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## Investing in Culture: Underwater Cultural Heritage and International Investment Law

Valentina S. Vadi

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# Investing in Culture: Underwater Cultural Heritage and International Investment Law

Valentina Sara Vadi\*

## ABSTRACT

*Underwater cultural heritage (UCH), which includes evidence of past cultures preserved in shipwrecks, enables the relevant epistemic communities to open a window to the unknown past and enrich their understanding of history. Recent technologies have allowed the recovery of more and more shipwrecks by private actors who often retrieve materials from shipwrecks to sell them. Not all salvors conduct proper scientific inquiry, conserve artifacts, and publish the results of the research; more often, much of the salvaged material is sold and its cultural capital dispersed. Because states rarely have adequate funds to recover ancient shipwrecks and manage this material, however, commercial actors seem to be necessary components of every regulatory framework governing UCH.*

*In this context, this Article aims to reconcile private interests with the public interest in cultural heritage protection. Such reconciliation requires that international law be reinterpreted and reshaped in order to better protect and preserve UCH and that preservation of cultural heritage be recognized as a key component of economic, social, and cultural development.*

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“To see a world in a grain of sand . . .  
And eternity in an hour.”<sup>1</sup>

## I. INTRODUCTION

Ancient shipwrecks contribute to our understanding of history by providing a glimpse into different epochs and societies. In recent times, the advancement of technology has made it possible to find, visit, and remove artifacts from shipwrecks that had remained in the abyss for centuries. The increasing ability to reach these archaeological treasures has intensified the debate over related ownership and management issues. Because of the huge efforts and expenses needed to recover and rescue these shipwrecks, commercial salvors have been particularly successful in maritime excavation. While private actors have recovered expenses by claiming possession rights and even selling the artifacts, the scientific community and the public at large have demonstrated an interest in the preservation of cultural heritage.<sup>2</sup> In dealing with these conflicting interests and philosophies, courts have struggled to settle cultural heritage disputes. Given the international dimension of most of the disputes, UCH has become the latest frontier of international legal debate.<sup>3</sup>

This Article proposes a different theoretical framework for reconciling private interests with the public interest in cultural heritage protection under international law. International law needs to be reinterpreted and reshaped in order to better protect and preserve UCH, and preservation of cultural heritage must be recognized as a key element of economic, social, and cultural development.

The Article begins by defining the multifaceted concept of UCH and describing the legal framework that governs it in order to verify whether the existing regime adequately protects undersea heritage. As a regime complex<sup>4</sup> governs the exploration and management of ancient shipwrecks, the fragmentation among different treaty regimes and the existence of maritime customs have led to new forms of piracy, effectively undermining UCH preservation.

1. WILLIAM BLAKE, *Auguries of Innocence*, in *THE POEMS: WITH SPECIMENS OF THE PROSE WRITINGS OF WILLIAM BLAKE* 208, 208 (1885).

2. Robyn Frost, *Underwater Cultural Heritage Protection*, 23 *AUSTL. Y.B. INT'L L.* 25, 25 (2004).

3. *Id.*

4. A “regime complex” is “a collective of partially overlapping and nonhierarchical regimes.” Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 *INT'L ORG.* 277, 277 (2004).

The Article then questions whether international investment law might provide an alternative framework for the protection of undersea heritage. In scrutinizing whether investment law is applicable to salvage contracts by which private actors rescue ancient shipwrecks with a state's consent, two questions arise: first, whether investment treaties are compatible with states' obligations to protect UCH, and second, whether investor-state arbitration is a suitable forum to deal with claims concerning UCH. In order to answer these questions, this Article will analyze a case currently under consideration at the International Centre for Settlement of International Disputes.

Finally, the Article contends that synergy may be found between public and private actors and that, as the proposed model demonstrates, preservation of cultural heritage is a key component of economic, social, and cultural development.

## II. TREASURES BENEATH THE SEA: THE CONCEPT OF UNDERWATER CULTURAL HERITAGE

Historic sunken vessels constitute the essence of UCH.<sup>5</sup> The concept of UCH is much broader, however, and can be defined as "all traces of human existence having a cultural, historical or archaeological character which have been partially or totally underwater, periodically or continuously, for at least 100 years."<sup>6</sup>

UCH requires protection for several reasons. First, cultural heritage has a historical and archaeological value, as it allows discourse and reflection upon the past. While, in some rare cases, aesthetic beauty alone would justify consideration of certain archaeological remains, in other more frequent cases it is the narrative connected to the object that makes it unique and fascinating. The existence of financial riches or a work of art on board a shipwreck is not only apparently random<sup>7</sup> but also may be

5. As one distinguished archaeologist explained, "[s]hips that know no frontiers on the oceans also, metaphorically, traverse the frontiers of man's achievement by virtue of the multifarious skills he has lavished upon them; they are his noblest artefact." Honor Frost, Editorial, *Museums from the Depths*, 35 MUSEUM 11, 11 (1983).

6. United Nations Educational, Scientific and Cultural Organization, Convention on the Protection of Underwater Cultural Heritage art. 1.1, Nov. 2, 2001, 41 I.L.M. 37 (2002) [hereinafter CPUCH].

7. For instance, the *Vrouw Maria*, a Dutch merchant snow-ship, was loaded with precious artifacts—including artworks belonging to Catherine the Great of Russia—when it sank near the coast of Finland on October 9, 1771. DEP'T OF ARCHAEOLOGY SECTION FOR MARITIME ARCHAEOLOGY, NAT'L BOARD OF ANTIQUITIES, MANAGEMENT PLAN OF THE WRECK OF THE VROUW MARIA 8, 14 (2004) (Fin.), available at [http://www.nba.fi/Internat/MoSS/download/mp\\_vm.pdf](http://www.nba.fi/Internat/MoSS/download/mp_vm.pdf) (last visited Mar. 22, 2009).

detrimental to preservation of the site by attracting looters and even vandals. Generally, sunken vessels provide unique information for reconstructing lifestyles, trade routes, and shipbuilding techniques that no longer exist. In some cases, navigation instruments, clothing, and even foods and medicines used aboard ships have been rescued.<sup>8</sup> The knowledge unveiled by the discovery of an ancient shipwreck thus represents an authentic knowledge treasure.

Ancient shipwrecks offer archaeological materials in context.<sup>9</sup> Discovering undersea heritage is like gaining access to the secrets of a civilization, in their entirety, at a fixed point in time.<sup>10</sup> In addition, UCH is often very well preserved, due to low oxygen levels in marine environments,<sup>11</sup> thus preventing both alterations and stratifications (unlike in the case of land archaeology, where almost everything is

Although a part of the cargo was salvaged at the time of the shipwreck, the rest of the items aboard the ship remain in the shipwreck, practically in those places where they were when the ship sank. *Id.* at 12.

8. For example,

[o]ne artifact, a porcelain toothpaste container, was recovered [from the Titanic] and has been included in several publications. Health rules and regulations established in the British Board of Trade's Merchant Shipping Acts of 1894 and 1906, stated that the Board shall issue a list of medicines and medical supplies for different classes of ships and voyages leaving the United Kingdom (Great Britain).

Richard A. Glenner, Alison G. Kassel & Laurel K. Graham, *Titanic Medical Care: Second to None*, VOYAGE (Autumn 2000), available at [http://www.fauchard.org/history/articles/voyage/voyage\\_fall02\\_titanic\\_ud.htm](http://www.fauchard.org/history/articles/voyage/voyage_fall02_titanic_ud.htm). These Acts instructed every ship leaving the U.K to carry the items listed. *Id.*

9. For instance, the large quantity of tobacco smoking pipes found among the remains of the Monte Christi "Pipe Wreck" in the Dominican Republic is reshaping traditional conceptions of colonial life and the tobacco trade in the Americas. See Jerome Lynn Hall, *The Monte Christi "Pipe Wreck,"* in UNDERWATER CULTURAL HERITAGE AT RISK: MANAGING NATURAL AND HUMAN IMPACTS 20, 20–22 (Robert Grenier, David Nutley & Ian Cochran eds., 2006).

10. Finding a shipwreck on the seabed may allow archaeologists to collect a whole series of data related to a certain society at a particular time. See KEITH MUCKELROY, MARITIME ARCHAEOLOGY 120 (1978) (explaining that the artifacts found on the Spanish Armada wrecks represent "the products and technology of Europe at the end of the sixteenth century"). What survives of the vessel and its contents represents a unity or, in archaeological terms, a "closed group." See *id.* (arguing the material taken from Spanish Armada wrecks "together represents one large and precisely dated closed group"). For instance, the rescue of an Elizabethan ship in the Thames Estuary has opened a window into the port's Elizabethan past. Anthony Firth, *Old Shipwrecks and New Dredging: An Elizabethan Ship in the Thames,* in UNDERWATER CULTURAL HERITAGE AT RISK: MANAGING NATURAL AND HUMAN IMPACTS, *supra* note 9, at 35–37.

11 UNESCO.org, Underwater Archaeology, [http://portal.unesco.org/culture/en/ev.php\\_URL\\_ID=38164&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php_URL_ID=38164&URL_DO=DO_TOPIC&URL_SECTION=201.html) (last visited Mar. 22, 2009).

altered over time). UCH is, therefore, much like a time capsule waiting to be unlocked.<sup>12</sup>

Second, as Dr. Last highlights, “[i]t is important when considering the concept of cultural heritage to recognise its importance in the formation of cultural identity.”<sup>13</sup> UCH may contribute to the formation and preservation of cultural identity and, by fostering people’s sense of community, can hold associative value. UCH may also have a spiritual dimension, as these ancient vessels, in many cases, represent a collective burial for the people who lost their lives in the shipwreck.<sup>14</sup> Recovering a shipwreck means resolving an historical jigsaw, a collective disappearance that happened centuries before.<sup>15</sup>

12. Patrick J. O’Keefe & Lyndel V. Prott, *Australian Protection of Historic Shipwrecks*, 6 AUSTL. Y.B. INT’L L. 119, 119–120 (1974–1975). As one archaeologist explains, “land sites typically present stratum after stratum of occupation. . . . [F]requently, artefacts from one period become mixed in with those of another when a site is disturbed making the archaeologist’s unravelling [sic] of the puzzle more difficult.” Robert F. Marx, *The Disappearing Underwater Heritage*, 35 MUSEUM 9, 9 (1983).

13. Kathryn Last, *Cultural Pluralism and the Return of Cultural Heritage*, in ACCOMMODATING CULTURAL DIVERSITY 123, 124 (Stephen Tierney ed., 2007).

14. As one author argues, “[i]n a technical sense, many shipwrecks are, in fact, gravesites. For example, over 1500 perished when the Titanic sank.” Christopher R. Bryant, *The Archaeological Duty of Care: The Legal, Professional, and Cultural Struggle over Salvaging Historic Shipwrecks*, 65 ALB. L. REV. 97, 100 n.21 (2001). After the wreckage was discovered in 1985 by Dr. Robert Ballard, the U.S. Congress enacted legislation “directing the Department of State to negotiate an international agreement to designate the wreck as a maritime memorial” and to protect it from looting and misguided salvage. Ole Varmer, *RMS Titanic, in UNDERWATER CULTURAL HERITAGE AT RISK: MANAGING NATURAL AND HUMAN IMPACTS*, *supra* note 9, at 14, 14–15. Similarly, after the passenger carrier M/S Estonia sank in 1994, taking with it more than 800 passengers and crew, Estonia, Finland, and Sweden agreed to designate the wreck as a maritime grave. Marie Jacobsson & Jan Klabbers, *Rest in Peace? New Developments Concerning the Wreck of the M/S Estonia*, 69 NORDIC J. INT’L L. 317, 317 (2000).

15. On maritime memorials, both underwater and ashore, see, for example, David J. Stewart, *Gravestones and Monuments in the Maritime Cultural Landscape: Research Potential and Preliminary Interpretations*, 36 INT’L J. NAUTICAL ARCHAEOLOGY 112 (2007). The sinking of the Ancona, an Italian liner that recently has been found by a salvage company, provides a paradigmatic example. Merchant Royal, SS Ancona Site Claimed by Odyssey Marine, [http://www.merchantroyalshipwreck.com/2007/09/ss\\_ancona.html](http://www.merchantroyalshipwreck.com/2007/09/ss_ancona.html) (Sept. 3, 2007, 19:44). The ship, “which had been making frequent trips between Naples and New York” since 1908, sank in 1915 near the coast of Sardinia after being shelled by a German U-boat. *Treasure Shipwrecks Around the World*, [http://www.treasurelore.com/florida/treasure\\_ships.htm](http://www.treasurelore.com/florida/treasure_ships.htm) (last visited Mar. 21, 2009). Its recovery sheds light on a dark corner of WWI, as the Ancona had mostly women and children immigrants on board and “was carrying no guns or munitions.” *Id.* At the time of the event, the public was outraged, and some political commentators labelled the episode a German “act of retaliation against Italy for having recently entered the war.” Kathryn J. Farrell, *Ethnic Settlers in Derbyshire, in THE PEAK DISTRICT* (Roy Millward & Adrian Robinson eds., 1975), available at <http://freepages.genealogy.rootsweb.ancestry.com/~wirksworth/history.htm> (last visited

Third, a unique feature of UCH is its inherently international character. Ships engaged in international and regional trade often wrecked at a distance from their origins and destinations.<sup>16</sup> It was common for vessels built in one country to transport cargoes to a second country under a third country's flag; furthermore, ships' crews were often internationally diverse, and wrecks often occurred in international waters or in the territorial waters of yet another country.<sup>17</sup> While one might argue that only the special circumstances of a case cause a ship to sink in a given area, certain regions that have represented maritime trade routes for centuries might constitute maritime cultural landscapes.<sup>18</sup> The cosmopolitan character of UCH as a "common heritage of mankind"<sup>19</sup> makes it an object worthy of protection by international law.<sup>20</sup> "The importance of cultural heritage to the international community has long been established and appreciated; not only does it manifest universally

Mar. 21, 2009). Following the incident, "the sinking of civilian passenger liners by German U-boats [became] commonplace." *Id.* For information on the legal battle surrounding the salvaged treasure of the Ancona, see John Ward Anderson, *Will Finders Be Keepers of Salvaged Treasure?; 17-Ton Haul of Silver and Gold From Atlantic Pits U.S. Firm Against Spain*, WASH. POST, Aug. 27, 2007, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/26/AR2007082601409.html>.

16. Trade has probably generated more cultural change among the humans than any other activity, and for at least 4,000 years a large part of the world's goods have traveled by sea. It has been estimated that until well after the 1800, as much as 5 per cent of all this material was lost to the sea.

THE SEA REMEMBERS: SHIPWRECKS AND ARCHAEOLOGY 9–10 (Peter Throckmorton ed., 1987).

17. See, e.g., Anastasia Strati, *Deep Seabed Cultural Property and the Common Heritage of Mankind*, 40 INT'L & COMP. L.Q. 859, 864 (1991).

18. In a seminal article, Professor Westerdahl introduced "maritime cultural landscape" as the archaeological concept combining sea and land and called for the development of this theoretical perspective. See Christer Westerdahl, *The Maritime Cultural Landscape*, 21 INT'L J. NAUTICAL ARCHAEOLOGY 6, 13 (1992).

19. The expression "common heritage of mankind" indicates the fundamental interest of the international community as a whole. See KEMAL BASLAR, *THE CONCEPT OF THE COMMON HERITAGE OF MANKIND IN INTERNATIONAL LAW* 72, 73 & n.186 (1998).

20. As Bauer highlights,

[t]he term "cultural heritage" contains an inherent tension. On the one hand, "culture" suggests something dynamic: it represents the different values and practices of different social groups, which continually evolve as they interact with others and their membership changes. On the other hand, "heritage" (and likewise "property") implies something more clearly defined and static: it refers to a specific object or tradition passed on from generation to generation with little to no significant change. The difficulty in resolving these opposing forces—change versus stability—underlies why protecting . . . cultural heritage is so difficult to regulate in law, policy and practice.

Alexander A. Bauer, *(Re)Introducing the International Journal of Cultural Property*, 12 INT'L J. CULTURAL PROP. 6, 6 (2005).



shared values, but by revealing and respecting the specific national features of different original civilizations, it also promotes understanding among nations.”<sup>21</sup>

### III. UNDERWATER CULTURAL HERITAGE: THE INTERNATIONAL LEGAL FRAMEWORK

At the international level, “[t]here is wide agreement . . . that archaeological remains and their treatment are a matter of ‘public’ concern.”<sup>22</sup> With regard to UCH, the need for appropriate management frameworks has become pressing because technological progress has allowed unprecedented accessibility to UCH, thereby increasing the risk of damage and destruction.

Because UCH is an important component of cultural heritage,<sup>23</sup> it receives general protection under a series of international law instruments protecting cultural rights. For instance, the Universal Declaration of Human Rights states that everyone “is entitled to realization . . . [of] cultural rights indispensable for his dignity.”<sup>24</sup> Cultural rights have similarly been confirmed by Article 15 of the International Covenant on Economic, Social and Cultural Rights, which recognizes individuals’ rights to take part in cultural life.<sup>25</sup>

21. Anastasia Strati, *The Implications of Common Heritage Concepts on the Quest for Cultural Objects and the Dialogue Between North and South*, 89 AM. SOC’Y INT’L L. PROC. 439, 439 (1995).

22. JOHN CARMAN, AGAINST CULTURAL PROPERTY: ARCHAEOLOGY, HERITAGE AND OWNERSHIP 45 (2005).

23. See CPUCH, *supra* note 6, art. 1 (defining “cultural heritage” as including archaeological sites of “historical, aesthetic, ethnological or anthropological” value). The World Heritage Convention introduced the concept of cultural heritage when it abandoned the more traditional concept of cultural property. Francesco Francioni, *Culture, Heritage and Human Rights: An Introduction*, in CULTURAL HUMAN RIGHTS 6 (Francesco Francioni & Martin Scheinin eds., 2008). The Convention’s decision had, of course, a deep symbolic value, distinguishing the concept of heritage from that of property by suggesting that heritage encompasses a certain public interest that is to be protected irrespective of ownership. *Id.* at 6–7. For commentary, see generally, Alan Audi, *A Semiotics of Cultural Property Argument*, 14 INT’L J. CULTURAL PROP. 131 (2007), and Tolina Loulanski, *Revising the Concept for Cultural Heritage: The Argument for a Functional Approach*, 13 INT’L J. CULTURAL PROP. 207, 208–21 (2007) (discussing the evolving concept of cultural heritage).

24. Universal Declaration of Human Rights, G.A. Res. 217A, art. 22, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948). Although the UDHR is not legally binding, some authors argue that it has become part of customary international law. *E.g.*, Peter Bailey, *The Creation of the Universal Declaration of Human Rights*, <http://www.universalrights.net/main/creation.htm> (last visited Mar. 21, 2009). Whatever the legal status of the UDHR, its influence on the development of public international law is generally acknowledged. *See, e.g., id.*

25. International Covenant on Economic, Social and Cultural Rights art. 1, 933 U.N.T.S. 3, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter

These provisions create both “a negative obligation not to interfere with cultural freedoms” and a positive obligation to protect cultural heritage.<sup>26</sup>

More specifically, a regime complex protects UCH at the international law level. This varied framework of regulation and norms paradoxically creates, however, a sort of legal vacuum, as the exact boundaries of the different regimes and different actors’ specific roles within those regimes are unclear. Furthermore, the provisions are extremely vague and reflect ambiguous compromises reached over the course of several separate negotiations.

#### A. *The International Law of the Sea and Underwater Cultural Heritage*

At the international law level, the 1982 United Nations Convention on the Law of the Sea (UNCLOS)<sup>27</sup> governs virtually all aspects of the law of the sea<sup>28</sup> but still only marginally addresses UCH. Although the UNCLOS recognizes the obligation of states to protect archaeological and historical objects, it includes only two

ICESCR]. Although the ICESCR has been widely adopted, the United States has signed but not ratified it. Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT’L L.J. 307, 309 (2007). See generally Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT’L L. 365 (1990) (endorsing the call for ratification of the ICESCR). Although cultural rights have been neglected for a long time, in recent years they have become the focus of increasing scholarly debate. ELSA STAMATOPOULOU, *CULTURAL RIGHTS IN INTERNATIONAL LAW: ARTICLE 27 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND BEYOND 2* (2007).

26. Francesco Francioni, *Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity*, 25 MICH. J. INT’L L. 1209, 1213 (2004). Because culture affects all aspects of human life, cultural rights illustrate the indivisibility and interdependence of all rights in a comprehensive fashion. See *id.* at 1222–23; see also JESSICA ALMQVIST, *HUMAN RIGHTS, CULTURE AND THE RULE OF LAW* 217 (2005).

27. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]. “As of February 1, 2008, 155 states have ratified, acceded to, or succeeded to, the UNCLOS.” Permanent Court of Arbitration, *Ad Hoc Arbitration Under Annex VII of the United Nations Convention on the Law of the Sea*, [http://www.pca-cpa.org/showpage.asp?pag\\_id=1288](http://www.pca-cpa.org/showpage.asp?pag_id=1288) (last visited Mar. 21, 2009).

28. As Prows explains, “the 1982 United Nations Convention on the Law of the Sea (UNCLOS) represents the culmination of thousands of years of international relations, conflict, and now nearly universal adherence to an enduring order for ocean space. Its adoption marked the most significant achievement for international law since the UN Charter . . . .” Peter Prows, *Tough Love: The Dramatic Birth and Looming Demise of UNCLOS Property Law (and What Is To Be Done About It)* 1 (N.Y. Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 01-19, 2006).

provisions, Article 149 and Article 303, that specifically refer to such objects and establishing an obligation to protect them.<sup>29</sup>

UNCLOS Article 149 states that “[a]ll objects of an archaeological and historical nature found [“on the seabed and ocean floor beyond the limits of national jurisdiction” (the “Area”)]<sup>30</sup> “shall be preserved and disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.”<sup>31</sup>

Similarly, under UNCLOS Article 303, states have a dual duty to protect objects of an archaeological and historical nature found at sea and to cooperate for this purpose.<sup>32</sup> A state may establish an archaeological zone within its contiguous zone<sup>33</sup> and thus consider another actor’s removal of any archaeological or historical object from the contiguous zone an infringement of the UNCLOS.<sup>34</sup> In addition, Article 303 states that UNCLOS does not affect the law of salvage or other admiralty rules.<sup>35</sup>

Notwithstanding these provisions, the extent of a coastal state’s rights is far from clear. The two provisions not only fail to define what constitutes an archaeological and historical object but also never outline the measures to be taken to protect these objects. There is also no clarification in the UNCLOS about regulating UCH

29. See UNCLOS, *supra* note 27, arts. 149, 303. For a detailed analysis of UNCLOS provisions dedicated to UCH, see generally, Tullio Scovazzi, *La Notion de Patrimoine Culturel de l’Humanité dans les Instruments Internationaux*, in *LE PATRIMOINE CULTUREL DE L’HUMANITÉ [THE CULTURAL HERITAGE OF MANKIND]* 3, 104 (James A.R. Nafziger & Tullio Scovazzi eds., 2008) (Neth.) and Marina Papa Sokal, *International Law for the Protection of Underwater Cultural Heritage: Can Our Past Be Salvaged?*, *CULTURE WITHOUT CONTEXT (The Illicit Antiquities Research Ctr.)*, Spring 2005, available at <http://www.mcdonald.cam.ac.uk/projects/iarc/culturewithoutcontext/issue16/papa-sokal.htm>.

30. UNCLOS, *supra* note 27, art. 1(1)(1).

31. *Id.* art. 149.

32. *Id.* art. 303(1).

33. 1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:

(a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;

(b) punish infringement of the above laws and regulations committed within its territory or territorial sea.

2. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.

*Id.* art. 33.

34. *Id.* art. 303(2).

35. *Id.* art. 303(3).

found on the continental shelf<sup>36</sup> or in the exclusive economic zone.<sup>37</sup> Thus, the UNCLOS left room for specific international instruments to elaborate a more detailed protection of UCH.<sup>38</sup>

*B. The UNESCO Convention on the Protection of  
Underwater Cultural Heritage: One Step Forward,  
Two Steps Back?*

The 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage (CPOCH)<sup>39</sup> provides a complement to the UNCLOS by ensuring and strengthening the international protection of UCH.<sup>40</sup>

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

*Id.* art. 76(1); *see also id.* art. 77(1) (“The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.”).

37. The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.

*Id.* art. 55.

In the exclusive economic zone, the coastal State has: (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds.

*Id.* art. 56(1)(a).

38. *See id.* art. 303(4) (UNCLOS “is without prejudice” to other international instruments on this subject).

39. CPOCH, *supra* note 6. The CPOCH entered into force three months after the deposit of the twentieth instrument of adhesion on January 2, 2009. *See* The Director-General, *Director-General’s Written Introduction to the General Debate of the Executive Board*, para. 62, delivered to the Executive Board of the United Nations Educational, Scientific and Cultural Organization, U.N. Doc. 180 EX/INF.19 (Oct. 1, 2008), available at <http://unesdoc.unesco.org/images/0016/001629/162953e.pdf>. At the time this Article was sent to the publisher, twenty-one countries had ratified the CPOCH. United Nations Educational, Scientific and Cultural Organization, Signatories to the Convention on the Protection of Underwater Cultural Heritage, <http://portal.unesco.org/la/convention.asp?KO=13520&language=E&order=alpha> (last visited Apr. 6, 2008) [hereinafter CPOCH Signatories].

The elaboration of the CPUCH, which entered into force on January 2, 2009, reflects the increasing awareness within the international community of the importance of protecting UCH.<sup>41</sup> Notwithstanding its noble objectives, the CPUCH has been criticized for several reasons, most notably its utopian character.<sup>42</sup> After briefly illustrating the CPUCH's main provisions, this Subpart will assess its pros and cons.

The CPUCH describes *in situ* preservation of UCH as the preferred policy option<sup>43</sup> and provides a rule against the commercialization of UCH for trade or speculation.<sup>44</sup> The purpose of these provisions is to foster tourism related to the archaeological discoveries.<sup>45</sup> Once a resource has been sold, particularly in a foreign state, it is no longer capable of providing any further economic benefit to the state in which it was found. Consequently, admiralty law (i.e., the law of salvage and the law of finds<sup>46</sup>) is retained in the CPUCH, but in an attenuated form. Under Article 4, salvage activities relating to UCH apply only if they are authorized by the competent authorities, in full conformity with the CPUCH.<sup>47</sup> As Patrick O'Keefe notes, "[t]he necessity for conformity with the convention will restrict

40. See Craig J.S. Forrest, *Defining 'Underwater Cultural Heritage,'* 31 INT'L J. NAUTICAL ARCHAEOLOGY 3, 10 (2002). For commentary on the CPUCH, see generally, PATRICK J. O'KEEFE, *SHIPWRECKED HERITAGE: A COMMENTARY ON THE UNESCO CONVENTION ON UNDERWATER CULTURAL HERITAGE* (2002); THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: BEFORE AND AFTER THE 2001 UNESCO CONVENTION (Roberta Garabello & Tullio Scovazzi eds., 2003); Sarah Dromgoole, *2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage*, 18 INT'L J. MARINE & COASTAL L. 59 (2003); Forrest, *supra*; and Djamchid Momtaz, *La Convention sur la Protection du Patrimoine Culturel Subaquatique*, in *LAW OF THE SEA, ENVIRONMENTAL LAW AND SETTLEMENT OF DISPUTES* (Tafsir Malick Ndiaye & Rüdger Wolfrum eds., 2007). For a look at the *travaux préparatoires*, see generally Janet Blake, *The Protection of the Underwater Cultural Heritage*, 45 INT'L & COMP. L.Q. 819 (1996) (discussing negotiations of the CPUCH).

41. See Guido Carducci, *Introduction to the UNESCO Convention on the Protection of the Underwater Cultural Heritage*, in *UNDERWATER CULTURAL HERITAGE AT RISK: MANAGING NATURAL AND HUMAN IMPACTS*, *supra* note 9, at i, i.

42. Robert Grenier, *Introduction: Mankind, and at Times Nature, Are the True Risks to Underwater Cultural Heritage*, in *UNDERWATER CULTURAL HERITAGE AT RISK: MANAGING NATURAL AND HUMAN IMPACTS*, *supra* note 9, at 17 ("The discussion had to be freed . . . from the romantic clichés.").

43. CPUCH, *supra* note 6, arts. 2(5), 33 annex (Rule 1).

44. See *id.* art. 2(7).

45. See *SKN Poised to Ratify UNESCO Convention*, SUN ST. KITTS & NEVIS, Mar. 12, 2009, <http://sunstkitts.com/paper/?asknw=view&asknw=view&view&sun=494418078207132005&an=282009086903122009&ac=Local> (quoting Antonio Maynard, Secretary-General of St. Kitts/Nevis National Commission for UNESCO, as stating that ratification of the CPUCH would be beneficial to the heritage tourism industry).

46. For the definition of salvage law and the law of finds, see *infra* Part III.C and Part III.D, respectively.

47. CPUCH, *supra* note 6, art. 4(a)–(b).

the applicability of salvage law.”<sup>48</sup> Indeed, as Guido Carducci comments, “the new universal instrument stands as a *lex specialis* for UCH and its protection, whereas [UNCLOS] remains an authoritative *lex generalis* for the whole law of the sea.”<sup>49</sup>

Depending on the location of UCH, specific regimes for cooperation between coastal and flag states, as well as other concerned states, may be applicable.<sup>50</sup> For instance, the CPUCH requires a state party to direct both its nationals and any ships flying its flag to report to the state party any discovery of UCH or any intention of undertaking activities related to UCH in the two zones adjacent to its zone.<sup>51</sup> The CPUCH contains a degree of creative ambiguity, as it is unclear whether the coastal state may also require such reports from either a foreign national or a foreign flag ship.<sup>52</sup> Surely, in its territorial waters a state may exercise sovereign powers, as territorial waters are part of the state’s territory. However, greater uncertainty arises as to the existence of such rights in other maritime zones.

Perhaps the most important achievement of the CPUCH is its Annex. Drafted by archaeologists with a view toward technical considerations, the Annex benefited from unanimous support at the time of its adoption.<sup>53</sup> It restates the need to preserve UCH *in situ* and also allows the possibility to adopt different measures for protecting or diffusing the knowledge of UCH.<sup>54</sup> The Annex further reaffirms the idea that cultural objects should not be considered mere commodities.<sup>55</sup> Like the CPUCH itself, however, the Annex is not legally binding. Nevertheless, it is worth recalling the trend in international law—standards complement and further explicit

48. Patrick J. O’Keefe, *Fourth Meeting of Governmental Experts to Consider the Draft Convention on the Protection of Underwater Cultural Heritage*, 11 INT’L J. CULTURAL PROP. 168, 171 (2002) [hereinafter O’Keefe, *Fourth Meeting*]; Markus Rau, *The UNESCO Convention on Underwater Cultural Heritage and the International Law of the Sea*, 6 MAX PLANCK Y.B. U.N. L. 387, 445 (2002).

49. Guido Carducci, Current Development, *New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage*, 96 AM. J. INT’L L. 419, 420 (2002).

50. CPUCH, *supra* note 6, arts. 7–13.

51. *Id.* art 9(1).

52. O’Keefe, *Fourth Meeting*, *supra* note 48, at 171.

53. CPUCH, *supra* note 6, art. 33 annex (Rule 1); *see also* Momtaz, *supra* note 40, at 448–49.

54. CPUCH, *supra* note 6, art. 33 annex (Rule 1); *see also* Momtaz, *supra* note 40, at 448–49.

55. Rule 2 of the Annex states that “[t]he commercial exploitation of underwater cultural heritage for trade or speculation or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of underwater cultural heritage. Underwater cultural heritage shall not be traded, sold bought or bartered as *commercial goods*.” CPUCH, *supra* note 6, art. 33 annex (Rule 2) (emphasis added).

rules.<sup>56</sup> While standards are not traditionally mentioned amongst the sources of international law listed by Article 38 of the Statute of the International Court of Justice,<sup>57</sup> they have become more influential in shaping state conduct in regard to international relations. As the Annex is widely recognized as embodying professional norm guidelines, it might be replicated in national legislations without the need for ratifying the CPUCH.

Because of its controversial provisions, the CPUCH has attracted a mere twenty-one parties to date.<sup>58</sup> There are numerous reasons why states are reluctant to ratify the CPUCH. Perhaps the most prevalent concern stems from its utopian character. The CPUCH adopts a purist, or preservationist, approach to UCH protection, allowing only a very limited approach to salvage.<sup>59</sup> However, many states lack the financial resources to implement such an approach.<sup>60</sup> Furthermore, by requiring *in situ* preservation, the CPUCH appears contradictory, as decay and spoilage seem unavoidable. In conclusion, by adopting a pure preservationist approach without conceding much space to private actors' concerns, the CPUCH seems to fall short of establishing a global consensus on the manner to protect UCH. This is a missed opportunity, as recent technological developments may increase looting and dispersion of UCH.

### C. Salvage Law

Salvage law, which is an important component part of maritime law, governs UCH. Maritime or admiralty law is the body of

56. Standards involve the question of reasonableness (i.e., what is acceptable conduct under the circumstances), thus functioning as a model against which to evaluate certain behaviors. Standards can evolve in legal tools, eventually giving rise to a sort of global administrative law. See generally Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 EUR. J. INT'L L. 1 (2006).

57. Article 38 of the Statute of the International Court of Justice states:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions . . . ; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1055, 3 Bevans 1179.

58. For signatories, see CPUCH Signatories, *supra* note 39.

59. For a more detailed analysis of the purism versus salvage debate, see *infra* Part V.A.

60. *Id.*

international private law that has developed in relation to maritime commerce since the Middle Ages.<sup>61</sup> In particular, salvage law regulates “salvage,” which maritime law defines as the act of rescuing life or property from peril on water.<sup>62</sup> While common law establishes neither a duty to aid another person when she or her property is in peril nor a right to a reward if aid is provided, maritime law has adopted a substantially different set of rules.<sup>63</sup> Specifically, salvage law aims to reward the salvor who has rescued life or property imperiled at sea.<sup>64</sup> The goal of salvage law is thus to promote solidarity among mariners and shipowners. The U.S. Supreme Court has explained the rationale of salvage law eloquently, stating that

[c]ompensation as salvage is not viewed by the admiralty courts merely as pay, on the principle of quantum meruit . . . but as a reward given for perilous services, voluntarily rendered, and as an inducement to seamen and others to embark in such undertakings to save life and property. Public policy encourages the hardy and adventurous mariner to engage in these laborious and sometimes dangerous enterprises . . .<sup>65</sup>

By way of analogy, admiralty courts<sup>66</sup> have applied the concept of salvage to the recovery of ancient relics. If a private actor rescues an ancient shipwreck, thus being considered a salvor, she is entitled to obtain a legal judgment granting her a reward.<sup>67</sup> The reward often

61. Maritime law is often considered a species of private international law rather than a branch of domestic or municipal law. See James A.R. Nafziger, *The Evolving Role of Admiralty Courts in Litigation Related to Historic Wreck*, 44 HARV. INT'L L.J. 251, 259 (2003). It is also considered part of the international law of the sea. *Id.* at 267. As Nafziger has rightly observed, maritime law constitutes a “hybrid of national and international rules.” *Id.* at 253.

62. *The Blackwall*, 77 U.S. (10 Wall.) 1, 14 (1869). Salvage may have a contractual or factual origin. If the parties stipulate a contract, the amount of the reward is determined by the salvage contract. William Tetley, *Maritime Transportation*, in 12 LAW OF TRANSPORT 3, § 4-284 (K. Zweigert & Ulrich Drobnig eds., 1981). If there is no contract, to have a valid claim for reward the salvor must show that the property saved was imperilled and that the salvor succeeded in preserving at least some of the property from the danger. See F.D. Rose, *Restitution to the Rescuer*, 9 OXFORD J. LEGAL STUD. 167, 198 (1989). The salvor has a maritime lien on the saved property and does not need to return it to the owner until his claim is satisfied. *Id.* at 199. Furthermore, the salvor may file a claim *in rem* against the property, in which case the court will take possession of the property unless the owner posts a bond to secure release. *Id.* at 199.

63. See *id.* at 169 (noting the assumption that common law is “generally hostile” to claims of rescuers).

64. *Id.* at 171.

65. *Blackwall*, 77 U.S. at 14.

66. “Admiralty courts are ordinary courts exercising jurisdiction and hearing disputes under the rules and procedures of admiralty law.” Nafziger, *supra* note 61, at 251 n.3.

67. David Curfman, *Thar Be Treasure Here: Rights to Ancient Shipwrecks in International Waters*, 86 WASH. U. L.R. 181, 188 (2008).



consists of a generous percentage of the value of the salvaged vessel or part of the proceedings from the sale or auction of recovered treasures and artifacts.<sup>68</sup>

Although salvage law has been elaborated under the common law legal system, the 1989 International Convention on Salvage,<sup>69</sup> which was adopted under the guidance of the International Maritime Organization,<sup>70</sup> also restated existing customary rules concerning salvage law and extended salvage law to other countries as well. Thus, it has effectively harmonized common law and civil law regimes concerning salvage law.<sup>71</sup> With regard to UCH, the Salvage Convention allows an optional reservation to its rules, permitting states to exclude the application of the Convention “when the property involved is *maritime cultural property of prehistoric, archaeological or historic interest* and is situated on the sea-bed.”<sup>72</sup> Because the reservation is limited to the application of the Convention, however, “it does not [ ] affect general admiralty law of which salvage law is a part.”<sup>73</sup>

68. See Bryant, *supra* note 14, at 121–22.

69. The International Convention on Salvage was adopted on April 28, 1989, and entered into force on July 14, 1996. International Maritime Organization, International Convention on Salvage art. 34 & n.1, Apr. 28, 1989, 1953 U.N.T.S. 193 [hereinafter International Convention on Salvage]. Negotiated and completed under the auspices of the International Maritime Organization (IMO), the Salvage Convention replaced the 1910 Brussels Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea. Int’l Maritime Org. [IMO], *Focus on IMO: A Summary of IMO Conventions*, at 4 n.1, 93, [http://www.imo.org/includes/blastDataOnly.asp/data\\_id%3D11171/SUMMARYJANUARY2005shortversion2.pdf](http://www.imo.org/includes/blastDataOnly.asp/data_id%3D11171/SUMMARYJANUARY2005shortversion2.pdf).

70. The International Maritime Organization (IMO) is the United Nations’ specialized agency responsible for improving maritime safety and preventing pollution from ships. Introduction to IMO, <http://www.imo.org/> (last visited Mar. 22, 2009). It was established by means of a Convention adopted under the auspices of the UN on March 17, 1948. 60th Anniversary of the Adoption of the IMO Convention, <http://www.imo.org/> (last visited Mar. 22, 2009). The IMO currently has 168 members. Introduction to IMO, *supra*. For more information on the IMO and its conventions, see generally, KENNETH R. SIMMONDS, *THE INTERNATIONAL MARITIME ORGANIZATION* (1994).

71. *E.g.*, GUIDO CAMARDA, CONVENZIONE “SALVAGE 1989” E AMBIENTE MARINO 10 (1992); SERGIO M. CARBONE, LEZIONI, CASI E MODELLI CONTRATTUALI DI DIRITTO MARITTIMO (1997); Umberto Leanza, *Zona Archeologica Marina*, in *PROTEZIONE INTERNAZIONALE DEL PATRIMONIO CULTURALE: INTERESSI NAZIONALI E DIFESA DEL PATRIMONIO COMUNE DELLA CULTURA* 41, 46 (Francesco Francioni, Angela Del Vecchio & Paolo De Caterini eds., 2000). On the positive role played by the IMO in drafting international maritime law conventions, see ROBIN ROLF CHURCHILL & ALAN VAUGHAN LOWE, *THE LAW OF THE SEA* 272 (3d ed. 1999).

72. International Convention on Salvage, *supra* note 69, art. 30(1)(d) (emphasis added).

73. EKE BOESTEN, *ARCHAEOLOGICAL AND/OR HISTORIC VALUABLE SHIPWRECKS IN INTERNATIONAL WATERS: PUBLIC INTERNATIONAL LAW AND WHAT IT OFFERS* 62 (2002).

Salvage law has achieved a truly international status through the ratification of the Salvage Convention and the emergence of maritime customs. Some authors consider it to be a species of private international law because it regulates the activities of private actors.<sup>74</sup> Other authors deem salvage law to be part of the *jus gentium*—the law of all nations.<sup>75</sup> Some courts have deemed it a part of “the venerable law of the sea.”<sup>76</sup> Regardless of its formal characterization, admiralty courts have applied salvage law even when historic vessels are involved. Thus, salvage law can be properly classified among the legal sources that, at the international level, govern the recovery of ancient shipwrecks.<sup>77</sup>

This is extremely problematic from a cultural perspective, however, because salvage law, as it has traditionally developed, is not capable of dealing with preservation issues. While maritime law has dealt with UCH only in a very incidental manner in the past, the more recent development of sophisticated technology has increasingly facilitated the rescue of ancient shipwrecks. Admiralty law, which has developed in an almost autochthonous way as a law used by merchants to deal with the daily practice of commercial maritime trade, has thus shown its inability to deal with the protection of UCH in the common interest of mankind.<sup>78</sup>

On one hand, admiralty law provides a powerful incentive for adventurers and salvors to dedicate time and money to discovering and rescuing ancient shipwrecks. As Christopher Bryant notes, “Fame aside, the potential for overwhelming financial reward is the true engine behind the salvaging of historic shipwrecks.”<sup>79</sup> Because salvaging ancient shipwrecks is prohibitively expensive,<sup>80</sup> outside investors are often sought to fund salvage operations. Such investment nevertheless remains extremely risky from a financial point of view.<sup>81</sup>

On the other hand, salvors lack expertise and often damage or destroy historic shipwrecks and artifacts. Furthermore, as selling artifacts constitutes the primary method of capitalizing on

74. See, e.g., *id.* at 93 (“Admiralty law is not public international law . . . . Admiralty law mainly regulates the activities conducted by or between private individuals . . .”).

75. See *id.*

76. *R.M.S. Titanic, Inc. v Haver*, 171 F.3d 943, 960 (4th Cir. 1999).

77. *Id.* at 961–62.

78. See, e.g., Paul Fletcher-Tomenius, Patrick J. O’Keefe & Michael Williams, *Salvor in Possession: Friend or Foe to Marine Archaeology?*, 9 INT’L J. CULTURAL PROP. 263, 298 (2000).

79. Bryant, *supra* note 14, at 107.

80. It is estimated that salvage operations cost more than \$30,000 per day. *Id.* at 111.

81. *Id.* at 107 & nn. 69–70.

shipwrecks, commerce in artifacts is a loss from an archaeological perspective because, after their sale, artifacts are no longer available for further study.

#### D. *The Law of Finds*

According to admiralty law, when no owner exists or can be determined, the party who recovers the property at sea is entitled to the application of the law of finds.<sup>82</sup> The law of finds is commonly considered a maritime concept despite its common law genesis.<sup>83</sup> Under this ancient doctrine, the title to the abandoned property is awarded to the finder.<sup>84</sup> While a salvor merely possesses the ship under salvage law, under the law of finds she is entitled to property since the law assumes that "the property involved either was never owned or was abandoned."<sup>85</sup> Thus, in order for someone to qualify as a finder, she must prove that the original owners abandoned the shipwreck.<sup>86</sup>

In the context of judicial proceedings, a salvor may invoke both salvage law and the law of finds.<sup>87</sup> If the court takes jurisdiction over the case, it will then focus on the specific facts at issue to determine

82. 2 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 16-7 (4th ed. 2009) (noting that the law of finds generally applies when abandonment has been shown, which generally can be shown "(1) where owners have publicly and expressly abandoned their property and (2) ancient shipwrecks where no owner comes forward").

83. The law of finds has its roots in common law cases such as *Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805). In *Pierson*, a New York court denied a hunter's claimed right to a fox, holding that an individual's mere pursuit of an animal did not convey upon that individual title to it. *Id.* Title was granted to a second hunter who actually seized the fox. *Id.* The concept is akin to the French Civil Code's tenet of *en fait de meubles la possession vaut titre* (if movables are concerned, possession equals title). CODE CIVIL [C. CIV.] art. 2279 (Fr.).

84. 2 SCHOENBAUM, *supra* note 82, § 16-7.

85. *Hener v. United States*, 525 F. Supp. 350, 356 (S.D.N.Y. 1981).

86. *See id.* at 357 ("Even sunken cargo and vessels are in general deemed 'abandoned' in admiralty only in the sense that the owner has lost the power to prevent salvage; a finding that title to such property has been lost requires strong proof, such as the owner's express declaration abandoning title.").

87. Sharp theoretical differences exist between the law of salvage and the law of "finds," although which

one is applicable to a particular case may present some difficulty. The clear major premise of the law of salvage is that the property that is the object of the salvage act is owned by persons other than the salvor. The purpose and rules of the law of salvage are designed to accord the salvor a right to compensation, not title. . . . The assumption of the law of finds is that the title to the property may have been lost . . . . The primary concern of the law of finds is title to the property.

2 SCHOENBAUM, *supra* note 82, § 16-7.

whether salvage law or the law of finds applies.<sup>88</sup> The judicial trend to apply the law of finds to historic shipwrecks is based on the presumption that the original owner had abandoned the vessel.<sup>89</sup>

The case of the recovery of the *Nuestra Señora de Atocha* is a particularly telling example. The famous Spanish galleon was carrying gold, silver, tobacco, and emeralds from Spanish colonies to King Phillip IV of Spain when it sank in 1622 near the Florida Keys.<sup>90</sup> Driven by a hurricane onto coral reefs, the vessel crashed and the crew of 550 drowned.<sup>91</sup> Several centuries later, Mel Fisher, an American salvor, found the *Atocha* after more than sixteen years of searching the sea.<sup>92</sup> Following the discovery, the state of Florida claimed ownership of the wreck and seized many items.<sup>93</sup> Florida signed salvage contracts with Fisher's private company allowing underwater salvage operations.<sup>94</sup> As payment, Florida would award the salvor 75% of the total appraised value of all materials recovered.<sup>95</sup> The payment might include recovered material, fair market value, or a combination of both.<sup>96</sup> The contract did not purport to effect any transfer of property; it was simply assumed that Florida owned the vessel under state law.<sup>97</sup> However, controversy

88. *Id.*

89. *Id.*

90. In the past, Spanish galleons carried European goods and Mexican silver to the Orient to exchange them for silk, gems, and spices. The galleon voyage, some 9,000 nautical miles in each direction, was the world's longest navigation. The ships themselves were built and owned by the Spanish Crown, ANGUS CONSTAM & TONY BRYAN, *SPANISH GALLEON 1530-1690*, at 46 (2004), which also regulated the immensely lucrative commerce. Katharine Bjork, *The Link That Kept the Philippines Spanish: Mexican Merchant Interests and the Manila Trade, 1571-1815*, 9 J. WORLD HIST. 25, 39-40 (1998). However, merchants regularly broke Crown regulations by placing ceilings on the value of shipments and restricting cargo in order to ship contraband. Cf. Cristoph Rosenmuller, PATRONS, PARTISANS, AND PALACE INTRIGUES 80-81 (2008) (describing the significant contraband trade and noting that traders routinely exceeded limits imposed by Spanish cargo restrictions). For a historical overview of the galleon trade, see CARLO M. CIPOLLA, *CONQUISTADORES, PIRATI, MERCATANTI: LA SAGA DELL'ARGENTO SPAGNUOLO* (1996); ANTONIO DOMÍNGUEZ ORTIZ, *THE GOLDEN AGE OF SPAIN, 1515-1659* (James Casey trans., 1971); Eugene Lyon, *Track of the Manila Galleons*, NAT'L GEOGRAPHIC, Sept. 1990, at 5.

91. *Atocha and Margarita Story*, <http://www.melfisher.com/Library/AtochaMargStory.asp> (last visited Mar. 23, 2009).

92. Mel Fisher's Treasures, <http://www.melfisher.com/default.asp> (last visited Mar. 23, 2009).

93. It is "the public policy of the state that all treasure trove, artifacts and such objects having intrinsic or historical and archaeological value which have been abandoned on state-owned lands or state-owned sovereignty submerged lands shall belong to the state . . . for the purposes of administration and protection." FLA. STAT. § 267.061(1)(b) (1974).

94. Fla. Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670, 674 (1982).

95. *Id.* at 675.

96. *Id.*

97. *Id.*

soon arose as to Florida's extension of the submerged lands doctrine, and the United States successfully proved that it was entitled to the area where the *Atocha* had come to rest.<sup>98</sup> The salvor immediately filed a complaint in the District Court for the Southern District of Florida, invoking an admiralty action in rem and attaching the *Atocha* as a defendant.<sup>99</sup> "The United States intervened in the action as a party-defendant and filed a counterclaim seeking a declaratory judgment that the United States was the proper owner of the ship."<sup>100</sup> After several years of litigation, the Supreme Court determined that the *Atocha* had been abandoned and ruled in favor of Fisher, thus giving him ownership of the vessel and its contents under the law of finds.<sup>101</sup>

In the case of two other Spanish galleons, *La Galga* and the *Juno*, private actors were unsuccessful in invoking the law of finds. After finding the warships sunk off the coast of Virginia in the eighteenth century, the salvage company Sea Hunt claimed ownership under the law of finds in an admiralty court.<sup>102</sup> However, Spain (the maritime power that had owned the ships) intervened in the proceedings, claiming ownership and contending that the shipwrecks were military gravesites.<sup>103</sup> While the district court held that Spain had abandoned *La Galga* in a 1763 treaty ending the Seven Years War,<sup>104</sup> the court of appeals reversed on the grounds that, under the treaty, Spain did not expressly abandon its properties at sea.<sup>105</sup> Sea Hunt then sought a partial salvage award from Spain for locating the vessels and related activities.<sup>106</sup> Spain rejected the claim, stating that it had had no intention of rescuing the ships because they were maritime graves.<sup>107</sup> Finally, the court confirmed the Spanish claims to the two vessels and refused to grant any compensation to the salvor, referencing general principles of

98. AdmiraltyLawGuide.com, Treasure Salvors, <http://www.admiraltylawguide.com/supct/TreasureSalvors.htm> (last visited Mar. 23, 2009) (citing *United States v. Florida*, 425 U.S. 791 (1976)).

99. *Treasure Salvors, Inc.*, 458 U.S. at 676.

100. *Id.* at 676-77.

101. *Id.* at 700.

102. Michael White, *International Decisions*, *Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634 (2000), cert. denied, 121 S. Ct. 1079 (2001), 96 AM. J. INT'L L. 678, 678-79 (2001).

103. *Sea Hunt, Inc. v. Unidentified, Shipwrecked Vessel or Vessels (Sea Hunt I)*, 47 F. Supp. 2d 678, 692 (E.D. Va. 1999).

104. *Id.* at 688, 690-92.

105. *Sea Hunt, Inc. v. The Unidentified Shipwrecked Vessel or Vessels (Sea Hunt II)*, 221 F.3d 634, 646 (4th Cir. 2000).

106. *Sea Hunt I*, 47 F. Supp. 2d at 692.

107. *Id.*

international comity.<sup>108</sup> The result is unsurprising, given the strong political and diplomatic motives that discourage the application of the law of finds to military vessels.<sup>109</sup> In the case of other historic vessels, however, the law of finds remains applicable.

In a contemporary case, Odyssey Marine Exploration announced the recovery of an estimated \$500 million worth of silver and gold coins from a shipwreck.<sup>110</sup> The company initially refused to reveal the name of the wreck or disclose its specific location, only stating that it was located in international waters in the North Atlantic.<sup>111</sup> When the company filed an admiralty in rem action over the *Black Swan* (the shipwreck's code name), the government of Spain, suspecting the wreck to belong to its fleet, filed a claim against Odyssey.<sup>112</sup> Suspicions have been fueled by the secrecy that has surrounded the recovery effort and the fact that on May 18, 2007, the company flew seventeen tons of coins from Gibraltar to Florida on a private aircraft.<sup>113</sup> In January 2008, the U.S. district court in Tampa,

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108. *Sea Hunt II*, 221 F.3d at 647. For commentary, see, for example, Mariano J. Aznar-Gómez, *Legal Status of Sunken Warships "Revisited,"* 9 SPANISH Y.B. INT'L L. 61, 74-75 (2003).

109. See Greg Stemm, *The Claims of Spain—Death Knell for Shipwreck Exploration?*, UNDERWATER MAG. (Nov. 2000), available at <http://www.shipwreck.net/gsarticle08.html> (arguing that by treating of sunken military vessels as "sovereign property" or "honored graves," national governments are not simply participating in an "anti-salvor initiative," but instead are practicing reciprocal diplomacy). As Aznar-Gómez further points out, "[w]ar graves must be cared for and preserved consistently with customary international humanitarian law." Aznar-Gómez, *supra* note 108, at 66 n.25.

110. Press Release, Odyssey Marine Exploration, Odyssey Provides "Black Swan" Shipwreck Information Update (May 21, 2007), available at <http://www.shipwreck.net/pr135.html>. While the value of the recovered coins is unconfirmed, the average potential price might amount to \$1000 per coin. *Id.* The high numismatic value is based not only on the coins' intrinsic value but also on their excellent condition and scarcity. *Id.*

111. Terry Aguayo, *A Bountiful Undersea Find, Sure to Invite Debate*, N.Y. TIMES, May 19, 2007, available at <http://www.nytimes.com/2007/05/19/us/19treasure.html?scp=1&sq=%22undersea%20find%22&st=cse>.

112. Verified Claim of the Kingdom of Spain at 1-2, Odyssey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel, No. 8:07-CIV-614-T-24MAP (M.D. Fla. May 31, 2007), available at <http://docs.justia.com/cases/federal/district-courts/florida/flmdce/8:2007cv00614/197978/13/>. According to Spain, the ship might be the *Nuestra Señora de las Mercedes*, which went down off the Portuguese coast en route from Montevideo to Cadiz. Answer of Claimant Kingdom of Spain to the Court's Interrogatories at 1, Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel, No. 8:07-CV-00614-SDM-MAP (M.D. Fla. May 8, 2008), available at <http://docs.justia.com/cases/federal/district-courts/florida/flmdce/8:2007cv00614/197978/107/>. The *Mercedes*, sunk by the British Navy in 1804, was carrying a cargo of coins. *Id.* at 1-2.

113. Daniel Foggo, *Stop, That's Our Treasure, Spain Tells Britain*, SUNDAY TIMES (U.K.), June 24, 2007, <http://www.timesonline.co.uk/tol/news/uk/article1977667.ece>.

Florida, ordered Odyssey to reveal the exact location of the ship.<sup>114</sup> Odyssey then stated that the wreck was recovered in the Atlantic Ocean approximately 180 miles from Portugal.<sup>115</sup> The proceedings are still pending,<sup>116</sup> but whatever the result of the case, the *Black Swan* model—whereby private actors release minimal information about the project until after the excavation has been completed—leaves space for potential abuses. The informational asymmetry, by which one player possesses knowledge that the other does not, can affect the way each party behaves and may undermine the other's legal rights and even duties.

#### E. *The Settlement of International Disputes Concerning Underwater Cultural Heritage*

Given the regime complex that governs UCH, several fora may assume jurisdiction over the different treaty regimes, and claimants may have a strategic advantage in selecting the forum—a tool known as forum shopping. Part II.E will analyze the functioning of these mechanisms and assess the way they deal with issues concerning UCH.

Before analyzing each regime, it is important to highlight, as a necessary premise, the existing dichotomy between the settlement mechanisms for UCH disputes. While both the UNCLOS and the CPUCH provide dispute settlement mechanisms of a public nature (open to sovereign states only, either as claimants or respondents),<sup>117</sup> maritime law provides a forum (i.e., admiralty courts) for disputes involving private actors.<sup>118</sup> As international treaties, both the UNCLOS and the CPUCH reflect the traditional conception of international law as law among nations. According to the traditional perspective of international law, private actors' interests may be protected only in an indirect way through mechanisms such as

114. Order at 1, *Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*, No. 8:07-cv-614-T-23MAP (M.D. Fla. Jan. 10, 2008), available at <http://docs.justia.com/cases/federal/district-courts/florida/flmdce/8:2007cv00614/197978/75/>. Selected documents of the case are available at *Odyssey Marine Exploration, Inc. v. The Unidentified Shipwrecked Vessel*, [http://dockets.justia.com/docket/court-flmdce/case\\_no-8:2007cv00614/case\\_id-197978/](http://dockets.justia.com/docket/court-flmdce/case_no-8:2007cv00614/case_id-197978/) (last visited Mar. 23, 2009) [hereinafter *Odyssey Marine Exploration Inc. Docket*].

115. *Recovered Treasure Came From Spanish Shipwreck*, COINLINK, Sept. 21, 2007, <http://www.coinlink.com/News/general-collecting/recovered-treasure-came-from-spanish-shipwreck/>.

116. *Odyssey Marine Exploration, Inc. Docket*, *supra* note 114.

117. See CPUCH, *supra* note 6, art. 25 (referring to “States Parties” only); UNCLOS, *supra* note 27, art. 291.

118. See *supra* text accompanying note 66.

diplomatic protection.<sup>119</sup> Maritime law, on the contrary, occupies a much more uncertain position. Although there are international treaties concerning maritime law, they often reflect, restate, or clarify maritime customs that have already been developed by private actors, such as merchants, insurers, and shipowners.<sup>120</sup>

States that have not ratified either the UNCLOS or the CPOCH are free to select traditional dispute resolution mechanisms such as negotiation, good offices, or conciliation and arbitration; they may even submit the dispute to the International Court of Justice (ICJ).<sup>121</sup>

The CPOCH provisions concerning dispute settlement are particularly detailed. The CPOCH provides that any dispute between two or more state parties shall be subject to negotiations in good faith or other peaceful means of dispute settlement.<sup>122</sup> If these negotiations fail, the dispute may be submitted to UNESCO for mediation upon agreement between the state parties concerned.<sup>123</sup> If mediation is not attempted or no settlement is reached by mediation, the provisions relating to the settlement of disputes set out in Part XV of the UNCLOS apply.<sup>124</sup> This is a *renvoi matériel*, as the dispute settlement mechanisms provided by the UNCLOS would apply even where the UNCLOS was not ratified by the parties to the CPOCH.<sup>125</sup>

The rules set forth in Part XV of the UNCLOS provide for the settlement of international disputes arising out of the interpretation or application of UNCLOS.<sup>126</sup> For instance, state responsibility

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119. Diplomatic protection includes a state's diplomatic and other action against another state on behalf of a national whose rights and interests have been injured by the other state. Int'l Law Comm'n [ILC], *Report of the International Law Commission*, ch. IV(E)(1), pt. 1, art. 1, U.N. Doc. A/61/10 (Aug. 11, 2006). Diplomatic protection is discretionary and may include negotiations with the other state, judicial or arbitral proceedings, and other forms of peaceful dispute settlement. *Id.* ch. IV(E)(1), pt. 1, arts. 1(8), 2(2). The ICJ has recently noted that "the role of diplomatic protection has somewhat faded, as in practice recourse is only made to it in rare cases where treaty régimes do not exist or have proved inoperative." Case Concerning Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo) (Preliminary Objections) (Order of May 24, 2007), available at <http://www.icj-cij.org/docket/files/103/13856.pdf>. In 2006, the International Law Commission adopted the Draft Articles on Diplomatic Protection, regulating the entitlement and exercise of diplomatic protection. See ILC, *supra*, Supp. No. 10.

120. On the hybrid nature of maritime law, see *supra* note 61.

121. For a general overview of these dispute settlement mechanisms, see J. G. MERRILLS, *INTERNATIONAL DISPUTE SETTLEMENT* (3d ed. 1998).

122. CPOCH, *supra* note 6, art. 25(1).

123. *Id.* art. 25(2).

124. *Id.* art. 25(3).

125. Ratification of the UNCLOS is not required in order for its dispute settlement mechanism to apply to disputes arising with regard to the interpretation or application of the CPOCH. *Id.* Therefore, the CPOCH truly incorporates Part XV of UNCLOS with regard to dispute settlement. *Id.*

126. UNCLOS, *supra* note 27, art. 279. For more on the dispute settlement provisions of UNCLOS, see Rosemary Rayfuse, *The Future of Compulsory Dispute Settlement Under the Law of the Sea Convention*, 36 VICTORIA U. WELLINGTON L. REV.



might arise under Article 303(1) if a state voluntarily destroyed UCH or refused to engage in any form of cooperation with other states.<sup>127</sup> The primary obligation of the conflicting parties under this regime is to resolve their dispute by peaceful means.<sup>128</sup> If the parties are unable to do so, Section 2 of Part XV provides a compulsory and binding mechanism.<sup>129</sup> Under this mechanism, any party to the dispute that is also a party to the UNCLOS may submit the matter to the International Tribunal for the Law of the Sea (ITLOS),<sup>130</sup> the ICJ,<sup>131</sup> or an ad hoc arbitral tribunal.<sup>132</sup> While forum shopping is a potential issue, it is worth recalling that both states must accept any procedure before it can be invoked.<sup>133</sup> A state might choose ITLOS where the dispute presents highly technical issues or the ICJ where the dispute has wider implications for general international law.

Dealing with claims filed by individuals, admiralty courts have applied salvage law to an overwhelming number of cases concerning UCH. However, these courts have rarely questioned whether salvage law is at all appropriate for historic shipwrecks. Only in recent cases

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683 (2005) (N.Z.); Howard Schiffman, *The Dispute Settlement Mechanism of UNCLOS: A Potentially Important Apparatus for Marine Wildlife Management*, 1 J. INT'L WILDLIFE L. & POL'Y 293 (1998); Andrew Serdy, *The Paradoxical Success of UNCLOS Part XV: A Half-Hearted Reply to Rosemary Rayfuse*, 36 VICTORIA U. WELLINGTON L. REV. 713 (2005) (N.Z.); Louis B. Sohn, *Peaceful Settlement of Disputes in Ocean Conflicts: Does UNCLOS III Point the Way?*, 46 LAW & CONTEMP. PROBS. 195 (1983).

127. Tullio Scovazzi, *A Contradictory and Counterproductive Regime*, in *THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: BEFORE AND AFTER THE 2001 UNESCO CONVENTION*, *supra* note 40, at 4.

128. UNCLOS, *supra* note 27, art. 279.

129. *Id.* arts. 286–96.

130. The International Tribunal for the Law of the Sea (ITLOS), established in accordance with Annex VI of the UNCLOS, has its seat in Hamburg, Germany. International Tribunal for the Law of the Sea, Overview: Seat of the Tribunal, [http://www.itlos.org/general\\_information/overview/seat\\_en.shtml](http://www.itlos.org/general_information/overview/seat_en.shtml) (last visited Mar. 23, 2009).

131. The International Court of Justice is “the principal judicial organ of the United Nations.” International Court of Justice: The Court, <http://www.icj-cij.org/court/index.php?p1=1> (last visited Mar. 23, 2009). It was established by the UN Charter in 1945. *Id.* For a discussion on why a state might choose the ITLOS over the ICJ to adjudicate a Law of the Sea dispute, see Alan Boyle, *Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction*, 46 INT'L & COMP. L.Q. 37 (1997).

132. For instance, the Permanent Court of Arbitration (PCA), an intergovernmental organization established in 1899 to facilitate peaceful dispute settlement, “has acted as a registry in several UNCLOS arbitrations.” Permanent Court of Arbitration, [http://www.pca-cpa.org/showpage.asp?pag\\_id=363](http://www.pca-cpa.org/showpage.asp?pag_id=363) (last visited Mar. 23, 2009). “Although these cases were not concerned with the protection of cultural property, the procedure followed in the conduct of these proceedings should constitute a useful precedent for conduct of any future arbitration relating to cultural property either under UNCLOS or CPUCH.” Brooks W. Daly, *The Potential for Arbitration of Cultural Property Disputes: Recent Developments at the Permanent Court of Arbitration*, 4 LAW & PRAC. INT'L CTS. & TRIBUNALS 261, 273 (2005).

133. UNCLOS, *supra* note 27, art. 287.

has attention been paid to deep water archaeological methodology.<sup>134</sup> While some authors criticize admiralty law as allowing “freedom of fishing” or promoting a “first-come first-served approach,”<sup>135</sup> others characterize the recent developments in admiralty law as a promising pattern.<sup>136</sup> In this sense, Nafziger affirmed that “[a]dmiralty courts . . . provide an alternative to lawlessness on the frontier of underwater cultural heritage and thereby fill a void”<sup>137</sup> and that “admiralty courts are justice-administering institutions in a cosmopolitan sense and not simply bodies for implementing local policy.”<sup>138</sup>

In conclusion, the existing mechanisms are restricted by some intrinsic limits. With regard to the dispute settlement mechanisms provided by the UNCLOS and the CPOCH, the main shortcomings of such mechanisms lie in their public nature, as their jurisdiction is limited to disputes between states. In other words, they do not take into account the emerging reality that private actors play an influential role in international relations—a particularly important one in relation to UCH. With regard to admiralty courts, the striking fact is that national courts ordinarily deal with artifacts found in international waters or even in the contiguous zones of other nations. Feelings of international comity may keep these courts impartial, but there nevertheless exists the risk that national courts unconsciously represent the hegemonic views of the maritime powers of their respective jurisdictions. In this sense, salvage law has not yet developed procedural and substantive guarantees that can adequately protect UCH.

#### IV. INTERNATIONAL INVESTMENT LAW AS A FURTHER LAYER OF REGULATION

Having analyzed the existing legal framework regulating UCH, this Article next addresses the question of whether salvage may be

134. For example, in *Bemis v. RMS Lusitania*, No. 95-2057, 1996 WL 525417, at \*4 (4th Cir. Sept. 17, 1996), the U.S. appellate court denied the claimant's status as salvor of the Lusitania wreck because very few artifacts had been recovered. The court also confirmed the denial of Bemis's request for an injunction that would prevent other “rogue” divers from taking artifacts from the ship. *Id.* Regardless of the wreck's “scientific, historic and archaeological significance,” Bemis had not recovered sufficient artifacts to establish his ownership interest in the contents of the ship. *Id.*

135. E.g., Tullio Scovazzi, *The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage*, in *ART AND CULTURAL HERITAGE: LAW, POLICY AND PRACTICE* 285, 288 (Barbara T. Hoffman ed., 2006).

136. See Nafziger, *supra* note 61, at 256, 260. *But see* Bryant, *supra* note 14, at 130.

137. Nafziger, *supra* note 61, at 256.

138. *Id.* at 260.

considered a form of investment. If salvage were recognized as investment, then salvage contracts would be protected under international investment treaties—yet another layer of international regulation governing UCH recovery and management. While other authors have extensively analyzed the aforementioned layers of UCH regulation,<sup>139</sup> scholars have not yet addressed the relationship between UCH recovery and international investment law. This Article, therefore, aims to investigate this unexplored theoretical connection and highlight its practical consequences. After delineating the basic features of investment law, the remainder of this Article investigates the interplay between UCH protection and investment law through an analysis of a recent case. Finally, the Article advances several policy options with the goal of reconciling the various existing sets of public international law.

A. *International Investment Law and Cultural Heritage:  
Defining and Connecting the Two Fields*

The law of foreign investment is one of the oldest and most complex areas of international law.<sup>140</sup> As there is still no single, comprehensive global treaty governing international investment, investor rights are defined by a plethora of bilateral and regional investment treaties and by customary international law.<sup>141</sup>

At the substantive level, investment treaties provide extensive protection to investors' rights in order to encourage foreign direct investment (FDI), a key element in advancing economic development.<sup>142</sup> Investment treaties include a broad definition of

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139. See, e.g., LEGAL PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: NATIONAL AND INTERNATIONAL PERSPECTIVES (Sarah Dromgoole ed., 1999); THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: NATIONAL PERSPECTIVES IN LIGHT OF THE UNESCO CONVENTION 2001 (Sarah Dromgoole ed., 2006).

140. On the complex interplay between international law and investment law, see Andreas F. Lowenfeld, *Investment Agreements and International Law*, 42 COLUM. J. TRANSNAT'L L. 123 (2003). For more general information on international investment law, see M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENTS* (2d ed. 2004).

141. On the recent flourishing of bilateral and regional investment treaties, see Jeswald W. Salacuse, *The Treatification of International Investment Law*, in LAW, CULTURE, AND ECONOMIC DEVELOPMENT 241 (Joseph J. Norton & C. Paul Rogers III eds., 2007); Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67, 115 (2005).

142. See, e.g., U.N. CONFERENCE ON TRADE & DEV., WORLD INVESTMENT REPORT 1999: FOREIGN DIRECT INVESTMENT AND THE CHALLENGE OF DEVELOPMENT, U.N. Sales No. E.99.II.D.3 (1999); U.N. CONFERENCE ON TRADE & DEV., WORLD INVESTMENT REPORT 2003—FDI POLICIES FOR DEVELOPMENT: NATIONAL AND INTERNATIONAL PERSPECTIVES, U.N. Sales No. E.03.II.D.8 (2003); Jagdish Bhagwati, *Why Multinationals Help Reduce Poverty*, 30 WORLD ECON. 211 (2007);

investment and provide extensive protection for investors from both direct and indirect expropriation.<sup>143</sup> While direct expropriation, such as nationalization or confiscation, involves the physical seizure of assets, indirect expropriation involves interference by a state in an investor's use or enjoyment of property and its benefits, even where that property is not formally seized and the legal title to that property still belongs to the owner.<sup>144</sup> Indirect expropriation is difficult to define, and authors and practitioners have not identified a clear boundary between the legitimate exercise of regulatory power and indirect expropriation.<sup>145</sup> A potential tension exists when a state adopts regulation interfering with foreign investments, as such regulation may be classified as a form of indirect expropriation.

At the procedural level, if salvors were considered investors, investment treaties would provide them direct access to an international arbitral tribunal. Indeed, the most notable feature of contemporary investment treaties has been the inclusion of investor-state arbitration as a dispute settlement mechanism.<sup>146</sup> In contrast to the traditional landscape, wherein states are the only subjects of international law and the only entities possessing capacity to raise international claims against other states in legal proceedings, modern

V.N. Balasubramanyam, M. Salisu & David Sapsford, *Foreign Direct Investment as an Engine of Growth*, 8 J. INT'L TRADE & ECON. DEV. 27 (1999).

143. Christopher Schreuer, *The Concept of Expropriation Under the ETC and Other Investment Protection Treaties*, TRANSNAT'L DISP. MGMT., Nov. 2005, at 1, 5; see also U.N. CONFERENCE ON TRADE & DEV., TAKING OF PROPERTY 38, UN DOC. UNCTAD/ITE/IIT/15, U.N. Sales No. E.00.II.D.4 (2000); Catherine Yannaca-Small, "Indirect Expropriation" and the "Right to Regulate" in *International Investment Law* 6-9 (Org. for Econ. Co-operation & Dev., Working Paper on International Investments, Paper No. 2004/4, 2004).

144. For instance, in *Metalclad*, the arbitral tribunal stated:

Expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also *covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use off] reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.*

ALAN REDFERN ET AL., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 494 (4th ed. 2004) (citing *Metalclad Corp. v. United Mexican States*, Award, para. 130, ICSID Case No. ARB(AF)/97/1, 40 I.L.M. 36 (2001), (Aug. 30, 2000)) (emphasis added).

145. See NOAH RUBINS & N. STEPHAN KINSELLA, INTERNATIONAL INVESTMENT, POLITICAL RISK AND DISPUTE RESOLUTION: A PRACTITIONER'S GUIDE 183 (2005).

146. Investor-state arbitration marks a major reform of traditional approaches given that individuals have no such right under customary international law. M. SORNARAJAH, THE SETTLEMENT OF FOREIGN INVESTMENT DISPUTES 61-84 (2000); see also Karl-Heinz Böckstiegel, *Arbitration of Foreign Investment Disputes—An Introduction*, in NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND 126 (Albert Jan van den Berg ed., 2005).

investment treaties require neither the diplomatic protection nor the intervention of the home state in the furtherance of disputes between the foreign investors and the host states. Instead, investment treaties shift litigation out of the public arena and into the private sector, to be adjudicated by arbitrators instead of national judges.<sup>147</sup>

If salvors were deemed to be investors, they could directly challenge national measures aimed at protecting cultural heritage and seek compensation for the impact of such regulation on their business. A preliminary question, however, is whether salvage contracts are investments. It is precisely this inquiry that Part IV.B seeks to answer by analyzing a recent case.

### B. *The Case Study: The DIANA Adventure*

Licensed by the East India Company to trade between Calcutta and Canton, the *Diana* vessel was returning to India laden with silks, tea, and blue-and-white porcelain<sup>148</sup> when it mysteriously sank in the Straits of Malacca on March 5, 1817.<sup>149</sup> In 1991, the government of Malaysia entered into a contract with Malaysian Historical Salvors (MHS), a British salvage company, to locate and salvage the cargo.<sup>150</sup> Under the terms of the contract, artifacts directly related to Malaysian history and culture would be retained by the government

147. See F. Francioni, *Access to Justice, Denial of Justice and International Investment Law*, in HUMAN RIGHTS AND JUDICIAL ADMINISTRATION OF "JUSTICE" IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION (Pierre-Marie Dupuy, Francesco Francioni & Ernst-Ulrich Petersmann eds., forthcoming 2009); Clara Reiner & Christoph Schreuer, *Human Rights and International Investment Arbitration*, in HUMAN RIGHTS, INTERNATIONAL INVESTMENT LAW AND INVESTOR-STATE ARBITRATION, *supra*.

148. The *Diana* vessel was used as one of the country's trading ships and exported cotton and opium to Canton, where the goods would be exchanged for silks, tea, and blue-and-white porcelain to bring back to India. See DORIAN BALL, *THE DIANA ADVENTURE* 29–35 (1995). Country traders operated between Indian and Chinese ports and other places in between. *Id.* at 29. This market niche was not subject to the East India Company monopoly, although country traders did have to register with the Company. *Id.* For more information on the Indian trade circuit, see ASIAN MERCHANTS AND BUSINESSMEN IN THE INDIAN OCEAN AND THE CHINA SEA (Denys Lombard & Jean Aubin eds., 2000); K.N. CHAUDHURI, *TRADE AND CIVILISATION IN THE INDIAN OCEAN: AN ECONOMIC HISTORY FROM THE RISE OF ISLAM TO 1750* (1985); K.N. Chaudhuri, *The Historical Roots of Capitalism in the Indian Ocean: A Comparative Study of South Asia, the Middle East, and China During the Pre-Modern Period*, in SOUTH ASIA AND WORLD CAPITALISM 87 (Sugata Bose ed., 1990).

149. BALL, *THE DIANA ADVENTURE*, *supra* note 148, at 9–15.

150. *Id.* at 94. The contract was made on a "no finds-no pay" basis, which is a well-established practice in marine salvage under which all the costs and risks of the salvage are borne exclusively by the salvage company. Claimant Malaysian Historical Salvors SDN BHD's Supplemental Comments on the Issue of "Investment" at 10, Malaysian Historical Salvors SDN, BHD v. Gov't of Malay. (U.K. v. Malay.), No. ARB/05/10 (ICSID W. Bank Dec. 17, 2006) [hereinafter Comments on Investment].

of Malaysia while other recovered items would be auctioned at Christie's in Amsterdam.<sup>151</sup> The Malaysian government would receive the proceeds of the auction sales, paying a percentage of the total to MHS.<sup>152</sup> According to the contract, if the appraised sum of the value of the unsold historical artifacts and the auction value of the sold items came to less than U.S. \$10 million, the claimant would be entitled to 70% of the proceeds.<sup>153</sup>

The salvage efforts took almost four years,<sup>154</sup> and nearly 24,000 complete pieces of Chinese blue-and-white porcelain were recovered when MHS found and salvaged the sunken vessel.<sup>155</sup> Items that were not withheld from sale by the Malaysian authorities were auctioned in March 1995, in Amsterdam by Christie's for approximately U.S. \$2.98 million.<sup>156</sup>

A dispute arose in regard to the proceeds of the auction and the quantity of items that Malaysia withheld from sale. When MHS received about 40% of the sale proceeds and contested the value of the salvaged historical items withheld from sale, the company commenced arbitration proceedings against the government of Malaysia in Kuala Lumpur.<sup>157</sup> The court dismissed the claim, and every challenge failed.<sup>158</sup> MHS then filed a request for arbitration at the International Centre for Settlement of Investment Disputes (ICSID),<sup>159</sup> contending that Malaysian courts had denied due process

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151. See *id.* at 8, 13.

152. Claimant Malaysian Historical Salvors SDN BHD's Memorial on Jurisdiction at 7, *Malaysian Historical Salvors*, No. ARB/05/10 (Mar. 15, 2006) [hereinafter Jurisdiction Memo].

153. Award on Jurisdiction ¶ 11, *Malaysian Historical Salvors*, No. ARB/05/10 (May 17, 2007).

154. Comments on Investment, *supra* note 150, at 9.

155. BALL, THE DIANA ADVENTURE, *supra* note 148, at 142, 149. Divers discovered plates with fascinating patterns, featuring a beautiful panoply of flowers, dragons, peacocks, and songbirds. *Id.* at 148–49.

156. Jurisdiction Memo, *supra* note 152, at 9–10.

157. *Id.* at 10–11. For an overview of the Malaysian system of alternative dispute resolution, see Michael Hwang S.C., Loong Seng Onn & Yeo Chuan Tat, *ADR in East Asia*, in *ADR IN BUSINESS: PRACTICE AND ISSUES ACROSS COUNTRIES AND CULTURES* 147, 175–80 (Jean-Claude Goldsmith, Gerald H. Pointon & Arnold Ingen-Housz eds., 2006).

158. Jurisdiction Memo, *supra* note 152, at 13.

159. The International Centre for Settlement of Investment Disputes (ICSID), a specialized arbitral institution established under the auspices of the World Bank, has no standing court or permanent tribunal; rather, it convenes ad hoc arbitral tribunals to settle each new investment dispute that comes before the Centre. See International Centre for the Settlement of Disputes, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States arts. 1, 36, 37, Mar. 18, 1965, 575 U.N.T.S. 515. Investors and governments from states that are not parties to the Convention have, since 1978, been able to bring claims at ICSID under what is known as the Additional Facility. CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY 6 (2001); David R. Sedlak, Comment, *ICSID's Resurgence in*

and that there was a violation of the Malaysia–United Kingdom Bilateral Investment Treaty (BIT).<sup>160</sup> Indeed, MHS argued that its performance under the contract fell within the meaning of “investment” and that, accordingly, it was protected under the BIT.<sup>161</sup> MHS contended that Malaysia had violated the BIT provisions concerning protection of investment and expropriation.<sup>162</sup> For its part, Malaysia objected to the ICSID’s jurisdiction over the dispute, alleging that the dispute did not concern an investment and that the subject matter of the agreement was purely contractual (and, therefore, of mere archaeological interest).<sup>163</sup>

Michael Hwang, the sole arbitrator, upheld Malaysia’s line of argument when he dismissed the claim for want of jurisdiction on May 17, 2007.<sup>164</sup> Rightly or wrongly, the arbitrator considered the nature of the claimant’s activities to be largely similar to a commercial salvage contract and concluded that, under ICSID practice and jurisprudence, “an ordinary commercial contract [could not] be considered as an ‘investment.’”<sup>165</sup>

This case is particularly pertinent because it marks the first time a marine salvage claim had been construed as an investor–state dispute. This Article critically assesses this approach in two different respects. First, from a procedural perspective, it analyzes the concept of investment. Because the rule of *stare decisis* does not apply to investment arbitration, international investment law does not offer homogenous precedents; indeed, the notion of investment has been interpreted in different ways by arbitral panels.<sup>166</sup> In addition,

*International Investment Arbitration: Can the Momentum Hold?*, 23 PENN ST. INT’L L. REV. 147, 157–58 (2004). For further commentary on the ICSID Convention, see JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KROLL, *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 774–804 (2003); C.F. Amerasinghe, *The International Centre for Settlement of Investment Disputes and Development through the Multinational Corporation*, 9 VAND. J. TRANSNAT’L L. 793 (1976) (discussing the purpose, procedures and jurisdiction of the ICSID); Paul C. Szaz, *A Practical Guide to the Convention on Settlement of Investment Disputes*, 1 CORNELL INT’L L.J. 1 (1968) (discussing the rules and procedures of the ICSID).

160. Jurisdiction Memo, *supra* note 152 at 22.

161. *Id.* at 10. The Malaysia/UK Bit defines “investment” as “every kind of asset” and includes in the definition “claims to money or to any performance under contract having a financial value” and “business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.” Agreement for the Promotion and Protection of Investments art. 1, U.K.-N. Ir.-Malay., May 21, 1981, 1989 U.K.T.S. No. 16.

162. Award on Jurisdiction ¶¶ 38–40, Malaysian Historical Salvors SDN, BHD v. Gov’t of Malay. (U.K. v. Malay.), No. ARB/05/10 (ICSID W. Bank Dec. 17, 2006).

163. *Id.* ¶ 41.

164. *Id.* ¶ 112.

165. *Id.*

166. Cristoph Schreuer, *Diversity and Harmonization of Treaty Interpretation in Investment Arbitration*, TRANSNAT’L DISP. MGMT., Apr. 2006, at 11–12 [hereinafter Schreuer, *Diversity*]. In general terms, there is no such thing as *stare decisis* in

investment agreements generally provide slightly different definitions of investment.<sup>167</sup>

Second, and more substantially, this Article imagines how the arbitrator might have addressed the substantive issues, had he accepted jurisdiction. On the one hand is the public policy interest in protecting and preserving cultural heritage. On the other hand are the economic interests of foreign investors. As the arbitral award has been challenged and is currently under review by an ad hoc annulment committee pursuant to Article 52 of the ICSID Convention, this analysis is particularly timely.<sup>168</sup>

### C. *The Arbitral Award and Its Definition of Investment*

Determining whether claimant rights conferred by a contract constitute an investment is increasingly becoming a critical threshold question in investment disputes because a positive answer

international law. *Trendtex Trading Corp. v. Cent. Bank of Nig.*, (1977) 2 W.L.R. 356, 365 (Eng.). According to Article 38(1) of the Statute of the International Court of Justice, sources of international law include international conventions and international customs, general principles, and, as a subsidiary means of interpretation, "judicial decisions and the teachings of the most highly qualified publicists" of international law. See *supra* note 57 and accompanying text. Judicial decisions are thus not deemed to be binding precedents, but rather subsidiary means of treaty interpretation. Agnieszka Szpak, *A Few Reflections on the Interpretation of Treaties in Public International Law*, 18 HAGUE Y.B. INT'L L. 59, 69 (2005). However, authors note that, although international courts and tribunals are not obliged to refer to previous decisions, in most cases they do. With regard to World Court jurisprudence, see Szpak, *supra*, at 70; with regard to World Trade Organization Appellate Body and panel reports, see Raj Bhala, *The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)* (pt. 1), 14 AM. U. INT'L L. REV. 845 (1999); Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)* (pt. 2), 9 J. TRANSNAT'L L. & POL'Y 1 (1999); Raj Bhala, *The Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication (Part Three of a Trilogy)* (pt. 3), 33 GEO. WASH. INT'L L. REV. 873 (2001). On the formation and role of *jurisprudence constante* in international investment law, see Andrea Bjorklund, *Investment Treaty Arbitral Decisions as Jurisprudence Constante*, in INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE (Colin B. Picker, Isabella D. Bunn & Douglas W. Arne eds., 2008); Jeffrey Commission, *Precedent in Investment Treaty Arbitration—A Citation Analysis of a Developing Jurisprudence*, 24 J. INT'L ARB. 129 (2007); Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 ARB. INT'L 357 (2007); Christoph Schreuer & Matthew Weiniger, *Conversations Across Cases—Is There a Doctrine of Precedent in Investment Arbitration?*, TRANSNAT'L DISP. MGMT., May 2008; Schreuer, *Diversity*, *supra*, at 11–14; Valentina S. Vadi, *Towards Arbitral Path Coherence & Judicial Borrowing: Persuasive Precedent in Investment Arbitration*, TRANSNAT'L DISP. MGMT., May 2008.

167. On the notion of investment in investment law, see *infra* Part IV.C.

168. See ICSID.org, List of Pending Cases, <http://icsid.worldbank.org/ICSID/ FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending> (last visited Mar. 23, 2009).



establishes the arbitral tribunal's jurisdiction.<sup>169</sup> The notion of investment has thus been defined as "the keystone of the ICSID Convention" because "a legal dispute arising directly out of it qualifies for ICSID jurisdiction."<sup>170</sup> While the ICSID Convention does not provide any definition of the term "investment," "the definitions of investment in contemporary treaties tend to be broad and open-ended," resting on the assumption that "foreign investment tends to spur economic development."<sup>171</sup>

The quantitative tendency toward amplifying the definition of investment in bilateral and regional treaties has not necessarily lent more clarity to its qualitative understanding. Indeed, the Digest of Justinian stated that every legal definition is "dangerous."<sup>172</sup> Yet, while extremely specific rules do not necessarily address every potential case, and the search for an exhaustive definition of investment can be compared to the search for the Holy Grail, the indeterminate parameters of extremely vague rules may leave legal issues unresolved.<sup>173</sup>

Therefore, with regard to the notion of investment, the clarification of this concept has been left to the interpretation of practitioners and arbitrators. Nevertheless, arbitral panels and scholars hold diverging views on investment.<sup>174</sup> Very generally, some authors have defined investment as "one type of human activity in which the profit sought is economic or monetary in nature."<sup>175</sup> Others, most notably Schreuer, have noted that, while it is not realistic to attempt to define investment, it is appropriate to identify some of its features:

[T]he first of such features is that the projects have a certain *duration*. . . . The second feature is a certain *regularity of profit and return*. A one-time lump

169. See Yves G. L. Wolters, *The Meaning of 'Investment' in Treaty Disputes: Substantive or Jurisdictional?—Lessons from Nagel v. Czech Republic and S.D. Myers v. Canada*, 8 J. WORLD INVESTMENT & TRADE 175, 175–85 (2007).

170. Devashish Krishan, *A Notion of ICSID Investment*, in 1 INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW 61, 61 (T.J. Grierson Weiler ed., 2008).

171. Barton Legum, Address at the ICSID, OECD and UNCTAD Symposium: Defining Investment and Investor 2 (Dec. 12, 2005), available at <http://www.oecd.org/dataoecd/5/1/10/36370461.pdf>. For an overview of the definitions of "investment" and "investor" in contemporary treaties, see, for example, *id.*

172. Dig. 50.17.202 (Javolenus, Letters 11) ("Omnis definitio in iure civili periculosa est . . .").

173. See Dominique Grisay, *International Arbitration: The ICSID Convention: A Convenient Solution for Companies in Conflict With States*, BULLETIN, Mar. 17, 2007, [http://www.imakenews.com/iln/e\\_article000763642.cfm?x=b11,0,w](http://www.imakenews.com/iln/e_article000763642.cfm?x=b11,0,w).

174. See Rudolf Dolzer, *The Notion of Investment in Recent Practice*, in LAW IN THE SERVICE OF HUMAN DIGNITY: ESSAYS IN HONOUR OF FLORENTINO FELICIANO 261, 275 (Steve Charnovitz, Debra P. Steger & Peter Van Den Bossche eds., 2005) ("At this moment, the diversity of reasoning of the tribunals makes it difficult to predict the direction of future jurisprudence.").

175. RUBINS & KINSELLA, *supra* note 145, at 1.

sum agreement, while not impossible, would be untypical. . . . [T]he third feature is the *assumption of risk* usually by both sides. . . . The fourth typical feature is that the commitment is *substantial*. . . . The fifth feature is the operation's *significance for the host State's development*.<sup>176</sup>

However, the established hallmarks of investment should be viewed not as prerequisites but as characteristics. As the sole arbitrator in the *MHS* case emphasized,

ICSID tribunals often remark that hallmarks may be interrelated and must be examined in relation to other hallmarks as well as in relation to the circumstances of the case. In other words, it may be that a particular hallmark may not be present when it is viewed in isolation; yet, when examined in the light of other hallmarks of investment or taking into account the circumstances of the case, a tribunal may still find jurisdiction for the Centre.<sup>177</sup>

Indeed, certain activities may appropriately be categorized as investments notwithstanding the absence—whether qualitative or quantitative—of a particular hallmark of an investment. It has been argued that, of the various criteria used to determine whether a transaction constitutes an investment, the most important is whether the transaction makes a substantial contribution to the host state's development.<sup>178</sup>

In the instant case, given the unusual nature of the salvage company's activities, some of the criteria were either met superficially or not met at all. Thus, the sole arbitrator paid particular attention to the final criterion: whether the contract made a significant contribution to the economic development of the state.<sup>179</sup> Adopting a teleological approach to the interpretation of the ICSID Convention, the arbitrator interpreted investment to refer to an activity that promotes some form of positive economic development for the host state.<sup>180</sup> Thus, the arbitrator considered whether the salvage contract contributed to the economic development of Malaysia and ultimately found that it did not materially benefit the Malaysian

176. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY*, *supra* note 159, at 140.

177. Award on Jurisdiction ¶ 72, *Malaysian Historical Salvors SDN, BHD v. Gov't of Malay*. (U.K. v. Malay.), No. ARB/05/10 (ICSID W. Bank May 17, 2007).

178. Martin Endicott, *The Definition of Investment in ICSID Arbitration: Development Lessons for the WTO?*, in *SUSTAINABLE DEVELOPMENT IN WORLD TRADE LAW* 379, 409 (Markus Gehring & Marie-Claire Cordonnier Segger eds., 2005). On the relationship between the law of foreign investments and development, see Arghyrios A. Fatouros, *International Investment Agreements and Development—Problems and Prospects at the Turn of the Century*, in *LIBER AMICORUM PROFESSOR IGNAZ SEIDL-HOHENVELDERN* 115, 115–32 (Gerhard Hafner et al. eds., 1998), and more recently, Andrew Newcombe, *Sustainable Development and Investment Treaty Law*, 8 *J. WORLD INVESTMENT & TRADE* 357 (2007).

179. Award on Jurisdiction ¶¶ 130–134, *Malaysian Historical Salvors*, No. ARB/05/10.

180. *Id.* ¶ 68.

public interest.<sup>181</sup> Rather, the benefits of the contract to the Malaysian public would merely be of a cultural and historical nature.<sup>182</sup> The arbitrator thus concluded that the contract was not an investment within the meaning of Article 25(1) of the ICSID Convention.<sup>183</sup>

## 1. A Critical Assessment

This Article argues that the logical sequence and the final decision adopted by the sole arbitrator were both correct.<sup>184</sup> This Article also concludes, however, that one of the major premises of the arbitrator's reasoning was flawed. One might ask why it is necessary to make this point, especially if the ultimate decision is correct. There are two principal reasons: first, the award may be reversed, as it is not currently final; and second, it is necessary to shed some light on the relationship between the protection of cultural heritage and social and economic development,<sup>185</sup> as the salvage and preservation of ancient shipwrecks might bring substantial contributions to the social, cultural, and economic development of host states.

In the instant case, the fact that economic considerations were paired with other considerations—namely cultural concerns—probably led the arbitrator to deny the investment-related qualities of the salvage activities. The fact that the salvage contract was not easily recognizable as an investment weighed heavily in assessing whether there existed an investment at all.<sup>186</sup> This was a conceptual mistake. A salvage contract may seem an unthinkable type of investment, vis-à-vis more traditional investments such as oil exploration and infrastructure building. Still, the notion of investment has evolved through time.<sup>187</sup>

181. *Id.* ¶ 131.

182. *Id.* ¶ 132.

183. *Id.* ¶ 146.

184. Other authors have criticized the *MHS* award for different reasons. Notably, Baltag has criticized the extensive and deferential reliance on previous case law. Crina Baltag, *Precedent on Notion of Investment: ICSID Award in MHS v. Malaysia*, TRANSNAT'L DISP. MGMT., Sept. 2007, at 13–15. Still others argue that the award reflects a narrow and conservative reading of the concept of investment. See, e.g., Yulia Andreeva, *The Tribunal in Malaysian Historical Salvors v. Malaysia Adopts a Restrictive Interpretation of the Term "Investment"*, 25 J. INT'L ARB. 503, 503 (2008).

185. Valentina S. Vadi, *Cultural Heritage & International Investment Law: A Stormy Relationship*, 15 INT'L J. CULTURAL PROP. 1, 1–23 (2008) [hereinafter Vadi, *A Stormy Relationship*]; Valentina S. Vadi, Case Study, *The Challenge of Reconciling Underwater Cultural Heritage and Foreign Direct Investment*, 17 ITALIAN Y.B. INT'L L. 143, 156–58 (2007).

186. Award on Jurisdiction ¶ 129, *Malaysian Historical Salvors SDN, BHD v. Gov't of Malay*. (U.K. v. Malay.), No. ARB/05/10 (ICSID W. Bank May 17, 2007).

187. Newcombe, *supra* note 178, at 368–69.

Furthermore, arbitral panels have taken different positions on the question of whether a significant contribution to the economic development of the host state is necessary in order for an action or contract to be considered an investment under the ICSID Convention. In the *Malaysian Historical Salvors* case, the arbitrator concluded that the economic benefits should be significant, otherwise “any contract which enhances the Gross Domestic Product of an economy by any amount, however small, would qualify as investment.”<sup>188</sup>

Nevertheless, as the arbitral tribunal stated in *Mihaly*, “the question whether an expenditure constitutes an investment or not is hardly to be governed by whether or not the expenditure is large or small.”<sup>189</sup> The claimant employed over forty people in Malaysia, imparted valuable knowledge and know-how regarding the process of historical marine salvage, and raised Malaysia’s profile as an attractive location for tourism.<sup>190</sup> While the arbitral tribunal dismissed the argument as speculative,<sup>191</sup> conservation of maritime archaeological sites does have a direct link to the development of the tourism business and other economic activities.<sup>192</sup> The contract provided for a share of the cultural artifacts to be given to Malaysian conservation programs.<sup>193</sup> In addition, from a cultural perspective, the Straits of Malacca not only can be considered a maritime cultural landscape<sup>194</sup> but also have recently been added to the UNESCO’s World Heritage List as a cultural site.<sup>195</sup> The Straits of Malacca have

188. Damon Vis-Dunbar, *Underwater Salvaging Firm Fails “Investment” Test in ICSID Case Against Malaysia*, INVESTMENT TREATY NEWS, June 30, 2007, at 2 (quoting arbitrator Michael Hwang).

189. *Mihaly Internat’l Corp. v. Democratic Socialist Republic of Sri Lanka*, No. ARB/00/2, ¶ 51 (ICSID W. Bank Mar. 15, 2002).

190. Award on Jurisdiction ¶ 133, *Malaysian Historical Salvors*, No. ARB/05/10.

191. *Id.* ¶ 144.

192. Syed Abdul Haris Bin Sayed Mustapa, *Showcasing Maritime Heritage Artefacts for the Benefit of the Tourist Industry in Malaysia*, 34 INT’L J. NAUTICAL ARCHAEOLOGY 211, 214 (2005); see also Michael Flecker, *The Ethics, Politics, and Realities of Maritime Archaeology in Southeast Asia*, 31 INT’L J. NAUTICAL ARCHAEOLOGY 12, 19–20 (2002) (discussing Malaysia’s part in maritime archaeology). In some countries, tourism has replaced other sources of income. See Chike C. Aniakor, *Cultural Objects as History and National Patrimony: A Moral Challenge*, 89 AM. SOC’Y INT’L L. PROC. 434, 435–36 (1995) (discussing examples of nations where tourism is a dominate income force).

193. See Comments on Investment, *supra* note 150, at 11 (noting that MHS “provided artifacts for Malaysia’s museums”).

194. On the concept of maritime cultural landscape, see Christopher Westerdaahl, *The Maritime Cultural Landscape*, 23 INT’L J. NAUTICAL ARCHAEOLOGY 5 (1992). With regard to the conceptualization of the Straits of Malacca as maritime cultural landscapes, see H.D. Evers and A.K. Hornidge, *Knowledge Hubs along the Straits of Malacca*, 5 ASIA EUR. J. 417, 417 (2007) (characterizing the Straits of Malacca as an area of “high intensity of cultural interaction”).

195. The World Heritage Committee added the Straits of Malacca site to the World Heritage List when it met in Quebec City on July 7, 2008. Press Release,

witnessed trading and cultural exchanges between East and West for over 500 years.<sup>196</sup> The influences of Asia and Europe have endowed affected towns with a specific multicultural heritage that is both tangible and intangible—a reflection of the network of sailing routes and maritime space.<sup>197</sup>

The decision in this case was myopic, as the arbitrator adopted a static interpretation of the ICSID Convention rather than the dual textual and teleological approach advanced by customary rules of treaty interpretation as restated in the Vienna Convention.<sup>198</sup> As the ICSID Convention is aimed at preserving an environment favorable to investment and development, salvage agreements might justifiably be considered a form of investment as long as they contribute to the cultural and economic development of the host state.<sup>199</sup>

Given that investment treaties seem to be imbalanced in favor of the foreign investor<sup>200</sup> and the international regime protecting UCH seems flawed, the sole arbitrator probably made the right decision with respect to cultural heritage preservation. However, the decision was made for the wrong reasons, as there may exist a positive correlation between the recovery of cultural heritage and economic, social, and cultural development.

## 2. What If the Case Was Reversed? The Challenge of Reconciling Cultural Heritage Protection and Investor Rights

As MHS has recently challenged the award, Part V.C.2 explores the possible results of a potential reversal of the case. If salvage contracts between a host country and a foreign salvor were to be considered investments, salvors' rights would receive extensive protections.

Given the breadth of investor rights under investment agreements, some authors have highlighted the remarkable trend toward the constitutionalization of international investment protection.<sup>201</sup> Indeed, investment treaties grant private parties

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UNESCO, Eight New Sites from the Straits of Malacca, to Papua New Guinea and San Marino added to UNESCO's World Heritage List (July 7, 2008), available at <http://whc.unesco.org/en/news/450>.

196. Evers & Hornidge, *supra* note 194, at 419.

197. *Id.* at 418.

198. United Nations, Vienna Convention on the Law of Treaties arts. 31–32, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

199. See *supra* note 177 and accompanying text.

200. M. Sornarajah, *Power and Justice in Foreign Investment Arbitration*, 14 J. INT'L ARB., Sept. 1997, at 103, 139.

201. E.g., DAVID SCHNEIDERMAN, CONSTITUTIONALIZING ECONOMIC GLOBALIZATION: INVESTMENT RULES AND DEMOCRACY'S PROMISE (2008); Peter Behrens, *Towards the Constitutionalization of International Investment Protection*, 45 ARCHIV DES VÖLKERRECHTS 153 (2007) (F.R.G.).

(individuals as well as business entities) subjective rights that must be protected by all three branches of states' governments (i.e., legislative, executive, and judicial).<sup>202</sup> Investment treaties also encompass a wide range of principles, including national treatment, most-favored-nation status, protection of foreign assets against expropriation, and fundamental norms such as fair and equitable treatment and full protection and security.<sup>203</sup>

Of particular significance, modern investment treaties include protection against both direct and indirect expropriation.<sup>204</sup> While the concept of direct expropriation coincides with the notion of taking,<sup>205</sup> the precise boundaries of indirect expropriation are unclear. Indeed, measures tantamount to expropriation are often deemed not directly to take investment property but rather to interfere with its use or deprive the owner of its economic benefits. Under this rubric, regulation aimed at protecting cultural heritage may be classified as a form of indirect expropriation if it affects the economic interests of foreign investors.<sup>206</sup> While the difference between an illegitimate expropriation and a legitimate regulatory measure is easily distinguishable in theory, the huge body of case law that has recently emerged with regard to indirect expropriation

202. For background information regarding bilateral investment treaties, see RUDOLPH DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 17 (2008).

203. *Id.*

204. For instance, according to Article 1110 of NAFTA:

No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment, except for: (a) a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law . . . and (d) on payment of compensation . . .

North American Free Trade Agreement art. 1110, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

205. For an outline of terms and definitions including expropriation, see CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES* 265 (2007).

206. See Charles N. Brower & Eckhard R. Hellbeck, *The Implications of National and International Environmental Obligations for Foreign Investments Protection Standards, Including Valuation: A Report From the Front Lines*, in *INTERNATIONAL INVESTMENTS AND PROTECTION OF THE ENVIRONMENT: THE ROLE OF DISPUTE RESOLUTION MECHANISMS* 19, 21 (The Int'l Bureau of Permanent Court of Arbitration ed., 2001).

From an investor's perspective . . . any attempt to lower the traditional customary standards of investment protection, i.e., prompt, adequate and effective compensation . . . would increase the risk of investing abroad, if not altogether foreclosing foreign investment.

*Id.*

shows that the distinction is hard to define in practice.<sup>207</sup> The concept of indirect expropriation is so broad that any governmental regulation devaluing foreign investors' capital could be put under this heading.<sup>208</sup>

Heritage preservation has received little, if any, consideration in the context of investor–state arbitration. In a previous article, this Author explored the conflict areas between investment treaty provisions and cultural heritage protection in both their tangible and intangible respects, through an empirical analysis of recent arbitral jurisprudence.<sup>209</sup> That article demonstrated that the regime established by investment treaties does not strike an appropriate balance between the various interests concerned and that there is very little space for the protection of cultural heritage in investment dispute settlement.<sup>210</sup>

If the *MHS* decision was reversed, arbitrators would face the challenge of reconciling cultural heritage protection with foreign investment promotion.<sup>211</sup> In this sense, a balance would need to be struck between the competing interests involved. With regard to UCH, the arbitrator's role would become even more complicated because of the interplay between different treaty regimes and maritime customs. Even where arbitrators are sympathetic to cultural heritage protection and balance it against investors' property rights, they cannot ignore certain limits to their mandate. The CPUCH has been ratified by a limited number of countries, and

207. Schreuer, *supra* note 143, at 6; see also R. Dolzer, *Indirect Expropriations: New Developments?*, 11 N.Y.U. ENVTL. L.J. 64 (2002); L.Y. Fortier & S.L. Drymer, *Indirect Expropriation in the Law of International Investment: I Know When I See It, or Caveat Investor?*, 19 ICSID REV. FOREIGN INVESTMENT L.J. 293 (2004).

208. See Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121 (2006). Because investment arbitration adjudicates disputes arising from the exercise of public authority by the state as opposed to private acts of the state, investment arbitration has been analogized to administrative law. See *id.* at 121–35 (exploring investment arbitration as an example of global administrative law).

209. Vadi, *A Stormy Relationship*, *supra* note 185.

210. *Id.*

211. *Sunken Treasure Award Faces Annulment*, GLOBAL ARB. REV. BRIEFING, Oct. 2, 2007. Judge Stephen Schwebel, distinguished U.S. arbitrator and former President of the International Court of Justice, has been chosen as president of the ad hoc committee hearing the annulment proceeding. *Schwebel to Chair Malaysian Annulment Hearing*, GLOBAL ARB. REV. BRIEFING, Nov. 20, 2007. The other reputed members of the ad hoc committee are Judge Mohamed Shahabuddeen, a Guyanese citizen who was Judge of the United Nations International Criminal Tribunal for the Former Yugoslavia and former Judge of the International Court of Justice, and Judge Peter Tomka, a Slovak diplomat and Judge of the International Court of Justice. *Id.* Given the high profile of the committee members, one cannot expect a decision of anything but the finest quality. *Id.*

neither Malaysia nor the UK is a party to it.<sup>212</sup> In addition, given the controversial nature of its provisions, the CPUCH is not likely to become part of customary international law.<sup>213</sup> While its Annex states very general principles, salvage law provides a very detailed governing principle that has been elaborated by admiralty courts for centuries.<sup>214</sup> Furthermore, as in the *MHS* case, if parties voluntarily sign a salvage contract, arbitrators would be bound to enforce that contract as long as it reflects (and does not contravene) customary maritime rules and practices.<sup>215</sup>

Finally, even if the CPUCH were to broadly enter into force, its applicability in the context of an investment dispute might be controversial. While national judges know and apply the applicable international law, disregarding the different rules invoked by the parties (*iura novit curia*), arbitrators generally consider only the legal arguments expressly made by the parties (*secundum alligata et probata*).<sup>216</sup> The application of any “building block of norms,”<sup>217</sup> therefore, would ultimately rely upon the parties’ will.

#### D. Legal Options

Having analyzed the potential consequences of conceptualizing salvage as a form of investment, this Article advances several legal options for reconciling the different interests concerned at the investment law level.

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212. The parties to the CPUCH are Panama, Barbados Bulgaria, Croatia, Cuba, Spain, Libyan Arab Jamahiriya, Nigeria, Lithuania, Mexico, Paraguay, Portugal, Ecuador, Ukraine, Lebanon, Montenegro, Saint Lucia, Romania, Cambodia, and Slovenia. CPUCH Signatories, *supra* note 39.

213. See *supra* Part III.B.

214. See *supra* Part III.C.

215. See *supra* notes 160–65. The relevant British authorities signed a similar salvage contract in 2002 for the recovery of the HMS *Sussex*. Ian Jack, *Who Owns What Lies Beneath?*, GUARDIAN (U.K.), Oct. 20, 2007, available at <http://www.guardian.co.uk/news/2007/oct/20/mainsection.ianjack>. The vessel contained the gold coins “sent by the English to buy the Duke of Savoy’s loyalty in the nine years’ war. . . . In return for Odyssey’s rights to explore and to excavate, Britain would retain 20% of the proceeds and up to £45 [million], 50% of those between £45m and £500, and 60% of the rest.” *Id.* However, the deal has dismayed marine archaeologists. *Id.*

216. See PAVEL KALENSKY, TRENDS OF PRIVATE INTERNATIONAL LAW 282 (1971) (discussing the distinction between *iura novit curia* and *secundum alligata et probata*).

217. See Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1664 (1996).



## 1. Systemic Interpretation

At the procedural level, customary rules of treaty interpretation as restated in the Vienna Convention<sup>218</sup> require treaty terms to be interpreted not only according to their strict textual meaning but also in good faith—in context and in light of their object and purpose.<sup>219</sup> Moreover, treaty terms must be interpreted while taking into account any relevant rules of international law applicable to the relationship between the particular parties.<sup>220</sup> This approach requires a systemic interpretation by arbitral tribunals.

Arbitrators should acknowledge their responsibility to chart the contours of international law norms and, more broadly, their role as cartographers of the international legal order.<sup>221</sup> If arbitral awards were to be considered persuasive precedent, arbitrators would be forced to realize their governing roles with regard to not only particular disputes but also subsequent arbitral panels.<sup>222</sup> Investment law is part of international law and thus must be consistent with its norms.<sup>223</sup>

With regard to UCH, the existing international legal framework is particularly problematic. First, the CPUCH is fiercely opposed by a number of geographically diverse maritime powers whose citizens practice salvage on a regular basis.<sup>224</sup> Second, maritime customs are very ambiguous with regard to UCH. Having originally developed to save men and objects at sea, maritime customs include rules that clash with cultural heritage preservation.<sup>225</sup> While a number of

218. Vienna Convention, *supra* note 198, pt. III, § 3.

219. *Id.* art. 31(1).

220. *Id.* art. 31(3)(c).

221. On the impact of Chapter 11 cases on the further development of international law, see Charles N. Brower & Lee A. Steven, *Who Then Should Judge? Developing the International Rule of Law Under NAFTA Chapter 11*, 2 *CHI. J. INT'L L.*, 193, 193–201 (2001).

222. Vadi, *supra* note 166, at 5.

223. *Id.* at 4. On the much debated issue of whether international law is a fragmented system, see, for example, INT'L LAW COMM'N [ILC], REPORT OF THE STUDY GROUP ON FRAGMENTATION OF INTERNATIONAL LAW, U.N. Doc. A/CN.4/L.682 (Apr. 4, 2006); Pierre-Marie Dupuy, *A Doctrinal Debate in the Globalization Era: On the "Fragmentation" of International Law*, 1 *EUROPEAN J. LEGAL STUD.* 1 (2007); Rosalyn Higgins, *A Babel of Judicial Voices? Ruminations From the Bench*, 55 *INT'L COMP. L.Q.* 791 (2006); Campbell McLachlan, *The Principles of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 *INT'L COMP. L.Q.* 279 (2005); Mario Prost & Paul Kingsley Clark, *Unity, Diversity and the Fragmentation of International Law: How Much Does the Multiplication of International Organizations Really Matter?*, 5 *CHINESE J. INT'L LAW* 2 (2007); Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-Contained Regimes and International Law*, 17 *EUR. J. INT'L L.* 483 (2006).

224. See Frost, *supra* note 2, at 34.

225. *Id.* at 36.

states have enacted relevant domestic legislation, the emergence of a norm under customary international law is controversial.<sup>226</sup>

However, to conclude that international arbitrators are entirely devoid of guidance would be to deny many important developments in international law. First, the UNCLOS specifically requires states to “protect objects of an archaeological nature found at sea” and to cooperate for this purpose.<sup>227</sup> Some UNCLOS provisions have already acquired customary status and, thus, are binding even on states that have not ratified the UNCLOS. While Article 303, for instance, admittedly does not affect admiralty law, it is also “without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological or historical nature.”<sup>228</sup> Second, with regard to both international agreements and rules of international law pertaining to the protection of objects of an archaeological or historical nature, cultural heritage law has recently become a very important part of international law.<sup>229</sup> Indeed, the protection of cultural heritage might already represent a customary norm.<sup>230</sup> Third, the Annex to the CPUCH is widely recognized as representative of common standards on the protection of undersea heritage already recognized by the archaeological community.<sup>231</sup> Paradoxically, the Annex may well represent the most important achievement of the CPUCH and be binding on the international community, irrespective of its ratification, due to its potential status as a customary norm of international law. Fourth, precedential cases decided by admiralty tribunals in common law countries have required adequate archaeological standards, thus emphasizing the need to preserve archaeological treasures.<sup>232</sup>

In this sense, interpretation of existing legal instruments and standards may help arbitrators properly adjudicate difficult cases like the *MHS* case. It will be incumbent upon arbitrators to strive for balance between the competing objectives of cultural heritage protection and foreign investors’ security. As Professor Park stated,

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226. *Id.* at 37.

227. UNCLOS, *supra* note 27, art. 303(1).

228. *Id.* art. 303(4).

229. James A.R. Nafziger, *The Development of International Cultural Law*, 100 AM. SOC’Y INT’L L. PROC. 317, 317–18 (2006).

230. Francesco Francioni, *Au-Delà des Traités: L’Émergence d’un Nouveau Droit Coutumier Pour la Protection du Patrimoine Culturel* 19–42 (European Univ. Inst. Dep’t of Law, Working Paper No. 2008/05, 2008).

231. *See supra* Part III.B.

232. Nafziger, *supra* note 61, at 256.

"[T]o some extent, arbitrators are expected to behave like judges in their concern for the public interest."<sup>233</sup>

Nevertheless, interpretation is a complex process that requires in-depth knowledge of the existing legal framework and should not result in lawmaking, which would violate the arbitration mandate. The arbitral tribunal must ascertain the goal and effect of state action. The mere presence of cultural elements in a given dispute does not imply that a state may adopt discriminatory or abusive practices. If a state fails to protect UCH, arbitrators must still respect their mandate and cannot substitute their judgment for that of the state.<sup>234</sup> At the same time, arbitrators may take international standards into account when reviewing state actions. If a state abuses its regulatory power, arbitrators may review such conduct in light of existing international law norms and award compensation where necessary. Of course, arbitrators in these situations will face difficult cases; Part IV.D.2 describes a more careful approach.

## 2. Legal Drafting: Introducing Cultural Clauses in Investment Agreements

Interpretation and jurisprudential balancing, two *ex post* approaches, may not provide adequate protection for cultural heritage due to the difficult—if not impossible—task of creating coherence in a regime complex that ultimately lacks it. After analyzing these *ex post* approaches to addressing cultural issues in the context of arbitral proceedings, one might wish to consider an *ex ante* or legislative approach to cultural heritage protection.

During the negotiations of the Multilateral Agreement on Investment (MAI),<sup>235</sup> France and Canada applied for an exception for

233. William Park, *Private Disputes and the Public Good: Explaining Arbitration Law*, 20 AM. U. INT'L L. REV. 903, 905 (2004).

234. In practice, it is unlikely that any two parties will agree that a dispute is essentially related to cultural heritage. Perhaps it would be more appropriate to identify disputes that have a cultural heritage component than to require that a dispute must solely be a disagreement over cultural heritage. This neutral approach is based on the consideration that cultural heritage claims are rarely, if ever, raised in the absence of other international legal arguments. See P. Sands, *Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development of International Environmental Law*, in LAW OF THE SEA, ENVIRONMENTAL LAW AND SETTLEMENT OF DISPUTES, *supra* note 40, at 313, 315.

235. Organisation for Economic Co-operation and Development, Multilateral Agreement to Investment, Draft Consolidated Text, OECD Doc. DAFFE/MAI(98)7/REV1 (Apr. 22, 1998). The Organisation for Economic Co-operation and Development (OECD) attempted to establish a Multilateral Agreement on Investments (MAI), but this effort collapsed in the 1990s at the hands of opposition from civil society. MARLIES FILBRI & ILZE PRAAGMAN, SOMO CENTRE FOR RESEARCH ON MULTINATIONAL CORPS., A SUSTAINABLE BALANCE? INTERNATIONAL INVESTMENT AGREEMENTS: HOW THEY REFLECT THE RIGHTS AND RESPONSIBILITIES OF DIFFERENT

the protection of national cultural goods.<sup>236</sup> Such a clause would have enabled all parties to abide by policies protecting cultural diversity. Negotiations for such a provision failed in 1998, however, and countries have since adopted different approaches to the issue.<sup>237</sup>

Some investment treaties anticipate possible disputes by providing exceptions for cultural industries. An interesting example of such an exception can be found in the Trans-Pacific Strategic Economic Partnership Agreement (Trans-Pacific SEPA), a treaty between Brunei Darussalam, Chile, Singapore, and New Zealand<sup>238</sup> that establishes a free-trade area between the signatories.<sup>239</sup> The Trans-Pacific SEPA sets out several general exceptions to its trade-related obligations, including measures necessary to protect objects and specific sites of historical or archaeological value.<sup>240</sup> The Trans-Pacific SEPA thus recognizes the need to promote cultural policies aimed at protecting both the tangible (archaeological and historical sites) and intangible (creative arts) cultural heritage of the countries involved. This sensitive approach to drafting an ad hoc cultural clause could also be more generally applied to investment treaties. For instance, while Canada has introduced an exception for cultural industries in its model foreign investment protection agreement (FIPA),<sup>241</sup> the boundaries of that exception still must be determined by arbitral bodies in cases where national regulations are challenged.<sup>242</sup> Nevertheless, cultural heritage is not a cultural

STAKEHOLDERS 2 (1999). The shortcomings of the MAI were evident: it was a one-sided instrument, unilaterally prepared by OECD member states to ensure higher standards of protection and legal security for foreign investors. *Id.* It did not adequately take into account the developmental needs of the host states, omitting crucial environmental and social issues. *Id.*

236. P. Muchlinski, *The Rise and Fall of the Multilateral Agreement on Investment: Where Now?*, 34 INT'L LAWYER 1033, 1048 (2000).

237. *Id.* at 1048–49.

238. The Trans-Pacific Strategic Economic Partnership Agreement, May 1, 2006, <http://www.mfat.govt.nz/downloads/trade-agreement/transpacific/main-agreement.pdf>.

239. *Id.* at 2–3.

240. *Id.* at 133.

241. Canada's FIPA Model, [http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/what\\_fipa.aspx?lang=en#structure](http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/what_fipa.aspx?lang=en#structure) (last visited Mar. 23, 2009). A FIPA is "a bilateral agreement aimed at protecting and promoting foreign investment through legally-binding rights and obligations." Canada's Foreign Investment Promotion and Protection Agreements (FIPAs): Canada's FIPA Program, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx> (last visited Mar. 23, 2009).

242. The cultural industries exception has been invoked by Canada in the recent United Parcel Service case. *United Parcel Serv. of Am. v. Gov't of Can.*, UNICTRAL (NAFTA), ¶¶ 156–172, May 27, 2007, available at [http://www.naftaclaims.com/Disputes/Canada/UPS/UPS-Canada-Final\\_Award\\_and\\_Dissent.pdf](http://www.naftaclaims.com/Disputes/Canada/UPS/UPS-Canada-Final_Award_and_Dissent.pdf). In this NAFTA case, the United States claimed that Canada's Publications Assistance Program (PAP)—a policy designed to promote the wider distribution of Canadian periodicals—discriminated against foreign investors. *Id.* ¶ 11. Canada argued, however, that the

industry. It is, therefore, necessary to consider the cultural industries exception as pivotal to broader legal drafting.

## V. FINISHING THE INTERRUPTED VOYAGE: INTERNATIONAL LAW AND UNDERWATER ARCHAEOLOGY

### A. *The Traditional Dichotomy: Purism vs. Salvage*

Historic shipwrecks recall fascinating adventures and have a romantic dimension that stretches the imagination. In practice, however, salvaging historic shipwrecks entails extensive research and hard work: finding the financial resources, investigating the right site, adopting a sophisticated methodology, and putting in hours of hard labor.<sup>243</sup> Deep-water excavation and the identification of shipwreck sites requires significant monetary resources.<sup>244</sup> Most countries not only lack funding for such works but also face unavailability of expertise, shortages of equipment, and lack of historical documents.<sup>245</sup>

According to the purist view, commercial salvage operators should be excluded from historical wreck sites, and *in situ* preservation of UCH is the best possible approach.<sup>246</sup> The purist view has been harshly criticized by some authors who deem it “a perfectionist policy” with “an element of unrealistic romanticism,”<sup>247</sup> only suitable for developed countries that are “willing to commit public funds to carry out archaeological excavations, inclusive of the time consuming and costly tasks of conservation . . . of art[i]facts, documentation, dissemination, and display.”<sup>248</sup> Unless salvors can recover UCH, the potential addition of that heritage to mankind’s

PAP was exempted from review under NAFTA by virtue of the cultural industries exception. *Id.* ¶ 67. The tribunal settled the case in Canada’s argument, finding that the Canadian program fell within the scope of the exception. *Id.* ¶ 172.

243. See BOESTEN, *supra* note 73, at 11.

244. See generally *R.M.S. Titanic v. Haver*, 171 F.3d 943, 966 (4th Cir. 1999) (“Because the wreck lies under 2.5 miles of water, where there is virtually no light, the water is frigid, and the water pressure is beyond general comprehension, only the most sophisticated oceanographic equipment can explore the site and recover property.”).

245. United Nations Educational, Scientific, and Cultural Organization—Frequently Asked Questions on the 2001 Convention for the Protection of Underwater Cultural Heritage, Benefits, [http://portal.unesco.org/culture/en/ev.php-URL\\_ID=36062&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php-URL_ID=36062&URL_DO=DO_TOPIC&URL_SECTION=201.html) (last visited Mar. 23, 2009).

246. Ricardo J. Elia, *The Ethics of Collaboration: Archaeologists and the Whydah Project*, 26 HIST. ARCH. 105, 106 (1992).

247. Derek Luxford, *Finders Keepers Losers Weepers—Myth or Reality? An Australian Perspective on Historic Shipwrecks*, in ART AND CULTURAL HERITAGE: LAW, POLICY AND PRACTICE *supra* note 135, at 300, 307.

248. Flecker, *supra* note 192, at 13.

store of knowledge will never occur:<sup>249</sup> “[T]he benefits of the quest for knowledge will only be realised if the quest is undertaken.”<sup>250</sup>

According to the mercantilist view, salvage contracts would represent useful joint ventures by which investors would assume financial risks in exchange for a share of the revenues amassed by the auction of the salvaged goods.<sup>251</sup> There is much to recommend the mercantilist approach. First, commercial salvage operators, who are often financed by external investors, have been extremely successful in locating and rescuing UCH.<sup>252</sup> Second, because the risk of losing UCH because of natural and human factors is relatively high, commercial salvage operators represent a means of recovering UCH before it is damaged. With regard to human factors, UCH may be threatened both by legitimate activities and by unauthorized appropriation. Construction work and exploitation of living and non-living resources are legitimate activities that may incidentally affect UCH by altering the shore or the seabed. The unauthorized commercial exploitation of UCH also puts it in danger.<sup>253</sup> Often, local divers recover artifacts without a license and without any archaeological expertise, selling their finds directly to antique dealers. In this context, valuable archaeological and historical information is lost forever.<sup>254</sup> Commercial salvage operators could help stop such damage to and loss of UCH.

### B. *Smart Salvage: A Third Way?*

Both developing countries and industrialized states may lack the willingness or resources necessary to recover shipwrecks. By contrast, salvage law governing commercial salvage operators contemplates monetary rewards and incentives for salvaging shipwrecks.<sup>255</sup> Regardless of how well they document the site or their operations, commercial salvors usually sell a part of the cargo to

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249. Forrest Booth, *The Collision of Property Rights and Cultural Heritage: The Salvors' and Insurers' Viewpoints*, in ART AND CULTURAL HERITAGE: LAW, POLICY AND PRACTICE, *supra* note 135, at 293, 299.

250. *Id.*; Luxford, *supra* note 247, at 307.

251. Booth, *supra* note 249, at 295–96.

252. *Id.* at 298.

253. See generally David Chang, *Stealing Beauty: Stopping the Madness of Illicit Art Trafficking*, 28 HOUS. J. INT'L L. 829, 830 (2006) (describing the nature and causes of black market trade in stolen art).

254. See Pilar Luna E., *The Sound of Campeche: A Place Full of History*, in UNDERWATER CULTURAL HERITAGE AT RISK: MANAGING NATURAL AND HUMAN IMPACTS, *supra* note 9, at 17, 17 (noting the use of dynamite by looters).

255. Ole Varmer, *The Case Against the 'Salvage' of the Cultural Heritage*, 30 J. MARITIME L. & COMMERCE 279, 290, 301 (1999).

recover expenses and make a profit.<sup>256</sup> Thus, the cargo in its entirety is unavailable for scholarly analysis.<sup>257</sup>

The remainder of this Article attempts to reconcile the apparently irreconcilable mercantilist and purist approaches<sup>258</sup> by arguing not only that archaeological and economic values are compatible but also that commercial salvage operations may be compatible with preservation.

### 1. Managing Underwater Cultural Heritage

With regard to material shipwreck remains, preservation should be the primary objective of salvage. The physical frailty of UCH requires ad hoc consideration. Terrestrial management models cannot simply be imposed on marine archaeological sites. The physical environment, the impossibility of monitoring a site on a constant basis, and the risk of destruction by tides and human activities all create an entirely different setting. The creed of preservation *in situ* is extremely problematic under water.<sup>259</sup> Furthermore, as Jesse Ransley asks, "Considering that divers are only a small, and relatively wealthy, section of the public, should diver access be a priority over other forms of public interpretation above the water?"<sup>260</sup> If recovering and displaying a wreck is not possible, its cargo should be recovered. Museums ensure better preservation and security schemes and allow accessibility to the elderly and disabled members of a population.

From a legal perspective, discourse on cultural heritage should focus more on governance than on ownership. Traditionally, salvage law attributes the property of maritime remains to the state; the salvor has mere possession rights.<sup>261</sup> Still, it may be argued that states should not be considered owners but rather guardians or custodians of these cultural goods. In other words, while the traditional concept of property involves the power to use or destroy a certain thing, custodianship denotes certain duties. Intriguingly, the

256. *Id.* at 297–98, 300.

257. *See id.* at 300 (under the commercial salvage regime, artifacts are sold or distributed to investors, resulting in their dispersal).

258. For the purists' approach and its conflict with commercial interests, see, for example, Elia, *supra* note 246, at 107–08; Craig J. S. Forrest, *Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?*, 34 J. MARITIME L. & COMMERCE 309, 318 (2003).

259. Jesse Ransley, *Rigorous Reasoning, Reflexive Research and the Space for Alternative Archaeology*, 36 INT'L J. NAUTICAL ARCHAEOLOGY 221, 224 (2006).

260. *Id.*

261. David J. Bederman, *Rethinking the Legal Status of Sunken Warships*, 31 OCEAN DEV. & INT'L L. 97, 101 (2000).

CPUCH does not address property issues, instead focusing only on management issues.<sup>262</sup>

From an economic perspective, the preservation of historical assets has the potential to generate a powerful heritage industry and increase tourism and related business. This economic potential demands the question of whether such revenues represent the leverage necessary to encourage project financing.<sup>263</sup> If a salvor were given the opportunity to cooperate in the management of cultural heritage after its recovery and to share subsequent revenues for a given period of time, such assurances might constitute the warranty needed to obtain equity financing.<sup>264</sup> Economists and lawyers might help policy makers envisage concession-agreement contracts between countries and investors. If the primary objective of the salvage company was to make a profit, profits could come from entertainment markets in which salvors would retain media rights and copyright in derivative products such as movies or books.<sup>265</sup> The host state would benefit from this as well, as it could retain recovered UCH and store it in appropriate structures without having to spend money for the salvage. Finally, after a certain number of years, the host state could regain full management rights over the UCH.

## 2. The Preservation of Cultural Heritage as a Key Factor in Sustainable Development

As Prott and O'Keefe explain,

Heritage creates a perception of something handed down; something to be cared for and cherished. These cultural manifestations have come down to us from the past; they are our legacy from our ancestors.

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262. See CPUCH, *supra* note 6 (lacking articles concerning property).

263. "Project finance" can be defined as the complex financing of long-term investment projects where project debt and equity are used to finance the project, and debt is repaid using the cash flow generated by the operation of the project. Eagletraders.com, What is Project Finance, [http://www.eagletraders.com/loans/loans\\_what\\_is\\_project\\_finance.htm#Introduction](http://www.eagletraders.com/loans/loans_what_is_project_finance.htm#Introduction) (last visited Mar. 23, 2009).

264. Warranties in a project contract serve as incentives for parties to enter the agreement. SCOTT L. HOFFMAN, *THE LAW AND BUSINESS OF INTERNATIONAL PROJECT FINANCE: A RESOURCE FOR GOVERNMENTS, SPONSORS, LAWYERS, AND PROJECT PARTICIPANTS* § 13.02(1) (3d ed. 2008).

265. For instance, Odyssey Marine Exploration, the company that specializes in shipwreck recovery and that is operating the Black Swan project, is currently negotiating with media partners for film, television, and other ancillary rights. See *Rumours, Possible Disney Deal Follow Odyssey Marine Treasure Find*, INT'L HERALD TRIBUNE, May 21, 2007, <http://www.iht.com/articles/ap/2007/05/21/america/NA-GEN-US-Treasure-Ship.php>.



There is today a broad acceptance of a duty to pass them on to our successors, augmented by the creations of the present.<sup>266</sup>

Preservation in the context of intergenerational equity should therefore be the goal of cultural heritage regulation. Indeed, sale is not the only option available for recovering the costs and expenses of salvaging historic shipwrecks.

Exhibitions of artifacts may represent a suitable social and economic option for the host state. Museums are not only “temples of heritage” but also important for fostering a dialogue and critical thinking.<sup>267</sup> From an economic perspective, they may also be profitable. The success of the *Titanic* salvors illustrates this point. In 1994, after conducting numerous expeditions and recovering 6,000 artifacts from the *Titanic* wreck, the salvage company went on city tours to display the artifacts for the public.<sup>268</sup> The huge success of the *RMS Titanic* is a testament to the potential profitability of a salvage operation without the sale of recovered artifacts. Remarkably, the venture was so profitable that the company opted to curtail its future shipwreck salvage work, “preferring above-water cash-paying customers to chasing high risk dreams of underwater riches.”<sup>269</sup>

States have similarly been willing to finance maritime museums.<sup>270</sup> Following the recovery of Viking ships, a nautical museum was established at Roskilde, Denmark.<sup>271</sup> The Viking Ship Museum in Oslo, Norway, is known worldwide.<sup>272</sup> In Germany, a national maritime museum has been built around the medieval cog found at Bremen, and the museum, situated at Bremerhaven, is now a national archaeological research center.<sup>273</sup> In the United Kingdom, the Portsmouth Historic Dockyard now includes the relics of the *Mary*

266. Lyndel V. Prott & Patrick J. O’Keefe, ‘Cultural Heritage’ or ‘Cultural Property’?, 1 INT’L J. CULTURAL PROP. 307, 311 (1992).

267. George H. Okello Abungu, *Africa and Its Museums: Changing of Pathways?*, in ART AND CULTURAL HERITAGE: LAW, POLICY AND PRACTICE, *supra* note 135, at 386, 386.

268. Peter Hodson, *How to Invest in Sunken Treasure; Salvage Stocks Offer High Returns, But Big Risk*, NAT’L POST, May 31, 2007, at FP8.

269. *Id.*

270. See Abungu, *supra* note 267, at 386 (“Although museums started as individual hobbies with collectors of unique items doing it for personal satisfaction, today they are respected institutions carrying out diverse functions that range from research, collection development, documentation, and inventory, to exhibition and education.”).

271. Viking Ship Museum, Information About the Museum, <http://www.vikingeskibsmuseet.dk/index.php?id=1333&L=1> (last visited Mar. 23, 2009).

272. Norway.com, The Viking Ship Museum, [http://www.norway.com/directories/d\\_company.asp?id=671](http://www.norway.com/directories/d_company.asp?id=671) (last visited Mar. 23, 2009).

273. The Medieval Fleet, Deutsches Schiffahrtsmuseum, <http://www.dsm.museum/MA/cog.htm> (last visited Mar. 23, 2009).

*Rose*, a Tudor warship.<sup>274</sup> In Greenwich, the *Cutty Sark* is conserved in a dry dock and attracts millions of tourists every year.<sup>275</sup> Indeed, there are more than 800 nautical museums around the world that are primarily supported by private–public partnerships.<sup>276</sup> Although maritime museums are interdisciplinary and play host to researchers from a variety of different fields,<sup>277</sup> they are no longer the exclusive territory of particularly erudite visitors. The evolution of modern techniques has made maritime museums increasingly attractive to a wide variety of tourists.

Like the growth in popularity of maritime museums on land, a series of initiatives has been undertaken in recent years to create underwater museums. For instance, Caesarea, an ancient port created during Herod's reign as king of Judaea, has become an underwater museum for divers who can admire an ancient shipwreck from Roman times.<sup>278</sup> Marked "trails" have been created, differentiated according to their difficulty.<sup>279</sup> In the United States, the Florida Keys National Marine Sanctuary includes a trail of historic shipwrecks.<sup>280</sup> In Finland, the wreck site of the *Konprins Gustav Adolf* was declared a maritime historical park in 2000.<sup>281</sup> Croatia, which is extremely rich in UCH, protects shipwreck sites with metal cages,<sup>282</sup> a design meant to deter potential looters while allowing divers to enjoy the sites. In Italy, an underwater "trail" has been created in Ustica, where divers can admire several shipwrecks,<sup>283</sup> and in Greece, the *HMHS Britannic* wreck site is set to become a seabed museum.<sup>284</sup>

274. Welcome to Portsmouth Historic Dockyard: Mary Rose, <http://www.historicdockyard.co.uk/maryrose/> (last visited Mar. 23, 2009).

275. The Cutty Sark, <http://www.greenwich-guide.org.uk/cutty.htm> (last visited Mar. 23, 2009).

276. FLAVIO SERAFINI, *MUSEI NAVALI E COLLEZIONI MARITTIME NEL MONDO* (2006).

277. Olivier Genin, *Maritime Museums: Custodians of an International Heritage*, MUSEUM INT'L, Fall 1996, at 4–5.

278. U.N. EDUC., SCIENTIFIC & CULTURAL ORG. [UNESCO], *UNDERWATER MUSEUMS AND DIVE SITES 3* (Oct. 9, 2007), [http://portal.unesco.org/culture/es/files/35206/12028970437Underwater\\_Museums\\_en.pdf/Underwater%2BMuseums%2Ben.pdf](http://portal.unesco.org/culture/es/files/35206/12028970437Underwater_Museums_en.pdf/Underwater%2BMuseums%2Ben.pdf).

279. *Id.* at 3–4.

280. *Id.* at 4.

281. *Id.*

282. *Id.* at 5.

283. *Id.*

284. Helena Smith, *Wreck of the Titanic Sister Ship Finds New Destiny as Tourist Attraction*, *GUARDIAN* (U.K.), Oct. 29, 2008, available at <http://www.guardian.co.uk/world/2008/oct/29/titanic-britannic-marine-museum-sea>.

Both museums and national parks contribute to local cultural and economic development.<sup>285</sup> Heritage management discourse usually focuses on issues of property. The general assumption is that societies and individuals “have at their disposal both cultural and economic types of capital which are different but convertible into one another.”<sup>286</sup> This Article moves beyond that traditional dichotomy and proposes a re-conceptualization of heritage as cultural capital that also serves as an engine for cultural, social, and economic development.

## VI. CONCLUSION

Ancient shipwrecks reveal important elements of human history. From a cultural perspective, UCH represents an “integral part of the cultural heritage of humanity and a particularly important element in the history of peoples and their relations with each other concerning their common heritage.”<sup>287</sup> Shipwrecks are an invaluable source of knowledge and profound historic and cultural value, and their conservation provides economic and societal benefits.

From an economic perspective, cultural heritage management may well represent an engine for growth and sustainable development, catalyzing tourism and related economic activities.<sup>288</sup> The *MHS* case demonstrates a myopic approach to the question of whether salvage may represent a form of investment. Development is better seen “as less like the construction business and more like education in the broad and comprehensive sense that covers knowledge, institutions and culture.”<sup>289</sup> Cultural capital is an

285. Yani Herreman, *The Role of Museums Today: Tourism and Cultural Heritage*, in ART AND CULTURAL HERITAGE: LAW, POLICY AND PRACTICE, *supra* note 135, at 419, 419.

286. PIERRE BOURDIEU, *DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGMENT OF TASTE* (Richard Nice trans., 1984).

287. See CPUCH, *supra* note 6, pmb1.

288. For instance, the World Bank is the most important source of funding for projects and investments related to cultural heritage. See Cultural Heritage and Sustainable Tourism: Cultural Heritage Projects, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTURBANDEVELOPMENT/EXTCHD/0,,contentMDK:21455657~menuPK:467698~pagePK:210058~piPK:210062~theSitePK:430430,00.html> (last visited Mar. 23, 2009). In the past decade, there have been sixty-eight projects funded by the World Bank that included cultural components or were specifically designed for cultural heritage conservation and management. *Id.* For analysis on World Bank’s policy of preserving cultural resources, see, for example, Charles E. Di Leva, *The World Bank’s Policy on Physical Cultural Resources*, in ART AND CULTURAL HERITAGE: LAW, POLICY AND PRACTICE, *supra* note 135, at 245, 245–48; Gary Paulson, *BTC Pipeline Project and the Preservation of Cultural Heritage*, in ART AND CULTURAL HERITAGE: LAW, POLICY AND PRACTICE, *supra* note 135, at 249, 252–54.

289. VINOD THOMAS, *WORLD BANK: THE QUALITY OF GROWTH* xxiii (2000).

essential component of sustainable development.<sup>290</sup> The conservation of cultural capital, through the maintenance of cultural values that provide people with a sense of identity and the investment needed to preserve and increase the cultural capital, would cause cultural systems to flourish and develop with a corresponding increase in welfare and economic output.<sup>291</sup>

From a legal perspective, while cultural rights have been defined as the “Cinderella” of the human rights catalogue<sup>292</sup> and only marginally studied, the linkage between cultural rights and cultural heritage has recently come to the fore. Linking cultural rights to cultural heritage protection is appropriate, as cultural heritage conservation contributes to the sense of identity and promotes the enjoyment of other human rights.<sup>293</sup> If the *MHS* award were to be reversed, then the competent arbitral tribunal would face the challenge of reconciling the promotion of foreign investment with UCH preservation. Only in recent times have scholars begun mapping the interactions between cultural heritage law and international economic law, focusing on the interrelation between international trade law and cultural heritage industries.<sup>294</sup> The relationship between international investment law and cultural heritage law has remained virtually unexplored.<sup>295</sup> This Article has thus sought to address and analyze the linkage between these two different fields of international law, concluding that investment law is not particularly well equipped to ensure adequate protection of UCH. As the CPUCH is not applicable to this dispute, the applicable law is the UNCLOS and relevant maritime customs, generally known as salvage law. The UNCLOS recognizes the need to protect UCH but allows the sale of recovered artifacts.

290. DAVID THROSBY, *ECONOMICS AND CULTURE* 69 (2001).

291. David Throsby, *Cultural Capital*, 23 *J. CULTURAL ECON.* 3, 9 (1999).

292. Y. Donders, *The Legal Framework of the Right to Take Part in Cultural Life*, in *HUMAN RIGHTS IN EDUCATION, SCIENCE AND CULTURE* 231, 232 (Y. Donders & V. Volodin eds., 2007).

293. See Andrew Ross, *Components of Cultural Justice*, in *LAW IN THE DOMAINS OF CULTURE* 203, 204 (Austin Sarat & Thomas R. Kearns eds., 1998) (“Increasingly, respect for people’s cultural identities . . . has come to be seen as a major condition of equal access to income, health, education, free association, [and] religious freedom.”).

294. See, e.g., PETER VAN DEN BOSSCHE, *FREE TRADE AND CULTURE: A STUDY OF RELEVANT WTO RULES AND CONSTRAINTS ON NATIONAL CULTURAL POLICY MEASURES* 19 (2007) (stating that economic globalization is often blamed for cultural impoverishment); TANIA VOON, *CULTURAL PRODUCTS AND THE WORLD TRADE ORGANIZATION* 3 (2007) (stating that there is a “conflict between trade values and other social values”).

295. See Austin Sarat & Thomas R. Kearns, *The Cultural Lives of Law*, in *LAW IN THE DOMAINS OF CULTURE*, *supra* note 293, at 1, 1, 5 (explaining the difficulty of using interdisciplinary approaches to link law to cultural studies).

Part V focused on the available legal options with regard to the conservation and management of UCH. The proposed approach reconciles both private and public interests in UCH management. While avoiding fierce but infertile contrapositions, this sensible approach is based on the assumption that an incentive-based system may be coupled with preservation policy to create an ideal approach to governing UCH.