

THE LAW AND PRACTICE REGARDING COIN FINDS United States Laws Concerning Historic Shipwrecks

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Art. 6. *Officers.* The officers of the INC shall be the President, two Vice-Presidents, the Secretary, the Treasurer. These officers shall be elected immediately after the election of the Council and shall serve at the pleasure of the Council. When the Council changes, the Treasurer will remain in office until the end of the calendar year.

Art. 7. *Duties of the Council.* The duties of the Council shall include admitting new members; preparing and publishing a budget and fixing the subscription; disseminating information among the membership (particularly through the annual report, in the *Compte rendu*, and *Newsletters*); extending patronage to particular projects, publications and conferences, organising the International Numismatic Congress and all other activities consistent, in the opinion of the Council, with the purpose of the INC.

Art. 8. *Finance.* The expenses of administration and publications are covered, by annual subscriptions, by gifts, by legacies and grants.

Art. 9. *Seat.* The seat of the INC is the office of the President.

Art. 10. *Change of Constitution.* The constitution may be changed by a two thirds majority of the votes cast at the General Meeting. Notice of proposed changes must be given to the members in writing at least three months prior to the Meeting.

Art. 11. *Dissolution.* The INC may be dissolved by a majority of two thirds of the votes cast at the General Meeting.

This is the second of a series of three articles discussing the laws of the United States relating to coin finds. The first article treated treasure trove, namely finds on land;¹ this article will treat the laws relating to shipwrecks, covering finds on navigable waters; a third article will discuss the laws relating to the import and export of archaeological artifacts to and from the United States.

Shipwrecks can be awarded to treasure hunters under two admiralty doctrines: the law of salvage and the law of finds. Three elements are necessary for a valid salvage claim: (1) a marine peril; (2) service voluntarily rendered when not required as an existing duty or from a special contract; and (3) success in whole or in part, or that the service rendered contributed to such success.² The first element has given the courts some trouble in the case of historic shipwrecks. Treasure hunters have succeeded in convincing admiralty courts that shipwrecks are in a marine peril on the seabed because they can still be lost by further action of the elements.³ Actually, when a ship sinks and its timbers become infused with seawater, it stabilizes in its new environment. When taken out of that environment and allowed to dry in the air, artifacts of bronze, iron, and wood crumble into a powder.⁴ It is, in fact, digging up artifacts and bringing them to the surface that puts them in peril, not leaving them on the bottom of the sea.

A salvage award is determined by six factors enumerated in the Blackwall: (1) the labor expended by the salvors in rendering the salvage service; (2) the promptitude, skill, and energy displayed in rendering the service and saving the property; (3) the value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed; (4) the risk incurred by the salvors in securing the property from the impending peril; (5) the value of the property saved;

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¹ John M. KLEEGERG, *The Law and Practice Regarding Coin Finds: Treasure Trove Law in the United States*, *Compte Rendu* 53 (2006), 13-26.

² *The "Sabine,"* 101 U.S. 384, 384 (1879).

³ See *Platoro Ltd., Inc., v. the Unidentified Remains of a Vessel* 614 F.2d 1051, 1055 (5th Cir. 1980); *Treasure Salvors, Inc., v. the Unidentified Wrecked, and Abandoned Sailing Vessel*, 569 F.2d 330, 336-37 (5th Cir. 1978); *Cobb Coin Co. v. the Unidentified, Wrecked and Abandoned Sailing Vessel*, 549 F.Supp. 540, 560-61 (S.D. Fla. 1982).

⁴ See Donald SHOMETTE, *The Hunt for HMS De Braak: Legend and Legacy* 263 (1993); Peter THROCKMORTON, *Shipwrecks and Archaeology: The Unharvested Sea* 22-31 (1970).

(6) the degree of danger from which the property was rescued.⁵ In historic shipwreck cases some courts have added a seventh factor to the traditional six Blackwall factors, namely the salvor's preservation of the historical and archaeological value of the wreck and cargo.⁶ Unfortunately admiralty courts have proved ill equipped at gauging the quality of archaeological research. For example, admiralty judges have fulsomely praised the activities of Mel Fisher,⁷ who is little regarded by the archaeological community.⁸

The award is not merely as pay, not a *quantum meruit* (contract implied by law) or a remuneration *pro opere et labore* (quasi contract), but a reward given for perilous services, voluntarily rendered, and as an inducement to navigators and others to embark in such undertakings to save life and property.⁹ Formerly the maximum a salvage award could attain was a moiety (50%) of the property saved;¹⁰ in historic shipwreck cases, however, courts have made salvage awards that are much higher, even 100%.¹¹

5 77 U.S. (10 Wall.) 1, 14 (1870).

6 See *Columbus-America Discovery Group v. Atl. Mut. Ins. Co.*, 56 F.3d 556, 573 (4th Cir. 1995); *Cobb Coin Co. v. the Unidentified, Wrecked and Abandoned Sailing Vessel*, 549 F.Supp. 540, 559 (S.D. Fla. 1982) ("This Court now holds that in order to state a claim for salvage award on an ancient vessel of historical and archeological significance, it is an essential element that the salvors document to the Admiralty Court's satisfaction that it has preserved the archeological provenance of a shipwreck."). Cf. *Marex Int'l, Inc., v. the Unidentified, Wrecked and Abandoned Vessel*, 952 F.Supp. 825, 829 (S.D. Ga. 1997) (applying an "archaeological duty of care," but awarding the wreck on the basis of the maritime law of finds).

7 See *Cobb Coin*, 549 F.Supp., at 558-59; *Treasure Salvors, Inc., v. the Unidentified Wrecked and Abandoned Sailing Vessel, "Nuestra Señora de Atocha,"* 546 F.Supp. 919, 927-928 (S.D. Fla. 1981). A court has also praised the archaeological efforts of the treasure hunters who dug up the Brother Jonathan, noting that they had not scooped up the wreck with a "clam bucket." See Q. David BOWERS, *The Treasure Ship S.S. Brother Jonathan: Her Life and Loss, 1850-1865* 354 (1998) ("And we know of a lot of horror cases, such as where they salvage with clam buckets and all that sort of thing."). The "clam bucket" was a reference to the botched salvage of *De Braak*. Yet, ironically, one of the treasure hunters behind the Brother Jonathan was Harvey Harrington, who initiated the botched salvage of *De Braak* in the first place. See *id.* at 320, 349; SHOMETTE, *supra* note 4.

8 Cf. Philip Zbarr TRUPP, Ancient shipwrecks yield both prizes and bitter conflict, *Smithsonian*, Oct. 1983, at 79, 86 (1983) (quoting the Florida state archaeologist Wilburn A. Cockrell, who said, "This myth that treasure hunters are real archaeologists is nothing short of immoral.").

9 *The Blackwall*, 77 U.S. (10 Wall.) 1, 14 (1870).

10 See *Columbus-America*, 56 F.3d, at 570-71.

11 See *id.* at 573 (awarding 90%); *MDM Salvage, Inc., v. the Unidentified, Wrecked and Abandoned Vessel*, 631 F.Supp. 308, 313 (S.D. Fla. 1986) (awarding 100%); *Platoro Ltd. v. the Unidentified Remains of a Vessel*, 518 F.Supp. 816, 823 (W.D. Tex. 1981) (awarding 100%), vacated, 695 F.2d 893 (5th Cir. 1983).

The salvor receives not title to the finds but a salvor's lien.¹² If the owner does not satisfy the salvor's lien, then the salvaged goods can be sold by the U.S. marshal and the amount recovered used to satisfy the salvor's lien.¹³ Salvage law does not award the salvor the actual artifacts, unless the amount of the salvor's lien is clearly more than the value of the recovered artifacts. In that case a court may, at its discretion, award title to the artifacts to the salvor, to save the expense of a sale.¹⁴

Salvage law is not supposed to cause a net economic loss to society.¹⁵ Yet treasure hunting does precisely that. In the 1960s it seemed that the recovery of treasure from shipwrecks would be extraordinarily profitable; now we know that virtually all treasure hunting enterprises lose money.¹⁶ Insofar as the legal system seeks to maximize the efficient use of resources, it stands to reason that courts would make rulings that are favorable to treasure hunters in the 1960s and 1970s¹⁷ (when they believed that treasure hunting was profitable) and unfavorable to treasure hunters in the early twenty-first century¹⁸ (when they began to realize it was not).

The law of finds applies if the court determines that the owner of the shipwreck has abandoned¹⁹ the ship.²⁰ Under the law of finds, the shipwreck is awarded to the first person to reduce it possession.²¹ The treasure hunter receives full title to the finds.²² Under salvage law, a co-salvor can be entitled to an award as well as an initial salvor;²³ under the law of finds, only the possessor of the property gets title.²⁴ Thus salvage encourages open, lawful, and cooperative conduct,²⁵ whereas the law of finds encourages finders to act secretly and to hide their recoveries, in order to

12 See *R.M.S. Titanic, Inc., v. the Wrecked and Abandoned Vessel*, 286 F.3d 194, 203-5 (4th Cir. 2002).

13 See *id.* at 203-4.

14 See *id.* at 204.

15 See *R.M.S. Titanic, Inc., v. the Wrecked and Abandoned Vessel*, 323 F.Supp. 2d 724, 742 (E.D. Va. 2004), aff'd, 435 F.3d 521 (4th Cir. 2006); *Platoro Ltd. v. the Unidentified Remains of a Vessel*, 695 F.2d 893, 904 (5th Cir. 1983).

16 See *infra* text accompanying notes 43-49.

17 See, e.g., *Cobb Coin Co. v. the Unidentified, Wrecked and Abandoned Sailing Vessel*, 549 F.Supp. 540 (S.D. Fla. 1982).

18 See, e.g., *R.M.S. Titanic, Inc., v. the Wrecked and Abandoned Vessel*, 435 F.3d 521 (4th Cir. 2006).

19 "Abandoned" has a complex meaning, which will be discussed below. See *infra* text accompanying notes 79 through 82.

20 See *Hener v. United States*, 525 F.Supp. 350, 356 (S.D.N.Y. 1981) (Abraham Sofaer, J.).

21 See *id.*

22 See *id.*

23 See *id.* at 357-58.

24 See *id.* at 356.

25 See *id.* at 358.

avoid claims of prior owners or of other would-be finders that could entirely deprive them of the property.²⁶ Although one court has argued that the law of finds is the only appropriate rule for ancient shipwrecks,²⁷ the law of finds is traditionally disfavored in admiralty because it encourages improper conduct.²⁸ One federal appellate court has inveighed in very strong language against the law of finds, stating that it is “but a short step from active piracy and pillaging.”²⁹ With such a negative view of the law of finds, any further awards of historic shipwrecks will be made on the basis of the law of salvage.

Federal admiralty law in the United States has been supplanted by a statute, the Abandoned Shipwreck Act of 1987 (the “ASA”).³⁰ The enactment of this law can best be understood after a review of the historical background.

Historic shipwrecks in the United States have been the subject of tremendous media interest because one treasure hunter, Mel Fisher, created a powerful publicity machine to raise money for his operations.³¹ Three Spanish treasure fleets have been discovered off the coasts of Florida. The first to be discovered were the wrecks of the 1733 fleet in the 1930s, which were dug up by Art McKee after 1945.³² From 1961 onwards, Kip Wagner dug up the wrecks of the 1715 fleet.³³ In July 1985, Mel Fisher located the main site of *Nuestra Señora de Atocha*, the largest ship in the 1622 fleet.³⁴ These discoveries captured the popular imagination, and treasure hunters became popular heroes in the United States.³⁵

It thus may seem surprising that the United States, a traditional advocate of private enterprise, should pass the ASA, which largely ended the treasure hunting of

26 See *id.* at 356.

27 See *Treasure Salvors, Inc., v. the Unidentified Wrecked and Abandoned Vessel*, 569 F.2d 330, 337 (5th Cir. 1978) (“Disposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd lengths.”).

28 See *Hener*, 525 F.Supp., at 356.

29 *R.M.S. Titanic, Inc., v. the Wrecked and Abandoned Vessel*, 435 F.3d 521, 533 (4th Cir. 2006).

30 43 U.S.C. §§2101-2106.

31 Cf. Robert DALEY, *Treasure* 140 (1977) (“Fisher, one sometimes suspected, wanted above all else to be famous.”).

32 See Roger C. SMITH, *Treasure Ships of the Spanish Main: The Iberian-American Maritime Empires*, in *Ships and Shipwrecks of the Americas. A History Based on Underwater Archaeology* 85, 99 (George F. BASS ed., 1988).

33 See *id.* at 95-96; Kip WAGNER, *Pieces of Eight: Recovering the Riches of a Lost Spanish Treasure Fleet* (1966).

34 See SMITH, at 92-94.

35 Pete AXTHELM, *Where Have All the Heroes Gone?*, *Newsweek*, Aug. 6, 1979, at 44, 49-50 (describing Mel Fisher as a “hero” and “heroic”).

historic shipwrecks in the territorial sea.³⁶ Yet treasure hunters made many enemies.

(1) Treasure hunters claim to be doing nautical archaeology, yet their publication of what they recover is wholly inadequate. Over 185,000 silver coins have been dug out of the *Atocha*.³⁷ Only a tiny fraction of that has been listed in auction catalogs. The Fisher organization has established a website where their coins will be listed in a database;³⁸ but as of October 2007, more than twenty years after the recovery of the main cultural deposit, and more than thirty-five years after the initial finds, only 12,814 silver coins from the *Atocha* have been listed on the website. Even fewer have been photographed. None of the weights are listed.

(2) Treasure hunters cause environmental damage.³⁹ Mel Fisher’s prop wash deflectors (the so-called “mailboxes”) blasted giant craters in the sea floor⁴⁰ and damaged sea grass in the Florida Keys.⁴¹ Burt Webber, Jr., blew up a coral reef to get at the treasure of the *Concepción*.⁴²

(3) Treasure hunters raise huge amounts of money from investors, yet none of their ventures show a profit.⁴³ The Fisher organization has repeatedly made the claim

36 See Melvin A. FISHER, *The Abandoned Shipwreck Act: The Role of Private Enterprise*, 12 *Colum.-VLA J.L. & Arts* 373, 377 (1988) (“The *Atocha* will be the last Spanish galleon recovered by private enterprise.”).

37 See Corey MALCOLM, *An Early, Lima Mint Coin from Nuestra Señora de Atocha*, *Navigators* (June 1999).

38 <http://www.historicshipwrecks.com>.

39 See Anne G. GIESECKE, *The Abandoned Shipwreck Act: Affirming the Role of the States in Historic Preservation*, 12 *Colum.-VLA J.L. & Arts*, 379, 387-88 (1988); Anne G. GIESECKE, *The Abandoned Shipwreck Act Through the Eyes of its Drafter*, 30 *J. Mar. L. & Com.* 167, 170-71 (1999).

40 Cf. Eugene LYON, *The Search for the Atocha* 119 (1979) (“From an aircraft flying over the site, observers could see how the boats had punched crater after crater in the sea bottom, leaving a surface pockmarked like that of the moon.”); Eugene LYON, *The Trouble with Treasure*, 149 *National Geographic* 787, 798-99 (1976) (reproducing a photograph showing the Mel Fisher boat Southwind blowing so many craters in the seafloor off the Florida Keys that the seafloor ends up looking like the surface of the moon).

41 See *Treasure Hunters are Fined for Destroying Sea Grass in Florida*, *N.Y. Times*, Aug. 3, 1997, Sec. 1, at 16.

42 See John GRISSIM, *The Lost Treasure of the Concepción. The Story of One of the World’s Greatest Treasures – and Burt Webber – the Man who Never Gave Up* 199-200 (1980) (stating that Burt Webber “used small underwater explosives” and adding that “the procedure worked well.”).

43 See, generally, Peter THROCKMORTON, *The World’s Worst Investment. The Economics of Treasure Hunting with Real-Life Comparisons*, in *Maritime Archaeology: A Reader of Substantive and Theoretical Contributions* 75 (Lawrence E. Babits & Hans Van Tilburg eds., 1998).

that the treasure dug out of the Atocha was worth \$400 million.⁴⁴ The bulk of the Atocha treasure, however, comprised 185,000 sea-damaged, low-grade silver cobs,⁴⁵ and it seems more probable that the true value of the Atocha treasure was closer to 3% of the value the Fishers give.⁴⁶ Another treasure hunter, Burt Webber, Jr., who dug up the coins from the *Concepción*, has made some interesting comments about the high estimates placed on their finds by the treasure hunters (Webber calls them “flimflam” values):

“These false values are bad for everyone.... We got about 31,000 pieces of eight from our digging. They sold at pretty high prices at first. But after we had sold 12,000 of them, we found a saturated market that forced us to wholesale the coins at \$45 each. That’s better than a melt down price, but still not very good.... A lot of investors, when they discover what’s happened, tend to back off. They get disillusioned; more than a few times they go to court. Honestly, one day the whole system is going to blow up.”⁴⁷

Edward W. Horan, the son and partner of Mel Fisher’s longtime admiralty lawyer, David Paul Horan, has admitted that investments in treasure salvage ventures have “notoriously poor track records.”⁴⁸ Tommy Thompson, who dug up 7,000 gold coins and 500 gold bars from the *SS Central America*, as of June 2006 was being sued by his investors for an accounting of the assets. Thompson’s whereabouts were unknown, his last known address being a trailer park in Florida.⁴⁹

(4) Treasure hunters have destroyed the artifacts they dig up. The treasure hunters who dug up *De Braak*, interested only in coins, dumped a rare late eighteenth century ship’s stove back into the sea.⁵⁰ The coins recovered from the *Atocha* were cleaned and polished in a very harsh manner.⁵¹ Gold bars that were recovered from

44 See Philip Zbar TRUPP, *Tracking Treasure* 78-79 (1986) (describing Mel Fisher’s “discovery of the \$400 million mother lode of the *Atocha*.”); Mayrav SAAR, *Booty Call*, *N.Y. Post*, Nov. 4, 2007 (stating that Mel Fisher made history when he discovered the *Atocha* with its “\$400 million haul of coins and artifacts.”).

45 See MALCOLM, *supra* note 37.

46 185,000 cobs at \$45 apiece would be \$8.325 million. See *infra* text accompanying note 47 for the \$45 value.

47 TRUPP, *supra* note 44, at 141-42.

48 Edward W. HORAN, *Organizing, Manning, and Financing a Treasure Salvage Expedition*, 30 *J. Mar. L. & Com.* 235 (1999).

49 See Mark TATGE & Miriam GOTTFRIED, *Ship of Fools: Two decades ago, investors gave Tommy Thompson millions for a piece of buried treasure. Will they ever see their money?*, *Forbes*, June 19, 2006, at 158.

50 See SHOMETTE, *supra* note 4.

51 Cf. Daniel SEDWICK & Frank SEDWICK, *The Practical Book of Cobs* 156 (4th ed. 2007) (“Most *Atocha* coins are also recognizable by their shiny brightness, the result of a controversial cleaning and polishing process catering more to jewelry demand than to serious

the *Central America* had their backs shaved off and melted down to make modern copies of Kellogg \$50 pieces.

(5) Treasure hunters have ventured into overt criminality. Mel Fisher sold fake coins and gold bars to raise money for his ventures. Fisher pled no contest in 1998.⁵² The Mafia was involved in the marketing of the coins from the Lucayan Beach treasure.⁵³ A treasure hunt in the Pacific involving Mike Hatcher has turned violent with death threats over an alleged \$60 million that has disappeared.⁵⁴

The problems with treasure hunting were epitomized by the horribly botched salvage of *HMS De Braak*. This British warship, which sank off the coast of Delaware in May 1798, was supposed to be salvaged in a partnership between the state archaeologists of Delaware and treasure hunters.⁵⁵ The treasure hunters believed that *De*

numismatists.”); Q. David BOWERS, *American Coin Treasures and Hoards* 209 (1997) (“In general, a heavily etched Spanish silver ‘dollar’ that, in addition to its sea immersion for centuries, has been poorly cleaned in recent times, is of little value to a collector.”).

52 See Good as Gold? Mel Fisher made a mint on old coins. Did he also mint them?, *People Weekly*, June 15, 1998, at 89-90; Jim CARRIER, *Hunter Admits Sale of Fake Gold Coins*, *N.Y. Times*, Nov. 27, 1998, at C3. The accusations that he was selling fake coins dogged Fisher for years and were made by some of the most eminent numismatists in the field (including Virgil Hancock and Clyde Hubbard); the accusations were brushed off by Fisher’s publicity machine – until Fisher pled no contest in 1998. Cf. DALEY, *supra* note 31, at 193-95 (belittling the accusations made against Fisher). The fake gold bars have been condemned as “swizzle (or swindle) sticks” in a recent study of Spanish treasure bars; they were previously condemned by Virgil Hancock. See Alan K. CRAIG & Ernest J. RICHARDS, Jr., *Spanish Treasure Bars From New World Shipwrecks* 145-48 (2003). Fisher gave the provenance of the fake coins and bars as being from the 1733 plate fleet. See Christie’s, New York, New York, USA, Auction Catalog (*Atocha* and *Santa Margarita*), June 14-15, 1988. Curiously, in 2002 the American Numismatic Association warned about the fake coins, but, apparently unaware of Fisher’s no contest plea, thought that the certificates of authenticity signed by Fisher had been faked and that Fisher was innocent of the scam. See *Collectors beware!*, 115 *Numismatist* 1399-1400 (2002). These fake gold bars should not be confused with another group of fake Mexican gold bars (the “Massapequa” group), condemned by Buttrey, Craig, Richards, Vince Newman, and myself, which were manufactured by Paul Gerow Franklin, Sr. and John Jay Ford, Jr. On this other group, see Craig & Richards, at 148-51; Theodore Venn BUTTREY, Jr., *False Mexican Colonial Gold Bars*, 3 *Memorias de la Academia Mexicana de Estudios Numismaticos* 21-42 (1973); E. G. V. NEWMAN, *Spanish Colonial Gold Bars from the Mexico Mint*, 98 *Spink’s Numismatic Circular* 51 (March 1990); John M. KLEEBERG, *How the West was Faked*, <http://www.fake-gold-bars.co.uk>.

53 See Patsy Anthony LEPERA & Walter GOODMAN, *Memoirs of a Scam Man: The Life and Deals of Patsy Anthony Lepera* 97-100, 147-48 (1974).

54 See Death threats over \$60 million fortune, *New Zealand Herald*, October 21, 2007, available at http://www.nzherald.co.nz/section/1/story.cfm?c_id=1&objectid=10471123; Treasure traps band of hunters, *Australian*, June 15, 2007, available at <http://www.the-australian.news.com.au/story/0,20867,21906765-28737,00.html>.

55 See SHOMETTE, *supra* note 4, at 213-16, 220-21, 283.

Braak held \$500 million in treasure.⁵⁶ On August 11, 1986, they raised the ship from Delaware Bay in a large sling.⁵⁷ However, as the ship was being raised, it shifted and its contents spilled back into the bay.⁵⁸ Then the treasure hunters scooped out the artifacts using a clam bucket.⁵⁹ The treasure hunters destroyed a ship for what turned out to be only 750 coins.⁶⁰ The State of Delaware was stuck with the problem of conserving the artifacts.⁶¹ When a ship sinks, it becomes waterlogged with seawater and stabilizes in its new environment. When brought out of water, the ship must be kept wet; if it dries out, the salt that remains will turn the artifacts – wooden timbers, bronze and iron cannon – into a powder.⁶² Conservation of the *De Braak* artifacts cost the State of Delaware \$115,000 in the first year alone.⁶³

Two long-lasting chains of litigation engendered great bitterness in Texas and Florida. In the autumn of 1967, treasure hunters dug up the site of the *Espíritu Santo*, a shipwreck of the 1554 plate fleet on Padre Island in Texas. Seventeen years of bitter litigation ensued.⁶⁴ A settlement was reached in 1984, when Texas paid the treasure hunters \$313,000 to settle their claims.⁶⁵ Florida initially co-operated with the treasure hunters, allowing them to excavate the shipwrecks off its coast in exchange for 25% of the artifacts.⁶⁶ Mel Fisher salvaged the *Atocha* under such an

56 See *id.* at 191-94, 298.

57 See *id.* at 249-54.

58 See *id.* at 252-53.

59 See *id.* at 243, 246-47, 261-62.

60 Cf. *id.* at 282 (stating that 650 coins were available to be appraised by James Lamb of Christie's, but adding that an additional number, estimated here at 100, was secretly held back by Harvey Harrington).

61 See *id.* at 272-75.

62 See *id.* at 263; THROCKMORTON, *supra* note 4, at 22-31.

63 See SHOMETTE, at 273.

64 See *Platoro Ltd. v. Unidentified Remains of a Vessel*, issuing an injunction but allowing an interlocutory appeal, 371 F.Supp. 351, 352 (S.D. Tex. 1970), salvage award made after the interlocutory appeal was dismissed, 371 F.Supp. 356 (S.D. Tex. 1973), rev'd and remanded with directions to dismiss for lack of jurisdiction, 508 F.2d 1113 (5th Cir. 1975), re-filed in the correct jurisdiction, dismissed on grounds of sovereign immunity, re-filed, dismissed on statute of limitations grounds, rev'd on grounds that the statute was tolled, 614 F.2d 1051 (5th Cir. 1980), entire res awarded in specie and attorney's fees awarded, 518 F.Supp. 816 (W.D. Tex. 1981), aff'd, except for the in specie award of the res and the award of attorney's fees, which were vacated, remanded to determine a dollar amount of the salvage award, 695 F.2d 893 (5th Cir. 1983).

65 J. Barto ARNOLD, *The Platoro Lawsuit: The Final Chapter, Proceedings of the Sixteenth Conference on Underwater Archaeology 1* (Society for Historical Archaeology, Special Publication Series, No. 4, Forsythe Johnston ed., 1985).

66 Each artifact was assigned a certain number of points. The artifacts would be separated into four piles of approximately equal value in terms of points. The State would then choose

agreement. The *Atocha* is approximately 9 1/2 miles off the coast of Florida (here formed by the Marquesas Keys),⁶⁷ and Florida believed it to be within its territorial waters.⁶⁸ However, in the Supreme Court decision *United States v. Florida*, the Supreme Court held that the waters immediately to the south of the Marquesas Keys were in the Atlantic Ocean, not the Gulf of Mexico.⁶⁹ Florida's territorial sea in the Atlantic extends out only three miles, not nine miles, and this placed the *Atocha* in international waters. Fisher sued to recover the artifacts that he had previously turned over to the Florida, and won.⁷⁰ Fisher next litigated over shipwrecks clearly within the territorial waters of Florida, and persuaded a Federal District Court to strike down Florida's treasure statute, Article 267.⁷¹ This decision deprived the states of all rights to shipwrecks within their own waters. The states redirected their efforts towards federal legislation that would re-assert the states' claims to historic shipwrecks, which then became the ASA.⁷²

Although a proposed bill passed the House of Representatives in 1984, it died in the Senate: Mel Fisher was able to stymie the bill through Paula Hawkins, the pro-Fisher Republican senator from Florida, who placed a "secret hold" on the bill. A "secret hold" enables one senator to stop a bill – anonymously – even if a majority of the Senate supports it.⁷³ Two major changes occurred in 1986: on August 11,

one of the piles. See *Cobb Coin Co. v. the Unidentified, Wrecked and Abandoned Sailing Vessel*, 549 F.Supp. 540, 546 n.2 (S.D. Fla. 1982); DALEY, *supra* note 31, at 233-34.

67 See *Treasure Salvors, Inc., v. the Unidentified Wrecked and Abandoned Sailing Vessel*, 546 F.Supp. 919, 923 (S.D. Fla. 1981).

68 See *Florida v. Treasure Salvors, Inc.*, 621 F.2d 1340, 1349 (5th Cir. 1980). Normally the territorial waters of a state only extend out three miles. See *United States v. Maine*, 420 U.S. 515 (1975). The coast of Texas and the Gulf Coast of Florida are the two exceptions. Those marine borders are nine miles. See *United States v. Louisiana*, 363 U.S. 1, 36-65 (1960); *United States v. Florida*, 363 U.S. 121 (1960).

69 See 420 U.S. 531 (1975) (*per curiam*).

70 See *Treasure Salvors, Inc., v. the Unidentified Wrecked and Abandoned Sailing Vessel*, 459 F.Supp. 507 (S.D. Fla. 1978), aff'd sub nom. *Florida v. Treasure Salvors, Inc.*, 621 F.2d 1340 (5th Cir. 1980), aff'd sub nom. *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982).

71 *Cobb Coin Co. v. the Unidentified, Wrecked and Abandoned Sailing Vessel*, 549 F.Supp. 540, 548-49, 553 (S.D. Fla. 1982).

72 See GIESECKE, *ASA through the Eyes of its Drafter*, *supra* note 39, at 169.

73 See SHOMETTE, *supra* note 4, at 292-93; GIESECKE, *The Role of the States*, *supra* note 39, at 387 (stating that Senator Hawkins placed a "secret hold" on the bill). The U.S. Senate does much of its business through unanimous consent. If one senator denies her or his consent, the business is stopped. The identity of the senator who places the "hold" is kept anonymous, although in the gossipy atmosphere of Washington the identity will eventually leak out. Federal Election Commission records show two donations by Fisher to Paula Hawkins' 1986 senatorial campaign: \$1,000 under the name of Mel A. Fisher, recorded as being

1986, the botched salvage of *HMS De Braak* occurred in a glare of intense media interest and horrified the public.⁷⁴ In November 1986 Paula Hawkins was defeated for re-election. The ASA was passed by the Senate in 1987, by the House of Representatives in 1988, and then signed into law by President Reagan.⁷⁵

The ASA applies to ships that are abandoned and either:

- (1) embedded in the submerged lands of a State;
- (2) embedded in coralline formations protected by a State on submerged lands of a State; or
- (3) on submerged lands of a State and is included in or determined eligible for inclusion in the National Register of Historic Places.⁷⁶

Under the ASA, the Federal government takes title to these shipwrecks, and then transfers the title to the States.⁷⁷

The act is designed to preserve historic shipwrecks, but the term “historic” is too vague to be the basis for a law.⁷⁸ Congress also did not want to interfere in the salvage of recently sunken ships and the removal of obstacles to navigation by the Army Corps of Engineers. Thus the terms “abandoned” and “embedded” were chosen, on the grounds that they would encompass the ships that Congress wanted to preserve against the treasure hunters, yet not interfere with the removal of recent wrecks.

The Supreme Court has stated that “the meaning of ‘abandoned’ under the ASA conforms with its meaning under admiralty law.”⁷⁹ The term abandonment has given the courts some trouble, because a ship can be “abandoned” in three different senses. A sinking ship is abandoned in the first sense when the captain orders passengers and crew to “abandon ship.”⁸⁰ The second meaning of abandonment occurs in the dispute between the original owner of the ship and the insurer over who will pay for the loss. When the insurance company agrees to pay the claim, it “accepts abandonment” and then becomes, in its turn, the owner of all rights, title and interest in

donated to the primary on June 30, 1986, and \$1,000 under the name of Melvin A. Fisher, presumably for the general election, on February 26, 1987. The records were searched at <http://www.newsmeat.com>.

⁷⁴ See SHOMETTE, *supra* note 4, at 249-54, 261.

⁷⁵ See GIESECKE, ASA through the Eyes of its Drafter, *supra* note 39, at 170.

⁷⁶ 43 U.S.C. §2105(a).

⁷⁷ 43 U.S.C. §2105(c).

⁷⁸ Thus a federal appellate court had struck down the Antiquities Act of 1906 because the term “antiquity” was unconstitutionally vague. See *United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974).

⁷⁹ *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 508 (1998).

⁸⁰ See *Bertel v. Panama Transport Co.*, 202 F.2d 247, 248-49 (2d Cir. 1953).

the shipwreck (“subrogation”).⁸¹ The third meaning of abandonment occurs when the owner (usually the insurance company as the subrogated owner), either by explicit declaration or by statements and acts that give rise to an inference abandons all interest in the ship.⁸² Only after abandonment in the third sense can the states take title under the ASA or a treasure hunter gain title under the law of finds.

The prevailing view is that abandonment must be proved by the elevated standard of clear and convincing evidence, rather than a mere preponderance of the evidence.⁸³ A vocal minority disagrees: a New York district court called it a “difficult question” and chose to leave the issue undecided.⁸⁴ Another judge, in a concurring opinion, has cautioned that heightening the evidentiary standard for abandonment defeats the will of Congress by eviscerating the ASA.⁸⁵ One federal court of appeals, in some surprisingly broad language, has observed that a “vessel may never be abandoned;”⁸⁶ this doctrine would eviscerate the ASA, but this view has not proved persuasive, not even on the lower courts when later considering a closely related case.⁸⁷ This heightened evidentiary standard means that when the owner (i.e. the owner’s descendants or an insurance company) appears, courts are reluctant to find abandonment.⁸⁸

⁸¹ See *People ex rel. Illinois Historic Pres. Agency v. Zych*, 687 N.E.2d 141, 144-48 (Ill. App. Ct. 1997), rev’d on other grounds, 710 N.E.2d 820, 825 (Ill. 1999); H. B. CHERMSIDE, Jr., Annotation: Rights in and ownership of wrecked or derelict vessels and their contents not cast upon the shore, 63 *A.L.R.* 2d 1369, 1370 (1959).

⁸² See ZYCH, at 148-50; CHERMSIDE, at 1370.

⁸³ See *Adams v. Unione Mediterranea di Sicurtà*, 220 F.3d 659, 671 (5th Cir. 2000); *Fairport Int’l Exploration, Inc., v. the Shipwrecked Vessel known as the Captain Lawrence*, 177 F.3d 491, 501 (6th Cir. 1999); *Columbus-America Discovery Group v. Atl. Mut. Ins. Co.*, 974 F.2d 450, 467-68 (4th Cir. 1992); *Falgout Bros., Inc., v. S/V Pangaea*, 966 F.Supp. 1143 (S.D. Ala. 1997); *Moyer v. the Wrecked and Abandoned Vessel, Known as the Andrea Doria*, 836 F.Supp. 1099, 1105 (D.N.J. 1993). Other decisions use the language “strong and convincing evidence.” See *Sea Hunt, Inc., v. the Unidentified, Shipwrecked Vessel or Vessels*, 47 F.Supp. 2d 678, 688 (E.D. Va. 1999), aff’d in part, rev’d in part, 221 F.3d 634 (4th Cir. 2000); *Zych v. the Unidentified, Wrecked and Abandoned Vessel, Believed to be the SB “Lady Elgin,”* 755 F.Supp. 213, 214 (N.D. Ill. 1990), rev’d on other grounds, 941 F.2d 525 (7th Cir. 1991); *People ex rel. Illinois Historic Pres. Agency v. Zych*, 710 N.E.2d 820, 825 (Ill. 1999) (“strong, convincing, and unequivocal evidence”).

⁸⁴ See *Trueman v. the Historic Steamtug New York*, 120 F.Supp. 2d 228, 234 (N.D.N.Y. 2000).

⁸⁵ See *Fairport*, 177 F.3d, at 502-3 (Karen Nelson Moore, J., concurring).

⁸⁶ *Dluhos v. the Floating and Abandoned Vessel, Known as “New York,”* 162 F.3d 63, 66 (2d Cir. 1998).

⁸⁷ See *Trueman*, 120 F.Supp. 2d, at 234.

⁸⁸ See *Columbus-America*, 974 F.2d, at 468. But see *Fairport Int’l Exploration, Inc., v. the Shipwrecked Vessel, Known as the Captain Lawrence*, 72 F.Supp. 2d 795, 798 (W.D. Mich. 1999), aff’d, 245 F.3d 857 (6th Cir. 2001) (finding, after a detailed factual analysis and despite the intervention of the owner’s heirs in the litigation, that the owner had abandoned the shipwreck by clear and convincing evidence).

It has not only been insurers who have claimed their rights in historic shipwrecks that are centuries old. The courts have consistently held that a sovereign owner never abandons its rights in a warship. Federal government property can only be abandoned by a vote of Congress.⁸⁹ Foreign sovereigns, too, uphold their claims to shipwrecks. The Kingdom of Spain, the owner of the most valuable shipwrecks that sank off the coasts of the United States, now appears in American courts and wins decisions in its favor.⁹⁰ When Texas archaeologists excavated the ship of the French explorer La Salle, which sank in Matagorda Bay in February 1686, France claimed the ship. In an agreement between France and the United States, signed on March 31, 2003, France was given the title to the artifacts, while day-to-day care was vested in perpetuity with the Texas Historical Commission.⁹¹ This judicial doctrine, that sovereign owners never abandon their rights in a warship or a military aircraft, was enacted in a federal statute in 2004.⁹²

The other requirement of the ASA – embeddedness – has emerged in litigation concerning shipwrecks in the Great Lakes.⁹³ The ASA was largely informed by the experience with warm, saltwater shipwrecks off the state of Florida. In that environment, a shipwreck falls apart onto itself and subsides into the seabed; shipwrecks are marked by accumulations of ballast stones.⁹⁴ In the cold, fresh waters of the

89 See *Int'l Aircraft Recovery, L.L.C., v. the Unidentified, Wrecked and Abandoned Aircraft*, 218 F.3d 1255, 1258-60 (11th Cir. 2000) (naval aircraft); *United States v. Steinmetz*, 973 F.2d 212, 222-23 (3d Cir. 1992) (holding that the federal government is the owner of the bell of the Confederate raider, the *CSS Alabama*, as the successor to the rights of the Confederate States of America); *Hatteras, Inc., v. the U.S.S. Hatteras*, 1984 AMC 1094, 1097-1101 (S.D. Tex. 1981), vacated in part on other grounds, 1984 AMC 1102 (S.D. Tex. 1982), aff'd without opinion, 698 F.2d 1215 (5th Cir. 1983).

90 See *Sea Hunt, Inc., v. the Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634 (4th Cir. 2000). Spain formerly did not intervene in litigation involving its ships. See *Treasure Salvors, Inc., v. the Unidentified, Wrecked and Abandoned Sailing Vessel*, 556 F.Supp. 1319, 1334 n.2 (S.D. Fla. 1983) (“The modern day government of Spain has expressed no interest in filing a claim in this litigation as a successor-owner.”).

91 See James E. BRUSETH, *From a Watery Grave: the Discovery and Excavation of La Salle's Shipwreck, La Belle* 3-6, 72 (2005). Any publication of artifacts from the La Belle must bear the phrase: “Property of France from the collection of the Musée national de la Marine, located in Paris, France.”

92 See Sunken Military Craft Act of 2004, Pub. L. No. 108-375, 118 Stat. 2094 (2004) (codified as 10 U.S.C. §113 note (Supp. V 2004)).

93 See *Zych v. Unidentified, Wrecked and Abandoned Vessel, believed to be the “Seabird,”* 941 F.2d 525, 528, 530, 534 (7th Cir. 1991) (remanding the case to the District Court to take evidence on the issue of embeddedness; however, in the District Court the two parties subsequently stipulated to the embeddedness issue and did not litigate it).

94 See DALEY, *supra* note 31, at 14-15; THROCKMORTON, *supra* note 4, at 17-19, 24-25.

Great Lakes, a ship can remain intact and upright on the seabed.⁹⁵ States have still been able to win title to non-embedded ships under the ASA by listing the ship in the National Register of Historic Places.⁹⁶

How can treasure hunters continue to dig up shipwrecks after the ASA? One way is to make a deal with the owners. Treasure hunters have been remarkably successful at finding the owners of old wrecks, especially insurance companies.⁹⁷ The court will then find that the wreck is not abandoned,⁹⁸ and the treasure hunter can dig up the shipwreck.

Another approach is to make a deal with the state to dig up the shipwrecks. Most state governments, following the advice of the professional archaeologists on their staff, are hostile to treasure hunters, but treasure hunters have wealthy backers, and the rich have much influence in American politics.⁹⁹ The State of Virginia issued per-

95 See THROCKMORTON, *supra* note 4, at 12. Cf. also *Ehorn v. the Abandoned Shipwreck Known as the Rosinco, her Tackle, Appurtenances, Furnishing and Cargo*, 185 F.Supp. 2d 965, 981 (E.D. Wisc. 2001) (holding, albeit in a decision where the State of Wisconsin defaulted, that the *Rosinco*, which sank on September 19, 1928, is not embedded), rev'd, 294 F.3d 856 (7th Cir. 2002).

96 See *Ehorn v. the Abandoned Shipwreck Known as the Rosinco*, 301 F.Supp. 2d 861, 867 (E.D. Wisc. 2002).

97 Insurance companies have either intervened directly or subrogated their claims to treasure hunters in litigation concerning the *SS Central America* (sank 1857), the *Lady Elgin* (sank 1860), the *Brother Jonathan* (sank 1865), and the *Lusitania* (sank 1915). In the *Central America* case the insurance companies did not make a deal with the treasure hunter (Columbus-America Discovery Group), but instead intervened in the litigation as adverse parties. The *Captain Lawrence* (sank 1933) was not insured, but there the treasure hunter made a deal with the daughters of the owner. Despite this, the treasure hunter did not win in the *Captain Lawrence* litigation, because the court held that the *Captain Lawrence* had been abandoned by clear and convincing evidence. See *Fairport Int'l Exploration, Inc., v. the Shipwrecked Vessel*, 72 F.Supp. 2d 795, 799 (W.D. Mich. 1999) (the *Captain Lawrence*); *Bemis v. the RMS Lusitania*, 884 F.Supp. 1042, 1045, 1047 (E.D. Va. 1995) aff'd without opinion, 99 F.3d 1129 (4th Cir. 1996) (the *Lusitania*); *Deep Sea Research, Inc., v. the Brother Jonathan*, 883 F.Supp. 1343, 1347 (N.D. Cal. 1990), aff'd, 102 F.3d 379 (9th Cir. 1996), aff'd in part, vacated in part sub nom. *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998) (the *Brother Jonathan*); *Zych v. the Unidentified, Wrecked and Abandoned Vessel, Believed to be the SB “Lady Elgin,”* 755 F.Supp. 213, 214 (N.D. Ill. 1990) (the *Lady Elgin*); *Columbus-America Discovery Group, Inc., v. the Unidentified, Wrecked and Abandoned Sailing Vessel*, 742 F.Supp. 1327, 1341-42 (E.D. Va. 1990), rev'd sub nom. *Columbus-America Discovery Group, Inc., v. Atl. Mut. Ins.*, 974 F.2d 450 (4th Cir. 1992) (the *Central America*).

98 But see *Fairport*, 72 F.Supp. 2d, at 798-801 (finding that there was a clear and convincing evidence that the owner had abandoned the shipwreck, despite the appearance of the owner's heirs in the litigation).

99 Cf. SHOMETTE, *supra* note 4, at 228-29, 251-52 (describing how L. John Davidson, a wealthy housebuilder from New Hampshire, was able to take over the *De Braak* treasure

mits allowing treasure hunters to dig up two Spanish shipwrecks, *La Galga* and the *Juno*.¹⁰⁰ In the end, however, the treasure hunters were defeated by the claims of Spain.¹⁰¹

Thirdly, treasure hunters who got control of shipwrecks under the old legal regime continue to exploit them. Barry Clifford, for example, continues to dig up pieces from the *Whydah*.¹⁰²

The fourth approach is to go after shipwrecks beyond the territorial sea, more than three miles out. This has been the case for three of the most highly publicized shipwrecks recovered since the ASA was passed in 1987, namely *El Cazador*; the *SS Central America*, and the *SS Republic*. *El Cazador*, a Spanish frigate that sank in 1784, sank 50 miles off the Mississippi Delta.¹⁰³ The *SS Central America*, which sank in 1857, sank 160 miles east of South Carolina.¹⁰⁴ The *SS Republic*, which sank in 1865, sank 100 miles southeast of Georgia.¹⁰⁵

In international law, the United States claims a twelve-mile territorial sea,¹⁰⁶ plus a contiguous zone that runs from twelve to twenty-four miles from the baseline,¹⁰⁷ plus an economic exclusion zone out to two hundred miles from the baseline.¹⁰⁸ In

hunt through his connections in Republican politics and was also able to shut down the protests of state archaeologists by pointing out his political connections to the Delaware state government).

100 See *Sea Hunt, Inc., v. the Unidentified, Shipwrecked Vessel or Vessels*, 221 F.3d 634, 638 (4th Cir. 2000). Ben D. Benson, the treasure hunter who wanted to dig up *La Galga* and the *Juno*, was a real estate developer who in 1999 was one of the 100 wealthiest individuals in Virginia, with a fortune estimated at \$105 million. See Maura SINGLETON, *Sea Hunt, Virginia Business* (August 1999), available at <http://www.virginiabusiness.com/edit/magazine/yr1999/aug99/itsup/cover.html>. He secured his political influence partly by hiring the former state attorney general of Virginia, Anthony F. Troy, as his personal attorney. See Victoria BENNING, *Virginia, Spain to Split Sunken Ships*, *Wash. Post*, May 3, 1999, at A6.

101 See *Sea Hunt*, 221 F.3d, at 638, 647.

102 Ryan HAGGERTY, *Yet More Booty Turns up at Pirate Wreck*, *Boston Globe*, July 18, 2007. Clifford's company, Maritime Underwater Surveys, Inc., was awarded title to the *Whydah* under the law of finds; since the litigation was commenced in 1982, the ASA did not apply. See *Commonwealth v. Maritime Underwater Surveys, Inc.*, 531 N.E.2d 549, 552 (Mass. 1988).

103 Cf. *Marex Int'l, Inc., v. the Unidentified, Wrecked and Abandoned Vessel*, 952 F.Supp. 825, 826 (S.D. Ga. 1997) (giving the location of *El Cazador*).

104 See *Columbus-America Discovery Group, Inc., v. the Unidentified, Wrecked and Abandoned Sailing Vessel*, 742 F.Supp. 1327, 1328 (E.D. Va. 1990).

105 See William J. BROAD, *Far Beneath the Waves, Salvagers Find History That's Laden With Gold*, *N.Y. Times*, August 17, 2003, Sec. 1, 14.

106 See Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988).

107 See Proclamation No. 7219, 64 Fed. Reg. 48,701 (Aug. 2, 1999).

108 See Proclamation No. 5030, 43 Fed. Reg. 10,605 (Mar. 14, 1983). This proclamation was issued after the United States chose not to sign the United Nations Convention on the

domestic law, however, the United States only recognizes a three-mile territorial sea (nine miles in the case of the Gulf Coasts of Texas and Florida); beyond that is international waters. American courts, which have a not wholly undeserved reputation for claiming a jurisdiction beyond their national borders, have exerted their jurisdiction over shipwrecks in international waters¹⁰⁹ and even in the territorial waters of another state.¹¹⁰ Courts have a “constructive,” “imperfect” or “inchoate” jurisdiction over shipwrecks outside the territorial sea: this inchoate jurisdiction is gradually perfected as the salvor recovers the objects and brings them onto land within the jurisdiction of the court.¹¹¹

The recovery of the so-called “*Black Swan*” shipwreck by Odyssey Marine Partners in the spring of 2007 has set up a jurisdictional dispute that could test this concept to its limits.¹¹² The “*Black Swan*” was found more than twenty-four miles off the coast of England, but was transported over three thousand miles to Florida because the U.S. admiralty courts were perceived as more favorable to treasure hunters than the English courts. It will be interesting to see if the U.S. courts will tolerate this degree of forum shopping. Even if the U.S. courts assert they have jurisdiction, they could decline to exercise it on the doctrine of *forum non conveniens*.¹¹³

In 2001, Unesco agreed upon a Convention on the Underwater Cultural Heritage (“UCH”).¹¹⁴ This would apply twenty-four miles seaward from the coastal baseline. The convention passed by a vote of 87-4-15.¹¹⁵ The UCH Convention would eliminate all commercial treasure hunting of historic shipwrecks that have lain beneath the oceans for over one hundred years.¹¹⁶ Its rules prescribe that archaeological excavations be fully documented¹¹⁷ and that the documentation be published in a timely

Law of the Sea in 1982. The United States substituted for that Convention by declaring a 200-mile economic exclusion zone unilaterally. The United States also abides by all the other provisions of the Law of the Sea, although it still has not ratified it.

109 See *R.M.S. Titanic, Inc., v. Haver*, 171 F.3d 943, 961 (4th Cir. 1999).

110 Cf. *Bemis v. the RMS Lusitania*, 884 F.Supp. 1042, 1044 (E.D. Va. 1995) (stating that the *Lusitania* sank twelve miles off the coast of Ireland, but still taking jurisdiction of the vessel).

111 See *R.M.S. Titanic, Inc., v. the Wrecked and Abandoned Vessel*, 435 F.3d 521, 530 (4th Cir. 2006).

112 Record wreck “found off Cornwall,” BBC News Website, May 19, 2007, http://news.bbc.co.uk/2/hi/uk_news/england/cornwall/6671975.stm.

113 Cf. *Titanic*, 171 F.3d, at 961 (discussing the doctrine of *forum non conveniens*).

114 Draft Convention on the Protection of the Underwater Cultural Heritage [hereinafter UCH Convention], available at <http://unesdoc.unesco.org/images/0012/001232/123278e.pdf>.

115 Robert C. BLUMBERG, *International Protection of Underwater Cultural Heritage*, available at <http://www.state.gov/g/oes/rls/rm/51256.htm>.

116 See UCH Convention, Rule 2.

117 See *id.*, Rules 26 and 27.

fashion.¹¹⁸ The UCH Convention also stipulates that there be no unnecessary disturbance of human remains or venerated sites.¹¹⁹ The UCH Convention requires twenty ratifications to enter into force;¹²⁰ as of 2005, however, it had only been ratified by Bulgaria, Croatia, and Panama.¹²¹

The United States did not vote on the UCH Convention because it is not a member of Unesco, but the United States objects to the Convention for two reasons: it extends the jurisdiction of the coastal states over the 200 mile zone; and it makes warships and military aircraft the property of the coastal state in which they sink, rather than remaining the property of the state whose flag they fly.¹²² Since, however, admiralty law is considered to be the *jus gentium*,¹²³ if enough nations ratify the UCH Convention U.S. admiralty courts may have no choice but to apply the UCH Convention as well, even if it is not ratified in the United States.¹²⁴

Additional reasons for the hostility of the states towards treasure hunting are not archaeological motives, but environmental ones. American waterways are heavily polluted, and excavation of any kind stirs up heavy metals and other poisonous chemicals, endangering humans, fish and other wildlife, and plants. Thus the State of Michigan resisted Steven Libert's desire to dredge the site of the *Captain Lawrence*,¹²⁵ even though the State conceded that the *Captain Lawrence* shipwreck, which sank in 1933, had no historical or archaeological interest.¹²⁶ Presumably the state resisted because dredging would have stirred up the pollutants on the bed of Lake Michigan.

Twenty years since the passage of the ASA, the United States law regarding historic shipwrecks is still lacking in clarity. The law has shifted away from the pro-treasure hunter days of the *Platoro*¹²⁷ and *Cobb Coin*¹²⁸ decisions. Only two treasure hunters have prevailed in litigation concerning shipwrecks within the territorial sea

118 See *id.*, Rule 30.

119 See *id.*, Rule 5.

120 See *id.*, Article 27.

121 Blumberg, *supra* note 115.

122 See *id.*

123 See *R.M.S. Titanic, Inc., v. Haver*, 171 F.3d 943, 960-61 (4th Cir. 1999).

124 Cf. BLUMBERG, *supra* note 115 (citing the views of Professor Dromgoole as to how laws on the ocean seaward of twenty-four miles could become customary international law, but noting that Blumberg himself disagrees).

125 See *Fairport Int'l Exploration, Inc., v. the Shipwrecked Vessel*, 913 F.Supp. 552, 556 (W.D. Mich. 1995), *aff'd*, 105 F.3d 1078 (6th Cir. 1997), vacated on other grounds, 523 U.S. 1091 (1998).

126 See *id.*

127 See ARNOLD, *supra* note 65.

128 See *Cobb Coin Co. v. the Unidentified, Wrecked and Abandoned Sailing Vessel*, 549 F.Supp. 540 (S.D. Fla. 1982).

since the ASA was passed, *Deep Sea Research*¹²⁹ and *Harry Zych*.¹³⁰ The law of finds is dead as a legal doctrine: superseded within the territorial sea by the ASA, and elsewhere strongly disfavored by the courts.¹³¹ Yet the ASA has not succeeded in transferring all historic shipwrecks into state ownership, since the states only own shipwrecks once they are abandoned. When the owners of the shipwrecks intervene in the litigation, the courts are willing to declare historic shipwrecks as "abandoned" only if the elevated standard of clear and convincing evidence is met. This has favored the treasure hunters in the case of the nineteenth and twentieth century shipwrecks that are owned by insurance companies (the *Brother Jonathan*¹³² and the *Lady Elgin*¹³³), but has checkmated the treasure hunters in the cases of the seventeenth, eighteenth, and nineteenth century shipwrecks that are owned by Spain (*La Galga* and the *Juno*).¹³⁴ Paradoxically, the ASA may have ended treasure hunting of historic shipwrecks not because it succeeded in outlawing treasure hunting outright, but because the legal situation is now so unclear that treasure hunters cannot raise money for expeditions.¹³⁵ A more potent weapon against treasure hunters has proven to be the claims of Spain. Spain's intervention can put an end to all treasure hunting of the most valuable ships in U.S. waters – the Spanish galleons.

129 See *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 508 (1998). The State of California then settled with Deep Sea Research in exchange for one-sixth of the coins. See BOWERS, *supra* note 7, at 350.

130 See *People ex rel. Illinois Historic Pres. Agency v. Zych*, 710 N.E.2d 820, 826 (Ill. 1999). The State of Illinois then settled with Harry Zych by paying him \$20,000 for his claims. See James HILL, Sea hunt for history. Finders keepers not always the rule for underwater shipwreck searchers, *Chi. Trib.*, Sept. 17, 1993, Sec. 2, at 1, 6.

131 See *R.M.S. Titanic, Inc., v. the Wrecked and Abandoned Vessel*, 435 F.3d 521, 533 (4th Cir. 2006).

132 See *Deep Sea Research*, 523 U.S., at 508.

133 See *Zych*, 710 N.E.2d, at 826.

134 See *Sea Hunt, Inc., v. the Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634 (4th Cir. 2000).

135 Cf. *Yukon Recovery, L.L.C., v. Certain Abandoned Property*, 205 F.3d 1189, 1196 (9th Cir. 2000) (discussing how the risk of not being compensated for their efforts under the ASA makes treasure hunters reluctant to undertake costly salvage operations).