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by Bernard H. Oxman*

INTRODUCTION

The purpose of this article is to examine the rules of the international law of the sea relevant to marine archaeology. It does not contain a detailed examination of other rules that, in the end, may be more important to those interested in marine archaeology.

The law of marine archaeology is primarily the law of a particular state regarding the conduct of marine archaeology and the resultant property interests in anything that may be found. It is what international lawyers commonly call "municipal law." Studies of the different rules regarding marine archaeology applicable in different jurisdictions would be part of the larger discipline of comparative law.

International law—some might say public international law—determines the limits of the jurisdiction of a state to make and enforce rules regarding marine archaeology, and the duties of states to each other regarding the manner in which they exercise their jurisdiction. Three particular questions are relevant in this regard:

(1) What is the power of a state to determine title to and disposition of objects of archaeological interest found at sea?


1. In the context of international law, the term "state" is used in its international sense and refers, for example, to the United States rather than to its constituent states which, for these purposes, are regarded as political subdivisions. Limits on the power of a federal state as a whole under international law also limit the power of its political subdivisions in an international context. Whether these limits apply to the power of political subdivisions with respect to each other or to the federal government in a domestic context is determined by municipal constitutional law which may, on occasion, rely on international law rules. Compare United States v. California, 381 U.S. 139 (1965) (Territorial Sea Convention rules are used to determine the baselines from which the limits of state jurisdiction are measured under the Submerged Lands Act) with Nevada v. Hall, 440 U.S. 410 (1979) (a state of the United States need not be accorded sovereign immunity in the courts of another state of the United States in an action for damages arising out of an automobile accident).
(2) What are the duties of a state regarding the disposition of objects of archaeological interest found at sea?

(3) What is the power of a state to regulate the conduct of marine archaeology?

The first question has two aspects. One concerns the power of a state over objects found or brought within its territory, including its territorial sea. The other concerns the power of a state over objects located at sea beyond its territorial sea. While perhaps less exotic, the former is presumably the more important question: sooner or later, objects removed from the sea will be brought into the territory of a state.

There is little doubt that every state has jurisdiction to determine title to and disposition of property within its territory. In accordance with its choice of law (private international law) rules, the courts of a state will normally respect claims of title to personal property (movables) based on the laws of another state that had jurisdiction to confer such title. Absent a treaty governing the matter, the extent of a state's obligation to respect such claims of title under international law is, however, unclear. Moreover, the jurisdiction of the first state to confer title may itself be in dispute.2

Marine archaeology outside the territory of a state seems to be conducted on the assumption that widely accepted rules of admiralty apply to archaeological objects found at sea, and that these rules, whether derived from the law of salvage or the law of finds, generally vest title in the person who first reduces the objects to possession. Many questions are left unanswered by this assumption. Foremost among them is: Under whose law does title vest? This fertile field for speculation is, happily, beyond the scope of this article. Two words of caution, however, must be noted. The first is that the expansion of various forms of coastal state jurisdiction beyond the territorial sea may implicate not only the power to regulate marine archaeological activities but, indirectly, the power to determine title to the objects found. The second is that the efforts of so-called states of origin to establish some sort of a priori right to cultural artifacts under international law has a direct bearing on the issue of title.

The latter point is linked to the second question regarding the du-

2. Even if private title derived from the laws of another state is recognized, every state is competent to take private property within its territory for a public purpose, provided it compensates the owner to the extent required by international law. In the case of archaeological objects, the "public purpose" requirement will normally raise few, if any, questions. The issue will be requisite compensation, a matter very much in dispute under international law generally and beyond the scope of this article.
ties of states with respect to archaeological objects found at sea. Some duties may be found in the law of the sea itself; those will be examined more closely in this article. Other duties may derive from what may be called an emerging conventional and customary law of cultural artifacts, a body of law not limited to marine archaeology. It is in this broader context that the question of a priori rights for so-called states of origin, questions of treating at least certain cultural artifacts as the common heritage of all the world and spelling out what this means in practice, and related questions of identifying and controlling undesirable international traffic in such objects are generally addressed. It is likely that, over time, the policies of this emerging branch of international law will add substance to the jurisdictional framework provided by the law of the sea.

As this brief introduction suggests, one must avoid over-estimating the role of the international law of the sea in addressing questions of marine archaeology. The law of the sea is important precisely because it supplies the jurisdictional framework pursuant to which states may, individually and cooperatively, develop a substantive law of marine archaeology. It is also important because its rules may reflect insights regarding behavior at sea that would not necessarily obtain on land. But the main burden for deciding what should happen to an archaeological object found at sea rests with those who have struggled with the same question regarding such objects found on land. The difference is that the law of the sea may yield more options than, and pose problems different from, those that arise from a terrestrial system rooted almost exclusively in territorial sovereignty.


The law of the sea was one of the first subjects identified by the International Law Commission as appropriate for codification and progressive development. The Commission's efforts resulted in four Conventions on the Law of the Sea adopted by the 1958 Conference on the Law of the Sea. Numerous states, including the United States, are parties to one or more of these Conventions.


After some years of preparation, the Third United Nations Conference on the Law of the Sea commenced a comprehensive review of the subject in 1973, culminating in the 1982 United Nations Convention on the Law of the Sea. Although the number of states that have already ratified the Convention is not yet sufficient to bring it into force, 155 states have signed it. Many of the articles relevant to this study were copied from, or can fairly be regarded as more precise elaborations upon, the 1958 Conventions. The exclusive economic zone, perhaps the most significant innovation of the Convention, has been widely accepted in state practice. With the notable exception of deep seabed mining, the provisions of the Convention were prepared by a system of consensus and appear to be generally acceptable to both signatories and non-signatories. The United States, which refused to sign the Convention because of its deep seabed mining provisions, has indicated that its behavior and positions in other respects will be guided by the Convention.

With respect to the issue of marine archaeology, it is reasonable to proceed on the assumption that the provisions of the 1982 U.N. Convention on the Law of the Sea are generally the best evidence of current international law binding on all states. Needless to say, this assumption would be highly controversial with respect to the regulation of deep seabed mining and the role of the International Seabed Authority, and might be challenged with respect to other specific provisions. This study, however, is not concerned with either the regulation of deep seabed mining or the International Seabed Authority as such and, with the exception of some specific provisions relevant to marine archaeology itself, rests upon general rules laid down in the Convention that seem to be generally accepted.

II. General Jurisdictional Principles

Any discussion of jurisdiction necessarily concentrates on the authority of a state to prohibit or regulate conduct. The existence of such authority says nothing about the wisdom of exercising it. A state


with jurisdiction over a given person or activity may well be guided by liberal values in determining its policies concerning the exercise of such jurisdiction.

Before turning to the jurisdicational rules specific to the international law of the sea, it is useful to note that nationality is one of the recognized bases of a state's jurisdiction under international law. In principle, a state may regulate the behavior of its nationals wherever they may be. A state could, if it so chose, prohibit its nationals from engaging in marine archaeology or impose conditions on such an activity.

The principle of nationality also applies to ships. A state may regulate a ship flying its flag and the activities on board without regard to the location of the ship. It could, therefore, if it so chose, prohibit ships flying its flag from engaging in marine archaeology or impose conditions on such an activity.

The principle of nationality does not, however, mean that the state of nationality may preclude another state from applying that state's own limitations on activities subject to its jurisdiction. For example, either State A or State B may preclude a ship flying the flag of State A from conducting archaeological activities in the territorial sea of State B. Furthermore, states are generally free to determine the conditions of access to their ports and the conduct of activities within their territory. A state could, for instance, prohibit or regulate the import or export of archaeological objects or the conduct of planning, logistical and support activities within its territory.

III. The High Seas

The classic regime of the high seas is, as such, largely unchanged by the 1982 Convention. To the extent that marine archaeology was previously regarded as a freedom of the high seas, it would continue to enjoy that status under the high-seas regime set forth in the new Convention.

What has been changed by the 1982 Convention is the scope of the regime of the high seas and the extent to which other regimes, in coastal areas in particular, limit and qualify the exercise of previous

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8. Neither article 2 of the 1958 Convention on the High Seas, supra note 4, nor article 87 of the 1982 Convention, supra note 5, specifically enumerates marine archaeology as a freedom of the high seas, but the enumerations in both, expressly qualified by the words inter alia, are clearly not intended to be exhaustive.
high-seas freedoms. In addition, the Convention contains elaborate environmental duties and some new provisions that affect marine archaeology directly.

It should be noted that the freedom of the high seas under international law is enjoyed by states. Each state may control the extent to which it permits its nationals and ships flying its flag to exercise that freedom.

IV. Areas of Coastal State Sovereignty

The coastal state has sovereignty over internal waters such as rivers and small bays, as well as a band adjacent to its coast and internal waters called the territorial sea. The 1982 Convention specifies that the maximum permissible breadth of the territorial sea is twelve miles. In addition, the Convention permits independent island states to exercise sovereignty over waters lying within lines drawn around the perimeter of certain archipelagoes.

All states enjoy passage rights in many parts of the sea are subject to coastal state sovereignty; however, other activities in those areas are generally subject to the control of the coastal state in the exercise of its sovereignty. The coastal state undoubtedly has the right to regulate and control marine archaeology in areas subject to its sovereignty.

The courts of a coastal state are likely, under their choice of law rules, to apply their own law to determine title to archaeological objects found within areas subject to the sovereignty of that state. The content of that law, of course, may be influenced by admiralty principles, including the law of salvage and the law of finds. It is somewhat less certain, however, that courts of other states, in deciding upon title at the time of discovery or removal, would also apply the law of the state in whose waters the object was found.

9. Convention, supra note 5, art. 2.
10. Convention, supra note 5, art. 3. The word "miles" in this article refers to nautical miles.
11. Convention, supra note 5, arts. 46-49.
12. Convention, supra note 5, arts. 8, 17, 38, 45, 52, 53.
13. In a federal state, municipal law would determine the extent to which federal or provincial (state) law applies.
14. One suspects that the influence of territorial considerations in determining title to movable property and the influence of admiralty principles in determining title to property found at sea would be the strongest factors affecting the resolution of the choice of law issue, absent an authoritative enunciation of policy or claim of title by the political branches of the forum state itself. With respect to the first of these, see Restatement (Second) of Conflict of Laws § 247 illustration 2 (1969).
V. Specific Provisions on Marine Archaeology

Articles 149 and 303 of the 1982 Convention deal specifically with marine archaeology. The text of article 149 appeared in the very first Informal Single Negotiating Text presented to the Conference in 1975. Article 303, in contrast, was not negotiated until late in the Conference and appeared for the first time in the Draft Convention (Informal Text) in 1980.

The extent to which either article reflects actual state practice is questionable. Marine archaeology was not a central issue at the Conference and did not attract widespread attention from the various delegations. On the other hand, neither article attracted opposition at the Conference. This leads to the conclusion that the participating states found these articles to be generally acceptable or, at the least, that these states did not perceive difficulties with these articles sufficient to warrant complicating or prolonging the Conference.

A. Article 149

Article 149 provides:

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

This provision appears last in a series of general principles in Part XI of the Convention that apply to the "Area" defined as "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction." This "Area" begins at least 200 miles from continental and insular coasts, and in many places well beyond 200 miles. It

17. Convention, supra note 5, art. 149.
18. Convention, supra note 5, art. 1.
19. The relevant limit of national jurisdiction is the outer limit of the continental shelf. Pursuant to article 76, para. 1,
The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.
is a vast and generally deep part of the ocean that was not frequented by pre-Columbian mariners and is far from the coastal hazards responsible for many ship wrecks.20

The extent to which the text of article 149 was negotiated by delegates is unclear. It was prepared in the context of First Committee negotiations that were primarily concerned with the regulation of deep seabed mining. Explanations for its inclusion may be rooted in both tactical desires to deflect more far-reaching proposals and substantive desires to reinforce the conclusion that marine archaeology is different from deep seabed mining and that the system for regulating deep seabed mining does not apply to marine archaeology. Be that as it may, the result is that salvage and marine archaeology are not subject to regulation by the International Sea-Bed Authority under the Convention.21

Article 149 must be read in the context of article 87, which declares the high seas to be open to all states, and the parallel provision in article 141, which declares the international seabed “Area” to be open to use by all states “without prejudice to the other provisions of” Part XI of the Convention.22 Article 149 is the only other provision that is directly relevant (apart from the general cross-reference...
to other rules of international law in article 138). It would therefore appear that previous high-seas law continues unchanged with respect to marine archaeology in the "Area" except to the extent that it is altered by article 149.23

Article 149 belongs to a thriving species of text that codifies rather than resolves an underlying policy dispute.24 An underlying tension in debates over the disposition of cultural artifacts is between universalist tendencies (the benefit of humanity as a whole) and nationalist tendencies (the preferential rights of so-called states of origin). Article 149 offers no guidance as to how to accommodate the conflicting policy goals it enunciates (much less as to what disposition of the artifacts will promote the benefit of all humanity)25 which state is to be regarded as a state of origin with respect to an object whose origin antedates the modern nation-state system and contemporary demographics, what is the nature of the preferential rights of the state of origin, or what constitutes due regard to such rights.

Because the 1982 Convention contains broad compulsory dispute-settlement provisions, it is worth considering whether article 149 is the kind of text that, in the main, is directed to political rather than judicial implementation. The text is essentially hortatory. This may be all to the good, given the absence in article 149 of the kind of craftsmanship normally found in legal texts purporting to deal with complex issues of title to property. Indeed, even in negating any effect on matters of title, paragraph 3 of article 303 is more carefully crafted than article 149.

The nature of article 149 invites speculation as to the reason for addressing the issue of marine archaeology at all with respect to pre-

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23. Article 136 declares the Area and its resources to be the "common heritage of mankind." It is not clear that this applies to wrecks and other man-made artifacts found there. It is also not clear whether the common-heritage principle, as incorporated into an elaborate Convention, has legal content apart from that contained in the other requirements of the Convention. Even if it does, the principle was understood in the context of the Law of the Sea negotiations as it relates to seabed mining. Its implications with respect to marine archaeology would necessarily be quite different, yet there is nothing in the records of the Conference to suggest that there was any intention to address those implications. In this light, the absence of an independent reference to the common-heritage principle in article 149 should be regarded as significant.

24. My colleague, Patrick Gudridge, first invited my attention to the ubiquity of such texts during a faculty seminar at the University of Miami School of Law.

25. One must bear in mind, for example, that free-market economists and socialist economists each believe their approach to the allocation of property rights benefits humanity as a whole. It is a fundamental mistake, and a remarkable indictment of free enterprise, for those who favor free-market models to conclude that the goal of benefiting all, or the principle of the common heritage of humanity, necessarily implies a public or socialist economic model.
cisely the area of the seabed that is least likely to yield significant cultural artifacts from centuries past. Is it possible that the deep seabed negotiations were merely an occasion for so-called states of origin to seek to advance general legal positions of no special importance with respect to the deep seabeds, but of considerable importance with respect to cultural objects found, or to be found, elsewhere? Was their effort to incorporate their views into the deep seabed mining text designed to influence negotiations later in the Conference over marine archaeology in coastal areas? If so, what is the legal effect of their failure to incorporate into article 303 the concepts set forth in article 149?

B. Article 303

Article 303 of the Convention provides:

1. States have the duty to protect objects of an archaeological and historical nature found at sea and shall co-operate for this purpose.
2. In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the sea-bed in the zone referred to in that articles without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.
3. Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges.
4. This article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.\(^6\)

Unlike the sweeping conceptual generalities of article 149 that are directed to conflicting perspectives on issues of title and use, the first two paragraphs of article 303 are fairly specific, and the third paragraph expressly negates any effect on rules regarding title.\(^7\)

The first paragraph enunciates a duty of protection applicable to all parts of the sea, including those parts of the seabed to which article 149 applies. Its greatest significance is that it applies this duty to coastal areas subject to the sovereignty or jurisdiction of the coastal state where important objects are most likely to be found and where competing uses of the sea and seabed that pose potential threats to cultural artifacts are likely to be most intense. While the nature of

\(^6\) Convention, supra note 5, art. 303.

\(^7\) From a negotiating perspective, article 149 and the third paragraph of article 303 can be viewed as examples of alternative drafting techniques for avoiding resolution of issues in a treaty text.
the duty of protection is left open, it is noteworthy that only with respect to protection of the environment does the Convention introduce a comparably categorical duty applicable everywhere at sea.

The second paragraph of article 33 in effect permits the coastal state to extend its control over marine archaeology beyond its territorial sea up to 24 miles from the coastal baselines. This provision was a result of negotiations in response to proposals to establish coastal state jurisdiction over archaeological and historical objects throughout the continental shelf. Critics argued that those proposals were both unnecessary and objectionable: unnecessary because most objects are likely to be found close to the coast and objectionable because the proposed amendments would alter the nature and balance of the exclusive economic zone and continental shelf regimes already negotiated.

For reasons of principle whose importance transcended any interests in marine archaeology as such, the maritime powers were unwilling to yield to any further erosions in the freedoms of the seas, particularly regarding coastal state jurisdiction over non-resource uses beyond the territorial sea. The inclusion of paragraph 2 of article 303 in the general provisions of the Convention rather than the texts dealing with jurisdiction, and the indirect drafting style employing cross-references and presumptions, were intended to emphasize both the procedural and substantive points that the regimes of coastal state jurisdiction as elaborated by the Second Committee of the Conference were not being reopened or changed.

It had long been established that the coastal state may control smuggling in the contiguous zone adjacent to its territorial sea, and it was already agreed at the Conference that the maximum limit of the contiguous zone would be extended from twelve to twenty-four miles. In principle, the second paragraph of article 303 adds nothing

28. Convention, supra note 5, art. 192.

At about the same time, in response to reports of efforts by the United States to recover a sunken Soviet submarine for intelligence purposes, the Soviet Union and its allies were pressing the proposition that sunken ships and aircraft, and equipment and cargo on board, may be salvaged only with the consent of the flag state. Id.
to this jurisdictional structure. It does not in any way expand the nature of coastal-state powers in the contiguous zone, but rather permits the coastal state to establish a presumption of smuggling. That presumption, in the absence of paragraph 2, might be justified by the facts in many cases but might be difficult to prove in court. By adding a legal presumption that facilitates the exercise of existing coastal state powers in the contiguous zone, paragraph 2 augments those powers only to the extent of the presumption. This is a technique often used in municipal law to facilitate the administration of justice. The result is coastal state control, no principle of coastal state jurisdiction as such, over marine archaeology in the contiguous zone beyond the territorial sea.

Paragraph 4 of article 303 is intended to harmonize the rules of the law of the sea regarding marine archaeology with the content of the emerging law of archaeology and cultural artifacts.

What do we mean by objects of an archaeological or historical nature? The term is not defined in the Convention. There was no reference during the negotiations to definitions in other contexts. It is important to bear in mind that whatever the justifications for particular definitions in the context of other instruments, in the context of the law of the sea an unduly liberal reading of the term to embrace more modern wrecks and objects could prejudice certain rights and principles that states were unwilling to yield in the negotiation of the Convention. For example, the interpretation automatically affects the scope of coastal state powers in the contiguous zone beyond the territorial sea.

The author, who represented the United States in the negotiation of article 303 and participated in its drafting, made the following contemporaneous observations on this point:

The provision is not intended to apply to modern objects whatever their historical interest. Retention of the adjective "historical" was insisted upon by Tunisian delegates, who felt that it was necessary to cover Byzantine relics that might be excluded by some interpretations of the word "archaeological." Hence, the term "historical origin," lacking at best in elegance, when used with the term "archaeological objects" in an article that expressly does not affect the law of salvage, does at least suggest the idea of objects that are many hundreds of years old. [The word "origin" was subsequently deleted by the Conference Drafting Committee.]

The article contains no express time limit. As time marches on, so does our sense of what is old. Nevertheless, given the purpose for using the term "historical," it may be that if a rule of thumb is useful for deciding what is unquestionably covered by this article, the most appropriate of the years conventionally chosen to represent the start of the
modern era would be 1453: the fall of Constantinople and the final collapse of the remnants of the Byzantine Empire. Everything older would clearly be regarded as archaeological or historical. A slight adjustment to 1492 for application of the article to objects indigenous to the Americas, extended perhaps to the fall of Tenochtitlán (1521) or Cuzco (1533) in those areas, might have the merit of conforming to historical and cultural classifications in that part of the world.51

VI. The Exclusive Economic Zone and the Continental Shelf

Beyond the territorial sea, while pursuant to the regimes of the exclusive economic zone and the continental shelf, all states enjoy certain high-seas freedoms, the coastal state is permitted to exercise jurisdiction over some activities.52 Both these regimes apply up to 200 miles from the coast; the regime of the continental shelf also applies to the seabed and subsoil of the continental margin where it extends seaward of 200 miles.53

The Convention does not establish coastal-state jurisdiction as such over marine archaeology, wrecks or cultural artifacts in the exclusive economic zone or on the continental shelf. Nevertheless, the manner in which marine archaeology is conducted might involve activities, such as drilling, that are subject to coastal-state jurisdiction.

A. Sovereign Rights with Respect to the Continental Shelf

In its commentary on articles subsequently incorporated into the 1958 Convention on the Continental Shelf, the International Law Commission clearly stated that coastal state jurisdiction over the continental shelf does not extend to wrecks.54 The relevant texts are repeated in the 1982 Convention, and there is nothing added that would alter the Commission's earlier conclusions on this subject.

32. The basic provisions are set forth in the Convention, supra note 5, arts. 56, 58, 77.
33. Id. arts. 57, 76. See supra note 18.
34. Referring to the article providing that the "coastal state exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources," the Commission stated, "It is clearly understood that the rights in question do not cover objects such as wrecked ships and their cargoes (including bullion) lying on the seabed or covered by the sand of the subsoil." Report of the International Law Commission, ii U.N. GAOR Supp. (No. 9) at 42, U.N. Doc. A/3159 (1956). Accord Treasure Salvors, Inc. v. The Unidentified Wrecked & Abandoned Sailing Vessel, 569 F.2d 330, 340 (5th Cir. 1978).
B. Economic Exploration and Exploitation

In the exclusive economic zone, the coastal state has:

sovereign rights for the purposes of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters . . . and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds.\(^{35}\)

The International Law Commission's interpretation of the article dealing with the sovereign rights of the coastal state with respect to natural resources of the continental shelf,\(^{36}\) from which the first part of the text quoted above is derived, makes clear that sovereign rights over the exploration and exploitation of natural resources do not embrace wrecks.

If any question is posed by this text, it is posed by the reference to "other activities for the economic exploitation and exploration of the zone." This clause, however, is directed to exploration and exploitation of the zone itself, i.e., the natural features of the zone. The language is qualified by the words "such as," which introduce the reference to the production of energy from the water, currents and winds. Marine archaeology does not remotely resemble such activities. There is no suggestion whatever in the travaux préparatoires that this clause was intended to cover wrecks. In brief, it would not be reasonable to construe these words as embracing wrecked ships or marine archaeology.

C. Marine Scientific Research

Resort to abstract classifications might lead to the conclusion that archaeology is not only a science but scientific research and therefore that archaeology at sea is marine scientific research. Such conceptualization is not, however, rooted in the text or travaux préparatoires of the 1982 Convention. The Convention expressly gives the coastal state the right to authorize and regulate marine scientific research in the exclusive economic zone and on the continental shelf. This general proposition was settled at the Conference before article 303 was drafted. What reason would there be to add paragraph 2 of article 303 if marine archaeology were regarded as marine scientific research under the Convention?

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35. Convention, supra note 5, art. 56.
36. See supra note 31.
While the Convention does not define marine scientific research, the provisions of Part XIII establish that the articles relating to marine scientific research deal with the search for knowledge about the natural marine environment or, in the words of article 243, "phenomena and processes occurring in the marine environment and the interrelations between them." Were these articles designed to cover marine archaeology, it would indeed be odd that "samples" are the only objects retrieved from the sea to which the text refers and that the text specifically requires identification of "samples which may be divided without detriment to their scientific value."  

D. *Freedoms in the Exclusive Economic Zone*

Perhaps the most interesting conceptual question is whether a high seas freedom to hunt for wrecks and artifacts is preserved in the exclusive economic zone. Even if marine archaeology is not made subject to coastal state jurisdiction as such, is it included in the high seas freedoms preserved in the exclusive economic zone?

The texts relevant to this question are as follows:

Part V

Exclusive Economic Zone

Article 58

1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and over-flight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.

2. Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.  

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38. Convention, supra note 5, art. 249, para. 1.

39. Id. art. 58, para. 1, 2.
Article 59

In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.40

Part VII
High Seas
Article 86

The provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State. This article does not entail any abridgement of the freedoms enjoyed by all States in the exclusive economic zone in accordance with article 58.41

Not all high seas freedoms are preserved in the exclusive economic zone; indeed, freedom of fishing is essentially eliminated. But those freedoms that are preserved by article 58 are high seas freedoms; this is what is meant by the words “referred to in article 87” in article 58, paragraph 1, the comprehensive cross-reference in article 58, paragraph 2 and the reverse cross-reference in the second sentence of article 86. Article 58, paragraph 2, incorporates by reference all the non-fisheries provisions of the high seas regime set forth in Part VII, except for the enumeration of high seas freedoms. These texts do not refer expressly to marine archaeology.

A right to conduct marine archaeology in the exclusive economic zone can be rooted in the language of article 58, paragraph 1. That provision can be read with relative ease to embrace ordinary salvage, removal of obstructions to navigation, hydrography and a variety of other activities. Diving is an activity traditionally associated with navigation. As long as the object sought is or was a ship or something

40. Id. art. 59.
41. Id. art. 86.
found on board a ship, a further relation to navigation may be established.42

Were article 59 to be regarded as the governing provision, each side of the debate would have to marshall the arguments for and against the preservation of the traditional high seas freedom. However, article 59 applies only in cases where the Convention as a whole does not attribute rights or jurisdiction to the coastal state or to other states within the exclusive economic zone. Article 303, paragraph 2, expressly attributes rights to the coastal state within waters forming part of the exclusive economic zone. Thus it would appear that article 59 should not be read to apply to marine archaeology. The rational understanding of the 24-mile limit on coastal state powers under article 303, paragraph 2, is that marine archaeology is preserved as a freedom of the high seas beyond that limit.

The conclusion that marine archaeology is preserved as a freedom of the high seas in that part of the exclusive economic zone seaward of 24 miles from the coastal baselines is reinforced by the negotiating history of article 303, paragraph 2. That provision was drafted as a response to proposals to establish coastal state jurisdiction throughout the exclusive economic zone or continental shelf.43 The geographic scope of coastal state control is more restricted under article 303 because some maritime states were unwilling to accept coastal state control throughout the exclusive economic zone or continental shelf and, for reasons of substance or accommodation, the proponents of broader control were prepared to accept the 24-mile limit. It would seem untoward to interpret the very general language of articles 58 and 59 in a manner that is contradicted by article 303 paragraph 2, and its negotiating history.

E. Limitations on Marine Archaeology

The Convention contains provisions regarding the exclusive economic zone and the continental shelf that may have a very significant bearing on marine archaeology. At least in some cases their impact may be so substantial that the coastal state will be in an effective position to determine whether, and if so under what conditions, marine archaeology may occur.

Pursuant to article 81, the coastal state has "the exclusive right to
authorize and regulate drilling on the continental shelf for all purposes.”

In addition, article 60 provides:

1. In the exclusive economic zone, the coastal State shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of:

(a) artificial islands;
(b) installations and structures for the purposes provided for in article 56 and other economic purposes;
(c) installations and structures which may interfere with the exercise of the rights of the coastal State in the zone.

2. The coastal State shall have exclusive jurisdiction over such artificial islands, installations, and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations.

The conduct of marine archaeology may require the use of installations or structures within the meaning of article 60. If such installations or structures are being used for “other economic purposes” within the meaning of paragraph 1(b), or if they “may interfere with the exercise of the rights of the coastal State in the zone” under paragraph 1(c), then the coastal state has control. Museums, universities and scientific institutions might be in a good position to avoid coastal state control under paragraph 1(b), but the broad wording of paragraph 1(c) still affords the coastal state room for argument to the contrary.

Activities in the exclusive economic zone must be conducted with “due regard to the rights and duties of the coastal State.” This is a flag state duty rather than a coastal state right. Correctly interpreted, this provision affords the basis for insisting that the flag state take reasonable steps to ensure “due regard,” but it does not confer jurisdiction on the coastal state to enforce the “due regard” obligation directly on the foreign ship.

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44. Convention, supra note 5, art. 81.
45. Id. art. 60, para. 1, 2.
46. Article 60, paragraph 1(c) was inspired by the reasoning in United States v. Ray, 423 F.2d 16 (5th Cir. 1970).
47. This control includes the power to adopt and enforce environmental regulations. Convention, supra note 5, arts. 208, 214.
48. Id. art. 58, para. 3.
VII. Settlement of Disputes

Many of the issues affecting marine archaeology, including those raised by articles 149 and 303, would appear to be subject to compulsory arbitration or adjudication under the Convention. Thus, one could imagine the development of precise interpretations of the Convention's rules, leading not only to greater certainty but to the progressive articulation of practical obligations under the broad duty to protect archaeological and historical objects found at sea. Neither individual pieces of national legislation, of necessity limited in geographic scope, nor sweeping cultural conventions devoid of compulsory dispute settlement or other enforcement mechanisms, might achieve as much in the end.

Even if all of the relevant substantive provisions of the 1982 Convention are reliably regarded as declaratory of existing international law and therefore binding on parties and non-parties alike, this is not the case with respect to compulsory arbitration or adjudication. A state must agree in order to be bound by the obligation to arbitrate or adjudicate. The current refusal of the United States Government to consider even a process of negotiation that could end in United States ratification therefore both discourages the development of this dispute settlement process and, if continued, might exclude the United States from the process.

CONCLUSION

The new international law of the sea continues the tradition of the freedom of the high seas under which marine archaeology may be freely conducted, but with some significant new limitations.

Those who disfavor the new coastal state limitations would be well advised to support the rapid entry into force of the 1982 Convention. It is unlikely that coastal State powers that evolve under customary international law will be less extensive than those set forth in the Convention. The likely trend is in the opposite direction. The Convention at least freezes the situation and binds the coastal states to compulsory arbitration.

Those who favor increased regulation of marine archaeology will find that, coupled with other rules of international law, the new in-

49. Id. arts. 286, 297, 298.
50. The alternative—realized far too often in practice in other contexts—is to pay high fees to accommodating lawyers who conclude that the coastal state is acting illegally and that the Secretary of State is a wimp for being unwilling to risk a military base, an oil investment or a trade war for the sake of protecting the client's project.
ternational law of the sea provides a more than adequate jurisdictional framework for imposing such limitations on marine archaeology as may be desirable. The 1982 Convention significantly adds to its jurisdictional framework a broad duty to protect archaeological and historical objects found at sea. The vitality of this system could be significantly enhanced by entry into force of the Convention, particularly in light of its compulsory dispute settlement provisions.

The law of the sea will not, however, resolve some of the most fundamental issues that face archaeology and the law of cultural artifacts generally. As articles 149 and 303 of the Convention demonstrate, these issues can be resolved only by those more expert in mediating the underlying economic, aesthetic, intellectual and political values asserted.

It remains to be seen whether the result will encourage marine archaeology and treat all peoples as the common cultural descendants of ancient civilizations, drinking from a single well of human wisdom and achievement, or will reveal modern states still to be little more than prehistoric tribes, hiding their wealth and squabbling over title to icons and watering holes.