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The Protection of the
Underwater Cultural Heritage:
An Emerging Objective
of the Contemporary Law
of the Sea

ANASTASIA STRATI



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- 12 Treves, T., "Remarks", 81 *American Society of International Law Proceedings* (1987) pp. 93-98 at p. 95. See further ID, "Codification du droit international et pratique des états dans le droit de la mer", *Hague Recueil* (1990-IV) pp. 9-302.
- 13 According to article 38, a rule set forth in a treaty may become binding upon a third State as a customary rule of international law, if it is recognised as such.

CHAPTER 4

Marine Spaces Under the Sovereignty of the Coastal State

INTERNAL WATERS

THE GENEVA CONVENTION ON THE TERRITORIAL SEA AND THE CONTIGUOUS ZONE (1958)

Article 5(1) of the TSC defines internal waters as “waters on the landward side of the baseline of the territorial sea”. These waters include rivers, lakes, bays, ports and canals within the land area of the State. Within the internal waters, the coastal State exercises territorial sovereignty,¹ which extends both to the seabed and the subsoil thereof and the air space above. Relics found on the bed or in the subsoil of internal waters are exclusively governed by the laws of the coastal State, whether it concerns their discovery, removal or trade.² The only exception to the unlimited territorial jurisdiction of the sovereign State is self-limitation or limitations imposed by international law.³ Flag States cannot, as a matter of strict law, demand any rights for their vessels. The law of the coastal State, however, might allow for the application of the admiralty rules of the flag State of a foreign ship removing archaeological or historical objects from the bed of the internal waters or its subsoil.⁴

A particular problem arising in connection with marine archaeology is the *access to, and use of, ports*. As a general rule, foreign shipping searching for or recovering underwater remains use local ports as bases of operations. The successful completion of a research project depends to a large extent upon the possibility of calling at such ports. In the absence of express provisions to the contrary, there are no additional requirements for the call of archaeological research vessels at foreign ports.⁵ Ports are presumed to be open unless entry is restricted or prohibited.⁶ However, difficulties may be encountered in practice as the whole issue lies within the discretionary

authority of the coastal State, which may make entry to its port dependent upon compliance with conditions concerning the removal of cultural property. The right of coastal States to prescribe conditions for access to their ports can be regarded as a rule of custom, as it is confirmed firmly by State practice over centuries.⁷ This means that vessels wishing to conduct archaeological operations in international waters from a foreign port may have to secure the permission of the coastal State. The main disadvantage of this scheme is that the enforcement jurisdiction of the coastal State is confined to its ports. If a ship does not enter the port, it lies beyond the authority of the coastal State.⁸ In closed areas, such as the Mediterranean, where distances between States are small, research vessels will have the alternative of using a foreign port where entry requirements are less of a burden. Still, in the absence of a more effective regime of protection, the prescription of conditions for entry into ports may provide a basis for regulating access to archaeological sites found in extraterritorial waters. Even though the coastal State is not entitled to extend its heritage laws to protect such sites, the requirement of its permission for the undertaking of archaeological research may ensure a substantial degree of control. In open sea areas, where the alternative use of foreign ports is not possible, the effectiveness of this regime will be greater.

While in port, ships are fully subjected to the laws and regulations of the port State. In practice, however, port States tend to enforce their laws only in cases where their interests are engaged.⁹ Local jurisdiction will, thus, be asserted when the offence affects the peace or good order of the port either literally (for example, customs or immigration offences) or in some constructive sense.¹⁰ Customs laws are particularly relevant to research vessels. These laws can either facilitate their operations or make the movement of personnel and equipment extremely difficult. Foreign shipping must also comply with export laws that incorporate protective measures against the illicit trade of artefacts. Illicit transactions taking place on board of ships will invoke the criminal jurisdiction of the port State.

THE UN CONVENTION ON THE LAW OF THE SEA (1982)

There are no significant differences between the legal regime of internal waters envisaged by the TSC and that provided for by the 1982 Convention. The only differences are minor verbal modifications necessary to correspond with the establishment of two new jurisdictional zones, the archipelagic

waters and the EEZ.¹¹ Like the TSC, the 1982 Convention does not regulate access to ports. However, the coastal right to make entry dependent on conditions is strengthened by article 211(3). Although its purpose is to prevent pollution coming from vessels, article 211(3) is based on the assumption that the port State has the discretionary authority to permit or deny entry of foreign shipping into its maritime ports. The same idea was expressed in a proposal made during the negotiations of UNCLOS III concerning coastal rights over archaeological objects found in extraterritorial waters; it was suggested that the coastal State should be entitled to make access to its maritime ports dependent on conditions relating to the removal of such objects.¹² Despite the fact that this proposal did not find its way into the Final Text of the Convention, it may still be used as a basis to protect the underwater cultural heritage unilaterally. Since the underlying purpose of such measures is the safeguarding of underwater archaeological sites, their adoption should be regarded as an expression of the duty to protect archaeological and historical objects found at sea under article 303(1).

The 1982 Convention introduced radical innovations to port State jurisdiction on pollution matters. Articles 218(1) and 220(1) extended the enforcement jurisdiction of the port State by enabling it to undertake investigations and, when the evidence so warrants, to institute proceedings against a vessel which is voluntarily within its ports or at an offshore terminal “in respect of any discharge from that vessel outside the internal waters, territorial sea or exclusive economic zone of that State in violation of applicable international rules and standards established through the competent international organisation or general diplomatic conference” and “in respect of any violation of its laws and regulations adopted in accordance with this Convention or applicable international rules and standards for the prevention, reduction and control of pollution from vessels when the violation has occurred within the territorial sea or the exclusive economic zone of that State” respectively.

This raises the question whether these provisions could be used as a basis for protecting the underwater cultural heritage. In other words, would port States be entitled to exercise enforcement jurisdiction against foreign vessels which have plundered marine archaeological sites and are voluntarily within their ports? In order to give an answer to this question a distinction should be made between sites within the territorial sea and the contiguous zone and sites in international waters. As will be discussed in Chapter 5, under the 1982 Convention, the coastal State is entitled to expand its competence over archaeological and historical objects found in the 24-mile contiguous

zone. There is no reason why the coastal State should not be entitled to institute proceedings against a vessel that has violated its laws within the 24-mile zone and is voluntarily within one of its ports or at an offshore terminal. However, if such damaging acts have occurred beyond the 24-mile limit, the coastal State will not be empowered to take legal proceedings against the responsible vessel. It should always be borne in mind that the enlarged enforcement jurisdiction envisaged by article 220(1) corresponds to extensive coastal rights over the prevention of pollution in the EEZ (c.f. article 211), while the coastal State does not enjoy such powers over underwater cultural property in this area. Similarly, article 218, which enables the port State to take legal proceedings against a vessel which has discharged polluting matter outside that State's internal waters, territorial sea or EEZ, cannot be applied by analogy to damaging acts against underwater cultural property, as it is an exception to the general rule that port State enforcement jurisdiction does not extend to acts committed on the high seas and should be interpreted restrictively. Nor does the establishment of the general duty to protect objects of an archaeological and historical nature by article 303(1) provide the basis for the justification of such claims.

CUSTOMARY INTERNATIONAL LAW

The exercise of coastal sovereignty in internal waters has long been recognised by the international community. As far back as 1876, in the United Kingdom, it was unanimously accepted that common law operated on the landward side of the low-water mark which formed the littoral boundary of a county and the commencement of the high seas.¹³ The nearer one moves landwards, the truer becomes the *dictum* of the ICJ in the *Fisheries Case (United Kingdom v. Norway) (1951)* that: "It is the land which confers upon the coastal State a right to the waters off its coast."¹⁴

Artefacts found on the bed or the subsoil of these waters would thus be exclusively governed by coastal law. The coastal State is also entitled to prescribe conditions for access to its maritime ports by foreign shipping. This right may be used as a basis for imposing limited control on ships undertaking archaeological operations on the high seas; unless coastal permission is obtained, there will be problems of customs and taxes on objects brought in on the ship. It is notable that in an attempt to prevent the salvaging of the wreck site of the *Titanic* by the French Institute for Maritime Research and Exploration (IFREMER), the U.S. Congress considered a ban

on the importation for commercial gain of any object from the wreck. The bill, which was never enacted, provided for termination of the embargo whenever the U.S. became bound by international agreement governing the exploration and salvage of the *Titanic*.¹⁵

THE TERRITORIAL SEA

THE GENEVA CONVENTION ON THE TERRITORIAL SEA AND THE CONTIGUOUS ZONE (1958)

In the past, the sovereignty doctrine was not shared by all States as a considerable number of them were claiming separate jurisdictional zones for different purposes and of different widths. The recognition of the territorial sea as part of the territory of the State was broadly accepted at the time of the Hague Conference in 1930.¹⁶ Nowadays, coastal sovereignty over the bed and the subsoil of the territorial sea is beyond dispute and is considered as one of the fundamental principles of the law of the sea.¹⁷ Article 2 of the TSC reads: "The sovereignty of the coastal State extends to the air space over the territorial sea as well as its bed and subsoil." Consequently, all activities related to cultural property found on the bed of the territorial sea fall within the plenary jurisdiction and control of the coastal State.

Coastal jurisdiction over foreign vessels

The jurisdiction of the coastal State in the territorial sea is subject to certain limitations due to the existence of a *right of innocent passage*. The right of innocent passage is enjoyed by all ships regardless of their nature, i.e., whether they are research vessels or not. The coastal State is obliged not to interfere with the innocent passage¹⁸ of foreign shipping through its territorial sea (article 15(1)), which is considered to be innocent so long as it is not prejudicial to the "peace, good order or security" of the coastal State (article 14(4)).

Two cases may thus be distinguished: (a) with respect to foreign ships that are not engaged in passage or they have stepped outside the right of innocent passage, the coastal State enjoys full legislative and enforcement jurisdiction; (b) with respect to foreign ships that are engaged in innocent passage, the enforcement jurisdiction of the coastal State is limited (c.f. articles 19 and 20).¹⁹ The limited enforcement jurisdiction is exercised only when passing ships fail to comply with coastal laws and regulations enacted in conformity

with article 17.²⁰ The failure to comply with these laws does not mean that passage is non-innocent; it will always be a question of determining whether such failure has been prejudicial to the “peace, good order or security” of the coastal State for the passage to be non-innocent.

Archaeological surveys as an exercise of the right of innocent passage

Since the right of innocent passage provides the only means for promoting the freedom of research within the territorial sea, there have been numerous attempts to interpret it extensively.²¹ However, any proposals for an extensive interpretation of the right of innocent passage in the interests of freedom of research, must be considered in the light of the TSC, which gives the coastal State a large margin of discretion as to what activities are prejudicial to the peace, good order or security of the coastal State. By definition, the right of innocent passage is confined to the superjacent waters. As a result, archaeological research conducted on the seabed cannot be considered as a legitimate exercise of innocent passage.²² A further limitation should be made in relation to activities that demand stopping or anchoring, as these operations would exceed the limits set by article 14(3): “Passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or by distress.” In this context, the discussion of archaeological research as an exercise of innocent passage is limited to survey activities and the operation of electronic remote-sensing devices. Is it permissible to consider the running of such instruments as incidental to the passage of ships through the territorial sea?

It has been argued that a ship making gravity measurements or investigating the properties of the sea-floor and using echo-sounder or a sonic bottom profiler for this purpose may well be considered as exercising the “ancient right of innocent passage”, so long as it is in conformity with “laws and regulations relating to transport and navigation” and “it is not prejudicial to the peace, good order or security of the coastal State.”²³ *Prima facie*, these suppositions appear to be compatible with the notion of innocent passage as elaborated by the TSC. However, it would be unrealistic to expect the adoption of an extensive interpretation of the right of innocent passage. Political and security reasons would not allow it.²⁴ In most cases, the operation of electronic remote-sensing devices would be considered as prejudicial to the security of the coastal State. Concerning archaeological research, the additional reason exists that operating vessels normally navigate in a grid

of survey lines; such manoeuvring cannot be regarded as “traversing” the territorial sea.²⁵ It seems, therefore, that the undertaking of archaeological surveys will render the operating vessel outside the notion of passage and within the full jurisdiction of the coastal State. The failure of the vessel to report the conduct of such research could also be considered to be “prejudicial to the peace, good order or security” of the coastal State, in which case the passage would be non-innocent.

Operation of national heritage laws

In relation to municipal law, the problem arises as to whether the legislation of the coastal State applies automatically to activities taking place in the territorial sea. This issue cannot be discussed in terms of international law exclusively. International law secures only recognition of coastal sovereignty over territorial waters; it does not determine the extent and the degree of the authority that each sovereign exercises in the territorial sea. This is something to be dealt with by municipal law. The pattern of national heritage legislation varies considerably between States. As noted, two types of heritage laws may be distinguished: general heritage legislation, and legislation dealing specifically with underwater remains.²⁶ A general heritage legislation would apply to relics found on the bed of the territorial sea, if it expressly extends its geographical scope so as to include them²⁷ or it may be interpreted so as to apply to underwater remains.²⁸ In addition, a number of general heritage laws include specific sections on shipwrecks.²⁹

Complications may arise in relation to federal States as to whether the States or the Federal Government has jurisdiction over cultural property found within the territorial sea. In the U.S.A., until recently, there was such a controversy over responsibility for managing historic wrecks. Although the Federal Submerged Lands Act³⁰ gives jurisdiction over submerged lands within territorial waters to the States, the enactment of State legislation to control activities relating to underwater cultural resources was, in substance, nullified as States were held not to be entitled to displace federal salvage law by their own legislation. In a number of cases, federal courts held that cases involving shipwrecks were within their exclusive admiralty jurisdiction and applied either the law of finds or the law of salvage to adjudicate the disputes over them. *Cobb Coin Company Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel (Cobb Coin I)* was the first case to challenge the authority of States for the recovery of historic shipwrecks.³¹ Subsequent judgments in this field created a jurisdictional conflict between the authority

of State government and the federal court to control the excavation of State land for the purpose of recovering shipwrecks.³² In an attempt to clear the confusion, the ASA was enacted. Under its provisions, the U.S. asserts title to any abandoned shipwreck which is: (a) embedded in submerged lands of a State; (b) embedded in coralline formations protected by a State on submerged lands of a State, or (c) on submerged lands of a State and is included in or determined eligible for inclusion in the National Register. This title is being transferred to the State in or on whose submerged lands the shipwreck is located.³³ The constitutionality of the ASA was recently questioned on the basis that it represents impermissible interference with admiralty jurisdiction.³⁴ Nevertheless, in *Harry Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed to Be the "Seabird" ("Seabird II")*, the district court of Illinois upheld ASA's constitutionality.³⁵ Similar problems are encountered in other federal States, such as Canada, where the Federal Government has jurisdiction over navigation and shipping (including the removal and disposal of wrecks), while property rights fall within the exclusive power of Provinces. However, provincial practice has not been challenged at federal level.³⁶

Finally, some scholars criticise the exclusive competence of coastal States to regulate access to archaeological sites found within the territorial sea, as leading to a considerable lack of uniformity and uncertainty in such rights of access. As an alternative, the establishment of international principles regulating these rights is proposed.³⁷ The co-ordination of national heritage laws, through the adoption of an international convention, will, undoubtedly, eliminate considerably differences in requirements upon rights of access to underwater archaeological sites. However, this should not take place by imposing informal sanctions against the State that arbitrarily denies access to archaeological sites³⁸ or by employing arguments, such as "the territorial sovereignty over a coastal State's adjacent waters is not so fundamental to State existence" and that "it is apparent that the oceans are continuous bodies of water whose resources and phenomena know no artificial boundaries. This is of great consequence to marine archaeology, since exploration and excavation may well lead the scientists across artificial territorial boundaries in the seas."³⁹ There can be little doubt that the artificial division of the seas in legal zones is detrimental for more than one sea use, let alone the environmental protection and the ecological balance of the oceans. In this context, co-operation between States is essential. At the same time it is important to appreciate the potential difficulties posed by the fact that territorial sovereignty constitutes one of the fundamental principles of the

law of the sea. Recent years have seen an expansion of coastal jurisdiction over wide ocean areas. It would be absurd to expect the recognition of the freedom of research or other activities, unrelated to international navigation, within the territorial sea. The fact that marine archaeology has “no distinct commercial or military objective” is inconsequential, as coastal States will always be suspicious of research vessels operating in their waters. It is notable that the 1985 Draft European Convention does not impose any restrictions on coastal authority to control access to archaeological sites found within the cultural heritage zone. The implementation of its provisions has been entrusted to a Standing Committee which is a purely consultative and co-ordinating body.

THE UN CONVENTION ON THE LAW OF THE SEA (1982)

Marine archaeology and the right of innocent passage

The notion of innocent passage

The 1982 Convention set the maximum breadth of the territorial sea at 12 nm (c.f. article 3) and elaborated the notion of innocent passage in a more precise and concrete way. First, the rule of “not hanging around” is strengthened by article 18(2) which reads that passage shall be “continuous and expeditious”, and second, article 19(2) offers a more helpful definition, as in addition to the general 1958 formula, it specifies the notion of “non-innocent” to certain activities committed during passage. The commission of any of these acts renders passage non-innocent, without being necessary to show that the latter is prejudicial to the “peace, good order or security” of the coastal State.

Under article 19(2)j, the carrying out of “research or survey activities” will render passage non-innocent automatically; the language used is broad enough to include archaeological research.⁴⁰ In addition paragraph (k) excludes from the notion of innocent passage all activities “not having a direct bearing on passage”, and paragraph (g) “the loading or unloading of any commodity contrary to the customs and fiscal regulations”.⁴¹ Can underwater cultural property be interpreted as a “commodity” so that its loading or unloading contrary to the customs and fiscal laws of the coastal State would render passage non-innocent? In the light of the judgment of the European Court of Justice (ECJ) of 10 December 1968 in *Commission of the European Communities v. Italian Republic*,⁴² the answer should be in

the positive. The Court held that by goods within the meaning of Article 9 of the EEC Treaty, there must be understood products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions.⁴³ Despite the fact that the interpretation of “goods” by the ECJ concerns exclusively the EEC Treaty, it does shed some light on the more general issue of the definition of cultural property and its distinction from other goods or articles of general use. The adoption of the philosophy of the ECJ would allow the interpretation of cultural property as a commodity, since it fulfils the two criteria suggested by the court: (a) it can be valued in money, and (b) it is capable as such of forming the subject of commercial transactions.

Exercise of coastal jurisdiction during innocent passage

Article 21 of the 1982 Convention provides that:

“The coastal State may adopt laws and regulations in conformity with the provisions of the Convention and other rules of international law, relating to innocent passage through the territorial sea, in respect of all or any of the following:

(g) marine scientific research and hydrographic surveys;⁴⁴

(h) the prevention of infringement of the customs, fiscal, immigrations or sanitary laws and regulations of the coastal State.”

Contrary to article 17 of TSC, article 21 introduces a limitation to the legislative jurisdiction of the coastal State *ratione materiae*; laws other than those included in article 21 must not be extended to passing ships. The breach of these laws and regulations will result in the exercise of the criminal and civil jurisdiction of the coastal State subject to the limitations of articles 27 and 28. Clearly, coastal States retain their right to unlimited jurisdiction in relation to ships found within territorial waters, but not engaged in innocent passage, i.e., vessels conducting archaeological research.

Prima facie, article 21 does not appear to be relevant to the protection of underwater cultural property, in that it deals with the exercise of jurisdiction during innocent passage which excludes archaeological research from its ambit. However, it may be of interest to the international trade of artefacts. Under paragraph (h), the coastal State is entitled to adopt laws and regulations relating to innocent passage so as to prevent the infringement of its customs and fiscal regulations. The failure of passing vessels to comply with these regulations and the repeated willingness to do so, may be considered prejudicial to the “peace, good order or security” of the coastal State in which case passage will be non-innocent. It is beyond dispute that each State

has “an absolute right to enforce its customs and revenue laws within its territorial waters. The passing of these laws is a matter for municipal legislation”.⁴⁵ The 1982 Convention explicitly upheld the right of the coastal State to adopt legislation in order to prevent the infringement of its customs and revenue laws by ships exercising the right of innocent passage.⁴⁶ The only qualification provided is that, in the application of these laws, the coastal State must not impose any requirements that would have the practical effect of denying or impairing the right of innocent passage (c.f. article 24 1(a)).

Conflict between marine archaeology and the right of innocent passage
Archaeological research in the territorial sea is governed exclusively by the municipal law of the coastal State. The only limitation that international law confers to the exercise of coastal sovereignty in this area, is the obligation “not to hamper” the right of innocent passage. If, under the circumstances, archaeological operations impair the passage of foreign vessels through the territorial sea or *vice versa*, the question arises as to whether the protection of underwater cultural property will acquire priority over the needs of international navigation.

Prima facie, the exercise of coastal sovereignty over the territorial sea would seem to weigh the balance in favour of the coastal State. However, international law acts as a restraining factor and requires that innocent passage should not be hampered. In this context, the coastal State will be entitled to take the necessary measures to facilitate the carrying out of marine archaeological operations, but will not be entitled to hamper innocent passage unjustifiably. Under article 21(1)a, “the coastal State may adopt laws and regulations relating to innocent passage through its territorial sea, in respect of the safety of navigation and the regulation of maritime traffic.”⁴⁷ For safety reasons, the coastal State may adopt legislation under which foreign shipping should keep clear of the area in question by using an alternative route.⁴⁸ The failure of passing vessels to comply with such measures will involve the exercise of the limited criminal and civil jurisdiction of the coastal State. In addition, if a shipwreck constitutes “danger” to international navigation, the coastal State will be responsible for taking all the precautions to avoid accidents and, if necessary, to remove the wreck in question.⁴⁹ With respect to ancient shipwrecks, it is rather unlikely that such a situation will occur as they are normally buried under thick layers of sand and sediments.

In case the conflict between innocent passage and archaeological operations is *unavoidable*⁵⁰, two factors should be weighed against each other: (a)

the damage to the need of the international community for freedom of navigation, and (b) the damage to the coastal State caused by the failure to protect the cultural property in question. However, the State which pursues archaeological research and preserves the underwater cultural heritage is acting in an interest wider than its own national interest; it is also acting in the interest of the international community in the protection of the cultural heritage. Could one, therefore, argue that it has the right to suspend innocent passage as a means of resolving the conflict? The answer would seem to be in the negative. Both under article 16(3) of the TSC and article 25(3) of the 1982 Convention, the coastal State is entitled to temporarily suspend innocent passage, "if it is essential for the protection of its security". An extensive interpretation of the term "security" so as to include the interests of coastal States in the protection of the underwater cultural heritage is not permissible as, in effect, it would abolish the very institution of innocent passage. Consequently, in case of unavoidable conflict between the right of innocent passage and marine archaeology, the coastal State will be entitled to take the necessary measures to regulate traffic so as to avoid interference of passing vessels with archaeological operations, but will not be entitled to suspend innocent passage on these grounds.

Effect of article 303 on cultural property found within the territorial sea

Duty to protect objects of an archaeological and historical nature (article 303(1))

Under the 1982 Convention, the coastal State is not only entitled to regulate access to archaeological sites found within the territorial sea boundary, but it has also the duty to protect them. Clearly, within marine spaces that fall under coastal sovereignty, the onus of responsibility for ensuring the protection of underwater cultural property lies upon the coastal State. One hopes that those coastal States which have not yet adopted legislation to protect their underwater heritage will do so on the basis of article 303(1). The latter should be given the broadest possible meaning so as to embrace the whole spectrum of activities related to the underwater cultural heritage.⁵¹ Article 303(1) may thus be read as: (i) the obligation to report the accidental discovery of archaeological sites to the competent authorities; (ii) the obligation to take the necessary *interim* protective measures for the preservation of an underwater site before the arrival of marine archaeologists or even to suspend construction projects; (iii) the need to preserve *in situ* the located remains and to avoid unnecessary excavation; (iv) the need for conservation, proper presentation and restoration of the recovered items. A similar

approach should be adopted in relation to the second duty established by article 303(1), the duty of co-operation. It should also be interpreted extensively so as to promote, *inter alia*, the exchange of scientific information, the undertaking of joint archaeological projects as well as the co-ordination of the fight against the illicit trade of artefacts which has expanded dramatically in the last years.

*Reservation of the rights of the identifiable owners, the law of salvage and other rules of admiralty*⁵² (article 303(3))

As pointed out, the law of salvage provides one of the most inappropriate means to regulate access to marine archaeological sites. By reserving it, article 303(3) paves the way for conflict and confusion, as the latter often conflicts with coastal heritage legislation. However, within the territorial sea, where the admiralty laws of the coastal State prevail over those of flag States, the question whether salvage law is excluded or not will be determined on the basis of national law alone.⁵³ It would be absurd to argue that a general provision reserving admiralty law and the rights of the identifiable owners can confer a considerable limitation to the sovereignty of the coastal State by excluding those archaeological provisions that vest title of ownership of underwater relics in the State, or, in case of conflict between salvage law and antiquities legislation, by rendering salvage law applicable. The coastal State will, thus, be entitled if it wishes to exclude salvage law from the regime of the underwater cultural heritage.

So far as *rights of ownership* are concerned, almost all jurisdictions provide that the owners do not lose their property rights simply by the sinking of their vessel. Instead, the question of title depends on whether the owners have abandoned the wreck or not. The requirements of abandonment differ between jurisdictions, although abandonment is very difficult to prove in both common and civil law systems if the wreck has not been expressly abandoned by the owner or his successors. To overcome this problem, a number of States have enacted legislation, which vests ownership of shipwrecks and their cargo to the State after the passage of a very short period of time. For example, Spanish legislation provides that the State becomes the owner of any sunken ship and its cargoes after three years, if the owners do not exercise their rights,⁵⁴ while in France the owner's rights can be terminated by a declaration made by the *Ministre de la Marine Marchande*.⁵⁵ In other words, the acquisition of title to the wreck by the State is done by way of deemed abandonment. The exercise of State prerogative over abandoned goods or goods belonging to unidentifiable persons is rather

common. This rule, which fundamentally differs from the otherwise predominant concept of the acquisition of property rights by occupation, vests title to the wreck in the sovereign State. In common law systems, the rule of sovereign prerogative - known as the "English rule" - was incorporated for the first time in the Merchant Shipping Act 1894.⁵⁶ Even in 1798, it was held that it is "the general rule of civilised countries that what is found derelict on the seas is acquired beneficially for the sovereign, if no owner shall appear" (*The Aquila*).⁵⁷ In contrast, the majority of the courts in the U.S.A. vested title of abandoned wrecks to the salvor/finder (the "American rule"). The American courts recognised the inherent power of the U.S. to assert ownership over artefacts recovered from the sea, but denied that Congress had exercised its sovereign prerogative in respect of abandoned property found at sea.⁵⁸ The ASA altered this position by giving a prerogative to the State in or on whose submerged lands the abandoned shipwreck is located.

The enactment of a general heritage law or one specifically dealing with underwater remains, superimposes a new legal regime on these traditional rules of maritime law. A number of these laws vest ownership of protected items to the State; some provide for State ownership under the assumption that no owner is known or can be identified,⁵⁹ while others provide for an automatic transfer of ownership of all antiquities to the State.⁶⁰

CUSTOMARY INTERNATIONAL LAW

With the exception of the right of innocent passage, the coastal State has exclusive jurisdiction over all acts committed in its territorial sea.^{60a} As a result, the conduct of archaeological activities in this area would always require its permission. Since innocent passage relates to continuous navigation through the territorial sea, archaeological research cannot be regarded as incidental to its exercise; under the circumstances, its conduct may passage non-innocent.

Finally, State practice provides evidence of the settlement of the maximum breadth of the territorial sea to 12 nm. As of 16 November 1993, one hundred and nineteen (119) States have claimed 12nm territorial seas.⁶¹

STRAITS USED FOR INTERNATIONAL NAVIGATION

Geographically speaking, a strait means a narrow water passage connecting two seas or large bodies of water. The legal status of the waters that constitute the strait determines the respective rights of the riparian and flag States. If the waters are high seas, namely if the territorial seas of the riparian States leave a navigable channel of high seas in the strait, then freedom of navigation applies. If the strait is comprised of the territorial seas of the riparian States, problems may arise as to the nature of the rights of passage by foreign shipping.

THE GENEVA CONVENTION ON THE TERRITORIAL SEA AND THE CONTIGUOUS ZONE (1958)

According to article 16(4) of the TSC: "There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State". The only difference between the general right of innocent passage through the territorial sea and the right of passage through straits is the non-suspendable nature of the latter. The exercise of coastal sovereignty over the strait is not affected in any other respect. Consequently, underwater cultural property found in this area would fall within the plenary authority of the riparian State. Similarly, the undertaking of archaeological surveys cannot be considered as a legitimate exercise of the right of passage through international straits.

THE UN CONVENTION ON THE LAW OF THE SEA (1982)

Legal status

The 1982 Convention envisages four types of straits: (a) special convention straits, the legal regime of which remains unaffected (article 35(c)); (b) straits with central area of high seas or an EEZ (article 36); (c) straits subject to the regime of transit passage: these are straits between one part of the high seas or an EEZ and another part of the high seas or an EEZ (article 37); (d) straits subject to the regime of innocent passage: these are straits which are formed by an island and its mainland and there exists seaward of the island a high seas route or an EEZ route of similar convenience (article 45(1)a),

and straits between a part of the high seas or an EEZ and the territorial sea of a foreign State (article 45(1)b).

Marine archaeology and the right of transit passage

The notion of transit passage

Article 34(1) emphasises the fact that the regime of transit passage “shall not in other respects affect the legal status of the waters forming such straits or the exercise by the States bordering the straits of their sovereignty or jurisdiction over such waters and their air space, bed and subsoil”. In the light of article 38(2), which defines transit passage as “the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit”, the conduct of archaeological surveys in the course of transit passage cannot qualify as a legitimate exercise of this right. This is confirmed by article 40, which requires prior authorisation of the States bordering straits for the carrying out of any research or survey activities by foreign ships, including marine scientific research and hydrographic survey ships, during transit passage, and article 39(1)a and c which provide respectively: “Ships and aircraft shall proceed without delay through or over the strait”, and “Ships should refrain from any activities other than those incident to their normal modes of continuous and expeditious transit, unless rendered necessary by *force majeure* or by distress.” These provisions are clear enough to dispense any doubts over the exclusion of marine archaeological research from the notion of transit passage. The *rationale* of both innocent and transit passage is to facilitate navigation and not to give flag States access to coastal waters for the carrying out of other activities unrelated to international shipping. For military and security reasons, coastal States would firmly object to any alterations to the nature and scope of these regimes. The conduct of archaeological research during transit passage will render passage non-innocent with the consequent implications.⁶²

Exercise of coastal jurisdiction during transit passage

The exercise of the legislative jurisdiction of States bordering straits in relation to transit passage is confined to the limited number of cases envisaged by article 42.⁶³ Among them features the “loading or unloading of any commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary laws and regulations” (para. (1)d). As already seen, an extensive interpretation of the term “commodity” so as to include underwater cultural property is possible. Since the legislative competence of the

coastal State in relation to transit passage is limited, article 42(1)d may be used as a basis for regulating the trade of artefacts during transit passage.

Finally, the 1982 Convention is silent on the enforcement jurisdiction of the riparian State during transit passage. As a result, the general territorial sea regime on innocent passage applies, where enforcement jurisdiction should only be exercised when the good order of the coastal State is disturbed or the flag State requests assistance.

Conflict between marine archaeology and transit passage

According to articles 44 and 45(2), both transit and innocent passage through international straits are non-suspendable. In case of absolute conflict⁶⁴ between archaeological operations and transit passage, the priority lies clearly in favour of the latter. Riparian States are not entitled to stop the passage of foreign shipping even for security reasons.⁶⁵ The temporary suspension of transit passage for the conduct of archaeological operations will raise the international responsibility of the riparian State. Only when a sunken wreck constitutes danger for international navigation does the riparian State enjoy the right to suspend transit passage without committing an international illegitimacy. Necessity requires that passage should be suspended for so long as it is necessary for the recovery of the wreck in question.⁶⁶ Otherwise, the prohibition of suspension is absolute.

CUSTOMARY INTERNATIONAL LAW

Rights of passage through international straits constitute one of the most controversial issues of the contemporary law of the sea. In 1949, in the *Corfu Channel Case* the ICJ held that: "It is, in the opinion of the Court, generally recognised and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorisation of a coastal State provided that the passage is innocent" and that "there is no right for a coastal State to prohibit such passage through straits in time of peace."⁶⁷ The Court's *dictum* referred to straits between two parts of the high seas. Rights of passage through straits between one part of the high seas and the territorial sea of a foreign State were not addressed by the Court. As already seen, under the TSC, passage through such straits is assimilated to passage through the territorial sea, with an additional non-suspension guarantee. It is highly questionable whether the

regime of transit passage envisaged by the 1982 Convention, which confers a more serious limitation to coastal sovereignty than the right of innocent passage, has acquired the status of a customary rule.⁶⁸ Nevertheless, this debate is of no interest to the international regime of marine archaeology in that the latter cannot be considered to be a legitimate exercise of the general right of passage through the territorial sea. Underwater cultural property found in straits falling under the territorial seas of the riparian States is exclusively governed by the respective national legislation.

ARCHIPELAGIC WATERS

THE GENEVA CONVENTION ON THE TERRITORIAL SEA AND THE CONTIGUOUS ZONE (1958)

In the past archipelagic States demanded a special regime for their waters based on the need to safeguard the unity of the nation and to promote the economic and cultural development. The TSC does not provide specifically for archipelagic waters. Nevertheless, the enclosure of *coastal archipelagos* can take place on the basis of article 4(2), which recognises the right of the coastal States to draw straight baselines around islands fringing a coast.⁶⁹

THE UN CONVENTION ON THE LAW OF THE SEA (1982)

The 1982 Convention promoted the claims of the archipelagic States⁷⁰ into a new jurisdictional zone, the archipelagic waters. The regime of archipelagic waters coincides with neither the internal waters nor the territorial sea; it is a *sui generis* regime which falls under the sovereignty of the archipelagic State. According to article 49, the sovereignty of the archipelagic State extends to the airspace above the archipelagic waters as well as to their bed and subsoil and the resources contained therein. So far as rights of passage through archipelagic waters are concerned, flag States enjoy both the right of innocent passage⁷¹ and the right of archipelagic sea lanes passage.⁷² The definition of the archipelagic sea lanes passage as “the exercise of the rights of navigation and overflight in the normal mode solely for the purpose of continuous, expeditions and unobstructed transit between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone,” and the *mutatis mutandis* application of the relevant articles regulating transit passage,⁷³ do not allow an extensive

interpretation of the archipelagic sea lanes passage so as to consider archaeological surveys as its legitimate exercise.

Consequently, the conduct of archaeological research within archipelagic waters falls within the plenary jurisdiction and control of the archipelagic State. In case of conflict between archaeological operations and archipelagic sea lanes passage, the priority is clearly in favour of the latter. Contrary to the exercise of innocent passage through archipelagic waters, archipelagic sea lanes passage is non-suspendable.⁷⁴

CUSTOMARY INTERNATIONAL LAW

To date, fifteen (15) States appear to have claimed archipelagic waters: Antigua and Barbuda, Cape Verde, Comoros, Fiji, Indonesia, Kiribati, Marshall Islands, Papua New Guinea, Philippines, Saint Vincent and Grenadines, São Tomé e Príncipe, Solomon Islands, Trinidad and Tobago, and Vanuatu.⁷⁵ Tuvalu has made provision for the possibility of the future declaration of “archipelagic waters”⁷⁶, while Mauritius has not claimed archipelagic waters but has, nonetheless, delimited its maritime zones from straight lines drawn around the Chagos archipelago referred to as “straight baselines”.⁷⁷ The concept of archipelagic waters is also recognised by the South Pacific Nuclear Free Zone Treaty (1985), which states in article 1(b) that “‘territory’ means internal waters, territorial sea and archipelagic waters, the seabed and subsoil beneath the land territory and the airspace above them”,⁷⁸ and in a number of bilateral agreements, such as the Treaty between Malaysia and the Republic of Indonesia relating to the Legal Regime of Archipelagic State and the Rights of Malaysia in the Territorial Sea, Archipelagic Waters and the Territory of the Republic of Indonesia Lying between East and West Malaysia (1982).⁷⁹

A number of scholars have questioned the status of archipelagic waters under customary law,⁸⁰ while others tied its general recognition to the fate of the 1982 Convention.⁸¹ It has also been argued that the compromise of archipelagic waters was “sold” to non-archipelagic States by the guarantee of innocent passage and archipelagic sea lanes passage. Movement of this compromise into the realm of customary international law could, therefore, be inferred from the care taken to reach the compromise and the paucity of objections to the result.⁸² The validity of this argument which advances the theory of instant customary law is doubtful.⁸³ Whether the concept of

the archipelagic waters is now part of customary law depends upon evidence of State practice recognising the relevant principles as they are elaborated in the Convention. Since State practice is not always in conformity with the regime envisaged by the 1982 Convention, it would be more reasonable to refer to the *general* concept of the archipelagic waters as a customary rule.⁸⁴ It is noticeable that a number of States, such as Australia, Denmark, Ecuador, Portugal and Spain, have drawn archipelagic baselines, although they do not qualify as “archipelagic States”.⁸⁵

So far as cultural property is concerned, it can be safely assumed that it falls under the sovereignty of the archipelagic State irrespective of whether existing national legislation makes specific reference to it.⁸⁶

CONCLUSION

The protection of underwater cultural property found landward of the outer limit of the territorial sea, does not create considerable problems of international law. The sovereignty of the coastal State extends over the bed of *internal waters* and brings within its plenary jurisdiction all activities related to the search for and recovery of underwater archaeological remains. Maritime ports are normally presumed to be open for archaeological research vessels, the port State having the right to restrict or even prohibit entry. If a coastal State makes entry to its ports dependent on conditions concerning the removal of underwater cultural property, its permission will be required for archaeological operations conducted from its ports, even when the latter take place in international waters. The prescription of such conditions has limited practical significance in that the enforcement jurisdiction of the coastal State is confined to its ports. However, in the absence of a more effective legal regime of protection, it may provide a basis for regulating access to archaeological sites in extraterritorial waters unilaterally.

Within the *territorial sea*, coastal States have the right to regulate both access to marine archaeological sites and the conduct of exploration and excavation activities. The conditions under which archaeological research takes place depends entirely on coastal laws and regulations. However, archaeological operations conducted in coastal waters must not interfere with the exercise of *innocent passage* by foreign shipping. Otherwise, the coastal State will break its obligation “not to hamper” innocent passage through the territorial sea. In case of conflict between archaeological operations and innocent

passage, the priority lies in favour of the latter. The coastal State will be entitled to adopt legislation under which passing vessels should keep clear of the area in question by using an alternative route of similar convenience; it will not be entitled, however, to suspend innocent passage for these reasons, even temporarily. The temporary suspension of innocent passage can be justified only if it is essential for the security of the coastal State. Finally, archaeological surveys cannot be considered as a legitimate exercise of innocent passage through the territorial sea. Under the TSC, the conduct of archaeological research will render passage non-innocent, only if it is considered to be prejudicial to the "peace, good order or security" of the coastal State. Under the 1982 Convention, the undertaking of research activities during passage renders it non-innocent automatically.

Similarly, archaeological research cannot be considered as a legitimate exercise of *transit or archipelagic sea lanes passage*. The *ratio* of these regimes is to serve the needs of international navigation and not to promote the freedom of research and other, unrelated to international shipping activities, within marine spaces that fall under coastal sovereignty. The 1982 Convention emphasises the fact that both the regime of transit passage through straits for international navigation and the regime of archipelagic sea lanes passage through archipelagic waters, do not affect the exercise of coastal sovereignty and jurisdiction over the respective waters, their airspace and the seabed. The conduct of archaeological research by foreign ships in the territorial sea without the prior authorisation of the coastal State will invoke the exercise of its civil and criminal jurisdiction. The coastal State will thus be entitled to exclude the vessel in question and, if the requirements of the right of "hot pursuit" are fulfilled, it may pursue it and arrest it on the high seas.⁸⁷

Finally, the duty of the coastal State to protect underwater cultural property found landward of the outer limit of the territorial sea should be considered as an emerging rule of custom. Each State is responsible for the protection of cultural heritage situated within its territory. Both in time of peace and war, cultural property should be respected. This tentative conclusion is confirmed by the 1982 Convention which establishes the duty to protect archaeological and historical objects found at sea. Recent years have seen an increased interest in the protection of the underwater cultural heritage. A group of States have enacted specific underwater heritage legislation, while others have made specific reference to underwater relics in their general heritage laws. In addition, an increased number of regional Protocols con-

cerning the protection of the marine environment have included the “historic and touristic attractions of coastal areas” among the protected interests.⁸⁸

NOTES

- 1 The coastal State exercises complete sovereignty over internal waters, as complete as over its land. This is implied by both the wording of article 1 of the TSC: “The sovereignty of a State extends, *beyond its land territory and its internal waters*, to a belt of sea...”, and the exclusion of a right of innocent passage through these waters, except in the case where the establishment of straight baselines along an indented coast has the effect of enclosing as internal waters areas, which previously had been considered as part of the territorial sea or of the high seas (c.f. article 5(1)).
- 2 There are two types of heritage laws: (a) general heritage legislation, and (b) legislation dealing specifically with underwater remains. Since the internal waters form an integral part of the territory of the coastal State, heritage laws should be applicable even if there is no particular reference to cultural property found under water. See further Prott, L.V. and O’Keefe, P.J., “Law and the underwater heritage” in UNESCO, *Protection of the underwater heritage*. Protection of the cultural heritage. Technical handbooks for museums and monuments, 4, 1981 pp. 165-200 at pp. 169-170; ID, *Law and the Cultural Heritage*, vol. 1, *Discovery and Excavation*, Professional Books Ltd., Abingdon, 1984 at pp. 90, 111-115.
- 3 Sovereignty is not a discretionary power which overrides the law, but rather the competence of a State as defined and limited by international law. See further Larson, A., Jenks, C. and others, *Sovereignty within the Law*, Oceana Publications Inc., Dobbs Ferry, New York, 1965.
- 4 Caflisch, L., “Submarine Antiquities and the International Law of the Sea”, 13 *N.Y.I.L.* (1982) pp. 3-32 at p. 10, footnote 28.
- 5 However, the ability of research ships to conduct undetected research or even espionage within coastal waters, might induce port States to demand additional requirements for their entry. In this respect, the legal nature of the vessel, namely whether it is a private or a public research vessel, will play an important role. According to Soons, “private research vessels appear to be generally considered as merchant vessels for this purpose. This means that entry is usually permitted as a matter of routine, and clearance requests are handled informally. For public research vessels (not being warships) and for warships (temporarily) employed as research vessels diplomatic clearance will be required”. Soons, A.H.A., *Marine Scientific Research and the Law of the Sea*, T.M.C. Asser Institute-The Hague, Kluwer Law and Taxation Publishers, 1982 at p. 91. See also Redfield, M., “The Legal Framework for Oceanic Research” in Wooster, W.S.(ed.) *Freedom of Oceanic Research*, Crane, Russak & Company Inc., New York, 1973 pp.41-95 at p. 43; Caflisch, L. and Piccard, S., “The Legal Regime of Marine Scientific Research and UNCLOS”, 38 *ZaöRV* (1978) pp. 848-901 at p. 854. In contrast, Burke argues that the consent of the coastal State would

be required for both public and private research vessels. Burke, W.T., *A Report on International Legal Problems of Scientific Research in the Oceans*, Clearinghouse for Federal Scientific and Technical Information, Doc. PB-177-724 at p. 5. *Ibid.*

- 6 The TSC does not deal specifically with rights of access to ports. However, the exercise of territorial sovereignty over national ports and the absence of a general right of passage through internal waters would seem to preclude the assertion of a right of entry by foreign ships. The vast majority of scholars recognise the full authority of the coastal State over access to ports and its competence to exclude entry by foreign vessels, virtually at will. An historical account of the minority view, from Grotius to recent scholars can be found in McDougal, M.C. and Burke, W.T., *The Public Order of the Oceans - A Contemporary International Law of the Sea*, Yale University Press, New Haven/London, 1962 at pp. 103-117. See further Hydeman, L.M. and Berman, W.H., *International Control of Nuclear Maritime Activities*. Atomic Energy Research Project, The University of Michigan Law School, Ann Arbor, 1960 at p. 131 *et seq.* The minority point of view based on, or just supported by, an arbitral decision (the *Aramco Arbitration* of 1958), claims that flag States may demand access to ports of other States as a matter of right. See *Saudi Arabia v. Arabian American Oil Company (Aramco)*, 27 *I.L.R.* 117. "According to a great principle of public international law, the ports of every State must be open to foreign merchant vessels and can only be closed when the vital interests of the State so require". This interpretation is not justifiable under customary international law: "Even the most extreme supporter of freedom of the seas would hardly deny the legal right of a State to exclude aliens and alien vessels from its ports or insist on the opposite. Today the littoral State has, if not a right of arbitrary exclusion, at least its equivalent in rights of regulation." Potter, P.B., *The Freedom of the Seas*, London, 1924 at p. 84. Text quoted in McDougal and Burke, *ibid* at pp. 107-108. See also the *Poggioli Case (1903) [Italian-Venezuelan Commission]*, X *R.I.A.A.* 669 at p. 670: "No allowance will be made for the closure of a port, whatever reasons may have induced it, when no contract relations between the government and the claimant are in question"; the *Orinoco Steamship Company Case [Opinion American Commissioner]*, (1903) IX *R.I.A.A.* 180: "Closure of ports and waterways during revolt by constituted authorities cannot be considered as a blockade unless the rebels have been recognised as belligerents. The right to close portions of the national territory to navigation is inherent in all governments"; the *Faber Case (1903) [German-Venezuelan Commission]*, X *R.I.A.A.* 438: "States through the territory of which navigable schemes flow, although these streams rise in the territory of other States, have the right to close the rivers to navigation at their discretion, and no appeal will lie therefrom. This doctrine would seem to apply even though these rivers emptied directly into the sea instead of debouching into an inland lake, as in the case under consideration, wholly within the territory of the State seeking to control the navigation of these rivers. This doctrine being applicable to their

inhabitants of the State at the headwaters of the streams is all the more applicable to domiciled foreigners”.

Since international law fails to impose any limitations to the exercise of coastal sovereignty in internal waters, this right would seem to lie within the exclusive competence of the port State. The only exceptions to the authority of the coastal State are the privileges of ships in distress, which enjoy both the right of free access to national ports and, while in port, certain immunities from local jurisdiction. See e.g., *the Creole Case (1853)* reprinted in Moore, J.B., 4 *International Arbitrations* 4375; *Kate A. Hoff (The Rebecca) Case, (1929) IV R.I.A.A.* p. 444. “Peace, good order and security” are undoubtedly good reasons for the closure of ports as the coastal State is entitled to prohibit passage through the territorial sea when these interests are prejudiced (article 14(4) of the TSC). *A fortiori*, therefore, it must have the right to close its ports for the same reasons. In the *Faber case, ibid* at p. 463, it was held that States have the right to prohibit temporarily navigation on rivers which flow at sea and close their ports, where it is “necessary to the peace, safety and convenience of its citizens.” However, despite the absence of a right to entry under international law, in practice, most States enjoy such rights. There seems to be a presumption that designated ports are open to foreign vessels in the absence of express provisions to the contrary made by the port State. This is confirmed by numerous bilateral treaties regulating access to ports, e.g., the 1968 Treaty of Navigation Between the Federal Republic of Germany and the Spanish State, *ST/LEG/SER.B/16* at p. 401, the 1923 Geneva Convention and the Statute on the International Regime of Maritime Ports, 58 *L.N.T.S.* 285, and the needs of navigation. See further Lowe, A.V., “The Right of Entry into Maritime Ports in International Law”, 14 *San Diego L. Rev.* (1977) pp. 597-622.

- 7 See, for example, *Patterson v. Bark Eudora*, (1903) 190 *U.S.* 169 at p. 178: “Indeed, the implied consent to enter our harbours may be withdrawn, and if this consent may be wholly withdrawn, it may be extended upon such terms and conditions as the government sees fit to impose”, and the cases cited in note 6. The ICJ in the *Nicaragua Case* recognised that “it is by virtue of its sovereignty that the coastal State may regulate access to its ports”; *I.C.J. Reports* (1986) 14 at p. 101, para 213. The coastal right to make entry to its ports dependent on conditions belongs to the exclusive domestic jurisdiction of the coastal State unfettered by international law. Any arguments opposing the establishment of those conditions as an illegal limitation of the freedom of the high seas are not valid. As already pointed out, the only exceptions to the authority of the coastal State are the privileges of ships in distress. It should be admitted, however, that the right of regulation is not unlimited and that it should be exercised within the limits of the principle of *abus de droit*. See Lowe, *ibid* at p. 608 and citations in footnote 38.
- 8 Under the TSC, it is not permissible for the port State to impose on foreign shipping obligations that have to be complied with throughout the voyage and then to enforce these rules on the high seas. Such practices would exceed the limits of enforcement jurisdiction which is based on the assumption that visiting

- ships owe "temporary allegiance" to the territorial sovereign. McDougal and Burke, *op. cit.* note 6 at p. 110. See also, Lowe, *ibid* at pp. 600-604.
- 9 Coastal States do not interfere with matters of internal discipline of the ships found within internal waters - the so-called "internal economy" of the ship - unless their assistance was invoked or the peace was compromised. This self-limitation is mainly confined to criminal matters. With respect to civil matters, the ships which are found within internal waters are fully subjected to local jurisdiction. See further, Brierly, J.L., *The Law of Nations. An Introduction to the International Law of Peace*, 6th ed. Clarendon Press, Oxford, 1963 at pp. 223-226.
 - 10 Churchill, R.R. and Lowe, A.V., *The Law of the Sea*, 2nd revised edition, Manchester University Press, 1988 at p. 55.
 - 11 C.f. article 8(1) and (2) respectively.
 - 12 Treves, T., "Rassegne: La nona sessione della conferenza sul diritto del mare", 63 *Rivista di diritto internazionale* (1980) pp. 432-463 at p. 441.
 - 13 *R v. Keyn (The Franconia) (1876)*, 2 *Ex D.* 63 at p. 1689. See also *R v. Forty-Nine Casks of Brandy (1836)*, 3 *Hag. Adm.* 257 at p. 289.
 - 14 Judgment of December 18th, 1951, *I.C.J. Reports* (1951) p. 116 at p. 133. See also Schwarzenberger, G., *International Law*, vol. 1, Stevens & Sons Ltd., London, 1957 at p. 195.
 - 15 S. 1581, 100th Cong., 1st Sess., 133 *Cong. Rec.* S.11150-51 (Aug. 3, 1987). See also *Ocean Policy News*, April 1987 at p. 3, and Nafziger, J.A.R., "Finding the Titanic: beginning an international salvage of derelict law at sea" , 12 *Columbia - VLA Journal of Law & the Arts* (1988) pp. 339-351 at pp. 349-350. The U.S. Congress also considered a ban on any for-profit display of the objects. See *Sunday Times*, 8 November 1987, p. 19, col.7, and Prott, L.V. and O'Keefe, P.J., *Law and the Cultural Heritage*, vol. 3, *Movement*, Butterworths, 1989 at p. 599: "Clearly, it was intended that the closing off of the lucrative United States market would deter speculative attempts to retrieve objects from the *Titanic*." On the discovery of the *Titanic* see "The *Titanic*: Lost and Found", 28 *Oceanus* No. 4 Winter 1985/86 (special issue); Ryan, P.R., "The *Titanic* revisited", 29 *Oceanus*, No. 3, Fall 1986, pp. 2-15; Ballard, R.D., *The Discovery of the Titanic: Exploring the Greatest of all Ships*, A Hodder & Stoughton/Madison Press Book, 1987.
 - 16 Although the divergence of views within the First Conference for the Progressive Codification of International Law at The Hague (March 12 - April 12, 1930) rendered the conclusion of a convention on the territorial sea impossible, the recognition of coastal sovereignty over the territorial sea would seem to be widely acceptable. See further Reeves, J.S., "The codification of the law of territorial waters", 24 *A.J.I.L.* (1930) pp. 486-499. See also the Harvard Law School Draft on "Convention on Territorial Waters", 23 *A.J.I.L.* (1929) at pp. 243-245, the Amended Draft Convention communicated to various Governments by the League of Nations Committee of Experts for the Progressive Codification of International Law with Questionnaire No. 2, January 29, 1926 (League of Nations Document C.196.M.70 1927 V. p.72), *ibid*, pp. 366-368 and the League

of Nations Documents C.74.M.39, 1929 V and C.351(b)M.145(b) 1930 V, reprinted in Rosenne, S. (ed.), *League of Nations-Conference for the Codification of International Law [1930]*, vol. 2, pp. 219-421 (with supplements) and vol. 4, pp. 1203-1423 respectively. For a discussion of the development of the doctrine of the territorial sea, see further O'Connell, D.P., *The International Law of the Sea*, vol. 1, Clarendon Press, Oxford, 1982 at pp. 59-123.

- 17 Early practice and doctrine were not concerned as much with the submerged areas as with the superjacent waters, because of the lack of any significant interest in use of them. As a result, the rule for the bed and the subsoil was conceived later than the corresponding rule for the superjacent waters and airspace, although the "subsequent crystallization process resulted in a unitary customary rule and not three separate rules." Marston, G., "The evolution of the concept of sovereignty over the bed and the subsoil of the territorial sea", 48 *B.Y.I.L.* (1976/77) pp. 321-332 at p. 332.
- 18 Under article 14(2), "passage" means "navigation through the territorial sea for the purpose of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters".
- 19 Article 19 deals with the exercise of the criminal jurisdiction of the coastal State and article 20 with the exercise of civil jurisdiction. Under article 19 coastal States *should not* enforce their laws in respect of crimes committed on passing ships, unless the consequences extend to the coastal State, or disturb the peace of the country or the good order of the territorial sea, or coastal State intervention is requested by the flag State or to suppress drug trafficking. Enforcement jurisdiction is excluded only when the crime was committed before the ship entered the territorial sea and the ship is merely passing through the territorial sea without entering internal waters. Similarly, article 20 provides that passing ships should not be stopped or diverted in order to exercise civil jurisdiction against a person on board. The arrest of ships for civil proceedings is also prohibited except in relation to obligations or liabilities assumed by the ship itself in the course of or for the purpose of its voyage through the territorial sea. However, coastal jurisdiction is reserved in the case of ships lying in the territorial sea or passing through it after leaving internal waters.
- 20 Article 17 confers no limitations to the legislative jurisdiction of the coastal State in relation to vessels exercising the right of innocent passage.
- 21 See, for example, the 1968 UNESCO Report on Legal Questions Related to Scientific Investigations of the Oceans: "The view was also expressed that the Group might concentrate on new interpretation of existing law as well as attempting to define new law or principles since it might be possible to facilitate research through such interpretations. For example, 'innocent passage' might be defined as including the right to run continuous recording instruments (which can be done anyway virtually undetectably) or take a few samples." UNESCO/IOC Summary Report of Working Group on Legal Questions Related to Scientific Investigations of the Ocean (First meeting, Paris 16-20 Sept. 1968), *Doc. AVS/9/89 M(8)*, December 1968 at p. 7. Text reprinted in Brown, E.D., "Freedom of

Scientific Research and the Legal Regime of Hydrospace”, 9 *Indian J. Int’l Law* (1969) pp. 327-380 at pp. 377-378.

- 22 Article 14(2) is in accordance with past developments which did not recognise the exercise of this right on the seabed. According to Marston, “the fragmentary development of the sovereignty of the coastal State over the territorial sea is still reflected in the fact that the right of innocent passage is impliedly confined to passage on the surface or through the water mass and does not include passage through the subsoil or airspace”. *Op. cit.* note 17 at p. 332. In addition, article 14(6) requires that all submarines and underwater vehicles must navigate on the surface.
- 23 Revelle, R., “Scientific Research on the Sea-Bed; International Co-operation in Scientific Research and Exploration of the Sea-Bed” in Sztucki, J.(ed.), *Symposium on the International Regime of the Sea-Bed. Proceedings*, Academia Nazionale dei Linzei, Rome, 1970, pp. 649-663 at p. 660.
- 24 The practice of certain maritime powers to employ trawlers and other environmental research ships for espionage provides a further justification for the rejection of such an extensive interpretation. The *Pueblo* incidence even if not directly related to innocent passage, provides one of the most illustrative examples of the political aspects of science. The *Pueblo* was an electronic surveillance ship which had been described by the U.S. Defence Department as an “environmental ship.” When captured by the North Koreans for espionage, the captain of *Pueblo* claimed that the ship was engaged in oceanographic research including the study of sun spots. For further discussion see Knauss, A.J., “Development of Freedom of Scientific Research Issue of the Third Law of the Sea Conference”, 1 *Ocean Dev. & Int’l. L.* (1973) pp. 93-120 at p. 95.
- 25 According to Miller, the methodical exploration of the seabed would seem to be “more comparable to mapping exercises than to the passage of a vessel”. Miller, H.C., *International Law and Marine Archaeology*, Academy of Applied Sciences, Belmont, Mass., 1973 at pp. 16-17.
- 26 The vast majority of States still apply their general heritage laws to underwater relics, while a small number have enacted legislation which specifically regulates aspects of the underwater cultural heritage. Others have legislation which falls into more than one of these categories. See, for example, *Italy: Law No. 1089 of 1 June 1939 on the Protection of Objects of Artistic and Historic Interest; Code of Navigation of 1942* including special provisions for objects of artistic, historic, archaeological and ethnographic interest; *United Kingdom: Ancient Monuments and Archaeological Areas Act 1979, c.46. Sec. 53(1):* “A monument situated in, on or under the seabed within the seaward limits of United Kingdom’s territorial waters adjacent to the coasts of Great Britain ... may be included in the Schedule under section 1(3) of this Act, and the remaining provisions of the Act shall extend accordingly to any such monument which is a scheduled monument (but not otherwise)”; *Protection of Wrecks Act, 1979, c.36.* The legislative approach towards the protection of underwater remains is far from unified. However, this is unimportant provided there are no loopholes in the legislative schemes which leave part of the cultural heritage unprotected.

Underwater cultural property should enjoy the same level of protection as cultural property on land. As argued: "For jurisdictions which have a wealth and variety of relics underwater there are a number of practical reasons in favour of a dual legal regime - one law applicable to relics on land; the other applying to those underwater. The major advantage is that of easy recognition by persons not skilled in the law; other advantages are association by name, concise statement of rights and duties and absence of need to refer to other legal provisions....In all cases, the best protection of the underwater cultural heritage lies in education and in persuasion of the diver, fisherman, oil worker or cable layer of the cultural value of what is found. This will be done more easily if reference can be made to a single piece of legislation which is easily accessible physically and associated by name: one in which rights and duties are set out concisely, without ambiguity or the need to refer to other legal provisions". Protz and O'Keefe, *op. cit.* note 2 at p. 114.

- 27 See, for example, *Algeria*: Ordinance No. 67-281 of 20 December 1967 on Excavations and the Protection of Historic and Natural Sites and Monuments. The definition of "historic monuments" includes movable and immovable property of national historic, artistic or archaeological importance (articles 19 and 57). Under article 14, "the State acquires by right any movable property discovered during the course of excavations or fortuitously in the Algerian territorial waters" (emphasis added). See also Burnham, B., *The protection of cultural property - Handbook of National Legislations*, ICOM, 1974, pp. 30-31. *Chile*: Law No. 17,288 of 27 January 1970 on National Monuments, amended by Laws No. 17,341 of 9 September 1970 and No. 17,577 of 14 December 1970 and by Decree Law No. 1 of 5 May 1979. Article 1: "National monuments, which shall remain in the custody and under the protection of the State are ... anthropo- archaeological, palaeontological pieces or objects or natural formations, which exist on or below the national territory or within Chilean territorial waters, the preservation of which is of historical, artistic or scientific interest" (emphasis added). UNESCO, *The Protection of Movable Cultural Property - Compendium of Legislative Texts*, vol. 1, 1984, pp. 85-101 at p. 86. *Cyprus*: Antiquities Law 1935 as amended by Laws No. 48 of 1964 and No. 32 of 1973. The Cypriot Antiquities Law provides a good illustration of a general antiquities legislation gradually extending to include archaeological remains found on the bed of the territorial sea. Article 2 of the original Antiquities Law (1935) read: "'Land' includes land (with the grazing rights, and all water and rights on, over or under such land), buildings, trees, easements and standing crops." This definition was amended by article 3(b) of the Law to Amend the Antiquities Law of 10 September 1964 (No. 48 of 1964): "Section 2 is hereby amended as follows: [b]y the insertion immediately after the interpretation of land of the words following: 'and also includes the territorial waters of the Republic'." A further amendment was made by article 2 of the Antiquities (Amending) Law of 8 June 1973 (No. 32 of 1973): "Section 2 of the principal law is amended as follows: by numbering the existing part thereof as subsection (1) and by adding the following amendments thereto: (b) by the repeal of the amendment to the definition of land made by section 3(b) of Law 48 of 1964

and the insertion immediately after the definition of the word land, of the words 'and includes the territorial waters of the Republic'." Section 2 now reads: "Antiquity" means any object, whether movable or part of immovable property, which is work of architecture, sculpture, graphic art, painting and any art whatsoever, produced, sculptures, inscribed or painted by human agency, or generally made in Cyprus earlier than the year A.D. 1850 in any manner and from the sea within the *territorial waters* of Cyprus and includes any such object or part thereof which has at a later date been added, reconstructed, readjusted or restored: Provided that in the case of such works of ecclesiastical or folk art of the highest archaeological, artistic or historical importance, the year A.D. 1900 shall be taken into account in place of the year A.D. 1850" (emphasis added). UNESCO, *The Protection of Movable Cultural Property, Collection of Legislative Texts, CLT-85/WS 22*, 1985. *Egypt*: Law No 117 of 1983 promulgating the Law on the Protection of Antiquities. Article 5: "The Organisation shall be responsible for exploration for antiquities above the ground, under the ground and the inland and *territorial waters*" (emphasis added). *Kenya*: The Antiquities and Monuments Act No. 2 of 1983. Section 3 declares that the application of this Act shall extend to monuments and antiquities on the seabed within the *territorial waters* of Kenya. *CLT-85/WS 29*, 1985. *Libyan Arab Jamahiriya*: The Antiquities Law (No 40 of 1968). Article 4(1): "All antiquities whether immovable or movable in or on the ground or in the ground or in the *territorial waters* shall be considered to be public property" (emphasis added). Article 39: "Archaeological excavations means any activity or activities undertaken with a view to discovering movable or immovable antiquities, by means of excavations, of topography or of exploration in water courses, the beds of lakes and gulfs or in any part of the depths of *territorial waters*" (emphasis added). *Qatar*: Law No. 2 of 1980 on Antiquities. Article 2: "Antiquities are of two kinds: movable and immovable; the latter includes sites of ancient buildings and their annexes, such as ruins of ancient cities and buildings, as well as mounds, grottoes, caves, citadels, ramparts, forts, religious places, schools and so forth, whether they are above or under the ground, or submerged by inland or *territorial waters*. Movable antiquities are antiquities which, by their nature, are not made to be attached to the ground and can be displaced without being damaged" (emphasis added). *CLT-85/WS 36*, 1985.

See also *Brunei*: Antiquities and Treasure Trove Enactment 1967. Article 1 defines antiquity as "any object, movable or immovable or any part of the soil or of the bed of a river or lake or of *the sea*" (emphasis added). Burnham, *ibid* at pp. 43-44; *Greece*: Codification of the provisions of Act 5351, together with the relevant applicable provisions of Acts BXM/7, 2447, 491 and 4823 and of the legislative Decree of 12/16 June 1926, into a single legislative text bearing the number 5351 and entitled "The Antiquities Act" and dated 24 August 1932; *CC-87/WS 5*, 1987. Article 1: "All antiquities whether movable or immovable, from ancient or subsequent times found in Greece and any national possessions in rivers, lakes and the *depths of the sea*, and on public, monastic and private land, shall be the property of the State" (emphasis added). *CC-87/WS 5*, 1987,

and *Turkey*: Cultural and Natural Objects (Conservation) Act, No. 18113 of 23 July 1983 as amended by Law No. 3386 of 17 June 1987. Article 3(a)(2): "Cultural objects are all movable and immovable objects above or below ground or *under water*, prehistoric or of historical times, of scientific, cultural, religious or artistic value" (emphasis added).

- 28 See, for example, *Albania*: Decree No 4874 of 23 September 1971 on the Protection of Cultural Monuments, Historic Monuments and Rare Natural Objects; Regulations of the Ministry of Education and Culture of 18 October 1972 for the Protection of Cultural and Historical Monuments; Regulations concerning the Protection of Cultural Monuments promulgated by the Decision of the Council of Ministers No 130 of 9 April 1955. In Albania a new law is under preparation. The draft legislation makes specific reference to antiquities found in rivers, lakes or under the sea and vests title of all antiquities in the State. As it stands it adopts a very general definition of the protected cultural property, including objects of 40 years old. Information kindly provided by Mr Guri Pani, Ministry of Culture, Youth and Sport, Tirana; *Lebanon*: Order No 166 LR of 7 November 1933 prescribing Regulations on Antiquities; Order No 255 LR of 28 September 1934 prescribing Regulations on the Suppression of Offences Relating to Antiquities and Historic Monuments.
- 29 *Finland*: Act of Archaeological Remains 1963 regulates "Ship Discoveries" in Chapter 3 (article 20). The Act, which is confined to Finland and its territorial waters, was kindly provided by Ms. Marianna Kaukonen, Curator, National Board of Antiquities, Helsinki; *Ireland*: National Monuments Act of 1930 as amended in 1954 and in 1987 by the National Monuments (Amendment) Act, 1987, No. 17 of 1987: An Act to make further provision for the protection and preservation of national monuments and archaeological objects, including provision for the regulation of the use and possession of detection devices, to make provision for the protection and preservation of historic wrecks, to amend and extend the National Monuments Acts, 1930 and 1954, and to provide for connected matters (sec. 3); *Norway*: Cultural Heritage Act of 1978, Act No. 50 of 9 June 1978 regulates "Ship's Finds" in Chapter IV (article 14), CC-87/WS 7, 1987; *Sweden*: Act No. 350 of 12 June 1942 concerning Ancient Monuments and Finds as amended by Act No. 77 of 17 March 1967 and Act No. 589, 30 June 1971, applies to "shipwrecks and objects found in the vicinity of such wreck and being connected thereto" (sec. 9(a)); see Prott, L.V. and O'Keefe, P.J., "Analysis of Legislation in Individual Countries" in Council of Europe, Parliamentary Assembly, *The Underwater Cultural Heritage*, Report of the Committee on Culture and Education (Rapporteur Mr. John Roper), Doc. 4200-E, Strasbourg, 1978, Appendix III, pp. 91-135 at pp. 125-126.
- 30 43 U.S.C. para. 1301 (1970).
- 31 1983 AMC 1003. The Florida Archives and History Act was held invalid as unconstitutional on the basis that it conflicted with federal principles of admiralty and maritime law, and the federal interest affected was substantial. In the opinion of the court, the case was not like those validating State police power regulations, which merely affect maritime concern, as the Florida statute interferes with substantial existing federal maritime rights: it prohibits salvors from

exploring sites in State waters without a permit, it grants exclusive rights for a fixed period regardless of the licensee's diligence in conducting operations, and it provides for a fixed salvage compensation unrelated to risk and merit. *Cobb Coin I* constituted a major obstacle to the protection of cultural resources as most of the regulatory programs of the twenty-five States, which had enacted underwater antiquities legislation at the time, were similar to the Florida Archives and History Act and could, therefore, be held invalid. These were: Alaska, Arizona, Colorado, Florida, Georgia, Hawaii, Indiana, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, New Hampshire, New York, North Carolina, North Dakota, Rhode Island, South Carolina, Texas, Vermont, Virginia, Wisconsin, Northern Mariana Islands. See further Throckmorton, P., "Introduction: Marine Archaeology", 28 *Oceanus*, No. 1 Spring 1985, pp. 2-12 at p. 3, and Shallcross, D.B. and Giesecke, A.G., "Recent Developments in Litigation concerning the Recovery of Historic Shipwrecks", 10 *Syracuse J. Int'l L. & Com.* (1983) pp. 371-403 at p. 400. It is notable that more than 35 cases were pending in 1983.

- 32 There were, however, a number of federal court admiralty cases, which decided in favour of State regulation of historic shipwrecks and revealed a tendency to address the controversial issue of the protection of underwater cultural resources in a more responsible manner. These were: *Maritime Underwater Surveys Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 717 F.2d. 6 (1st Circ. 1983). In this case, the First Circuit held that the Eleventh Amendment barred adjudication of a State's interest in artifacts found within its coastal waters, absent the State's consent, and dismissed salvor's action for title to and possession of a 1717 wreck in Massachusetts's waters, since the Commonwealth was obviously the plaintiff's principal adversary, even though not named as a defendant in the *in rem* complaint. Although the district court held that Massachusetts's claim of title to the vessel was colorable, the First Circuit did not reach the issue of colorability of title: "Because this is not a claim against a named State official and because of the Eleventh Amendment's flat prohibition of suits against States regardless of their merit, we need not reach the colorability of the Commonwealth's claim (although we have no doubt that Commonwealth's claim is at least colorable, see note 1). We merely hold that when a State asserts title to antiquities lodged within the seabed under its authority, the Eleventh Amendment bars federal adjudication of State's interest, absent its consent." It seems, therefore, that a different framing of the complaint, or the participation of State officials to the salvage operations of Maritime Surveys which would have waived the defence of the Eleventh Amendment, might have led to a different holding. It is on these grounds that the overall significance of Maritime Surveys had been questioned. "The practical effect of Maritime Surveys will not be to discourage salvors from conducting recovery operations on historic shipwrecks, but it will simply shift legal battles from the federal courts to State courts". *Ibid* at p. 404. As a matter of fact, in 1986 the Supreme Court declared that title to the vessel is vested in Maritime and that since the Commonwealth's statutory scheme conflicts with federal maritime law, Maritime was not obliged to comply with the statute's requirements,

Maritime Underwater Surveys Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel, 1987 AMC 2590. The judgment was affirmed by the Supreme Judicial Court, *Commonwealth of Massachusetts v. Maritime Underwater Surveys*, 1989 AMC 425, which held that the federal maritime law of finds and not State statutory scheme for protection of underwater archaeological resources governs right to salvage the wreck of a 18th century pirate vessel lying in Mass. State waters' (see also *Richard Fitzgerald v. The Unidentified Wrecked and Abandoned Vessel*, 1989 AMC 1075, which was held to be indistinguishable from *Maritime Underwater Surveys*. However, in *Elias Lopez Soba, Executive Director of the Institute of Puerto Rican Culture v. Richard Fitzgerald, et al.*, 1993 AMC 120, the Supreme Court of the Commonwealth of Puerto Rico, affirmed the decision of the Superior Court that under applicable Puerto Rican legislation, objects recovered from a sunken shipwreck in Puerto Rican waters belong to the Commonwealth, and there is no need to apply maritime salvage law. It is notable that in 1987 Puerto Rico did pass legislation to protect underwater archaeological resources (Act No. 7), under which all artifacts found in Puerto Rican waters are public property, but the events in controversy took place before its enactment);

Subaqueous Exploration & Archaeology Ltd. v. The Unidentified, Wrecked and Abandoned Vessel, 577 F. Supp. 597, 1984 AMC 913 (D.Md. 1983). In this case, the Federal Court provided another solution to this problem by holding that the law of marine salvage and finds is applicable only to "recently wrecked or damaged vessels" and not to "an ancient, abandoned shipwreck." The court also held that Maryland had a colorable claim to the vessels on the basis of the Submerged Lands Act of 1953 and the Maryland statute passed originally in 1968, and that therefore the Eleventh Amendment barred the maintenance of the proceedings; *Klein v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 568 F. Supp. 1562 (S.D. Fla. 1983), 1984 AMC 1897, aff'd 758 F.2d 1511 (11th Cir. 1985). In this case the historic shipwreck was found on submerged lands within the Key Biscayne National Monument, in other words, on lands owned by the United States. The court held that the shipwreck, which was embedded in submerged land, owned by the United States and administered and controlled by National Park System, belonged to the United States, and the alleged finder was not entitled to salvage award where government was in constructive possession of the shipwreck; *Chance v. Certain Artifacts, etc.* 1985 AMC 609 (S.D. Ga. 1984), where the U.S. District court upheld Georgia's claim that the wreck was embedded on State property and that consequently title to the vessel rests with the State. In *Jupiter Wreck v. The Unidentified, Wrecked and Abandoned Sailing Vessel, Her Tackle etc.*, 1988 AMC 2705, the U.S. district court held that Florida Statutes giving the State ownership of property found in State-owned submerged lands, neither conflict with nor are preempted by federal maritime salvage law. Federal question jurisdiction exists only where the issue appear on the face of a "well-pleaded" complaint and may not be predicated on a federal admiralty law defense raised only in defendant's answer. The Southern District of Florida remanded the State of Florida's court action brought to enjoin salvor from continuing unlicensed activity forbidden by State

law governing the exploration of wrecks in State waters. It was irrelevant that the federal court had already taken jurisdiction in an *in rem* action by the salvor against such a wreck. The court applied the common law of finds with the result that the owner of the soil has title to abandoned property found beneath it. Since the *res* is embedded in soil, which is owned by the State, it belongs to the latter. *Ibid* at 2716. Finally, in *People v. Massey*, 137 Mich. App. 480; 358 NW2d 615 (1984), the Michigan Court of Appeals declared that the 1929 Michigan Aboriginal Records and Antiquities Act, as amended in 1980 which gives the State of Michigan jurisdiction over all articles of historical and recreational value within the territorial borders on the Great Lakes' bottomlands, is constitutional, and the Michigan Supreme Court denied leave to appeal. Although the court recognised that all cases of admiralty and maritime matters were within the Federal Government's jurisdiction, it concluded that federal authority extends only to matters and issues relevant to navigation through the Great Lakes, and not to beds or bottomlands of navigable waters. See further Barrows, R.T., "Ownership of Submerged Lands and Rights to Articles found Thereon", 66 *The Michigan Bar Journal* (1987) pp. 886-893 and Grigg, J.W., "The Michigan Aboriginal Records and Antiquities Act: a Constitutional Question", 65 *Michigan Bar Journal* (1986) pp. 432-437.

- 33 Pub. L. No 100-298, 102 Stat. 432 (1988); 43 U.S.C. para. 2101-2106 (1988). At the time the ASA was being considered, 28 States had enacted legislation to protect historic shipwrecks off their coasts. In *Commonwealth of Massachusetts v. Maritime Underwater Surveys*, *ibid* at p. 413, the Supreme Judicial Court held that while the ASA by its terms does not affect any legal proceedings prior to the law's enactment, its provisions are consistent with the view that title to or rights in ancient wrecks were *not* conveyed in the SLA and that the constitutional power to take control of and assert title to abandoned wrecks remained in the Federal Government. Thus, until enactment of the ASA, Federal Government retained dominion over ancient wrecks lying in the seabed within the three-mile territorial limit. See also Owen, D.R., "The Abandoned Shipwreck Act of 1987: Good-Bye to Salvage in the Territorial Sea", 19 *J. Mar. Law & Com.* (1988) pp. 499-516. Although the U.S. territorial sea now extends to 12nm (c.f. Proclamation of the President on 27 December 1988), the ambit of the ASA is still confined to 3nm, as the former expressly provides that Federal and State law remains unaltered. A new bill to deal with this issue is being prepared. For a discussion of the ASA, see Fisher, M.A., "The Abandoned Shipwreck Act: the role of private enterprise", 12 *Columbia - VLA Journal of Law & the Arts* (1988) pp. 373-377; Giesecke, A.G., "The Abandoned Shipwreck Act: Affirming the role of the States in historic preservation", 12 *Columbia - VLA Journal of Law & the Arts* (1988) pp. 379-389; Hewitt, N.M., "The proposed Abandoned Shipwreck Acts of 1987 - archaeological preservation and maritime law", 12 *Suffolk Transnational Law Journal* (1989) pp. 381-393; Stevens, T.T., "The Abandoned Shipwreck Act of 1987: Finding the Proper Ballast for the States", 37 *Villanova Law Review* (1992) pp. 573-617 and Runyan, T.J., "Shipwreck legislation and the preservation of submerged artifacts", 22 *Case W. Res. J.*

- Int'l L.* (1990) pp. 31-45. The ASA also anticipates the preparation of guidelines, which shall seek to maximize the enhancement of natural resources, foster a partnership among sport divers, fisherman, archaeologists, salvors and other interests to manage shipwreck resources of the States and the United States, facilitate access and utilization by recreational interests and recognize the interests of individuals and groups engaged in shipwreck discovery and salvage. See Abandoned Shipwreck Act Guidelines, 54 *Fed. Reg.* 13642-13658 (1989) published in corrected form as *Final Guidelines* in December 1990. See further Croom, A., "The United States' Abandoned Shipwreck Act goes into action - a report", 21 *I.J.N.A.* (1992) pp. 39-53, and Nelson, R.H., "Guiding the Ocean Search Process: Applying Public Land Experience to the Design of Leasing and Permitting Systems for Ocean Mining and Ocean Shipwrecks", 20 *Ocean Devel. & Int'l L.* (1989) pp. 577-600, who discusses the different parameters that should be taken into consideration when designing new leasing and permitting systems for ocean shipwrecks. As of 4 December 1990, there were 142 shipwrecks listed in or determined eligible for listing in the National Register.
- 34 *Harry Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed to Be the "Seabird" ("Seabird I")*, 941 *F.2d* 525 (7th Cir. 1991), 1992 *AMC* 532. There is a close question whether the enactment of the ASA divested federal courts of their admiralty jurisdiction over claims relating to embedded shipwrecks. However, the U.S. Court of Appeals, Seventh Circuit did not deal with the issue of constitutionality. In its view, before deciding whether the ASA is constitutional, remand was required so that the district court can determine whether the wreck was in fact embedded and, if so, whether the Act is constitutional to allow its application. Specific finding that the shipwreck is embedded in submerged lands within the meaning of the ASA was necessary in order to preclude the claimant from invoking the law of finds or the law of salvage; the conclusion of the district court that the shipwreck was "likely" embedded was insufficient (*Harry Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed to Be the "Seabird"*, 746 *F. Supp.* 1334; 1991 *AMC* 359; the district court also held that the constitution does not prohibit Congress from altering substantive maritime law so long as that law continues to be applied by federal courts, and that the enactment of ASA did not constitute impermissible interference with the uniformity of federal maritime law by making the common law of finds rather than maritime salvage law applicable to wrecks embedded in State submerged lands). As argued: "It is of course preferable that a suit be resolved on the first appeal. However, we will not question the constitutionality of a federal statute on the mere assumption that it might be relevant. If the ASA applies to the *Seabird* because it is embedded, our discussion regarding the issues to be considered in determining the ASA's constitutionality will be available to the parties and the district judge". *Ibid* at p. 534.
- 35 811 *F. Supp.* 1300 (N.D.Ill. 1992). The district court concluded that the Congress, in enacting the ASA, acted in a manner consistent with the recognised limits in its power to alter or modified federal admiralty jurisdiction.

- 36 See further Langley, S.B.M., "Canadian Archaeology and the Law" in Langley, S.B.M. & Unger, R.W.(eds.), *Nautical Archaeology: Progress and Responsibility*, BAR International Series No. 220, 1984, pp. 18-31, and Runyan, T.J., "Shipwreck legislation and the preservation of submerged artifacts", 22 *Case W. Res. J. Int'l L.* (1990) pp. 31-45 at p. 41.
- 37 Shore, H., "Marine Archaeology and International law: Background and Some Suggestions", 9 *San Diego L. Rev.* (1972) pp. 668-700 at p. 673. "The freedom of marine archaeologists to conduct exploration and excavation of submarine sites within the territorial jurisdiction of coastal States will not ordinarily conflict with the goals inhering to the exercise of national sovereignty over coastal waters, where such 'freedom' is properly managed ... It is not suggested that coastal States relinquish their control over marine archaeological research conducted in areas otherwise subject to their jurisdiction. What is being urged is that States, by international convention, define the nature and extent of such control so as to uniformly harmonise the potentially conflicting interests of marine archaeology and coastal State sovereignty". *Ibid* at p. 680.
- 38 "Marine archaeologists wishing to explore or excavate submarine sites would be required to register a 'Certificate of Intent' with the Commission [i.e., a suggested International Marine Archaeological Commission, which would serve as an international source of information on marine archaeological research] ... after the Certificate is filed with the Commission and the marine archaeologists have applied for a deed of concession from the coastal State in whose waters they intend to conduct the research, the coastal State would have a specified period of time to determine whether it would be necessary to deny the scientists access ... the coastal State would have the final say. Continual arbitrary denial of access, however, could lead to *informal sanctions* by other States and individuals who could, for example, deny technical assistance to or participation by, the objecting State in foreign expeditions" (emphasis added). *Ibid* at pp. 681-682. It should be noted, however, that under Shore's proposal the coastal State would not be relinquishing its authority to grant deeds or concession to marine archaeologists; it would be merely agreeing to grant them according to uniform international principles ... the 'competent authority' would still be the concerned coastal State, but the conditions would now be subject to certain international principles. *Ibid* at p. 684. Furthermore, she argues that: "A coastal State shall not arbitrarily deny, nor unfairly restrict ... the right of qualified marine archaeologists to explore for and excavate submarine archaeological sites within coastal waters over which such State has jurisdiction". "Such denial shall not be considered arbitrary if it is considered necessary by the coastal State for the protection of more pressing interests unrelated to marine archaeology."
- 39 *Ibid* at p. 678.
- 40 State practice will indicate whether and to what extent the interpretation of research will create difficulties. According to Soons, the correct view is that article 19(2) refers only to research activities carried out without coastal authorisation. As article 19(2) does not specify the opposite one could argue that it also encompasses the research carried out with the permission of the coastal State.

However, such an extensive interpretation would seem to be absurd. *Op. cit.* note 5 at pp. 149-150.

- 41 See further Migliorino, who discusses the question whether article 19(2)e and f dealing with the "launching, landing or taking on board of any aircraft" and the "launching, landing or taking on board of any military device" respectively, provides a basis for arguing that the removal of archaeological and historical objects during the exercise of innocent passage is permissible. The author concludes, correctly, that such an argument goes beyond the *rationale* of article 19(2)e and f, which provides that even the taking on board, let alone the removal, of aircraft or military devices would render passage non-innocent. Migliorino, L., *Il recupero degli oggetti storici ed archeologici sommersi nel diritto internazionale*, Studi e documenti sul diritto internazionale del mare, 15, Dott. Giuffrè, A. editore, Milano, 1984 at pp. 58-59.
- 42 *Reports of Cases Before the Court* (1968) pp. 432-434. In this case, the Commission brought before the Court, under article 169 of the EEC Treaty, an application for a declaration that the Italian Republic by continuing, after 1st January 1962, to levy the progressive tax provided for in article 37 of Law No. 1089 of 1st June 1939 on the export to other member States of articles having an artistic, historical, archaeological or ethnographical value, has failed to fulfil the obligations imposed on it by article 16 of the Treaty establishing the EEC. The Court held that Italy had indeed failed to fulfil its obligations under article 16.
- 43 In the Court's opinion, article 36 of the EEC Treaty which permits restrictions on exports justified on grounds of the protection of national treasures possessing artistic, historic or archaeological value, constitutes an exception to the fundamental principle of the elimination of all obstacles to the free movement of goods between member States, and should be construed strictly. As a result, it could not apply by analogy in the sphere of charges having an effect equivalent to a customs duty on exports. *Ibid* at p. 427. The rules of the Common Market applied to articles possessing artistic or historic value subject only to the exceptions provided for by the Treaty. *Ibid*.
- 44 There seems to be an inconsistency between article 21 and article 19(2). If article 19(2) is interpreted so as to consider that the carrying out of marine scientific research during passage automatically renders it non-innocent, then the inclusion of marine scientific research in the list of article 21 which enumerates the subjects on which the coastal State may adopt laws and regulations relating to innocent passage, is incomprehensible. Article 19(2) should therefore, be interpreted as specifying those activities with respect to which the presumption exists that they make passage non-innocent. The coastal State, however, may destroy this presumption and hold otherwise. Under this interpretation, a ship carrying out marine scientific research during passage through the territorial sea in accordance with coastal laws enabling such research or, in the absence of such laws, with prior express consent of the coastal State, is still exercising the right of innocent passage. See further Soons, *op. cit.* note 5 at p. 148.
- 45 Colombos, C.J., *The International Law of the Sea*, 6th ed., Longman Group Ltd., London, 1967 at p. 136. Back in 1927, Schücking stated that national legislation, international practice and codifications projects are all in general

agreement with the right of customs inspection as formulated by M. Fauchille in his "Traité de Droit International Public": "The coastal State is authorised to establish in its territorial waters a customs supervision which includes the right of enforcement over vessels, the inspection and detention of ships and boats suspected of contraband, the seizure of prohibited articles and their forfeiture and punishment by way of fines and confiscation." League of Nations Document, C.196.M.70 1927 V pp. 29, 51. Text quoted in Whiteman, M.M., 4 *Digest of International Law* 1965 at p. 391.

- 46 By comparison, the TSC does not enumerate the laws and regulations of the coastal State that are applicable to ships exercising the right of innocent passage. However, article 17 of the TSC retains the unlimited *ratione materiae* jurisdiction of the coastal State over ships exercising the right of innocent passage. It is notable that in the ILC list of issues on which laws and regulations might be enacted by the coastal State, "the observance of rules relating to security and of customs and health regulations" was included. The list is mentioned in the ILC's Commentary on draft article 18. See Report of the International Law Commission to the General Assembly (Doc. A/3159), "Commentary to the articles concerning the law of the sea", II *ILC Yearbook* (1956) at pp. 273-274.
- 47 See also article 17 of the TSC and the aforementioned list of the ILC's Commentary on draft article 18, *ibid*, which includes the "safety of traffic and the protection of channel and buoys" amongst the matters on which laws and regulations might be enacted.
- 48 Along these lines, the 1982 Protocol Concerning Mediterranean Specially Protected Areas provides in article 7 that within the protected areas established in accordance with this Protocol, State parties will be entitled to take, in conformity with international law, the measures required to regulate the passage of ships and any stopping or anchoring. Article 303(1), which reads that "all States have the duty to protect objects of an archaeological and historical nature found at sea and shall co-operate for this purpose", provides another basis for the adoption of coastal measures. The coastal State is, therefore, not only entitled to adopt protective legislation in order to avoid interference of innocent passage with marine archaeological operations, but it also has the duty to do so. Furthermore, article 303(1) may be used as a basis for requiring flag States to comply with coastal legislation. Since all States are under the obligation to protect archaeological objects and to co-operate therefor, flag States should respect the coastal measures taken in this duty.
- 49 Article 15(2) of the TSC and article 24(2) of the 1982 Convention read: "The coastal State is required to give appropriate publicity to any dangers to navigation of which it has knowledge, within its territorial sea." Since the duty to remove a wreck that creates danger or obstructs navigation lies with the owner, the coastal State would be entitled to either order the owner or the flag State to remove it, or remove it itself and charge them with the necessary costs. See Münch (von) I., "Schiffwracks: Völkerrechtliche Probleme", 20 *Archiv des Völkerrechts* (1982) pp. 183-198 at p. 196. On the need to limit the liability for the removal of wrecks see Luksic, B., "Limitation of Liability for the raising and removal of ships and wrecks: A comparative survey", 12 *J. Mar. Law &*

Com. (1981) pp. 50-64. Recent amendments to the U.S. Wreck Removal Act (Pub. L. 99-662, Nov. 17, 1986, 100 *Stat.* 4199; 33 *U.S.C.* para. 409, 414-415), however, removed the distinction between negligent and non-negligent owners and made all such owners strictly liable for the costs of removing sunken vessels. See Quinby, C. & Owen, D.R., "Recent Amendments to the U.S. Wreck Removal Act", *Lloyd's Maritime and Commercial Law Quartely* (1989) pp. 15-20.

- 50 It is rather unlikely that an absolute incompatibility between the two activities will occur, as, under normal circumstances, deviation off the scheduled sea route will be sufficient to avoid conflict.
- 51 As argued: "It is a positive duty; it goes beyond just passing legislation; it goes beyond imposing penalties. It requires a positive program of management both to extract and preserve information". O' Keefe, P.J., "The law and nautical archaeology: an international survey" in Langley & Unger (eds.), *op. cit.* note 36 at pp. 9-17.
- 52 According to the Report of the President on the work of the informal plenary meeting of the Conference on general provisions, the term "rules of admiralty" should be understood to mean commercial maritime law: "It was also decided that in translating the term 'rules of admiralty' from the original English into other languages account should be taken of the fact that this was a concept peculiar to Anglo-Saxon law and the corresponding terms in other legal systems should be used to make it clear that what was meant was commercial maritime law." Doc. A/CONF.62/L.58, *UNCLOS III, Off. Rec.* vol. XIV, p. 128 at p. 129.
- 53 The question has been posed whether the reservation covering admiralty rules and laws and practices on cultural exchanges, also extends to domestic legislation specifically regulating the salvage, protection and preservation of submarine antiquities as distinguished from ordinary wrecks and their cargoes. Caflisch, *op. cit.* note 4 at pp. 20-21. A distinction should be made between States that have enacted specific underwater antiquities legislation and States that have incorporated such protective measures in their salvage laws. For example, in France, Decree No. 61-1547 contains a whole chapter on wrecks which present an archaeological, historic or artistic interest (Chapter V of Decree No. 61-1547 of 26 December 1961 establishing the regime of shipwrecks, (*J.O.* du 12 janvier 1962). Chapter V was not modified by Decree No. 85-632 of 21 June 1985 amending Decree No. 61-1547 of 26 December 1961 establishing the regime of shipwrecks, 59 *Semaine Juridique* (1985) PTS 2-4, para. 57335. See also Chabert, J. "How underwater archaeology is regulated in France" in UNESCO, *Underwater Archaeology: A Nascent Discipline*, Museums and Monuments XIII, Paris, 1972, pp. 297-303. The reservation made by article 303(3) may be construed extensively so as to cover protective measures incorporated in admiralty laws. In contrast, heritage laws should be excluded from the ambit of paragraph (3) even if they deal exclusively with historic shipwrecks.
- 54 See Law 60/1962 of 24 December 1962 on the regime of salvage and findings, "Regimen de auxillio, salvamentos, remolques, hallazgos y extracciones maritimas", article 29 (Jefatura del Estado, B.O. 27) in XXI Aranzari, *Nuevo Diccionario de Legislacion* RENT-SEGU, 26404-27245, editorial Aranzari, Pamplona,

1977, para. 27006. See also Decree 984/1967 of 20 April 1967 approving Regulations for the Application of the Law of 24 December 1962, (Mo Marina, B.O., 17 mayo), *ibid*, para. 27008.

- 55 See article 12 of the Decree No. 85-632 of 1985 (*op. cit.* note 53) and article 1 of Law No. 61-1262 of 24 November 1961 on the Control of Shipwrecks. Similarly, in Greece the State acquires ownership of a sunken wreck, if there is no identifiable owner, or the identified owner fails to raise the wreck within three years from the date of the judgment declaring his right of ownership (or if an attempt is made to raise the wreck, which is interrupted for three successive years). The Abandoned Wreck Law of the Cayman Islands (revised in 1977) provides that a wreck which "has remained continuously upon the seabed within the limits of the islands for a period of 50 years and upwards before being brought to shore" belongs to the State. "All wreck found in the possession of any person within the islands shall be deemed to be abandoned wreck until the contrary is proved to the satisfaction of a Magistrate or the Commissioner of Wreck and any person found in the possession of abandoned wreck shall be presumed to have brought it ashore, unless he has some satisfactory explanation of the manner in which it came into his possession."
- 56 57 & 58 *Vict.*, c.60 para. 523 (Right of Crown to unclaimed wreck).
- 57 165 *Eng. Rep.* 87 (Adm. 1798) at p. 89. The *Aquila* involved a Swedish ship found floating at sea. The vessel was returned to the owners, but the cargo remained unclaimed and was disputed between the finders and the Crown. According to Blackstone, property in wrecks and chattels thereby rested originally and solely vested in the Crown, without any transfer or derivative assignment either by deed or law from any former proprietor, as they are inherent to the sovereign by the rules of law. Blackstone, W., *Commentaries on the Laws of England*, Oxford, Clarendon Press, MDCCLXV vol. I, ch. 7 at pp. 280-284. The earliest codification of the common law notion of sovereign prerogative was in 1275 by the Statute of Westminster, which limited the King's right to property at sea to "wrecks". In 1601, however, in the *Constable's Case* the King's right to property found at sea was interpreted to include flotsam, jetsam and lagan. On the development of the British rule see Kenny, I.J. and Hrusoff, R.R., "The ownership of the treasures of the sea", 9 *Wm. & Mary L. Rev.* (1967) pp. 383-401 at pp. 384-392.
- 58 In particular see *United States v. Tyndale*, 116 *F.2d* 820 (2d Cir. 1902) and *Thompson v. United States*, 62 *Ct. Cl.* 516 (1926). For a discussion of these cases see Lipka, L.J., "Abandoned Property at Sea: Who Owns the Salvage 'Finds'?", 12 *Wm. & Mary L. Rev.* (1970) pp. 97-110 at pp. 103-104, and Kenny and Hrusoff, *ibid* at pp. 394-395.
- 59 Under article 2 of *French Law No 89-874* of 1 December 1989 on Maritime Cultural Property amending Law of 27 September 1941 regulating Archaeological Excavations, "maritime cultural property situated in the maritime public zone whose owner cannot be located shall be the property of the State. Property whose owner has not been located within three years following the date on which their discovery was made public shall be the property of the State".

United Nations, *Law of the Sea: Current Developments in State Practice*, No. III, Office for Ocean Affairs and the Law of the Sea, 1992, pp. 39-43. Note that "property" has been substituted for "assets" which appears in the U.N. English translation of the French Law. See also article 511 of the *Italian Code of Navigation*, promulgated by Royal Decree No. 327 of 30 March 1942, which provides that objects of artistic, historic, archaeological or ethnographic interest found in the sea, whose owner does not claim them, belong to the State, and sec. 14 of the *Norwegian Cultural Heritage Act*, *op. cit.* note 29, which provides that: "The State shall have right of ownership of boats more than 100 years old, hulls, gear, cargo and all else that has been on board, or parts of such objects, when it is clear that *it is no longer reasonably possible to find out if there is an owner or who is the owner*" (emphasis added). Similarly, sec. 28(1) of the *Danish Museum Act* No. 291 of June 6, 1984, with later amendments, reads: "Objects, including wrecks of ships, which at any time must be assumed to have been lost for more than 100 years ago, shall belong to the State, unless somebody proves to be the rightful owner, if the object is found in territorial waters and on the continental shelf, however, not beyond 24 nautical miles". Finally, article 20 of the *Finnish Act on Archaeological Remains*, 1963, *op. cit.* note 29, provides that "items discovered in wrecks envisaged in paragraph 1, or which evidently originate from such wreck go to the State without redemption, and otherwise the provisions concerning movable archaeological items shall apply to them, where relevant". According to paragraph 1: "Wrecks of ships or other craft discovered in the sea or in inland waters, which can be expected to be more than one hundred years old, or parts of such wrecks, are protected ...". See also the *Irish National Monuments (Amendment) Bill* 1993, No. 52a of 1993, which reads in article 2(1): "Without prejudice to any other rights howsoever arising in relation to any archaeological object found before the coming into operation of this section, there shall stand vested in the State the ownership of any archaeological object found in the State after the coming into operation of this section where such object has no known owner at the time when it was found".

- 60 In this respect consider the *Greek Antiquities Law* of 24 August 1932 (article 1), *op. cit.* note 27, and the *Chinese Protection of Cultural Relics Law* of 1982 (article 4) and the *Regulation on Protection and Administration of Underwater Cultural Relics* of 1989 (article 3) For a discussion of the Chinese legislation see Zhao, H., "Recent Developments in the Legal Protection of Historic Shipwrecks in China", 23 *Ocean Dev. & Int'l L.* (1992) pp. 305-333. See also the *Turkish Cultural and Natural Objects (Conservation) Act*, 1983 as amended in 1987, *op. cit.* note 27 (articles 5 and 23) and the *Italian Law* No. 1089 of 1 June 1939 on the Protection of Objects of Artistic and Historic Interest (articles 44 and 49 vest title to antiquities which are fortuitously discovered or which are discovered in the course of excavations to the State). The application of blanket ownership laws is being criticised by some scholars on the basis that it encourages illicit excavation of archaeological sites and the crime of stealing national property. For further discussion see *supra* chapter 3 at pp. 92, 100-101.

- 60a In the Nicaragua case, *op.cit.* note 7 at p. 101, para 212, the ICJ stated: "The basic legal concept of State sovereignty in customary international law ... extends to the internal waters and territorial sea of every State and to the air space above its territory... The Court has no doubt that these prescriptions of treaty-law (note: the TSC and the 1982 Convention) merely respond to firmly established and longstanding tenets of customary international law". The Court also acknowledged that article 18(1)b of the 1982 Convention dealing with the right of innocent passage for the purposes of leaving or entering internal waters "does no more than codify customary international law on this point". *Ibid* at p. 101, para 213.
- 61 This number does not include Turkey which claims 12nm for the Mediterranean and Black Sea. See United Nations, *The Law of the Sea: Practice of States at the Time of Entry of the United Nations Convention on the Law of the Sea*, Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, 1994 at p. 215. If one adds Germany to the list of States claiming 12 nm territorial seas, their number rises to one hundred and twenty (120). Five States claim territorial seas of 3nm, two States territorial seas of 4nm, three States territorial seas of 6nm, one State territorial sea of 20nm, two States territorial seas of 30nm, one State territorial sea of 35nm, one State territorial sea of 50nm, and eleven States territorial seas of 200nm.
- 62 This is due to article 38(3) which states: "Any activity which is not an exercise of the right of transit passage through a strait, remains subject to the other applicable provisions of this Convention", and article 19(2)j, which provides that the carrying out of research and survey activities will render passage non-innocent automatically. It should be noted, however, that with regard to transit passage the practical problems in discovering ships engaged in research activities are increased. This is due to article 39(1)c which does not require submarines to navigate on the surface.
- 63 Under article 19(2)j, the carrying out of research and survey activities during innocent passage is prohibited. Article 42 is, in all, less numerous than the relevant article on innocent passage. However, the significance of this extended *ratione materiae* limitation of the legislative jurisdiction of riparian States is moderated when it is seen in the light of the aforementioned articles 39(1)c and 38(3).
- 64 If it is considered that a strait is a narrow water passage and that, therefore, the availability of alternative shipping routes is low, there is seemingly an increase in incompatibility between freedom of passage and other coastal activities.
- 65 See further Migliorino, *op. cit.* note 41 at pp. 67-70 and footnotes 77, 78, 79, 80.
- 66 *Ibid* at pp. 69-70.
- 67 *Corfu Channel Case*, Judgment of April 9, 1949, *I.C.J. Reports* (1949) p. 4, 28.
- 68 The customary law position on this question, supported mainly by the major maritime powers, is the weakest and the most difficult to defend. See, for example, the *Restatement (Third) of Foreign Relations Law of the United States*,

Part V (The Law of the Sea), which declares that the provisions of the Convention dealing with transit passage are also customary law, but offers no independent reference to or an assessment of the basis in State practice that it appears to believe to exist. See further Burke, W., "Remarks" in "The Law of the Sea: Customary Norms and Conventional Rules", 81 *American Society of International Law Proceedings* (1987) pp. 75-104 at pp. 75-84. In favour of the U.S. position are, among others, Wainright, R., "Navigation through three straits in the Middle East: effects on the United States of being a non-party to the 1982 Convention on the Law of the Sea", 18 *Case W. Res. J. Int'l L.* (1986). pp. 361-414, and Burke, K., DeLeo, D., "Innocent passage and transit passage in the United Nations Convention on the Law of the Sea", 9 *Yale Journal of World Public Order* (1983) pp. 389-408. Others have expressed the opinion that the conventional regime would influence the State practice even before the entry into force of the Convention. In this respect, the Joint Declaration by the Government of the United Kingdom and the Government of the French Republic is mentioned, which recognises an unimpeded transit passage in the Straits of Dover. See further Nandan, S.N., Anderson, D.H., "Straits used for international navigation: a commentary on Part III of the United Nations Convention on the Law of the Sea", 60 *B.Y.I.L.* (1989) pp. 159-204.

- 69 Mid-ocean archipelagos do not fall within the ambit of article 4. See further Brown, E.D., *Passage Through the Territorial Sea, Straits Used for International Navigation and Archipelagos*, David Davies Memorial Institute of International Studies, 1974.
- 70 According to article 46(a), "archipelagic State' means a State constituted wholly by one or more archipelagos and may include other islands." Consequently, metropolitan States are not entitled to apply the scheme provided by the 1982 Convention to their mid-ocean archipelagic dependencies.
- 71 Article 52.
- 72 The latter is exercised in sea lanes and air-routes specifically designated by the archipelagic State or, in their absence, in routes normally used for international navigation. See article 53(1) and (12).
- 73 See articles 39 (duties of ships and aircraft during transit passage), 40 (prior authorisation of the States bordering straits for the undertaking of research and survey activities) and 42 (application of laws and regulations of States bordering straits).
- 74 Under article 52(2): "The archipelagic State may, without discrimination on form or in fact among foreign ships, suspend temporarily in specific areas of its archipelagic waters the innocent passage of foreign ships if such suspension is essential for the protection of its security. such suspension shall take effect only after having been duly published". Concerning the exercise of archipelagic sea lanes passage, article 54 requires the *mutatis mutandis* application of article 44, which, in turn, reads that riparian States do not enjoy the right to suspend transit passage through international straits.
- 75 *Antigua and Barbuda: Territorial Waters (Amendment) Act 1986; Cape Verde: Decree No. 126/77 of 31 December 1977*, United Nations, *The Law of the Sea: Practice of Archipelagic States*, Office for Ocean Affairs and the Law of the

- Sea, 1992, pp. 17-20; *Comoros*: Law No. 82-005 relating to the delimitation of the maritime zones of the Islamic Federal Republic of Comoros, 28 July 1982, *ibid*, pp. 20-22; *Fiji*: Marine Spaces Act, 1977; Interpretation (Amendment) Act, 1977; Marine Spaces (Amendment) Act, 1977; Marine Spaces (Archipelagic Baselines and Exclusive Economic Zone) Order, 1981, and Marine Spaces (Territorial Seas) (Rotuma and its dependencies) Order 1981, *ibid*, pp. 23-44. See also Smith, R.W., *Exclusive Economic Zone Claims: An Analysis and Primary Documents*, Martinus Nijhoff Publishers, Dordrecht, 1986, pp. 129-146; *Indonesia*: Act No. 4 concerning the Indonesian Waters of 18 February 1960, *Limits in the Seas* No. 35 (1971); *Kiribati*: Marine Zones Act (Declaration) Act 1983 (No. 7 of 1983) in Smith, *ibid*, pp. 245-249; *Marshall Islands*: The Marine Zones (Declaration) Act 1984; *Papua New Guinea*: National Seas Act, 1977 in Churchill, R. and others (eds.), *New Directions in the Law of the Sea*, vol. VII, p. 485; *Philippines*: Act No. 3046 of 17 June 1961 to define the Baselines of the Territorial Sea of Philippines, as amended by Act No. 5446 of 18 September 1968; *ST/LEG/SER.B/15* at p.105; *Limits in the Seas* No. 33 (1971); *St. Vincent and Grenadines*: Maritime Areas Act, 1983 (Act. No. 15) in Smith, *ibid*, pp. 399-403; *São Tomé e Príncipe*: Decree-Law No. 14/78 of 16 June 1978; *ST/LEG/SER.B/19* at p.101; Decree-Law No. 48/82 of 2 December 1982; *Limits in the Seas* No. 36 at p. 147; *Solomon Islands*: Delimitation of Marine Waters Act, Act No. 32 of 1978 in Smith, *ibid* at pp. 413-416; Declaration of Archipelagos of Solomon Islands, 1979, and Declaration of Archipelagic Baselines, 1979, *ST/LEG/SER.B/19* at pp. 106-107; *Trinidad and Tobago*: Ministry of Foreign Affairs Notice, No. 500 of 1983, *ibid* at pp. 455-457; Act No. 24 of 1986, Archipelagic Waters and Exclusive Economic Zone Act, *Law of the Sea Bulletin*, No. 7 April 1987 at p. 6; *Vanuatu*: Maritime Zones Act No. 23 of 1981 in Smith, *ibid* at pp. 471-476; *Law of the Sea Bulletin*, No.1 (1983) at p. 64.
- 76 Marine Zones (Declaration) Ordinance 1983, Explanatory Memorandum in Smith, *ibid* at pp. 459-464.
- 77 Maritime Zones Act 1977 and Notice No. 194 of 1984; Smith, *ibid* at pp. 288 and 292.
- 78 South Pacific Nuclear Free Zone Treaty (1985). Adopted at Raratonga, Cook Islands, August 6; 24 *ILM* (1985) p. 1442.
- 79 United Nations, *op. cit.* note 75 at pp. 144-155. For a discussion see Hamzah, B.A., "Indonesia's archipelagic regime: implications for Malaysia", 8 *Marine Policy* (1984) pp. 30-43. See also Treves, T., "Codification du droit international et pratique des états dans le droit de la mer", *Recueil des Cours* (1990-IV), pp. 9-302 at p. 79, who argues that certain provisions of the Treaty on Delimitation of the Territorial Sea, Continental Shelf and Exclusive Economic Zone between the Netherlands Antilles and Venezuela in the Caribbean Sea (1978) are drafted so as to take into account future proclamation of archipelagic waters by the Antilles, once independent.

- 80 O'Connell, for example, argued in 1982 that: "Although seven mid-ocean archipelagic States have legislated for archipelagic baselines (Fiji, Solomons, Philippines, Indonesia, Mauritius, Micronesia and Papua New Guinea), there is as yet no overwhelming trend towards the emergence in customary international law of a special regime for archipelagos, independent of the application of the particular case of archipelagos of the ordinary straight baseline principle". *Op. cit.* note 16. Similarly, in Treves' view in 1980: "Though the Law of the Sea Conference has agreed on the main features of archipelagic waters, there is room for doubt about the status of the concept under international law, as it stands today. Nonetheless, especially (but perhaps not exclusively) if the Law of the Sea Conference adopts a treaty with provisions on archipelagic waters along the lines of the negotiating text, and the most directly involved States do not dissent, it seems likely that ... custom would grow out of accepted compromise." Treves, T., "Military Installations, Structures and Devices on the Seabed", 74 *A.J.I.L.* (1980) pp. 808-857 at p. 829. It is notable, however, that Treves, *op. cit.* note 79 at pp. 77-83, accepts today the principle of archipelagic waters as part of customary law. Finally, Lentsch comments that: "It appears from the foregoing that the employment of the straight baseline as a method of delimitation for archipelagic States seems to be generally recognised, albeit within reasonable limits. A certain degree of jurisdiction of the archipelagic State over the enclosed waters between the islands of the archipelago and the superjacent airspace consequently has to be accepted. It is doubtful, though, whether there is general recognition of the claim to these waters as 'internal' waters, over which the archipelagic State has complete and exclusive sovereignty, including the superjacent airspace." See Lentsch, P. (de Vries), "The Right of Overflight over Strait States and Archipelagic States: Developments and Prospects", 14 *N.Y.I.L.* (1983) pp. 165-225.
- 81 Brown, E.D., "Exclusive Economic Zones: The Legal Regime and the UN Convention on the Law of the Sea" in *Exclusive Economic Zones - Resources, Opportunities and the Legal Regime. Advances in Underwater Technology, Ocean Science and Offshore Engineering*, vol. 8, Graham & Trotman, London, 1986, pp. 15-35 at p.17.
- 82 Gamble, J.K. and Frankowska, M., "The 1982 Convention and customary law of the sea: observations, a framework and a warning", 21 *San Diego I. Rev.* (1984) pp. 491-511 at p. 501.
- 83 For a discussion of the concept of instant customary international law see Cheng, B., "United Nations Resolutions on Outer Space: 'Instant' International Customary Law?", 5 *Indian J. Int'l L.* (1965) pp. 23-48 and Danilenko, G.M., *Law-Making in the International Community*, Martinus Nijhoff Publishers, 1993 at pp. 97-98, who argues that the creation of customary law presupposes duration of custom-generating practice over a certain period of time. In contrast, see Alvarez, J.E., "Book review: G.M. Danilenko, Law-Making in the International Community", 15 *Michigan Journal of International Law* (1994) pp. 747-784 at p. 774 *et seq.*

- 84 For example, both the Philippines and Indonesia have not modified their archipelagic legislation, which was enacted before the adoption of the 1982 Convention and is incompatible with its provisions. The Preamble to the Republic Act No. 3046 of 17 June 1961 (Philippines) states: "All the waters around, between and connecting the various islands of the Philippine archipelago, irrespective of their width of dimension, have always been considered as necessary appurtenances of the land territory forming part of the island or internal waters of the Philippines". A similar approach has been adopted by Cape Verde, which claims the enclosed waters as internal waters. See also Ku, Ch., "The Archipelagic States Concept and Regional Stability in Southern Asia", 23 *Case W. Res. J. Int'l L.* (1991) pp. 463-479 at pp. 473-474, who discusses the closing of Sunda and Lombok straits by Indonesia in 1988. Indonesia justified the action on its "sovereign right to close the straits", precisely the kind of unilateral action the 1982 Convention tried to foreclose in article 53. She maintained that it need not concern itself with the obligations of the 1982 Convention because it was not yet in force. Treves, *op. cit.* note 79, wonders whether the tolerance existing today towards the claims of archipelagic States not complying with the provisions of the Convention will be consolidated after its entry into force. There are, of course, States, such as Antigua and Barbuda, Fiji, Papua New Guinea, Sao Tome e Principe, the Solomon Islands, Trinidad and Tobago and Vanuatu, which have drawn archipelagic waters in accordance with the provisions of the 1982 Convention. The same applies to the enabling legislation of Kiribati, St. Vincent and Tuvalu, which, however, have not yet drawn the necessary archipelagic baselines.
- 85 *Australia (Houtman Abrolhos Islands)*: Proclamation of 4 February 1983, *Commonwealth of Australia Gazette* No. 29 of 9 February 1983; *Denmark (Faroes)*: Order No. 598 of 21 December 1976 on the Fishing Territory of the Faroes in Churchill, R. and others (eds.), *New Directions in the Law of the Sea*, vol. V at p. 111; *ST/LEG/SER.B/19* at p. 1920; Order No. 599 of 21 December 1976 on the Boundary of the Sea Territory of the Faroes, *ibid* at p. 1102; *Ecuador*: Supreme Decree No. 959-A of 28 June 1971 establishing archipelagic baselines for Galapagos Archipelago, *Limits in the Seas*, No. 42 (1972); *ST/LEG/SER.B/18* at p. 15; *Portugal (Madeira and Azores)*, Decree-Law No. 495/85 of 29 November 1985, Treves, *op. cit.* note 79 at p. 83; *Spain*: Law No. 15/78 of 20 February 1978 on the Economic Zone, *ST/LEG/SER.B/19*, p. 250; Smith, p. 425, and Royal Decree No. 2510/1977, *ST/LEG/SER.B/19*, p. 112. See further Churchill, R.R. and Lowe, A.V., *The Law of the Sea*, Manchester University Press, 2nd edn., 1988 at pp. 106-108, who argue that such claims could still be valid *vis-à-vis* those States which have acquiesced in them. It may be noted that the United States protested against the Portuguese claim in a 1986 diplomatic note. See United States Department of State, *Limits in the Seas*, No. 112, 1992 at p. 27.
- 86 To the extent that the sovereignty of the archipelagic State is recognised over the archipelagic waters, underwater cultural property found within this area would fall within the plenary authority of the archipelagic State. Ecuador, for example, has declared, "the water column, the seabed, and the marine subsoil

of the sea located within the interior of the Galapagos Archipelago, along with a band of 15 nautical miles surrounding the said baselines” to be a marine resource reserve: c.f. President’s Decree on Galapagos Marine Resource Reserve, *The Official Register of Ecuador*, No. 434, May 13 1986, reprinted in 30 *Oceanus* No. 2, Summer 1987, pp. 28-29. As already seen, the Galapagos Archipelago features among the 358 properties which are included in the World Heritage List envisaged by the 1972 UNESCO Convention on the Protection of the World Natural and Cultural Heritage (see *supra* chapter 3 at p. 94).

- 87 According to article 23 of the CHS and article 111 of the 1982 Convention, the hot pursuit of a foreign ship may be commenced from the internal waters or the territorial sea only when the following requirements have been satisfied: (1) the competent authorities have good reason to believe that the ship has violated the laws and regulations of the coastal State (in this case, the antiquities legislation or any relevant customs and fiscal laws regulating the export/import of archaeological and historical objects); (2) the pursuit may only be commenced after a visual or auditory signal to stop has been given and ceases as soon as the ship pursued enters the territorial sea of its own country or of a third State; (3) the right of hot pursuit may be exercised only by warships or military aircraft or other ships or aircraft on government service specially authorised. Hot pursuit is not deemed to have begun, unless the pursuing ship has satisfied itself by such practicable means, as may be available, that the ship pursued, or one of its boats, are within the limits of the territorial sea.
- 88 In particular see the 1981 Protocol to the Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region of 23 March 1981. Text reprinted in Simmonds, K.R. (ed.) *New Directions in the Law of the Sea [New Series]*, J.5, Release 83-1, issued July 1983, and the 1982 Protocol concerning Regional Co-operation in Combating Pollution by Oil and Other Harmful Substances in Cases of Emergency, adopted by the Contracting Parties to the Regional Convention for the Conservation of the Red Sea and Gulf of Aden Environment, *ibid*, J.19, Release 84-1, issued September 1985. Similarly, the 1981 Convention for the Protection of the Marine Environment and Coastal Area of the South-East Pacific provides in its Preamble: “Convinced of the economic, social, *cultural* value of the South-East Pacific as a means of linking the countries of the region...” (emphasis added), *ibid*, J.18, Release 84-1, issued September 1984. It is noteworthy that the Director of the Office of Ocean Law and Policy, U.S. Department of State, stated before the House Merchant Marine and Fisheries Committee, 29 October 1985 that: “In concluding my testimony I would like to emphasise that customary international law supports co-operation among States to protect objects of an archaeological and historical nature found at sea.” Hoyle, B.J., “U.S. Position on Titanic Memorial Site”, 28 *Oceanus*, No. 4, Spring 1985, pp. 45-46 at p. 46.