Blood and Treasure: How Should Courts Address the Legacy of Colonialism When Resolving Ownership Disputes Over Historic Shipwrecks?

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As long as people have been sailing the seas, there have been shipwrecks—and adventurers on the search for sunken treasure. For centuries, the law regarding the salvage and ownership of shipwrecks has been governed by jus gentium: international common law based on norms and tradition. With the international recognition of the value of cultural property following the devastation of World War II and the passage of the UN Convention on the Law of the Sea (UNCLOS) in 1982, the paradigm regarding ownership of sunken historical artifacts has shifted. However, the more modern regime surrounding ownership of sunken artifacts has fallen short. By attempting to adhere to modern legal concepts regarding sovereign ownership of war vessels, cases over ancient shipwrecks often ignore the impact of colonialism. Nations that once saw their treasure plundered under brutal Spanish colonial rule now see those artifacts from sunken wrecks returned to Spain, even though the artifacts are discovered by private companies thousands of miles away from Spanish waters. This Note seeks to examine the current treatment of ownership disputes over sunken treasure found in the Americas and offers a new legal regime regarding historic wrecks—one that encourages the salvage of sunken artifacts while addressing the legacy of colonialism by returning artifacts to their countries of origin.

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INTRODUCTION

"Not all treasure's silver and gold, mate." So spoke the one and only Captain Jack Sparrow. As attitudes toward archaeology and cultural property evolve, the value of artifacts depends less on the presence of gold, silver, or precious jewels and more on their historical and cultural provenance. In a post-colonial world,

changing attitudes regarding cultural patrimony and respect for indigenous cultures have led to a new perspective on "ownership" of cultural property. While this debate has been carried out in museum halls across Europe, encompassing heated debates about the Elgin marbles and the Benin bronzes, it has yet to make its way to the sea floor.

Shipwrecks and the hunt for sunken treasure have captured the public imagination for centuries. As long as there have been ships, there have been shipwrecks. The first salvage operations began with the Ancient Greeks, with salvors' rights outlined in Rhodian law dating from the first millennium B.C. There are approximately three million shipwrecks scattered across the ocean floors, and new technology has enabled treasure hunters to discover and recover shipwrecks and artifacts that were previously believed lost to the depths.

Of the many muddled areas of international law relating to resolving competing ownership claims for marine resources, it may be hard to see why shipwrecks deserve much discussion. However, shipwrecks not only have the unique ability to capture the public's imagination, but can also be a microcosm that embodies many of the competing interests and tensions in international ocean law. In examining the legal regimes surrounding shipwrecks, one encounters conflicts between private actors and states as well as disputes between formerly colonized nations and their colonizers.

Part I briefly discusses the history of Spanish conquest and shipwrecks in the Americas and the economics of modern-day treasure hunters. Part II examines the differing legal regimes that govern ownership of shipwrecks, including UNCLOS, the UNESCO Convention on Underwater Cultural Heritage, and the Abandoned Shipwrecks Act (ASA). Part III discusses recent shipwreck cases where ownership of wrecks and artifacts was disputed between the discovering company, the ship's original country of origin, and the country of origin for the artifacts. These cases highlight the difficulties and gaps in current law in equitably deciding ownership of shipwrecks and their cargos. Part IV proposes a new
regime for determining ownership of artifacts, which emphasizes the need to standardize and equitably reform the current process for determining ownership of historic shipwrecks.

I. THE TREASURE HUNTERS: FROM CONQUISTADORS TO MODERN-DAY SALVORS

Before descending into the depths of our discussion of sunken treasure, a brief examination of the history of European colonialism and trade in the Americas is necessary to understand the issues at play in determining ownership claims of sunken vessels and their cargo. Because most shipwreck discoveries have been made by private treasure hunters, a brief discussion of the economics of private salvage companies is also warranted.

A. Spanish Colonial Presence in the Americas

Because most of the shipwreck cases in this paper involve Spanish ships carrying treasure originating from South and Central America, this part will focus primarily on addressing the history of Spanish colonizers in the Americas.

The Spanish conquest of the Americas swiftly followed Christopher Columbus's landing on Hispaniola in 1492. By the mid-1500s, the Spanish crown claimed a territory ranging from the southwestern United States to as far south as Chile. Spanish colonization of the Americas began in the Caribbean as early as 1493, on Christopher Columbus's second voyage. Spanish colonizers spread from the Caribbean to North America, arriving in Florida in 1513. In 1519, Hernán Cortés landed in Mexico, and subjugated the Aztec civilization by 1521. In 1538, Francisco Pizarro journeyed south through the Isthmus of Panama to Peru, subjugating the Incan empire by 1538. Pizarro, in his conquest of Peru, demanded that the Inca fill a room with gold and silver treasures gathered throughout the Incan empire as ransom for the captured emperor Atahualpa.

8. *Infra* note 225.

9. This is not meant to suggest, however, that the English, French, Portuguese and Dutch did not also have an extensive presence in the Americas from the sixteenth to the eighteenth centuries. See generally European Colonization of the Americas, NEW WORLD ENCYCLOPEDIA (Feb. 24, 2015), http://www.newworldencyclopedia.org/entry/European_Colonization_of_the_Americas.


11. H. Michael Tarver & Emily Slape, *Columbus, Christopher*, in 1 THE SPANISH EMPIRE: A HISTORICAL ENCYCLOPEDIA 142–43 (H. Michael Tarver & Emily Slape eds., 2016) [hereinafter THE SPANISH EMPIRE].

12. Cheryl H. White et al., *Creation of an Empire*, in 1 THE SPANISH EMPIRE 85–86.

13. *Id.* at 89.

14. *Id.* at 90.

The task took eight months and scholars estimate the treasure to be valued at over $50 million. Nonetheless, Pizzaro summarily executed Atahualpa, and his men melted down the gold and silver treasures so they could better fit in ships' holds.

Spanish settlers retained cultural and economic ties with Spain, and Spanish ships transported silver and gold mined from modern-day Peru, Chile, Bolivia, and Mexico back to Spain. Between 1566 and 1790, the Spanish Treasure Fleet made twice-yearly voyages between Spain and ports in Panama, Mexico, and Colombia. The Spanish left the Americas with vast quantities of gold and silver, upsetting Spain's economy by creating rampant inflation. Seventy percent of total global gold production in the 1600s came from Spanish holdings in the New World. However, it is estimated that ten to fifteen percent of the gold and silver that left New Spain's ports never reached Europe—instead, large quantities of gold and silver ended up on the seafloor.

The extraction of gold and silver in the Americas came at tremendous human cost. The mines in Potosí, located in the Viceroyalty of Peru (modern-day Bolivia), were some of the most productive silver mines in the colonial Americas. Potosí mines generated 45,000 tons of silver between 1556 and 1783. The mines utilized a forced-labor system, relying on indigenous Peruvians and later African slaves. Approximately eight million native Peruvians and Africans died in these mines.

Looking at the history of Spanish colonization of the Americas shows a legacy of exploitation and bloodshed. It also shows how difficult it can be to resolve ownership disputes: how does one identify the exact location where the gold and silver came from when precious metals from across Central and South America were collected at a few ports? Which modern day country can make a claim when the Spanish exploitation of mineral resources was continent-wide? This debate becomes even more complicated when such artifacts are found in

16. Id.
17. Id.
21. Id. at 164.
22. See id.
25. Id. at 192–93.
26. Id.
shipwrecks, since the specific identity of wrecks and the exact provenance of artifacts is subject to dispute.27

B. Economics of Private Salvage Companies

Hundreds of years after the conquistador era, humankind's obsession with treasure remains. Ever since people have been sailing the seas, there have been shipwrecks and salvage operations.28 From the days of free diving and diving bells to the modern-day use of technologically-advanced sonar, enterprising salvors have utilized a variety of techniques to raise sunken treasure from the depths.29 New technologies have allowed for the discovery of long-lost shipwrecks. One of the most famous salvage expeditions was the discovery of the Titanic in 1985.30 The Titanic operation heralded a new era of salvage operations, where new technology allowed salvors to both locate and raise artifacts from previously unreachable ships. The Titanic was located in 13,000 feet of water using advanced sonar techniques and the use of remote operated vehicles (ROVs).31 Similar technology was used to discover the Bismarck, a sunken German World War II battleship, in 1989 at a depth of 15,000 feet in the North Atlantic.32

The cost of locating and salvaging a wreck can vary tremendously. Wrecks located in shallow waters can be found by visual inspection, and human divers can access and retrieve artifacts.33 Other expeditions searching for deep-water wrecks can cost tens of millions of dollars. Private salvage companies spend the majority of their time and money locating wrecks. Locating a wreck can take years and can involve combing through old archives to examine letters and ships' manifests.34 The passage of time and existence of conflicting accounts can add to the difficulty in locating wrecks; shipwrecks in deep-water are often not intact,

27. See infra Part IV.B for a further discussion of the difficulties of identifying centuries-old wrecks.
28. See Gormley, supra note 5.
31. Id. at 291–92; Woods Hole Oceanographic Inst., Ships & Technology Used During the Titanic Expeditions, https://www.whoi.edu/know-your-ocean/ocean-topics/underwater-archaeology/rms-titanic/ships-technology-used-during-the-titanic-expeditions/.
33. Mather, supra note 29, at 176–77.
34. Odyssey Marine's hunt for the Sussex, a sunken British warship, involved looking through documents relating to the British exchequer and reading personal letters between members of Louis XIV's court. See Capolitano, supra note 6.
with debris fields that can span large distances. Modern-day salvage companies focused on finding historic wrecks borrow techniques from off-shore mineral and oil exploration by utilizing sonar and ROVs. Once a potential wreck is identified, salvors will traverse up to hundreds of square miles of open ocean looking for the telltale signs of a ship. Once a wreck is located, salvors will attempt to raise artifacts and treasure. Locating and raising artifacts from wrecks can be an environmentally destructive process, particularly in shallow waters. Salvors will direct powerful blasts of water at the seafloor, with the goal of removing sand and revealing sunken wrecks. This increases the turbidity of the water and can harm fragile ecosystems, such as coral reefs.

Because salvage operations require large amounts of upfront capital, salvage companies often rely on outside investors to fund their expeditions. Hedge funds, private equity firms, and individual investors have all funded private salvage companies focusing on historic wrecks. Deep-sea expeditions can cost up to $30 million, with costs running up to $35,000 per day. The need to pay back investors can lead to artifacts from shipwrecks being sold in auction houses, online, and even on home-shopping channels. Odyssey Marine, the only publicly-traded salvage company, claims that artifacts sold to private buyers are "mass produced" items of minimal historical significance, such as coins. While it can be argued that salvage companies are one of the few entities willing to invest extensive resources in discovering historic shipwrecks, it should not be overlooked that they are private businesses whose primary purpose is to produce a profit. The sheer cost of mounting an expedition, coupled with the chance to

37. Capolitano, supra note 6.
40. Id.
41. Id. at 371.
43. Id.
45. See Capolitano, supra note 6.
46. Id.; Kleinman, supra note 44.
claim tens of millions of dollars' worth of gold and silver, raises the stakes around shipwreck ownership disputes.

II. FINDERS KEEPERS? LEGAL PRINCIPLES FOR DETERMINING OWNERSHIP OF HISTORIC SHIPWRECKS

The question of who owns a shipwreck and its artifacts depends on many things: where the wreck is physically located, what country owned the ship originally, which parties are making claim to it, and in what jurisdiction finders are making their claims. To better understand the current gaps in the law surrounding cultural artifacts recovered from shipwrecks, a brief survey of current legal regimes is needed. Part A briefly discusses the background principles of the law of salvage and law of finds, which were the controlling legal theories for determining ownership until the advent of codified international law in the twentieth century, and remain relevant in adjudicating claims over shipwrecks. Part B discusses the governing international law relating to the ownership of shipwrecks. Finally, Part C discusses how U.S. courts address shipwreck ownership cases.

A. Law of Salvage and Law of Finds

Although the law of salvage and law of finds have historically been the customary way to address shipwreck disputes, and these have been augmented in modern times by international law and US statutory law governing historic wrecks. However, the principles embodied in the law of salvage and law of finds that encourage the use of abandoned property and compensating salvors are still important concerns for deciding ownership claims. While the laws of salvage and finds are found in the common law dating back to the Middle Ages, this section will primarily focus on its application in US federal court, where all the cases discussed in this paper have been filed.

The traditional law regarding ownership of wrecks contains two separate bodies of law: the law of salvage and the law of finds. Both the law of salvage and the law of finds stem from the same principle of encouraging putting property back into use, but they have several distinct differences. The law of salvage does not convey ownership rights to the salvor, but rather allows him to raise and recover cargo from a sunken vessel for a "very liberal salvage award." In

salvage cases, the original owner of the ship retains legal title to the ship and its cargo. To establish a claim for a salvage award, salvors must show that (1) the salvors’ efforts were voluntary, (2) the salvor succeeded in salvaging some property and (3) the property was in marine peril. If the salvor successfully makes a claim for salvage, he is rewarded with a percentage of the proceeds from the sale of the property. In determining an award, courts look at the difficulty of salvage operation, the skill of the salvor, the amount of danger the property was in, and the value of the saved property.

Historically, shipwrecks were not considered to be subject to the law of finds, which applied only to "maritime property which had never been owned by anybody, such as ambergris, whales and fish." However, a modern trend beginning in the 20th century was to apply the law of finds to shipwrecks. The law of finds "expressed the ancient and honorable principle of 'finders, keepers.'" In short, if property is considered "abandoned," the first person to claim it is entitled to claim ownership. To establish finders' rights, finders must show that (1) the property was abandoned and (2) they have "control" over it.

These two laws of finds and salvage present competing values and objectives. The law of finds encourages finders "to act acquisitively [and] secretly, and to hide their recoveries, to avoid claims of prior owners or other would-be finders that could entirely deprive them of the property." In contrast, "[t]he primary concern of salvage law is the preservation of property on oceans and waterways" which better fits "the needs of marine activity." Unlike traditional concepts of abandonment, which allows finders to lay claims on property, under the law of salvage, owners of cargo "lost" at the bottom of the sea are still the rightful owners. One of the goals of marine salvage is to "promote

50. Terence P. McQuown, An Archaeological Argument for the Inapplicability of Admiralty Law in the Disposition of Historic Shipwrecks, 26 WM. MITCHELL L. REV 289, 296 (2000). The first two elements of a salvage claim are more or less self-explanatory. The question of whether property is in "marine peril" is a more interesting one—courts have looked at different criteria to determine if property is in "marine peril." See id. at 297. However, an in-depth discussion of the elements of "marine peril" is beyond the scope of this paper. Although courts have disagreed whether hundreds-of-years-old wrecks are in fact in "peril," see id. at 308–12, determining if a wreck is in peril or not has not been a major factor in the cases discussed in this paper, and will be left for another day.

51. Id. at 298.

52. Id.

53. Id.


55. See id. at 476–77 (Widener, J., dissenting) (noting that the application of the law of salvage to historic wrecks was a recent development).

56. Id. at 459.

57. McQuown, supra note 51, at 300.


59. Id. (quoting Hener, 525 F. Supp. at 357–58).
commerce by encouraging people to save property from destruction at sea and discourage embezzlement of salvaged property.\(^{60}\)

Shipwrecks present two interesting twists to the law of finds regarding how the law treats abandonment and embedded objects. While at first glance, a ship moldering away at the bottom of the ocean for four hundred years might appear to be abandoned, the legal definition of abandonment is more complicated. Abandonment requires a "clear and unmistakable affirmative act to indicate a purpose to repudiate ownership."\(^{61}\) Historically, "[a]dmiralty courts have adhered to the traditional and realistic premise that property previously owned but lost at sea has been taken involuntarily out of the owner's possession and control by the forces of nature at work in oceans and waterways."\(^{62}\) Because owners of ships lost at sea did not "voluntarily" repudiate their ownership, shipwrecks were not considered abandoned, but still the property of the original owner. The passage of time alone is also not enough to render property abandoned.\(^{63}\) However, "[i]n the treasure salvage cases, often involving wrecks hundreds of years old, the inference of abandonment may arise from lapse of time and nonuse of the property."\(^{64}\) Additionally, common law has historically held that property "embedded" in the land is not subject to the law of finds but belongs to the owner of the land.\(^{65}\) This raises another issue with determining abandonment, as shipwrecks could be "embedded" in the sea floor which, depending on location, can be considered common property of humankind.\(^{66}\)

The question of abandonment of shipwrecks made its way all the way to the Supreme Court in 1998 in the case of \textit{California v. Deep Sea Research, Inc.}\(^{67}\) In \textit{Deep Sea Research}, a private salvage company filed an \textit{in rem} action (an action to determine rights over property) to claim salvors' rights over the \textit{Brother Jonathan}, a steamship carrying gold bullion that sank four and a half miles off the coast of California in 1865. Deep Sea Research claimed it was a salvor of the ship, since the insurance company that had paid the ships' owners now had title to the gold.\(^{68}\) California intervened, claiming the \textit{Brother Jonathan} was abandoned and embedded in the seafloor and, under the Abandoned Shipwrecks Act,\(^{69}\) belonged

\begin{footnotesize}
\begin{enumerate}
\item McQuown, supra note 51, at 295.
\item \textit{Id.} at 461 (quoting The Port Hunter, 6 F. Supp. 1009, 1011 (D. Mass. 1934)). \textit{See also} Eduardo M. Penalver, \textit{The Illusory Right to Abandon}, 109 MICH. L. REV. 191, 196 (2010) (abandonment requires the intentional and voluntary relinquishment of "right, title, and interest").
\item \textit{Id.} at 461.
\item \textit{Id.} (quoting \textit{ADMIRALTY AND MARITIME LAW}, § 15–7, 514).
\item McQuown, supra note 51, at 301.
\item \textit{See} UNCLOS art. 5 (discussing ownership of the deep seabed).
\item \textit{See infra} Part II.C for a discussion of the Abandoned Shipwrecks Act.
\end{enumerate}
\end{footnotesize}
to California. California argued that the Eleventh Amendment, which extends the doctrine of sovereign immunity to states, precluded Deep Sea Research from contesting California's claim to the ship. Both the district court and appellate court ruled in favor of Deep Sea Research, holding that for the Eleventh Amendment to apply, California must have "colorable title" by demonstrating the Brother Jonathan was in fact abandoned. California appealed to the United States Supreme Court. Although the question of whether the Brother Jonathan was abandoned was an issue in the case, the Supreme Court dashed the hopes of maritime lawyers seeking guidance on abandonment of historic shipwrecks and issued a narrow ruling focusing on the application of the Eleventh Amendment. The Supreme Court held that the Eleventh Amendment did not preclude admiralty in rem actions against states if the state did not in fact have "possession" over the shipwreck. Regarding abandonment, the Supreme Court unhelpfully stated that the meaning of "abandoned . . . conforms with its meaning under admiralty law." Subsequent cases have held that "warships" or ships that belonged to a sovereign cannot be subject to in rem actions on two main grounds. First, courts have held that sovereign nations must expressly abandon title to their ships, precluding actions asserting finders' claims of ownership. Second, courts have held that foreign nations are immune from suit in US courts, as codified by the Foreign Sovereign Immunities Act (FSIA). The United States' policy is that, categorically, any sunken warship is immune from salvage claims. International law decrees that neither the law of salvage nor the law of finds applies to wrecks of vessels owned by sovereign states. Another issue with applying the law of finds to shipwrecks is the concept of "control." How does one establish "control" over a vessel that can be thousands of feet under water? In the case of shipwrecks,

70. Jones, supra note 68, at 208.
71. U.S. CONST. amend. XI.
73. Id. at 209–11.
74. Id. at 211.
75. Id. at 205–06.
76. Id. at 211.
78. See, e.g., Sea Hunt Inc. v. The Unidentified Shipwrecked Vessel or Vessels, 221 F.3d 634 (4th Cir. 2000).
79. See, e.g., Odyssey Marine Expl. Inc. v. The Unidentified, Shipwrecked Vessel, 675 F. Supp. 2d. 1126 (M. D. Fla. 2009). The FSIA and its application to shipwreck cases will be discussed more in depth in Part III.A.2.
81. Id. at 146.
courts have applied a theory of "constructive possession" where finders can deposit part of a wreck with the court. 82

Looking at the law of salvage and the law of finds shows the difficulty of applying admiralty law to historic shipwrecks, particularly in regard to determining if and when a shipwreck has been "abandoned."

B. International Law

International law throws a further wrench into determining ownership of shipwrecks. Instead of looking solely at the original ownership of a wreck and applying the law of salvage and finds, international law also considers the physical location of the wreck and its status as historic or cultural property. While international law does recognize the cultural and historical value of shipwrecks, the fact that the United States is not a signatory to many international treaties means its application in US courts has been limited. However, international law's principle of honoring the cultural and historical value of artifacts provides helpful guidance when looking at the competing interests at stake in the salvage of historic shipwrecks.

1. UNCLOS Articles 303 and 149

The 1982 UN Convention on the Law of the Sea (UNCLOS) is "the most complex and far-reaching treaty ever concluded." 83 Coming into effect in 1994, UNCLOS consists of 320 articles and governs a range of issues, including the continental shelf, the creation of exclusive economic zones (EEZ), fishery rights, and scientific research operations. 84 UNCLOS codifies the existence of a 200-mile EEZ, where coastal nations have control over the harvesting of marine resources, and a twelve-mile territorial sea. 85 Although the United States never ratified UNCLOS, it accepts several of its tenets, including the existence of a 200-mile EEZ and the idea of the high seas belonging to "all nations" as customary international law. 86

Two specific articles of UNCLOS are relevant to determining the ownership of shipwrecks. Article 303 states that "States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose." 87 Article 303 also states that shipwrecks found in the contiguous zone

82. See infra note 162 and accompanying text for a discussion of constructive possession in the context of a shipwreck case.
84. Id.
85. Id.
86. See R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943, 965 (4th Cir. 1999) ("The mutual access to the high seas is firmly etched in the jus gentium.").
of a coastal state may not be removed without that state's permission.\textsuperscript{88} The contiguous zone extends twenty-four nautical miles offshore.\textsuperscript{89} Article 149 also addresses "objects of an archaeological and historical nature" found on the high seas.\textsuperscript{90} Article 149 requires that such artifacts "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 archaeological origin."

While both Articles 303 and 149 express the goals of preserving historical artifacts on the high seas, neither fully displaces traditional admiralty law.\textsuperscript{91} Additionally, neither Article explicitly establishes a mechanism for determining ownership of historical artifacts, although Article 149 seems to give preference to the country where the artifacts originated.\textsuperscript{92}

2. \textit{UNESCO Convention on the Protection of Underwater Cultural Heritage}

The UNESCO Convention on the Protection of Underwater Cultural Heritage provides further guidance on how international law should address historic shipwrecks. Proposed in 2001, one of the goals of the Convention on Underwater Cultural Heritage was "to prevent the exploitation of historic shipwrecks for profit."\textsuperscript{93} The Convention prohibits applying the law of salvage and finds unless doing so is required for the preservation of cultural heritage.\textsuperscript{94} While the Convention on Underwater Cultural Heritage espouses lofty goals, only thirty-one countries (not including the United States) are signatories to it.\textsuperscript{95} More countries may be hesitant to sign because of a fear that the Convention could potentially limit sovereign nations' activities in their own territorial seas, since the Convention requires States who have underwater cultural property in their jurisdiction to affirmatively search for and protect it.\textsuperscript{96} The Convention on Underwater Cultural Heritage also does not specifically lay out what constitutes "cultural heritage," instead defining it broadly as "[a]ll traces of human existence having a cultural, historical, or archeological character which have been partially

\begin{itemize}
\item \textsuperscript{88} Id.
\item \textsuperscript{89} See id. art. 33.
\item \textsuperscript{90} Id. art. 149.
\item \textsuperscript{91} Lang, supra note 47, at 400.
\item \textsuperscript{92} See UNCLOS art. 149. Article 149 states "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 archaeological origin."
\item \textsuperscript{93} Cheng, supra note 23, at 711.
\item \textsuperscript{94} Id. at 712–13.
\item \textsuperscript{95} Id. at 713.
\end{itemize}
or totally under water, periodically or continuously, for at least 100 years."97 Interestingly, this could apply to almost any human-made object once it reaches the requisite age, including "splinters from surfboards, broken coke bottles and lobster traps."98

While the Convention on Underwater Cultural Heritage's goal to protect historic wrecks is laudable, its overly-broad definition as to what constitutes underwater cultural heritage and proscriptive treatment of states who have underwater cultural property in their waters means that is not likely to be a widely accepted solution. States may not be willing or able to devote time and resources to discovering and salvaging historic artifacts as is required by the Convention, particularly since there is no limit as to what can be considered "cultural property."

3. Other Treatments of Cultural Property Under International Law

While there is minimal international law regarding shipwreck ownership specifically, applying international law regarding the ownership and disposition of cultural property to shipwrecks generally can provide further guidance. The idea of needing protections for cultural property first arose in the aftermath of World War II, where the devastation of historic sites across Europe and systematic looting by Nazis led to the realization that new laws were needed to preserve humankind's common cultural heritage.99 Scholars estimate that up to twenty percent of art in the Western world was expropriated during World War II.100 The 1954 Hague Convention recognized the need for special protection of cultural property during armed conflicts.101 The Hague Convention defined cultural property as "movable or immovable property of great importance to the cultural heritage of every people."102 In 1970, UNESCO refined the definition of cultural property to "property which, on religious or secular grounds, is specifically designated by each State as being of importance."103

While the 1954 Hague Convention applied only to cultural property threatened during wartime, in 1970 the UN Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership

97. Henn, supra note 96, at 175 (quoting the Convention on Underwater Cultural Heritage).
98. Id. at 176.
101. Harris, supra note 99, at 234.
of Cultural Property focused on the need of protecting cultural property from illegal trading on private markets. Additionally, the 1970 Convention explicitly recognized that property transferred from colonized people to a colonizing state is illicitly transferred and should be returned to its country of origin.

There are two competing theories regarding the proper place of cultural property. One, cultural nationalism, argues that cultural property belongs to its country of origin or the descendants of the people who created it. A competing view, cultural internationalism, argues that cultural property belongs to humankind as a whole. Such a view often justifies the placement of historic artifacts from around the world in Western museums, arguing that such institutions have the resources to preserve them and guarantee access to the greatest number of people.

Repatriation, or the return of illicitly traded goods to their country of origin, is the primary means to address stolen cultural property. Perhaps the most famous cases of repatriation involve the returning of artwork stolen by Nazis during the Holocaust to their rightful owners. The international community became interested in repatriating Nazi-looted art in the 1990s due to the recognition of the fiftieth anniversary of the Holocaust. One famous case involved the return of a Gustav Klimt portrait of Adele Bloch-Bauer I to the descendants of its former owner. Italy has also been aggressive in its pursuit of its antiquities: Italy has been engaged in a fifty-year battle for the return of an ancient Greek statue that was once lost at sea in antiquity, but that now stands on display at the Getty museum in Los Angeles. Egypt is pressing claims against the British Museum for the return of the Rosetta Stone and even the Sphinx’s beard. While there does seem to be a modern trend toward recognizing the cultural property rights of nations and people whose art was stolen from them, repatriation is a cumbersome, lengthy process. The most famous cases have also been primarily against

104. Hughes, supra note 2, at 136.
106. Kiwara-Wilson, supra note 4, at 397.
110. Id. at 64–65.
112. See generally Shuart, supra note 108.
113. See O’Donnell, supra note 109, at 64–65 (noting that the battle over Adele Bloch-Bauer I took over six years and was ultimately resolved through private arbitration outside of the court system).
flagship museums, which often fight tooth and nail to preserve their famous collections.

Current international law suggests that the countries of origin of looted and stolen artifacts should have preference, but disputes over ownership are often litigated in courts situated in the countries where the artifact is currently located. Such courts apply their own laws and see international law as merely advisory, if they even take note of it all.114

C. United States Case Law – Treasure Salvors, Inc. and the Abandoned Shipwrecks Act

Although only a few of the shipwrecks discussed in depth in this paper are located within the territorial sea or EEZ of the United States,115 providing an overview of the current statutory regimes operating in the United States provides insights into how US law values and manages historic wrecks. Similarly, with an estimated 50,000 wrecks off coastal US waters,116 including an estimated 4,000 sunken ships off the coast of Florida,117 it is only a matter of time before another historic wreck carrying artifacts from former Spanish colonies is uncovered in US waters. Such a dispute would likely be litigated in US courts.

Prior to 1987, claims to shipwrecks were adjudicated in US courts using traditional admiralty law. Litigation over historic wrecks also sometimes invoked the Antiquities Act, passed in 1906, and the Archaeological Resources Protection Act, passed in 1979.118 The United States passed the Abandoned Shipwrecks Act (ASA) in 1987, which abrogated the traditional law of finds and salvage as applied to shipwrecks within state waters.119 The ASA applies to wrecks "(1) embedded in submerged lands of a State; (2) embedded in coralline formations protected by a State on submerged lands of a State; or (3) on submerged lands of a State and is included in or determined eligible for inclusion in the National Register."120 The purpose of the Act was to allow states to take title of and manage historic shipwrecks with the goal of "allowing access to historians and sport divers."121

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114. See infra Part III.A.3 for discussion of a US district court's treatment of Peru's claims to treasure found on a Spanish galleon.

115. The Mercedes sank approximately thirty miles off the coast of Portugal; the San José is approximately sixteen miles off the coast of Colombia.


119. Curfman, supra note 107, at 195.

120. 43 U.S.C. § 2105(a).

121. Curfman, supra note 107, at 195.
Prior to the passage of the ASA, there were disputes between state and federal district courts over the ownership of shipwrecks in US coastal waters, with states claiming title to shipwrecks found within three miles of their coasts and federal district courts claiming they had sole jurisdiction over admiralty claims. The landmark 1978 case *Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel* encapsulated many of the tensions between state, federal, and international law and was a major factor in the passage of the ASA.

In *Treasure Salvors*, a private US company claimed to have discovered the wreck of *Nuestra Señora de Atocha*, a Spanish galleon which sank off the coast of Florida in 1622. Treasure Salvors located the wreck in 1971 "after an arduous search" and raised "gold, silver, artifacts, and armament valued at $6 million." Treasure Salvors filed an *in rem* action in district court asserting their claim to the treasure. The United States filed a counterclaim, arguing it had title under the Antiquities and Abandoned Property Act. The district court granted summary judgment to Treasure Salvors, and the government appealed. The Fifth Circuit affirmed the district court's decision, finding that the United States had no claim to the wreck under any laws existing at the time. Interestingly, the Fifth Circuit did not go so far as to state that Treasure Salvors had "exclusive title to, and the right to immediate and sole possession of, the vessel and cargo as to other claims if any there be, who are not parties or privies to this litigation." However, the Fifth Circuit did state that "[t]he Atocha is indisputedly an abandoned vessel."

The tale of the *Atocha* did not end there. After the Fifth Circuit's decision, Florida filed a separate suit claiming that it had title. The case made its way all the way up to the Supreme Court, which held that the Eleventh Amendment applies to shipwreck cases.
did not preclude in rem actions. The case of the *Atocha* was the "catalyst" that prompted Congress to pass the ASA in 1987. After the passage of the ASA in 1987, which gave states title to "abandoned" and "embedded" wrecks found in state waters, it is likely that *Treasure Salvors* would have gone a different way, with Florida succeeding on its claim. While the ASA applied to abandoned shipwrecks, its statutory language and subsequent court cases did little to clarify the meaning of the term "abandoned." In *Deep Sea Research*, discussed above, the Supreme Court intentionally refused to provide guidelines for determining if a historic shipwreck was abandoned. It was not until 2000 in *Sea Hunt Inc. v. Unidentified Shipwrecked Vessel or Vessels* that a US court revisited the question of whether sunken Spanish ships in US waters were abandoned.

*Sea Hunt* was the first time Spain successfully established a claim to a sunken Spanish vessel in US waters. *Sea Hunt*, a private salvage company, claimed to have found the remains of two Spanish naval vessels, *La Galga* and *Juno*, which sank off the coast of Virginia in 1750 and 1802, respectively. *Sea Hunt* filed suit in Virginia, alleging that Virginia was the rightful owner of the abandoned vessels under the ASA. The district court held that Spain had expressly abandoned its claim to *La Galga* after a 1763 treaty ending the Seven Years War between France, Spain, and England, but that Spain had not abandoned its claim to the *Juno*. The Fourth Circuit reversed the district court's holding regarding *La Galga*, analyzing the text of the 1763 treaty to show that it did not apply to "movable property located in coastal waters." The court noted that the United States was justified in supporting Spain's claim, as the United States has a strong interest in ensuring its 'sunken vessels and lost crews are treated as sovereign ships and honored graves, and are not subject to exploration, or exploitation, by private parties seeking treasures of the sea.' The court also noted that "[f]ar from abandoning these shipwrecks, Spain has vigorously asserted its ownership rights in this proceeding." However, the court failed to address the fact that it was not until after *Sea Hunt* had spent millions of dollars locating and salvaging the ships

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136. *Supra* notes 75–77 and accompanying text.
137. 221 F.3d 634 (4th Cir. 2000).
139. *Id.* at 1262.
140. *Sea Hunt*, 221 F.3d at 638.
141. *Id.* at 640. *Sea Hunt* had negotiated permits with the Virginia Marine Resources Commission to conduct salvage operations on historic wrecks off the Virginia coast. *Id.* at 639.
142. *Id.* at 640.
143. *Id.* at 644–46.
144. *Id.* at 647.
145. *Id.*
that Spain began to "vigorously assert its ownership rights." 146 *Sea Hunt* shows that Spain will still aggressively pursue title to ships lost hundreds of years ago and thousands of miles away from its shores. While the ASA attempted to provide some clarity over rights to abandoned shipwrecks, its failure to define the term abandoned has left the issue open to courts to decide. Additionally, because many historic wrecks in US waters originate from foreign nations, courts may also be hesitant to declare such wrecks abandoned, particularly if abandonment requires express repudiation of title, as seen in *Sea Hunt*.

III.

A TALE OF TWO SHIPWRECKS: NUESTRA SEÑORA DE LAS MERCEDES AND THE SAN JOSÉ

Two recent cases involving Spanish wrecks highlight the difficulties in determining ownership of shipwrecks and their artifacts, and the failures of existing legal regimes to address historical injustices committed by colonial powers in the Americas. In *Odyssey Marine Exploration Inc. v. Unidentified, Shipwrecked Vessel*, a US district court granted Spain's motion to dismiss an *in rem* action brought by a US company regarding a wreck purported to be the *Nuestra Señora de las Mercedes* discovered in international waters. 147 In *Odyssey Marine II*, the Eleventh Circuit affirmed the district court decision, holding that the *Mercedes* was immune from arrest under the Foreign Sovereign Immunities Act (FSIA). 148 The Eleventh Circuit also dismissed the claims advanced by Peru, which argued that many of the artifacts originated in Peru and were plundered by Spanish conquistadors. In contrast to *Odyssey Marine*, where a former colonial power retained rights to a sunken vessel containing Peruvian artifacts, in the case of the *San José*, Colombia, a formerly colonized country, is mounting an expedition to recover and salvage a sunken Spanish galleon containing artifacts that originated in South America.

A. Odyssey Marine Exploration Inc. v. Unidentified, Shipwrecked Vessel

*Odyssey Marine* is a more recent example of US courts awarding Spain title to long-lost sunken ships. Although the case raised provocative questions regarding Peru's rights to cargo it claimed were the spoils of colonialism, both the district court and Eleventh Circuit held that such questions were best left unanswered.

146. See id.
148. *Odyssey Marine II*, 657 F.3d at 1175.
1. Odyssey Marine's Discovery of the Nuestra Senora de las Mercedes

British forces sank the Spanish frigate Nuestra Senora de las Mercedes off Cape St. Mary, Portugal on October 5, 1804. For the next 200 years, the ship laid undisturbed at a depth of 1,100 meters. In 2006, Odyssey Marine mounted an expedition to search for sunken vessels in the historically heavily-trafficked sea lane off the coast of the Iberian Peninsula. In March 2007, Odyssey Marine discovered the remains of the Mercedes and recovered gold and silver coins from the wreck. Odyssey Marine transferred the gold and silver artifacts from the wreck to a secure location in Florida, and filed an in rem action in the district court, seeking a warrant of arrest against the ship. Odyssey Marine claimed that it owned the wreck and its cargo, or alternatively deserved "a liberal salvage award." Spain filed its own claim and motion to dismiss, asserting that the Mercedes was a Spanish naval vessel that Spain had never abandoned and was immune from arrest under the FSIA. Peru also filed a claim, asserting ownership over the Mercedes' cargo by alleging that the gold and silver originated in Peru.

2. Dismissal of Odyssey Marine's in rem Action and Appeal to the Eleventh Circuit

The district court granted Spain's motion to dismiss, holding "the ineffable truth of this case is that the Mercedes is a naval vessel of Spain and that the wreck of this naval vessel, the vessel's cargo, and any human remains are the natural and legal patrimony of Spain." The district court's order incorporated and adopted a report and recommendation from the magistrate judge. The magistrate judge's order was skeptical of Odyssey Marine's invocation of the law of finds, noting "Odyssey essentially seeks a judicial declaration that would give it exclusive title against the world to artifacts located on a plot of Atlantic seabed over 4,000 miles from this district." Odyssey Marine claimed that there was "no definitive archaeological evidence" that the ship was in fact the Mercedes, and thus Spain could not claim ownership. The district court rejected Odyssey Marine's

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149. Odyssey Marine I, 675 F. Supp. 2d at 1132–33.
150. Id. at 1130.
151. Odyssey Marine II, 657 F.3d at 1166.
154. Id.
155. Id.
156. Id.
157. Id. at 1129.
158. Id. at 1131 n. 4.
159. Id. at 1132.
argument, noting that there was "overwhelming circumstantial evidence pointing to the *Mercedes*—the location, coins, cannons, and artifacts."160

The report next analyzed whether the court had jurisdiction over the case. The magistrate judge observed a disconnect between a district court in Florida and a sunken Spanish vessel: "To the casual observer, it might seem odd that a federal court in this district would be tasked with adjudicating salvage claims to the remnants of a centuries-old shipwreck discovered off the European continent in international waters."161 The report then found that because Odyssey Marine had deposited an artifact of the ship with the clerk of the court, the court had "possession," allowing for the *in rem* action.162 While the court allowed Odyssey Marine to file its *in rem* claim, the court highlighted the need to "be sensitive to the principle of international comity when dealing with a dispute involving the exercise of extraterritorial jurisdiction, as the application of international law evokes a sense not only of discretion and courtesy but also of obligation among sovereign states."163

The next question the report addressed was whether the vessel, as property of Spain, was immune from suit under the FSIA, which states that a foreign State's property present in the United States is presumptively immune from suit unless an exception applies.164 The FSIA, which passed in 1976, codifies the doctrine of sovereign immunity, which, as the name suggests, immunizes foreign States from suit in US courts.165 Unlike more traditional applications of sovereign immunity, the FSIA has exceptions allowing citizens to bring suits against foreign nations under certain circumstances.166 These exceptions include suits with relation to property involved in "commercial activity" in the United States.167 In *Odyssey Marine I*, the court held that "[u]nquestionably, the *Mercedes* is the property of Spain,"168 and that Odyssey Marine failed to even attempt to prove that a FSIA exception applied.169 The report also dismissed Peru's claims to the artifacts,

160. *Id.* at 1134.

161. *Id.* at 1136.

162. *Id.* at 1137. The Court cited *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 496 (1998), noting that "the Supreme Court implicitly approved a salvor's presentation of a recovered artifact as the fictional equivalent of a wreck discovered in [domestic] waters." *Id.* This "constructive possession concept" also applies to "historic wreck[s] in international waters." *Id.* at 1137 (citing *R.M.S. Titanic*, 171 F.3d at 967–68).

163. *Id.* (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 cmt. a (1987)).


165. Redman, *supra* note 100, at 80–01.

166. *Id.* at 81.


168. *Odyssey Marine I*, 675 F. Supp. at 1140. The Court supported its reasoning with the following facts: the ship "was constructed in 1788 by Navy Engineers in the shipyard of the Spanish Navy in Havana, Cuba; commanded by officers and crewed by sailors of the Royal Spanish Navy throughout its service; and designated as a Spanish frigate of war. It remains on the Royal Navy's official registry of ships." *Id.* (internal citations omitted).

169. *Id.* at 1130–40.
noting the lack of applicable law and the court's hesitance to get involved in international disputes: "no court has ventured into waters far beyond its jurisdictional boundaries to resolve a dispute between two sovereigns over the remnants of one of the sovereign's sunken warships."  

Both Odyssey Marine and Peru appealed. Odyssey Marine claimed that the court erred in determining that no FSIA exceptions applied, arguing that the Mercedes was exempt from Spain's claims of sovereign immunity because only ships engaged in non-commercial activity were eligible for sovereign immunity under international law. The Eleventh Circuit was wary of the argument that granting immunity to non-commercial vessels under international law showed there was an intent to create an exception to the FSIA for foreign commercial activity, even though foreign commercial activity was not a listed exception. However, the Eleventh Circuit held that the line of reasoning was irrelevant because the "Mercedes was not engaged in commercial activity." Odyssey Marine ignored another possible FSIA exception, one that has often been used in art expropriation cases. Section 1605(a)(3) states "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case [] in which rights in property taken in violation of international law are in issue." Odyssey Marine could potentially have argued that the colonial exploitation of Peru violated international law, and thus Spain was not immune from suit. Neither Peru nor Odyssey Marine attempted to argue that § 1605(a)(3) applied, even though Peru's claims stemmed from the fact that the artifacts were originally stolen from indigenous Peruvians, which would have been a violation of international law.  

Peru's appeal rested on the claim that while Spain may have ownership of the Mercedes, Peru was the rightful owner of the artifacts on board that had originated in Peru, as Peru "has a patrimonial interest in cargo that originated in its territory." The Eleventh Circuit chose not to address the merits of Peru's claims. Instead, the court held that according to existing laws and for the "promotion of the comity interest," the cargo was not severable from the ship and, thus, immune from suit under the FSIA.

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170. "For disputes between competing sovereigns over underwater cultural heritage discovered in international waters, there is no customary international law." Id. at 1147.  
171. Id.  
172. Odyssey Marine II, 657 F.3d at 1176.  
173. Id.  
174. Id.  
175. See Redman, supra note 99 at 82.  
176. While Spain's exploitation of Peru occurred several hundred years before the enactment of the FSIA, the Supreme Court held in Republic of Austria v. Altmann, 541 U.S. 677 (2004), that FSIA exceptions can apply retroactively. See id. at 85.  
177. Odyssey Marine II, 657 F.3d at 1180.  
178. Id. at 1181–82.
The Eleventh Circuit's decision in *Odyssey Marine II* shows a court hesitant to extend jurisdiction over ownership disputes of sunken vessels found in international waters. While perhaps a correct application of the FSIA, the court's decision neglected to address key questions of fairness. While Odyssey Marine might have acted underhandedly in its discovery and exportation of the artifacts, the court's decision neglected to take into account the significant costs and expenses incurred by Odyssey Marine. Indeed, without the company's efforts and expenditures, the rich cultural treasures of the *Mercedes* would still be lost beneath the waves. Additionally, by refusing to address the merits of Peru's claims to the cargo that originated in Peru, the court intentionally avoided the issue of whether it was just to reward a former colonial power the fruits of its exploitation.

3. Peru's Claims to the Cargo

While both the district court and the Eleventh Circuit focused the bulk of their arguments on whether the United States had jurisdiction to hear the case, they both ignored one of the more interesting questions: how should courts deal with cargo found in shipwrecks that was arguably stolen from somewhere else? While the district court in *Odyssey Marine I* paid lip service to the difficulty of reconciling Spain's ownership claims with its bloody colonial past, both the district court and Eleventh Circuit chose to dodge the issue on jurisdictional grounds. It is easy to understand why US courts may find it in their best interest to avoid weighing in on "Peru and Spain's dispute [] intertwined with centuries of mutual history." This Note is not a court opinion, and will thus proceed in analyzing how Peru's claims could have been handled differently. Examining the context of Peru's claims to the *Mercedes's* treasure sheds light on the competing values at stake when determining the ownership of centuries-old wrecks and their cargo.

In *Odyssey Marine I*, Judge Steven Merryday in the opening of his opinion noted that he "reviewed with particular interest and admiration the statement on behalf of Peru by Professor John Norton Moore. . . who offers a provocative and scholarly elaboration of his observation that this case is not 'about sovereign rights over wrecks … or the dispute between salvors and sovereigns.'" Judge Merryday also noted that Moore's "aspirational notion that cultural, historical, and archaeological 'linkage' could be "the crucial linkage for recognizing sovereign state interest." However, Judge Merryday ultimately dismissed Moore's

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180. *See Odyssey Marine I*, 675 F. Supp. 2d at 1127. The court also characterized Peru's claim as "an equitable one grounded on claims of exploitation by its former colonial ruler." *Id.* at 1145.


182. *Id.* at 1129.

183. *Id.*
arguments, finding that his theories "are not the governing tools of decision in this case in the United States district court."\(^{184}\)

Despite Judge Merryday's insistence that Moore's arguments were not applicable in a US court, examining Moore's affidavit provides important guidance for how Peru could assert its claim of ownership over the Mercedes's cargo. Moore distinguished Peru's claims from those of Odyssey Marine, noting that Peru is not "a private individual seeking to bring an action against a sovereign" and thus the "case does not present a simple case sovereign request for immunity."\(^{185}\) Moore also argued that this district court was the proper place to adjudicate Peru's claims, as denying jurisdiction would "amount to a de facto adjudication" which would "effectively set aside international law and law of the sea repudiating colonialism and protecting national cultural heritage."\(^{186}\) While the report in Odyssey Marine I said that current international law compels US district courts to respect the "traditional notions of international comity" and stay out of the dispute between Spain and Peru,\(^ {187}\) Moore argues the opposite: international law requires that the court address Peru's claims to the Mercedes's cargo.

Moore's argument is directly at odds with the court's assertion that there "is no customary international law" for "disputes between competing sovereigns over underwater cultural heritage."\(^{188}\) Moore argues that the Convention on Underwater Cultural Heritage should govern, as the cargo of the Mercedes is over 200 years old and contains "objects of an archaeological and historical nature."\(^ {189}\) The Convention "severely restricts the law of salvage or law of finds" in regards to objects of cultural or archaeological significance.\(^{190}\) Moore also points out that UNCLOS Article 149 gives preference of ownership of artifacts to "the State or country of origin, or the State of cultural origin, or the State of historical or cultural origin."\(^ {191}\) While the United States is not a signatory UNCLOS, the United States has accepted other codified international laws, including UNCLOS's creation of a 200-mile EEZ.\(^ {192}\) Moore argues that Article 149 is, in effect, customary international law. However, the district court was not persuaded, stating that UNCLOS Article 149 did not apply because the Mercedes and her cargo were not on the "seabed . . . beyond the limits of national

\(^{184}\) Id.


\(^{186}\) Id. at 6.

\(^{187}\) Odyssey Marine I, 675 F. Supp. 2d at 1147.

\(^{188}\) Id.


\(^{190}\) Id. at 9.

\(^{191}\) Id. at 7. Spain also claimed that it, not Peru, was the rightful "country of origin" because Peru was not in fact a country at the time the gold was extracted.

\(^{192}\) Id. at 6.
Moore's most persuasive arguments are those that highlight the inequities of awarding Spain ownership of the treasure. Moore notes that the treasure "has not been in the physical possession of Spain for over 200 years, . . . has never been within the boundaries of modern Spain," and "was taken from Peru in a period now widely understood as a shameful exploitation of the native population of Peru." Peru's claim is supported by "the universal modern authority in opposition to colonialism, supporting preservation of culture, and protecting national sovereignty over natural wealth and resources."

Perhaps a sign of the strength of the argument that Peru is deserving of protection under international law to atone for the horrors inflicted upon its indigenous population by colonial Spain is that neither the district court nor Eleventh Circuit attempted to counter it. Out of the many competing claimants for the treasure of the Mercedes, it seems unjust that Spain, who stole the treasure, lost it, and then made no attempts to find it, should succeed on its claim. The court's holding in Odyssey Marine ignores the significant and costly efforts Odyssey Marine took to discover the Mercedes, as well as Peru's equitable claim to artifacts that originated in its territory.

B. The Wreck of the San José and Sea Search Armada, Inc. v. Republic of Colombia

The continuing legal dispute over the San José involves a formerly colonized nation, Colombia, bringing a claim of ownership to the salvaged artifacts from a sunken Spanish galleon. The basic facts of the San José case appear similar to Odyssey Marine: A US treasure hunting company, Sea Search Armada, located a vessel in foreign waters, sought to claim ownership, and saw its claims dismissed by a US court. While in Odyssey Marine, the court also dismissed the country of origin's claim to the salvaged artifacts, in San José, Colombia is continuing its salvage operation and opposing Spanish claims to the wreck.
The Sea Search Armada case has its origins in a three-hundred-year-old naval battle. On June 8, 1708, in the midst of the War of Spanish Succession, British forces fired on the San José, a treasure galleon sailing from the port of Cartagena, Colombia, to Europe. The galleon carried precious stones, silver, and gold from across Spain's vast colonial holdings. A British cannon shot ignited the galleon's powder, creating a massive explosion, sending the ship, its crew, and its cargo to the seafloor, where it would remain undisturbed and undiscovered for over 250 years.

1. Sea Search Armada v. Republic of Colombia

The legal dispute over the San José dates back to 1984, when Sea Search Armada (SSA), a private salvage company, claimed that the Colombian government had contracted with them to salvage the wreck. SSA alleged that it had disclosed the location of the wreck, but Colombia prohibited them from carrying out salvage operations. In 1989, Colombia passed a law stating that Colombia had all rights to the shipwreck site; SSA sued, arguing that the law violated Colombia's constitution. SSA won the lawsuit, but "Colombia refused to honor the ruling of the Colombia Supreme Court and permit SSA access to the site of the shipwreck." Over twenty years later, in 2010, SSA filed suit in the District Court for the District of Columbia, alleging breach of contract and conversion claims and requesting that the court enforce the ruling of the Colombian Supreme Court that SSA was entitled to half of the San José's treasure. Colombia moved to dismiss the case. The district court granted Colombia's motion, quickly deciding that both the breach of contract and conversion claims were time-barred, since both carried a three-year statute of limitations. The court also held that it could not enforce the judgment of the Colombia Supreme Court awarding SSA half of the San José's treasure, because the Uniform Foreign–Money Judgments Recognition Act, which allows US courts to enforce judgments from foreign jurisdictions, only applied to specific monetary judgments, and half of a wreck valued anywhere between $4 billion and $17 billion is "hardly a specific sum."

One wonders whether SSA might have had better luck in court if it had hired better lawyers; the judge in the case describes the "rather prolix Complaint" which

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201. Lang, supra note 47, at 384–85.
202. See id. at 385.
203. Id. at 386.
204. Sea Search Armada, 821 F. Supp. at 270.
205. Id.
206. Id.
207. Id. at 273–74
208. Id. at 275.
"then careens off the tracks" as well as noting the Complaint "reads like a Patrick O'Brian glorious-age-of-sail novel and a John Buchan potboiler of international intrigue." In any case, it is unlikely that SSA would be able to recover in US courts. However, the fate of the US-based salvage company is only a small part of the story—perhaps more salient will be the inevitable dispute between Colombia, who currently claims ownership, and Spain, who was the original owner of the San José.

2. **Sea Search Armada Contrasted with Odyssey Marine**

While the San José case bears some similarities to Odyssey Marine, the outcome in Sea Search Armada hinged on the application of a completely different area of law—contracts. Sea Search Armada necessarily focused on contract because SSA never made a claim of ownership to the vessel; the law of finds could not be applied. However, similar to the outcome in Odyssey Marine, the court again focused its decision on procedural issues. In Sea Search Armada, the court did not even discuss the merits of SSA's claim. There are also several important key factual differences between Sea Search Armada and Odyssey Marine. First, the San José is located sixteen miles off Colombia's coast, whereas the Mercedes lies off the coast of Portugal. Additionally, Sea Search Armada did not address any competing claims of Spanish ownership. One reason there was no discussion of Spain's ownership claim is that Sea Search Armada was not an in rem action; the court was not asked to determine who was the rightful owner of the vessel. Even if Spain had wanted to make a claim to the San José, it is unlikely that the court would have had jurisdiction. The vessel was not in US waters, and SSA had not deposited a piece of the ship with the court to establish constructive possession.

The San José wreck and its legal aftermath are a prominent example of a colonized country seeking to assert ownership over a sunken Spanish galleon. Spain may still pursue a legal claim to the wreck, although such a battle will likely take place outside US courts. If that happens, Colombia will have strong arguments for ownership—both the physical location of the wreck in Colombia's

209. *Id.* at 270–71.

210. *Id.* at 270.

211. See *Sea Search Armada*, 821 F. Supp. at 270-71. Although Sea Search Armada did bring a conversion claim, the court noted its skepticism of SSA's argument, stating "[e]ven were the conversion claim somehow to turn on Colombia's alleged refusal to comply with the Colombia Supreme Court's ruling, Plaintiff has failed to provide any dates for the Court to assess the timeliness of its Complaint." *Id.* at 273.

212. The court dismissed SSA's claims as time-barred. *Id.* at 270.


214. SSA's only claim relating to ownership was a conversion claim, which the court did not address the merits of, finding that claim was time-barred. *Id.* at 273.

215. See *supra* note 161 and accompanying text.
territorial sea and the legal principles of equity proposed by Moore. However, applying Moore's framework could also add a layer of complexity to the San José case. Spain's colonial holdings were vast, and it is likely that the treasure in its hold originated in several countries. An application of Moore's framework may require Colombia to defeat competing claims from other South American countries.

Examining these two cases shows that shipwreck disputes encompass several different legal fields, including contracts, international law, sovereign immunity, and traditional common law principles regarding salvage and finds. This hodgepodge of laws shows that there is no clear legal regime to settle shipwreck disputes—the outcome of these cases depends largely on where the wrecks were found and what court the claims were filed in. This lack of certainty and the tendency of shipwreck claims (at least in US courts) to become tangled in layers of procedural wrangling could in the long-run discourage exploration and discovery of new wrecks and push off the discussion of who should rightfully own cultural artifacts indefinitely.

IV.
A NEW REGIME FOR DETERMINING OWNERSHIP OF SHIPWRECKS AND CULTURAL ARTIFACTS

Current case law in the United States leaves much to be desired in its adjudication of shipwreck ownership. US courts have often refused to address issues of colonial exploitation and the theft of cultural property from indigenous peoples. Current international law, as discussed in Part II, provides guiding principles but is sporadically enforced. In this Part, I propose a new regime for dealing with ancient shipwrecks that prioritizes the discovery and preservation of artifacts, while honoring the claims of formerly colonized countries seeking to reclaim their lost treasures. Such a scheme strikes a balance between compensating private companies for their efforts in discovering shipwrecks while recognizing the importance of restoring cultural property to its country of origin.

216. See supra Part I.A for a discussion of the extent of Spain's empire in the Americas.
217. Arguably, Colombia has been able to sustain its claim to the San José because the ship, while conclusively a Spanish warship, is only sixteen miles off its coast. See Watts & Burgen, supra note 208.
218. For example, the United States is not a party to UNCLOS and US courts seem hesitant to get involved with deciding questions of international law.
219. The actual implementation and enforcement of this scheme is out of scope for this paper. Several authors have discussed the merits of the formation of an international committee to adjudicate shipwreck disputes. See, e.g., Henn, supra note 96, at 192–96; Lang, supra note 47, at 415–20. While this author remains skeptical that "committees are power, and committees make things happen. Committees are the lifeblood of our democratic system," see Parks and Recreation: Pilot, NBC Television Broadcast Apr. 6, 2009, some form of international group is needed to balance the
A. Ensure Private Companies are Awarded Finder's Fees

Perhaps the only thing that is clear about shipwreck ownership disputes is that the deck is stacked against private companies' claims of ownership. While arguably not the most pressing issue when deciding how to deal with a history of colonialism and plunder, compensating private companies has some benefits. Without clear methods for establishing finders' awards, private treasure hunting companies may be hesitant to make their finds public at all, choosing instead to salvage treasure in secret and sell it on the black market. A better scheme would be one that reimburses salvors' costs with a predetermined finders award. This would encourage salvors to discover and report more shipwreck sites. Treating private treasure hunting companies fairly would likely result in stronger protections for cultural property.

Additionally, creating a mechanism to reward private companies' salvage efforts would better guarantee fair compensation for their work. As discussed in Part I.B, salvage expeditions can cost millions of dollars. For example, in Odyssey Marine, the company utilized a $2 million ROV. The company also devoted additional resources to raise the treasure. Without the efforts of Odyssey Marine, it is likely that the Mercedes would still be lost beneath waves. However, because Spain was deemed to never have "abandoned" its ship, Odyssey Marine was left with nothing. Following Odyssey Marine's loss at the Eleventh Circuit, the company turned its efforts to locating deep-sea mineral deposits, finding shipwreck-discovery to be too risky an undertaking. Without private treasure hunters like Odyssey Marine, the bulk of marine artifacts would likely remain undiscovered. A Congressional report recognized that "more items are on public display as a result of artifacts [sport divers] have donated to museums and galleries than from any other source, including archaeologists."

Encouraging and facilitating partnerships between private companies and national governments can help to spur discovery of new wrecks and uncover historically significant artifacts. States are not likely to mount and fund their own expeditions to recover shipwrecks, which partly explains their hesitancy to sign on to the Convention on Underwater Cultural Heritage. While Odyssey Marine was unsuccessful in laying claim to the Mercedes, the company has attempted to work with governments to recover artifacts from shipwrecks. In 2002, Odyssey

competitively at stake in resolving shipwrecks. The composition and jurisdiction of such a committee is a topic for another day.

221. Varmer, supra note 118, at 294.
222. Capolitano, supra note 6.
223. However, Spanish archaeologists claim that Odyssey Marine damaged the wreck by carelessly recovering artifacts.
224. See Trigaux, supra note 36.
225. Harris, supra note 99, at 251–52 (quoting H. R. REP. No. 100-59, at 874 (1987)).
226. Henn, supra note 96, at 177.
Marine negotiated a deal with the British government to salvage The Sussex, a British warship which sank off the coast of Gibraltar in 1694. Odyssey Marine claimed to have located the ship in 2001 after searching for the ship since 1995. However, the original deal between Odyssey Marine and the British government appears to have stalled due to disputes with Spain over the salvage operations, as well as concerns from archaeologists over Odyssey Marine’s methods. Although the deal between Odyssey Marine and the British government has not resulted in the recovery of any meaningful artifacts so far, partnerships between private companies and governments could have several key advantages. Enlisting private companies to help locate and salvage shipwrecks should result in more discoveries, as governments may not have the funds nor political will to mount a years-long, multimillion-dollar treasure search, while private companies backed by investors may. Setting expectations between private companies and nations before salvage operations begin can also avoid the type of time-consuming and costly court proceedings, seen in Odyssey Marine and Sea Search Armada.

Finally, a collaborative deal worked out between private companies and governments could result in more uniform standards. Instead of the current paradigm, where private companies run their searches and salvage operations with little oversight, establishing set guidelines and processes upfront could ensure that salvors utilize proper archaeological techniques. Deals between private companies and national governments can mean that non-commercially valuable artifacts from a wreck are preserved and studied by archaeologists. Although budgeting for compensating private salvors may shift additional costs to governments, there are several ways to fund salvage awards. For example, it is


228. See Capolitano, supra note 6.


230. Spain has refused to allow permits to Odyssey Marine to conduct exploration activities in its territorial waters following the controversy over the Mercedes. See Chris Chaplow, HMS Sussex Part 3: Black Swan and Current Situation, ANDALUCIA.COM, http://www.andalucia.com/history/hms-sussex/black-swan. Odyssey Marine also seems to be moving away from the treasure hunting business, instead focusing its efforts on locating deep-sea mineral deposits. Trigaux, supra note 36.

231. See Henn, supra note 96, at 193. Although the country of Colombia is funding its own salvage operation of the San José, it is possible that such an operation would not have been possible without the earlier efforts of SSA. See Lang, supra note 47, at 389 (noting that although Colombia claims it located the ship without assistance from SSA, their source is an “unnamed academic” who allegedly located the vessel by studying a map uncovered in the Library of Congress).

232. Henn, supra note 96, at 192.

233. See supra Part III for a discussion of these two cases.

234. Henn, supra note 96, at 194–95.

235. See Varmer, supra note 118, at 297.
possible that some types of artifacts can be sold on the open market without impairing the historic record. There has been a robust trade in coal and wood slivers from the Titanic and Mary Rose, objects deemed to have little archaeological value.\textsuperscript{236} Another option for compensating salvors is to award them intellectual property rights to their discoveries, such as exclusive photography rights.\textsuperscript{237}

These agreements, of course, rely on trust between governments and private companies. As discussed in Part III.B, SSA alleges that the Colombian government reneged on its agreement to pay SSA a share of the San José treasure in exchange for SSA's efforts in locating the ship. Additionally, even when both parties proceed in good faith, as seen in the deal between Sea Hunt and the state of Virginia, Spain's successful claims over La Galga effectively derailed Sea Hunt's salvage operations.\textsuperscript{238}

The lesson that should be learned from Sea Hunt is that governments must pay attention to the incentives they create for private salvors. A private company, afraid that its finds could be seized by national governments, is more likely to conduct its salvage operations covertly and secretly auction away any artifacts to private bidders.\textsuperscript{239} After the ruling against Odyssey Marine, Odyssey Marine's general counsel stated, "in the future no one will be incentivized to report underwater finds. . . . [A]nything found with a potential Spanish interest will be hidden or even worse, melted down or sold on eBay."\textsuperscript{240} While the statement may be hyperbolic,\textsuperscript{241} the illicit trade in antiquities and cultural artifacts is a billion-dollar industry, and is second only to drug trafficking in terms of scale.\textsuperscript{242} The trade and looting of artifacts is not limited to land. For example, the opening of all of Greece's waters to recreational scuba diving has led to concerns of looting of archaeological sites by private divers.\textsuperscript{243} Recreational divers in the United States have also been known to pocket historic artifacts they find on the seafloor.\textsuperscript{244}

\textsuperscript{236} Id. at 292, 300.
\textsuperscript{238} See supra notes 139–145 and accompanying text.
\textsuperscript{239} See Werner, supra 179, at 1030–31.
\textsuperscript{240} Id. at 1031.
\textsuperscript{241} Id.
\textsuperscript{242} Hughes, supra note 2, at 131.
\textsuperscript{243} The vast majority of ancient Greek bronzes were recovered from shipwrecks, since statutes on land were often melted down to make coins or weapons. Lefteris Papadimas & Daniel Flynn, Sunken Greek Treasures at risk from scuba looters, REUTERS (Feb. 22, 2009), https://www.reuters.com/article/us-greece-treasures/sunken-greek-treasures-at-risk-from-scuba-looters-idUSTRE51M0C120090223.
\textsuperscript{244} See Paull, supra note 39, at 365.
Some argue that the proper way to preserve shipwrecks and historical artifacts is to leave shipwrecks where they lie, and US courts’ unforgiving treatment of private salvage operations means that important historical sites will likely remain undisturbed for future generations. Such an argument is also bolstered by the fact that many wrecks are also mass graves, and some believe that conducting salvage operations would be disrespectful to the dead. However, a policy that presumes that shipwrecks are best left alone ignores the research and educational potential of excavating wrecks. Shipwrecks serve as “time capsules” to the past, and discouraging excavation and exploration of wrecks means denying researchers important opportunities. The discovery and exploration of ancient shipwrecks have given researchers invaluable insights into the past. For example, the Mary Rose, an English warship which sank in 1545 and was raised in 1982, generated 19,000 artifacts. The Vasa is a Swedish flagship which sank on its maiden voyage in 1628 in Stockholm Harbor and laid almost perfectly preserved until it was raised by Sweden in 1961. Well-preserved Roman wrecks have also been raised and uncovered in the Mediterranean. A blanket preference for leaving shipwrecks where they lie will also reduce public access to these important historical artifacts. Leaving shipwrecks undisturbed means that only trained divers will be able to see them, a costly and often dangerous undertaking. The idea that modern technology, such as video or virtual reality, could allow the public to access shipwrecks from dry land is an interesting one, but it does not address the intangible value in being able to see historical artifacts in person. As will be discussed in Part IV.B, shipwreck

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245. See Varmer, supra note 118, at 288. Varmer notes that artifacts may be better preserved under the sea, and that new technologies may be developed in the future that will allow archaeologists to study these artifacts without risking damage. Id. Important archaeological context may be lost when items are raised to the surface for study. Id. at 289–90.


251. See Paull, supra note 39, at 364–65 (noting that recreational divers see shipwrecks as attractive dive sites).


253. See David Brieber et al., In the white cube: Museum context enhances the valuation and
artifacts also may be closely tied to the histories of formerly colonized nations, and their return to their country of origin can help restore those nations' cultural patrimony.

Additionally, concerns about human remains can be assuaged by acknowledging the long temporal gaps between a sailor's death and the shipwreck's discovery. While we may rightfully be disturbed facing the corpses of sailors and soldiers who perished aboard the *U.S.S. Arizona* during Pearl Harbor\(^{254}\) or seeing the haunting images of rows of empty shoes on the wreck of the *Titanic*,\(^{255}\) we may have less visceral reactions when encountering remains of a Roman sailor or Renaissance soldier. As it becomes less likely that surviving relatives recall the disaster, excavating a wreck with human remains can be accomplished provided that the human remains are dealt with respectfully.

**B. Relax the Presumption for Flagged Nations' Retaining Ownership**

Another necessary change to the current law regarding shipwreck ownership is the need to reduce the emphasis on "flagged nations" and look more at the total historical context of a shipwreck. As Odyssey Marine argued in *Odyssey Marine II*, the warships and galleons of colonial powers bear little resemblance to modern naval vessels. Although technically "owned" by the Spanish crown, many galleons were primarily engaged in trade between the Americas and Europe.\(^ {256}\) Although honing in on the exact identity of a ship does provide important historical context for artifacts, focusing on identifying the exact name of the ship to the exclusion of all else overlooks other important concerns.

The tortured reasoning that US courts use to determine if a wreck is "expressly abandoned" seems to focus on the least important part of wrecks. The value of historic wrecks, besides the pure monetary value of their cargo, is mostly found in their cultural and archaeological significance. However, US courts tend to ignore the history and cultural context and focus their inquiries solely on whether such a vessel is a "warship" and thus owned by a sovereign state. For example, in *Sea Hunt*, the Fourth Circuit spent several pages of its opinion analyzing the original meaning of the words in Article XX of a treaty ratified in 1763.\(^ {257}\) The Fourth Circuit even chided the district court for its attempt to look at *La Galga* in its historical context. The district court noted that the treaty should be interpreted "together with the background of the complete change of

\(^{254}\) See id. at 293.


\(^{256}\) See Tarver & Slape, *supra* note 19, at 117.

\(^{257}\) See *Sea Hunt*, 221 F.3d 634 at 644-47.
sovereignty in the North American colonies" after the end of the Seven Years War. The Fourth Circuit rejected the district court's interpretation, noting that the "plain meaning" of the words "continent of North America" meant land, and thus Spain had not abandoned La Galga, as the ship was in the sea.

Currently, determining whether the ships' flagged nation should retain ownership over a wreck involves a mix of factors. One of the key questions US courts ask is whether the vessel was a military vessel or otherwise owned by a sovereign. However, looking at state-ownership of vessels dating from the Age of Exploration does not perfectly align with a vessel being "military" or not. State-owned ships were heavily engaged in private enterprise, including transporting cargo and people. For example, the Spanish crown had a complete monopoly on trade to and from the Americas until the late 1700s—so any Spanish vessel engaging in legal commercial activity between 1500-1700 was likely a vessel owned by the Spanish crown. Additionally, trying to figure out the exact identity of a wreck and what country it came from can be a fraught endeavor: for example, in *Global Marine Exploration, Inc. v. The Unidentified, Wrecked, and (For Finders-Rights Purposes) Abandoned Sailing Vessel*, Global Marine Exploration attempted to fend off a claim from France that a shipwreck was that of *La Trinité*, which sank off the coast of Florida in a hurricane in 1565. If the ship was *La Trinité*, then it was a vessel owned by the French crown and would be immune from arrest under the FSIA. Global Marine Exploration argued that the ship was not a French vessel, but a Spanish ship which had completed a raid on an early French colony, which would account for the presence of French cannons and a stone bearing the arms of France. While an interesting academic exercise for the court, involving delving into survivors' accounts and hypothesizing how far survivors of the shipwreck could reasonably have travelled on foot in the mid-sixteenth century, it is not clear how such an analysis fulfills the goals of equitably determining ownership. Other than for procedural purposes, there is no explanation of why determining if a four-hundred-year-old ship was originally French or Spanish should be a dispositive question regarding current ownership. Both countries have had 400 years to retrieve their wreck.

259. *Sea Hunt*, 221 F.3d at 644 ("We disagree with the district court's interpretation.").
260. Id.
261. *See Tarver & Slape, supra* note 19, at 117.
263. Id. at 1224.
264. Id.; *see supra* notes 162–165 and accompanying text for a discussion of the FSIA.
Relying on the original country of ownership of old vessels further complicates negotiations between private companies and governments over salvage operations. For example, in both Sea Hunt and Global Marine Exploration, both companies had received permits from the states of Virginia and Florida, respectively, to conduct exploration and salvage operations in those states' waters. Both deals were scuttled when France and Spain stepped in and asserted ownership. Basing ownership decisions of wrecks solely on the original country of ownership creates uncertainty and ambiguity, particularly where the identity of the ship is disputed, as seen in both Odyssey Marine and Global Marine Exploration.

When the exact identity of a ship cannot be determined, a preferable regime is one that looks at a wreck in its full historical context and focuses less on what flag the ship was sailing under. Because this paper argues that the place of origin of the artifacts is more important than the country of origin of the ship, spending time debating whether a ship was a French merchant vessel or warship misses the point, particularly since the designation of a vessel as a "warship" can be dispositive of any alternative ownership claims. A ship carrying cargo and settlers to the Americas is arguably more important to the history of France and Spain's former colonies, now independent countries, than to modern-day France and Spain. For example, the wreck of La Trinité changed the course of Florida's history. Had La Trinité made it to its destination, Florida may well have had a French, as opposed to Spanish, colonial presence, changing the course of United States history. The rightful place of La Trinité and its artifacts is arguably not in France, but Florida. In fact, France and Florida have agreed to jointly restore and exhibit the artifacts from La Trinité, suggesting that France itself recognizes the importance of the ship to Florida's history.

One of the main arguments for respecting countries' claims over their flagged vessels is that the United States has an interest in keeping private treasure hunters away from its own sunken military vessels. In the 1980s, the US State Department issued a letter stating that warships "sunk during military hostilities..."
are presumed not to be abandoned." They issued the letter in response to an inquiry regarding Japanese ships sunk during World War II. However, vessels sunk during World War II are very different from centuries-old wrecks, and concerns over losing military technology or desecrating graves grow less important over time. Upholding or denying Spain's claim to the *Mercedes* likely has little impact on addressing claims to more recently sunk naval ships. Establishing a statute of limitations which says that wrecks are considered abandoned after two hundred years, or to wrecks that sank before the twentieth century, would not lead to a mass treasure-hunting run on sunken US warships.

C. Ensure That the Countries' Where Treasure Originates Get Their Fair Share

Once we relax the presumption that a ship's nation of origin should have ownership rights, we are left with the more difficult question of deciding who gets ownership. Current international law principles can be helpful but can only get us so far. Both UNCLOS articles 149 and 303 and the Convention on Underwater Cultural Heritage embody lofty goals but provide little practical guidance in resolving ownership disputes. In a post-colonial world, it is also important to consider the equitable considerations of awarding long-lost shipwrecks to former colonizers who plundered their treasure from indigenous people. A new ownership regime must take into account that many sunken treasures were stolen from exploited peoples.

The evolution of our perception of colonizers and private treasure hunters can be seen in the language of US courts' opinions. For example, in *Treasure Salvors*, the court opens by framing the case as "rooted in an ancient tragedy of imperial Spain, and embrac[ing] a modern tragedy as well. The case also presents the story of a triumph, a story in which the daring and determination of the colonial settlers are mirrored by contemporary treasure seekers." In contrast, by the time of *Odyssey Marine* and *Sea Search Armada*, the court seemed less inclined to reward private treasure hunters for their "daring and determination." However, this level of skepticism has not extended to Spain. US courts seem to give great deference to Spanish claims over wrecks, and the federal government has intervened in defending Spain's claims. Although this deference makes some sense in terms of the United States' national interest in protecting its own sunken naval vessels, couching arguments over ownership of long-lost ships in upholding "comity" between sovereign nations does a disservice

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275. *Id.*
276. *See supra* Part II.B.
278. *Id.*
279. The US government supported Spain's claims in both *Sea Hunt* and *Odyssey Marine.*
to Peru's history and the history of its indigenous people. As Moore notes, "an equally compelling . . . reason" to reward Peru some of the cargo from the *Mercedes* is that the artifacts "were removed during a period of odious colonialism, with a widespread looting of gold, silver and other precious commodities as the fruits of forced labor."\(^{280}\) Returning artifacts to Peru could signal that the international community recognizes the lasting harms of colonialism.

A more equitable approach to determining shipwreck ownership claims would be to make the recovered cargo severable from its ship, and to award artifacts to the country from which they originated. Although the Eleventh Circuit held in *Odyssey Marine II* that cargo was not severable under the ASA and Sunken Military Craft Act,\(^{281}\) the court also acknowledged that neither statute speaks explicitly to the issue.\(^{282}\) However, one downside of making cargo severable from a wreck is that it vastly complicates the process of determining ownership. For example, in the case of the *Mercedes*, twenty-five individuals also put forth claims to the cargo, claiming that they were descendants of the original owners of the cargo or else had an ancestral interest in the cargo.\(^{283}\) Adjudicating the provenance of every single artifact would be arduous and time consuming, as after hundreds of years it may be difficult, if not impossible, to identify the original owner of the cargo. Making cargo severable could also lead to disputes between multiple nations. The *San José* and its cargo are currently claimed by Colombia, but the wreck likely contains artifacts that originated elsewhere in the vast holdings formerly under Spanish colonial rule.

Various repatriation movements can provide guidance in addressing artifacts recovered from historic shipwrecks. Post-World War II, there has been a trend toward returning cultural patrimony to the people from whom it was stolen, most famously in the cases involving art stolen by the Nazis.\(^{284}\) However, unlike famous looted artworks, the artifacts found in shipwrecks are much less easily identifiable—they are often a mix of treasures, and oftentimes these cultural objects were melted down into non-descript gold ingots to save space in ships' holds.\(^{285}\) Unlike treasures uncovered in archaeological digs, which for the most part have not travelled far from their place of origin, treasures found in shipwrecks by their very nature are often hundreds if not thousands of miles away from their point of origin. The idea of repatriation also does not address the line between

\(^{280}\) Affidavit of John Norton Moore, *supra* note 185, at 11.

\(^{281}\) *Odyssey Marine II*, 657 F.3d at 1180.

\(^{282}\) *See id.* at 1181 (noting "[w]hile the SMCA and the ASA do not state cargo is part of the vessel for immunity purposes, they show the protections awarded to a sunken sovereign vessel also extend to the cargo aboard that vessel.").

\(^{283}\) *Id.* at 1168 ("one individual claimed an ancestral interest in any of Spain's treasure in Florida.").

\(^{284}\) O'Donnel, *supra* note 109, at 64–65.

\(^{285}\) *See Cartwright, supra* note 15 (describing Pizzaro's melting down of Peruvian treasure during his conquest of the Incan empire).
object and art; does gold and silver bullion, although extracted through forced labor, have the same cultural value as a painting or statue? Additionally, the repatriation movement focuses primarily on art and artifacts once they have entered a private market. It does not provide much guidance on addressing conflicting interpretations of the origin of a certain object. Finally, and most importantly, repatriation movements are often influenced and swayed by public opinion.286 Certain repatriation efforts have gained widespread national attention, while other looted artifacts, such as the Benin Bronzes, remain ensconced in western museums.287

While repatriation as currently implemented may not be applicable in all ways to sunken artifacts, the goal of returning looted art and artifacts to their country of origin is still worth pursuing. The fact that the debate over ownership of sunken treasures comes before they have been sold on the market to buyers means that one hurdle of the art repatriation movement is already overcome. Instead of having to take property from a museum or private buyer who may have believed they were acting in good faith, the property raised from shipwrecks has no clearly established owner. Because many valuable artifacts found on ships, such as coins, come in multiples, if several formerly colonized countries make claims to the treasure, one potential solution is to divide it into shares. Another option is the creation of some kind of travelling exhibit, the proceeds of which could be split among several nations. This could potentially reconcile the two competing interests of honoring a country’s claim to cultural property while also allowing global access.291

While it may never be easy to fairly adjudicate who owns historic shipwrecks and their artifacts, a new paradigm is needed to establish ownership of sunken treasure taken from colonized nations. Such a theory lies in basic principles of fairness: Spain should no longer be rewarded for exploiting the labor of others. Rewarding the salvors for their efforts can encourage future shipwreck discoveries and prevent artifacts from disappearing from the archaeological record after being sold on the black market. Relaxing the presumption that

286. See O'Donnell, supra note 109, at 50 (describing restitution as "bedeviled by 'politically radioactive' litigation"); Hughes, supra note 2, at 133.
287. See Kiwara-Wilson, supra note 4, at 386.
289. See Hughes, supra note 2, at 133.
291. See supra Part II.B.3 for a discussion of the competing theories of cultural nationalism and internationalism.
original owners of ships should retain ownership of the cargo by default overlooks the impacts of colonialism and can lead to protracted disputes. Finally, a scheme that prioritizes claims by formerly-colonized countries recognizes the value of their stolen cultural artifacts and provides some restitution for a bloody colonial past.

CONCLUSION

From the shores of Hispaniola to a Florida district courtroom, this discussion of shipwrecks has sailed through space and time. Looking at historic shipwrecks in the context of cultural property, and not just as subjects of admiralty law, provides new avenues for dealing with the legacy of colonialism. The movement to repatriate and protect stolen cultural property, which first arose from the ashes of World War II, can also provide a means of redress to the victims of colonialism. A legal regime that treats artifacts recovered from shipwrecks as belonging to their country of origin is one small attempt to right the wrongs of the past.