Finders Keepers--The Titanic and the 1982 Law of the Sea Convention

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Finders Keepers? The *Titanic* and the 1982 Law of the Sea Convention

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I cannot believe my eyes.... I have never seen the ship—nor has anyone for 73 years.... She is the *U.S.S. Titanic*, the luxury liner lost after collision with an iceberg in 1912.¹

Several modern cases have applied the rule of “find” with its concomitant dogma of “finders keepers” to instances of long lost and abandoned wrecks.²

**I. INTRODUCTION**

When the *Titanic* sank few believed it would ever be found.³ Technological advances, however, have enabled searchers to find the *Titanic* seventy-three years later.⁴ Technology such as that which made discovery⁵ of the *Titanic* possible has provided the means for discovery of other sunken vessels and treasure.⁶ This technology now allows private entre-

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2. 3a Benedict on Admiralty (MB) § 158 (7th ed. 1983).
4. The luxury liner, believed to be unsinkable, sank on April 14, 1912, when she hit an iceberg during her maiden voyage from England. Angier, *After 73 Years, a Titanic Find*, TIME, Sept. 16, 1985, at 68.
preneurs, scientific research teams, and state-supported searchers access to nearly all parts of the ocean floor and the array of ships and treasure "lost" there. The question of who owns these treasures therefore has become more relevant.

The *Titanic* was discovered in September 1985. Reactions to the discovery and opinions regarding the ship's ownership and proper disposal varied. The chief scientist in the expedition which found the *Titanic*, Robert Ballard, plans only to observe the ship from a manned research submarine. He believes that the ship should be left on the seabed as a memorial to those who died. Jack Grimm, who claims to have discovered the ship in 1981, wants to recover some of the valuables. John Pierce, who led a team which retrieved goods from the *Lusitania*, recently won a case allowing him to attempt to raise that ship. Pierce believes those who discovered the *Titanic* have no special claim to it.

The exact position of the *Titanic* has not been released. Because of the differences in opinion regarding the proper disposal or treatment of the *Titanic*, Ballard would only describe the ship's location as approximately 500 miles off the coast of Newfoundland, Canada, and 13,000 feet under the sea.

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7. N. Y. Times, Sept. 6, 1985, at 8, col. 1. The discovery was made by the crew of the *Knorr*, although the *Titanic* had first been located a month earlier by the French survey ship *Le Suroit*. The first photographs of the ship were taken by the *Knorr's* search vehicles. See supra note 3.

8. USA Today, Sept. 4, 1985, at 1, col. 3.


10. Angier, *supra* note 4, at 70. See Ballard & Michel, *supra* note 1. In addition, Eva Hart, a survivor of the *Titanic*, believes, like most of the survivors, that the *Titanic* should be left submerged as a memorial. Ballard and Michel, *supra* note 1, at 718. Reps. Jones, Lent, Biaggi, Studds, Lowery, Carpenter, and Hughes introduced H.R. 3272, 99th Cong., 1st Sess. (1985), to designate the shipwreck of the *Titanic* as a maritime memorial and to provide for reasonable research, exploration, and, if appropriate, salvage activities. 131 CONG. REC. H7408 (daily ed. Sept. 11, 1985). The bill was passed under suspension of rules by a two-thirds vote on December 2, 1985. 131 CONG. REC. (daily ed. Dec. 2, 1985). The representatives who introduced the bill may not have been using the term "salvage" in its legal sense. See infra notes 42-43 and accompanying text.

11. For an account of Grimm's search for this ship, see W. HOFFMAN & J. GRIMM, *supra* note 3.


13. Id.

The Titanic and the Law of the Sea Convention

The 1982 Convention on the Law of the Sea (LOS Convention) will at least serve as a guide, and may determine ownership rights to the Titanic. The LOS Convention is the first multilateral treaty containing provisions directly applicable to the disposal of, protection of, and rights


16. The United States Constitution sets forth three sources of the supreme law of the land: the Constitution itself, legislation enacted by Congress in accordance with the Constitution, and all treaties constitutionally entered into by the United States. U.S. Const. art. VI, cl. 2. Article 6 provides:

This constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

It would appear to be self-evident that all treaties to which the United States is a party are an integral part of United States law under article 6. The United States has not, however, ratified the LOS Convention, and thus the LOS Convention cannot qualify as the supreme law of the land as a treaty made under the authority of the United States.

In terms of legislation enacted by Congress, Congress has the power to alter, qualify, or supplement the traditional admiralty law. Panama R. Co. v. Johnson, 264 U.S. 375 (1924). It has done so through the Judiciary Act of 1948 which provides in relevant part:

The district courts shall have original jurisdiction, exclusive of the states of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.


Regardless of forum, however, the prevailing rule under the savings to suitors clause is that federal substantive law applies. Baptiste v. Superior Court of Los Angeles County, 106 Cal. App. 3d 87 (2d Dist. 1980), cert. denied, 449 U.S. 1124 (1981). Although the statute provides that suitors may pursue their remedies in the state courts, the state courts are bound to apply federal law in such disputes in order to secure a single and uniform body of maritime law. A/S J. Ludwig Mowinckels Rederi v. Dow Chemical Co., 25 N.Y.2d 576 (1970) cert. denied, 398 U.S. 939 (1970). In other words, there is no body of state maritime law. A state court hearing a maritime cause of action under the saving to suitors clause may apply its own procedural law, however. Maxwell v. Olsen, 468 P.2d 48 (Alaska 1980).

What is federal substantive maritime law? Although the Constitution is silent as to the role of customary international law in the United States legal system, the United States Supreme Court has held that:

International law is part of our law, and must be ascertained and administered by the court of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.

The Paquete Habana, 175 U.S. 677 (1900). In other words, federal substantive maritime law is customary international law in the absence of a treaty in force or an act of Congress. See generally U.S. Department of Justice Legal Education Institute, International Law for Attorneys in Domestic Program Agencies 35-41 (Rev. ed. 1985).

Because the United States has not ratified the LOS Convention, its courts would not apply the Convention per se. United States courts would, however, apply the LOS Convention to the
to sunken ships and treasure. The *Titanic* and its valuables fall within the Convention’s provisions pertaining to objects of an historical and archeological nature (OHANs). Although the LOS Convention is not extent it codifies customary international law. The extent to which articles 149 and 303 codify the customary international law of salvage and finds is the focus of this Note.

Finally, it is possible that the LOS Convention could be applied beyond the extent to which it codifies customary international law simply by virtue of its progressive nature. Drafted over several years by multinational committees, the LOS Convention is a strong indication of emerging customary international law which is, by definition, developmental in nature. See infra notes 10-13 and accompanying text; see also infra notes 36-40 and accompanying text.

This choice of law question is distinct from the jurisdictional question, which is outside the scope of this Note. See infra note 23.


The only treaty of the four which arguably applies to objects of archeological and historical nature (OHANs) such as the *Titanic* is the Convention on the Continental Shelf, *supra*, under the theory that long-sunken ships are natural resources. Article 2(1) states, “The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.” Id. art. 2(1). But, the International Law Commission, in interpreting the article, has excluded sunken ships from the definition of “natural resource,” holding that “[i]t is clearly understood that the rights in question do not cover objects such as wrecked ships and their cargoes (including bullion) lying on the seabed or covered by the sand of the subsoil.” 11 U.N. GAOR, Supp. (No. 9) at 42, U.N. Doc. A/3159 (1956). Thus, although it could have, the Convention on the Continental Shelf does not apply to OHANs such as the *Titanic*. In addition, the LOS Convention specifically supersedes this treaty saying: “This Convention shall prevail, as between States Parties, over the Geneva Conventions on the Law of the Sea of 1958.” LOS Convention, *supra* note 15, art. 311(1). The only other multilateral treaty preceding the LOS Convention was the 1910 Assistance and Salvation Convention, Sept. 23, 1910, 37 Stat. 1658, T.S. No. 76, 1913 G.B.T.S. No. 4 (entered into force Mar. 1, 1913), which contains no specific provision regarding OHANs.
yet in force, its provisions have an influence on international law.19

This Note will discuss the law of salvage and the law of finds, which applied to OHANs before the LOS Convention. The Note will then focus on article 14920 and article 30321 of the LOS Convention, which apply directly to the Titanic and other OHANs.22 The language of articles 149 and 303 will be interpreted, aided by a historical survey of the Convention's drafting process and by a comparison with the terms of other articles of the Convention.

18. Thirty-two of the necessary 60 states have ratified the LOS Convention. LOS Convention, supra note 15, art. 308(1); see K. SIMMONDS, 2 NEW DIRECTIONS IN THE LAW OF THE SEA, ch. V3, at 1 (1986); see infra note 82.

19. See infra notes 95-113 and accompanying text.

20. LOS Convention, supra note 15, art. 149.

21. Id. art. 303.

22. Other articles of the LOS Convention arguably apply to the Titanic and other sunken treasure. These include Part V, articles 55-75, entitled "The Exclusive Economic Zone," and article 143, entitled "Marine Scientific Research." See id. These articles will not be discussed in this Note. Article 56 would not be applicable if the Titanic were considered a natural resource. See supra note 17. Article 56(1) might be used, however, to assert a claim based on the exclusive right to explore and exploit this region. Article 143 is the provision most likely to be seen as applicable because marine scientific research is heavily funded by states and private groups that hope to benefit from the projects, and the Titanic was found by a research vessel sponsored by scientific research teams from the United States and France. See supra note 5. In addition, the early stages of exploration of the seabed for historic artifacts likely will be carried out largely by these same research teams, because they are equipped with the funds and equipment to reach the seafloor. Because the drafters created provisions specifically discussing OHANs, however, it is unlikely that a claim based on articles 56 and 143 would be recognized. Articles 6 and 143 are reprinted below in pertinent part, for the reader's information.

Article 56 states:

1. 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 superadjacent to the sea-bed and of the sea-bed 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;
   (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
      (i) the establishment and use of artificial islands, installations and structures;
      (ii) marine scientific research;
      (iii) the protection and preservation of the marine environment;
      (c) other rights and duties provided for in this Convention.

2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.

3. The rights set out in this article with respect to the sea-bed and subsoil shall be exercised in accordance with Part VI.

LOS Convention, supra note 15, art. 56.

Article 143 states in pertinent part:
Next, the potential effect of articles 149 and 303 on ownership rights to OHANs will be analyzed. This Note compares and contrasts the Convention provisions with the law of salvage and the law of finds. In addition, the Note examines the outcome of the Titanic controversy under both the LOS Convention and the laws of salvage and finds. Finally, suggestions to help remedy inadequacies of the Convention are provided so that an effective, consistent international approach to ownership disputes over OHANs can be developed and implemented.

II. HISTORICAL FOUNDATION FOR THE LOS CONVENTION

A. Mare Liberum and Mare Clausum

Two important doctrines governing the law of the sea preceded the development of the customary international law of salvage and the law of finds. The first of these was *mare liberum.* "Free seas" proposed that the seas are free in the sense that all persons are free to navigate upon them.

The second and contrasting doctrine of the sea is *mare clausum* ("closed seas"). *Mare clausum* proposes that there is nothing in natural

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3. States Parties may carry out marine scientific research in the Area. States Parties shall promote international co-operation in marine scientific research in the Area by:

(a) participating in international programmes and encouraging co-operation in marine scientific research by personnel of different countries and of the Authority;

(b) ensuring that programmes are developed through the Authority or other international organizations as appropriate for the benefit of developing States and technologically less developed States with a view to:

(i) strengthening their research capabilities;

(ii) training their personnel and the personnel of the Authority in the techniques and applications of research;

(iii) fostering the employment of their qualified personnel in research in the Area;

(c) effectively disseminating the results of research and analysis when available, through the Authority or other international channels when appropriate.

Id. art. 143.

23. The outcome of any decision on these long-sunken ships will be affected, of course, by jurisdictional issues. The exact location, for example, of the Titanic, will affect the tribunal in which any determination of rights to the ship and its effects would be heard. This question of jurisdiction is outside the scope of this Note. For a discussion of jurisdiction under United States law, see Owen, *Some Legal Troubles With Treasure: Jurisdiction and Salvage,* 16 J. MAR. L. & COM. 139 (1985).


25. Id. at 10.

26. Id.
law to preclude territorial occupation of the sea. Rights of passage and other rights granted to countries are simply privileges granted by those who control that geographic region of the sea.

John Selden, a lawyer and scholar, advocated the doctrine of *mare clausum*, and further asserted that there was nothing in international law to preclude territorial occupation of the sea, including the establishment of sea frontiers using parallels and meridians. Historically, British sovereigns used Selden's ideas to protect fishing rights until eventually *mare liberum* became established, for a time, as customary international law. Britain reluctantly accepted *mare liberum*, but only because the doctrine allowed the British to assert jurisdiction over activities such as piracy without claiming dominion or sovereignty over the waters where those acts occurred. In this sense, the doctrine of free seas benefits only those with the power to assert their rights to the seas.


1. Customary International Law

The law of salvage and the law of finds developed from the ancient doctrines of *mare liberum* and *mare clausum* and from British maritime law. Because the British frequently adjudicated issues related to shipping on the high seas, and because maritime law is intrinsically international, the current law of salvage and law of finds developed primarily in the British courts. This foundation gave the law of salvage and the law

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27. *Id.*
28. *Id.*
29. Selden was a seventeenth century legal scholar who advocated the theory of *mare clausum*. *Id.*
30. Selden used the term "sea frontiers" in the sense of an international border and the region beyond it. *Id.*
31. In geography, the term "parallel" refers to the imaginary lines representing degrees of latitude encircling the earth parallel to the equator. AMERICAN HERITAGE DICTIONARY 900 (2d College ed. 1982). Likewise, a meridian is the line made by encircling the earth's surface while passing through both geophysical poles. *Id.* at 787.
32. T. SCHÖNBAUM & A. YIANNOPOULOS, supra note 17, at 10. James I (1603-1625) and Charles I (1625-1649) asserted the doctrine to protect the rich fishing grounds off the coast of the British Isles from foreign fleets. *Id.*
33. *Id.*
34. *Id.*
36. See T. SCHÖNBAUM & A. YIANNOPOULOS, supra note 17, at 10.
37. For decades now, these theories have been applied in the courts of the United States, which like Britain, is a great shipping power. *Id.*
of finds their international character and authority. Through repeated application, the law of salvage and the law of finds became customary international law.\textsuperscript{38} This customary international law served as the foundation for the LOS Convention.

Customary international law is one possible source of law for settling international disputes. The International Court of Justice (ICJ) often uses customary international law to reach its decisions.\textsuperscript{39} Because the LOS Convention is the first treaty with provisions specifically dealing with OHANs,\textsuperscript{40} the law of salvage and the law of finds would control the disposition of OHANs if the LOS Convention is not recognized or in effect between the parties to the dispute.

2. The Law of Salvage

A court may apply the law of salvage to property that meets several requirements, which have remained unchanged for decades. They are: 1) marine peril;\textsuperscript{41} 2) salvage service voluntarily rendered when not required.

\textsuperscript{38} For a discussion of the unique international nature of maritime law and the consequence that traditional bodies of maritime law have the quality of customary international law, see id. at 1-10.

\textsuperscript{39} Article 38 of the Statute of the International Court of Justice, 1978 I.C.J. Acts & Docs. 77, states:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   (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.

2. This provision shall not prejudice the power of the Court to decide a case \textit{ex aequo et bono}, if the parties agree thereto.

Of course, when a treaty codifies customary international law, the court need not decide between the bodies of law given in subsections 1(a) and 1(b) above. The structure of article 38 implies that treaty and custom can be different sources leading to different international law, but obscures the fact that these two principle sources interrelate. Gamble, \textit{The Treaty/Custom Dichotomy: An Overview}, 16 TEX. INT'L L.J. 305, 307 (1981).

\textsuperscript{40} See supra note 17.

\textsuperscript{41} In order to be in "marine peril," the property must be in danger, either presently or reasonably apprehended. Plymouth Rock, 9 F. 413, 416 (S.D.N.Y. 1881); Fort Meyers Shell & Dredging Co. v. Barge NBC 512, 404 F.2d 137, 139 (5th Cir. 1968). Actual loss and subject to the elements constitutes marine peril for the purpose of making a valid salvage claim. Platoro Ltd. v. Unidentified Remains of a Vessel, 518 F. Supp. 816, 821 (W.D. Tex. 1981), aff'd, 695 F.2d 893 (5th Cir. 1983), \textit{cert. denied}, 464 U.S. 818 (1983). The \textit{Platoro} court held that an argument that the vessel was safely embedded and preserved in a 10 to 15 foot layer of sand was not persuasive because Platoro had no way of knowing how well preserved the cargo would be. \textit{Id.} at 821. Another court recently stated that the "argument that no marine peril
as an existing duty or from a special contract; 3) successful salvage in whole or in part, or the salvage service contributing to the success.\textsuperscript{42}

3. The Law of Finds

The elements required for application of the law of finds are also well-established.\textsuperscript{43} First, the law of finds applies only when property has been abandoned.\textsuperscript{44} Competing searchers are entitled to enter the area where the abandoned property is located and to seek to reduce it to their possession as long as they act without infringing on the rights of other searchers. Second, rights are "transferred" to the first person who reduces the property to possession.\textsuperscript{45}

4. The Differences Between the Law of Salvage and the Law of Finds

The difference between the application of the law of salvage and the law of finds is "highly material."\textsuperscript{46} The law of finds applies only if the property was abandoned; salvage law, on the other hand, applies only if existed ignores the reality of the situation." Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 569 F.2d 330, 337 (5th Cir. 1978)(Treasure Salvors, Inc. is granted limited title to the \textit{Nuestra Señora de Atocha}; the Fifth Circuit does not decide whether Treasure Salvors' title is exclusive of all other claimants)[hereinafter \textit{Treasure Salvors I}]. "Marine peril includes more than the threat of storm, fire or piracy to a vessel in navigation. . . . There is no dispute that the \textit{Atocha} was lost. Even after discovery of the vessel's location it is still in peril of being lost through the actions of elements." \textit{Id.} Another court held that the ship and cargo were not in marine peril and declined to follow the Fifth Circuit rule that an abandoned ship wreck constitutes marine peril for the purpose of stating a valid salvage claim. Subaquaeous Exploration and Archaeology, Ltd. v. Unidentified, Wrecked and Abandoned Vessel, 577 F. Supp. 597, 611 (D. Md. 1983).

\textsuperscript{42} G. GILMORE & C. BLACK, THE LAW OF ADMIRALTIES 534-35 (1975); see Sabine, 101 U.S. 384 (1879); \textit{Platoro}, 518 F. Supp. at 820; Cobb Coin Co. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 549 F. Supp. 540, 557 (S.D. Fla. 1982); Legnos v. M/V Olga Jacob, 498 F.2d 666, 669 (5th Cir. 1974). A discussion of the substantive area of salvage law called "contract salvage" is outside the scope of this Note.

\textsuperscript{43} See \textit{Hener} v. United States, 525 F. Supp. 350, 354, 356 (S.D.N.Y. 1981). \textit{Hener} involved a dispute among several groups of divers over the right to salvage any remaining silver from the cargo of a barge which sank in 1903 off Staten Island. Dredging and diving recovered 85% of the cargo before operations stopped in October 1903. Three groups of amateur divers sought to enjoin the United States Coast Guard from enforcing a safety zone which prevented them from diving for the silver. The court held that the silver was abandoned, but the court also determined that none of the diver groups had asserted enough possession over it to have vested title. For an analysis of \textit{Hener}, the law of salvage, and the law of finds, see generally Note, \textit{Treasure Salvage: Admiralty Court "Finds" Old Law}, 28 LOY. L. REV. 1126 (1982).

\textsuperscript{44} \textit{Hener}, 525 F. Supp. at 354.

\textsuperscript{45} \textit{Id.} A mere searcher has no property right if he succeeds in finding the property, but does not assert possession. \textit{Id.}

\textsuperscript{46} \textit{Id.} at 355. The distinction is important not only because the application of one or the other doctrine is outcome-determinative, but also because each body of law fosters different
the title to that property remained in its prior owner. If the law of finds is applied, the court distributes the property to the finders; if salvage law is applied, the court turns the property over to the owner and goes on to determine the appropriate salvage fees to award the salvor.

The law of salvage and the law of finds are based on differing goals, assumptions, and rules. Salvage law aims to save property and to compensate those who save it. Salvage law assumes that the property being salved is owned by another and has not been abandoned. It also assumes that property lost at sea has been taken involuntarily.

Salvage law rules promote its goals. Property may not be salvaged unless it is in some peril. Any assertion that title to property has been lost requires strong proof, such as express abandonment. A salvor may rebut the presumption of abandoned title. Courts allow a salvor the superior right of possession, but not title, until a court has passed on title and the salvage fee. A salvor must have the intent and the capacity to save property, and must have actually saved it. The salvor must intend to save, but not necessarily to own the property. To recover the award, possession need only be to the extent necessary to perform the salvage service and to justify a reward. In addition, if the salvor does not retrieve the property by him or herself, but instead helps another salvor, the salvor will be rewarded proportionately to the extent of his or her aid.

In contrast to the law of salvage, the aims of the law of finds center on determining title to ownerless property. The law of finds assumes that the finder has title against all the world, unless the original owner can rebut the presumption.

The law of finds promotes these goals. It requires a high degree of
control over the property to establish title because the finder must establish intent in addition to possession. 61 Under the law of finds, property cannot be shared; a mere contribution to the effort to assert possession is not compensated. 62

The rules of salvage law and the rules of finds law create different incentives. The rules of salvage markedly diminish the incentive for salvors to work secretly, hide recoveries, and ward off competition from other would-be salvors. 63 Salvage rules enable courts to encourage open, lawful, and cooperative conduct, based on the salvage law goal of preserving property. 64

The rules of the law of finds encourage groups to act avariciously. 65 Because neither the effort nor the acquisition of property alone is enough, would-be finders are encouraged to act secretly, hide recoveries, and deprive other would-be finders of property. 66

5. Treasure Salvage

Commentators, writing long before the LOS Convention negotiations began, believed the law of finds should apply in maritime cases of long-lost wrecks, publicly abandoned property, or things found on seas or rivers that were never the property of any person. 67 Indeed, the law of finds applies to long-lost wrecks because usually these wrecks are either expressly abandoned by their owners or adjudicated abandoned later. 68 In the United States today, attempts to discover or retrieve OHANs are often referred to as “treasure salvage.” 69 Those who find OHANs can bring an in rem action under the law of salvage because courts assume the OHAN no longer has an owner. 70 The plaintiff asserts that he or she

61. Id.
62. Id.
63. Id. at 358.
64. Id.
65. Id. at 356.
66. Id.
67. 3A Benedict on Admiralty (MB) § 158 (7th ed. 1983).
68. Florida v. Treasure Salvors, Inc., 621 F.2d 1340 (5th Cir. 1980)(Florida had no claim to the artifacts under the contract law theory of mutual mistake, but the Fifth Circuit declined to decide whether Florida was bound under Treasure Salvors I}[hereinafter Treasure Salvors II]; see Treasure Salvors I, supra note 41.
69. Owen, supra note 23, at 140.
70. Metropolitan Dade County v. One Bronze Cannon, 537 F. Supp. 923, 926 (S.D. Fla. 1982) (citing Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 640 F.2d 560, 66 n.5 (5th Cir. 1981) (district court did not abuse its discretion by granting an injunction prohibiting salvors other than Treasure Salvors, Inc. from conducting salvage operations near abandoned vessel; case remanded to district court for modification of the injunction)[hereinafter Treasure Salvors III]).
has salvaged the property, that he or she deserves a salvage award, and that the award should be the OHAN itself. In such cases the "salvor" actually obtains the same result as would a finder under the law of finds: possession of the OHAN. Several plaintiffs have recently proceeded on this theory because the original owners of the property were unknown, and several of these plaintiffs have been successful.71 Because the plaintiff's claim is technically a salvage claim, he or she must establish that the OHAN is in marine peril before receiving an award.72 Other than this requirement and procedural differences, the result of these "salvage" actions is "finders keepers."

Others have successfully proceeded under a pure law of finds theory with an action for possession and confirmation of title, asserting the vessel was abandoned and that he or she had become the owner as finder in possession.73 One such case, known as "Treasure Salvors III,"74 involved a claim to bullion aboard the sunken Nuestra Señora de Atocha. After the Fifth Circuit Court of Appeals determined that the property was abandoned, it applied the law of finds.75 It held that the finder had asserted adequate possession and that it held title to the bullion.76

The ownership rights to the Titanic may be determined under either of these theories. The plaintiff might bring an in rem action under the law of salvage and seek to have the ship itself be designated the salvage award. For the plaintiff to succeed, a court would have to determine that the Titanic was in peril. Alternatively, if the plaintiff brought an action under the law of finds, asserting that he or she had become the owner, a court would have to determine that the Titanic was abandoned. Under either theory, ownership rights to the Titanic would be determined under the prevailing concept of finders keepers.77

72. See supra notes 41-42 and accompanying text; see also Owen, supra note 23, at 171-75.
73. This result has been noted with approval in subsequent cases. See Rickard v. Pringle, 293 F. Supp. 981 (E.D.N.Y. 1968); Wiggins v. 1100 Tons, More or Less, of Italian Marble, 186 F. Supp. 452 (E.D. Va. 1960).
74. Treasure Salvors III, supra note 70, at 560.
75. Id. at 568-70.
76. Id.
77. This conclusion is also reached by T. Schoenbaum & A. Yiannopoulos, supra note 17, at 507.
6. The Law of Finds and Mare Liberum

Mare liberum and the law of finds are similar in their philosophies and effects. Mare liberum proposes that the sea is free and open to all and that all states have access to it in its entirety. The problem with this philosophy is that only those states with power and ability truly have access to the entire sea. The law of finds is based on the same philosophy: those who can assert possession over abandoned property can gain title to it.

III. THE LOS CONVENTION

Although the LOS Convention was signed in December 1982 by 117 states, it is not yet in force. It was to remain open for ratification for twenty-four months after the opening date and to enter into force between ratifying states twelve months after deposit of the sixtieth ratification or instrument of accession. Thirty-two states and other entities had ratified the Convention as of January 1987.

The LOS Convention is the result of over fifteen years of negotiations and work by over 130 nations. Meetings and discussions regarding the Convention began in 1967, and the first formal session was held at the United Nations Headquarters in 1973. Fifteen years of work on the Convention produced a comprehensive document. Its 320 articles and nine annexes address issues affecting nearly every nation. Most significantly here, the Convention was the first treaty to include provisions specifically applicable to OHANs.

Many official documents arose out of the years of discussion and

78. See supra notes 24-35 and accompanying text.
79. See supra notes 43-45 and accompanying text. This is also true for the in rem salvage action.
81. LOS Convention, supra note 15, arts. 305(2), 308(1).
82. This is an increase from 1984 when only nine countries had ratified the Convention.
84. McDorman, supra note 80, at 230.
85. The articles address the 200-mile Exclusive Economic Zone, id. arts. 55-75, the continental shelf, id. arts. 76-85, the development of resources of the Area, including seabed and mining rights, id. arts. 150-55, navigation through straits, id. arts. 34-45, and many other topics.
86. See supra note 17.
negotiation. These records summarize states' representatives' comments and some committee reports. The official documents show that representatives only briefly discussed OHANs; the representatives were more concerned with seabed mining, reservations, marine scientific research, pollution, and the definition of the continental shelf. Likewise, commentators have written about LOS Convention provisions pertaining to the Exclusive Economic Zone, seabed mining rights, marine pollution, marine scientific research, and the settlement of disputes. Articles 149 and 303, which specifically address OHANs, have sparked little controversy or comment, however.

87. The Official Documents of the United Nations Convention on the Law of the Sea are cited herein as UNCLOS III OR.


94. Note, supra note 17, at 777.
A. The LOS Convention’s Influence

Even if the LOS Convention has not codified customary international law, it may have binding power. Although not legally in force, the LOS Convention has influence as a complex and long-negotiated international document affecting states’ rights, because international law imposes obligations on signatories of treaties before those treaties are ratified.

First, the World Court and the ICJ have relied on treaties not in force in their decisions. For example, the ICJ has given force to signatories’ reservations, but refused to give force to non-signatories’ reservations when a treaty was signed. In an earlier case, the Permanent Court of International Justice (PCIJ) gave provisional status to a treaty between signatories when the treaty was later ratified, although it was not legally in force when the dispute arose.

Second, state action may bind signatories of treaties not in force. States may bind themselves by including a provision in the treaty itself. The Strategic Arms Limitation Treaty (SALT) and the Agreed Statement and Common Understandings appended to SALT II are regarded as binding in and of themselves, despite the fact that they are unratified, because they contain a provision which explicitly binds states. The LOS Convention lacks such a provision, but in the opinion of several commentators, carries force nevertheless, on other bases.

For instance, states may bind themselves by issuing statements showing an intent to follow a treaty before its ratification. Thus, the LOS Convention may be binding on states which have publicly expressed an intent to be bound by it. For example, before the LOS Convention was signed, a United States representative stated his signature reflected an


96. See supra notes 83-86 and accompanying text.


98. Id. at 275 (citing the Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15).

99. Id. (citing Mavrommatis Palestine Concessions (Jurisdiction), 1924 P.C.I.J. (ser. A) No. 2, reprinted in 1 WORLD COURT REPORTS 293, 297 (M. Hudson ed. 1934)).

100. Id. at 280 & n.56.

101. Id.

102. Id. at 281-82 n.57. For example, Henry Kissinger made an implied concession to comply with international control and regulation of deep seabed mining and the 200-mile Exclusive Economic Zone. Larson, The Reagan Rejection of the U.N. Convention, 14 OCEAN DEV. INT’L L. 337, 340 (1985).
obligation to refrain from acts which would defeat the object and purpose of the Convention.\textsuperscript{103} Furthermore, the United States has accepted the twelve-mile territorial sea described in article 3.\textsuperscript{104} The United States has also expressed an intent to exercise its navigational rights consistent with the LOS Convention.\textsuperscript{105}

Third, article 18 of the Vienna Convention on Treaties\textsuperscript{106} provides that treaties not in force can be binding in nature. The nature of this obligation, however, is debated.\textsuperscript{107} Some states believe they are bound morally and others believe they are bound legally.\textsuperscript{108} Whatever the nature of the obligation, it is clear that signatories to a treaty not in force are bound to some extent by signing.\textsuperscript{109}

Finally, some commentators believe that the LOS Convention is binding based on international politics.\textsuperscript{110} One representative to the Convention stated, "I would swallow a little principle in the interest of

\begin{footnotesize}
\footnotesize{\begin{enumerate}
\item Rogoff, supra note 97, at 282 n.57 (citing Letter from Elliot Richardson to Gerry Studds (June 15, 1979), reprinted in Law of the Sea: Hearings on H.R. 2759 Before the Subcomm. on Oceanography of the Comm. on Merchant Marine & Fisheries, 96th Cong., 1st Sess. 206 (1979)). The statement refers to LOS Convention, supra note 15, art. 3.
\item Statement by the Legal Advisor of the United States Department of State, 66 AM. INT'L L. 133, 133 (1972). The statement refers to LOS Convention, supra note 15, art. 3.
\item United States Proclamation on an Exclusive Economic Zone, 22 I.L.M. 461 (1983). President Reagan also warned states not to deprive the United States of navigational rights because of its failure to sign the LOS Convention. See McDorman, supra note 80, at 223. Arguably the Proclamation recognizes the establishment of the Exclusive Economic Zone as emerging and binding customary international law. The LOS Convention itself defines "States Parties" as those which have "consented to be bound" by it. LOS Convention, supra note 15, art. 1(2)(l). States which fail to sign a treaty yet claim they are entitled to claim and enjoy certain provisions of the treaty are sometimes called "Third States." Lee, supra note 95, at 541-42. For a good discussion of these states' obligations and claims, see \textit{id.} Lee points out that articles 149 and 303 use the term "States," not "States Parties." \textit{Id.} at 50.
\item The Vienna Convention on the Law of Treaties provides in article 18:
\begin{quote}
A state is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance, or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound be the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.
\end{quote}
Vienna Convention on the Law of Treaties, art. 18, May 23, 1969, U.N. Doc. A/CONF.39/27 (1969), reprinted in 8 I.L.M. 679 (1969). Four years have lapsed since the LOS Convention was opened for signature. While some may argue this endangers the binding effect of the Convention, most others would agree that four years in the international scheme is not long enough to invalidate over 15 years of work. See infra notes 8-13 and accompanying text.
\item Rogoff, supra note 97, at 283-88.
\item \textit{Id.} at 285-88. Rogoff believes that the nature of the obligation not to defeat the object or purpose of a treaty before signature is legal. \textit{Id.} at 289.
\item \textit{Id.} at 285-89.
\end{enumerate}}
\end{footnotesize}
not being the only country in the world to stay outside a universal regime of ocean law.” 111 Another commentator has described the LOS Convention as “a major guidepost in the evolution of the law of sea, regardless of whether or not it comes into force.” 112 Finally, Javier Perez de Cuellar, Secretary General of the United Nations, stated at the end of the last meeting of the Convention that “[because] international law is now irrevocably transformed, so far as the seas are concerned, we need not wait for the process of ratification . . . to begin.” 113 Thus, it is clear that at least for some, the LOS Convention is binding, regardless of whether it is legally in force, because of the strong political influence it has had on the rules governing the sea. The Convention has gained its stature through 15 years of negotiations among 117 participating states. More importantly, the Convention sets out a world-wide set of rules covering the seas, which reaches the shores of almost every nation.

B. Articles 149 and 303: Geographical Differences

1. Geographic Differences

Included within the comprehensive LOS Convention are two articles describing the handling of the oceans’ OHANs. Articles 149 and 303 apply to different parts of the sea. Article 149, entitled “Archeological and Historical Objects,” 114 falls within the section of the LOS Convention containing provisions regarding “the Area.” 115 By definition, article 149 applies exclusively to OHANs found at sea outside national jurisdictions.

By contrast, article 303, entitled “Archeological and Historical Objects Found at Sea,” 116 falls within the General Provisions section of the Convention. 117 Section 1 of article 303 applies to property found “at sea.” 118 Section 2 applies to property found within the Contiguous Zone (CZ), a portion of the sea not exceeding twenty-four nautical miles from

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111. Id. at 31. See also Ratiner, The Law of the Sea: A Crossroads for American Foreign Policy, 60 FOREIGN AFF. 1006, 1021 (1982). Ratiner believes that Japan, France, Germany, Great Britain, Belgium, and the Netherlands will ratify the Convention. Ratiner, supra note 110, at 29.

112. McDorman, supra note 80, at 230.


114. LOS Convention, supra note 15, art. 149.

115. Article 1 defines the Area as “the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.” Id. art. 1(1).

116. Id. art. 303.

117. Id. arts. 300-04 (General Provisions).

118. Article 303(1) gives States a duty to protect OHANs “found at sea.” Id. art. 303(1).
the low water mark along the coast.\textsuperscript{119} The geographic area in which states have rights under article 303 is greater than the territorial sea, whose breadth is not to exceed twelve miles from the baselines.\textsuperscript{120} This geographic area is, however, less than the area of the continental shelf, as defined in the LOS Convention.\textsuperscript{121} The definition is complicated, but generally the continental shelf extends 200 miles from the baselines,\textsuperscript{122} and the outer limits of the shelf cannot exceed 350 nautical miles.\textsuperscript{123} The contiguous zone covers a portion of the sea which is less than the continental shelf and more than the territorial sea.

By including both articles 149 and 303, the LOS Convention divides the sea geographically into two portions to determine property rights to OHANs. Article 149 applies to international waters. Article 303 applies to waters over which states have specified rights.

2. Article 149: Archaeological and Historical Objects

Article 149 appears today as it did in the September 1980 "Informal Text."\textsuperscript{124} This article remained unchanged from the Informal Text, through the Draft Convention,\textsuperscript{125} to the Final Convention.\textsuperscript{126} Article 149 provides:

All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archeological origin.\textsuperscript{127}

While the Convention defines some terms in article 1,\textsuperscript{128} material terms in article 149 are not defined. In addition, the Convention inten-

\textsuperscript{119} The contiguous zone extends "24 nautical miles from the baselines from which the breadth of the territorial sea is measured." \textit{Id.} art. 33(2). A nautical mile is a unit of length used in sea and air navigation based on the length of one minute of arc of a great circle and is equal to 1852 meters or 6076 feet. \textsc{American Heritage Dictionary} 833 (2d College ed. 1982). \textit{See infra} note 169 for text of article 33.

\textsuperscript{120} LOS Convention, \textit{supra} note 15, arts. 3, 4.

\textsuperscript{121} \textit{Id.} art. 76. The analysis of how the LOS Convention changes or codifies the customary international law regarding the continental shelf is outside the scope of this Note. \textit{See generally} T. Schoenbaum & A. Yiannopolous, \textit{supra} note 17, at 50.

\textsuperscript{122} LOS Convention, \textit{supra} note 15, art. 76(1).

\textsuperscript{123} \textit{Id.} art. 76(5).


\textsuperscript{127} LOS Convention, \textit{supra} note 15, art. 149.

\textsuperscript{128} Article 1 defines the "Area," the "Authority," "activities in the Area," "pollution of the marine environment," and "States Parties." \textit{Id.} art. 1.
tionally kept no records of delegates' deliberations in making specific changes in the drafts. The chairperson of the drafting committee stated:

In order to ensure that the consideration of drafting changes not give rise to substantive implications or interpretive records, the Committee and its organs have followed the practice of avoiding records of discussions of drafting changes and the reasons therefore.

The first problem article 149 raises is defining OHAN, because an object must be an OHAN in order for article 149 to apply. There are, however, no discussions in the Official Records of the Convention relating to the drafters' intentions behind selecting the phrase "archeological and historical object." Apparently, the drafters originally intended OHANs to refer to property more than fifty years old. The fact that they later deleted this age requirement raises speculation whether they felt the requirement was too stringent or whether they believed including both the phrase "archeological and historical nature" and an age requirement was redundant. While it seems most sunken ships would qualify as

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130. Article 149 first appeared as article 20 in the Draft Articles considered by the committee at its informal meetings in 1974. Article 20 read:

(A) 1. Particular regard being paid to the preferential rights of [the State of (sic) country of][the State of cultural][the State of historical and archaeological] origin, all objects of an archeological and historical nature found in the Area shall be preserved [or disposed of by the Authority for the benefit of the international community as a whole].
2. The recovery and disposal of wrecks and their contents more than [fifty] years old found in the Area shall be subject to regulation by the Authority without prejudice to the rights of the owner thereof.] or
(B) Omit this provision.

Thus, the original version of article 149 provided for preservation or disposal of wrecks more than 50 years old. The second paragraph also appeared in the second version of article 149, as article 19, which read:

1. All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of by the Authority for the benefit of the international community as a whole, particular regard being paid to the preferential rights of the State of (sic) country of origin, or the State of cultural origin, or the State of historical and archaeological origin.
2. The recovery and disposal of wrecks and their contents more that 50 years old found in the Area shall be subject to regulation by the Authority without prejudice to the rights of the owner thereof.
3. Any dispute with regard to a preferential right under paragraph 1 or a right of ownership under paragraph 2, shall, on the application of either party, be subject to the procedure for settlement of disputes provided for in this Convention.

OHANs, the deletion of the time requirement in the final draft and the lack of any other definition creates uncertainty and compels further consideration of the phrase.

Logically, the determination of whether an object is of an archeological and historical nature might include factors such as its age, its state of origin, and its uniqueness. The *Titanic* appears to satisfy these considerations. The ship is unique given both its use of watertight compartments and its lavish decor. In addition, it is historical because the ship sank over seventy-three years ago, which makes the ship twenty-three years older than the drafters' original age requirement for an OHAN.

Not all objects at the discovered site of a sunken ship may meet the proposed definitional requirements of an OHAN, however. For example, underwater photographs of the *Titanic* show cut glass windows, wine bottles, chamber pots, mugs, and platters, in addition to parts of the ship itself. Some may argue these objects do not fit the definition of OHANs because they are not old enough to be archeological or historical. Others may believe that the objects do qualify as OHANs because, while they are ordinary items, they are or were aboard an extraordinary vessel.

The second problem apparent in article 149 is that objects considered OHANs must be "preserved or disposed of." It is interesting that the drafters allowed for either preservation or disposal because these two actions seem very different.

"Preserving" connotes delivery from marine peril. Marine peril is used in salvage law to refer to the danger of destruction from the elements. Some have argued that OHANs are not in this kind of peril, because they are well-preserved in the environment of the deep sea. Others feel the marine environment does place these OHANs in peril, as

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132. LOS Convention, *supra* note 15, art. 149. The first draft of article 149 showed the disposal language in brackets, suggesting that it might be later deleted. See *supra* note 130.
133. Article 149 does not provide for a tribunal to decide this issue. The first and second versions of the provision delegated that power to the "Authority." See *supra* note 130 (the Authority is described in articles 156-91, LOS Convention, *supra* note 15, arts. 156-91, and defined in article 1, *id.* art. 1). It is difficult to determine why this language was deleted in later drafts. But, without the language, there may be disagreement over which tribunals would be best suited to hear disputes over rights to OHANs.
134. See *supra* note 41.
135. Ballard believes that the *Titanic* is very well preserved because it is at great depths, where it is shielded from the destructive effects of sunlight and algae. Ballard & Michel, *supra* note 1, at 696.
The Titanic and the Law of the Sea Convention

[Image 0x0 to 438x653]

it is defined in salvage law. But it is possible, in light of the increasing interest in these objects, that OHANs are in a different kind of peril because searchers may discover and retrieve them. For example, the Titanic seems to be in “retrieval” peril because several parties are interested in the site and one party is interested in raising the Titanic. While “retrieval” peril is at least as likely as destruction by the elements, and much more imminent, this was not the type of peril contemplated by salvage law. It is difficult to know whether it was a type of peril foreseen by the drafters of the LOS Convention.

The Official Records of the Convention also lack interpretive clues to the meaning of the term “disposal.” The term might refer to the action necessary when parts of an OHAN must be harmed or destroyed to preserve other parts of it. To preserve portions of the Titanic, for example, it might be necessary to dispose of other portions. Preservation of the furniture on board might require disposal or destruction of part of the hull. Similarly, preservation of the hull’s structure might require destruction of part of the hull decoration. The term “disposal” could also be used to advocate for the destruction of parts of an OHAN when it blocks recovery of other valuable items, such as oil or manganese nodules. The Titanic might be destroyed or disposed of if such resources were discovered beneath it.

The third interpretive problem in article 149 is the phrase, “the benefit of mankind.” The phrase has perhaps the longest history of any language in the entire Convention and was introduced in the preliminary sessions in 1967. The phrase now appears in several places in the LOS Convention: the Preamble, and elsewhere.

136. *Treasure Salvors I*, supra note 41, at 337; see supra text accompanying note 41.
137. See supra notes 11-13 and accompanying text.
138. Id.
139. LOS Convention, supra note 15, art. 149. One delegate at the resumed eleventh session described the language as the “cornerstone” of the Convention. 17 UNCLOS OR (Plenary Meetings) at 128, U.N. Doc. A/CONF.62/z/1 (1982).
141. LOS Convention, supra note 15, Preamble 6. Paragraph 6 of the Opening Statement includes the statement: *Desiring* by this Convention to develop the principles embodied in resolution 2749 (XXV) of 17 December 1970 in which the General Assembly of the United Nations solemnly declared *inter alia* that the area of the sea-bed and ocean floor and
The idea may be traced to the concern regarding the philosophy of *mare liberum.* Mare liberum held that the oceans beyond a belt of territory were open to all nations. The Conventions chose not to include the *mare liberum* language because it realized that in effect *mare liberum* allowed only some states to monopolize the sea.

The first drafts of article 149 used the phrase "for the benefit of the international community as a whole" instead of the "benefit of mankind." While the Convention intentionally avoided documenting the

the subsoil thereof, beyond the limits of national jurisdiction, as well as its resources, are the common heritage of mankind, the exploration and exploitation of which shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States. . . .

142. Article 136 states "The Area and its resources are the common heritage of mankind." *Id.* art. 136.

143. *Id.* arts. 125(1), entitled "Rights of Access to and from the Sea and Freedom of Transit"; 155(2), entitled "The Review Conference"; and 311(6) "entitled Relation to Other Conventions and International Agreements."


145. See *supra* notes 24-25 and accompanying text.

146. 17 UNCLOS OR (Plen. Mtg. of the 11th Session) at 60 U.N. Doc. A.CONF.62/z/1 (Vol. XVII) (1982). Mr. Lusaka, President of the United Nations Council for Namibia, suggested that *mare liberum* was no longer effective because a few states had, through increased technology, exclusive access to certain parts of the sea. The President of the Conference also noted that the concept of the "common heritage of mankind" was a new concept negotiated in response to technology and that it differed from customary international law and the ideas behind it. 16 UNCLOS OR (11th Session) at 167, U.N. Doc. A/CONF.62/z/1 (Vol. XVI) (1982). Those who argue that *mare liberum* is the same philosophy as the "common heritage of mankind" have been called the "new pretenders" because they use "common heritage" language to maintain their exclusive access. Brown, *Freedom of the High Seas Versus the Common Heritage of Mankind: Fundamental Principles in Conflict,* 20 SAN DIEGO L.R. 521, 522-23 (1983). They do this by asserting that the seas are free and open to all when, in fact, only they have the power and technology to reach them. Brown's term may be a misnomer; because the "common heritage of mankind" states appear to be doing the same thing Britain did on the advice of John Selden, these states may not be considered "new." See *supra* notes 28-35 and accompanying text.

147. The third version of article 149 which appeared as article 19, read:

All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of the international community 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. U.N. Doc. A/CONF.62/WP.8/Rev.1/Part 1 (1976).

reasons for changing the language, a report of the Drafting Committee in 1980 shows the Committee recommended changing language in articles 137, 140, 149, and 153 to read "mankind as a whole." This decision was consistent with the Committee's statement in an earlier report that an accurate analysis of the text included "ensuring correct and uniform usage of the terminology and phrases throughout the negotiating text." The Committee also feared that use of different terms when the same meaning was intended would lead to difficult and mistaken interpretation.

The Drafting Committee's comments about uniform use and meaning of terms creates questions surrounding the phrase "benefit of mankind" as it is used in article 149. In the seabed mining provisions the benefit discussed seems to be primarily economic. The closing remarks by several representatives focused on using the phrase to eliminate the disparity between rich and poor states and to prevent monopolization of activities in the Area. These concerns are echoed by the commentators who have written on the seabed provisions, and who envision the language as the foundation of a plan to divide the manganese mined from the seabed between all nations, both those with and those without the technology to mine it themselves.

The "benefits" to mankind from OHANs may be economic, such as the funds raised from admission to see OHANs or from selling them to public or private collections. More likely, however, the benefit will be primarily intangible. Such benefits might include viewing the objects, raising and preserving the artifacts, or studying OHANs from an historical, mechanical, or cultural perspective.

148. See supra note 130.
155. For example, the court recognized an award "in specie" was more appropriate than an award in money where the plaintiff discovered the wreck sites of a 1715 fleet. The court reasoned that the item involved was uniquely and intrinsically valuable, stating the item itself might be awarded because of its indivisibility and uniqueness. Cobb Coin Company, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel, 525 F.Supp. 186, 198 (S.D. Fla. 1981).
If "benefit of mankind" were interpreted to have the same meaning when applied to OHANs as when applied to seabed mining, the phrase, would lead to an inappropriate result. The benefits derived from mining, minerals, or currency are fungible and thus easily divisible. These items can benefit mankind if they are divided equitably among the states. On the other hand, the benefits derived from the recovery of OHANs may be impossible to divide. Because they are of historical and archaeological value, OHANs are unique by definition and thus difficult to appraise. Furthermore, division of OHANs may significantly decrease both their monetary value and their intangible value. For instance, if pieces of the Titanic are sent to different states, it may be difficult to understand the ship's faulty structure or its awesome size. Therefore, the mandate that OHANs must be used to benefit mankind may require that OHANs be kept intact and that access to them be allowed.

The fourth interpretive problem of article 149 is that it creates "preferential rights." This phrase is another which the Drafting Committee did not discuss in its reports. Accordingly, there are few clues to its meaning. Preferential rights may include the right to decide what is the best course of action for the benefit of mankind in a given situation. For example, those granted preferential rights to the Titanic may be entitled to decide whether the ship should be left as a memorial, brought up and sold to world buyers, put in a museum, or any combination of these possibilities. Preferential rights may also entitle the holder to be the primary beneficiary of the OHANS. Under this theory, preferential rights may provide the state holding them with the opportunity to carry out retrieval operations, to conduct scientific experiments, or to receive the proceeds from admission charged at a museum where retrieved objects are located. The term "preferential" suggests that the state holding these rights would even have the option of disposing of OHANs if it felt it was appropriate to do so.

The treaty does not establish that the state with preferential rights would have the exclusive power to search for or retrieve an object before others are allowed the opportunity. It is also unclear whether a state with preferential rights which decides not to search for or retrieve an object may stop another state from doing so. For instance, article 149 does not specify whether a state wanting to leave the Titanic as a memorial on the bottom of the sea could prevent another from searching for it, or even

156. See supra text accompanying note 136; see also supra note 155.
157. LOS Convention, supra note 15, art. 149.
from retrieving it.\footnote{158}

Article 149 gives preferential rights to the "State or country of origin, or the State of cultural origin, or the State of historical and archeological origin."\footnote{159} The drafters failed to report their reasons for choosing these terms. It appears, however, that the drafters intended the rights to be given to a single state. The first draft of article 149 showed each of these states in separate brackets.\footnote{160} Despite one delegation's view that the Authority should dispose of the OHANs,\footnote{161} all of these states were included in the final Convention. In addition, while it is possible that the drafters considered granting preferential rights to one, two, or all three of these states simultaneously, the term "preferential" connotes exclusivity.

Defining the terms used to describe the three different states is difficult but crucial for interpretation and application of article 149. The "state of origin" most likely refers to the state where an OHAN was designed or built. If an OHAN was designed in one state and built in another, two different states each might argue that it qualifies as the state of origin and make claims to an OHAN under article 149. The tribunal would be forced to determine whether one state held preferential rights which were exclusive, or whether more than one state could share the rights.

Article 149 fails to provide guidelines for the situation which arises when an OHAN's state of origin no longer exists. The drafters may have included the "state of cultural origin" to remedy the situation where the state of origin is no longer in existence. In that case, the state whose people descended from those of the state of origin might be successful in asserting rights to the OHANs. The state with preferential rights may be the state which has replaced the original state of origin under an "inheritance" theory.

In most, if not all, cases the state of origin and the state of archeological and historical origin would be identical. Assuming this were true, there would be no dispute over the preferential rights. If the state of cultural origin and the state of archeological and historical origin were not identical, there probably would be a dispute over who held the preferential rights.\footnote{162} In that event, ordinarily states would follow the dis-

\begin{footnotesize}
\begin{enumerate}
\item The U.S. House of Representatives apparently wants to leave it on the seabed as a memorial. See supra note 10.
\item LOS Convention, supra note 15, art. 149.
\item See supra note 130, which includes the text of the first draft of article 149, referred to then as article 20.
\item 3 UNCLOS OR at 163, U.N. Doc. A/CONF.62/C.1/L.3 (1974); see supra note 130.
\item The issues surrounding the handling of disputes are outside the scope of this Note. See generally supra note 17, and the articles cited therein; see also infra note 163.
\end{enumerate}
\end{footnotesize}
pute procedures provided for in the Convention. Because the drafters deleted a specific reference to the Convention dispute resolution provisions from the first draft of article 149, these provisions apparently have been disapproved for use in connection with that article. The settlement dispute provisions probably would apply, however, to disputes regarding OHANs in the geographic region to which article 303 applies because of the extensive nature of the provisions and the fact that no specific disapproval was expressed by the drafters.

Because the Titanic probably meets the definition of an OHAN, if it were found in the area governed by article 147, the Convention would mandate that it be used for the "benefit of mankind," with preferential rights being given to the state of origin. In the case of the Titanic, one state, probably Britain as the designer and financier of the ship, would be solely empowered to decide the ship's fate. It is also likely, however, that the United States and France, because they helped discover the Titanic, would make claims to it. Canada may also make a claim based on the location of the ship. It is also possible that other states would make claims based solely on the argument that the ship must be used for the benefit of mankind and that none of the states claiming preferential rights would act in a way that would foster such a result.

163. Paragraph 3 of the second draft mandated the Authority hear disputes. See supra note 130. Interpretive issues surrounding articles 149 and 303 make settlement dispute portions of the Convention important. LOS Convention, supra note 15, arts. 186-91, 279-99 and Annex VI. These procedures are limited to states parties and other groups specifically provided for in the Convention. LOS Convention, supra note 15, art. 291. The two main characteristics of the dispute settlement provisions are a binding solution and a variety of means for reaching it. States are to settle disputes peacefully in accord with the U.N. Charter. Id. art. 279. Article 33, paragraph 1, of the U.N. Charter reads: "1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice." U.N. CHARTER art. 33, reprinted in N. BENTWICH & A. MARTIN, CHARTER OF THE UNITED NATIONS 205 (1969). When settlement is not reached under the U.N. Charter, the Convention allows for settlement by conciliation and advisory decision. LOS Convention, supra note 17, Annex V and Annex VI. If no settlement can be reached, several compulsory procedures are available, including the International Tribunal for the Law of the Sea, the ICJ, an arbitration tribunal, or a special tribunal. Id. art. 287. On the issue of dispute settlement procedures in general, see Sohn, Problems of Dispute Settlement in E. MILES & J. GAMBLE, LAW OF THE SEA: CONFERENCE OUTCOMES & PROBLEMS OF IMPLEMENTATION 223, 227 (1977).

164. See supra note 130.

165. See supra note 163.

166. See supra note 14 and accompanying text for the location of Titanic.

167. Canada may be included in the negotiations because the Titanic is nearest to her shore, albeit 500 miles from the coastline.
3. Article 303: Objects of Historical and Archeological Nature Found at Sea

Article 303 first appeared in the Draft Convention in September 1980. It did not appear in any drafts of the Convention before that time. Article 303 provides:

1. States have the duty to protect objects of an archaeological and historical nature found at sea and shall co-operate for this purpose.

2. In order to control traffic in such objects, the coastal State may, in applying Article 33, presume that their removal from the sea-bed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.

3. Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or law and practices with respect to cultural exchanges.

4. This article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.

168. The first draft of Article 303 read:

1. States have the duty to protect archaeological objects and objects of historical origin found at sea, and shall co-operate for this purpose.

2. In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the sea-bed in the area referred to in that article without the approval of the coastal State would result in an infringement within its territory or territorial sea of the regulations of the coastal State referred to in that article.

3. Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges.


169. LOS Convention, supra note 15, art. 33. Article 33 reads:

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. Article 33 excludes the territorial sea from its definition of the contiguous zone. The article describes the control states may exercise in their contiguous zones. Id. art. 33. Article 303(2) allows a coastal state to protect certain rights in “applying Article 33.” Id. art. 303.

170. Id. art. 303. This was a slightly different version than the one in the Draft Convention in 1981, in which paragraph 2 read:

2. In order to control traffic in such objects, the coastal State may, in applying Article 33, presume that their removal from the sea-bed in the area referred to in that
a. Section 1

The first problem section 1 of article 303 creates is interpretation of the duty imposed on states to "protect" OHANs. Definitional problems similar to those arising from the article 149 "preserve" language arise here.\(^\text{171}\) In addition, as the situation surrounding the Titanic illustrates, not all agree on what is adequate protection of a sunken ship or its cargo.\(^\text{172}\) Some believe adequate protection mandates leaving the ship on the seabed where darkness, cold, and sea water protect it.\(^\text{173}\) Others believe preserving objects requires their removal from the sea environment.\(^\text{174}\) This disagreement is similar to the difference in opinion regarding what constitutes marine peril.\(^\text{175}\) Disagreements over the level of protection desirable or necessary may prevent the cooperation mandated by article 303.

The second problem section 1 raises is determining who will be bound by the duty to protect OHANs. The language of the section explicitly delegates this duty to states, but the scope of this duty is unclear. For example, does a state have a duty to protect objects from both citizens and noncitizens? Furthermore, could the language could be interpreted to impose a duty on a state's nationals to protect OHANs when the state itself cannot or will not protect them? For example, it is not clear whether the Knorr's chief scientist would have a duty to prevent the United States government or entrepreneurs from raising the Titanic if such action could potentially harm it. Alternatively, it is possible that an entrepreneur would have a duty to retrieve the Titanic or parts of it, if he believed that Ballard's plan to allow it to remain on the sea floor left the ship in "peril." These different interpretations create potential conflicts between the state and its nationals.

The final problem in section 1 is determining to which part of the sea it applies. While section 2 of article 303 refers to OHANs in the

\(^{171}\) See LOS Convention, supra note 15, art. 303(1).

\(^{172}\) See supra notes 133-137 and accompanying text.

\(^{173}\) See supra note 10.

\(^{174}\) See supra notes 11-14 and accompanying text.

\(^{175}\) See supra notes 133-136 and accompanying text.
contiguous zone,\textsuperscript{176} section 1 applies to OHANs “at sea.” At first glance, the “at sea” language appears to overlap with the Area in article 149 and therefore creates confusion whether the rules in article 149 or the rules in article 303 should apply. However, because article 149 was drafted in the early sessions, when the delegates focused on the provisions regarding the Area, arguably they intended article 149 to apply strictly and exclusively to the Area. Accordingly, the rules in article 303 apply to the contiguous zone.

b. \textit{Section 2}

The first interpretive problem in section 2 is determining what constitutes a violation. The only act section 2 explicitly states will violate article 303(2) is \textit{removal} of an OHAN.\textsuperscript{177} The Convention fails to make explicit whether other actions that may affect states’ rights would violate the section. For example, taking photographs and films,\textsuperscript{178} conducting research, diving in and around, or transporting other people near an OHAN may affect other states’ rights.\textsuperscript{179} Such activities would not violate section 2, however, because they are not technically “removal,” even though they may harm an OHAN in several ways. For example, taking photographs or films may invite the curious to explore the location of the OHAN for themselves. Transporting others near the OHANs would disturb the environment and increase the possibility of physical harm through an accident, equipment failure, or terrorism.

The consequences of violating section 2 are also unclear. The Convention does not state whether returning the OHANs to their rightful

\textsuperscript{176} LOS Convention, \textit{supra} note 15, art. 303(2). Article 33 defines the contiguous zone in paragraph 2. \textit{See supra} note 120.

\textsuperscript{177} LOS Convention, \textit{supra} note 15, art. 303(2).

\textsuperscript{178} Photographs of the \textit{Titanic}, published in National Geographic Magazine, may abridge the rights of others because they were published exclusively there and may render other photographs of the \textit{Titanic} less valuable. In addition, one might argue that having exclusive possession of undersea photographs of an OHAN amounts to possession as required by the law of finds, at least in the abstract. For example, Grimm claims his photograph of the propeller, and his knowledge of the approximate location of the \textit{Titanic} before Ballard found it, may be the basis of a claim to the ship. B. \textsc{Hoffman} & J. \textsc{Grimm}, \textit{supra} note 3. Such an argument by itself probably would fail to convince a court to rule in favor of Grimm’s position.

\textsuperscript{179} Ballard’s refusal to disclose the location of the ship may also be considered “removal,” because failure to disclose the location prevents others from removing it. Ballard’s failure to disclose this information may also violate Article 244 of the Convention which states that those with scientific information must release it. LOS Convention, \textit{supra} note 15, art. 244. \textit{See supra} note 22 for a discussion of application of the Marine Scientific Research provisions to OHANs. Ballard could argue that he has shared information with the French research team and that he is under no obligation (even under the Convention, were it in force) to disclose such information to those who may only be interested in retrieval for profit, not research.
state is the only or simply the preferred remedy for removal. The Convention also fails to state whether monetary compensation for the removal would be adequate. Because these objects are always unique and often one-of-a-kind, money damages would fail to compensate many finders, who would insist on compensation in the form of title to the OHAN. Awarding title to OHANs is similar to awarding specific performance, rather than money damages, as a remedy for breach of contract for unique goods. Thus, United States courts may be willing to allow an action in rem for a salvage award consisting of the item itself.

c. Section 3

Section 3 creates by far the most difficult interpretive issues in article 303. An important feature of section 3 is the term “identifiable owner.” This term was inserted with the intent of protecting other international agreements and rules of international law. The drafters’ intent to recognize other rules of international law here and in section 4 creates the most important and puzzling questions in interpreting article 303. These references to other bodies of law raise the question of whether the delegates intended to draft new law regarding OHANs or simply codify customary international law. They could have codified customary international law much more simply and clearly.

Several other articles in the Convention refer to customary international law. These references to international law limit the provisions of the Convention. One commentator points out that most references to customary international law which limit the provisions of the Convention appear in subject areas involving marginal areas of seas off coastal states in historical geographical areas or historic usage. The reference to international agreements in article 303(4) fits this description because article 303 applies to OHANs in the CZs off coastal states. The draft-

180. See supra notes 73-75 and accompanying text.
181. Id.
182. But see Note, supra note 17. The author believes article 303 is clearer and easier to apply than article 149.
184. These include articles 60 and 58 regarding exclusive economic zones; articles 2, 7, 21, 39, 19, and 34 regarding the Territorial Sea; and article 138 regarding the Area. For a complete list of articles using this language, see Howard, The Third United Nations Conference on the Law of the Sea and the Treaty/Custom Dichotomy, 16 Tex. Int'l L. Rev. 321, 339 (1981).
185. Id.
186. Id.
187. The continental shelf and territorial sea boundaries are described supra notes 121-124 and accompanying text.
ers may have included references to international law in articles regarding coastal areas to ensure that the clauses did not supersede law allowing special rights in the CZ. In this way, these references indicate the influence the international legal system and the international political environment have upon one another.  

As mentioned above, section 3 recognizes the rights of “identifiable owners.” These identifiable owners might also be called ex-owners. By recognizing these owners, section 3 creates conflicts between the identifiable owner and the finder, who would be awarded title under the customary international law of finds. While under the law of finds, the finder would get title as soon as he or she met the possession plus intent requirements, the finder under article 303 would have to surrender title if the ex-owner came forward and was properly “identified.”

Section 3 also states that nothing in it affects “the law of salvage and other rules of admiralty.” The law of finds or the in rem salvage action are the rules of admiralty most likely to be applied in the case of OHANs because OHANs are usually abandoned. By conferring rights on identifiable owners, the LOS Convention differs from the “law of salvage and other rules of admiralty” even though the Convention explicitly states that it does not affect these preceding bodies of law. A careful analysis of the Convention shows that it does indeed contradict itself, unless the reference to “the law of salvage and other rules of admiralty” supercedes the other clauses of article 303. If the reference to “the law of salvage and other rules of admiralty” supercedes the other clauses of article 303, the article does not change the law preceding the Convention in the portion of the sea over which it applies.

Finally, section 3 refers to “laws and practices with respect to cultural exchanges.” The practice of cultural exchanges apparently refers to the cultural relationship between any two or three states at any given time. The likelihood of cooperative decision-making would vary between any pair or group of nations from decade to decade or year to year, de-

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188. Howard, supra note 184, at 338.
189. See supra notes 43-46 and accompanying text.
190. Id.
191. LOS Convention, supra note 15, art. 303(3). The President’s report noted that this language was peculiar to Anglo-Saxon Law and advised that translations should be made to indicate its peculiar origin. 14 UNCLOS OR (Report of President on Work of the Informal Plenary Meeting of the Conference on General Provisions) at 129, U.N. Doc. A/CONF.62/L.58 (1980).
192. See supra notes 70-72 and accompanying text.
193. See infra notes 204-215.
194. LOS Convention, supra note 15, art. 303(3).
195. Id.
pending on the diplomatic relationships maintained at the time. For example, under this section the rights to the OHANs on the Titanic and rights to the ship itself could be determined by negotiations or agreement between the United States, Britain, France, and perhaps Canada, based on their willingness to share OHANs. Barring excessive greed, territorialisim, or terrorism, the likelihood of a cooperative decision-making and sharing between these countries is much more probable than if countries hostile to each other were involved.

d. Section 4

The first interpretive problem of article 303(4) is the provision stating that the article is "[w]ithout prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature." Again, the Convention proceedings explicitly stated that this section was added with the intent of protecting other international agreements and rules of international law. International agreements would include treaties. There are currently several international agreements which may apply to OHANs, but none do so directly.

196. *Id.* art. 303(4). It seems fairly certain that the drafters meant international agreements regarding the protection of OHANs, and, separately, rules of international law regarding OHANs. In this Note it is assumed that this sentence is to be read in the disjunctive.


2. This Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.

3. Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.

4. States Parties intending to conclude an agreement referred to in paragraph 3 shall notify the other States Parties through the depositary of this Convention of their intention to conclude the agreement and of the modification or suspension for which it provides.

This article does not affect international agreements expressly permitted or preserved by other articles of this Convention.

198. The first international agreement is the UNESCO Convention. UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Owner-
Section 4 also refers to "rules of international law." The first source of international law to which section 4 may refer is export law in specific countries. United States legislation protecting pre-Columbian work already is in effect. Mexico revised its antiquities law to impede exports of archeological works. These international agreements, however, are unlikely to affect directly the outcome of the disposal of OHANs under the LOS Convention because they apply to a limited number of parties and to limited types of property.

Section 4 may also be interpreted as referring to the customary international law of salvage and finds. This would mean that the result under article 303 may be identical to the result under the law before the treaty. As mentioned above, this result contradicts the express statement in section 3 that nothing in the article affects the law of salvage and other rules of admiralty. If the Titanic were found to be located in that portion of the sea over which article 303 applies, several results are possible. The article might be applied to give the state in whose CZ the OHAN was sitting the right to presume that removal would be an infringement. Because section 3 provides that nothing is to affect the rules of salvage or other rules of admiralty, however, the law of finds may apply to OHANs found there.

The second international agreement regarding OHANs is the European Convention on the Protection of the Archaeological Heritage. This treaty applies to museums and institutions whose acquisition policy is under state control. Because this convention does not strictly apply to private institutions, however, it is of limited application.

The third international agreement is a treaty between the United States and Mexico. This treaty applies only to dealings between Mexico and the United States. Therefore, the treaty's complex procedure for deciding whether specific objects qualify as pieces of archeological, historical, or cultural property would not apply to OHANs in the international framework.

199. LOS Convention, supra note 15, art. 303(4).


202. See supra note 94 and accompanying text.
Convention might not be applied in the case of OHANs found within the CZ. Instead, the law of salvage and the law of finds may apply. If so, the rule under article 303 remains finders keepers.

IV. COMPARISON OF ARTICLES 149 AND 303 TO THE CUSTOMARY INTERNATIONAL LAW

Articles 149 and 303 differ from the customary international law of salvage and finds in several important respects: the geographic division of the sea, the rights given to finders, the rights given to salvors, and the incentives of the law of salvage and the law of finds.

A. Geographic division

Article 149 deals with OHANs in the Area and article 303 deals with OHANs in the contiguous zone. This division has several practical difficulties: it creates restrictions on searches through invisible guidelines, it creates the need to determine the location of the OHAN before "finding" it, and, for OHANs in the contiguous zone, it may result in a random vesting of rights in the state within whose CZ the OHAN rests, without concern for the state for which the OHAN will have value.

This geographic division of the sea is not relevant under the law of finds and the law of salvage. Under current law, searchers are restricted only occasionally by the possible legal effect of the object's location. The Convention, on the other hand, may allow a state to enjoin others from studying, photographing, or retrieving an OHAN, based solely on its location.

The sea is constantly moving; accordingly, while it is theoretically possible to draw boundaries on a map of the sea floor, it is difficult for seekers on an expedition to recognize strict boundaries. Seekers for OHANs often do not know exactly where objects are located. Under the law of finds, title to an OHAN vests in a finder who expends time and money to assert possession over it. Under the LOS Convention, a seeker may need to know the location of the object before making a decision whether to search for or assert rights over it. A finder who would ordinarily gain title to the OHAN may have to forfeit it simply because of its location, even if he or she invested a great deal of time and capital.

203. See supra notes 114-123 and accompanying text.

204. The only limitation arises when the property is on the state's continental shelf, which it seems clearly is the property of the state. This issue was addressed in Treasure Salvors II, supra note 68, at 1340.

205. See supra notes 43-45 and accompanying text.
Dividing the sea into geographic compartments may be appropriate for some of the seas' retrievables, such as fish, kelp, salt, gold, or manganese nodules, but it is not appropriate for OHANs. The location of an OHAN is important, not relative to the seabed, but to the state or states of origin and other states with a particular interest in it. For example, Britain and its nationals have a historical and financial interest in the ship because they built and insured it. The United States and its nationals value the ship and its OHANs aboard for their historical and novelty value. States for whom OHANs may have particular value should have the first opportunity to own them, rather than those states the OHANs sit the closest to geographically.

B. Rights of Finders: Article 149 and the Law of Finds

The law of finds and article 149 are similar because they entitle anyone to search for and find OHANs. The similarity, however, ends there. Under the law of finds, the finder of OHANs becomes the owner of the OHAN as soon as he or she asserted possession over it. Because an OHAN is almost always considered to be legally abandoned and without an owner, it is not until the finder discovers, possesses, and claims it, that he or she becomes the owner.

Under article 149, a finder would have ownership rights only if the state of origin conceded them. Article 149, therefore, essentially applies the law of finds, with the following proviso: The finder must defer to the state of origin. Clearly, article 149 diminishes the rights of the finder unless that finder coincidentally is the state holding the preferential rights under the above analysis.

C. Rights of Salvors: Article 303 and Salvage Law

Philosophically, article 303 is more similar to the law of salvage than to the law of finds because article 303 imposes a duty on certain states to protect OHANs found in the contiguous zone. This "duty" is analogous to the "duty" to salvage property in marine peril. Therefore,

206. See supra notes 3-4.
207. See supra notes 5-13 and accompanying text.
208. See supra notes 10, 11. The United States has memorialized the Titanic in songs ("It Was Sad When that Great Ship Went Down"), movies ("The Unsinkable Molly Brown"), and games ("Trivial Pursuit"). Since the ship's discovery, model replica sales of the Titanic have increased in the United States by 500%. USA Today, Sept. 17, 1985, at 1, col. 7.
209. See supra notes 43-45 and accompanying text.
210. See supra notes 157-163 and accompanying text.
211. LOS Convention, supra note 15, arts. 303(1) and (2).
article 303 and the law of salvage both impose an obligation on parties to rescue property.

Article 303 is also similar to the law of salvage because it recognizes "identifiable owners." The law of salvage does not use this term but the identifiable owner is analogous to the owner in the law of salvage, to whom the salvor must return the property. 212 Article 303 affects the rights of salvors in the situation where the salvor is a finder looking for OHANs. It affects these rights because it prevents the salvor from bringing an in rem action and being awarded the OHAN itself as the salvage award. Article 303 affects the rights of salvors when the salvor is, in fact, the finder.

Article 303(2) affects salvors' rights by giving states the right to prevent removal of objects within their CZs. 213 The salvor’s rights thus are different from what they would be under salvage law because article 303 allows the state in whose contiguous zone the OHAN sits to prevent removal. Under salvage law, the salvor could salvage or remove the object and be compensated. Under article 303, the coastal state takes on the role of exclusive salvor with the duty to protect OHANs and the authority to allow or prevent the OHANs' removal. Under the law of salvage, a party who helps in the recovery of property in marine peril will be compensated proportionately. 214 Here, however, the coastal state becomes either a single salvor or an owner, affecting the rights of other would-be salvors.

Finally, it is possible that article 303 affects the rights of salvors by its reference to "other rules of admiralty." In doing so, article 303 may turn the salvor into a finder and actually expand his or her rights by allowing the salvor to operate under the rules of the law of finds. Alternatively, the salvor may still be termed a "salvor" and receive a salvage award of the OHAN itself. These conflicting effects on the rights of salvors, depending on the reading of article 303, demonstrate the complexity and contradictory nature of the article.

D. Incentives

Articles 149 and 303 are attractive in theory. Neither provision deals adequately with OHANs such as the Titanic, however, because neither provides the incentives necessary to encourage action (unless arti-
Article 303 is interpreted to apply the law of finds to the portion of sea within its ambit. Article 149 alters the law of finds and attempts to promote more cooperative behavior in international waters by mandating OHANs be used for the benefit of mankind while at the same time considering the interests of several states for whom the OHAN may have particular value. Similarly, by imposing a duty on coastal states to protect OHANs and reserving power to treaties and other international bodies of law, article 303 purports to promote cooperation among states and consideration of multiple interests. In doing so, however, it recognizes too many bodies of law and parties to be effective.

Each of these articles has made too great a compromise. To promote cooperation, article 149 has removed the greatest incentive for seekers of OHANs. It has removed the ownership rights, which under the law of finds vested in the seekers as soon as they achieved intent plus possession. Instead, under article 149, the finder would be divested of title, and the state, as determined under the analysis above, would receive it. Likewise, in order to give rights to coastal states and identifiable owners while still recognizing the law of salvage and the law of finds, article 303 fails to provide salvage law’s incentive of the salvage award. If the salvor were treated as a finder, and if the references to rules of admiralty and international law were to supersede the Convention provisions, the salvor would retain the incentive of obtaining title. If, on the other hand, the salvor were prevented from removing the OHAN by the coastal state, the salvor would not have the incentive of the salvage award which is usually paid upon delivery of the property to the owner.

Thus, while articles 149 and 303 may eliminate the acquisitiveness and secretiveness of the law of finds in favor of more cooperative and equitable behavior under the law of salvage, neither article provides the incentive needed to make it economically feasible.

V. PROPOSALS

Article 149 should be amended to require finders of OHANs to give international notice of their discoveries. If a “state of origin” came forward, it would be required to offer the finder a “salvage” award as compensation for retrieving the OHAN. This amendment would also require the finder to accept the compensation but return the OHAN to the state. In addition, the state would be required to deposit the OHAN in an international forum where it would benefit mankind; thus, the world would have access to the OHAN. Under such an amendment, the finder would be compensated for his or her capital outlays and time, and the OHAN
would be preserved. This system of compensation probably would be objectionable to those finders who only want title to the OHAN. The system, however, would allow for fair compensation and an incentive for retrieval while achieving more closely the objectives of the Convention as reflected in the "benefit of mankind" language and the comments of the representatives to the Convention.

Article 303 should be amended similarly to require the state where the OHAN is found or the "identifiable owner" to compensate the salvor. Article 303 should also necessarily require that these states allow the world access to the OHANs.

An alternative amendment to both articles 149 and 303 would create a salvage fund to pay those who search for, find, and retrieve objects of archeological and historical importance to the world. Without this kind of fund, or the compensation described above, the "finder" of OHANs is forced in most circumstances to sell the objects (the photographs, the information, or the items themselves) to reimburse him or herself for the huge capital expenditures needed to gain access to the seabed.

If the international community sincerely wants to protect OHANs for the benefit of states of varying origins, identifiable owners, or even "mankind," it must provide the financial incentive needed. For OHANs both inside and outside national jurisdiction, compensation to finders, whether by the identifiable owner, the state(s) of origin, or an international fund, is necessary to encourage cooperative discovery, retrieval, and care of OHANs. Otherwise, for OHANs, the rule will continue to be finders keepers.

VI. CONCLUSION

Articles 149 and 303 of the LOS Convention differ from the customary international law of salvage and finds. The provisions are lofty in theory but difficult to interpret and apply. Ambiguities and inconsistencies exist because of undefined terms and concessions to customary international law.

At first glance, article 149 appears to set out a workable set of rules for dealing with OHANs in the Area. The article appears to promote application of the law of finds, but requires a would-be finder to defer to the state(s) of origin. This deference may be appropriate, in light of the concern that OHANs be used for the benefit of mankind and somehow shared. But the article removes the incentive of the law of finds, the vesting of title in the finder, without providing a replacement. Without a
replacement incentive, this modification of finds law will deter those with the ability to search for and recover OHANs from even attempting recovery.

Article 303 is more complicated. While it states that it does not affect the customary international law preceding it, article 303 in fact differs from customary international law in important respects. Under one theory, article 303 discourages those with the ability to salvage by giving rights to “identifiable owners” and coastal states. But under another theory, article 303 retains the incentive of title in the law of finds, by deferring to “other rules of admiralty” which include the law of finds. Under the latter theory, article 303 simply codifies the law of finds.

In addition, while section 1 of article 303 ostensibly encourages cooperation, section 2 fails to provide the incentives necessary to truly promote it. Article 303 lacks the incentive provided by the salvage award, an integral part of traditional salvage law.

Because Articles 149 and 303 lack the incentive of the law of salvage, courts will be urged to use the law of finds to settle conflicts instead of seeking interpretation of the Convention, because the law of finds was the customary international law which most likely would apply to OHANs before the Convention existed. Therefore, the Convention’s articles directly applicable to OHANs must be amended to be effective. The amendments must define the Convention’s terms more clearly. Furthermore, the LOS Convention must incorporate incentives comparable to those in the customary international law of salvage if it is to truly protect OHANs for the benefit of mankind. Otherwise, the ownership of OHANs discovered while the LOS Convention is in effect will be determined under the international folly of finders keepers.