

NOTE

UNESCO AND THE BELITUNG SHIPWRECK: THE NEED FOR A PERMISSIVE DEFINITION OF “COMMERCIAL EXPLOITATION”

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I. INTRODUCTION

In 1998, fishermen diving for sea cucumbers off the coast of Belitung Island in Indonesia accidentally discovered the wreck of a ninth-century AD Arabian ship laden with cargo from Tang dynasty China.¹ Looting began almost immediately.² The Indonesian government could not afford to protect or recover the shipwreck, so it granted a salvage permit to Seabed Explorations, a German company with experience in the region, in an effort to both preserve the artifacts and prevent them from being dispersed in a manner that would leave them unknown to the public and the academic community.³ Within two years of receiving the permit, Seabed recovered over sixty-three thousand artifacts, which it later sold as a complete collection to the government of Singapore for \$32 million.⁴ Singapore built a permanent museum installation for the shipwreck, and in conjunction with the Smithsonian Institution,

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1. Elizabeth Bartman, *From the President: The Belitung Shipwreck*, *ARCHAEOLOGY*, Sept.–Oct. 2011, available at <http://archive.archaeology.org/1109/departments/president.html>; Press Release, Freer Gallery of Art & Arthur M. Sackler Gallery, Media Backgrounder: Discovery, Recovery, Conservation and Exhibition of the Belitung Cargo (Mar. 16, 2011) [hereinafter Media Backgrounder], <http://www.asia.si.edu/press/2011/prShipwreckedBackgrounder.asp>; Sonia Kolesnikov-Jessop, *Ancient Arab Shipwreck Yields Secrets of Ninth-Century Trade*, *N.Y. TIMES* (Mar. 7, 2011), <http://www.nytimes.com/2011/03/08/arts/08iht-singshow08.html>.

2. Bartman, *supra* note 1; Laura Gongaware & Ole Varmer, *Tang Cargo: To Exhibit or Not to Exhibit—What Is Best for This Cultural Resource?*, *LAWYERS’ COMM. FOR CULTURAL HERITAGE PRES. BLOG* (Aug. 15, 2011, 11:28 AM), www.culturalheritagelaw.org/blog?mode=PostView&bmi=676757.

3. Bartman, *supra* note 1; Gongaware & Varmer, *supra* note 2; Media Backgrounder, *supra* note 1.

4. Bartman, *supra* note 1; Gongaware & Varmer, *supra* note 2.

organized a five-year traveling exhibition to allow people all over the world to see the artifacts.⁵

The recovery of the Belitung Shipwreck complied with Indonesian and arguably customary maritime law.⁶ The Smithsonian Institution, which was involved in the initial organization of the traveling exhibition, however, has expressed ethical concerns about displaying artifacts that were recovered by a commercial salvage company and sold for profit.⁷ Their concerns relate to language in the 2001 United Nations Educational, Scientific, and Cultural Organization's (UNESCO) Convention on the Protection of the Underwater Cultural Heritage (2001 Convention).⁸ Article 2(7) of the Convention states that "[u]nderwater cultural heritage shall not be commercially exploited," and Annex Rule 2 states that, "[t]he commercial exploitation of underwater cultural heritage for trade or speculation or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of underwater cultural heritage. Underwater cultural heritage shall not be traded, sold, bought or bartered as commercial goods."⁹

These provisions mirror longstanding professional standards followed by some museums and most archaeological organizations.¹⁰ Such organizations have traditionally believed that "commercial exploitation" is antithetical to their mission of preserving cultural heritage for scientific and public benefit.¹¹ The Smithsonian, therefore, understandably feels as though exhibiting the Belitung artifacts would violate important professional standards that have recently been given international legitimacy by UNESCO.¹² Unfortunately, the 2001 Convention does not define "commercial

5. Bartman, *supra* note 1; Gongaware & Varmer, *supra* note 2; Media Backgrounder, *supra* note 1.

6. *Cf.* Gongaware & Varmer, *supra* note 2 (explaining that the recovery complied with Indonesian law and presenting arguments from both sides on the question of customary law).

7. *Id.*; Media Backgrounder, *supra* note 1.

8. Gongaware & Varmer, *supra* note 2; Media Backgrounder, *supra* note 1.

9. Convention on the Protection of the Underwater Cultural Heritage art. 2(7), Annex r. 2, *adopted* Nov. 2, 2001, 559 U.N.T.S. 8164 (entered into force Jan. 2, 2009) [hereinafter 2001 Convention].

10. *Cf., e.g.*, Gongaware & Varmer, *supra* note 2 (describing an instance where the Smithsonian considered professional ethics).

11. *See, e.g.*, Bartman, *supra* note 1; Elizabeth Bartman, *Statement on Belitung Shipwreck*, ARCHAEOLOGICAL INSTIT. AM. (June 8, 2011), <http://www.archaeological.org/news/advocacy/5260>; Press Release, Freer Gallery of Art & Arthur M. Sackler Gallery, Smithsonian Hosts Discussion on Issues Surrounding the Exhibition of the Belitung Cargo (Apr. 25, 2011) [hereinafter Smithsonian Hosts Discussion], <http://www.asia.si.edu/press/2011/prShipwreckedDiscussion.asp>.

12. Gongaware & Varmer, *supra* note 2.

exploitation,” so it is difficult to know which activities are violations.¹³

The controversy surrounding Indonesia’s efforts to preserve the shipwreck illustrates that, by basing an international convention on professional standards followed by a limited number of Western cultural institutions, the UNESCO Convention frustrates its own stated purpose of preserving artifacts for scientific and public benefit. Specifically, the Convention’s vague, restrictive proscription of “commercial exploitation” disincentivizes responsible efforts to prevent permanent destruction of archaeological materials.

The Belitung Shipwreck is an apt illustration of this problem. Although the Belitung excavation would have violated UNESCO’s absolute condemnation of commercial involvement in underwater cultural heritage management, it otherwise conformed to the Convention’s goals and rules. In this case, commercial salvage was the only realistic means of protecting the artifacts from looting and dispersal. Adherence to the 2001 Convention’s strictures would have made it impossible for the Indonesian government to make a good-faith effort to preserve the Belitung Shipwreck for study and display. Indonesia’s response to the discovery of the Belitung Shipwreck demonstrates that State-sanctioned “commercial” activity following the best scientific practices that circumstances allow can be part of an effective cultural heritage management program.

The 2001 Convention should be modified to permit State-approved commercial recovery of underwater cultural heritage in a manner that is scientifically responsible and enables academic research. Including a permissive definition of “commercial exploitation” in Article 1 would be a simple way to make this change. Without this modification, scientists and the public, especially in Western countries, are likely to permanently lose access to valuable underwater cultural heritage.

This Note first examines the 2001 Convention’s practical effects on both the recovery of underwater cultural heritage in general and the artifacts recovered from the Belitung Shipwreck in particular. Next, it demonstrates that Indonesia did everything it reasonably could to preserve the Belitung Shipwreck, and that its actions

13. Article 1 of the 2001 United Nations Educational, Scientific, and Cultural Organization’s (UNESCO) Convention on the Protection of the Underwater Cultural Heritage (2001 Convention) defines several terms, but “commercial exploitation” is not among them. See 2001 Convention, *supra* note 9, art. 1.

largely adhered to the Convention's spirit and requirements.¹⁴ Finally, it argues that the Convention could better achieve its goals if it contained a definition of "commercial exploitation" that permitted States to responsibly utilize private salvage companies, rather than abiding by the restrictive rule favored by academic archaeologists.

II. BACKGROUND

The rules laid out in the 2001 Convention depart dramatically from the traditional law of the sea.¹⁵ Protecting underwater archaeological sites requires such a departure because traditional law does not recognize underwater cultural heritage as a distinct kind of property.¹⁶ The 2001 Convention clearly defines and lays out specific procedures for preserving cultural heritage, which properly focus on the long-term interests of both the scientific community and the general public.¹⁷ Some of the concerns, however, that nations with extensive maritime heritage expressed during negotiations leading up to the Convention's creation have proven to be well founded.¹⁸ The Belitung Shipwreck, in particular, demonstrates some of the consequences of applying the convention's lofty standards to complicated real-world situations.

14. Of course, the 2001 Convention did not exist at the time of the Belitung Shipwreck's recovery. Also, Indonesia is not yet a signatory, although it is apparently currently working with UNESCO to develop the expertise it will need to join. See Ulrike Guérin, Sec'y of the 2001 Convention, UNESCO, Remarks at the Lawyers' Committee for Cultural Heritage Preservation 2011 Annual Conference: Keeping the Lid on Davy Jones' Locker: The Protection of Underwater Cultural Heritage from Titanic to Today (Nov. 3, 2011) (recording available at <http://vimeo.com/album/1798869/video/34734283>).

15. For example, the traditional law of salvage and law of finds are significantly abrogated. See, e.g., Guido Carducci, *New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage*, 96 AM. J. INT'L L. 419, 425 (2002).

16. See, e.g., *Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*, 675 F. Supp. 2d 1126, 1147 (M.D. Fla. 2009); James A.R. Nafziger, *Evolving Role of Admiralty Courts in Litigation Related to Historic Wreck*, 44 HARV. INT'L L. J. 251, 261-63 (2003).

17. See 2001 Convention, *supra* note 9, *passim*.

18. For example, some States feared that the decision to treat all artifacts that are more than one hundred years old the same would be logistically burdensome. This lack of a "significance test" has led many major maritime nations, such as Great Britain and the United States, to reject the convention. See, e.g., Sarah Dromgoole, *United Kingdom, in THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: NATIONAL PERSPECTIVES IN LIGHT OF THE UNESCO CONVENTION 2001* 313, 338-39, 375-76 (Sarah Dromgoole ed., 2d ed. 2006).

A. *The Customary Law of the Sea and Culturally Significant Shipwrecks*

The customary law of the sea developed gradually from Classical times.¹⁹ Rather than a set of international agreements, the customary law of the sea is a collection of standards to which most States voluntarily adhere.²⁰ It primarily evolved to resolve commercial disputes, and therefore mainly addresses shipping issues and related torts.²¹ The 1982 United Nations Convention on the Law of the Sea (1982 Convention), which defines key principles, rights, and responsibilities related to use of the oceans, affirms that general international law governs maritime issues not explicitly regulated by the United Nations.²²

Although the customary law of the sea lays out rules governing the recovery of disabled and sunken vessels, it does not recognize the need to preserve underwater cultural heritage or distinguish between shipwrecks that are culturally or historically significant and those that are not.²³ Numerous States recognize the need to protect archaeologically significant shipwrecks, but customary international law does not provide direction for achieving this goal.²⁴

Recognizing the need for international standards regarding disputes over underwater cultural heritage, the drafters of the 1982

19. THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 1-1 (5th ed. 2011). The earliest known codification of Maritime Law comes from tenth-century BC Rhodes. See Tullio Scovazzi, *The Application of "Salvage Law and Other Rules of Admiralty" to the Underwater Cultural Heritage: Some Relevant Cases*, in THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: BEFORE AND AFTER THE 2001 UNESCO CONVENTION 19, 78 (Roberta Garabello & Tullio Scovazzi eds., 2003). A better-preserved tradition comes from the sixth-century AD law codes of Justinian. See *id.*

20. Many question the purported universality of the law of salvage. U.S. courts regard the customary law of the sea as a *jus gentium* ("law of nations"), and have so since the nation's founding. *Odyssey Marine Exploration*, 675 F. Supp. 2d at 1136. Other nations follow similar practice. *Id.* U.K. courts, however, treat what the United States views as the customary law of the sea simply as national law. See Guido Carducci, *The Crucial Compromise on Salvage Law and the Law of Finds*, in THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: BEFORE AND AFTER THE 2001 UNESCO CONVENTION 193, 196 (Roberta Garabello & Tullio Scovazzi eds., 2003); Nafziger, *supra* note 16, at 261.

21. See SCHOENBAUM, *supra* note 19, § 1-1.

22. U.N. Convention on the Law of the Sea, art. 303(1), pmbl., *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994); see Carducci, *supra* note 15, at 419; Carducci, *supra* note 20, at 197.

23. *Odyssey Marine Exploration*, 675 F. Supp. 2d at 1147; see, e.g., Nafziger, *supra* note 16, at 261-63; Scovazzi, *supra* note 19, at 78.

24. For specific national approaches, see THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: NATIONAL PERSPECTIVES IN LIGHT OF THE UNESCO CONVENTION 2001 (Sarah Dromgoole ed., 2d ed. 2006).

Convention included Article 303, which declares that “[s]tates have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.”²⁵ They also included Article 149, which provides the following:

[a]ll objects of an archaeological and historical nature found in [international waters] 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.²⁶

Nevertheless, Article 303 foregoes any attempt to modify the customary law of the sea by declaring that “[n]othing in this article affects the rights of identifiable owners, the law of salvage, or other rules of admiralty.”²⁷ The 1982 Convention also declines to establish standards regarding the protection of underwater cultural heritage and neglects to say how disputes over such material should be resolved.²⁸

Even more surprising, the 1982 Convention does not define the class of objects that States must protect and preserve for the benefit of mankind.²⁹ This omission alone makes the 1982 Convention incapable of providing guidance because notions of what is culturally or historically significant are constantly shifting and vary greatly between cultures.³⁰ Absent adherence to the 2001 Conven-

25. U.N. Convention on the Law of the Sea, *supra* note 22, art. 303(1). The United States is not a party to this convention.

26. *Id.* art. 149.

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

28. Carducci, *supra* note 15, at 420; Tullio Scovazzi, *A Contradictory and Counterproductive Regime*, in *THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: BEFORE AND AFTER THE 2001 UNESCO CONVENTION* 3, 4–5 (Roberta Garabello & Tullio Scovazzi eds., 2003).

29. *See* Carducci, *supra* note 15, at 420.

30. The constantly shifting definition of cultural heritage was discussed at a recent conference at the National Trust for Historic Preservation in Washington, D.C. *See* Richard M. Leventhal, Professor of Anthropology, Univ. of Pa. & Am. Section Curator, Univ. of Pa. Museum of Archaeology & Anthropology, Remarks at the Lawyers' Committee for Cultural Heritage Preservation 2011 Annual Conference: Keeping the Lid on Davy Jones' Locker: The Protection of Underwater Cultural Heritage from Titanic to Today (Nov. 3, 2011). In essence, different cultures have widely differing views of the value of archaeological material, and in the future, any given culture may decide that something it currently thinks has no value is in fact worthy of preservation. Not surprisingly, valuation of cultural heritage tends to increase with a society's overall economic development and the possibility of using that heritage to attract tourism revenue. *See* Dromgoole, *supra* note 18, at 312. As an example of how mutable the concept of what constitutes a culturally significant artifact can be, consider the black-and-red-figure vases made in Athens during the sixth and fifth centuries BC. In ancient Athens, vases decorated with figural scenes were likely simply aristocratic commodities. *See, e.g.*, Elisavet Stasinopoulou-Kakarouga, *Attic Vase Painting*, in *ATHENS-SPARTA* 105, 105–09 (2006). Etruscans (an indigenous Italian people) able to

tion, therefore, underwater cultural heritage is governed entirely by the law of the sea.³¹ Consequently, the law of salvage and the law of finds are the traditional means of determining title for historical shipwrecks.³² Under the customary law of the sea, private salvage companies are free to locate, recover, and sell the contents of shipwrecks regardless of the contents' historical or cultural significance.³³

B. *How the 2001 Convention Seeks to Protect Underwater Cultural Heritage*

The 2001 Convention responds to the customary law of the sea's inability to ensure the preservation of historical shipwrecks by binding signatories to a set of rules specifically addressing the treatment of underwater cultural heritage.³⁴ It also categorically forbids, but does not define, "commercial exploitation."³⁵ The 2001 Convention's strictures have had some unintended consequences, however, as illustrated by the case of the Belitung Shipwreck.

1. History and Purpose of the 2001 Convention

The 2001 Convention seeks to address pressing threats to underwater cultural heritage and to resolve legal issues that sometimes confound efforts to preserve historically significant wrecks.³⁶ The foremost threat is the advent of new technology that makes deep-

acquire such vases, however, valued them enough to seal them in their tombs. See, e.g., Nigel Spivey, *Greek Vases in Etruria*, in *LOOKING AT GREEK VASES* 131, 133–38 (1991). When those tombs were re-discovered in the eighteenth century AD, wealthy collectors from Northern Europe valued the vases for their artistic merit, but understandably thought they were Etruscan. *Id.* Today, however, such vases are considered to be key cultural documents of Classical Greece. See, e.g. Stasinopoulou-Kakarouga, *supra*. Recent international controversies over the ownership of such vases underscore how highly they are valued. See, e.g., Randy Kennedy & Hugh Eakin, *The Met, Ending 30-year Stance, Is Set to Yield Prized Vase to Italy*, N.Y. TIMES (Feb. 3, 2006), <http://www.nytimes.com/2006/02/03/arts/03muse.html>. The cultural significance attached to such vases, therefore, has varied both across time and between cultures.

31. Carducci, *supra* note 15, at 420; Scovazzi, *supra* note 28, at 4–5.

32. For very short summaries of the law of salvage and the law of finds, see Nafziger, *supra* note 16, at 254 n.12, 253 n.11.

33. *Id.*

34. 2001 Convention, *supra* note 9, pmbl.

35. *Id.* annex r. 2.

36. For a detailed history of the 2001 Convention, the negotiation process, and the role of the International Law Association, see Roberta Garabello, *The Negotiating History of the Convention on the Protection of the Underwater Cultural Heritage*, in *THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: BEFORE AND AFTER THE 2001 UNESCO CONVENTION* 89 (Roberta Garabello & Tullio Scovazzi eds., 2003).

sea salvage more feasible.³⁷ The availability of this technology has sparked an increase in the number of private salvage companies searching for, recovering, and selling materials from culturally and historically significant shipwrecks.³⁸ Often, these companies do not follow scientific practices designed to preserve artifacts and understand their contexts.³⁹ Salvage companies also do not tend to be concerned with public access to culturally significant items.⁴⁰ The 2001 Convention was meant to help protect underwater cultural heritage from such companies.⁴¹

The drafters of the 2001 Convention also sought to reasonably standardize laws regarding cultural heritage found at sea with established rules governing archaeological materials found on land.⁴² Achieving this goal required formally recognizing that ownership of cultural heritage cannot be based on location because artifacts are often not found in their region of origin or among the people of whose cultural patrimony they properly belong.⁴³ This problem is especially pertinent to underwater cultural heritage because historical shipwrecks are found in waters through which the ship was merely passing while in transit between its own State and the State of its cargo's origin.⁴⁴ Furthermore, modern political entities often have only a tenuous relationship with their historical predecessors.⁴⁵ The drafters of the 2001 Convention hoped to provide States with a means of resolving disputes in light of such complexities.⁴⁶

As soon as formal negotiations leading up to the drafting of the 2001 Convention began, the scientific community expressed support for the Convention's goals.⁴⁷ Some governments, however,

37. See Carducci, *supra* note 15, at 421.

38. *Id.*

39. *Id.*

40. *Cf. id.* (explaining that the practices of salvage companies deprive the public of valuable knowledge).

41. 2001 Convention, *supra* note 9, pmbl.

42. Guérin, *supra* note 14.

43. Elizabeth Greene, Assoc. Professor, Dep't of Classics, Brock Univ., Remarks at the Lawyers' Committee for Cultural Heritage Preservation 2011 Annual Conference: Keeping the Lid on Davy Jones' Locker: The Protection of Underwater Cultural Heritage from Titanic to Today (Nov. 3, 2011) (recording available at <http://vimeo.com/album/1798869/video/34780868>).

44. *Cf.* 2001 Convention, *supra* note 9, art. 2(7)(7), annex r. 2 (providing that ownership of underwater cultural heritage be based on the origin rather than current location of artifacts).

45. Greene, *supra* note 43.

46. *Id.*

47. See James Nafziger, Professor, Willamette Univ. Coll. of Law, Remarks at the Lawyers' Committee for Cultural Heritage Preservation 2011 Annual Conference: Keeping the

ended up opposing the 2001 Convention, fearing, among other things, that the Convention would force them to take on the logistically burdensome task of protecting artifacts regardless of their actual significance.⁴⁸ Notable among the opponents was the United Kingdom, which has an especially rich maritime heritage as well as an extensive domestic legal regime for protecting culturally and historically significant underwater artifacts.⁴⁹

2. Signatories' Obligations Under the 2001 Convention

The 2001 Convention establishes strict rules for the treatment of underwater cultural heritage.⁵⁰ The rules aim to establish clear, standardized procedures through which signatories manage historic shipwrecks in their waters and cooperate with other States.⁵¹ The rules' strictness, however, has deterred many States from joining the Convention.⁵² The 2001 Convention's broad definitions, specific requirements, vague prohibition of "commercial exploitation," and reliance on national courts are each examined below.

a. How the 2001 Convention Defines Key Terms

The 2001 Convention unambiguously defines "underwater cultural heritage" as anything of human origin that has been underwater for at least one hundred years.⁵³ This definition is clear and easily administrable. It also prevents conflicts related to individual nations' incongruent and dynamic notions of cultural heritage. Rather than an arbitrary number, the one hundred year threshold is based on the age requirement for a world heritage site found in the original 1970 UNESCO Convention.⁵⁴

Lid on Davy Jones' Locker: The Protection of Underwater Cultural Heritage from Titanic to Today (Nov. 3, 2011) (recording available at <http://vimeo.com/album/1798869/video/34780621>).

48. For specific objections and the richness of the United Kingdom's maritime heritage, see Dromgoole, *supra* note 18, at 338, 349. For how the lack of a "significance test" discouraged the United Kingdom and United States from joining, see *supra* note 18.

49. Eventually, the Convention passed by a vote of 87-4 with 15 abstentions. See Carducci, *supra* note 15, at 420.

50. Warships and military aircraft have different rules not pertinent to this Note. See Carducci, *supra* note 15, at 423; Carducci, *supra* note 20, 203-04; Dromgoole, *supra* note 18, at 381.

51. See 2001 Convention, *supra* note 9, pmbl.

52. See, e.g., Dromgoole, *supra* note 18, 313-24, 337-47.

53. 2001 Convention, *supra* note 9, art. 1(1)(a); Carducci, *supra* note 15, at 422; Dromgoole, *supra* note 18, at 374.

54. See Greene, *supra* note 43.

This definition, however, has led some States, including the United Kingdom, to reject the 2001 Convention.⁵⁵ These States believe that only artifacts that meet a certain threshold of cultural significance should be governed by the convention.⁵⁶ These States would presumably not treat a nineteenth-century coin found in the sea just 100 yards from the beach in the same manner that they would treat a Classical statue found in an ancient shipwreck.⁵⁷ Although accounting for significance would make the convention less administrable, it would enable some States with significant maritime heritage, such as the United Kingdom, to join without taking on the costly responsibilities disproportionately borne by members that have countless centuries-old artifacts in their territorial waters.⁵⁸

b. Responsibilities Imposed by the 2001 Convention

The 2001 Convention and its Annex Rules establish weighty responsibilities for member States.⁵⁹ First and foremost, it requires signatories to preserve underwater cultural heritage “for the benefit of humanity” as a whole and not merely for the State’s benefit.⁶⁰ States are required to ensure that the 2001 Convention’s rules are followed not only in their territorial waters but also in their exclusive economic zone.⁶¹ Anyone who discovers historical artifacts in international waters must notify their State, which must notify UNESCO’s Director-General, who then notifies all States with any potential interest in the artifacts and appoints a “coordinating

55. At the same time, most common law countries do not put heritage values before property and commercial interests, whereas civil law countries do, which may also partially explain the United Kingdom’s reluctance to join the treaty. See Sarah Dromgoole, Professor of Mar. Law, Univ. of Nottingham Sch. of Law, Remarks at the Lawyers’ Committee for Cultural Heritage Preservation 2011 Annual Conference: Keeping the Lid on Davy Jones’ Locker: The Protection of Underwater Cultural Heritage from Titanic to Today (Nov. 3, 2011).

56. See Carducci, *supra* note 15, at 422–23; Dromgoole, *supra* note 18, at 338–39, 375–76.

57. See generally, Dromgoole, *supra* note 18, at 338–39 (describing the practices of the United Kingdom).

58. See *id.* 333–39.

59. For a description of the responsibilities, see *id.* at 384; Carducci, *supra* note 15, at 424.

60. 2001 Convention, *supra* note 9, art. 2(3); see Carducci, *supra* note 15, at 424.

61. Territorial waters extend twelve nautical miles from a State’s shoreline. U.N. Convention on the Law of the Sea, *supra* note 22, art. 3. The exclusive economic zone, on the other hand, is the area within two hundred miles of a State’s coast. 2001 Convention, *supra* note 9, art. 7–10; see Carducci, *supra* note 15, at 429–30.

State” to oversee the site.⁶² The “coordinating State” then bears the responsibility of protecting the site just as it would if the site were within its waters.⁶³

The responsibility of protecting underwater remains in the manner required by the 2001 Convention can be expensive.⁶⁴ The Annex Rules designate *in situ* preservation as the preferred means of protecting a site.⁶⁵ These rules instruct signatories to disturb underwater sites only when doing so is either necessary to preserve the artifacts or would significantly enhance knowledge.⁶⁶ The preference for leaving artifacts at the bottom of the sea makes States responsible for both historical materials in their waters as well as materials in international waters when they are designated the “coordinating State” by UNESCO.⁶⁷ This responsibility continues for an indefinite period of time,⁶⁸ and it requires preventing looting, so States must closely police waters near historical sites.⁶⁹

If a State does recover artifacts to protect them or to enhance knowledge, the artifacts must be preserved indefinitely and made publicly available.⁷⁰ A State’s responsibility to recovered artifacts continues indefinitely.⁷¹ This responsibility supersedes traditional property law and is meant to keep culturally significant artifacts off of the art market.⁷²

States must also combat the market for illicitly recovered artifacts by preventing such items from entering their territory.⁷³ Illicit items that do enter a State must be seized.⁷⁴ In this way, the 2001

62. 2001 Convention, *supra* note 9, art. 11, 12(1)–(3); see Dromgoole, *supra* note 18, at 381–84.

63. See 2001 Convention, *supra* note 9, art. 12(4)–(6).

64. Cf. Dromgoole, *supra* note 18, at 381–84 (describing the significant, numerous obligations of member States to the 2001 Convention).

65. See 2001 Convention, *supra* note 9, annex r. 1; Dromgoole, *supra* note 18, at 376, 384.

66. See 2001 Convention, *supra* note 9, annex r. 1; Guérin, *supra* note 14.

67. 2001 Convention, *supra* note 9, art. 12.

68. This responsibility is established *ex silencio*; although the Convention states when States’ duties begin, it says nothing about when they end. For further comments about ongoing State responsibilities, see Carducci, *supra* note 15, at 427.

69. See 2001 Convention, *supra* note 9, art. 10(4); Carducci, *supra* note 15, at 431; Guérin, *supra* note 14.

70. See 2001 Convention, *supra* note 9, art. 19(2); Carducci, *supra* note 15, at 426; Guérin, *supra* note 14.

71. Once again, this responsibility is established *ex silencio*.

72. See Guido Carducci, *supra* note 15, at 426–27; Dromgoole, *Foreward* to THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: NATIONAL PERSPECTIVES IN LIGHT OF THE UNESCO CONVENTION 2001, at xxvii, xxxiv (Sarah Dromgoole ed., 2d ed. 2006).

73. 2001 Convention, *supra* note 9, art. 14; Carducci, *supra* note 15, at 426–27.

74. 2001 Convention, *supra* note 9, art. 18(1); Carducci, *supra* note 15, at 427.

Convention makes States responsible for closely policing their art markets.⁷⁵ Presumably, customs officials must be able to determine whether an object entering a State had previously been underwater for at least one hundred years.⁷⁶

c. The 2001 Convention Prohibits “Commercial Exploitation”

The 2001 Convention categorically prohibits “commercial exploitation” of underwater cultural heritage.⁷⁷ The rule is based on the assumption that profit motive and scientific research are fundamentally incompatible.⁷⁸ Academic archaeologists, who widely embrace this assumption, have overwhelmingly supported the 2001 Convention and its condemnation of commercial exploitation in particular.⁷⁹

Unfortunately, the 2001 Convention does not define “commercial exploitation.”⁸⁰ The drafters clearly intended the prohibition to apply to “treasure hunters”: people and corporations that identify historical shipwrecks, recover what they can without using best archaeological practices, and sell any artifacts of value on the open market.⁸¹ By not adequately documenting their excavations and by dispersing materials found together at sea, such “treasure hunters” destroy the contexts that academic archaeologists would use to gain as full an understanding as possible of historical wrecks, their crews, and their cultures.⁸² The 2001 Convention’s vague proscription against “commercial exploitation” is generally interpreted as prohibiting private contractors from profiting from, and even participating in, excavations.⁸³ At the same time, the rule against “commercial exploitation” nevertheless allows States to benefit financially from recovery, and therefore, has received some criticism.⁸⁴

75. See Carducci, *supra* note 15, at 427.

76. The 2001 Convention does not suggest ways in which customs officials should go about this impractically difficult task. For examples of such customs enforcement, see Dromgoole, *supra* note 72, at xxxi.

77. 2001 Convention, *supra* note 9, art. 2(7).

78. Guérin, *supra* note 14. It is difficult to imagine other fields—particularly, medical and technological disciplines—holding the same view.

79. Greene, *supra* note 43.

80. Although “commercial exploitation” is an important aspect of the 2001 Convention, it is not one of the terms defined in Article 1.

81. See Dromgoole, *supra* note 72, at xxvii.

82. See Greene, *supra* note 43.

83. See Guérin, *supra* note 14.

84. See Dromgoole, *supra* note 72, at xxxiv; Forward of e-mail from Ulrike Guérin, Sec’y of the 2001 Convention, UNESCO (Dec. 12, 2011, 8:24 AM) (on file with author).

i. Using Private Contractors is Forbidden

The 2001 Convention's failure to define "commercial exploitation" has led to the perverse result that any involvement of a for-profit entity in the recovery of underwater cultural heritage is condemned.⁸⁵ Maritime excavations that utilize for-profit contractors, but otherwise conform to the spirit, goals, and strictures of the 2001 Convention, are considered violations.⁸⁶ Excavations conducted by for-profit contractors are considered violations even if the contractors have extensive experience and hold doctorate degrees in archaeology.⁸⁷ Under the Convention, excavation must be conducted either by the State itself or by a non-profit cultural institution such as a university or museum.⁸⁸

By forbidding the involvement of for-profit contractors, the 2001 Convention would prohibit cultural heritage management decisions recently made in the United Kingdom, arguably the State with the most underwater cultural heritage to preserve.⁸⁹ In 2002, the United Kingdom contracted with Odyssey Marine Exploration, Inc. (Odyssey), a U.S. salvage company that the 2001 Convention's drafters would consider a "treasure hunter," to recover a hoard of coins from the *HMS Sussex*, a seventeenth-century English ship.⁹⁰ Odyssey agreed to be paid with funds generated from the sale of a portion of the recovered coins.⁹¹ Since then, the United Kingdom has contracted with Odyssey through competitive bidding to recover other English ships.⁹² If the United Kingdom had joined the 2001 Convention, it would not have been free to contract Odyssey or sell portions of the recovered artifacts.⁹³

ii. States Themselves May Benefit Financially

The undefined "commercial exploitation" forbidden by the 2001 Convention does not include all income-creating activity.⁹⁴ According to the 2001 Convention's Secretariat, a recovery of

85. See Guérin, *supra* note 14.

86. See Dromgoole, *supra* note 18, at 341; Guérin, *supra* note 84.

87. See Guérin, *supra* note 14.

88. See *id.*

89. See Dromgoole, *supra* note 18, at 341–42.

90. See *id.* at 341.

91. See *id.*

92. Examples include the *HMS Sussex*, *HMS Mantola*, and *HMS Gairsoppa*. See, e.g., *SS Mantola Project Overview*, ODYSSEY MARINE EXPLORATION, <http://www.shipwreck.net/ssmantola.php> (last visited May 9, 2013) (explaining that Marine Odyssey Exploration received rights from the U.K. government to excavate the *HMS Mantola*); *SS Gairsoppa Project Overview*, ODYSSEY MARINE EXPLORATION, <http://www.shipwreck.net/ssgairsoppa.php> (last visited May 9, 2013) (rights to *HMS Gairsoppa*).

93. See Dromgoole, *supra* note 18, at 341.

94. See Guérin, *supra* note 84.

underwater cultural heritage conducted by a State that intended to create a regional museum in order to generate tourist revenue and traffic for local businesses would not be considered “commercial exploitation.”⁹⁵ As applied, the 2001 Convention prohibits paying for-profit salvage companies for their services, but allows activities that will directly profit a State and perhaps indirectly benefit private enterprises.⁹⁶ The rationale for these distinctions is not clear. At the very least, the distinction between activities that profit private entities and activities that profit a State highlights the need for a definition of “commercial exploitation” in the 2001 Convention.

iii. Criticism of the Prohibition of “Commercial Exploitation”

Some critics of the prohibition of “commercial exploitation” argue that the 2001 Convention’s inflexibility could actually increase the frequency of clandestine, unscientific salvage.⁹⁷ Such critics assert that a salvage company unable to profit through collaboration with a State, even when employing professional archaeologists and using best practices, will be more likely to not disclose their finds, recover artifacts in secret without documenting their activities, and sell historically significant artifacts on the illicit market.⁹⁸ There is no data, however, that would substantiate or disprove such an argument.⁹⁹

C. The Belitung Excavation Complied with the Spirit of the 2001 Convention

The 2001 Convention has significantly affected the future of the Belitung Shipwreck.¹⁰⁰ The fact that the wreck was recovered between 1998 and 2000, before the 2001 Convention was completed, has not diminished the controversy.¹⁰¹ Neither has the fact that Indonesia is not yet a signatory to the 2001 Convention.¹⁰²

95. *See id.*

96. *See id.*

97. *See* Megan van Zyl, An Analysis of the Objectives and General Principles of the United Nations Educational, Scientific and Cultural Organisation’s Convention on the Protection of Underwater Cultural Heritage 35 (2005) (unpublished LL.M. dissertation, Univ. of Cape Town), available at <http://web.uct.ac.za/depts/shiplaw/theses/meganvanzyl.pdf>.

98. *See id.*

99. *See id.* at 33–34.

100. *See* Bartman, *supra* note 1.

101. *See* Media Backgrounder, *supra* note 1.

102. *Id.* As of August 2013, Indonesia has not joined the convention. For a current list of State parties, see Convention on the Protection of the Underwater Cultural Heritage, UNESCO, <http://www.unesco.org/eri/la/convention.asp?KO=13520&language=E&order=alpha> (last visited Sept. 4, 2013) [hereinafter Convention Parties].

Indonesia's licensing of Seabed Explorations, a commercial salvage company, to excavate the Belitung site has drawn sharp criticism that may prevent Western museums from exhibiting the Belitung artifacts.¹⁰³

1. Indonesia Licensed a Commercial Salvage Company to Excavate the Site

The Belitung controversy revolves around Indonesia's decision to grant Seabed Explorations, a New Zealand-based private salvage company founded by German archaeologist Tilman Walterfang, a license to recover the shipwreck.¹⁰⁴ The Indonesian government claims it licensed Seabed because it recognized the need to preserve the shipwreck, but lacked the financial resources and expertise needed to mount an excavation itself.¹⁰⁵ Indonesia also asserts that its Navy was initially unable to protect the site from looters because of political turmoil at the time.¹⁰⁶ The license was legal under Indonesian law.¹⁰⁷ Seabed's excavation led to the discovery of thousands of significant artifacts that have been sold to the government of Singapore, which intends to permanently display them in a State-funded museum.¹⁰⁸

a. The Excavation was Conducted by Qualified People

Experts with solid academic credentials were in charge of Seabed's excavation of the Belitung Shipwreck site, which lasted two seasons.¹⁰⁹ Michael Flecker, who earned a Ph.D. at the National University of Singapore, oversaw the excavation and immediately began publishing it in the *International Journal of Nautical Archaeology*, a peer-reviewed journal published by the Nautical Archaeological Society and Wiley-Blackwell, a major academic pub-

103. Bartman, *supra* note 1.

104. *See id.*; Michael Flecker, *A Ninth-Century AD Arab or Indian Shipwreck in Indonesia: First Evidence for Direct Trade with China*, 32 *WORLD ARCHAEOLOGY* 335, 353 (2001).

105. Media Backgrounder, *supra* note 1.

106. The Suharto regime fell in May 1998, after a thirty-two-year rule; Suharto stepped down after student-led protests. *See* Media Backgrounder, *supra* note 1; Seth Mydans, *The Fall of Suharto: The Overview; Suharto, Besieged, Steps Down After 32-year Rule in Indonesia*, N.Y. *TIMES* (May 21, 1998), <http://www.nytimes.com/1998/05/21/world/fall-suharto-overview-suharto-besieged-steps-down-after-32-year-rule-indonesia.html>.

107. Media Backgrounder, *supra* note 1.

108. *Id.*

109. *See* Michael Flecker, *Tang Treasures from the Sea: An Arab Shipwreck in Indonesian Waters*, *HERITAGE ASIA*, June–Aug. 2005, at 6, 11.

lisher.¹¹⁰ Seabed hired Andreas Rettel to supervise conservation of the artifacts.¹¹¹ Rettel trained at the Römisch-Germanisches Zentralmuseum, a State-funded archaeological museum in Mainz, Germany that was founded in 1852.¹¹² Seabed also hired several distinguished academics to study the finds.¹¹³

b. The Finds Were Highly Significant

The Belitung Shipwreck had tremendous archaeological significance.¹¹⁴ Seabed recovered over sixty thousand artifacts from the Belitung Shipwreck site.¹¹⁵ These discoveries include the largest group of artifacts from Tang dynasty China ever recovered.¹¹⁶ Seabed's finds permitted scholars to determine that the wreck was a ninth-century AD Arab dhow, the oldest Arab ship ever found in Asia.¹¹⁷ The artifacts, which include a variety of Chinese luxury goods that were apparently bound for markets in the Middle East, provide some of the first evidence for a maritime component to the "silk road" trade.¹¹⁸

110. Gongaware & Varmer, *supra* note 2; Media Backgrounder, *supra* note 1; Michael Flecker, *A 9th-Century Arab or Indian Shipwreck in Indonesian Waters: Addendum*, 37 INT'L J. NAUTICAL ARCHAEOLOGY 384, 384 (2008) [hereinafter Flecker, *Addendum*]; Flecker, *supra* note 109, at 6, 11; Flecker, *supra* note 104, at 335; Michael Flecker, *A 9th-Century Arab or Indian Shipwreck in Indonesian Waters*, 29 INT'L J. NAUTICAL ARCHAEOLOGY 199, 119, 216 (2000).

111. Rettel headed a team of conservators from Germany and New Zealand. See Media Backgrounder, *supra* note 1.

112. *Id.* For general information about the museum, see About the RGZM, RÖMISCH-GERMANISCHES ZENTRALMUSEUM, <http://web.rgzm.de/30.html?&L=1> (last visited May 9, 2013).

113. Seabed also commissioned John Guy (the Metropolitan Museum of Art's curator of South and Southeast Asian Art), Francois Louis (Professor, Bard Graduate Center), and Hsieh Ming-Liang (Chair, Graduate Institute of Art History, National Taiwan Museum, Taipei) to study the artifacts. Their work is the basis of the exhibition catalog. Media Backgrounder, *supra* note 1.

114. See, e.g., Media Backgrounder, *supra* note 1.

115. See, e.g., Bartman, *supra* note 1; Gongaware & Varmer, *supra* note 2; Kolesnikov-Jessop, *supra* note 1.

116. Media Backgrounder, *supra* note 1.

117. See Media Backgrounder, *supra* note 1; *cf.*, e.g., Gongaware & Varmer, *supra* note 2 (describing the age and significance of the wreck); Kolesnikov-Jessop, *supra* note 1 (same); Press Release, Freer Gallery of Art & Arthur M. Sackler Gallery, Smithsonian and Singapore Present Shipwreck Treasures (July 28, 2010) [hereinafter Smithsonian and Singapore Present Shipwreck Treasures], <http://www.asia.si.edu/press/2010/prShipwreck.asp> (same). For ship age, see, e.g., Media Backgrounder, *supra* note 1. Researchers have even learned that the ship was built with a certain type of teak from east Africa. See George Yeo, Minister for Foreign Affairs, Singapore, Opening Speech at the Marina Bay Sands Art-Science Museum's Launch of "Shipwrecked: Tang Treasures and Monsoon Winds" (Feb. 18, 2011) (transcript available at <http://www.asia.si.edu/Shipwrecked/downloads/yeo021811.pdf>).

118. See, e.g., Smithsonian and Singapore Present Shipwreck Treasures, *supra* note 117.

c. Seabed Sold the Entire Collection of Artifacts to the Government of Singapore

Under its license from the Indonesian government, Seabed gained title to the artifacts it recovered from the Belitung Shipwreck site.¹¹⁹ Rather than immediately selling individual artifacts at auction, Seabed sold the entire collection in 2005 to Singapore's Sentosa Development Corporation.¹²⁰ The Sentosa Development Corporation is a statutory board—a corporation owned by Singapore's government that performs administrative duties and reports to a government ministry.¹²¹ In this case, it reports to Singapore's Ministry of Trade and Industry.¹²² Singapore bought the entire collection to ensure that it would remain intact and could be studied as a whole.¹²³

d. Singapore Plans to Permanently Display the Artifacts and Mount a Traveling Exhibit

Singapore is committed to preserving the Belitung Shipwreck artifacts and making them available to both academics and the public.¹²⁴ Singapore's Tourism Board and National Heritage Board partnered with the Freer and Sackler Galleries, the Smithsonian Institution's Museums of Asian Art to organize the traveling exhibit *Shipwrecked: Tang Treasures and Monsoon Winds*, so that museum-goers worldwide would have a chance to see the artifacts.¹²⁵ The exhibit opened in its first venue, a Singaporean museum, in February 2011.¹²⁶ Singapore's Tourism Board also

119. *Cf.*, e.g., Bartman, *supra* note 1 (reporting that Seabed contracted with the Indonesian government to excavate the wreck and then sold the recovered artifacts to the Singaporean government).

120. The price was \$32 million. *See* Gongaware & Varmer, *supra* note 2; Media Backgrounder, *supra* note 1. The estate of Tan Sri Khoo Teck Puat helped purchase the artifacts. Smithsonian and Singapore Present Shipwreck Treasures, *supra* note 117.

121. *See About MTI: Sentosa Development Corporation (SDC)*, MINISTRY TRADE & INDUS. SINGAPORE, [http://www.mti.gov.sg/AboutMTI/Pages/Sentosa%20Development%20Corporation%20\(SDC\).aspx](http://www.mti.gov.sg/AboutMTI/Pages/Sentosa%20Development%20Corporation%20(SDC).aspx) (last visited May 9, 2013).

122. *See id.*

123. *See* Yeo, *supra* note 117; George Yeo, Minister for Foreign Affairs, Singapore, Speech at the Jewel of Muscat Gala Dinner at the Asian Civilisations Museum, Singapore (July 5, 2010), (transcript available at <http://jewelofmuscat.com/~jewelofmuscat/?q=en/node/4202>).

124. *Cf.*, e.g., Yeo, *supra* note 123.

125. In addition to Singapore and the Smithsonian, the exhibit was meant to travel throughout Europe and the Middle East. *See* Gongaware & Varmer, *supra* note 2; Kolesnikov-Jessop, *supra* note 1; Smithsonian and Singapore Present Shipwreck Treasures, *supra* note 117.

126. *See* Media Backgrounder, *supra* note 1; Press Release, Asian Civilisations Museum, Conference on Maritime Archaeology in Singapore (Feb. 18, 2011) [hereinafter Asian

announced that the Belitung Shipwreck will be on permanent display in a museum operated by Singapore's National Heritage Board once the traveling exhibit is over.¹²⁷ Together, the traveling and permanent exhibits should allow millions of people to learn about the Belitung Shipwreck.

2. Outrage Over the "Commercial Exploitation" of the Belitung Shipwreck May Prevent Western Museum-goers from Seeing the Belitung Artifacts

The seemingly positive outcome of the Belitung Shipwreck's story may be jeopardized by Indonesia's licensing of a commercial salvage company.¹²⁸ According to the 2001 Convention and organizations that support its principles, the Belitung Shipwreck was commercially exploited because a private, for-profit company was allowed to excavate and sell the wreck's artifacts.¹²⁹ Indonesia's action complied with local laws,¹³⁰ and Indonesia licensed Seabed Explorations quickly following the discovery of the wreck in 1998, three years before the 2001 Convention was completed.¹³¹ Moreover, neither Indonesia, Singapore, nor the United States has joined the 2001 Convention.¹³² Nevertheless, the Convention's condemnation of commercial exploitation threatens Singapore's plans to display the Belitung collection in the United States.¹³³

The Smithsonian Institution, which helped organize the Belitung Shipwreck exhibition, has postponed its plans for the show and is questioning whether it can ethically exhibit materials excavated in violation of the 2001 Convention.¹³⁴ Although there is no legal barrier to exhibiting the collection because the United States is not a signatory, the Smithsonian nevertheless feels beholden to the 2001 Convention's standards.¹³⁵ This concern

Civilisations Museum Conference], http://www.acm.org.sg/pressrelease_docs/58_doc1_ACM_media_release_Conference_on_Maritime_Archaeology_in_Singapore.pdf.

127. See Gongaware & Varmer, *supra* note 2; Media Backgrounder, *supra* note 1.

128. See, e.g., Gongaware & Varmer, *supra* note 2.

129. The only issue is that "a salvage company, instead of professional archaeologists" was used to recover the wreck, indicating a commercial motive. Bartman, *supra* note 1; see Gongaware & Varmer, *supra* note 2.

130. Gongaware & Varmer, *supra* note 2.

131. *Id.*

132. The current list of State parties is available at Convention Parties, *supra* note 102. As of August 2013, none of the aforementioned countries had joined the 2001 Convention.

133. Gongaware & Varmer, *supra* note 2.

134. On April 25, 2011, the Smithsonian hosted a meeting of archaeological professionals to discuss whether the exhibition should go forward; it still has no firm plans. See *id.*; Smithsonian Hosts Discussion, *supra* note 11.

135. Gongaware & Varmer, *supra* note 2; Media Backgrounder, *supra* note 1.

reflects the belief—widely held within the academic archaeological community—that for-profit activity is necessarily antithetical to archaeological best practices.¹³⁶

Some academic archaeologists fear that exhibiting the Belitung Shipwreck will demonstrate popular demand for ancient artifacts lost at sea, and therefore, will further encourage archaeologically irresponsible commercial salvage companies to recklessly excavate underwater cultural heritage in the future.¹³⁷ The Archaeological Institute of America, the world's preeminent professional organization for academic archaeologists, has called upon the Smithsonian to completely cancel the exhibit.¹³⁸ The Archaeological Institute of America has also announced its categorical opposition to exhibiting artifacts “obtained from commercially exploited sites.”¹³⁹ Stigmatizing commercially exploited artifacts in this way, however, could prevent U.S. museum-goers from seeing the Belitung Shipwreck in their own country.¹⁴⁰

The Smithsonian's final decision is still forthcoming, so the fate of the Belitung Shipwreck exhibit continues to be uncertain.¹⁴¹ The controversy surrounding Indonesia's relationship with Seabed Explorations has spurred the organization of multiple conferences during the past year on ethics in underwater archaeology.¹⁴² The effects these discussions will have on the 2001 Convention and the views of academic archaeologists remain to be seen.¹⁴³

136. See Gongaware & Varmer, *supra* note 2; Media Backgrounder, *supra* note 1.

137. See, e.g., Bartman, *supra* note 11.

138. *Id.*

139. Bartman, *supra* note 1.

140. See Gongaware & Varmer, *supra* note 2.

141. In December 2011, the Freer/Sackler Galleries convened a panel of “experts from professional organizations such as UNESCO, the National Oceanic and Atmospheric Administration, the International Committee on Monuments and Sites, the World Archaeological Congress Committee on Ethics, the Philippines National Museum and others,” who recommended not bringing the exhibit to the Smithsonian; a position that Smithsonian officials are currently reviewing. See Press Release, Freer Gallery of Art & Arthur M. Sackler Gallery, Shipwrecked Advisory Group: Statement on “Shipwrecked” Advisory Group Meetings, December 8–9, (Dec. 14, 2011) [hereinafter Shipwrecked Advisory Group Statement], <http://www.asia.si.edu/press/2011/prShipwreckedAdvisoryStmntDec142011.asp>.

142. One important meeting was the discussion held at the Smithsonian. See Smithsonian Hosts Discussion, *supra* note 11. The Asian Civilisations Museum in Singapore held a full conference on June 18, 2011. See Asian Civilisations Museum Conference, *supra* note 126. Most recently, The Lawyers' Committee for Cultural Heritage Preservation hosted a symposium on Nov. 3, 2011, entitled “Keeping the Lid on Davy Jones' Locker: The Protection of Underwater Cultural Heritage from Titanic to Today.” *Third Annual Conference: Keeping the Lid on Davy Jones' Locker*, LAWYERS' COMM. FOR CULTURAL HERITAGE PRES., <http://www.culturalheritagelaw.org/2011conference> (last visited May 9, 2013).

143. Shipwrecked Advisory Group Statement, *supra* note 141.

III. ANALYSIS

The 2001 Convention laudably prioritizes scientific and public interests. Despite its noble intentions, however, it places disproportionate burdens on certain nations, and some of its rules have unintended consequences that contradict its goals. Although there is a genuine need for an international agreement on preserving underwater cultural heritage, the 2001 Convention is seemingly written for an ideal world and overlooks key practical realities. As the remainder of this Note asserts, the story of the Belitung Shipwreck demonstrates that the 2001 Convention's condemnation of what it calls "commercial exploitation" actually makes it harder for well-meaning States to protect culturally and historically significant artifacts found underwater. Defining "commercial exploitation" in a way that allows signatories to contract with for-profit salvage companies that follow archaeological best practices would make the 2001 Convention more effective and would encourage more States to join.

A. *The 2001 Convention Would Have Led to the Destruction of the Belitung Shipwreck if Indonesia Had Been a Signatory*

Read literally, the 2001 Convention's requirements are severe. They make a State indefinitely responsible for the preservation or recovery of any artifact that has been submerged in its waters for at least one hundred years.¹⁴⁴ States are responsible for coordinating multilateral efforts to preserve artifacts located in international waters, albeit no mechanism for such coordination exists.¹⁴⁵ They forbid States from employing private contractors to perform these expensive and highly specialized tasks, even though States are theoretically just as capable as private companies of sidestepping best archaeological practices, and State officials are capable of corruption.¹⁴⁶ Further, the burden that the 2001 Convention places on States, especially those with significant maritime heritage, is potentially onerous and has dissuaded several major nations from signing.¹⁴⁷

144. 2001 Convention, *supra* note 9, *passim*.

145. *Id.* art. 6(1).

146. *Cf. id.* annex, r. 2 ("The commercial exploitation of underwater cultural heritage for trade or speculation . . . is fundamentally incompatible with the protection and proper management of underwater cultural heritage. Underwater cultural heritage shall not be traded, sold, bought or bartered as commercial goods.").

147. Dromgoole, *supra* note 18, at 337–47. Those major nations that have not joined the 2001 Convention because of its proscription against commercial exploitation are there-

The Belitung Shipwreck's story demonstrates that the procedures the 2001 Convention requires States to follow upon the discovery of underwater artifacts are sometimes unrealistic. If Indonesia had been subject to the 2001 Convention's rules when fishermen discovered the Belitung wreck in 1998, it would have been required to first secure the site from looters, presumably by establishing a constant naval presence.¹⁴⁸ This naval presence would have continued indefinitely, since the 2001 Convention requires that sites be protected *in situ* unless recovery either is the only way to preserve the artifacts or would substantially enhance human knowledge.¹⁴⁹ If Indonesia had decided to recover the wreck, it would have had to do so at its own expense or with only the help of non-profit organizations, and it would have become permanently responsible for the preservation and display of the artifacts.¹⁵⁰ The wreck's accidental discovery would, therefore, have heavily burdened the Indonesian government.

During the protests and political upheaval that led to the resignation of President Suharto in 1998, Indonesia lacked the financial resources and administrative command and control needed to follow the procedures that the 2001 Convention now mandates.¹⁵¹ Although Indonesia recognized the need to stop looters who were removing individual artifacts and selling them on the art market, it simply could not afford to protect and recover the Belitung Shipwreck in the way that the 2001 Convention requires.¹⁵² Had Indonesia been bound by the 2001 Convention at the time, it could not

fore not necessarily participating in its less costly or controversial aspects, such as seeking to control trade in illicit archaeological materials.

148. For details of what actually occurred following the Belitung discovery, see, e.g., Bartman, *supra* note 1; Media Backgrounder, *supra* note 1; Kolesnikov-Jessop, *supra* note 1. For the 2001 Convention's rule requiring *in situ* preservation, see 2001 Convention, *supra* note 9, annex r. 1; Dromgoole, *supra* note 18, at 376. For the 2001 Convention's rule requiring signatories to prevent looting, see 2001 Convention, *supra* note 9, art. 10(4); Carducci, *supra* note 15, at 431; Guérin, *supra* note 14. In reality, Indonesia's Navy was unable to prevent looting during excavation. See Media Backgrounder, *supra* note 1.

149. For *in situ*/excavation rules, see 2001 Convention, *supra* note 9, annex r. 1; Dromgoole, *supra* note 18, at 376.

150. 2001 Convention, *supra* note 9, *passim*.

151. The protests that led to the end of Suharto's thirty-two-year reign caused economic problems in the country, including the currency losing half its value. See Mydans, *supra* note 106.

152. Even absent the 1998 upheaval in Indonesia's government, it is unlikely that Indonesia's Navy could have actually prevented all looting. During 1999's monsoon season, when Seabed was not excavating as a result of monsoon season, the Indonesian Navy was able to patrol the Belitung Shipwreck site, but failed to prevent all looting. Even some artifacts looted during this period and before Seabed's excavation began found their way to eBay. See Gongaware & Varmer, *supra* note 2; Media Backgrounder, *supra* note 1.

have met its obligations, and it is very likely that looters would have destroyed the wreck's archaeological context.¹⁵³ Indonesia's situation shows that the 2001 Convention's insistence on ideal preservation practices can lead to prohibitive costs that could actually deter States from protecting underwater artifacts at all. These prohibitive costs are also among the reasons why some States declined to join the 2001 Convention.¹⁵⁴

B. *Indonesia's Actions Closely Conformed to the Spirit of the 2001 Convention*

Fortunately, Indonesia found a pragmatic way to preserve the Belitung Shipwreck in a manner that closely conformed to the spirit, if not the letter, of the 2001 Convention. Indonesia's decision illustrates that public-private partnerships can be and sometimes must be a part of responsible cultural heritage management programs.¹⁵⁵ By making tough, pragmatic decisions in a timely fashion, Indonesia was able to achieve the major goals of the 2001 Convention: preserving underwater cultural heritage and making it available to people worldwide.¹⁵⁶

1. Indonesia Preserved the Belitung Shipwreck

By quickly licensing an experienced commercial salvage company employing trained archaeologists to immediately recover the Belitung Shipwreck, Indonesia saved the site from looting.¹⁵⁷ This looting would have stripped the site of both its artifacts and the archaeological context academics need to fully understand its historical and cultural significance. Indonesia's decision ensured that the wreck's artifacts would, at the very least, be professionally excavated and documented.

153. Cf. Media Backgrounder, *supra* note 1 (explaining that Indonesia did not have the resources to mount an excavation and that the wreck was immediately vulnerable to looting).

154. Dromgoole, *supra* note 18, at 338–39.

155. Some archaeologists contend that public-private partnerships are needed to preserve underwater cultural heritage in areas like Southeast Asia where there are countless artifacts but few government resources. Cf., e.g., Media Backgrounder, *supra* note 1 (describing what was gained by Indonesia's public-private partnership).

156. For the goals of the 2001 Convention, see 2001 Convention, *supra* note 9, pmbl.

157. The Archaeological Institute of America questions the advisability of Indonesia's quick action. Bartman, *supra* note 1. Indonesia also negotiated to recover artifacts taken from the site between salvage seasons by looters. See Gongaware & Varmer, *supra* note 2.

Some academic archaeologists claim they could have recovered the Belitung wreck more expertly than Seabed Explorations did.¹⁵⁸ However, there are no indicia, and never will be, of what else, if anything, could have been learned from the site. Accordingly, arguments that a lengthy excavation by a non-profit cultural institution such as a university or museum would have more thoroughly enhanced human knowledge are highly speculative. Indonesia took the only steps realistically available to preserve the Belitung Shipwreck and should not be criticized for its inability to act in a manner only possible in the most ideal situations. This is especially true given that Seabed Explorations preserved a majority of the Belitung artifacts and at least some of its archaeological record.¹⁵⁹ Both of these would have been completely lost if Indonesia had not acted and thereby allowed continued looting.¹⁶⁰

2. The Artifacts Have Been Made Available to “Humanity”

By ensuring that the Belitung Shipwreck would be responsibly excavated by a single organization, Indonesia made it possible for the wreck’s artifacts to benefit humanity. First, human knowledge received some benefit simply from Seabed Exploration’s documentation of its work and Dr. Flecker’s publications of the finds.¹⁶¹ Seabed also likely increased the Belitung artifacts’ longevity by conducting professional conservation.¹⁶² Without Indonesia’s quick action, both the documentation of the archaeological record and the objects themselves would likely have been lost.

Furthermore, by allowing a single enterprise to gain title to all of the Belitung artifacts, Indonesia also increased the chances that the wreck’s contents would remain together so that researchers could study the objects as a group. Although Seabed theoretically could have sold each of the sixty thousand recovered artifacts to

158. The Archaeological Institute of America argues that “[f]ew records were kept of the finds and we have no proper documentation of the ship, its crew, or its cargo,” despite the publication of four articles about the excavation. Bartman, *supra* note 1; Bartman, *supra* note 11. Archaeological Institute of America President Elizabeth Bartman even calls Seabed Explorations “commercially-motivated treasure hunters.” Bartman, *supra* note 1; Bartman, *supra* note 11. Indonesia now supposedly admits that the methods used were damaging, although one of their indicia is that non-commercial ceramics were redeposited. Guérin, *supra* note 14.

159. See Media Backgrounder, *supra* note 1.

160. Gongaware & Varmer, *supra* note 2; cf. Media Backgrounder, *supra* note 1 (describing the danger of looting prior to the excavation).

161. See generally Flecker, *Addendum*, *supra* note 110 (one of Dr. Flecker’s reports on his finds).

162. Media Backgrounder, *supra* note 1.

individual buyers, it was predictable that the company would minimize its transaction costs by finding a single purchaser interested in the entire collection. Given the collection's tremendous price and the amount of space it required,¹⁶³ the only realistic potential purchasers were governments and select major museums. Fortunately, Singapore purchased the collection with the intention of preserving it in a permanent museum exhibit after taking it to numerous venues in the Middle East, Europe, and the United States, where millions of people would be able to see it.¹⁶⁴ Thanks to the government of Singapore and the public-private partnership between Indonesia and Seabed Explorations, the Belitung artifacts will be indefinitely preserved and publicly available, thereby achieving two of the 2001 Convention's primary goals.¹⁶⁵ The 2001 Convention's proscription against "commercial exploitation" would have made this outcome impossible. In fact, adhering to the Convention's letter in this case would have defeated its purpose and spirit.

C. *The Solution is Providing a Permissive Definition
of "Commercial Exploitation"*

A permissive definition of "commercial exploitation" could make the 2001 Convention more effective at protecting underwater cultural heritage. It could easily be added to Article 1 and encourage the United States and Great Britain, arguably the States best equipped to preserve maritime archaeology, to join. The definition should maintain the 2001 Convention's focus on using State involvement to ensure that underwater artifacts are preserved for the benefit of humanity, but it should also acknowledge that for-profit salvage companies could help achieve this important goal.

Article 1 of the 2001 Convention should state that commercial exploitation occurs whenever a commercial salvage company recovers materials defined as underwater cultural heritage and any of the following three conditions are met: (1) there is no State authorization for the recovery; (2) the salvage company does not use the archaeological best practices that are reasonable under the circumstances; or (3) the recovered artifacts are knowingly dis-

163. The collection sold for \$32 million. See Gongaware & Varmer, *supra* note 2; Media Backgrounder, *supra* note 1.

164. Gongaware & Varmer, *supra* note 2; Media Backgrounder, *supra* note 1; Yeo, *supra* note 117; Yeo, *supra* note 123.

165. 2001 Convention, *supra* note 9, art. 2(6); Carducci, *supra* note 15, at 426; see, e.g., Guérin, *supra* note 14.

persed among buyers who do not intend to make them available for public study and display. This definition would both help achieve the 2001 Convention's goals and acknowledge that operations like the recovery of the Belitung Shipwreck provide a valuable service to human knowledge.

1. Commercial Salvage Companies Should Need State Authorization to Recover Underwater Cultural Heritage

The 2001 Convention recognizes that States must play an active role in preserving archaeological materials submerged in their waters.¹⁶⁶ Although not immune from corruption and improper motives, State agencies are better equipped than any other organization to determine what underwater artifacts should be preserved or recovered, and who should do the recovery.¹⁶⁷ In addition to serving this gate-keeping function, States are uniquely positioned to oversee and regulate recovery operations and collection management to ensure that they achieve the goals of the 2001 Convention.¹⁶⁸

Accordingly, to avoid the stigma of "commercial exploitation," for-profit salvage companies should need to acquire State authorization before recovering underwater artifacts, including artifacts that they themselves discover. For the sake of administrability, this authorization should come from the State in whose territorial waters the materials are currently located, not from the State or States that may ultimately claim title to the artifacts. States could develop their own policies on how to award licenses, choosing, for example, to rely on competitive bidding, or to simply allow companies to recover those historic shipwrecks that the companies locate. The requirement of State authorization is not markedly different from the current law of salvage.¹⁶⁹

States must be prepared to act quickly, however. As the story of the Belitung Shipwreck demonstrates, important underwater sites can be subject to potentially catastrophic looting as soon as they are discovered.¹⁷⁰ Therefore, States must realize that in some cases taking even a few weeks to decide whether to authorize recovery can threaten a site it has the responsibility to protect. State author-

166. See Dromgoole, *supra* note 72, at xxxiii.

167. States are certainly capable of engaging in "commercial exploitation." See *id.* at xxxii.

168. 2001 Convention, *supra* note 9, pmb1.

169. For the law of salvage generally, see Nafziger, *supra* note 16, at 254 n.12.

170. See, e.g., Carducci, *supra* note 15, at 421.

ization is an unavoidable part of preventing commercial exploitation, but it will only be effective if States act efficiently and make good faith efforts to achieve the 2001 Convention's goals.

2. Commercial Salvage Companies Should be Required to Use the Archaeological Best Practices that Are Reasonable Under the Circumstances

Permitting irresponsible recovery of underwater cultural heritage would defeat the 2001 Convention's goal of enhancing human knowledge about the past. Excavations that fail to use archaeological best practices permanently destroy contextual information that makes it possible to fully appreciate the significance of artifacts.¹⁷¹ Therefore, any recovery of underwater cultural heritage by a for-profit salvage company that does not use archaeological best practices should be branded as commercial exploitation.

Best practice standards are widely available in the archaeological literature, and any academically trained professional is familiar with them.¹⁷² Determinations of whether practices are being followed, however, are potentially contentious. Competitors are likely to accuse their rivals of not following best practices in order to increase their chances of receiving licenses in the future, and academic purists will likely find fault with any excavation mounted by a for-profit company.¹⁷³ Consequently, the State agencies that authorize recoveries must also be prepared to review excavation reports and certify that salvage companies acted responsibly under the circumstances. Those for-profit salvage companies that fail to meet such standards could face administrative penalties or simply be prohibited from receiving licenses in the future. Although there is no realistic way to ensure perfect adherence to best practices and disagreements within the archaeological community are inevitable, to prevent commercial exploitations, States must be prepared to insist upon certain standards to ensure that excavators preserve as much information as possible about their finds.¹⁷⁴

171. See, e.g., Greene, *supra* note 43.

172. The standard reference for underwater archaeological methods is NAUTICAL ARCHAEOLOGICAL SOC'Y, UNDERWATER ARCHAEOLOGY: THE NAS GUIDE TO PRINCIPLES AND PRACTICE (Amanda Bowens ed., 2d ed. 2010).

173. See, e.g., Greene, *supra* note 43.

174. A neutral, non-State body might appear to be a better source for such determinations. Placing such determinations in the hands of a U.N. agency, however, would seriously undermine the autonomy of the State regulatory board that decided to authorize the excavation in the first place. Furthermore, States are best equipped to determine which archaeological methods are ideal under conditions present in their own waters. Finally, efficiency is a necessary component of the regime proposed here, and limiting the number

3. Collections Should Remain Intact and Only Be Sold to Buyers Intending to Make Them Available for Study and Display

The 2001 Convention insists that recovered underwater cultural heritage benefit humanity, a goal that can be achieved only when artifacts are available for scientific study and public enjoyment.¹⁷⁵ Therefore, avoiding the stigma of “commercial exploitation” should involve ensuring that collections of artifacts remain intact and are sold only to governments, institutions, or individual collectors who intend to make them available to a wide audience. As with the conditions stated above, State oversight would be necessary to ensure compliance.

Meeting this requirement should be simple. On account of the costs involved in recovery and the scarcity of the objects themselves, most archaeologically significant collections of artifacts will be so expensive that only institutions like major museums will be able to afford them.¹⁷⁶ Such institutions exist in order to enhance human knowledge and must responsibly make their collections available in order to remain both relevant and solvent. Furthermore, for-profit salvage companies should want to sell collections as a whole in order to keep their transaction costs down and thereby maximize profits. Simply requiring that collections be marketed intact will help achieve the 2001 Convention’s goals.

In addition, this requirement should not be used to entirely exclude private collectors. States must recognize that private collectors sometimes care for their artifacts as well as museums do. Private collectors also often allow academics to study their collections, loan their artifacts to museums, and bequeath their treasures to cultural institutions upon their deaths.¹⁷⁷ Although such private collectors might be motivated by a desire for prestige or by hopes of using publicity to increase their collections’ market value, they

of decision makers that can oversee an excavation will allow State-sanctioned excavations to move forward quickly enough to recover a site before looters can.

175. Carducci, *supra* note 15, at 424.

176. Chinese vases as old as those found among the Belitung Shipwreck recently sold for \$10–20 million apiece at auction in Hong Kong. See Donald Frazier, *Chinese Art? All Roads Lead to Hong Kong*, N.Y. TIMES (Mar. 25, 2012), <http://travel.nytimes.com/2012/03/25/travel/in-hong-kong-rare-chinese-art-at-auction.html>.

177. For example, Shelby White, who has assembled one of the world’s best private collections of Classical antiquities, frequently makes her collections available to academics, offers objects she owns on extended loans to museums, and plans to bequeath her entire collection to the Metropolitan Museum of Art, where she sits on the board of trustees. See, e.g., Elisabetta Povoledo, *Collector Returns Art Italy Says Was Looted*, N.Y. TIMES (Jan. 18, 2008), <http://www.nytimes.com/2008/01/18/arts/18collect.html>.

nevertheless sometimes achieve the same goals as ostensibly more altruistic cultural institutions. Therefore, private collectors should not be barred from purchasing artifacts recovered from underwater excavations provided they are willing to adhere to easement-like conditions that allow the collections to be studied and occasionally publicly displayed.¹⁷⁸ Private individuals should also be allowed to purchase portions of collections that no cultural or government institution is willing or able to buy.

IV. CONCLUSION

The 2001 Convention laudably seeks to encourage States to protect underwater archaeological materials. Its goal of preserving submerged artifacts for human study and enjoyment is unquestionably noble. However, its absolute condemnation of "commercial exploitation," although written with the best of intentions and based on views widely held in the academic archaeological community, currently prevents the 2001 Convention from accomplishing its mission.

The Belitung Shipwreck's story illustrates the counterproductive effect of a categorical ban on commercial exploitation. Indonesia was able to save the Belitung site only by licensing a for-profit salvage company, a decision that the 2001 Convention would have forbidden. Thanks to Indonesia's decision, the Belitung artifacts are now being cared for and displayed as a complete collection in Singapore.

Fortunately, the solution to the counterproductive aspect of the 2001 Convention's rule against commercial exploitation is simple: amending Article 1 to include a definition of commercial exploitation that would allow States to authorize for-profit salvage companies to recover underwater cultural heritage so long as the company uses best practices and does not knowingly disperse the artifacts it recovers among buyers who do not intend to make them available for public study and display. This simple change, which recognizes the importance of public-private partnerships in cultural heritage management, would facilitate greater preservation of underwater archaeology, encourage more States to join the 2001 Convention, and better achieve UNESCO's goals.

178. Suggestions of specific requirements that should bind private collectors who purchase collections of artifacts recovered from ancient shipwrecks are outside the scope of this Note. UNESCO, however, could certainly convene a panel of property experts to determine what encumbrances should attach.