporters claim that the law of salvage and finds have no role to play in, and are not suited to, the protection of UCH.⁴⁸ But U.S. admiralty courts have increasingly required that in order to be eligible for a salvage award or exclusive salvage rights when dealing with archaeologically significant wrecks, salvors must follow established archaeological procedures. The Titanic case is one in point. In that case the salvor agreed to refrain from selling items recovered from the vessel, except lumps of coal, and committed to retaining artifacts together as a collection. The court which granted RMST exclusive salvage rights has indicated that this agreement played a significant role in the court's decision.⁴⁹ Other courts have acted in a similar manner.⁵⁰ In the Titanic case the court has

⁴⁸ See, e.g., Varmer, supra note 11.

⁴⁹ RMS Titanic, Inc. v. The Wrecked and Abandoned Vessel Titanic, supra note 14, at 718. n.10, 723.

permitted the salvors to exhibit the items recovered, including a portion of the hull, to the fee paying public. This is how the salvor in that case has been able to recoup the huge expenditures it has made in diving on and salvaging from the wreck.⁵¹

⁵⁰ Columbus America Discovery Group v. Atlantic Mutual Ins. Co., *supra* note 3, at 468. MDM Salvage, Inc. v. Unidentified, wrecked and Abandoned Tailing Vessel, 631 F.Supp. 308, 310 (S.D. Fla. 1986); Moyer v. The Andrea Doria, *supra* note 15; The Brother Jonathan, *supra* note 2. See also Schoenbaum, *supra* note 9, 16-7 at 346 (2d ed.)1994).

⁵¹ RMS Titanic, Inc. v. The Wrecked and Abandoned Vessel, *supra* note 14, at 717-718, 724.

There is another aspect to the abrogation of the law of salvage. It is a part of existing international law and has been for centuries. Also, it is the subject of an international convention which most maritime nations, including the U.S., have ratified.⁵² One eminent authority on salvage law has noted that UNCLOS “seeks to preserve the law of salvage as regards ‘objects of an archaeological and historical nature found at sea.’”⁵³ In the U.S., as in most maritime nations, application of the Salvage Convention and salvage law is administered by an admiralty court, which are federal courts, with original jurisdiction in a U. S. District Court. Although not spelled out in specific terms, the Draft Convention calls for State Parties to institute a permitting process. It is likely that archaeologists would urge that any implementing legislation in this country provide that some federal administrative agency⁵⁴ administer and direct any UCH permitting regime and, in effect, displace admiralty courts from first instance jurisdiction in historic wreck cases.⁵⁵ In other words a federal administrative agency would decide who could explore the wreck, what if any compensation he might receive, whether in situ preservation should be implemented, whether or not any artifacts can be recovered and taken from the wreck, and what

⁵² International Salvage Convention, 1989 reprinted in 6 Benedict on Admiralty Doc. 4-2A (Wiswall 7th ed. rev.). This Convention was designed to replace the 1910 Salvage Convention in order, inter alia, to take account of environmental considerations. It came into force on July 14, 1996. Interestingly, under Article 30 of the 1989 Salvage Convention, State Parties may reserve the right not to apply the provisions of the Convention when the property involved is maritime cultural property of prehistoric archaeological or historic interest and is situated on the sea-bed. In ratifying the 1989 Salvage Convention the United States did not make such a reservation.

⁵³ Geoffrey Brice, Q.C., Salvage and the Underwater Cultural Heritage, 20 Marine Policy 337, 338 (1996).

⁵⁴ Probably NOAA. See pp. 26-31 infra.

⁵⁵ See Varmer, supra note 11, at 301.

arrangements can be made for same. Presumably the only role the admiralty courts, or any court, would play in connection therewith would be an appeal from decisions by the administrator under the limited review standards of the Administrative Procedure Act.⁵⁶ Salvors are not happy with this prospect. They feel that any administrative agency dealing with this subject may not be even handed, but will be aligned toward the view of the archaeologists.⁵⁷ They are wary of the delays and frustration inherent in any administrative process.⁵⁸ They prefer the dispute solver to be a federal judge who has no brief for either side, no institutional bias, and can move with dispatch when the occasion demands it. As any maritime lawyer who has dealt with ship arrests, property attachments, and preliminary injunction knows, an admiralty court can act on very short notice when the occasion demands. On the other hand,

⁵⁶ 5 U.S.C. §706 provides that an agency's actions cannot be set aside unless they are (1) arbitrary and capricious; (2) an abuse of discretion or otherwise not in accordance with law; (3) unconstitutional; or (4) in excess of statutory jurisdiction, authority or limitations and without observance of process of law. There is generally no appeal de novo.

⁵⁷ Recent developments with the Titanic will not ease their concerns in this area. See pp. 26-31 infra.

⁵⁸ For a graphic example of bureaucratic misuse of authority (albeit state bureaucrats) see Paul N. Keller, Salvor-Sovereign Relations: How the State of Illinois Destroyed the Lady Elgin, 30 J. Mar. L. & Com. 245 (1999).

administrative agencies are not noted for swift action.

In short, the fact the Draft Convention seeks to oust the law of salvage and finds is a serious point of controversy.

(4) **Conflict with UNCLOS**

Option 1 of the proposed Draft Convention provides that State Parties may regulate UCH in their exclusive economic zone and on their continental shelf, requiring, at a minimum, compliance with the Annex Rules. While other jurisdictional Options contained in the Draft Convention are less specific, the effect is the same in that they provide either that any UCH activity in those areas must comply with the Annex Rules or that State Parties should exercise their “sovereign rights” in those areas to ensure that UCH is protected in accordance with the Annex Rules.⁵⁹ The effect of these jurisdictional options seem essentially identical, that is, it gives coastal states the right to regulate UCH activities in their EEZ zones and on their continental shelves.

⁵⁹ See pp. 9-10 supra.

The problem is, however, that this conflicts with UNCLOS. Under UNCLOS Article 56 coastal states have sovereign rights over the EEZ for the purpose of exploring and exploiting, conserving and managing natural resources, and with regard to other activities, economic exploitation and exploration of the zones such as the production of energy. Article 56 gives coastal states jurisdiction to establish artificial islands, marine scientific research and the preservation of the marine environment. With respect to the continental shelf, UNCLOS Article 77 gives coastal states sovereign rights for the purpose of exploring the continental shelf and exploiting its natural resources. Natural resources are defined as consisting of mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, etc. What the provisions of UNCLOS do not grant coastal states in the EEZ and continental shelf zones is sovereignty over cultural heritage. In short, no cultural heritage zone is established by UNCLOS. The concept of allowing coastal states to have sovereignty over “cultural heritage” in their EEZ and Continental Shelf zones was a topic of debate leading up to the Law of the Sea Convention. Indeed, Article 303 of UNCLOS provides that the outer limit of a coastal state’s authority over archaeological and historical objects found at sea is 24 nautical miles.⁶⁰ The ILA draft for the preservation of UCH, which was the precursor of the UNESCO Draft, sought to establish cultural heritage zones out to 200 nautical miles and to modify the Law of the Sea Convention in this context. This was specifically opposed by many maritime powers at the third U.N. conference on the Law of the Sea, including the United States and the United Kingdom, and was rejected.⁶¹

⁶⁰ UNCLOS, *supra* note 26, Art. 303, para. 2.

⁶¹ Bederman, *supra* note 16, at 338. See also Patrick J. O’Keefe and James A. R. Nafziger, The Draft Convention on the Protection of the Underwater Cultural Heritage, 25 Ocean Dev.

Despite this, the provisions in the Draft Convention, while not specifically establishing a cultural heritage zone out to 200 miles or out to the limits of the Continental Shelf, in effect attempt to do so in contravention of UNCLOS.

(5) **The Prohibition of Commercial Activity**

& Int'l L. 391, 397 (1994).

Rule 2 of the Annex to the Draft Convention states unequivocally “Underwater Cultural Heritage shall not be traded, sold, bought and bartered as items of commercial value.” In short, the proposed Draft Convention forbids any commercial activity pertaining to UCH. As a practical matter this would mean that salvors, who often have to invest millions of dollars to locate and recover shipwrecks,⁶² would be prohibited from making any money as a result of their efforts in connection therewith, except possibly to the extent that they have been engaged by contract by museums or governmental authorities.⁶³ Even with this proviso the salvor who locates and recovers a vessel that contains artifacts such as gold coins or gold bars, as in the case of the Atocha, would be prevented from realizing any profit by the sale of such artifacts, the sale of videos, books and photographs pertaining to the artifacts, or even from exhibiting them to a fee paying public.

Not surprisingly, it is this complete ban of any commercial exploitation of the recovery and salvage of UCH that so antagonizes the historic salvors. They do not understand why, if there is a redundancy of artifacts, such as in the recovery of thousands of gold coins which are essentially similar, it is necessary to retain all of them in museums or for study by the archaeological community and prevent any of them from being sold. Similarly, the over broad definition of UCH combined with the profit prohibition seriously affects the personal and intellectual property rights of identifiable owners and/or their

⁶² See p. 3 supra and p. 32 infra.

⁶³ A proposed amendment to the Draft Convention would permit recovery for “services” performed. See Draft Annex Rule 2. It is far from certain that even this limited amendment will pass muster with the governmental experts drafting the Convention.

subrogated insurers.⁶⁴ Throughout the world there are many private persons who routinely acquire, trade and barter items such as stamps, toys, coins, documents, furniture and other collectibles that are over 100 years old. Why should the mere fact that an item has been underwater for 100 years mean that it should be treated differently?

IV. THE MARITIME LAW ASSOCIATION POSITION

In March of 1999 The Maritime Law Association of the United States (MLA) submitted to the U. S. Government its position paper, approved by its Board of Directors, on the proposed UNESCO Draft Convention. In that position paper the MLA stressed that it supported the goal of protection of UCH, but recognized that there were legitimate differences of opinion as to what objects should be designated as UCH, and whether protection of those objects and the public interest were best served by recovery of the property or simply leaving it in place. The MLA stressed that any Convention should be consistent with UNCLOS. Further, the MLA indicated its opposition to those articles of the Draft Convention that would abrogate the rights of qualified commercial salvors from engaging in the excavation and removal of UCH. The MLA stated that it felt that the law of salvage and finds and the protection of UCH were not incompatible, and that any Convention ought to recognize the important role of private enterprise and commercial incentives in discovering and protecting UCH and should also protect the right of owners of vessels and artifacts. The position paper further supports the principle that admiralty courts should have jurisdiction over UCH and should continue to recognize and apply the law of salvage and finds. The MLA also pointed out that the Convention should permit the sale of artifacts or

⁶⁴ See pp. 15-17 supra.

other materials “in situations where funding may otherwise not be readily available to support an appropriate project or where national legislation allows.” In short, the MLA recognizes the need for protection of UCH, but viewed the Draft Convention as too one-sided in its failure to take into account the rights of commercial interests and the property rights of owners, salvors, and insurers.

V. U.S. DELEGATION EFFORTS

The United States Delegation to the meetings of joint experts currently working on the Draft Convention has been attempting over the last few years to seek changes in the Draft Convention that would narrow the definition of UCH,⁶⁵ and remove the conflict with UNCLOS⁶⁶ In addition, the U.S. Delegation has sought to soften the presumption that in situ preservation is the first choice in approaching UCH by amending the Annex so that in situ preservation would merely be a first option to be considered, but not the presumed choice.⁶⁷ The Delegation has also sought to include language that would permit

⁶⁵ The U.S. Delegation has supported the inclusion of the modifying phrase “archaeological or cultural significance” in the definition of UCH. See Comments of the United States of America on Selected Articles Being Considered in Working Group One (U.S. Comments WG1) in connection with the Third Meeting of Governmental Experts to consider the Draft Convention on the Protection of the Underwater Cultural Heritage at UNESCO Headquarter, Paris, July 3-7, 2000.

⁶⁶ The U.S. Delegation has indicated that the Draft Convention must not conflict with UNCLOS and cannot provide new coastal state regulatory authority over UCH. It has indicated that it believes Option 2 (see pp. 9 above) is consistent with UNCLOS based on the understanding the phrase “sovereign rights” referred to therein refers only to resource rights and not rights over UCH in a coastal state’s EEZ or on their continental shelf. U. S. Comments, Third Meeting. Presumably this means that under Option 2 a State Party could only interfere with UCH activities in these areas to the extent it might impact in natural resources in the area. Query - what assurance is there that the term “sovereign rights” will be given such a restrictive interpretation?

⁶⁷ Comments of the United States of America on Selected Articles Being Considered By

reward for “the provision of services” in Annex Rule 2 so as to permit the State Parties to utilize commercial enterprises to help protect and manage UCH.⁶⁸ In addition, the Delegation supports the sale of deaccessioned objects, i.e., objects for which the need for curation is no longer deemed necessary.⁶⁹ Despite its efforts, the U.S. Delegation is hampered by a number of factors. First, the United States Delegation is one of the few that has as members a representative of commercial interests. Most delegations are made up of governmental functionaries from the cultural ministries of the nations involved. There is a decided bias in favor of the archaeological viewpoint and hostility to the views of those who exhibit any concern for commercial or property interests. One of the members of the United States Delegation is Greg Stemm, the President of ProSEA, The Professional Shipwreck Explorers Association, Inc. A recent member of the delegation is John Kimball, the head of the MLA Study Group on UCH. The fact that the United States Delegation contains representatives of commercial interests makes it suspect in the eyes of a number of the other delegations. In addition, the U.S. Delegation is hampered because the United States is not a member of UNESCO and, technically, the United States has no vote in the proceedings that are taking place at the meetings in Paris. In any event, whatever the cause, it is apparent that the United States Delegation has an uphill battle in softening the

Working Group Three, Rule 1.

⁶⁸ Id. Rule 2.

⁶⁹ Id.

anti-commercial bias and dealing with other problems that exist in the Draft Convention. Only time will tell how successful their efforts will be.

No prediction can be made with respect to the timetable for completion of the Draft Convention or when it might be submitted to a diplomatic conference. The stated attempt of those in charge of the joint meeting of experts is to have a completed draft following the meeting of the experts to be held in Paris in April of 2001 and for submission to the UNESCO General Assembly which is to take place in October of 2001 and which presumably would be followed by a diplomatic conference. However, anyone who looks at the number of square brackets⁷⁰ and options that are contained in the present Draft Convention realizes that much work will need to be done before a consensus is reached on the document. It may be years away from completion.

V. RECENT DEVELOPMENTS IN THE TITANIC LITIGATION

As those of you who attended last year's Houston Marine Insurance Seminar know, salvage rights with respect to the Titanic have been granted to a corporation named RMS Titanic, Inc. (RMST) by the United States District Court for the Eastern District of Virginia. That grant of salvage rights was

⁷⁰ Language enclosed in square brackets indicate changes that have been proposed by one or more Delegations.

approved in large measure by the United States Court of Appeals for the Fourth Circuit.⁷¹

⁷¹ RMS Titanic, Inc. v. Haver, et al., 171 F.3d 943, 1999 AMC 1330 (4th Cir.); cert. denied, 120 S.Ct. 74 (1999).

In 1986 Congress passed the RMS Titanic Memorial Act,⁷² urging the State Department to enter into negotiations with Canada, France and England to establish a treaty honoring the Titanic as a memorial. Nothing substantive was done under that legislation until 1996 when the United States began negotiating an international agreement with those countries (the “Agreement”). That Agreement is now imminent. However, these negotiations, and the terms of the Agreement, only became known to the general public earlier this year. The proposed Agreement provides that rules annexed thereto form an integral part of the Agreement. These rules are, in many particulars, quite similar to the UNESCO Draft Convention Annex Rules. They establish in situ preservation as the preferred policy for preservation of the Titanic and its artifacts. They contemplate that activities at the wreck site shall be submitted to a State Party for approval, and outline the extensive details such applications for approval must contain. In other words the Agreement contemplates a permitting process.

In June of this year NOAA published proposed guidelines relating to the Titanic Memorial Act, and, presumably, any Agreement that may be concluded.⁷³ These guidelines are identical to the proposed Agreement rules. While calling for in situ preservation as the preferred management technique, they do contemplate some recovery or excavation, but only “when justified by educational, scientific, or cultural interests” or to protect Titanic or its artifacts from “significant threat.”⁷⁴ In addition, the proposed guidelines dictate that any recovered artifacts should be kept together as a project collection. NOAA’s

⁷² 16 U.S.C. §§450 *rr et seq.*

⁷³ Proposed Guidelines for Research, Exploration and Salvage of R.M.S. Titanic, 65 Fed. Reg. No. 107, 35326-35381 (June 2, 2000) (hereafter “Guidelines”).

⁷⁴ Guidelines at 35330.

description of the guidelines indicates that this means that individual artifacts cannot be sold. NOAA states that this would not preclude sale or transfer of an entire collection to a museum provided the collection is kept together.⁷⁵ NOAA goes on to note that current professional curation practices would permit museums to exclude objects from the collection or subsequently deaccess them. Such objects could then be sold by the museum.⁷⁶

⁷⁵ Guidelines at 35328.

⁷⁶ Id. Interestingly some scientists apparently think that the lumps of coal used to power the Titanic are not only cultural artifacts, but that they should be curated in perpetuity. Id.

RMST, which has not sold any of the artifacts it has recovered (except lumps of coal), does derive considerable revenue from exhibitions that it has put on throughout this country and abroad and from books, souvenirs and the like. RMST is concerned that the proposed Agreement and Guidelines⁷⁷ would impact adversely on its existing personal property, intellectual property, and salvage rights. Accordingly, it complained to Judge Clark in the Eastern District of Virginia, and two hearings have been held in that court concerning the present status of this proposed Agreement and the U.S. government's position in connection therewith. In the meantime, RMST filed a declaratory judgment action in the Eastern District of Virginia seeking, inter alia, an injunction against the U.S. government from proceeding with the proposed Agreement. In that suit RMST contended that the proposed Agreement and the implementing guidelines (regulations) that would accompany it, would, in effect, extinguish RMST's previously granted exclusive salvage rights, oust the jurisdiction of the admiralty court, and establish a permitting regime to be administered by NOAA for any further salvage dives on the Titanic, and that any further salvage activities would be severely limited under rules that are almost identical to the Annex Rules incorporated into the UNESCO Draft Convention. RMST complained that no action was taken by the government under the Memorial Act for years, and it was only years after RMST was granted salvage rights that the government began to take steps toward a treaty. It further asserted that the government never appeared in the salvage proceedings in the Eastern District of Virginia to contest the

⁷⁷ The proposed Guidelines are, at present, designated as non-mandatory. However, RMST fears that, upon finalization of the Agreement, they will be mandatory and part of any implementing legislation.

exclusive grant of salvage rights to RMST, and that it should not be permitted, at this late date, to oust RMST's personal and intellectual property rights by means of the proposed Agreement.

More specifically RMST's suit contended (1) that the RMS Titanic Memorial Act violates the Separation of the Powers doctrine, and is therefore unconstitutional because it directs the Secretary of State to enter into negotiations with various countries to develop an international agreement despite the fact that the conduct of foreign affairs is solely within the purview of the executive branch of the government; (2) that the proposed Agreement and rules contemplate the creation of a permitting process for salvors as well as rules governing salvage operations which are not contemplated by the Memorial Act; (3) that neither the Secretary of State nor NOAA have reported to Congress on the progress of Agreement negotiations as required by the Memorial Act; (4) that the proposed Agreement makes two incorrect assertions (a) that the wreck lies on the Canadian continental shelf, and (b) that there are human remains on the site, which shows that the negotiators did not consult with or engage the participation of the public, including RMST; (5) that the government's actions are unconstitutional because they divest the federal judiciary of admiralty jurisdiction; (6) that the government has waived and is estopped from interfering with the exclusive salvage rights granted to RMST; and (7) that the ratification of the Agreement and implementation of it by proposed regulations would constitute a taking of RMST's salvage and property rights without just compensation in violation of the Fifth Amendment of the Constitution.⁷⁸

⁷⁸

RMS Titanic, Inc. v. Madeleine K. Albright, et al. Amended Complaint for Declaratory

Judgment, Civil Action No. 2:93cv902, in the U.S. District Court for the Eastern District of Virginia,
Norfolk Division.

The government responded with a Motion to Dismiss. It asserted that the District Court lacks subject matter jurisdiction over the case because (1) there is no final administrative action that would invoke the sovereign immunity provisions of the Administrative Procedure Act; (2) the lack of finality dictates that the case is not appropriate for judicial review; (3) RMST lacks standing because it has not shown actual harm, only the possibility of harm; (4) the case involves the exercise of foreign relations which is within the sole purview of the executive, as opposed to the judicial, branch of the government; (5) there is no case or controversy in view of the lack of any final action or implementation of the treaty; (6) the issue of the government's right to enter into the Agreement is a political one and non-justiciable, and (7) the exclusive forum for Fifth Amendment takings claims over \$10,000 is the U.S. Court of Federal Claims. In addition the government argued that the Separation of Powers argument fails because, *inter alia*, the President has full authority to negotiate such an Agreement even without any authority granted by the Titanic Memorial Act.⁷⁹

On September 8, 2000, a hearing was held on the government's Motion to Dismiss. On September 15, the court entered the order granting the government's Motion to Dismiss, essentially on the grounds that the Agreement has not yet been entered into and there has been no final administrative action. In granting the government's Motion, the court indicated that its action was without prejudice to

⁷⁹ Memorandum in Support of Federal Defendant's Motion to Dismiss, RMS Titanic Inc. v. Madeleine K. Albright, et al. supra.

RMST's right to reinstitute its suit if and when the Agreement is ever concluded, implementing legislation is enacted, and final guidelines and/or regulations are issued.⁸⁰

⁸⁰ RMS Titanic, Inc. v. Madeleine K. Albright, et al., *supra*, note 78, Order dated September 15, 2000.

While the Titanic is a unique wreck in many ways,⁸¹ these developments in the Titanic case are particularly instructive because they may foretell what lies in store if and when the UNESCO Draft Convention is finalized. If what NOAA is proposing for the Titanic is any guide, it will seek something similar in connection with any UNESCO Convention, i.e., an administrative agency, presumably NOAA, enforcing the Annex Rules of the UNESCO Convention, the ouster of the first instance jurisdiction of the admiralty court and the law of salvage and finds, and the consequent impact on the property rights, both personal and intellectual, of owners, subrogated insurers and/or salvors.

VI. CONCLUSION

⁸¹ In addition to the extensive public interest in the wreck, it is, of course, the subject of a congressional act, i.e., The RMS Titanic Memorial Act.

If the draft UNESCO Convention is adopted in its present form, it is probable that ratification in the United States will draw some serious opposition.⁸² Certainly it will face serious opposition from commercial salvors of historic wrecks and perhaps from the salvage industry in general. Indeed, if conflicts with UNCLOS remain it is likely that there will be significant opposition from various U.S. government constituencies. There is no real dispute as to the need for protection of antique wrecks and artifacts of truly significant archaeological and scientific importance. There is no real dispute as to the need to study such wrecks and make the knowledge gleaned from them accessible to the public at large. Similarly there is general agreement that an international solution is desirable. But the extreme breadth and pervasive bias of the UNESCO Draft Convention against commercial and property interests, and against the law of salvage and finds, is unfortunate, misguided, and counterproductive. It is unfortunate because it drives apart the two groups with the most interest in UCH, archaeologists and historic wreck salvors. It is counterproductive and misguided because archaeologists will need the skills and expertise of responsible salvors to locate, and where appropriate, recover the wrecks and artifacts they so want to study. This does not come cheap. The expenses involved in location and recovery of wrecks can be staggering.⁸³ Governments are not likely to set apart significant parts of their budgets on such projects.

⁸² The Convention in its present form is also likely to draw opposition at the international level. In a letter to its member national maritime associations the President of the Comité Maritime International (CMI) has noted the serious effect the Draft Convention has on the freedom of commercial salvors. He indicates that the CMI has established a working group to study the draft and “to ensure that it works with the existing international law of salvage (Salvage Convention 1989) rather than against it.” Patrick Griggs, President, Comité Maritime International, Letter to the Presidents of all National Maritime Law Associations (July 1999).

⁸³ See note 8 *supra*. See Abbass, *supra* note 10, at 263, stating that “Because of... shared monetary problems, it would seem logical that archaeologists and for-profit projects could pool

Removal of all commercial incentives will result in fewer reported discoveries and recoveries.⁸⁴ While discouraging responsible salvors it will leave the field for the less scrupulous “tomb robbers” and “looters.”⁸⁵ Whatever an international convention may provide, policing the high seas will be well nigh impossible to accomplish. Further, the presumption regarding in situ preservation, as shown above, is wrong in some instances and often does not enhance public, or even scientific, access.

resources and cooperate.”

⁸⁴ Sarah Dromgoole and Nicholas Gaskell, Draft UNESCO Convention on the Protection of Underwater Cultural Heritage 1998, 14 Int’l J.Mar. & Coastal L. 171, 192 stating that “... removal of the system of salvage rewards would also remove an incentive to report finds and this would undermine, among other things, the provisions of the Draft Convention relating to notification of discoveries.”

⁸⁵ Brice, supra note 53, at 342.

Compromise is both possible and preferable.⁸⁶ The archaeological mind set against the law of salvage and finds overlooks the developments in that law that imposes on commercial salvors appropriate scientific standards and restrictions.⁸⁷ Those wishing to oust the law of salvage and finds point to the concept in salvage law that a vessel sunk is in marine peril and must be recovered. This conflicts, they say, with the in situ preservation presumption.⁸⁸ But as noted above, we now know that in situ preservation is not the best approach in some cases. Analysis of that issue can and should be addressed by the admiralty court on a case by case basis as necessary. Archaeological supporters also point out that while various courts have imposed standards and conditions on historic salvors, this is done on a case by case basis, depends on the judge, and the scientific standards are not codified as a definitive requirement of salvage law.⁸⁹ These arguments can be addressed by the adoption of a protocol to the

⁸⁶ J. Ashley Roach, Shipwrecks: Reconciling Salvage and Underwater Archaeology, Center for Oceans Law and Policy, University of Virginia, 22nd Annual Conference, Montego Bay (January 1998) where the author notes that compromise is necessary for thereto be a viable treaty adopted by UNESCO, and states:

“There are many values associated with wrecks that lie on the seabed. Those values are memorial, commercial, recreational, or archaeological or in combination. Successful strategies for the future will ensure that no one value prevails, that interests are balanced, and that everyone with an interest sits at the table from whatever sector or nation.”

See also Brice, supra note 53, at 342.

⁸⁷ See pp. 16-18 supra.

⁸⁸ Varmer, supra note 11, at 280.

⁸⁹ Id. at 300.

already existing international Salvage Convention of 1989 and, in the United States, appropriate amendments to the U. S. Salvage Act.⁹⁰ Indeed, Sir Geoffrey Brice, Q.C., until his recent death one of the world's leading authorities on salvage law, has proposed and drafted such a protocol.⁹¹ The Courts could employ archaeologists as special master on scientific issues.⁹² Further, NOAA could be accorded standing to intervene as a party in salvage cases to put forth the archaeological or historic viewpoint.

The admiralty courts have been dealing with salvage cases for centuries. Dealing appropriately with historic shipwrecks is well within their purview and competence. In fact admiralty courts are dealing effectively with these cases today and can and should provide the procedural setting to reconcile the views of the salvor and the archaeologist. Sufficient substantive guidance for admiralty courts can be provided by appropriate legislation and/or protocols to existing conventions. It seems apparent that no prospective regime can anticipate or cover all of the different circumstances or factual patterns that will emerge with each newly discovered wreck. The extent of cultural value that may exist with any given wreck will range from zero to 100%. That will be true of commercial value as well. It is the admiralty

⁹⁰ 46 U.S.C. §§727-731.

⁹¹ Brice, *supra* note 53, at 342. See also James A. R. Nafziger, *The Titanic Revisited*, 30 J. Mar. L & Com 311, 325-326.

⁹² See Varmer, *supra* note 11, at 287 suggesting such a possible compromise.

courts that can provide the flexibility and impartiality to balance the competing interest that will arise when dealing with a virtual infinite range of wrecks and artifacts.⁹³

⁹³ See Sweeney, An Overview of Commercial Salvage Principles in the Context of Marine Archaeology, 30 J.Mar.L.&Com. 185, 200-202 (1999).

If there is to be a viable international agreement the archaeological community and historical salvors must each give ground. To this date at least most of the archaeological community has shown little interest in compromise.⁹⁴ While the archaeologists should give reasonable ground on such issues as in situ preservation, admiralty jurisdiction, and profit incentives, by the same token, salvors need to accept the fact that some truly significant historic wrecks and artifacts that are not redundant should be curated and not sold as items of commerce. They should further concede that in some instances leaving the wreck on the bottom may indeed be the current best method of preservation. Both parties should reasonably insist upon a level playing field in the decision making process that will arise on a case by case basis, for each wreck will pose its own peculiar set of problems. Compromise will not happen unless attitudes on each side change, and the two groups stop regarding each other as the personification of evil on the one hand and intellectual snobs on the other.

⁹⁴ There are signs that some in the archaeological community are moving toward cooperation with salvors. Recently the chair of the Underwater Archaeological Committee of the Archaeological Institute of America urged his colleagues to cooperate with salvors who believe they have discovered a fifth century B.C. Phoenician vessel in the Mediterranean. William J. Broad, Phoenician Ship Wreck: Teaming Up to Find Ancient Mariners, N.Y. Times, October 12, 1998.

(B0149425.WPD;1)

APPENDIX

**DRAFT CONVENTION
ON THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE***

Preamble

The States Parties to the present Convention;

Acknowledging the importance of underwater cultural heritage as an integral part of the cultural heritage of humanity and a particularly important element in the history of peoples, nations, and their relations with each other concerning their shared heritage,

Noting growing public interest in underwater cultural heritage,

Aware of the fact that underwater cultural heritage is threatened by unsupervised activities not respecting fundamental principles of underwater archaeology and the need for conservation and research of underwater cultural heritage,

Aware further of increasing commercialization of efforts to recover underwater cultural heritage and availability of advanced technology that enhances identification of and access to wrecks,

Conscious also of growing threats to underwater cultural heritage from various other activities, namely exploitation of natural resources of various maritime zones, construction, including, construction of artificial islands, installation and structures, laying of cables and pipelines,

Believing that cooperation among States, marine archaeologists, museums and other scientific institutions, salvors, divers and their organizations is essential for the protection of underwater cultural heritage,

Considering that exploration, excavation, and protection of underwater cultural heritage necessitates the application of special scientific methods and the use of suitable techniques and equipment as well as a high degree of professional specialization, all of which indicates a need for uniform governing criteria,

Recognizing that underwater cultural heritage should be preserved for the benefit of humankind, and that therefore responsibility for its protection rests not only with the State or States most directly concerned with a particular activity affecting the heritage or having an historical or cultural link with it, but with all States and other subjects of international law,

Bearing in mind the need for more stringent measures to prevent any clandestine or unsupervised excavation which, by destroying the environment surrounding underwater cultural heritage, would cause irremediable loss of its historical or scientific significance,

Realizing 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, including the United Nations Convention on the Law of the Sea of 10 December 1982,

Convinced that information and multi-disciplinary education about underwater cultural heritage, its historical significance, serious threats to it, and the need for responsible diving, deep-water exploration and other activities affecting it, will enable the public to appreciate the importance of underwater cultural heritage to humanity and the need to preserve it, and

Committed to improving the effectiveness of measures at international and national levels for the preservation in place or, if necessary for scientific or protective purposes, the careful removal of underwater cultural heritage that may be found beyond the territories of States

Have agreed as follows:

Article I

Definitions

For the purposes of this Convention:

- 1 . (a) "Underwater cultural heritage" means all traces of human existence¹ [which have been] partially, totally or periodically (situated) underwater for at least 100 years [or are 100 years old and underwater], including:
 - (i) sites, structures, buildings, artefacts and human remains, together with their

¹ Proposals to add criteria of significance or other limitations on the breadth of this formulation were noted as criteria desired by a number of delegations.

archaeological and natural contexts;² and

² It was noted that "sites" and "natural contexts" might need definitions depending on the decision taken on Articles 4 to 7.

- (ii) wreck³ such as a vessel, aircraft, other vehicle or any part thereof, its cargo or other contents, together with its archaeological and natural context.
 - (b) Notwithstanding the provision of paragraph l(a), a State Party may designate certain traces of human existence within its jurisdiction⁴ as under-water cultural heritage even though they have been underwater for less than 100 years.
2. "States Parties" means States which have consented to be bound by this Convention and for which the Convention is in force.
 3. "UNESCO" means United Nations Educational, Scientific and Cultural Organization.
 4. "Director-General" means the Director-General of UNESCO.
 - [5. "Convention" means the 1992 United Nations Convention on the Law of the Sea.]
 - [6. "Activity directed at underwater cultural heritage" means activity having underwater cultural heritage as its primary object and which may, directly or indirectly, physically disturb or otherwise damage underwater cultural heritage.]

Article 2

Scope of the Convention⁵

³ It was noted that "wrecV (in the English text) is a technical term of salvage law and includes more than shipwrecks. It was therefore agreed not to use the word "wrecks".

⁴ Certain delegations understand this to mean "in waters under its jurisdiction or in respect of vessels of its flag

⁵ This formulation represents the three different views on this Article which it was felt

1. [DELETE]

1 . [This Convention applies to underwater cultural heritage found at sea.]

1 . [This Convention shall apply to underwater cultural heritage irrespective of its location and to activities which affect or endanger it.]

[2. This Convention shall not apply to the remains and contents of any warship, naval auxiliary, other vessel or aircraft owned or operated by a State and used, at the time of its sinking, only for non-commercial purposes.]

[Article 2 bis

Relationship between this Agreement and the Convention

Nothing in this Agreement shall prejudice the rights, jurisdiction and duties of States

could not be resolved before discussions of Articles 4 to 7.

under the Convention. [This Agreement shall be interpreted and applied in the context of and in a manner consistent with the Convention.⁶]]

Article 2 ter

Regional agreements

*(would be placed here if Option I for Articles 5 and 6 is adopted;
text is included within Options 2 and 3)*

Article 3

General principle

1 . The States Parties shall preserve the underwater cultural heritage for the benefit of humankind in accordance with the provisions of this Convention.

[2. To that end, States Parties shall take all necessary measures to cooperate, specifically in the event of common interest by reason of the localization of the wreck and the flag State or because of the same cultural, archaeological or historical origin.]

Article 4

Underwater cultural heritage

⁶ It was noted that a final decision on this question could not be made until the result of this working group of Articles 4 to 7.

in internal waters, archipelagic waters and territorial sea⁷

1. States Parties, in the exercise of their sovereignty, have the exclusive right [in accordance with Article 2]⁸ (without prejudice to Article 2) to regulate and authorize (activities directed at) underwater cultural heritage in their internal water, archipelagic waters and territorial, sea.
2. Without prejudice to other international agreements and rules of international law regarding the protection of underwater cultural heritage, States Parties [should take all necessary measures to ensure] (shall require) that, at a minimum, the Rules of the Annex be applied to [activities directed at] underwater cultural heritage in their internal waters, archipelagic waters and territorial sea.

Article 4 bis

Underwater cultural heritage in the contiguous zone⁹

States Parties may (in applying Article 303(2) of the United Nations Convention on the Law of the Sea) regulate and authorize [in accordance with Article 303(2) of the United Nations Convention on the Law of the Sea] [activities directed at] underwater cultural heritage within their contiguous zone. In doing so, States Parties [shall] [should] require compliance, at a minimum, with the Rules of the Annex.

[In respect of Articles 5, 6 and 7, three options were offered for consideration but the positions of all States are reserved.]

⁷ Certain delegations proposed adding a new paragraph to Article 4 to ensure efficient protection of underwater cultural heritage located in occupied territories.

⁸ There were concerns expressed that the final draft of this clause should not prejudice the rights and duties of States in their internal waters and territorial sea.

⁹ One delegation considered that this provision would not apply to semi-enclosed areas.

OPTION I

Article 5

Underwater cultural heritage in the exclusive economic zone and on the continental shelf

1. States Parties shall require that any discovery relating to underwater cultural heritage occurring in their exclusive economic zone or on their continental shelf be reported to their competent authorities.¹⁰
2. States Parties may regulate (activities directed at] underwater cultural heritage in their exclusive economic zone and on their continental shelf. In doing so, States Parties shall require compliance, at a minimum, with the Rules of the Annex, in particular taking into account the needs of conservation and research.
3. States Parties may deny the conduct of [activities directed at] underwater cultural heritage having the effect of [unjustifiably] [interfering with the exploration or exploitation of their natural resources, whether living or not living, and with other rights or jurisdiction which they enjoy under the United Nations Convention on the Law of the Sea in these areas).
4. States may enter into regional or bilateral agreements, or develop existing agreements, for the preservation of common underwater cultural heritage. For this purpose, they may adopt rules and regulations which may be more stringent than those adopted at global level. [These agreements will be open to States of cultural origin and States of historical and archaeological origin.]

Article 6

Non-use of areas under the jurisdiction of the coastal State

States Parties shall take measures to prohibit the use of their territory, including their maritime ports

¹⁰ It was noted that some clarification could be made as to who should report and to which competent authorities. The need was also noted to reflect on how to notify discoveries made in areas subject to conflicting claims.

and off-shore terminals, or other area under their jurisdiction or control in support of any [activity directed at] underwater cultural heritage and inconsistent with the Rules of the Annex.

Article 7

Prohibition of certain activities by nationals and ships

1. States Parties shall take all practicable measures to ensure that [their nationals and] vessels flying their flag refrain from engaging in any [activity directed at] underwater cultural heritage in a manner inconsistent with the Rules of the Annex.
2. Measures to be taken by a State Party in respect of [its nationals and] vessels flying its flag shall include:
 - (a) prohibition of [activities directed at] underwater cultural heritage in areas where no State Party exercises control under Article 5(2) otherwise than in accordance with the Rules of the Annex;
 - (b) all practicable measures to ensure that they do not engage in [activities directed at] underwater cultural heritage within the exclusive economic zone or continental shelf of a State Party which exercises control under Article 5(2) in a manner contrary to the laws and regulations of that State.

OPTION 2

Article 5

Underwater cultural heritage in the exclusive economic zone and on the continental shelf

In the exercise of their sovereign rights in the exclusive economic zone and on the continental shelf, as provided for in the United Nations Convention on the Law of the Sea, States Parties shall take account of the need to protect, underwater cultural heritage in accordance with this Convention.

Article 6

Non-use of areas under the jurisdiction of the coastal State

1. All States Parties shall take measures to prohibit use of their territory, including their maritime ports and off-shore terminals, or other area under their jurisdiction or control in support of any activity directed at underwater cultural heritage and inconsistent with the Rules of the Annex.
2. This provision shall apply to any such activity beyond that State's territorial sea but not within an area over which another State exercises control [in accordance with customary international law as reflected in the United Nations Convention on the Law of the Sea] unless requested by that State.

Article 7

Prohibition of certain activities by nationals and ships

1. States Parties shall require that any discovery relating to underwater cultural heritage by their nationals or through the activities of vessels flying their flag in the exclusive economic zone or the continental shelf of another State be reported to the competent authorities of that State or the State of origin, or the State of cultural origin, or the State of historical and archaeological origin.¹¹
2. Measures to be taken by a State Party in respect of [its nationals and) vessels flying its flag, shall include:
 - (a) to prohibit [activities directed at] underwater cultural heritage in areas where no State Party exercises sovereignty or control in a manner contrary to the Rules of the Annex;
 - (b) to ensure that they do not engage in [activities directed at] underwater cultural heritage within the exclusive economic zone or continental shelf of a State Party which exercises sovereignty or control in a manner contrary to the Rules of the Annex.

new article

(to be consistent, this is provisionally called.)

Article 2 ter

¹¹ The need was also noted to reflect on how to notify discoveries made in areas which are subjected to conflicting claims.

Regional agreements¹²

States may enter into regional or bilateral agreements, or develop existing agreements, for the preservation of common underwater cultural heritage. For this purpose, they may adopt rules and regulations which may be more stringent than those adopted at global level. [These agreements will be open to States of cultural origin and States of historical and archaeological origin.]

OPTION 3

Article 2 bis

Relationship between this Convention and UNCLOS

Nothing in this Convention shall prejudice the rights, jurisdiction and duties of States under the United Nations Convention on the Law of the Sea. [This Convention shall be interpreted and applied in the context of and in a manner consistent with UNCLOS.]]

Article 2 ter

Regional agreements

States may enter into regional or bilateral agreements, or develop existing agreements, for the preservation of common underwater cultural heritage. For this purpose, they may adopt rules and regulations which may be more stringent than those adopted at global level. [These agreements will be open to States of cultural origin and States of historical and archaeological origin.]

Article 5

Underwater cultural heritage in the exclusive economic zone

¹² It was understood that these agreements would have to be consistent with international law.

and on the continental shelf**

1. A State Party shall be notified of any activity or discovery relating to underwater cultural heritage occurring in its exclusive economic zone or on its continental shelf.¹³
2. Such State Party shall take appropriate measures for the assessment and registration of that information.
3. States shall, where appropriate, exchange this information with the competent authorities of other interested States, in particular the State whose nationals reported the discovery. Such information shall be transmitted to UNESCO.
4. States may authorize protective interventions and scientific research of the discovered underwater cultural heritage. To this end they shall consult the competent authorities of a State whose nationals or vessels flying its flag intend to engage in such activity and shall ensure that such activity:
 - (a) complies, at a minimum, with the Rules of the Annex;
 - (b) involves the participation of competent experts of the State Party in whose exclusive economic zone or on whose continental shelf the discovered underwater cultural heritage is located.
5. States Parties shall prohibit:
 - (a) any activity [directed at] underwater cultural heritage which is in violation of paragraphs 1, 2, 3 and 4; or
 - (b) the use of its territory, including its maritime ports and off-shore terminals, or other area under its jurisdiction such as the continental shelf or exclusive economic zone, in support

¹³ The need was also noted to reflect on how to notify discoveries made in areas which are subject to conflicting claims.

** *Chairman's note: Articles 5 and 6 of the draft are included in a single Article in Option 3. Article 7 of the draft becomes Article 6 in Option 3.*

of any activity (directed at] underwater cultural heritage which is in violation of paragraphs 1, 2, 3 and 4.

Article 6

Prohibition of certain activities by nationals and ships

All States Parties shall take all practicable measures to ensure that [their nationals] and vessels flying their flag do not engage in any activity [directed at] underwater cultural heritage in a manner inconsistent with this Convention and its Annex, or the laws and regulations of the State Party in whose exclusive economic zone or on whose continental shelf such underwater cultural heritage is located, as appropriate.

Article 7

Underwater cultural heritage in the area

1. Any discovery of under-water cultural heritage in the area, as defined in Article 1, paragraph 1(l) of the United Nations Convention on the Law of the Sea; shall be reported [by the State Party whose nationals or vessels flying its flag made such discovery to the Director-General of UNESCO, who in turn shall transmit such information to the Secretary-General of the International Seabed Authority as soon as possible.]
2. (UNESCO shall inform of the discovery all States that enjoy preferential rights under Article 149 of the United Nations Convention on the Law of the Sea.)]

(End of the three options)

[Article 7 bis

Underwater cultural heritage in the area

Any discovery of underwater cultural heritage in the area, as defined in Article 1, paragraph (1) of the United Nations Convention on the Law of the Sea, shall be reported by the finder to the Secretary-

General of the International Seabed Authority, which shall transmit the information to the Director-General of the United Nations Educational, Scientific and Cultural Organization.]***

Article X

Activities incidentally affecting underwater cultural heritage****

1. Each State Party shall take reasonable measures to ensure that activities are avoided that adversely affect known underwater cultural heritage in its internal waters, archipelagic waters, territorial sea, exclusive economic zone or on its continental shelf.
2. Where a State Party designates as requiring special protection underwater cultural heritage in its internal waters, archipelagic waters, territorial sea, exclusive economic zone or on its continental shelf, it shall take all necessary measures to ensure that activities do not adversely affect such under-water cultural heritage.
3. Where UNESCO designates as requiring special protection underwater cultural heritage in the Area, each State Party shall take all necessary measures to ensure that vessels flying its flag do not undertake activities that adversely affect such underwater cultural heritage.]

Article 8

Permits

A State Party may [issue] ~~provide for the issuance of~~ permits, subject to compliance with (the Rules of the Annex), allowing entry into its territory of underwater cultural heritage.

~~Should an excavation or retrieval of underwater cultural heritage occur without a prior authorization of a State Party, the State Party may issue permits allowing entry of such underwater cultural heritage into its territory, provided that excavation and retrieval activities have been conducted in accordance with the operative provisions of the Charter.~~

Article 9

**** *Chairman's note: if ~~Article X~~ is ~~accepted~~, ~~Article 8~~ would logically precede ~~Article 7~~ in ~~Option 3~~. Option 3 contains an alternative proposal on the "area" in its Article 7.*

**** *Chairman's note: if Article X is accepted, it would logically precede Article 7 in Option 3.*

Seizure of underwater cultural heritage

1. Subject to Article 8, each State Party shall provide for the seizure of underwater cultural heritage excavated or retrieved in a manner not in conformity with the Rules of the Annex, which is brought to its territory. ~~either directly or indirectly.~~

[2. A State shall seize underwater cultural heritage known to have been excavated or retrieved from the exclusive economic zone or the continental shelf of another State Party exercising control of those areas in accordance with Article 5, paragraphs 2 to 5 above only after the request or with the consent of that State.]

Article 10

Other sanctions

1. Each State Party shall impose criminal, administrative [or civil] sanctions for importation of underwater cultural heritage which is subject to seizure under Article 9.

2. State Parties [shall] ~~agree to cooperate with each other in the enforcement of these sanctions. Such cooperation shall include, but not be limited to, production and transmission of documents, making witnesses available, service of process and extradition.~~

Article 11

Notification requirements and treatment of seized underwater cultural heritage

1. Each State Party undertakes to record, protect and take all reasonable measures to conserve underwater cultural heritage seized under this Convention.

2. Each State Party shall notify its seizure of underwater cultural heritage under this Convention to the [Director-General of UNESCO] and to any other State Party which is known to have a cultural heritage interest therein.

Article 12

Disposition of underwater cultural heritage

1. A State Party which has seized underwater cultural heritage shall decide on its ultimate disposition for the public benefit 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, and the interests of those States which have expressed a national heritage interest in it [pursuant to their preferential rights as State of origin, State of cultural origin, or State of historical and archaeological origin.]

[2. States Parties shall provide for the non-application of any internal law or regulation having the effect of providing commercial incentives or any other reward for the excavation and removal of underwater cultural heritage.]*****

Article 13

Collaboration and information-sharing

1. Whenever a State Party has expressed a national heritage interest in particular underwater cultural heritage to another State Party, the latter shall consider collaborating in the investigation, excavation, documentation, conservation, study and cultural promotion of the heritage.

2. To the extent compatible with the purposes of this Convention, each State Party undertakes to share information with other States Parties concerning underwater cultural heritage, such as but not limited to, discovery of heritage, location of heritage, heritage excavated or retrieved contrary to [the Rules of the Annex] or otherwise in violation of international law, pertinent scientific methodology and technology, and legal developments relating to heritage.

3. Whenever feasible, each State Party shall use appropriate international databases to disseminate information about underwater cultural heritage excavated or retrieved contrary to [the Rules of the Annex] or otherwise in violation of international law.

***** *Chairman's note: to be deleted here as it is part of the Annex and/or Article 3 of the General Principles.*

Article 14

Underwater cultural heritage in the area*****

Article 15

Education

Each State Party shall endeavour by educational means to create and develop in the public mind a realization of the value of the underwater cultural heritage as well as the threat to this heritage posed by violations of this Convention and non-compliance with the Rules of the Annex.

Article 16

Training in underwater archaeology

1. States Parties shall take measures to further research in accordance with [the Rules of the Annex] by providing training in underwater archaeological investigation and excavation methods and in techniques for the conservation of underwater cultural heritage, or by encouraging the competent bodies or organizations to do so.
- [2. States Parties shall cooperate to promote training and transfer of technology relating to underwater cultural heritage.]

Article 17

Assistance of UNESCO

1. States Parties may call upon UNESCO for technical assistance concerning underwater cultural heritage as regards information and education, consultation and expert advice, coordination and good offices, [or in connection with any [technical] problem arising out of the application of the present Convention or the Rules of the Annex.]
- ~~2. The Organization shall accord such assistance within the limits fixed by its programme and by its resources.~~
- [3. The Organization may, on its own initiative, conduct research and publish studies on matters relevant to the protection of the underwater cultural heritage.]

*****See Chairman's note marked *** on page 9 of the draft Convention.

[3. The Organization shall inform States Parties on activities directed at cultural heritage.]

Article 18

National services

1. In order to ensure effective implementation of this Convention, States Parties undertake to expand the activities of existing competent national services or, if appropriate, to establish national services for that purpose.

~~2. National services should actively encourage the participation of interested persons in preservation and study of the underwater cultural heritage and in support of archaeological research. This participation is subject to the authorization and control of the national service concerned and must respect the operative provisions of the Charter.~~

~~3. States Parties shall establish an internal procedure or procedures for resolving disputes concerning whether or not an activity affecting underwater cultural heritage is in conformity with the operative provisions of the Charter.~~

Article 19

Peaceful settlement of disputes

Any dispute between two or more States Parties concerning the interpretation or application of the present Convention or the Rules of the Annex and not settled by negotiation shall, at the request of any of the parties to the dispute, be submitted to arbitration. If the States Parties are unable to agree on the constitution of the arbitral tribunal within six months from the date of the request for arbitration, any of the parties to the dispute may refer the dispute to the International Court of Justice.

Article 20

Ratification, acceptance, approval or accession

1. Member States of UNESCO, as well as non-Member States of UNESCO which have been invited by the Executive Board of UNESCO to become Parties, may become Parties to this Convention by depositing with the Director-General of UNESCO an instrument of ratification, acceptance, approval or accession.

******See Chairman's note marked *** on page 9 of the draft Convention.*

2. The Convention shall enter into force three months after the deposit of the fifth instrument referred to in paragraph 1, but solely with respect to the five States that have so deposited their instruments. It shall enter into force for each other State three months after that State has deposited its instrument.

Article 21

Reservations and exceptions

No reservations or exceptions may be made to this Convention.

Article 22

Amendments

1. A State Party may, by written communication addressed to the Director-General of UNESCO; propose amendments to this Convention. The Director-General shall circulate such communication to all States Parties. If, within six months from the date of the circulation of the communication, not less than one half of the States Parties reply favourably to the request, the Director-General shall present such proposal to the General Conference of UNESCO for adoption.

2. Once adopted, amendments to this Convention shall be subject to ratification, acceptance, approval or accession by the States Parties, unless otherwise provided in the amendment itself

3. Articles 20, 21 and 23 shall apply to all amendments to this Convention.

4. Amendments to this Convention shall enter into force for the States Parties accepting or acceding to them three months after the deposit of the instruments referred to in paragraph 2 by two thirds of the States Parties. Thereafter, for each other State Party it shall enter into force three months after the deposit of its instrument.

5. An amendment may provide that a smaller or a larger number of acceptances or accessions shall be required for its entry into force than are required by this Article.

6. A State which becomes a Party to this Convention after the entry into force of amendments in accordance with paragraph 4 shall, failing an expression of different intention by that State:

(a) be considered as a Party to this Convention as so amended; and

(b) be considered as a Party to the unamended Convention in relation to any State Party not

bound by the amendment.

Article 23

Denunciation

1. A State Party may, by written notification addressed to the Director-General of UNESCO, denounce this Convention.
2. The denunciation shall take effect twelve months after the date of receipt of the notification, unless the notification specifies a later date.
3. The denunciation shall not in any way affect the duty of any State Party to fulfil any obligation embodied in this Convention to which it would be subject under international law independently of this Convention.

Article 24

The Charter*****

1. The Charter annexed to this Convention form an integral part of it, and, unless expressly provided otherwise, a reference to this Convention or to one of its Parts includes a reference to the Rules of the Annex relating thereto.
2. The Charter may be revised from time to time by the International Council of Monuments and Sites. Revisions of the operative provisions shall be deemed to be revisions of the annexed operative provisions. The Director-General of the United Nations Educational, Scientific and Cultural Organization shall notify all States Party to this Convention of the text of such revisions. States Parties shall be bound by the revisions, except those State Parties that notify the depository of their non-acceptance in writing. Such notification shall be made within six months after the receipt of the notification of the text of revisions.
3. A State which becomes a Party to this Convention after the adoption of amendments to the Rules of the Annex in accordance with paragraph 2 shall:
 - (a) be considered to have accepted the Rules of the Annex as so amended; and
 - (b) be considered as having accepted the unamended Rules of the Annex in relation to any State Party not bound by the amendments to the Rules of the Annex.

Article 25

Authoritative texts

This Convention has been drawn up in Arabic, Chinese, English, French, Russian and Spanish, the six texts being equally authoritative.

Chairman's note: this Article will need revision to make it compatible with the decision to replace the words "operative provisions of the Charter" by the words "rules of the Annex" throughout the text.

ANNEX

RULES CONCERNING ACTIVITIES DIRECTED AT UNDERWATER CULTURAL HERITAGE

1. General principles

1. The protection of underwater cultural heritage is best achieved through in situ preservation, which should be considered as the first option. Accordingly, activities directed at underwater cultural heritage shall be authorized by the competent authority of the concerned State only when they make a significant contribution to knowledge, protection and [/or] enhancement of underwater cultural heritage.
2. The commercial exploitation of underwater cultural heritage for trade or speculation [, other than in the provision of services] or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of the underwater cultural heritage. Underwater cultural heritage shall [~~should~~] not be traded, sold, bought and bartered as items of commercial value.
3. Activities directed at underwater cultural heritage shall not adversely impact underwater cultural heritage more than is necessary for the objectives of the project.
4. Activities directed at under-water cultural heritage must use non-destructive techniques and prospection and [limited] sampling in preference to recovery of objects. (If excavation is necessary for the purpose of scientific studies,) the methods and techniques. used must be as non-destructive as possible and contribute to the preservation of the remains.
5. Activities directed at underwater cultural heritage shall avoid the unnecessary disturbance of human remains or venerated sites.
6. Activities directed at underwater cultural heritage shall be strictly regulated to ensure proper recording of historical, cultural and archaeological information.
7. Public access to conduct activities relating to underwater cultural heritage that are non-intrusive (such as photography) should, where practicable, be encouraged.

II. Project design

8. Prior to any activity directed at underwater cultural heritage, a project design for the activity shall be developed and submitted to the competent authority for authorization and appropriate peer review.
9. The project design shall include:
 - (a) proposals for, or results of, all preliminary work as appropriate;
 - (b) the objectives of the project;
 - (c) the methodology to be used and the techniques to be employed;
 - (d) the anticipated funding;
 - (e) a timetable for completion of the project;
 - (f) composition, qualifications, responsibility and experience of the team;
 - (g) plans for post-fieldwork analysis and other activities;
 - (h) a conservation programme for artefacts and the site in close cooperation with the competent authority;
 - (i) site management and maintenance policy for the whole duration of the project;
 - (j) a documentation programme;
 - (k) a safety policy;
 - (l) arrangements for collaboration with museums and other, in particular scientific, institutions;
 - (m) report preparation;
 - (n) deposition of archives, including underwater cultural heritage removed; and
 - (o) a programme for publication.
10. Activities (directed at underwater cultural heritage) shall be carried out in accordance with the project design approved by the competent authority.
11. Where unexpected discoveries are made or circumstances change, the project design shall be

reviewed and amended with the approval of the competent- authority.

12. In cases of urgency or chance discoveries, activities directed at the underwater cultural heritage including conservation measures or activities for a period of short duration, including in particular site stabilization, may be authorized in the absence of a project design to protect underwater cultural heritage.

III. Preliminary work

13. The preliminary work referred to in Chapter H shall include an assessment that evaluates the [scientific significance and] vulnerability of the underwater cultural heritage and surrounding natural environment to damage by the proposed project, and the potential to obtain data that would meet the project's objectives.

14. The assessment shall also encompass background studies of available historical and archaeological evidence, archaeological and environmental characteristics of the site, and the consequences of any potential intrusion for the long-term stability of the underwater cultural heritage affected by the activities.

IV. Project objective, methodology and techniques

15. The methodology shall comply with the project's objectives and the techniques employed shall be as non-intrusive as possible.

V. Funding

16. {Except in cases of emergency to protect underwater cultural heritage, adequate funding shall ~~should~~ be assured in advance of any activity sufficient to complete all stages of the project design, including conservation, documentation and curation of recovered artefacts, and report preparation and dissemination.

17. The project design shall exhibit demonstrated ability (such as securing a bond) to the project through to completion.

18. The project design shall include contingency plans that will ensure conservation of underwater cultural heritage and supporting documentation in the event of any interruption of anticipated funding.

19. Project funding shall [should] not require the sale, acquisition or barter of underwater cultural heritage,

VI. Project duration - Timetable

20. An adequate timetable shall be developed to assure in advance of any activity directed at underwater cultural heritage the completion of all stages of the project design, including conservation, documentation and curation of recovered underwater cultural heritage, and report preparation and dissemination.

21. The project design shall include contingency plans that will ensure conservation of underwater cultural heritage" and supporting documentation in the event of any interruption in or termination of the anticipated timetable.

VII Competence and qualifications

22. Activities directed at underwater cultural heritage shall only be undertaken under the direction of and in the presence [in control] of a qualified underwater archaeologist with scientific competence appropriate to the project.¹⁴

23. All persons on the project team shall be qualified and have demonstrated competence appropriate to their project roles.

VIII. Conservation and site management

24. The conservation programme shall provide for treatment of the archaeological remains during the activities directed at underwater cultural heritage, in transit and in the long term. Conservation shall be carried out in accordance with current professional standards.

25. The site management programme shall provide for the protection and management in situ for underwater cultural heritage in the course of and upon termination of fieldwork. The programme shall include public information, reasonable provision for site stabilization, monitoring and protection against interference.

IX. Documentation

26. The documentation programme shall set out thorough documentation of activities, including a progress report directed at underwater cultural heritage in accordance with current professional standards of archaeological documentation.

27. Documentation shall include, at a minimum, a comprehensive record of the site including the

¹⁴ This provision was accepted in principle on the basis that "activities directed at underwater cultural heritage" shall be defined so as to exclude non-destructive activities.

provenance of underwater cultural heritage moved or removed in the course of the activities directed at underwater cultural heritage, field notes, plans, drawings, sections, photographs and recording in other media.

X. Safety

28. A safety policy shall be prepared that is adequate to ensure the safety and health of the project's team and third parties and is consistent with any applicable statutory and professional requirements.

XI. Reporting

29. Interim and final reports shall be made available according to the timetable set out in the project design, and deposited in relevant public records.

30. Reports shall include:

- (a) an account of the objectives;
- (b) an account of the methods and techniques employed;
- (c) an account of the results achieved;
- (d) recommendations concerning conservation and curation of any underwater cultural heritage removed as well as of the site; and
- (e) recommendations for future activities; [and]
- [(f) basic graphic and photographic documentation on all phases of the activity.]

X11. Curation of Project archive

31. The project archive, including any underwater cultural heritage removed and a copy of all supporting documentation, should (shall) as much as possible be kept together and intact as a collection in a manner that can [be available] provide for scientific and public access as well as the curation of the archive [within at least five years of the completion of the archaeological fieldwork].

32. Arrangements for curation of the project archive shall be agreed to before any activity commences, and shall be set out in the project design.

33. The project archive shall be prepared according to current professional standards.

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